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Thursday
November 14, 1991

Briefing on How To Use the Federal Register
For information on a 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: November 25, 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.
DIRECTIONS: North on 11th Street from Metro Center to southwest corner of 11th and L Streets

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Presidential Documents

Title 3—

The President

Proclamation 6370 of November 8, 1991

National Poison Prevention Week, 1992

By the President of the United States of America

A Proclamation

For more than three decades, we Americans have observed National Poison Prevention Week as part of a concerted, nationwide campaign to reduce the number of accidental poisoning deaths among children. This annual observance, coupled with our year-round efforts in both the public and private sectors, has helped to save lives: during the past 30 years, the number of poisoning deaths among children under 5 years of age has declined markedly, from 450 in 1961 to 42 in 1988.

This "success story" certainly merits celebration. However, because the loss of even one child is more than any family can bear and more than our Nation should tolerate, we must continue to alert the public about the need for poison prevention.

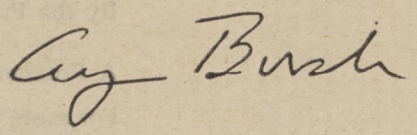
Leading that effort today is the Poison Prevention Week Council, a coalition of 37 national organizations that are determined to protect the health and safety of our most vulnerable citizens. The Council, which embodies our public-private partnership for poison prevention, coordinates the annual observance of National Poison Prevention Week. It also distributes lifesaving information and encourages local poison control centers, pharmacies, health departments, and other agencies to conduct poison prevention programs. The United States Consumer Product Safety Commission, which each year provides a member to serve as Secretary of the Poison Prevention Week Council, helps to direct this important public health campaign to prevent childhood poisonings. It is a truly national effort, enlisting the help of parents, health professionals, educators, and government officials, as well as members of industry and the media.

Poison prevention awareness has saved lives, but there is more to do. The American Association of Poison Control Centers reports that almost 1 million children are exposed each year to potentially poisonous medicines or household chemicals. We must continue to warn parents, grandparents, and other adults about the threat of childhood poisoning and encourage them to adopt safety measures. We can take a simple yet vital step to prevent accidental poisonings by using child-resistant closures and by keeping medicines and household chemicals out of the reach of children.

To encourage all Americans to learn more about the dangers of accidental poisonings and to take more preventative measures, the Congress, by a joint resolution approved September 26, 1961 (75 Stat. 681), has authorized and requested the President to issue a proclamation designating the third week of March of each year as National Poison Prevention Week.

NOW, THEREFORE, I, GEORGE BUSH, President of the United States of America, do hereby proclaim the week beginning March 15, 1992, as National Poison Prevention Week. I call upon all Americans to observe this week by participating in appropriate programs and activities and by learning how to prevent accidental poisonings among children.

IN WITNESS WHEREOF, I have hereunto set my hand this eighth day of November, in the year of our Lord nineteen hundred and ninety-one, and of the Independence of the United States of America the two hundred and sixteenth.



[FR Doc. 91-27512
Filed 11-12-91; 12:18 pm
Billing code 3195-01-M

Presidential Documents

Proclamation 6371 of November 12, 1991

National Women Veterans Recognition Week, 1991

By the President of the United States of America

A Proclamation

Earlier this year, some 35,000 American service women played highly visible roles in ensuring the success of our military operations in the Persian Gulf. While we celebrate their outstanding contributions—and those of their counterparts here at home and at bases around the world—we do well to remember that women have been an invaluable part of the United States Armed Forces for generations.

Since the earliest days of our Republic, women have written many important pages in American military history, often accepting great risks and sacrifices for the sake of others. During the Revolutionary War and later during the Civil War, thousands of women provided compassionate aid to sick and wounded soldiers. Many other women served as scouts and couriers, and a number of historical accounts relate the stories of women who disguised themselves as men in order to join in the fighting. During the Spanish American War, women nurses waged a valiant battle against an epidemic of typhoid fever in Army camps. Their work so impressed the Congress that it established the Nurses Corps as a permanent auxiliary of the Army. By World War I, the Navy and the Coast Guard were also accepting women volunteers.

When World War II required the total commitment of this Nation's will and resources, women achieved full military status in the Women's Army Corps and in the Navy's WAVES. The Coast Guard and the Marines followed suit in accepting women enlistees, and the Women's Air Force Service Pilots was formed to ferry military aircraft.

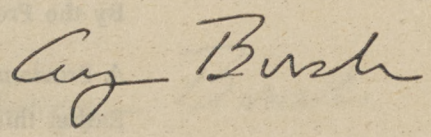
During the half century since World War II, women have continued to be an invaluable part of our Nation's armed forces. From Korea and Vietnam to places such as Panama and the Persian Gulf, American service women have consistently demonstrated the extraordinary courage, patriotism, and skill that we have come to expect of this country's military personnel. Some have been wounded, and others have made the ultimate sacrifice, in the line of duty.

Over the years, the number of women in our armed forces has steadily increased. Today nearly one and one quarter million women stand among our Nation's veterans. This week, we proudly and gratefully salute each of them.

In recognition of the many contributions that women veterans have made to our country, the Congress, by Senate Joint Resolution 145, has designated the week beginning November 10, 1991, as "National Women Veterans Recognition Week" and has authorized and requested the President to issue a proclamation in observance of this week.

NOW, THEREFORE, I, GEORGE BUSH, President of the United States of America, do hereby proclaim the week of November 10 through November 16, 1991, as National Women Veterans Recognition Week. I urge all Americans to observe this week with appropriate programs, ceremonies, and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twelfth day of November, in the year of our Lord nineteen hundred and ninety-one, and of the Independence of the United States of America the two hundred and sixteenth.



[FR Doc. 91-27562
Filed 11-12-91; 2:51 pm]
Billing code 3195-01-M

Editorial note: For the President's remarks commemorating Veterans Day, see issue No. 46 of the *Weekly Compilation of Presidential Documents*.

Presidential Documents

Proclamation 6372 of November 12, 1991

National Alzheimer's Disease Month, 1991 and 1992

By the President of the United States of America

A Proclamation

Advances in science and medicine have given millions of Americans the opportunity to enjoy longer, healthier lives. Older Americans now constitute a growing percentage of our Nation's population, and, together, they represent a rich source of knowledge and insight for younger generations. By providing senior citizens with opportunities to share their wisdom and experience, we not only strengthen and enrich this country but also affirm the inherent dignity and worth of every human being, regardless of his or her age.

Today, more and more employers and other Americans are recognizing the enormous talent and potential of senior citizens. One of the greatest threats to fulfilling that potential, however, comes from Alzheimer's disease.

Alzheimer's is a debilitating brain disease that, over a period of years, robs its victims of their memory and intellect, their health, their independence, and eventually their lives. Alzheimer's disease also disrupts the lives of thousands of Americans who must endure the physical, emotional, and financial strains of caring for an affected parent, spouse or sibling.

Fortunately, the families of Alzheimer's patients are not alone in their struggle with this terrible disease. In communities across the country, health care providers, social workers, and other concerned professionals and volunteers have joined forces to promote public awareness of Alzheimer's and to help families that are affected by it. Federal, State, and local governments are working to improve the delivery of services for people with Alzheimer's, and researchers in both the public and private sectors are striving to learn how we can prevent and eventually cure the disease. Scientists and physicians are also developing new methods to manage symptoms of Alzheimer's, as well as facilities that are better equipped for the special needs of people with the disease and related disorders.

Our ultimate goal, however, must be to eliminate the need for such treatments and facilities. Accordingly, under the leadership of the National Institute on Aging, the Federal Government will continue to conduct and support biomedical research on Alzheimer's disease. During the past few years, we have learned much about the basic processes of Alzheimer's and drawn closer to identifying its causes; we will now seek further progress in these areas, and we will place special emphasis on the discovery and development of therapeutic drugs. Such efforts will be crucial to finding ways of treating and preventing Alzheimer's disease.

As an expression of our Nation's commitment to protecting the health of all older Americans, the Congress, by Senate Joint Resolution 36, has designated November 1991 and November 1992 as "National Alzheimer's Disease Month" and has authorized and requested the President to issue a proclamation in observance of these months.

NOW, THEREFORE, I, GEORGE BUSH, President of the United States of America, do hereby proclaim November 1991 and November 1992 as National Alzheimer's Disease Month. I encourage all Americans to observe these months with appropriate programs and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twelfth day of November, in the year of our Lord nineteen hundred and ninety-one, and of the Independence of the United States of America the two hundred and sixteenth.

George Bush

[FR Doc. 91-27567
Filed 11-12-91; 3:05 pm]
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Rules and Regulations

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 90-AWP-8]

Alteration of VOR Federal Airway V-291; AZ

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment alters the description of Federal Airway V-291 located in the State of Arizona. The realignment of this airway is necessary to improve the flow of traffic along the Albuquerque Air Route Traffic Control Center (ARTCC) and Los Angeles ARTCC border. This action will improve traffic flow in this area, reduce the flying time of overflights, and reduce controller workload.

EFFECTIVE DATE: 0901 UTC, January 9, 1992.

FOR FURTHER INFORMATION CONTACT: Alton D. Scott, Airspace and Obstruction Evaluation Branch (ATP-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Rules and Procedures Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-9252.

SUPPLEMENTARY INFORMATION:

History

On December 14, 1990, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to alter the description of VOR Federal Airway V-291 (55 FR 51431). 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 7400.6G dated September 4, 1990.

The Rule

This amendment to part 71 of the Federal Aviation Regulations alters the description of V-291 located in the State of Arizona. This action will substantially increase the efficiency of operations along the Albuquerque and Los Angeles ARTCC border by reducing the flying time between Winslow and Peach Springs, AZ, and eliminating some of the congestion over the Drake, AZ, VORTAC. The adjustment of this route is designed to alleviate congestion of air traffic and to establish optimum use of the airspace.

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. App. 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. § 71.123 is amended as follows:

V-291 [Amended]

By removing the words "to Flagstaff, AZ." and substituting the words "Flagstaff, AZ; to Peach Springs, AZ. The airspace within R-2302 is excluded."

Issued in Washington, DC, on November 5, 1991.

Harold W. Becker,

Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 91-27384 Filed 11-13-91; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Parts 292a and 319 [DIA Regulation 12-12]

Defense Intelligence Agency Privacy Program; Correction

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule correction.

SUMMARY: On November 6, 1991, (56 FR 56595), the Department of Defense published a final rule redesignating 32 CFR part 292a as 32 CFR part 319. This document corrects the words of issuance to include the redesignation.

EFFECTIVE DATE: November 14, 1991.

FOR FURTHER INFORMATION CONTACT: L.M Bynum, Correspondence and Directives Directorate, Washington Headquarters Services, Pentagon, Washington, DC 20301-1155.

SUPPLEMENTARY INFORMATION: The words of issuance (56 FR 56595, November 6, 1991) are corrected to read as follows:

"For the reasons set forth in the preamble, 32 CFR part 292a is redesignated as part 319 and is amended to read as follows:"

(Pub. L. 93-579, 88 Stat. 1896 (5 U.S.C. 552(a)).

Dated: November 8, 1991.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 91-27347 Filed 11-13-91; 8:45 am]

BILLING CODE 3810-01-M

32 CFR Part 310

DoD Privacy Program

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule amendment.

SUMMARY: On October 29, 1991 (56 FR 55631), the Department of Defense published a redesignation of privacy rulemaking documents. It redesignated part 286a as 310. This amendment specifically identifies the changes that are to be made in the text of the newly redesignated part 310.

EFFECTIVE DATE: November 14, 1991.

FOR FURTHER INFORMATION CONTACT: L. M. Bynum, Correspondence and Directives Directorate, Washington Headquarters Services, Pentagon, Washington, DC 20301–1155, telephone 703–697–4111.

SUPPLEMENTARY INFORMATION:

List of Subjects in 32 CFR Part 310

Privacy.

Accordingly, 32 CFR part 310 is amended as follows:

PART 310—DOD PRIVACY PROGRAM

1. The authority citation for newly redesignated part 310 is revised to read as follows:

Authority: Pub. L. 93–579, 88 Stat. 1896 (5 U.S.C. 552a).

§ 310.1 [Amended]

2. Newly redesignated § 310.1(a) is amended by changing "286a" to "310".

§ 310.2 [Amended]

3. Newly redesignated § 310.2(c) is amended by changing "§ 286a.12" to "§ 310.12".

§ 310.6 [Amended]

4. Newly redesignated § 310.6 is amended in paragraph (a)(2) by changing "286a" to "310"; paragraph (c)(4) by changing "286a" to "310"; and paragraph (f) by changing "§ 286a.4(c)" to "§ 310.4(c)".

§ 310.10 [Amended]

5. Newly redesignated § 310.10 is amended in paragraph (a)(1) by changing "§ 286a.3(n)" to "§ 310.3(n)"; paragraph (b)(2) by changing "§ 286.63(c)" to "§ 310.63(c)"; paragraph (b)(3) by changing "§ 286.64(c)" to "§ 310.64(c)"; and paragraph (f) by changing "§§ 286a.63 and 286a.64" to "§§ 310.63 and 310.64".

§ 310.11 [Amended]

6. Newly redesignated § 310.11 is amended is paragraph (b) is amended by changing "§§ 286a.30(d) and 286a.40(d) " to "§§ 310.30(d) and 310.40(d)".

§ 310.12 [Amended]

7. Newly redesignated § 310.12 is amended in paragraph (a)(3) by changing "§ 286a.12" to "§ 310.12" and paragraph (d) by changing "§ 286a.40(d)" "§ 310.40(d)".

§ 310.20 [Amended]

8. Newly redesignated § 310.20 is amended in paragraph (d)(2)(i) by changing "§ 286a.10" to "§ 310.10" and paragraph (d)(2)(iii) by changing "§ 286a.41(e)" to "§ 310.41(e)".

§ 310.30 [Amended]

9. Newly redesignated § 310.30 is amended in paragraph (a)(6) by changing "§ 286a.20(b)" to "§ 310.20(b)"; paragraph (a)(8) by changing "§ 286a.31" to "§ 310.31"; paragraph (d)(1) by changing "§ 286a.31(b)" to "§ 310.31(b)"; paragraph (f)(4) by changing "§ 286a.31" to "§ 310.31"; paragraph (h)(3) by changing "§ 286a.52" to "§ 310.52"; and paragraph (l) by changing "§ 286a.32" to "§ 310.32".

§ 310.31 [Amended]

10. Newly redesignated § 310.31 is amended in paragraph (a)(1)(i) by changing "§ 286a.30" to "§ 310.30"; paragraph (a)(1)(iii) by changing "§ 286a.50(c)" to "§ 310.50(c)"; and paragraph (b)(1)(ii) by changing "§ 286a.30 and § 286a.33" to "§ 310.30 and § 310.33".

§ 310.32 [Amended]

11. Newly redesignated § 310.32 is amended in paragraph (b)(1) by changing "§ 286a.50" to "§ 310.50" and paragraph (d)(2) by changing "§ 286a.30" to "§ 310.30".

12. Section 310.33(e) is amended by changing "§ 286a.41(k)" to "§ 310.41(k)".

§ 310.40 [Amended]

13. Newly redesignated § 310.40 is amended in paragraph (b) by changing "§ 286a.41(a)" to "§ 310.41(a)" and paragraph (c)(3) by changing "§ 286a.41" to "§ 310.41".

§ 310.41 [Amended]

14. Newly redesignated § 310.41 is amended in paragraph (e)(2)(iv) by changing "§ 286a.62(i)" to "§ 310.62(i)"; paragraph (e)(5) by changing "§ 286a.62(a)(1)" to "§ 310.62(a)(1)"; paragraph (g)(2) by changing "§ 286.44" as "§ 310.44"; and paragraph (k)(7) by changing "§ 286a.33" to "§ 310.33".

§ 310.43 [Amended]

15. Newly redesignated § 310.43(b)(1) is amended by changing "§ 286a.41" to "§ 310.41".

§ 310.44 [Amended]

16. Newly redesignated § 310.44 is amended in paragraph (a)(3)(ii) by changing "§ 286a.32(i)(1)" to "§ 310.32(i)(1')"; paragraph (a)(3)(iii) by changing "§ 286a.40" to "§ 310.40"; paragraph (f)(1)(i) by changing "§ 286a.41" to "§ 310.41"; paragraph (f)(1)(ii) by changing "§ 286a.50(b)" to "§ 310.50(b)".

§ 310.50 [Amended]

17. Newly redesignated § 310.50 is amended in paragraph (b)(1) by changing "§ 286a.60(e)" to "§ 310.60(e)"; paragraph (b)(4) by changing "§ 286a.61" to "§ 310.61"; and paragraph (e)(1) by changing "§ 286.61" to "§ 310.61".

§ 310.51 [Amended]

18. Newly redesignated § 310.51 is amended in paragraph (a)(6) by changing "§ 286a.50" to "§ 310.50" and paragraph (b) by changing "§ 286a.30" to "§ 310.30".

§ 310.52 [Amended]

19. Newly redesignated § 310.52(a)(2) is amended by changing "§ 286a.51(a)" to "§ 310.51(a)".

§ 310.60 [Amended]

20. Newly redesignated § 310.60 is amended in paragraph (e)(4) by changing "286a.61" to "310.61" and paragraph (f)(3) by changing "286a.62" to "310.62".

§ 310.61 [Amended]

21. Newly redesignated § 310.61 is amended in paragraph (a) by changing "§ 286a.50" to "§ 310.50"; paragraph (b)(1)(i) by changing "§ 286a.62" to "§ 310.62"; and paragraph (b)(2) by changing "§ 286a.50" to § 310.50".

§ 310.62 [Amended]

22. Newly redesignated § 310.62 is amended in paragraph (i)(1)(i) by changing "§ 286a.41" to § 310.41"; paragraph (i)(3) by changing "§ 286a.41(e)" to "§ 310.41(e)" and "§ 286a.3(p)" to "§ 310.3(p)"; paragraph (l)(1) by changing "§ 286a.50(d)" to "§ 310.50(d)"; paragraph (l)(3)(iv) by changing "§ 286a.30(c)(1)" to "§ 310.30(c)(1)"; paragraphs (m)(1), (n)(1), and (o)(1) by changing "§ 286a.50(d)" to "§ 310.50(d)"; and paragraph (o)(3) by changing "§ 286a.52(b)" to § 310.52(b)".

§ 310.63 [Amended]

23. Newly redesignated § 310.63 is amended in paragraph (b)(1)(iv) by changing "§ 286a.64" to "§ 310.64"; paragraph (b)(1)(v) by changing "§ 286a.62(e)" to "§ 310.62(e)" and "§ 286a.62(h)" to "§ 310.62(h)"; paragraph (b)(2)(ii) by changing

"§ 286a.64(a)" to "§ 310.64(a)" and paragraph (b)(2)(iii) by changing "§ 286a.62(f)" to "§ 310.62(f)"; paragraph (b)(3)(ii) by changing "§ 286a.62(j)(2)" to "§ 310.62(j)(2)" and paragraph (b)(3)(iii) by changing "§ 286a.10(a)" to "§ 310.10(a)"; paragraph (b)(4)(iii) by changing "§ 286a.62(h)" to "§ 310.62(h)" and "§ 286a.62(g)" to "§ 310.62(g)"; paragraph (b)(5)(iv) by changing "§ 286a.64" to "§ 310.64" and paragraph (b)(5)(vii) by changing "§ 286a.62(j)(1)" to "§ 310.62(j)(1)"; paragraph (d)(1)(ii) by changing "§ 286a.60(f)" to "§ 310.60(f)"; paragraph (d)(2) by changing "§ 286a.103" to "§ 310.103"; paragraph (f) by changing "§ 286a.60(e)" to "§ 310.60(e)"; paragraph (g)(1) by changing "§ 286a.63(d)" to "§ 310.63(d)" and by correctly redesignating paragraph (d)(4) as (d)(1)(iv) and by changing in correctly redesignated paragraph (d)(1)(iv) "§ 286a.60(f)" to "§ 310.60(f)".

§ 310.64 [Amended]

24. Newly redesignated § 310.64 is amended in paragraph (a)(1) by changing "§ 286a.63(b)" to "§ 310.63(b)"; paragraph (a)(2) by changing "§ 286a.63(c)" to "§ 310.63(c)"; paragraph (b)(1) by changing "§ 286a.62" to "§ 310.62"; and paragraph (b)(3) by changing "§ 286a.62(q) to "§ 310.62(q)".

§ 310.72 [Amended]

25. Newly redesignated § 310.72(a)(3) is amended by changing "§ 286a.70" to "§ 310.70".

§ 310.112 [Amended]

26. Newly redesignated § 310.112(a) is amended by changing "§ 286a.60(f)" to § 310.60(f)" and paragraph (b) by changing "§ 286a.111(a)" to "§ 310.111(a)".

Appendix A [Amended]

27. Appendix A is amended in the parenthentical sentence following the heading by changing "§ 286a.13" to "§ 310.13"; paragraph C, introductor; text, by changing "§ 286a.13" to "§ 310.13"; paragraph F.1.b. by changing "§ 286a.60" to "§ 310.60", paragraphs F.3.b. and c. by changing "§ 286a.63" to "§ 310.63", paragraph G.1. by changing "§ 286a.13" to "§ 310.13"; and paragraph H.7. by changing "§ 286a.63" to "§ 310.63".

Appendix B [Amended]

28. Appendix B is amended in the parenthentical sentence following the heading by changing "§ 286a.13" to "§ 310.13" and paragraph B.1. by changing "§ 286a.13" to "§ 310.13".

Appendix C [Amended]

29. Appendix C is amended in the parenthentical sentence following the heading by changing "§ 286a.41" to "§ 310.41".

Appendix D [Amended]

30. Appendix D is amended in the parenthentical sentence following the heading and footnote 1 by changing "§ 286a.50" to "§ 310.50".

Appendix E [Amended]

31. Appendix E is amended in the parenthentical sentence following the heading by changing "§ 286a.60" to "§ 310.60" and in the paragraph entitled *Contesting record procedures*, change "291a" to "318".

Appendix F [Amended]

32. Appendix F is amended in the parenthentical sentence following the heading and paragraph A. by changing "§ 286a.63" to "§ 310.63"; paragraphs B.1. and 4. by changing "§ 286a.62" to "§ 310.62", paragraph B.6. by changing "§ 286a.10" to "§ 310.10"; and paragraph C.1. by changing "§ 286a.64" to "310.64".

Appendix G [Amended]

33. Appendix G is amended in the parenthentical sentence following the heading by changing "§ 286a.64" to "§ 310.64".

Appendix H [Amended]

34. Appendix H is amended in the parenthentical sentence following the heading by changing "§ 286a.104" to "§ 310.104".

Appendix I [Amended]

35. Appendix I is amended in the parenthentical sentence following the heading by changing "§ 286a.110" to "§ 310.110".

Dated: November 8, 1991.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 91-27342 Filed 11-13-91; 8:45 am]

BILLING CODE 3810-01-M

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32 CFR Part 311

OSD Privacy Program

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule amendment.

SUMMARY: On October 29, 1991 (56 FR 55631), the Department of Defense published a redesignation of privacy rulemaking documents. It redesignated part 286b as 311. This amendment revises the heading for part 311 and specifically identifies the changes that are to be made in the text of the newly redesignated part 311.

EFFECTIVE DATE: November 14, 1991.

FOR FURTHER INFORMATION CONTACT: L.M. Bynum, Correspondence and Directives Directorate, Washington Headquarters Services, Pentagon, Washington, DC 20301-1155, telephone 703-697-4111.

SUPPLEMENTARY INFORMATION:

List of Subjects in 32 CFR Part 311

Privacy.

Accordingly, 32 CFR part 311 is amended as follows:

PART 311—OSD PRIVACY PROGRAM

1. The authority citation for newly redesignated part 311 is revised to read as follows:

Authority: Pub. L. 93-579, 88 Stat. 1896 (5 U.S.C. 552a).

2. The heading for part 311 is revised to read as set forth above.

§ 311.5 [Amended]

3. Newly redesignated § 311.5 is amended in paragraph (b), introductory text, by changing "ASDC(A)" to "ASD(PA)" and in paragraph (b)(1) by changing "OASDP(A)" to "OASD(PA)".

§ 311.6 [Amended]

4. Newly redesignated § 311.6(a)(2) is amended by changing "OBM" to "OMB".

§ 311.7 [Amended]

5. Newly redesignated § 311.7(a) is amended by changing "§ 286b.6" to "§ 311.6".

Dated: November 8, 1991.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 91-27349 Filed 11-13-91; 8:45 am]

BILLING CODE 3810-01-M

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32 CFR Parts 313, 314, and 315

Privacy Act of 1974; Implementation

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule amendment.

SUMMARY: On October 29, 1991 (56 FR 55631), the Department of Defense published a redesignation of privacy rulemaking documents. It redesignated parts 286c as 313, 286d as 314, and 286e as 315. This amendment revises the heading for part 313, and specifically identifies the changes that are to be made in the text of the newly redesignated parts 313, 314, and 315.

EFFECTIVE DATE: November 14, 1991.

FOR FURTHER INFORMATION CONTACT: L.M. Bynum, Correspondence and Directives Directorate, Washington Headquarters Services, Pentagon, Washington, DC 20301–1155, telephone 703–697–4111.

SUPPLEMENTARY INFORMATION:

List of Subjects in 32 CFR Parts 313, 314, and 315

Privacy.

Accordingly, 32 CFR part 313 is amended as follows:

PART 313—THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF AND THE JOINT STAFF PRIVACY PROGRAM

1. The authority citation for newly redesignated part 313 is revised to read as follows:

Authority: Pub. L. 93–579, 88 Stat. 1896 (5 U.S.C. 552a)

2. The heading for newly redesignated part 313 is revised to read as set forth above.

§ 313.1 [Amended]

3. Newly redesignated § 313.1 is amended by changing "286b" to "311".

Accordingly, 32 CFR part 314 is amended as follows:

PART 314—DEFENSE ADVANCED RESEARCH PROJECTS AGENCY PRIVACY, ACT OF 1974

1. The authority citation for newly redesignated part 313 is revised to read as follows:

Authority: Pub. L. 93–579, 88 Stat. 1896 (5 U.S.C. 552a).

§ 314.1 [Amended]

2. Newly redesignated § 314.1 is amended by changing "286b" to "311".

Accordingly, 32 CFR part 315 is amended as follows:

PART 315—UNIFORMED SERVICES UNIVERSITY OF HEALTH SCIENCES, PRIVACY ACT OF 1974

1. The authority citation for newly redesignated part 315 is revised to read as follows:

Authority: Pub. L. 93–579, 88 Stat. 1896 (5 U.S.C. 552a),

§ 315.1 [Amended]

2. Newly redesignated § 315.1 is amended by changing "286b" to "311".

Dated: November 8, 1991.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 91–27350 Filed 11–13–91; 8:45 am]

BILLING CODE 3810–01–M

32 CFR Parts 317 and 318

Privacy Act of 1974; Implementation

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule amendment.

SUMMARY: On October 29, 1991 (56 FR 55631), the Department of Defense published a redesignation of privacy rulemaking documents. It redesignated part 290a as 317 and 291a as 318. This amendment specifically identifies the changes that are to be made in the text of the newly redesignated parts 317 and 318.

EFFECTIVE DATE: November 14, 1991.

FOR FURTHER INFORMATION CONTACT: L.M. Bynum, Correspondence and Directives Directorate, Washington Headquarters Services, Pentagon, Washington, DC 20301–1155, telephone 703–697–4111.

SUPPLEMENTARY INFORMATION:

List of Subjects in 32 CFR Parts 317 and 318

Privacy.

Accordingly, 32 CFR parts 317 and 318 are amended as follows:

PART 317—DEFENSE CONTRACT AUDIT AGENCY, PRIVACY ACT OF 1974

1. The authority citation for newly redesignated part 317 is revised to read as follows:

Authority: Pub. L. 93–579, 88 Stat. 1896 (5 U.S.C. 552a).

§ 317.6 [Amended]

2. Newly redesignated § 317.6(a) is amended by changing "§ 290a.9" to "§ 317.9" and changing "§ 290a.6(a)5" to "§ 317.6(a)(5)".

§ 317.7 [Amended]

3. Newly redesignated § 317.7(a) is amended by changing "§ 290a.6" to "§ 317.6" and in paragraph (b)(3) by changing "§ 290a.5" to "§ 317.5".

§ 317.10 [Amended]

4. Newly redesignated § 317.10(b)(1) is amended by changing "§ 290a.5" to "§ 317.5"; paragraph (e) by changing "§ 290a.5" to "§ 317.5", paragraph (e)(1) by changing "§ 290a.7" to "§ 317.7"; and paragraph (f)(2) by changing "§ 290a.7" to "§ 317.7".

PART 318—DEFENSE NUCLEAR AGENCY PRIVACY PROGRAM

1. The authority citation for newly redesignated part 318 continues to read as follows:

Authority: Pub. L. 93–579, 88 Stat. 1896 (5 U.S.C. 552a).

§§ 318.1 and 318.4 [Amended]

2. Newly redesignated §§ 318.1 and 318.4 (a) and (b) are amended by changing "286a" to "310".

§ 318.5 [Amended]

3. Newly redesignated § 318.5(b) is amended by changing "286a.50(c)" to "310.50(c)".

Dated: November 8, 1991.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 91–27348 Filed 11–13–91; 8:45 am]

BILLING CODE 3810–01–M

32 CFR Parts 321 and 322

Privacy Act of 1974; Implementation

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule amendment.

SUMMARY: On October 29, 1991 (56 FR 55631), the Department of Defense published a redesignation of privacy rulemaking documents. It redesignated part 298a as 321 and part 299a as 322. This amendment specifically identifies the changes that are to be made in the text of the newly redesignated parts 321 and 322.

EFFECTIVE DATE: November 14, 1991.

FOR FURTHER INFORMATION CONTACT: L.M. Bynum, Correspondence and Directives Directorate, Washington Headquarters Services, Pentagon, Washington, DC 20301–1155, telephone 703–697–4111.

SUPPLEMENTARY INFORMATION:

List of Subjects in 32 CFR Parts 321 and 322

Privacy.

Accordingly, 32 CFR parts 321 and 322 are amended as follows:

PART 321—DEFENSE INVESTIGATIVE SERVICE, PRIVACY ACT OF 1974

1. The authority citation for newly redesignated part 321 is revised to read as follows:

Authority: Pub. L. 93–579, 88 Stat. 1896 (5 U.S.C. 552a).

§ 321.4 [Amended]

2. Newly redesignated § 321.4 is amended in paragraph (d)(1) by changing "§ 298a.5" to "§ 321.5" and by changing "§ 298a.4b" to "§ 321.4(b)" and paragraph (d)(2) by changing "§ 298a.14" to "§ 321.14".

§ 321.6 [Amended]

3. Newly redesignated § 321.6 is amended in paragraph (a)(1) by

changing "§ 298a.14" to "§ 321.14"; paragraph (b)(2)(i) by changing "§ 298a.5" to "§ 321.5"; and paragraph (b)(6) by changing "§ 298a.12" to "§ 321.12".

§ 321.11 [Amended]

4. Newly redesignated § 321.11 is amended in paragraph (b), introductory text, by changing "§ 298a.4b" to "§ 321.4(b)" and paragraph (b)(5) by changing "§ 298a.14" to "§ 321.14".

§ 321.15 [Amended]

5. Newly redesignated § 321.15 is amended in paragraph (g)(1) by changing "§ 298a.2" to "§ 321.2" and paragraph (g)(2) by changing "§ 298a.2(f)" to "§ 321.2(f)".

PART 322—PRIVACY ACT SYSTEMS OF RECORDS-DISCLOSURES AND AMENDMENT PROCEDURES-SPECIFIC EXEMPTIONS, NATIONAL SECURITY AGENCY

1. The authority citation for newly redesignated part 321 is revised to read as follows:

Authority: Pub. L. 93–579, 88 Stat. 1896 (5 U.S.C. 552a).

§ 322.4 [Amended]

2. Newly redesignated § 322.4(b)(1) is amended by changing "§ 299a.4(a)(1)" to "§ 321.4(a)(1)".

§ 322.5 [Amended]

3. Newly redesignated § 322.5 is amended by changing "§ 299a.4(a)(2)" to "§ 321.4(a)(2)".

§ 322.6 [Amended]

4. Newly redesignated § 322.6 is amended by changing "§ 299a.4(a)(1)" to "§ 321.4(a)(1)".

§ 322.10 [Amended]

5. Newly redesignated § 322.10 is amended in paragraphs (b)(1), (b)(2), (b)(3), (b)(4), (b)(5), (b)(6), (b)(7), (b)(8), (b)(9), (b)(10), (b)(11), (b)(12), and (b)(13) in the *Exemption* paragraph by changing "299a.10(a)" to "§ 322.10(a)".

Dated: November 8, 1991.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 91–27344 Filed 11–13–91; 8:45 am]

BILLING CODE 3810–01–M

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32 CFR Parts 323 and 1286

Privacy Act of 1974; Implementation

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule amendment.

SUMMARY: This document redesignates 32 CFR part 1286 as part 323. The purpose of this redesignation is to make administrative changes within Chapter I of title 32 of the Code of Federal Regulations for ease of use and to transfer parts into the appropriate subchapter.

EFFECTIVE DATE: November 14, 1991.

FOR FURTHER INFORMATION CONTACT: L.M. Bynum, Correspondence and Directives Directorate, Washington Headquarters Services, Pentagon, Washington, DC 20301–1155, telephone 703–697–4111.

SUPPLEMENTARY INFORMATION:

List of Subjects in 32 CFR Parts 323 and 1286

Privacy.

Accordingly, under the authority of 5 U.S.C. 552a 32 CFR Chapter I, is amended as follows:

PART 323—[REDESIGNATED FROM PART 1286]

1. Part 1286 is redesignated as part 323 and placed in Subchapter O.

Appendix A and, Appendix C [Amended]

2. Appendix A, paragraph 0.2. and Appendix C., paragraph C., are amended by changing "1286" to "323".

Authority: Privacy Act of 1974, Pub. L. 93–579, 88 Stat. 1896 (5 U.S.C. 552a)

Dated: November 8, 1991.

L.M. Bynum

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 91–27341 Filed 11–13–91; 8:45 am]

BILLING CODE 3810–01

Department of the Navy

32 CFR Part 719

Regulations Supplementing the Manual for Courts-Martial

AGENCY: Department of the Navy, DOD.

ACTION: Final rule.

SUMMARY: The Department of the Navy is amending the regulations supplementing the Manual for Courts-Martial in order to reflect changes to Chapter I of the Manual of the Judge Advocate General. The publication of this rule will inform members of the public about the procedures and authority for grants of immunity from prosecution in trials by courts-martial.

EFFECTIVE DATE: October 3, 1990.

FOR FURTHER INFORMATION CONTACT: Captain Roger A. Smith, JAGC, USN, Deputy Assistant Judge Advocate General (Military Justice), Office of the Judge Advocate General, 200 Stovall Street, Alexandria, VA 22332-2400, (202) 433-5895.

SUPPLEMENTARY INFORMATION: Pursuant to the authority conferred under 5 U.S.C. 301; 10 U.S.C. 133, 939, 5013, and 5148; E.O. 11476; and 32 CFR700.206 and 700.1202; the Judge Advocate General revises 32 CFR 719.112. This revision reflects the changes made to Chapter I of the Manual of the Judge Advocate General of the Navy, JAG Instruction 5800.7C. This part has been revised. It sets forth the procedures and authority for grants of immunity from prosecution in trials by courts-martial.

This revision was adopted on October 3, 1990. To the limited extent that this revision could be deemed to originate any requirements within the Department of the Navy, it has been determined that such requirements relate entirely to internal Naval management and personnel practices that can be administered more effectively without public participation in the rule-making process. It has therefore been determined that invitation of public comment on this revision would be impracticable and unnecessary and is therefore not required under the provisions of 32 CFR parts 296 and 701. It has also been determined that this final rule is not a "major rule" within the criteria specified in Executive Order 12291, and does not have substantial impact on the public.

List of Subjects in 32 CFR Part 719

Military Law, Military Personnel.

For the reasons set out in the preamble, title 32, part 719 of the Code of Federal Regulations is amended as follows:

PART 719—REGULATIONS SUPPLEMENTING THE MANUAL FOR COURTS-MARTIAL

1. The authority citation for part 719 is revised to read as follows:

Authority: 3 U.S.C. 301; 5 U.S.C. 301; 10 U.S.C. 815, 5013, 5148; 32 CFR 700.206 and 700.1202.

2. Subpart C of part 719 is amended by revising § 719.112 to read as follows:

§ 719.112 Authority to grant immunity from prosecution.

(a) *General.* In certain cases involving more than one participant, the interests of justice may make it advisable to grant immunity, either transactional or testimonial, to one or more of the participants in the offense in consideration for their testifying for the

Government or the defense in the investigation and/or the trial of the principal offender. Transactional immunity, as that term is used in this section, shall mean immunity from prosecution for any offense or offenses to which the compelled testimony relates. Testimonial immunity, as that term is used in this section, shall mean immunity from the use, in aid of future prosecution, of testimony or other information compelled under an order to testify (or any information directly or indirectly derived from such testimony or other information). The authority to grant either transactional or testimonial immunity to a witness is reserved to officers exercising general court-martial jurisdiction. This authority may be exercised in any case whether or not formal charges have been preferred and whether or not the matter has been referred for trial. The approval of the Attorney General of the United States on certain orders to testify may be required, as outlined below.

(b) *Procedure.* The written recommendation that a certain witness be granted either transactional or testimonial immunity in consideration for testimony deemed essential to the Government or to the defense shall be forwarded to an officer competent to convene a general court-martial for the witness for whom immunity is requested, i.e., any officer exercising general court-martial jurisdiction. Such recommendation will be forwarded by the trial counsel or defense counsel in cases referred for trial, the pretrial investigating officer conducting an investigation upon preferred charges, the counsel or recorder of any other fact-finding body, or the investigator when no charges have yet been preferred. The recommendation shall state in detail why the testimony of the witness is deemed so essential or material that the interests of justice cannot be served without the grant of immunity. The officer exercising general court-martial jurisdiction shall act upon such request after referring it to his staff judge advocate for consideration and advice. If approved, a copy of the written grant of immunity must be served upon the accused or his defense counsel within a reasonable time before the witness testifies. Additionally, if any witness is expected to testify in response to a promise of leniency, the terms of the promise of leniency must be reduced to writing and served upon the accused or his defense counsel in the same manner as a grant of immunity.

(c) *Civilian witnesses.* Pursuant to 18 U.S.C. 6002 and 6004, if the testimony or other information of a civilian witness at a court-martial may be necessary in the public interest, and if the civilian witness has refused or is likely to refuse to testify or provide other information on the basis of a privilege against self-incrimination, then the approval of the Attorney General of the United States, or his designee, must be obtained prior to the execution or issuance of an order to testify to such civilian witness. The cognizant officer exercising general court-martial jurisdiction may obtain the approval of the Attorney General in such a circumstance by directing a message or letter requesting the assistance of the Judge Advocate General (Code 20) in the form prescribed in paragraph (e) of this section.

(d) *Cases involving national security.* In all cases involving national security or foreign relations of the United States, the cognizant officer exercising general court-martial jurisdiction shall forward any proposed grant of immunity to the Judge Advocate General for the purpose of consultation with the Department of Justice. See section 0126 of the Manual of the Judge Advocate General regarding relations between the Departments of Defense and Justice. The cognizant officer exercising general court-martial jurisdiction may obtain approval by the Attorney General of a proposed grant of immunity by directing a letter requesting the assistance of the Judge Advocate General (Code 20) in the form prescribed in paragraph (e) of this section.

(e) *Content of immunity requests.* In all cases in which approval of the Attorney General of the United States is required prior to the issuance of a grant of immunity, whether under paragraphs (c) or (d) of this section, the cognizant officer exercising general court-martial jurisdiction shall forward by message or letter the proposed order to testify and grant of immunity to the Judge Advocate General (Code 20). The order to testify should be substantially in the form set forth in Appendix A-1-i(3) of the Manual of the Judge Advocate General. Requests for assistance shall be in writing, should allow at least three weeks for consideration, and must contain the following information:

(1) Name, citation, or other identifying information of the proceeding in which the order is to be used.

(2) Name of the witness for whom the immunity is requested.

(3) Name of the employer or company with which a witness is associated or the military unit or organization to which a witness is assigned.

(4) Date and place of birth, if known, of the witness.

(5) FBI or local police file number, if any, and if known.

(6) Whether any State or Federal charges are pending against the witness and the nature of the charges.

(7) Whether the witness is currently incarcerated, under what conditions, and for what length of time.

(8) A brief resume of the background of the investigation or proceeding before the agency or department.

(9) A concise statement of the reasons for the request, including:

(i) What testimony the witness is expected to give;

(ii) How this testimony will serve the public interest;

(iii) Whether the witness:

(A) Has invoked the privilege against self-incrimination; or

(B) Is likely to invoke the privilege;

(iv) If paragraph (e)(9)(iii)(B) of this section is applicable, then why it is anticipated that the prospective witness will invoke the privilege.

(10) An estimate as to whether the witness is likely to testify in the event immunity is granted.

(f) *Post-testimony procedure.* After a witness immunized in accordance with paragraphs (c) and (d) of this section has testified, the following information should be provided to the United States Department of Justice, Criminal Division, Immunity Unit, Washington, DC 20530, via the Judge Advocate General (Code 20).

(1) Name, citation, or other identifying information, of the proceeding in which the order was requested.

(2) Date of the examination of the witness.

(3) Name and residence address of the witness.

(4) Whether the witness invoked the privilege.

(5) Whether the immunity order was used.

(6) Whether the witness testified pursuant to the order.

(7) If the witness refused to comply with the order, whether contempt proceedings were instituted, or are contemplated, and the result of the contempt proceeding, if concluded. A verbatim transcript of the witness' testimony, authenticated by the military judge, should be provided to the Judge Advocate General at the conclusion of the trial. No testimony or other information given by a civilian witness pursuant to such an order to testify (or any information directly or indirectly derived from such testimony or other information) may be used against him in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

(g) *Review.* Under some circumstances, the officer granting immunity to a witness may be disqualified from taking reviewing action on the record of the trial before which the witness granted immunity testified. A successor in command not participating in the grant of immunity would not be so disqualified under those circumstances.

(h) *Form of grant.* In any case in which a military witness is granted transactional immunity, the general court-martial convening authority should execute a written grant, substantially in the form set forth in appendix section A-1-i(1) of the Manual of the Judge Advocate General. In any case in which a military witness is granted testimonial immunity, the general court-martial convening authority should execute a written grant substantially in the form set forth in appendix section A-1-i(2) of the Manual of the Judge Advocate General.

Dated: November 6, 1991.

Wayne T. Baucino,

Lieutenant, JAGC, U.S. Naval Reserve, Alternate Federal Register Liaison Officer.

[FR Doc 91-27430 Filed 11-13-91; 8:45 am]

BILLING CODE 3810-AE-F

POSTAL SERVICE

39 CFR Part 265

Release of Information

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: On July 10, 1991, the Postal Service published a proposal to amend 39 CFR 265.8(e)(3) to increase the fee for individual requests for change of address information from $1.00 to $3.00 (56 FR 31363). The Postal Service adopts the proposed rule as a final rule. The increase is necessary to help meet the present costs of providing the service.

EFFECTIVE DATE: January 1, 1992.

FOR FURTHER INFORMATION CONTACT: Robert Muschamp, Retail Management Division, (202) 268-3549.

SUPPLEMENTARY INFORMATION: The service for providing change of address information for individual requests allows any person upon payment of the prescribed fee, to obtain the new address of any specific customer who has filed with the Postal Service a permanent Change of Address Order (PS Form 3575 or handwritten order). Disclosure is limited to the address of the specifically identified individual about whom the information is requested.

The Postal Service proposed an increase of the current $1 fee to $3 for each individual request for change of address information to help meet the actual costs of providing the service. There was a sixty day comment period for the proposal ending on September 9, 1991. Although the Postal Service received one request for more information, no substantive comment regarding the proposed amendment was received. The Postal Service, therefore, is increasing the fee to $3 to bring the fee more in line with the actual cost of providing the service. A further increase to match costs (currently, at approximately $5.00) will be evaluated in the future after the Postal Service assesses the impact of the increase to $3.

Corresponding changes will be made in the Administrative Support Manual §§ 352.653, 353.321(c), and 353.321(d).

The Postal Service will continue with the policy stated in 39 CFR 265.8(g)(5) of waiving the prescribed fee under stated circumstances.

List of Subjects in 39 CFR Part 265

Release of information, Postal Service.

For the reasons set out in the proposed rule and this notice, the Postal Service amends part 265 of 39 CFR chapter I as follows:

PART 265—RELEASE OF INFORMATION

1. The authority citation in 39 CFR part 265 continues to read as follows:

Authority: 39 U.S.C. 401; 5 U.S.C. 552.

2. In part 265, § 265.8(e)(3) is revised to read as follows:

§ 265.8 Schedule of fees.

* * * * *

(e) * * *

(3) Change of address orders. Although change of address information is not required by the Freedom of Information Act to be made available to the public, the fee for obtaining this information in accordance with paragraph (d)(1) of § 265.6 is included in this section as a matter of convenience. The fee for searching for a change of address order is $3.00. This fee is charged regardless of whether a permanent change of address is found on file. (See paragraph (g)(5) of this section.)

* * * * *

Stanley F. Mires,

Assistant General Counsel, Legislative Division.

[FR Doc. 91-27222 Filed 11-13-91; 8:45 am]

BILLING CODE 7710-12-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Public Land Order 6905

[OR-943-4214-10; GP1-231; OR-19573 (WASH)]

Revocation of Executive Order Dated November 8, 1912, Which Established Powersite Reserve No. 312; Washington

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order revokes in its entirety an Executive order which withdrew 680 acres of lands for the Bureau of Land Management's Powersite Reserve No. 312. The lands are no longer needed for the purpose for which they were withdrawn. The lands have been conveyed out of Federal ownership and will not be restored to surface entry, mining or mineral leasing.

EFFECTIVE DATE: November 14 1991.

FOR FURTHER INFORMATION CONTACT: Linda Sullivan, BLM Oregon State Office, P.O. Box 2965, Portland, Oregon 97208, 503-280-7171.

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1988), it is ordered as follows:

1. The Executive Order dated November 8, 1912, which withdrew the following described lands for Powersite Reserve No. 312, is hereby revoked in its entirety:

Willamette Meridian

T. 15 N., R. 16 E.,
Sec. 20, SW¼NW¼, N½SW¼, SE¼SW¼, W½SE¼, and SE¼SE¼;
Sec. 28, E½ and N½NW¼.

The areas described aggregate 680 acres in Yakima County.

2. The lands have been conveyed out of Federal ownership and will not be restored to operation of the public land laws generally, including the mining and mineral leasing laws.

Dated: October 29, 1991.

Dave O'Neal,

Assistant Secretary of the Interior.

[FR Doc. 91-27304 Filed 11-13-91; 8:45 am]

BILLING CODE 4310-33-M

43 CFR Public Land Order 6906

[OR-943-4214-10; GP1-235; OR-19569 (WASH)]

Revocation of Executive Order Dated May 28, 1912, Which Established Powersite Reserve No. 272; Washington

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order revokes in its entirety an Executive order which withdrew lands for the Bureau of Land Management's Powersite Reserve No. 272. The 160 acres of lands remaining in Powersite Reserve No. 272 are no longer needed for the purpose for which they were withdrawn. The lands have been conveyed out of Federal ownership and will not be restored to surface entry, mining or mineral leasing.

EFFECTIVE DATE: November 14, 1991.

FOR FURTHER INFORMATION CONTACT: Linda Sullivan, BLM Oregon State Office, P.O. Box 2965, Portland, Oregon 97208, 503–280–7171.

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1988), it is ordered as follows:

1. The Executive Order dated May 28, 1912, which withdrew the following described lands for Powersite Reserve No. 272, is hereby revoked in its entirety:

Willamette Meridian

T. 10 N., R. 3 E.,
Sec. 8, NE¼NE¼.
T. 11 N., R. 4 E.,
Sec. 32, N½SE¼and SW¼SE¼.

The areas described aggregate 160 acres in Cowlitz and Lewis Counties.

2. The lands have been conveyed out of Federal ownership and will not be restored to operation of the public land laws generally, including the mining and mineral leasing laws.

Dated: October 30, 1991.

Dave O'Neal,

Assistant Secretary of the Interior.

[FR Doc. 91–27305 Filed 11–13–91; 8:45 am]

BILLING CODE 4310–33–M

43 CFR Public Land Order 6907

[NV-943-4214-10; Nev-051742]

Public Land Order No. 6849, Correction; Mineral Withdrawal of a Portion of the Sheldon National Wildlife Refuge; Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order will correct errors in the legal descriptions in Public Land Order No. 6849 which withdrew approximately 445,766 acres of the Sheldon National Wildlife Refuge from mining location for the Fish and Wildlife Service to protect the wildlife habitat and unique resource values of the refuge lands.

EFFECTIVE DATE: November 14, 1991.

FOR FURTHER INFORMATION CONTACT: Vienna Wolder, BLM Nevada State Office, P.O. Box 12000, Reno, Nevada 89520, 702–785–6526.

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1988), it is ordered as follows:

The land descriptions in Public Land Order No. 6849, 56 FR 16278–16280, April 22, 1991, are hereby corrected as follows:

On page 16278, second column, line 8 from the bottom is hereby corrected to read "S½;".

On page 16279, first column, line 21 is hereby corrected to read "SE¼NW¼, NW¼SW¼, S½SW¼,".

On page 16279, second column, line 3 is hereby corrected to read "Sec. 8, E½, E½SW¼;".

On page 16279, second column, line 16 is hereby corrected to read "Sec. 17, E½, SW¼, E½NW¼, SW¼NW¼;".

On page 16279, second column, line 32 is hereby corrected to read "N½SE¼, SE¼SE¼;".

On page 16279, third column, line 2 is hereby corrected to read "T. 45½ N., R. 24 E.,".

On page 16279, third column, line 14 is hereby corrected to read "T. 43 N., R. 24½ E.,".

On page 16279, third column, line 21 is hereby corrected to read "T. 44 N., R. 24½ E.,".

On page 16279, third column, line 40 is hereby corrected to read "Secs. 22 to 27, inclusive;".

On page 16279, third column, delete lines 41 and 46.

On page 16279, third column, line 47 is hereby corrected to read "Secs. 34, 35, and 36.".

On page 16279, third column, line 10 from the bottom is hereby corrected to read "Sec. 35, Lots 1, 2, 3, 5, 6, and 7;".

On page 16279, third column, delete line 9 from the bottom.

On page 16279, third column, line 8 from the bottom is hereby corrected to read "Sec. 36, S½, S½N½, NE¼NE¼.".

On page 16279, third column, line 7 from the bottom is hereby corrected to read "T. 45½ N., R. 25 E., unsurveyed,".

On page 16279, third column, line 6 from the bottom is hereby corrected to read "Sec. 25, W½W½;".

On page 16280, first column, line 17 is hereby corrected to read "Sec. 22, SE¼SE¼ excluding patented portion, S½SW¼, SW¼SE¼;".

On page 16280, first column, line 18 is hereby corrected to read "Sec. 23, SW¼SW¼ excluding patented portion, SE¼SW¼, S½SE¼;".

On page 16280, first column, line 33 is hereby corrected to read "N½SW¼;".

On page 16280, first column, line 35 is hereby corrected to read "Sec. 31; Lots 1, 2, 3, NE¼, E½NW¼;".

On page 16280, second column, delete lines 12 and 13.

On page 16280, second column, line 14 is hereby corrected to read "Sec. 33, N½SE¼, SW¼SE¼;".

On page 16280, second column, line 15 is hereby corrected to read "Sec. 34, SW¼NE¼, SE¼NW¼;".

On page 16280, second column, delete lines 16, 17, 30, 31, 38, 39, 40, and 41

Dated: November 5, 1991.

Dave O'Neal,

Assistant Secretary of the Interior.

[FR Doc. 91–27303 Filed 11–13–91; 8:45 am]

BILLING CODE 4310–HC–M

43 CFR Public Land Order 6908

[OR-943-4214-10; GP1-232; OR-19726 (WASH)]

Revocation of Executive Order Dated May 31, 1915, Which Established Powersite Reserve No. 493; Washington

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order revokes in its entirety an Executive order which withdrew 498 acres of land for the Bureau of Land Management's Powersite Reserve No. 493. The lands are no longer needed for the purpose for which they were withdrawn. The lands have been conveyed out of Federal ownership and will not be restored to surface entry, mining or mineral leasing.

EFFECTIVE DATE: November 14, 1991.

FOR FURTHER INFORMATION CONTACT: Linda Sullivan, BLM Oregon State Office, P.O. Box 2965, Portland, Oregon 97208, 503–280–7171.

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1988), it is ordered as follows:

1. The Executive Order dated May 31, 1915, which withdrew the following described lands for Powersite Reserve No. 493, is hereby revoked in its entirety:

Willamette Meridian

T. 11 N., R. 6 E.,
Sec. 11, lots 1 to 7, inclusive, and lot 10, N½ NE¼, and NW¼SE¼;
Sec. 12, lot 5;
Sec. 13, lots 1, 2, and 8, NW¼NE¼, and SW¼NW¼.

The areas described aggregate 498 acres in Lewis County.

2. The lands have been conveyed out of Federal ownership and will not be restored to operation of the public land laws generally, including the mining and mineral leasing laws.

Dated: October 31, 1991.

Dave O'Neal,

Assistant Secretary of the Interior.

[FR Doc. 91-27306 Filed 11-13-91; 8:45 am]

BILLING CODE 4310-33-M

43 CFR Public Land Order 6909

[CO-930-4214-10; COC-4390]

Withdrawal of National Forest System Lands for Protection of the Niwot Ridge Biosphere Reserve; Colorado

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order withdraws 2,631.80 acres of National Forest System lands from mining for 20 years to protect ongoing research on alpine flora and fauna, and the impact of man on the sensitive alpine environment in the Niwot Ridge Biosphere Reserve. The lands have been and will remain open to such forms of disposition as may by law be made of National Forest System lands and to mineral leasing.

EFFECTIVE DATE: November 14, 1991.

FOR FURTHER INFORMATION CONTACT: Doris E. Chelius, BLM Colorado State Office, 2850 Youngfield Street, Lakewood, Colorado 80215-7076, 303-239-3706.

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1988), it is ordered as follows:

1. Subject to valid existing rights, the following described National Forest System lands are hereby withdrawn from location and entry under the United States mining laws (30 U.S.C. ch. 2 (1988)), but not from leasing under the mineral leasing laws, for the protection of the Forest Service Niwot Ridge Biosphere Reserve:

Sixth Principal Meridian

Roosevelt National Forest

T. 1 N., R. 73 W.,
Sec. 7, lots 3 and 4, E½SW¼, and SE¼;
Sec. 8, S½S½NE¼ and S½;
Sec. 9, NW¼SW¼ and S½S½;
Sec. 10, NE¼SW¼, S½SW¼, and SE¼;
Sec. 15, N½ and N½SE¼;
Sec. 17, NE¼, E½NW¼, NE¼SW¼, and SE¼ exclusive of mineral patent 18600;
Sec. 21, NE¼NE¼, S½NE¼, and SE¼ NW¼;
Sec. 22, NW¼, NW¼SW¼, NW¼SE¼, and S½SE¼;
Sec. 23, S½NE¼SW¼, S½SW¼, SW¼ NW¼SE¼, and SW¼SE¼.

The areas described aggregate approximately 2,631.80 acres of National Forest System lands in Boulder County.

2. The withdrawal made by this order does not alter the applicability of those public land laws governing the use of the lands under lease, license, or permit, or governing the disposal of their mineral or vegetative resources other than under the mining laws.

3. This withdrawal will expire 20 years from the effective date of this order unless, as a result of a review conducted before the expiration date pursuant to section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f) (1988), the Secretary determines that the withdrawal shall be extended.

Dated: October 31, 1991.

Dave O'Neal,

Assistant Secretary of the Interior.

[FR Doc. 91-27302 Filed 11-13-91; 8:45 am]

BILLING CODE 4310-JB-M

DEPARTMENT OF TRANSPORTATION

Maritime Administration

46 CFR Part 382

[Docket No. R-140]

RIN 2133-AA93

Determination of Fair and Reasonable Rates for the Carriage of Bulk and Packaged Preference Cargoes on U.S.-Flag Commercial Vessels

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Final rule.

SUMMARY: The Maritime Administration (MARAD) is clarifying a requirement for the submission of port and cargo handling information for cargo preference voyages. The requirement is contained in a regulation that describes information that vessel operators are required to submit to MARAD for its calculation of fair and reasonable rates for the carriage of liquid and dry bulk preference cargoes on U.S.-flag commercial vessels. An inappropriate reference to another MARAD regulation is being removed.

DATES: The effective date of this rule is November 14, 1991.

FOR FURTHER INFORMATION CONTACT: Arthur B. Sforza, Director, Office of Ship Operating Assistance, Maritime Administration, 400 Seventh Street SW., room 8114, Washington, DC 20590, tel. 202-366-2323.

SUPPLEMENTARY INFORMATION: The regulations in 46 CFR part 382 prescribe the type of information that must be submitted by operators interested in carrying bulk and packaged preference cargoes, and the method for calculating fair and reasonable rates for the carriage of dry (including packaged) and liquid bulk preference cargoes on U.S.-flag commercial vessels, except less than full cargoes on liner vessels, pursuant to section 901 of the Merchant Marine Act, 1936, as amended (46 App. U.S.C. 1241(b)). MARAD is amending section 382.2(c) to clarify that the operator's expense for despatch (where discharge of the cargo is expedited) is not an appropriate expense to be included in required port and cargo handling information that is furnished to MARAD. Section 382.2(d) makes reference to certain MARAD regulations as providing guidance to operators concerning the reporting format to be used in submitting vessel operating cost data. One of this references is to 46 CFR part 272, Maintenance and Repair Reporting Instructions. The regulation in 46 CFR part 272 to which this provision refers involves the responsibilities of subsidized operators in reporting to MARAD for purposes of subsidy determination only, and has no relevance to the determination of fair and reasonable rates. Accordingly, because the reference to 46 CFR part 272 is inappropriate and potentially confusing to those who are subject to the regulations in 46 CFR part 382, it is being removed.

Rulemaking Analyses and Notices

Executive Order 12291 (Federal Regulation) and DOT Regulatory Policies and Procedures

This rulemaking has been reviewed under Executive Order 12291, and it has been determined that this is not a major rule. It will not result in an annual effect on the economy of $100 million or more. There will be no increase in production costs or prices for consumers, individual industries, Federal, State, or local government, agencies, or geographic

regions. Furthermore, it will not adversely affect competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This rulemaking does not involve any change in important Departmental policies, and it is considered nonsignificant under DOT regulatory policies and procedures (44 FR 11034, February 26, 1979). Because the economic impact should be minimal, further regulatory evaluation is not necessary.

This rulemaking relates to amendment of an existing regulation that provides guidance to subsidized operators with respect to the format that shall be required for submission of cost data to MARAD that the agency will use in determining fair and reasonable rates. Accordingly, it is a matter of agency practice and procedure. Pursuant to the Administrative Procedure Act 5 U.S.C. 553(b), requirements for notice and opportunity for public comment are not applicable. Since MARAD does not anticipate that publication for comment would result in the receipt of useful information, such publication is not required under DOT's Regulatory Policies and Procedures either. The rule is being made effective on publication for good cause pursuant to 5 U.S.C. 553(d)(3).

Federalism

MARAD has analyzed this rulemaking in accordance with the principles and criteria contained in Executive Order 12612 and has determined that these regulations do not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act

MARAD certifies that this regulation will not have a significant economic impact on a substantial number of small entities.

Environmental Assessment

MARAD has considered the environmental impact of this rulemaking and has concluded that there is no impact and that an environmental impact statement is not required under the National Environmental Policy Act of 1969.

Paperwork Reduction Act

This rulemaking contains no reporting requirements that require approval by the Office of Management and Budget pursuant to provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 46 CFR Part 382

Agricultural commodities, Cargo vessels, Government procurement—foreign relations, loan programs—Foreign relations, Water transportation.

Accordingly, 46 CFR part 382 is amended as follows:

PART 382—[AMENDED]

1. The citation of authority continues to read as follows:

Authority: Secs. 204 and 901 of the Merchant Marine Act, 1936, as amended (46 App. U.S.C. 1114, 1241); 49 CFR 1.66.

§ 382.2 [Amended]

2. MARAD hereby is amending § 382.2 as follows:

(a) In paragraph (c)(2), before the period, by adding the words "other than dispatch"; and

(b) In the first sentence of paragraph (d), by removing the text ", and 46 CFR part 272, Maintenance and Repair Reporting Instructions,".

By order of the Maritime Administrator.

Dated: November 8, 1991.

James E. Saari,

Secretary, Maritime Administration.

[FR Doc. 91-27397 Filed 11-13-91; 8:45 am]

BILLING CODE 4910-81-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 2, 21, 74, and 94

[Gen. Docket No. 90-54, FCC 91-302]

Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, Private Operational-Microwave Fixed Service, and Cable Television Relay Service; Use of the Frequencies in the 2.1 and 2.5 GHz Band

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This Second Report and Order (Second Report) resolves issues raised in the Further Notice of Proposed Rule Making (Further Notice), 55 FR 46017 (October 31, 1990) in this proceeding which reviews the rules relating to the three microwave radio services used in the provision of wireless cable service—Multipoint Distribution Service (MDS), Private Operational-Fixed Service (OFS), and Instructional Television Fixed Service (ITFS). Specifically, the Second Report: (1) Reallocates the three OFS H channels to MDS; (2) reallocates half of the MDS response channels to OFS, except those specific channels already in use by MDS systems; (3) delineates the procedures an applicant should use to initiate an involuntary station modification, including collocation, in certain specific circumstances; (4) provides guidelines under which involuntary point-to-point migration proposals will be reviewed; (5) establishes a rural exemption to the prohibition of cable ownership of wireless cable systems, and an exemption for the provision of local programming, subject to guidelines; and (6) adopts a modified version of the proposal, contained in the Further Notice to permit use of available ITFS channels by wireless cable entities. In order to implement this decision in an expeditious fashion, the Commission will not accept new OFS applications for the H channels filed after September 26, 1991. The Commission will accept minor amendments, as defined in 47 CFR 1.962, to OFS applications already on file. The actions taken in the Second Report, in conjunction with the other actions taken in this proceeding, are needed to modernize and conform the rules in various services in order to reduce the impediments to and enhance the viability of MDS services offering multiple channels of premium video programming over-the-air directly into homes.

EFFECTIVE DATE: January 2, 1992.

FOR FURTHER INFORMATION CONTACT: Jane Hinckley, Mass Media Bureau, Policy and Rules Division (202) 632-7792.

SUPPLEMENTARY INFORMATION:

Paperwork Reduction. Public reporting burden for § 21.912(e) is estimated to average 2 hours per respondent, public reporting burden for § 21.912(f) is estimated to average 2 hours per respondent, public reporting burden for § 74.902 is estimated to vary from 2 hours to 6 hours 50 minutes, public reporting burden for § 74.985 is estimated to average 5 hours, 50 minutes per respondent, public reporting burden for § 74.990 is estimated to average 2 hours per respondent, public reporting burden for § 74.991 is estimated to average 5 hours 50 minutes per respondent, and public reporting burden for § 74.992 is estimated to average 3 hours 50 minutes per respondent. These estimates include 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 the burden, to the Federal Communications Commission, Information Resources Branch, room 416, Paperwork Reduction Project Washington, DC 20554, and to the Office of Management and Budget, Paperwork Reduction Project Washington, DC 20503.

This is a synopsis of the Commission's Second Report and Order in Gen. Docket No. 90–54, adopted September 26, 1991, and released October 25, 1991.

The complete text of this Second Report and 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, Downtown Copy Center, at (202) 452–1422, 1919 M Street NW., room 246, Washington, DC 20554.

Synopsis of Second Report and Order

1. This proceeding was initiated by Notice of Proposed Rule Making/Notice of Inquiry (55 FR 07344, March 1, 1990) with the goal of facilitating the development of wireless cable by unifying and updating the rules governing the various microwave radio channels that can be collectively used to provide wireless cable service. The initial Report and Order (Report) (55 FR 46006, October 31, 1990) resolved most of the issues in this proceeding, but certain aspects of the issues raised in the Report required further consideration. Thus, the Further Notice was issued soliciting comment on: (1) Reallocation of the OFS H channels to MDS; (2) allocation of MDS, OFS, and ITFS response channels; (3) involuntary station modification, including involuntary collocation; (4) certain modifications for collocation without prior Commission authorization; (5) involuntary migration of point-to-point ITFS operations on the E and F channels; (6) ownership or operation of wireless cable facilities by cable entities; and (7) use of available ITFS channels by wireless cable entities. The Second Report resolves these remaining issues and terminates the proceeding. (The Commission has received several petitions for reconsideration of the Report, and these will be addressed in a separate Order on Reconsideration.)

2. The Second Report first reallocates the three OFS H channels to MDS. Accordingly, current licensees will retain their licenses but will henceforth operate as MDS licensees under the Commission's part 21 rules. The Commission recognizes that a few existing H-channel licensees engage in OFS-type operations, and these licensees will be allowed to continue to provide such service. The Commission will not automatically grandfather these H-channel OFS operations, however, because there appear to be very few such users, and because the Commission wishes to facilitate the Conversion to MDS service by willing H-channel operators. Therefore, if a current H-channel licensee wishes to continue to provide service or transmit signals incompatible with §§ 21.903 through 21.908 of the Commission's rules, that licensee must file, on or before January 2, 1992, a written request to the Private Radio Bureau that operation of its H-channel station be regulated under part 94.

3. If the Commission permits an H-channel station to remain subject to part 94 and that station is later assigned, it will be converted to regulation under the part 21 rules unless (1) regulation under part 94 is requested in the assignment application, (2) the applicant shows good cause when the H-channel station should not be converted to part 21 regulation, and (3) the Commission determines that the public interest will be served by regulation of the station under part 94. ITFS entities will not be permitted to apply for H-channel MDS licenses, as some commenters request, because such use would be inconsistent with the purposes of the reallocation. Current ITFS uses of H channels, however, may apply to be reclassified as ITFS licensees on those channels, to avoid loss of existing ITFS service. In order to update the Commission's records, ITFS users of the H channels are directed to notify the Mass Media Bureau of their election of ITFS status on or before January 30, 1992. If H channels licensed to an ITFS entity are later assigned or transfered, the channels will be converted automatically to regulation under the part 21 rules as of the date that consent to assignment or transfer is granted.

4. In order to implement this decision in an expeditious fashion, the Commission will not accept new OFS applications for the H channels after September 26, 1991. The Commission will accept minor amendments, as defined in 47 CFR 1.962, to OFS applications already on file. Parties interested in filing MDS applications for the H channels can again submit applications on January 2, 1992, or thereafter. The Commission notes that the decision not to accept OFS applications for the H channels is procedural in nature and is therefore not subject to the notice and comment provisions of the Administrative Procedure Act (APA). See 5 U.S.C. 553(d). Further, as a procedural action, it is not subject to the 30 day effective date provisions of the APA. In any event, good cause exists to make the freeze on the acceptance of applications for the OFS H channels effective immediately because advance notification could prompt the filing of additional applications under the OFS rules, thus undermining our reallocation and defeating the purpose of the freeze.

5. Second, the Second Report finds that all of the response channels associated with the H channels will remain for OFS use, and 50 percent of the MDS response channels will be reallocated to OFS. MDS systems can effectively utilize some two-way capability, but the commenters have not advanced a compelling reason why MDS entities should retain all of the E and F response channels. Because the Commission is not aware of specific current uses of the MDS response channels being reallocated to OFS, it will not automatically grandfather all existing MDS response channel licenses. Instead, it will permit licensees to seek grandfathered status based on their current operations. Upon receipt of written notice from the Commission following adoption of the Second Report, licensees will have 60 days to request grandfathered status based on current use. If any grandfathered response channels are subsequently assigned, they will automatically be converted to OFS unless (1) grandfathered status is requested on the assignment application, including a showing of good cause why the channels should be grandfathered, and (2) the Commission grants such status in connection with action on the application.

6. The Commission is unable, at this time, to determine the appropriate assignment and operational criteria for this new OFS spectrum. Because few commenters addressed these matters, the Commission will defer any such decision until a new rulemaking is completed that addresses the appropriate technical standards for these channels. OFS applications for these response channels will not be entertained until after we adopt technical standards. The Commission will soon initiate a rulemaking proceeding addressing issues such as channelization, co-channel and adjacent channel interference protection, and permissible system configurations for these channels. The American Petroleum Institute has submitted comments on technical rules to govern this spectrum, which will be considered

in any rulemaking undertaken on this issue.

7. The Commission will not reallocate any of the ITFS response channels, including response channels associated with ITFS systems operating on the E and F channels. As proposed in the Further Notice, the response channels associated with channels E3, E4, F3 and F4 will be reallocated to OFS. The grandfathered use of these reallocated response channels by an MDS or ITFS licensee in an individual case will not warrant allocation of other response channels in their place.

8. Third, the Second Report delineates the procedures an applicant should use to initiate an involuntary station modification, including collocation, in certain specific circumstances. First, the Commission will allow forced upgrades of ITFS operations by new applicants desiring to invoke the 0 dB interference protection standard and in conjunction with the revision of permissible aural power levels. Second, a station that is prevented from operating at 100 watts because the higher power will cause adjacent-channel or co-channel interference to another station may upgrade the interfered-with station to eliminate interference. However, it is not intended that involuntary transmitter modifications be restricted solely to stations increasing their output power to the full 100 watts (roughly equivalent to 33 dBW EIRP); involuntary modifications can be acceptable with respect to any permissible output power increase that would otherwise cause harmful interference to another station. Third, a licensee may upgrade another licensee's facility if the other licensee is unable to meet the revised transmitter tolerance or out-of-band emissions standards promulgated in the Report. These involuntary modifications are authorized with appropriate safeguards.

9. As collocation of MDS and/or ITFS facilities can be essential to resolving adjacent-channel interference problems, affecting the grantability of up to half of the channels in an area, it is critical to the successful establishment of wireless cable in many areas. The Commission therefore includes involuntary collocation as an acceptable involuntary modification. An MDS or ITFS licensee or applicant in the area may seek involuntary collocation of another facility with its own facility. An MDS or ITFS licensee may not, however, force another operator to grant access to that operator's existing site, although it can offer that option as an alternative.

10. In addition to licensees, applicants may seek involuntary collocation; to minimize any unnecessary impact on ITFS entities, only those applicants with unopposed applications may do so. (An unopposed application is one that faces no competing application(s) or petition(s) to deny.) Applicants will be required to confirm their unopposed status after the period for competing applications and petitions to deny has passed. If an application is opposed, the companion ITFS involuntary modification application will be returned. It may be refiled when the initial application is again unopposed.

11. The application for involuntary modification may be prepared, signed and filed by the party initiating the change, and must be served on the affected ITFS party on the day of filing. The applicant should submit FCC form 330, but need not fill out section II (Legal Qualifications). A cover letter must clearly indicate that the modification is involuntary, as well as delineate the parties involved. The modified operator will have 60 days to oppose any involuntary modification. The petitioner should state its reasons for opposing the modification with specificity, including engineering challenges and practical problems such as limitations of the proposed antenna support structure.

12. The Second Report does not adopt a specific "impracticability" standard as proposed in the Further Notice, because the Commission cannot predict at this time the full range of practical considerations that may be interposed. Instead, the Commission will resolve these matters on a case-by-case basis. An issue that will receive particular attention in cases proposing involuntary collocation will be the desirability of the affected party's present site compared to the proposed new site. This issue contemplates both serviceability for existing receive sites and nontechnical issues such as accessibility of location, rent or other lease terms compared to the new site, and any prejudicial consequences of a site move that cannot be adequately protected against or compensated for.

13. The initiating party will be responsible for all costs necessary to the modification, including purchasing, testing and installing new equipment (including labor costs), reconfiguration of existing equipment, administrative costs, legal and engineering expenses necessary to prepare and file the modification application (but not for the modified party's adversarial efforts, for which costs can be included in any voluntary settlement prior to Commission disposition), and other reasonable documented costs. The initiating party must also secure a bond or establish an escrow account to cover reasonable ongoing expenses that may fall upon the remaining licensee such as incremental increase in power, maintenance and site rental rates if applicable. The bond or escrow should also account for the possibility that the modifying operator subsequently becomes bankrupt. This is particularly important in the collocation situation, as the ITFS licensee's prior site may be unavailable and the licensee may not be able to locate a suitable new site. If it becomes necessary for the Commission to assess the sufficiency of a bond or escrow amount, it will take into account such factors as projected electricity or maintenance expenses, or relocation expenses, as relevant in each case.

14. The involuntary modified facilities must be operational before the initiating party will be permitted to begin its new or modified operations. Further the modification must not disrupt the ITFS licensee's provision of service, and the licensee whose facilities are being modified must have the right to inspect the work and make reasonable demands for changes. The Commission reiterates that it strongly encourages and expects the cooperation of all parties so that the majority of modifications will be voluntary.

15. Fourth, the Second Report denies a request by Mitchell Communications Corp. (Mitchell) that the Commission amend 47 CFR 21.42, to facilitate collocation. Mitchell has not shown that § 21.42 can be modified without the potential for increasing harmful interference to other parties, and the Commission continues to believe that prior Commission review of collocation of facilities is necessary to sufficiently protect other operators both MDS and ITFS, from harmful interference.

16. Fifth, the Second Report provides guidelines under which involuntary point-to-point migration proposals will be reviewed. Involuntary migration of point-to-point facilities will only be permitted if the substitute spectrum is, at a minimum, licensable by ITFS operators on a primary basis and provides a signal that is equivalent to the prior signal in picture quality and reliability. The alternative spectrum need not be specifically allocated to the ITFS service. (Some commenters argue that the alternative spectrum must be available for excess capacity leasing. While point-to-point spectrum is not generally suitable for excess capacity leasing, the Commission will take leasing into consideration if the operator being moved currently leases excess capacity or can show that it reasonably expects to do so in the near future.) Based on the comments of the parties as well as Commission analysis, the Second Report finds that a uniform

standard cannot be established to determine suitability in all cases, due to widely differing conditions. Moreover, signal quality of individual ITFS stations varies widely from system to system; it would be inappropriate to require, for example, that the initiating party provide a TASO 2 signal when the ITFS system was previously operating at a lower standard. The Commission notes, however, that if the initiating party is able to provide the ITFS licensee with a TASO 2 signal, its migration proposal will be presumed grantable unless the ITFS operator provides evidence to the contrary.

17. If the initiating party locates what it believes to be suitable alternative spectrum, it must submit data with the modification application for the facility to be migrated regarding the strength, reliability and interference level of the prior signal and the projected strength, reliability and interference level of the new signal. On the same day it files the modification applications, the initiating party must serve a copy of the application on the party to be moved. The operator being moved will have a 60-day period in which to oppose the initiating party's application. The petitioner should offer evidence, including engineering data, that it cannot be moved without detriment to its provision of service. If the migration is permitted, the initiating party will be responsible for all costs. Like the involuntary modification situation, this includes construction and equipment expenses, legal and engineering costs, and other appropriate documented expenses. Parties must secure a prepayment bond or establish an escrow account to protect the migrated party in the event that the initiating party ceases operation. The bond or escrow arrangement must account for any incremental increase in the cost of continuing operation on the new system or returning to the former frequencies abandoned by a bankrupt wireless cable operator. Moreover, if the new facilities prove to be unsatisfactory in practice, the party whose facilities were modified will be entitled to revert to its former facilities at the expense of the modifying party. The Commission reiterates that it strongly encourages the cooperation of all parties to reach a voluntary agreement.

18. Sixth, the Second Report adopts as a general model for the cable/MDS cross-ownership prohibition, a rural exception similar to the cable/teleco rural exception in § 63.58 of the Commission's rules. The Commission concludes that cable operators may apply within their franchise areas for MDS channels or lease MDS or ITFS channels in rural areas, which are defined by the Census Bureau as "incorporated areas" or "unincorporated areas" with a population of less than 2,500. The Commission expects that this rural exception will speed the introduction of multichannel service to customers in sparsely populated areas without appreciably reducing realistic and desired opportunities for wireless cable operators to introduce service competitive with existing cable service. Cable operators may not, however, apply for MDS channels in rural areas if an MDS entity is already operating on at least four MDS channels in the area. The Commission has developed this exception to extend service to areas not currently served; if a rural area is already served by an MDS entity on at least four channels, the justification for the exception to the general cross-ownership prohibition has been eliminated or reduced to the point where it does not outweigh the considerations underlying the general prohibition. In order to qualify for the exception, the cable television company's entire cable television service area must be rural. The rural exception will be inapplicable if the protected service area of the MDS station includes even a portion of a place which is non-rural.

19. An exception for other, non-rural, areas is not warranted in light of the record in this proceeding. The Commission does not expect non-rural areas generally to have the same difficulty attracting wireless cable service as rural areas, and thus, again, the considerations underlying the general prohibition are not outweighed.

20. The Second Report determines the issue of forced divestiture of existing MDS/cable and ITFS/cable operations. The Commission concluded that existing cable/wireless cable operations and contracts will be grandfathered. Divestiture not only would be a hardship to both the cable operator and its customers, whose service would be disrupted or eliminated, but appears unnecessary given the apparently limited number of systems operated by cable companies. The Commission will also grandfather cable applications for MDS channels filed before February 8, 1990, the date the initial Notice of Proposed Rule Making and Notice of Inquiry in this proceeding was adopted.

20. Additionally, the Commission will grandfather lease arrangements between cable and MDS or ITFS entities for which a lease or a firm and final agreement was signed prior to February 8, 1990. After that date, the parties had notice that a cross-ownership restriction could be adopted and that divestiture could be required, so the same equitable arguments are not applicable. Each applicant for MDS stations who filed on February 8, 1990, or thereafter an application which is now inconsistent with § 21.912 of the Commission's rules must notify the Commission of such inconsistency on or before January 30, 1992, and must amend its application on or before March 2, 1992, to bring it into compliance with current rule requirements. Absent such amendment, inconsistent applications will be dismissed. If a cable television company lease agreement for MDS or ITFS station time or capacity has been executed on February 8, 1990, or thereafter, a copy of the lease must be filed on or before March 2, 1992, together with a description of divestment procedures. Assignment or transfer of control applications for MDS stations filed after the effective date of this Second Report and Order must include a description of any cable television company interest in the assignor, assignee, transferror or transferee. If MDS channels currently licensed to a cable company are subsequently assigned, the cable/MDS cross-ownership prohibition will apply.

21. In recognition of the public interest benefit which can derive from local programming ventures, the Second Report also establishes a local programming exception to the licensing and leasing prohibitions of § 21.912. There will be a limited exception to those prohibitions for MDS or ITFS channels used in the delivery to multiple cable headends of locally produced programming, that is, programming produced in or near the cable operator's franchise area and not broadcast on a television station available within that franchise area. Under this exception, a cable operator will be permitted one MDS channel, or its equivalent in ITFS excess capacity, in an MMDS protected service area for this purpose. No more than one MDS channel, or its equivalent in ITFS excess capacity, in an MMDS protected service area can be used under this exception.

22. The licensee of facilities used by a cable operator to provide local programming, by lease or otherwise, must include in the notification it files with the Commission, a cover letter explicitly identifying itself or its lessee as a local cable operator and stating that any relevant lease was executed to facilitate the provision of local programming. The first application or the first lease notification in an area filed with the Commission will be entitled to the exemption. The limitations on one MDS channel or its

ITFS equivalent per party and per area include any grandfathered cable/MDS or cable/ITFS operations. In these grandfathered situations, the Commission will consider granting waivers to permit the use of a second MDS channel for the delivery of locally produced programming; the applicant must demonstrate, at a minimum, that it is ready and able to provide additional locally produced programming to area cable systems and that no other practical means of delivering the programming are available to it. In considering requests for waiver, the Commission will also take into account the competitive environment for the production and delivery of locally produced programming in the relevant markets. In applying for an MDS channel, the cable operator must show that it will use the channel to provide the proposed local programming within one year. Similarly, local programming service pursuant to a lease must be provided within one year of the date of the lease or one year of grant of the licensee's application for the leased channel(s), whichever comes later. If an MDS license for these purposes is granted and the programming is subsequently terminated, the channel will be automatically forfeited on the day after the local programming is discontinued.

23. Finally, the Second Report adopts a modified version of the Commission's proposal to permit use of available ITFS channels by wireless cable entities. The Commission believes that the rules specified below will spur further development of the wireless cable industry while at the same time benefitting the educational community and protecting long-term ITFS growth. Utilization of available ITFS frequencies by wireless cable ventures can provide valuable service to the public, creating a potential for multichannel video, either as a new service or a competitor to existing hardwire service, in many areas where it could not otherwise develop. Moreover, the Commission believes that this initiative will encourage ITFS use of currently unemployed spectrum by facilitating the construction of additional MDS systems. Similarly, to the extent an MDS system becomes a viable operation through its use of ITFS frequencies, it may well be interested in leasing excess capacity from existing ITFS licensees operating on other ITFS channels. The Commission notes that, under the new rules specified below, a significant number of ITFS channels will be preserved in each community expressly to accommodate future ITFS use. ITFS systems currently being planned will therefore have an ample opportunity to continue to develop.

24. The ITFS commenters who oppose this proposal have not demonstrated that carefully prescribed use of available ITFS frequencies by wireless cable entities will significantly impair or restrict any reasonably foreseeable ITFS use. It is unclear how schools can lose potential leasing revenues where no stations yet exist; moreover, under the current rules, the areas in question are unlikely to attract wireless cable entities as lessees because there are few or no current ITFS operators or applicants from which to lease excess capacity.

25. The Commission notes some commenters' concern that the ITFS entity's right of access will not be meaningful because wireless cable parties will construct systems not amenable to ITFS use. On the contrary, the Commission expects that the vast majority of, if not all, ITFS uses will be accommodated. Moreover, the Commission is not persuaded that its actions are ill-advised because they are characterized by some commenters as constituting a "reallocation" of ITFS spectrum. The Commission believes that the detailed provisions it describes governing the use of ITFS spectrum by wireless cable entities demonstrate that its decision does not amount to a reallocation in any traditional sense. To the extent that its actions might be deemed to constitute a reallocation, the Commission notes that it has provided taken action only after notice and a full opportunity for comment as required by section 553 of the Administrative Procedure Act, 5 U.S.C. 553, and after a full evaluation of which course best serves the public interest.

26. Several of the provisions advanced in the Further Notice can be implemented as proposed. First, the proposals regarding the number of available ITFS channels that will be subject to wireless cable use will be adopted as follows:

(a) A minimum of eight of the twenty channels allocated to ITFS must be preserved for future ITFS use in any community in which a wireless cable entity applies for ITFS frequencies. For these purposes, wireless cable entities are MDS/MMDS licensees and operators who lease channels from MDS/MMDS licensees. A channel will be considered available for future ITFS use if there are no co-channel operators or applicants within 50 miles of the transmitter site of the proposed wireless cable operation, and if the transmitter site remains available for use at reasonable terms by new ITFS applicants on those channels within three years of commencing operation. Future operators need not be given unconditional access to the site; leasing arrangements are acceptable.

(b) A maximum of eight of the twenty ITFS channels can be licensed to a wireless cable entity in any community.

(c) Mutually exclusive applications by wireless cable entities for ITFS channels will be governed by MDS comparative procedures.

27. Consistent with our previously stated commitment to ITFS service, this rule will not permit the last remaining ITFS channels in any given area to be used by wireless cable entities. Thus, at least two educational institutions or entities in each community, in addition to any that already have facilities, will be able to apply for their own ITFS facilities in the future.

28. In conjunction with the above provisions, the Second Report also allows ITFS entities the right to demand access to wireless cable facilities licensed on ITFS frequencies. Wireless cable entities licensed on ITFS channels can use channel mapping technology to facilitate the provision of adequate access to these channels by ITFS entities and to promote efficient spectrum/channel utilization. ITFS access to ITFS channels licensed to wireless cable entities shall be made as follows:

(a) An educational institution or entity that would be eligible for ITFS facilities that are licensed to a wireless cable entity may demand access to those facilities, subject to conditions further described below. Such request for access will be made by application to the Commission on FCC Form 330 for a determination as to eligibility, with a copy served on the subject wireless cable licensee. An applicant for access must fill out sections I, II, III and IV of the ITFS application Form 330. Section I, question 1 should be answered by spelling out, "For access to existing facilities." Section I, question 2b should include the name of the wireless cable licensee or applicant. Normal ITFS cutoff rules (47 CFR 74.911) will be followed. If there are competing requests for access, the ITFS comparative process (47 CFR 74.913) will be used.

(b) Only one educational institution or entity per wireless cable licensed channel will be entitled to access from the wireless cable entity.

29. The access provisions allow for ITFS operation on all ITFS frequencies if the demand for ITFS service ultimately warrants the use of all channels. At the same time, the outer limits of a wireless cable operator's exposure to liability are measurable, so that it can make a

reasonable judgment as to whether a wireless cable system dependent on ITFS channels would be viable.

30. Next, the Commission provides that only wireless cable entities offering a reasonable expectation of prompt wireless cable service will be able to apply for licenses for ITFS frequencies:

(a) A wireless cable applicant must hold a conditional license, a license or a lease, or must have filed an unopposed application for at least four MDS channels to be used in conjunction with the facilities proposed on the ITFS frequencies.

(b) A wireless cable applicant must show that there are no unused MDS channels available for application, purchase or lease that could be used in lieu of the ITFS frequencies applied for.

(c) A wireless cable entity may apply for ITFS frequencies at the same time it applies for the related MDS frequencies, but if that MDS application is opposed by a timely filed mutually exclusive application or petition to deny, the application for ITFS facilities will be returned. (That entity can, of course, reapply for ITFS facilities, if still available, upon grant of its MDS application(s).

(d) A wireless cable entity licensed on ITFS channels will be subject to the MDS one-year construction requirement.

31. These provisions will avoid the preemption of new ITFS services by wireless cable applications that are unlikely to result in a viable wireless cable service. They also effect a reasonable compromise between the need for new wireless cable operators in a community to apply for entire systems at once and the need to avoid taking ITFS channels out of circulation for extended periods of time, during which no benefit is provided to the public. These safeguards will ensure that wireless cable parties do not file for ITFS channels simply to impede the development of ITFS systems in the area.

32. In order to provide potential wireless cable operators and ITFS users a degree of certainty with respect to both financial exposure and scheduling/use expectations, an ITFS entity's right of access to a wireless cable system licensed on ITFS frequencies is delineated carefully as follows:

(a) An ITFS-eligible entity determined to have right of access to wireless cable licensed facilities will have access to up to 40 hours per channel per week. The ITFS entity has the unqualified right to demand and designate 20 of those hours as follows:

(1) 3 hours of the ITFS entity's choice each day, Monday through Friday, between 8 a.m. and 10 p.m., excluding holidays and school vacations; and

(2) The remaining five hours any time of the ITFS entity's choice between 8 a.m. and 10 p.m., Monday through Saturday.

(b) When no other vacant channels are available to an ITFS access user, it will have a right of access to the second 20 hours. No time-of-day or day-of-week obligations will be imposed on either party with respect to the second 20 hours of access time.

(c) The ITFS user must provide the wireless cable licensee with its planned schedule of use four months in advance.

(d) No minimum amount of programming will be required of an ITFS operator seeking access to one channel; for access to a second channel, the ITFS entity must use at least 20 hours per week on the first channel from 8 a.m. to 10 p.m., Monday through Saturday; for access to a third channel, the ITFS entity must use at least 20 hours per week on the first channel and on the second channel during the hours prescribed above, and so on. Access will not be granted to a single entity for more than four channels, unless it can satisfy the waiver provisions related to the four-channel limitation in the ITFS rules (47 CFR 74.902(d)).

(e) When an ITFS entity is granted access to an ITFS channel of a wireless cable licensee, the wireless cable licensee will be required to pay half of the cost of five standard receive sites on that channel.

(f) During the first three years that the wireless cable operator is licensed, the wireless cable entity may, as an alternative to providing access to its own facilities, pay the costs of an application and facility construction for such ITFS entity on other available ITFS channels (including half of the cost of five receive sites per channel). In the event such an ITFS application is contested, the ITFS entity may elect access to the existing MDS facilities. The Commission reiterates that only one educational institution or entity per wireless cable licensed channel will be entitled to access from the wireless cable entity.

(g) After a wireless cable entity licensed to use ITFS channels has been in operation for three years, it will not be required to grant new or additional access to such ITFS channels, or provide any alternative facilities to any ITFS entity seeking access to its facilities, if there are suitable ITFS frequencies available for the ITFS entity to build its own system. If an ITFS operator entering an access agreement with a wireless cable entity plans to seek additional hours of access after the wireless cable entity has been in operation for three years, it should so indicate in the access agreement. Again, only one educational institution or entity per wireless cable licensed channel will be entitled to access from the wireless cable entity. If there are no other available ITFS frequencies in the area, even after the wireless cable entity has been operating for three years, an ITFS entity will be entitled to access to the wireless cable entity's ITFS facilities, under terms described above.

(h) The parties may mutually agree to modify any requirements or obligations imposed by these provisions (including the time of day and minimum hours per day requirements specified in (a) above), except for the requirement that an ITFS entity use at least 20 hours per week on a channel of a wireless cable licensee before requesting access to an additional channel.

33. These provisions establish a specific framework within which ITFS access to wireless cable facilities licensed on ITFS channels can be implemented. They provide ample opportunity and flexibility for ITFS use of the ITFS frequencies, when no other practical means of implementing ITFS service are available. They also prevent one or two ITFS entities from exhausting all of the access rights on a limited amount of educational programming by requiring a 20-hour minimum before the ITFS entity may request additional channels. At the same time, they provide potential wireless cable operators and ITFS users a degree of certainty with respect to both financial exposure and scheduling/use expectations. They also provide some flexibility to MDS operators who wish to persuade ITFS access users to modify their use to better suit the wireless cable licensee's needs. The Commission emphasizes that parties are expected to act in good faith and to maximize the use of the channels in question to benefit all operators involved. An ITFS access user can demand access to more than 20 hours on a channel only where there is absolutely no capacity for it to expend its ITFS service by use of other ITFS channels. In addition, the wireless cable operator has the flexibility to avoid disturbance of its own operation altogether by building separate facilities for the ITFS entity, which the wireless cable entity may be able to lease back, further enhancing its own system. While these provisions offer assistance to ITFS operators in building ITFS facilities, either on the MDS entity's ITFS channels or other available ITFS channels, some serious commitment from the ITFS entity is also required to ensure that the ITFS entity

legitimately intends to provide ITFS service on the facilities. Moreover, the three-year requirement provides the MDS entity with some degree of certainlty as to the extent to which they could be responsible for providing access or facilities when channels are otherwise available for direct application by ITFS entities.

34. When a wireless cable operator seeks to be licensed on ITFS frequencies, the Commission's procedural rules will emphasize public notice to local educational institutions and entities, and will provide for the absolute primacy of ITFS applications vis-a-vis wireless cable applications where the two may be mutually exclusive. The Commission will not, however, permit ITFS applicants to preempt wireless cable applicants when other ITFS frequencies are available for their use:

(a) A wireless cable applicant for ITFS channels will file sections I and V of FCC Form 330, with a complete FCC Form 494 appended. A cover letter will clearly indicate that the application is for a wireless cable entity to operate on ITFS channels.

(b) An application for available ITFS frequencies filed by a wireless cable applicant will be subject to a same-day cut-off period with respect to other wireless cable applicants and a 60-day cut-off period with respect to ITFS applicants. All cut-off lists for ITFS frequencies, regardless of the nature of the applicant, will be published as ITFS public notices.

(c) Wireless cable applicants for ITFS frequencies will publish local public notice as prescribed in new § 74.991 of the Commission's rules.

(d) If an ITFS application and a wireless cable application for ITFS facilities are mutually exclusive, the ITFS application will be granted if the applicant is qualified.

(e) An ITFS applicant may not file an application mutually exclusive with a wireless cable application if there are order ITFS channels available for the proposed ITFS facility. If another party has applied for the channels in question, those channels will be considered unavailable.

35. If permitting wireless cable entities to use ITFS channels is to be of any practical use, potential wireless cable ventures must have some degree of certainty that applications, once filed, can be granted and services, once initiated, can continue. These provisions provide that level of protection without unduly restricting ITFS applicants. Wireless cable applications will only be filed where there are ample available channels to begin with; such applications would be unreasonably discouraged if they could be readily negated by competing ITFS applications. Moreover, in those areas with multiple available ITFS channels, the wireless cable entity often could simply refile for other available ITFS channels, an unnecessarily wasteful procedure. In those cases where an ITFS entity has no other channels for which to apply, however, the ITFS needs for the ITFS-allocated frequencies will prevail over the wireless cable needs. In addition, the local public notice provision, a minimally burdensome requirement, is consistent with the Commission's determination to provide local educational entities and institutions an opportunity to secure their rights. The disparate cut-off periods are appropriate to the respective classes of applicants, according to the procedural rules for each service. Once a wireless cable applicant achieves cut-off status, it will be treated as a primary service provider.

36. Finally, The Commission will provide wireless cable licensees operating on ITFS frequencies with an MDS protected service area while affording receive site protection to ITFS access users of such facilities:

(a) The interference protection provided wireless cable applicants and licensees of ITFS facilities will be that described in § 21.902(d) of the Commission's rules.

(b) ITFS users of wireless cable channels licensed on ITFS frequencies will be protected from interference at individual receive sites.

37. The receive site based protection afforded ITFS licensees would not be appropriate for wireless cable entities licensed on ITFS channels. A wireless cable system uses omnidirectional facilities to reach as many subscribers as possible rather than point-to-point facilities to reach specific receive sites. Moreover, such facilities will be collocated with and used in conjunction with MDS-licensed facilities and other ITFS facilities that will have identical technical characteristics and serve the same customers. Interference protection equivalent to that afforded MDS facilities is therefore essential. Different protection standards for wireless cable entities and ITFS entities on ITFS frequencies should not be overly troublesome, as similar interservice coordination is already required for co-channel and adjacent-channel operations involving the D, E, F and G channels. Of course, an MDS entity afforded circular protection pursuant to this provision must protect pre-existing MDS and ITFS operators from interference. Educational entities that acquire access to ITFS frequencies licensed to wireless cable entities will be afforded the same protection as other ITFS entities. This will protect an ITFS entity that has distant receive sites without detriment to the wireless cable entity from which it receives access.

38. These provisions collectively should ensure that there is little negative impact on the future provision of ITFS service resulting from the beneficial utilization of ITFS frequencies by wireless cable operators as a result of this rulemaking. To the contrary, the Commission expects that in many instances, ITFS service will be initiated where it would not have otherwise developed. At the same time, these provisions give wireless cable operators a reasonable opportunity to use available ITFS channels while retaining the Commission's oft-repeated commitment to the development of ITFS.

Final Regulatory Flexibility Analysis Statement

39. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 605, it is certified that this decision will have a significant impact on a substantial number of small entities because it organizes disparate technical, procedural, and ownership rules affecting wireless radio operations into a cohesive, simplified set of regulations. In relocating the H channels to MDS, the Commission initiates a freeze on acceptance of new OFS applications. H channel licensees, while retaining their licenses, will operate as MDS licensees. This rulemaking proceeding has endeavored to minimize the possible negative consequences of the modified or new wireless cable regulations on ITFS entities. In some situations, the Commission has rejected proposals that would substantially benefit wireless cable because of their potentially negative impact on ITFS. The Commission believes that the rule and policy changes adopted in the Second Report will not only protect the interests of ITFS licensees, but will further enhance ITFS service. At the same time, the Commission is committed to furthering competition in the multichannel video distribution marketplace by increasing system capacity where spectrum is available and its use can be coordinated with ITFS use. The rule and policy changes adopted in this proceeding should optimize these pursuits while protecting and enhancing current and future ITFS service.

40. The Secretary shall send a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the

Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96–354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.*, (1981)).

41. It is therefore ordered, That pursuant to the authority contained in section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), parts 21, 74 and 94 of the Commission's rules, 47 CFR parts 21, 74, and 94 are amended as set forth below.

42. It is further ordered, That the amendments to 47 CFR parts 1, 2, 21, 74 and 94 adopted in this Second Report and Order will be effective pending approval by the Office of Management and Budget.

43. It is further ordered, That Gen. Docket No. 90–54 is terminated.

List of Subjects

47 CFR Part 1

Administrative practice and procedure.

47 CFR Part 2

Radio, Television.

47 CFR Part 21

Communications common carriers, Domestic public fixed radio services.

47 CFR Part 74

Television broadcasting, experimental, auxiliary, and special broadcast and other program distributional services.

47 CFR Part 94

Radio, private operational-fixed microwave service.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

Amendatory Text

Parts 1, 2, 21, 74 and 94 of title 47 of the Code of Federal Regulations are amended to read as follows:

PART 1—[AMENDED]

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

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

45. Section 1.824 is amended by revising the heading and paragraphs (a) and (b) to read as follows:

§ 1.824 Random selection procedures for Multichannel Multipoint Distribution Service and Multipoint Distribution Service H-Channel stations.

(a) If there are mutually exclusive applications for an initial conditional license or license, the Commission may use the random selection process to select the conditional licensee or licensee. Each such random selection shall be conducted under the direction of the Office of the Managing Director in conjunction with the Office of the Secretary. Following the random selection, the Commission shall announce the tentative selectee and determine whether the applicant is qualified to receive the conditional license or license. If the Commission determines that the tentative selectee is qualified, it shall grant the application. In the event that the tentative selectee's application is denied, a second random selection will be conducted. Petitions for Reconsideration, Motions to Stay or Applications for Review may be submitted at the time the Commission grants or denies the application of the tentative selectee. The filing periods specified in the rules shall apply for such pleadings.

(b) Competing applications for conditional licenses and licenses shall be designated for random selection in accordance with §§ 1.1621, 1.1622 (a), (b), (c), (d), and (e), and 1.1623. No preferences pursuant to § 1.1622 (b)(2) or (b)(3) shall be granted to any MMDS or MDS H-channel applicant whose owners, when aggregated, have an ownership interest of more than 50 percent in the media of mass communication whose service areas, as set forth at § 1.1622 (e)(1) through (e)(7), wholly encompass or are encompassed by the protected service area contour, computed in accordance with § 21.902(d) of this chapter, for which the license or conditional license is sought.

* * * * *

PART 2—[AMENDED]

46. The authority citation for part 2 continues to read as follows:

Authority: Secs. 4, 302, 303, 307, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 302, 303, 307, unless otherwise noted.

47. Section 2.106 is amended by revising footnote NG47 to read as follows:

§ 2.106 Table of frequency allocations.

* * * * *

NG47 In the band 2500–2690 MHz, channels 2500–2686 MHz, and the corresponding response frequencies 2686.0625–2689.8125 MHz, may be assigned to stations in the Instructional Television Fixed Service (part 74 of this chapter); channels in 2596–2680 MHz, and response frequencies 2686.5625–2687.6875 MHz may be assigned to Multipoint Distribution Service stations (part 21 of this chapter); and frequencies in the 2686.875–2687, 2687.875–2688, 2688.5–2688.75 and 2688.875–2689.75 MHz bands may be assigned to stations in the Operational Fixed Service (part 94 of this chapter). In Alaska, however, frequencies within the band 2655–2690 MHz are not available for assignment to terrestrial stations.

* * * * *

PART 21—[AMENDED]

48. The authority citation for part 21 continues to read as follows:

Authority: Secs. 1, 2, 4, 201–205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 410, 602; 48 Stat. 1064, 1066, 1070–1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102, as amended; 47 U.S.C. 151, 154, 201–205, 208, 215, 218, 303, 313, 314, 403, 602; 47 U.S.C. 552.

49. Section 21.11 is amended by revising paragraphs (a), (d) and (f) to read as follows:

§ 21.11 Miscellaneous forms shared by all domestic public radio services.

(a) *Licensee qualifications.* FCC Form 430 ("Licensee Qualification Report") must be filed annually, no later than March 31 for the end of the preceding calendar year, by licensees for each radio service authorized under this part, if service was offered at any time during the preceding year. Each annual filing must include all changes of information required by FCC Form 430 that occurred during the preceding year. In those cases in which there has been no change in any of the required information, the applicant or licensee, in lieu of submitting a new form, may so notify the Commission by letter. All Multipoint Distribution Service non-common carrier licensees must annually file FCC Form 430.

* * * * *

(d) *Assignment of license.* FCC Form 702 ("Application for Consent to Assignment of Radio Station Construction Authorization or License for Stations in Services Other than Broadcast") must be submitted to assign voluntarily (as by, for example, contract or other agreement) or involuntarily (as by, for example, death, bankruptcy, or legal disability) the station authorization. In the case of involuntary assignment (or transfer of control) the application must be filed within 10 days of the event causing the assignment (or transfer of control). FCC Form 702 must also be used for non-substantial (*pro forma*) assignments. In addition, FCC Form 430 ("Licensee Qualification Report") must be submitted by the proposed assignee unless such assignee has a current and substantially accurate report on file with the Commission. Whenever a group of station licenses in the same radio services are to be assigned to a single assignee, a single "blanket" application may be filed to

cover the entire group, if the application identifies each station by call sign and station location and if two copies are provided for each station affected. The assignment must be completed within 45 days from the date of authorization. Upon consummation of an approved assignment, the Commission must be notified by letter of the date of consummation within 10 days of its occurrence.

* * * * *

(f) *Transfer of control of corporation holding a conditional license or license.* FCC Form 704 ("Application for Consent to Transfer of Control") must be submitted in order to voluntarily or involuntarily transfer control (*de jure* or *de facto*) of a corporation holding any conditional licenses or licenses. FCC Form 704 must also be used for non-substantial (*pro forma*) transfers of control. In addition, FCC Form 430 ("Licensee Qualification Report") must be submitted by the proposed transferee unless said transferee has a current and substantially accurate report on file with the Commission. The transfer must be completed within 45 days from the date of authorization. Upon consummation of an approved transfer, the Commission must be notified by letter of the date of consummation within 10 days of its occurrence.

§ 21.23 [Amended]

50. Section 21.23 is amended by adding "or Multipoint Distribution Service H-channel" after "MMDS" in paragraphs (a) and (b).

§ 21.30 [Amended]

51. Section 21.30 is amended by adding "or for Multipoint Distribution Service H-channel stations" after "Multichannel Multipoint Distribution Service" in paragraph (a)(4).

52. Section 21.33 is amended by revising paragraph (a) to read as follows:

§ 21.33 Grants by random selection.

(a) If an application for a license in the Multichannel Multipoint Distribution Service (MMDS), or for Multipoint Distribution Service H-Channel stations, or in the Digital Electronic Message Service (DEMS) is mutually exclusive with another such application and satisfies the requirements of § 21.31(b) of this part, and if an MMDS or MDS H-channel application satisfies § 21.914 of this part, the applicants may be included in the random selection process set forth in part 1, §§ 1.821 through 1.825 of this chapter. Renewal applications shall not be included in a random selection process.

* * * * *

53. Section 21.101 is amended by revising footnote 6 to the table in paragraph (a) to read as follows:

§ 21.101 Frequency tolerance.

(a) * * *

[6] Beginning November 1, 1991, equipment authorized to be operated in the frequency bands 2150–2162 MHz, 2596–2644 MHz, 2650–2656 MHz, 2662–2668 MHz, and 2674–2680 MHz for use in the Multipoint Distribution Service shall maintain a frequency tolerance within ±1 KHz of the assigned frequency.

* * * * *

54. Section 21.107 is amended by revising footnote 1 to the table in paragraph (b) to read as follows:

§ 21.107 Transmitter power.

* * * * *

(b) * * *

[1] In the 2150–2162 MHz, 2596–2644 MHz, 2650–2656 MHz, 2662–2668 MHz, and 2674–2680 MHz frequency bands, when used for the Multipoint Distribution Service, EIRP up to 2000 watts may be authorized pursuant to Section 21.904 of this Part.

* * * * *

55. Section 21.307 is amended by revising paragraphs (a), (b), (b)(4), (c)(1), (c)((1)(i), (c)(1)(i)(B), (c)(2)(i)(A), (c)(2)(i)(G), (c)(2)(ii)(A), (c)(2)(iii)(A), (d)(1)(ii), (e)(1), (e)(1)(i), (e)(1)(ii), (e)(1)(iii), (e)(1)(iv), (e)(2), (f)(1), and (f)(2)(i) to read as follows:

§ 21.307 Equal employment opportunities.

(a) *General policy.* Equal opportunities in employment must be afforded by all common carrier and Multipoint Distribution Service non-common carrier licensees or conditional licensees to all qualified persons, and no personnel shall be discriminated against in employment because of sex, race, color, religion, or national origin.

(b) *Equal employment opportunity program.* Each licensee or conditional licensee must establish, maintain, and carry out, a positive continuing program of specific practices designed to assure equal opportunity in every aspect of employment policy and practice. Under the terms of its program, a licensee or conditional licensee must:

* * * * *

(4) Conduct a continuing campaign to exclude every form of prejudice or discrimination based upon sex, race, color, religion, or national origin, from the licensee's or conditional licensee's personnel policies and practices and working conditions.

* * * * *

(c) *Additional information to be furnished to the Commission.* (1) Equal Employment Programs to be filed by common carrier and Multipoint Distribution Service non-common carrier licensees and conditional licensees:

(i) All licensees or conditional licensees must file a statement of their equal employment opportunity program not later than December 17, 1970, indicating specific practices to be followed in order to assure equal employment opportunity on the basis of sex, race, color, religion, or national origin in such aspects of employment practices as regards recruitment, selection, training, placement, promotion, pay, working conditions, demotion, layoff and termination.

* * * * *

(B) If a licensee or conditional licensee has fewer than 16 full-time employees, no such statement need be filed.

(2) * * *

(i) *To assure nondiscrimination in recruiting.* (A) Posting notices in the licensee's or conditional licensee's offices informing applicants for employment of their equal employment rights and their right to notify the Equal Employment Opportunity Commission, the Federal Communications Commission, or other appropriate agency. Where a substantial number of applicants are Spanish-surnamed Americans such notice should be posted in Spanish and English.

* * * * *

(G) Making known to the appropriate recruitment sources in the employer's immediate area that qualified minority members are being sought for consideration whenever the licensee or conditional licensee hires.

(ii) *To assure nondiscrimination in selection and hiring.* (A) Instructing personally those on the staff of the licensee or conditional licensee who make hiring decisions that all applicants for all jobs are to be considered without discrimination.

* * * * *

(iii) *To assure nondiscriminatory placement and promotions.* (A) Instructing personally those of the licensee's or conditional licensee's staff who make decisions on placement and promotion that minority employees and females are to be considered without discrimination, and that job areas in which there is little or no minority or female representation should be reviewed to determine whether this results from discrimination.

* * * * *

(d) *Report of complaints filed against licensees and conditional licensees.* (1) All licensees or conditional licensees must submit an annual report to the FCC no later than May 31 of each year indicating whether any complaints regarding violations by the licensee or

conditional licensee or equal employment provisions of Federal, State, Territorial, or local law have been filed before anybody having competent jurisdiction.

* * * * *

(ii) Any licensee or conditional licensee who has filed such information with the EEOC need not do so with the Commission, if such previous filing is indicated.

(e) *Complaints of violations of equal employment programs.* (1) Complaints alleging employment discrimination against a common carrier or Multipoint Distribution Service non-common carrier licensee or conditional licensee will be considered by the Commission in the following manner:

(i) If a complaint raising an issue of discrimination is received against a licensee or conditional licensee who is within the jurisdiction of the EEOC, it will be submitted to that agency. The Commission will maintain a liaison with that agency which will keep the Commission informed of the disposition of complaints filed against any of the common carrier or Multipoint Distribution Service non-common carrier licensees or conditional licensees.

(ii) Complaints alleging employment discrimination against a common carrier or Multipoint Distribution Service non-common carrier licensee or conditional licensee who does not fall under the jurisdiction of the EEOC but is covered by appropriate enforceable State law, to which penalties apply, may be submitted by the Commission to the respective state agency.

(iii) Complaints alleging employment discrimination against a common carrier or Multipoint Distribution Service non-common carrier licensee or conditional licensee who does not fall under the jurisdiction of the EEOC or an appropriate state law, will be accorded appropriate treatment by the FCC.

(iv) The Commission will consult with the EEOC on all matters relating to the evaluation and determination of compliance with the common carrier and Multipoint Distribution Service non-common carrier licensees or conditional licensees with the principles of equal employment as set forth herein.

(2) Complaints indicating a general pattern of disregard of equal employment practices which are received against a licensee or conditional licensee who is required to file an employment report to the Commission under § 1.815(a) of this chapter, will be investigated by the Commission.

(f) *Records available to the public*—(1) *Commission records.* A copy of every annual employment report, equal employment opportunity programs, and reports on complaints regarding violations of equal employment provisions of federal, state, territorial, or local law, and copies of all exhibits, letters, and other documents filed as part thereof, all amendments thereto, all correspondence between the conditional licensee or licensee and the Commission pertaining to the reports after they have been filed and all documents incorporated therein by reference, are open for public inspection at the offices of the Commission.

(2) *Records to be maintained locally for public inspection by licensees or conditional licensees*—(i) *Records to be maintained.* Each common carrier or Multipoint Distribution Service non-common carrier licensee or conditional licensee required to file annual employment reports, equal employment opportunity programs, and annual reports on complaints regarding violations of equal employment provisions of federal, state, territorial, or local law must maintain, for public inspection, in the same manner and in the same locations as required for the keeping and posting of tariffs as set forth in § 61.72 of this chapter, a file containing a copy of each such report and copies of all exhibits, letters, and other documents filed as part thereto, all correspondence between the conditional licensee or licensee and the Commission pertaining to the reports after they have been filed and all documents incorporated therein by reference.

* * * * *

§ 21.900 [Amended]

56. Section 21.900 is amended by adding "or for a Multipoint Distribution Service H-channel station" after "Service" in the last sentence in the last paragraph and by substituting "must" for "shall".

57. Section 21.901 is amended by revising the first and last sentences of paragraph (a), by revising paragraphs (b)(4) and (b)(5), by adding paragraph (b)(6), and by adding paragraph (f) to read as follows:

§ 21.901 Frequencies.

(a) Frequencies in the bands 2150–2162 MHz, 2596–2644 MHz, 2650–2656 MHz, 2662–2668 MHz, and 2674–2680 MHz are available for assignment to fixed stations in this service. * * * The response channels E1, E2, F1, and F2 listed in § 74.939(d) of this chapter are grandfathered for fixed stations in this band and are shared with Instructional Television Fixed Service Stations licensed under part 74 of the commission's rules; the existing response channels E3, E4, F3, and F4 listed in § 74.939(d) of this chapter are grandfathered and licensed under this part 21.

(b) * * *

(4) At 2596–2602 MHz, 2608–2614 MHz, 2620–2626 MHz, and 2632–2638 MHz (designated as channels E1, E2, E3, and E4, respectively, with the four channels to be designated the E-group channels), and response channels E1 and E2 (1) listed in § 74.939(d) of this chapter,[1] or

(5) At 2602–2608 MHz, 2614–2620 MHz, 2626–2632 MHz, and 2638–2644 MHz (designated as channels F1, F2, F3, and F4, respectively, with the four channels to be designated the F-group channels), and response channels F1 and F2 listed in § 74.939(d) of this chapter,[1] or

(6) At 2650–2656 MHz, 2662–2668 MHz, and 2674–2680 MHz (designated as channels H1, H2 and H3, respectively, with the three channels to be designated the H-group channels).[1]

* * * * *

(f) *MDS H-channel applications.* Frequencies in the bands 2650–2656 MHz, 2662–2668 MHz, or 2674–2680 MHz must be assigned only in accordance with the following conditions:

(1) All applications for H-channel MDS stations at 2650–2656 MHz, 2662–2668 MHz, or 2674–2680 MHz frequency bands must be filed in each area by only a single applicant, either directly or indirectly. The stockholders holding more than one percent of an entity's stock, the partners, the owners, the trustees, the beneficiaries, the officers, the directors, or any other person or entity holding a similar cognizable interest in the applicant for, or conditional licensee, or licensee of, a station for the 2650–2656 MHz, 2662–2668 MHz, or 2674–2680 MHz frequency bands in any area, must not have, either directly or indirectly, a similar cognizable interest in the applicant for, or conditional licensee, or licensee of, a station for the same 2650–2656 MHz, 2662–2668 MHz, or 2674–2680 MHz frequency band in the same area.

(2) All applicants for H-channel MDS stations at frequencies in the bands 2650–2656 MHz, 2662–2668 MHz, or 2674–2680 MHz must specify either the H1, H2, or H3 channel for which an application is filed; however, the Commission may on its own initiative assign different channels in these frequency bands if it is determined that such action would serve the public interest.

Notes:

[1] No response channels are provided for channels E3, E4, F3, F4, H1, H2, and H3.

* * * * *

§ 21.902 [Amended]

58. Section 21.902(f)(2) is amended by replacing "2596–2644 frequency band" with "2596–2644 MHz, 2650–2656 MHz, 2662–2668 MHz, and 2674–2680 MHz frequency bands".

59. Section 21.902(i)(1) is revised to read as follows:

§ 21.902 Frequency interference.

* * * * *

(i) * * *

(1) For each application for stations in the 2596–2644 MHz, 2650–2656 MHz, 2662–2668 MHz, and 2674–2680 MHz frequency bands filed on or after December 30, 1991, the applicant must submit an analysis demonstrating that operation of the applicant's transmitter will not cause harmful interference to any existing, cochannel and adjacent-channel E-channel, F-channel, or G-channel Instructional Television Fixed Service (ITFS) station, licensed or with a construction permit authorized, with a transmitter site within 50 miles of the coordinates of the Multichannel Multipoint Distribution Service (MMDS) or MDS H-channel station's proposed transmitter site.

* * * * *

§ 21.902 [Amended]

60. Section 21.902(i)(2) (i) and (ii) are amended by adding after "MMDS", "or MDS H-channel".

61. Section 21.902(i)(6)(i) amended by adding before "ITFS", "cochannel or adjacent channel", and by adding after "MMDS", "or MDS H-channel".

62. Section 21.902(i)(6)(iii) (A) through (F) are amended by adding after "MMDS", "or MDS H-channel".

63. Section 21.902(i)(6)(iv) is amended by adding after "MMDS", "or MDS H-channel".

§ 21.905 [Amended]

64. Section 21.905(c) is amended by replacing the first reference to "2569–2644" with "2596–2644 MHz, 2650–2656 MHz, 2662–2668 MHz, or 2674–2680 MHz" and by replacing the second reference to "2569–2566" with "2596–2544 MHz, 2650–2656 MHz, 2662–2668 MHz, and 2674–2680 MHz".

§ 21.908 [Amended]

65. Section 21.908(b) is amended by replacing "2150–2162 MHz and 2596–2644 MHz" with "2150–2162 MHz, 2596–2644 MHz, 2650–2656 MHz, 2662–2668 MHz, and 2674–2680 MHz".

66. Paragraph (c) is added to § 21.909 to read as follows:

§ 21.909 MDS response stations.

* * * * *

(c) The response channels associated with channels E3, E4, F3, F4, H1, H2, and H3 are allocated to the private operational-fixed service (part 94 of this chapter).

67. Section 21.912 is amended by replacing "2596–2644" with "2596–2680" in paragraphs (a) and (c), and by removing in paragraph (c) the word "proposed", and by adding paragraphs (d), (e), (f), and (g) to read as follows:

§ 21.912 Cable television company eligibility requirements.

* * * * *

(d)(1) A cable television company shall be exempt from the provisions of paragraphs (a) through (c) of this section if the protected service area, as defined at § 21.902(d) of this part, contains none of the following:

Any incorporated place of 2,500 inhabitants or more, or any part thereof;

Any unincorporated place of 2,500 inhabitants or more, or any part thereof; or

Any other territory, incorporated or unincorporated, included in an urbanized area.

(2) All population statistics and definitions used in qualifying for this exemption shall be the most recent available from the U.S. Department of Commerce, Bureau of the Census. In no event shall any statistics resulting from censuses prior to 1980 be used. The Census Bureau has defined some incorporated places of 2,500 inhabitants or more as "extended cities." Such cities consist of an urban part and a rural part.

(3) If the proposed protected service area includes a rural part of an extended city, but includes no other territory described in this paragraph, an exemption shall apply. If there is an MDS applicant, conditional licensee, or licensee in the area for at least four MDS channels, this rural exemption to § 21.912 does not apply.

(e) The provisions of paragraphs (a) through (c) of this section will not apply to one MDS or MMDS channel used to provide locally-produced programming to cable headends. Locally-produced programming is programming produced in or near the cable operator's franchise area and not broadcast on a television station available within that franchise area. A cable operator will be permitted one MDS channel in an MMDS protected service area for this purpose, and no more than one MDS channel in an MMDS protected service area may be used by a cable television company or its affiliate or lessor pursuant to this paragraph. The licensee for a cable operator providing local programming pursuant to a lease must include in a notice filed with the Common Carrier Bureau a cover letter explicitly identifying itself or its lessee as a local cable operator and stating that the lease was executed to facilitate the provision of local programming. The first application or the first lease notification in an area filed with the Commission will be entitled to the exemption. The limitations on one MDS channel per party and per area include any cable/MDS operations grandfathered pursuant to paragraph (f) of this section or cable/ITFS operations grandfathered pursuant to § 74.931(e) of this chapter.[1] The cable operator must demonstrate in its MDS/MMDS application that the proposed local programming will be provided within one year from the date its application is granted. Local programming service pursuant to a lease must be provided within one year of the date of the lease or one year of grant of the licensee's application for the leased channel, whichever is later. If an MDS license for these purposes is granted and the programming is subsequently discontinued, the license will be automatically forfeited the day after local programming service is discontinued.

(f) Applications filed by cable television companies, or affiliates, for MDS channels prior to February 8, 1990, will not be subject to the prohibitions of this section. Applications filed on February 8, 1990, or thereafter will be returned. Lease arrangements between cable and MDS entities for which a lease or a firm agreement was signed prior to February 8, 1990, will also not be subject to the prohibitions of this section. Leases between cable television companies, or affiliates, and MDS/MMDS station licensees, conditional licensees, or applicants executed on February 8, 1990, or thereafter, are invalid.

(g) Interested persons may file a petition to deny an application filed pursuant to paragraph (d) or (e) of this section within 30 days after the Commission gives public notice that the application or petition has been filed. Petitions must be served upon the applicant, and must contain a complete and detailed showing, supported by affidavit, of any facts or considerations relied upon. The applicant may file an opposition to the petition to deny within 30 days after the filing of the petition, and must serve copies upon all persons who have filed petitions to deny. The Commission, after consideration of the pleadings, will determine whether the public interest, convenience and necessity would be served by the grant or denial of the application, in whole or in part. The Commission may specify other procedures, such as oral argument, evidentiary hearing or further written submission directed to particular aspects, as it deems appropriate.

Notes: [1] In these grandfathered situations, we will consider granting waivers to permit the use of a second MDS channel for the delivery of locally produced programming. Because allocating a second channel to this use would further reduce the channel capacity available for wireless cable service, we will require an applicant for the second channel to demonstrate, at a minimum, that it is ready and able to provide additional locally produced programming to area cable systems, and that no other practical means of delivering the programming are available to it. In considering requests for waiver, we will also take into account the competitive environment for the production and delivery of locally produced programming in the relevant markets.

§ 21.914 [Amended]

68. Section 21.914 is amended by replacing "2150–2162 MHz or 2596–2644 MHz" with "2150–2162 MHz, 2596–2644 MHz, 2650–2656 MHz, 2662–2668 MHz, or 2674–2680 MHz".

PART 74—[AMENDED]

69. The authority citation for part 74 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, as amended, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply secs. 301, 303, 307, 48 Stat. 1081, 1082, as amended, 1083, as amended; 47 U.S.C. 301, 303, 307.

70. Section 74.902 is amended by revising paragraph (h) and adding paragraphs (i) and (j), to read as follows:

§ 74.902 Frequency assignments.

* * * * *

(h) On the E and F-channel frequencies, a point-to-point ITFS station may be involuntarily displaced by an MDS applicant, conditional licensee or licensee, provided that suitable alternative spectrum is available and that the MDS entity bears the expenses of the migration. Suitability of spectrum will be determined on a case-by-base basis; at a minimum, the alternative spectrum must be licensable by ITFS operators on a primary basis (although it need not be specifically allocated to the ITFS service), and must provide a signal that is equivalent to the prior signal in picture quality and reliability, unless the ITFS licensee will accept an inferior signal. Potential expansion of the ITFS licensee may be considered in determining whether alternative available spectrum is suitable.

(i) If suitable alternative spectrum is located pursuant to paragraph (h) of this section, the initiating party must prepare and file the appropriate application for the new spectrum, and must simultaneously serve a copy of the application on the ITFS licensee to be moved. The initiating party will be responsible for all costs connected with the migration, including purchasing, testing and installing new equipment, labor costs, reconfiguration of existing equipment, administrative costs, legal and engineering expenses necessary to prepare and file the migration application, and other reasonable documented costs. The initiating party must secure a bond or establish an escrow account to cover reasonable incremental increase in ongoing expenses that may fall upon the migrated licensee. The bond or escrow account should also account for the possibility that the initiating party subsequently becomes bankrupt. If it becomes necessary for the Commission to assess the sufficiency of a bond or escrow amount, it will take into account such factors as projected incremental increase in electricity or maintenance expenses, or relocation expenses, as relevant in each case.

(j) The ITFS party to be moved will have a 60-day period in which to oppose the involuntary migration. The ITFS party should state its opposition to the migration with specificity, including engineering and other challenges, and a comparison of the present site and the proposed new site. If involuntary migration is granted, the new facilities must be operational before the initiating party will be permitted to begin its new or modified operations. The migration must not disrupt the ITFS licensee's provision of service, and the ITFS licensee has the right to inspect the construction or installation work.

71. Section 74.931 is amended by revising paragraph (a) and adding paragraphs (h), (i) and (j) to read as follows:

§ 74.931 Purpose and permissible service.

(a) Instructional television fixed stations are intended primarily to provide a formal educational and cultural development in aural and visual form, to students enrolled in accredited public and private schools, colleges and universities. Authorized instructional television fixed station channels must be used to transmit formal educational programming offered for credit to enrolled students of accredited schools, with limited exceptions as set forth in §§ 74.990 through 74.992 of this part.

* * * * *

(h) Except as specified in paragraph (i) of this section, no licensee of a station in this service may lease transmission time or capacity to any cable television company either directly or indirectly through an affiliate owned, operated, controlled by, or under common control with the cable television company, if the ITFS main transmitter station is within 20 miles of the cable television company's franchise area or service area.

(i) The provisions of paragraph (h) of this section will not apply to ITFS excess capacity leased directly or indirectly to cable operators or affiliates to provide locally-produced programming to cable headends. Locally-produced programming is programming produced in or near the cable operator's franchise area and not broadcast on a television station available within that franchise area. A cable operator or affiliate will be permitted to lease ITFS excess capacity equivalent to one MDS channel within 20 miles of the cable television franchise area or service area for this purpose, and within 20 miles of the cable television franchise area or service area, no more ITFS excess capacity than the equivalent of one MDS channel may be used by a cable television company or affiliate pursuant to this paragraph. The licensee for a cable operator providing local programming pursuant to a lease must include in a notice filed with the Mass Media Bureau a cover letter explicitly identifying its lessee as a local cable operator or affiliate and stating that the lease was executed to facilitate the provision of local programming. The first lease notification for an MDS or ITFS channel in an area filed with the Commission will be entitled to the exemption. The limitations on the equivalent of one MDS channel per party and per area include any cable/ITFS operations grandfathered pursuant to paragraph (j) of this section or any cable/MDS operations grandfathered pursuant to § 21.912(f) of this chapter. Local programming service pursuant to a lease must be provided within one year of the date of the lease or one year of grant of the licensee's application for the leased channel(s), whichever is later.

(j) Lease arrangements between cable and ITFS entities for which a lease or a firm agreement was signed prior to February 8, 1990, will not be subject to the prohibitions of paragraph (h) of this section. Leases between cable television entities and ITFS entities executed on February 8, 1990, or thereafter, are invalid.

72. Section 74.932 is amended by revising paragraph (a) introductory text and paragraph (b) to read as follows:

§ 74.932 Eligibility and licensing requirements.

(a) With certain limited exceptions set forth in §§ 74.990 through 74.992 of this part, a license for an instructional television fixed station will be issued only to an accredited institution or to a governmental organization engaged in the formal education of enrolled students or to a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations, and which is otherwise qualified under the statutory provisions of the Communications Act of 1934, as amended.

* * * * *

(b) No numerical limit is placed on the number of stations which may be

licensed to a single licensee. However, individual licensees will be governed by the limitations of §§ 74.902 and 74.990(d) of this part as to the number of channels which may be used. A single license may be issued for more than one transmitter if they are to be located at a common site and operated by the same licensee. Applicants are expected to accomplish the proposed operation by the use of the smallest number of channels required to provide the needed service.

* * * * *

73. Section 74.986 is added to read as follows:

§ 74.986 Involuntary ITFS station modifications.

(a) Parties specified in paragraph (b) of this section may, subject to Commission approval, involuntary modify the facilities of an existing ITFS licensee in the following situations:

(1) If the initiating party is prevented from invoking the 0 dB interference protection standard (see § 21.902(f)(2) of this chapter and § 74.903(a)(2) of this part) for projecting its impact on an existing ITFS licensee because of that licensee's pre-May 26, 1983, facilities, the applicant, permittee or licensee may modify the facilities of the pre-existing ITFS station with equipment adequate to perform at that level of interference;

(2) If the initiating party is prevented from operating at a higher transmitter output power or EIRP because such power level will cause harmful interference to an ITFS station and modifying the ITFS station will avoid such harmful interference;

(3) If the initiating party is prevented from installing a signal booster because such installation will cause harmful interference to an ITFS station and modifying the ITFS station will avoid harmful interference;

(4) If an ITFS licensee uses equipment incapable of meeting the aural power standard specified in § 74.935(d) and that equipment becomes a source of harmful adjacent-channel interference, and other equipment would avoid such harmful intereference.

(5) If an ITFS licensee uses equipment incapable of meeting the transmitter tolerance standard specified in § 74.961 of this part and that equipment becomes a source of harmful co-channel interference, and other equipment would avoid the harmful interference;

(6) If an ITFS licensee uses equipment incapable of meeting the out-of-band emissions standard specified in § 74.936 of this part and that equipment becomes a source of harmful adjacent-channel interference, and other equipment would avoid the harmful interference; and

(7) If harmful adjacent-channel interference may be avoided by colocation of an ITFS facility with its own facilities.

(b) Involuntary modification may be sought by an MDS, MMDS or ITFS licensee, conditional licensee, permittee or applicant. Opposed applicants do not have authority to seek involuntary colocation. An opposed application is one that faces a competing application(s) or petition(s) to deny. Applicants will be required to confirm their unopposed status after the period for competing applications and petitions to deny has passed. If an initiating application is opposed, the companion ITFS modification application will be returned. It may be refiled when the initial application is again unopposed.

(c) The application for involuntary modification must be prepared, signed and filed by the initiating party. The applicant must submit FCC Form 330 but need not fill out section II (Legal Qualifications), and the application must include a cover letter clearly indicating that the modification is involuntary and identifying the parties involved. A copy of the application must be served on the affected ITFS party on or before the day of filing. The ITFS party to be modified will have a 60-day period in which to oppose the modification application; the opposition should state objections to the modification with specificity, including engineering and other challenges. If the modification includes colocation, the opponent should address the desirability of the present site compared to the proposed new site.

(d) The party initiating the modification will be responsible for all costs connected with the modification, including purchasing, testing and installing new equipment, labor costs, reconfiguration of existing equipment, administrative costs, legal and engineering expenses necessary to prepare and file the modification application, and other reasonable documented costs. The initiating party must secure a bond or establish an escrow account to cover reasonable incremental increase in ongoing expenses that will fall upon the modified ITFS entity and to cover expenses that would inure to the modified ITFS entity in the event the initiating party becomes bankrupt. In establishing a bond or escrow amount, such factors as projected electricity or maintenance expenses, or relocation expenses must be taken into account, as relevant in each case.

(e) The involuntarily modified facilities must be operational before the initiating party will be permitted to begin its new or modified operations. The modification must not disrupt the ITFS licensee's provision of service, and the ITFS licensee has the right to inspect the construction or installation work.

74. Section 74.990 is added to read as follows:

§ 74.990 Use of available instructional television fixed service frequencies by wireless cable entities.

(a) Notwithstanding the provisions §§ 74.931 and 74.932 of this part, a wireless cable entity may be licensed on instructional television fixed service frequencies in areas where at least eight other instructional television fixed service channels remain available in the community for future ITFS use. Channels will be considered available for future ITFS use if there are no co-channel operators or applicants within 50 miles of the transmitter site of the proposed wireless cable operation, and if the transmitter site remains available for use at reasonable terms by new ITFS applicants on those channels within three years of commencing operation.

(b) No more than eight instructional television fixed service channels per community may be licensed to wireless cable entities.

(c) To be licensed on instructional television fixed service channels, a wireless cable applicant must hold a conditional license, license or a lease, or must have filed an unopposed application for at least four MDS channels to be used in conjunction with the facilities proposed on the ITFS frequencies. An unopposed application is one that faces no competing application(s) or petition(s) to deny. Applicants will be required to confirm their unopposed status after the period for filing competing applications and petitions to deny has passed. If an MDS or MMDS application is opposed, the companion ITFS application will be returned.

(d) To be licensed on instructional television fixed service channels, a wireless cable applicant must show that there are no multipoint distribution service or multichannel multipoint distribution service channels available for application, purchase or lease that could be used in lieu of the instructional television fixed service frequencies applied for. A wireless cable entity may apply for instructional television fixed service frequencies at the same time it applies for the related MDS or MMDS frequencies, but if that MDS or MMDS application is opposed by a timely filed mutually exclusive application or petition to deny, the application for ITFS facilities will be returned.

(e) If an instructional television fixed service application and a wireless cable application for available instructional television fixed service facilities are mutually exclusive, as defined at § 21.31(a) of this chapter, the instructional television fixed service application will be granted if the applicant is qualified. An instructional television fixed service applicant may not file an application mutually exclusive with a wireless cable application if there are other instructional television fixed service channels available for the proposed instructional television fixed service facility.

(f) The interference protection provided wireless cable applicants and licensees of instructional television fixed service facilities will be that described in § 21.902 of this chapter.

75. Section 74.991 is added to read as follows:

§ 74.991 Wireless cable application procedures.

(a) A wireless cable applicant for available instructional television fixed service channels must file sections I and V of FCC Form 330, with a complete FCC Form 494 appended. A wireless cable applicant must include with its application a cover letter clearly indicating that the application is for a wireless cable entity to operate on ITFS channels. A wireless cable application for available instructional television fixed service channels will be subject to § 21.914 of this chapter with respect to other wireless cable applicants and a 60-day cut-off period with respect to instructional television fixed service applicants. All cut-off lists for ITFS frequencies, regardless of the nature of the applicant, will be published as ITFS public notices.

(b) Within 30 days of filing its application, a wireless cable applicant for available instructional television fixed service channels must give local public notice of the filing of its application in a newspaper. The local public notice must be made in a daily newspaper of general circulation published in the community in which the proposed station will be located at least twice a week for two consecutive weeks in a three week period. If there is no such daily newspaper, notice must be made in a weekly newspaper of general circulation published in the community once a week for three consecutive weeks in a four week period. If there is no daily or weekly newspaper published in the community, notice must be made in the daily newspaper, wherever published, that has the greatest general circulation in the community twice a week for two consecutive weeks within a three week period.

(c) The public notice required by paragraph (b) of this section shall contain, where applicable, the following information:

(1) The name of the applicant if the applicant is an individual, the names of all partners if the applicant is a partnership, or the names of all officers and directors and of those persons holding 10 percent or more of the capital stock or other ownership interest if the applicant is a corporation or an unincorporated association;

(2) The purpose for which the application will be filed (*i.e.*, for a construction permit for a wireless cable system);

(3) A statement that the channels applied for are ITFS channels normally reserved for educational use, and a list of the specific frequencies or channels on which the proposed station will operate;

(4) The date the application was tendered for filing with the FCC;

(5) The facilities sought, including type and class of station, power, location of studios, transmitter site and antenna height; and

(6) A statement that a copy of the application and related material are on file for public inspection at a stated address in the community in which the station is located or is proposed to be located.

76. Section 74.992 is added to read as follows:

§ 74.992 Access to channels licensed to wireless cable entities.

(a) An educational institution or entity that would be eligible for ITFS channels that are licensed to a wireless cable entity may be entitled to access to those channels. Requests for access may be made by application to the Commission on FCC Form 330 with a copy simultaneously served on the wireless cable licensee. An applicant for access must fill out sections I, II, III and IV of the ITFS application Form 330. Section I, question 1 should be answered by spelling out, "For access to existing facilities." Section I, question 2b should include the name of the wireless cable licensee or applicant. A cover letter must clearly indicate that the application is for ITFS access to a wireless cable entity's facilities on ITFS channels.

(b) An ITFS entity determined by the Commission to have right of access to wireless cable licensed facilities may have access to a maximum of 40 hours per channel per week. The ITFS entity has the right to designate 20 of those hours as follows:

(1) 3 hours of the ITFS entity's choice each day, Monday through Friday, between 8 a.m. and 10 p.m., excluding weekends, holidays and school vacations; and

(2) The remaining five hours any time of the ITFS entity's choice between 8 a.m. and 10 p.m., Monday through Saturday.

(c) No time-of-day and day-of-week obligations will be imposed on either party with respect to the other 20 hours of access time.

(d) The ITFS user must provide the wireless cable licensee with its planned scheduled of use four months in advance. No minimum amount of programming will be required of an ITFS operator seeking access to one channel; for access to a second channel, the ITFS user must use at least 20 hours per week on the first channel from 8 a.m. to 10 p.m., Monday through Saturday; for access to a third channel, the ITFS entity must use at least 20 hours per week on the first channel and on the second channel during the hours prescribed above, and so on. Only one educational institution or entity per wireless cable licensed channel will be entitled to access from the wireless cable entity. Access will not be granted to a single entity for more than four channels, unless it can satisfy the waiver provisions of § 74.902(d) of this part.

(e) When an ITFS entity is granted access to an ITFS channel of a wireless cable licensee, the wireless cable licensee will be required to pay half of the cost of five standard receive sites on that channel. The wireless cable entity may, at its option, pay the costs of an application and facility construction for such ITFS entity on other available ITFS channels, including half of the cost of five receive sites per channel.

(f) An instructional television fixed service entity granted access to instructional television fixed service channels licensed to a wireless cable entity will have the interference protection afforded ITFS licensees (see § 74.903 of this part).

(g) After three years of operation, a wireless cable entity licensed to use ITFS channels will not be required to grant new or additional access to such ITFS channels, or provide any alternative facilities to any ITFS entity seeking access to its facilities, if there are suitable ITFS frequencies available for the ITFS entity to build its own system.

(h) The parties may mutually agree to modify any requirements or obligations imposed by these provisions, except for the requirement that an educational

entity use at least 20 hours per week on a channel of a wireless cable licensee before requesting access to an additional channel.

PART 94—[AMENDED]

77. The authority citation for part 94 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

78. The table in § 94.61 is amended by removing the entry "2500 to 2690" and adding the entry "2650 to 2690," removing note 22, and revising note 5, to read as follows:

§ 94.61 Applicability.

* * * * *

(b) * * *

Frequency Band (MHz)	
* * * * *	
2650 to 2690	[5]
* * * * *	

[5] Frequencies in this band are shared with earth stations in the Fixed Satellite Service (part 25 of this chapter), space stations in the Broadcasting Satellite Service (part 25 of this chapter), and with stations in the Instructional Television Fixed Service (ITFS) (part 74 of this chapter). No new licenses will be issued in the bands 2650–2656, 2662–2668 or 2674–2680 MHz. Existing stations in the 2650–2656 MHz, 2662–2668 MHz and 2674–2680 MHz frequency bands will be grandfathered and licensed under part 21 of this chapter.

* * * * *

79. Paragraph (a) of § 94.63 is revised to read as follows:

§ 94.63 Interference protection criteria for operational fixed stations.

(a) Before filing an application for new or modified facilities under this part, the applicant must perform a frequency engineering analysis to assure that the proposed facilities will not cause interference to existing or previously applied-for stations in this service of a magnitude greater than that specified in the criteria set forth in paragraph (b) of this section, unless otherwise agreed to in accordance with § 94.15(b). As an exception to the above requirement, when the proposed facilities are to be operated in the bands 932–935 MHz, 941–944 MHz, 10,550–10,680 MHz, 17,700–19,700 MHz, 21,200–21,800 MHz, 22,400–23,000 MHz, or 38,600–40,000 MHz, applicants must follow the prior coordination procedure specified in § 21.100(d) of this chapter. In addition, when the proposed facilities are to be operated in the bands 12,500–12,700 MHz, applications must also follow the procedures in § 21,706(c) and (d) of this chapter and the technical standards and requirements of part 25 of this chapter as regards licensees in the Communication-Satellite Service. See also § 94.77.

* * * * *

80. Section 94.65 is amended by revising paragraph (f) to read as follows:

§ 94.65 Frequencies.

* * * * *

(f) *2500–2690 MHz:* Operational-fixed stations may be authorized on the following frequencies:

Frequencies (MHz)
2686.9375
2687.9375
2688.5625
2688.6875
2688.9375
2689.5625
2689.6875

Operational-Fixed stations authorized in this band as of July 16, 1971, which do not comply with the provisions of this part may continue to operate on the frequencies assigned on a coequal basis with other stations operating in accordance with the Table of Frequency allocations. Requests for subsequent license renewals or modifications for such stations will be considered. However, expansion of systems comprised of such stations will not be permitted, except pursuant to the provisions of this part. No new licenses will be issued under this part until specific operating parameters are established for this band.

§ 94.67 [Amended]

81. The table in § 94.67 is amended by removing the entry "2,500 to 2,690," removing note 2, and redesignating notes 3, 4, 5, 6, 7, 8 and 9 as notes 2, 3, 4, 5, 6, 7 and 8.

§ 94.71 [Amended]

82. The table in § 94.71 is amended by removing the entries "2650–2680 MHz" and "2686.9375–2688.9375," removing note 3 and redesignating notes 4, 5, 6 and 7 as notes 3, 4, 5 and 6.

83. The table in § 94.73 is amended by removing the entries "2500 to 2686" and "2686 to 2690" and revising note 4 to read as follows:

§ 94.73 Power limitations.

* * * * *

[4] Except in the bands 12,500–12,700 MHz, the maximum allowable EIRP is specified in § 94.77.

* * * * *

84. The table in § 94.75 is amended by removing the entry "1850 to 2690" and adding the entry "1850 to 2500," and by revising note 2 to read as follows:

§ 94.75 Antenna limitations.

* * * * *

[2] Except for 2,150–2,160 MHz, where the maximum beamwidth is 360 degrees.

* * * * *

85. The table in § 94.92 is amended by removing the entries "2550–2656," "2662–2668," "2674–2680," "2686.9375," "2687.9375" and "2688.9375," removing notes 6 and 9, and redesignating notes 7 and 8 as notes 6 and 7.

§ 94.95 [Removed]

86. Section 94.95 is removed and reserved.

Appendix—H-Channel Transition

1. *Forms.* Because converted H-channel stations will be subject to the MDS rules, it will not be necessary to promulgate new forms as suggested by some commenters. See 47 CFR 21.3, 21.5, 21.6, 21.7, 21.11 and 21.13.

2. *Part 21 Applicability.* As of January 2, 1992, the part 21 rules will apply to all H-channel applications and authorizations. Prior to January 2, 1992, any applicants or licensees for H-channel stations who wish to be considered under part 21 rules must submit a waiver request to the Domestic Radio Branch, Common Carrier Bureau, FCC, room 6310, 1919 M Street, NW, Washington, DC 20554. See 47 CFR 21.19; see also Multipoint Distribution Service, 29 Rad. Reg. 2d 382 (1974). After January 1, 1992, a licensed H-channel station that has met its construction completion requirement may continue to operate according to the terms of its authorization, but must operate under part 21 regulation.

3. *Part 94 Applicability.* Unless a waiver is granted pursuant to paragraph 2 herein, the part 94 rules will apply to all H-channel applications and authorizations until January 2, 1992. Any applicant or licensee of an H-channel station who wishes the part 94 rules to apply, in lieu of the part 21 rules, after January 1, 1992, must submit, on or before January 2, 1992, a waiver request to the Microwave Branch, Private Radio Bureau, FCC, Gettysburg, PA 17326. See paragraph 8 herein for a discussion of non-common carrier status. Any request for waiver must be properly filed, and accompanied by the appropriate fee, and be properly signed by the licensee or applicant. Attorneys may not sign waiver requests on behalf of a client, except as permitted by 47 CFR 94.29.

4. *Processing of Pending Initial Applications.* Initial H-channel applications for a new station filed prior to September 27, 1991, for which final action has not been taken, will continue to be processed pursuant to part 94 rules. A freeze is in effect for filing applications between September 26, 1991 and January 2, 1992. On January 2, 1992, initial applications for a new H-channel station may be filed on FCC Form 494 pursuant to part 21 rules. See 47 CFR 21.4, 21.5(b), and 21.900; see also 47 CFR 1.743. If a license for a H-channel station has been issued prior to January 2, 1992, with a construction completion deadline date on January 2, 1992, or thereafter, there must be compliance with appropriate Part 21 rules, including the requirement to file a

timely certification of completion of construction on FCC Form 494A, together with the appropriate filing fee. See also Part 21 Revision, 2 FCC Rcd 5713 (1987); Part 21 Rules, 60 FCC 2d 549 (1976); Domestic Public Radio Services, 55 FCC 2d 744 (1975).

5. *Processing of Modification Applications.* Pending modification applications for H-channel stations, for which final action has not been taken, will continue to be processed pursuant to part 94 rules. Any applicant who wishes its modification application of an H-channel station to be considered under § 21.41 or § 21.42 must resubmit the modification application, with appropriate showings, as a new modification application on January 2, 1992, or thereafter. On January 2, 1992, or thereafter, modification applications for an H-channel station must be filed on FCC Form 494 and filed pursuant to part 21 rules.

6. *Amendments.* An application, initial or modification, pending in the Private Radio Bureau may be amended in accordance with applicable part 94 rules. Applicants are advised, however, that a major amendment (see 47 CFR 94.45) makes an application untimely filed with respect to the September 26, 1991 freeze, and will result in dismissal of the application. This includes any change in the station location.

7. *Requests for Extension.* Requests for extension of time to construct an H-channel station filed prior to January 2, 1992, must be submitted to the Private Radio Bureau and will be considered pursuant to the part 94 rules. Applications for extension of time to construct an H-channel station filed on January 2, 1992, or thereafter, must be submitted to the Common Carrier Bureau, on FCC Form 701, with the appropriate filing fee, pursuant to the part 21 rules. See 47 CFR 1.105, 21.11(b) & 21.40; see also Part 21 Revision, 2 FCC Rcd 5713, 5717–18, 5721–22 (1987); Notice of Proposed Rulemaking, *id.*, 104 FCC 2d 116, 120, 122–26 (1986).

8. *Renewals.* In 1983, a ten-year term was adopted for part 21 licenses. Therefore, all MDS/MMDS licenses expired May 1, 1991. The next expiration date for all MDS/MMDS licenses is May 1, 2001. H-channel station licenses do not have a similar common expiration date. For any H-channel station license, with a license term expiring after September 26, 1991 and before January 2, 1992, its renewal application must be submitted as prescribed by the part 94 rules. After January 1, 1992, the licensee of a licensed H-channel station that has met its construction requirement must file a renewal application, on FCC Form 405, 30 to 60 days prior to the expiration date stipulated on the license pursuant to 47 CFR 21.44 and 21.45. See 47 CFR 1.62. Any H-channel renewal application granted after January 2, 1992, will be given a license expiration date of May 1, 2001. Eventually, all H-channel licenses will expire on the same day as MDS/MMDS station licenses expire.

9. *ITFS Protection.* Although an H-channel station will become a single-channel, not a multichannel, MDS station, each applicant who files an application for an H-channel station on January 2, 1992, or thereafter, must comply with the requirements of 47 CFR 21.902(i).

10. *Status Election.* MDS/MMDS applicants, conditional licensees, and licensees may elect either common carrier or non-common carrier status. *MDS Status Election Order*, 2 FCC Rcd 4251 (1987). As of January 2, 1992, current H-channel applicants and licensees are deemed non-common carriers. Non-common carrier status should assure licensees that service as currently provided by an OFS licensee may continue. Therefore, most H-channel licensees will be assured that a request for continued application of part 94 rules is unnecessary. See paragraph 3 herein. Pursuant to 47 CFR 21.23 and 21.40, H-channel applicants and licensees may elect common carrier status. If there is a subsequent election of non-common carrier status, § 21.910 is applicable. We note that item 17(d) of FCC Form 494 asks an MDS applicant if it elects common carrier or non-common carrier status.

11. *Filing Fees.* Each H-channel application or form filed on January 2, 1992, or thereafter, must be submitted in the manner and with the filing fee stipulated at 47 CFR 1.1105.

12. *Mutually-Exclusive Applications.* For H-channel applications filed on January 2, 1992, or thereafter, mutual-exclusivity determinations will be made pursuant to 47 CFR 21.31 and 21.914.

13. *Annual Reports.* Section 21.911 with regard to annual reports will apply to H-channel stations as of January 2, 1992. However, H-channel stations are not required to file annual reports until March 1, 1993, for the calendar year 1992.

14. *H-channel Lotteries.* Lotteries held for H-channel applications filed January 2, 1992, or thereafter, will comply with the provisions of 47 CFR 1.824, 1.1621–1.1623, and 21.33(a).

15. *Summary.* Applying the discussion in this appendix, we provide the following two examples of possible scenarios for H-channel stations after the January 2, 1992 transition to the Multipoint Distribution Service.

Example One: A part 94 licensee who has completed H-channel station construction, or is scheduled to complete construction, or should have completed station construction before January 2, 1992, must file a waiver request if the licensee wants continued applicability of the part 94 rules, on or before January 2, 1992, or the part 21 rules will apply. If the waiver request is not granted, the next required filing would be a renewal application, unless a modification application or an extension application is filed.

Example Two: A part 94 licensee who has not completed station construction before January 2, 1992, if the construction completion date specified on the H-channel authorization is January 2, 1992, or thereafter, must file in a timely manner, either: (a) Pursuant to part 94 rules, a waiver request for continued applicability of the part 94 rules, if the licensee wants continued applicability of the part 94 rules; or (b) pursuant to part 21 rules, an extension application, with the appropriate filing fee; or (c) pursuant to part 21 rules, a certification of completion of construction, with the appropriate filing fee.

[FR Doc. 91–26668 Filed 11–13–91; 8:45 am]

BILLING CODE 6712–01–M

47 CFR Parts 15 and 68

[Gen. Docket No. 89–605; FCC 91–308]

Cordless Telephones

AGENCY: Federal Communications Commission (FCC).

ACTION: Final rule; petition for reconsideration.

SUMMARY: The Commission is denying the petition filed by Unisonic Products Corporation requesting limited reconsideration of the Report and Order (R&O), 56 FR 3783, January 31, 1991, as it relates to the transition provisions in the R&O that require the importation of cordless telephones without digital security coding to cease by September 12, 1991. The Commission finds that the six-month transition period specified in the R&O is appropriate and necessary to reduce the harm being caused by cordless telephones without security coding to the "911" Emergency Services Telephone System and to the telephone network in general.

EFFECTIVE DATE: September 27, 1991.

FOR FURTHER INFORMATION CONTACT: George Harenberg, Technical Standards Branch, Office of Engineering and Technology, (202) 653–7314.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Memorandum, Opinion and Order (MO&O) in Gen. Docket No. 89–605, FCC 89–605, adopted on September 27, 1991 and released on October 28, 1991.

The full text of this MO&O 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, Downtown Copy Center, (202) 452–1422, 1114 21st Street NW., Washington, DC 20036.

Summary of Notice

1. Security coding is a cordless telephone feature for preventing unauthorized access of the telephone line, the dialing of calls in response to signals other than those from the matching handset, and unintentional handset ringing. In the R&O in this proceeding, the Commission found that cordless telephones that do not incorporate security coding are causing interference to the public switched telephone network and also are adversely affecting the "911" Emergency Services Telephone System.

2. In the R&O, the Commission noted that the marketplace had already had seven years to respond to the problems

caused by cordless telephones without security coding. However, it observed that only half of the 10 million cordless telephones sold each year have any type of security coding features. The Commission also determined that the costs of security coding were minimal. Thus, the Commission found it in the public interest to establish mandatory requirements for security coding for cordless telephones. To provide a transition period for development and/or modification of cordless telephone equipment to comply with the new security coding requirements, the Commission permitted the manufacture and importation of cordless telephones without security coding until September 12, 1991. The Commission observed that the technology needed to comply with the new rules was already available.

3. Unisonic Products Corporation (Unisonic) requests that the Commission interpret the transition provisions of § 47 CFR 15.37(e) as not being applicable to cordless telephones for which contracts were executed, or orders placed and in process, before March 11, 1991, the effective date of the R&O. Unisonic indicates that it had contracted, prior to the January 25, 1991 release of the R&O, to purchase cordless telephones without security coding from foreign manufacturers and to sell them to retailers for the 1991 Christmas season.

4. The Commission finds that Unisonic's arguments in support of its request to be unpersuasive. While the Notice of Proposed Rule Making (Notice) 55 FR 879, January 10, 1990, in this proceeding contemplated a one-year implementation period, comments were invited on whether this was an appropriate length of time. Based on the comments, the Commission determined that a shorter implementation period was warranted in light of the potential for interference to the telephone network and disruption of "911" emergency services. Notwithstanding the Notice, Unisonic chose to enter into long-term contracts to supply cordless telephones without security coding. Thus, Unisonic's contract situation arises from risks it chose to accept. The Commission does not find Unisonic's business decisions to be an adequate justification to delay implementation of the security coding requirements.

5. In accordance with the above discussion and pursuant to the authority contained in sections 4(i), 301, 302, 303, 304 and 307 of the Communications Act of 1934, as amended, *It is ordered* That the Petition for Limited Reconsideration of the Report and Order filed by Unisonic Products Corporation is denied.

List of Subjects

47 CFR Part 15

Radio, communications equipment.

47 CFR Part 68

Terminal equipment, Telephone, Communications equipment.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 91-27414 Filed 11-13-91; 8:45 am]

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DEPARTMENT OF ENERGY

48 CFR Parts 950, 952, 970

Acquisition Regulation; Nuclear Hazards Indemnity Clauses

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) today publishes a final rule revising the Department of Energy Acquisition Regulation (DEAR) to implement the provisions of the Price-Anderson Amendments Act of 1988 as those amendments affect the nuclear hazards indemnity clauses previously in the DEAR. This final rule reflects consideration of comments received in response to the publication of a proposed rule on this subject that appeared in the Federal Register on August 17, 1990, at 55 FR 33730.

EFFECTIVE DATE: This rule will take effect on January 1, 1992.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Analysis of Final Rule.
A. Background.
B. Discussion of Public Comments.
II. Procedural Requirements.
A. Review Under Executive Order 12291.
B. Review Under Regulatory Flexibility Act.
C. Review Under Paperwork Reduction Act.
D. Review Under National Environmental Policy Act.
E. Review Under Executive Order 12612.

I. Analysis of Final Rule

A. Background

The Price-Anderson Act (Act) was enacted in 1957 as an amendment to the Atomic Energy Act of 1954 to establish a system of financial protection for persons who may be liable for and persons who may be injured by a nuclear incident. In the case of the former Atomic Energy Commission and now the Department of Energy, the system of financial protection took the form of indemnification of its contractors. Originally, the availability of the indemnification with regard to individual contractors was subject to the discretion of the agency.

Congress enacted the Price-Anderson Amendments Act of 1988 (PAAA) as a reauthorization and alteration of the system of financial protection. Generally, after the enactment of the PAAA, the indemnification applies mandatorily to DOE contractors and any other person who may be liable for public liability from a nuclear incident or precautionary evacuation arising out of contractual activities. The PAAA, otherwise, broadens and refines the provisions of the Act.

In addition, the PAAA provides DOE the authority to assess civil penalties on its contractors, with certain named exceptions that are indemnified under the statute, and their subcontractors and suppliers for violation of DOE nuclear safety rules, regulations, or orders. The PAAA also subjects officials of these contractors, with no exceptions, to criminal liability for specified violations of the Atomic Energy Act of 1954, as amended, and DOE nuclear safety rules, regulations, or orders.

On August 17, 1990, DOE issued a Notice of Proposed Rulemaking to amend the Department of Energy Acquisition Regulation (DEAR) to reflect the changes in DOE's indemnification framework necessitated by passage of the PAAA. In particular, DOE proposed to amend parts 950, 952, and 970 of title 48 of the Code of Federal Regulations with regard to definitions, revisions to the nuclear hazards indemnity agreement (NHIA) clauses, including deletion of the version dealing with product liability, and requirements to include such clauses in DOE's contracts and subcontracts.

B. Discussion of Public Comments

Nine entities submitted comments in response to the publication of the proposed rule. Seven of the sets of comments were submitted by, or on behalf of, current DOE contractors. One set was submitted by the American Bar

Association, and the remaining set was submitted by a DOE Field Office.

Several of the comments addressed proposed paragraph (k) of the NHIA clause that would require DOE contractors to include a nuclear hazards indemnity clause in any subcontract which may involve the risk of public liability. "Public liability" is defined in the Act to include legal liability for a nuclear incident or precautionary evacuation. These comments argued the inclusion is unnecessary since the definition of "persons indemnified" in the Atomic Energy Act includes DOE contractors and their subcontractors and suppliers regardless of whether DOE has entered into indemnity agreements with them. The comments also indicated the requirement would impose on contractors administrative burdens and the obligation to make judgments concerning which subcontracts involved the risk of public liability. The comments made several suggestions, including the deletion of this requirement, the retention or modification of the current "representation" clause at DEAR 950.7008(a) and 970.2870(f), and the insertion of a short clause in all subcontracts that an indemnity agreement between DOE and the subcontractor would be incorporated by reference in all situations that involved the risk of public liability.

DOE agrees with the comments that an agreement between DOE and a contractor or its subcontractor or supplier is not a condition precedent to indemnification under Price-Anderson. The PAAA, however, quite clearly charges DOE to enter into indemnification agreements "with any person who may conduct activities under a contract with the Department of Energy that involve the risk of public liability." After reviewing the comments, DOE believes that the proposal to comply with this obligation by including the appropriate clause in covered subcontracts would not be an undue burden on DOE prime contractors.

DOE prime contractors must already decide on the appropriate flowdown of clauses to subcontractors implementing a myriad of Federal statutes and regulations. Also, inclusion of the NHIA clause in subcontracts is subject to the reasonable exercise of discretion by the prime contractor. The NHIA clause should be the norm in any subcontracts which involve any conceivable risk of public liability, perhaps in all subcontracts in which the subcontractor will have an onsite presence. As a result, inclusion of the NHIA clause in substantially all subcontracts may be the reasonable result.

One comment addressed the issue of whether an indemnification agreement between DOE and a subcontractor would create some type of privity of contract between DOE and the subcontractor with respect to matters not in the indemnification agreement. DOE does not intend flowdown of the NHIA clause to give rise to any such effects and, if handled in the manner as described in the final rule, it will not.

The comments also addressed proposed section 952.250–72 that would continue the practice of putting indemnity assurance clauses in architect-engineer (A–E) contracts. The comments took the position the risk of public liability is present when work is done under an A–E contract. Accordingly, they urge that the NHIA clause, rather than the indemnity assurance, be put in the A–E contract at the time of award.

DOE traditionally has utilized indemnity assurances in A–E contracts because the risk of public liability under such contracts remains inchoate until at least the award of a contract to operate the facility. The terms of the assurance clause have required DOE to negotiate the NHIA coverage into the contract for facility operation on a best efforts basis and, if unsuccessful, into the A–E contract.

In analyzing these comments, DOE has reviewed the changes to the statutory language and believes that a change to its policy of not providing indemnification at the time of the award of the A–E contract is warranted. Section 170d. of the Act previously "authorized" the Secretary to enter into agreements of indemnification "with its contractors * * * under the risk of public liability * * *." Today the Secretary is required to enter into agreements of indemnification with "any person who may conduct activities under a contract with the Department of Energy that involve the risk of public liability * * *." Though an A–E contractor is not under the risk of public liability at the time of award (that is, the risk remains inchoate), the A–E contractor's "activities under (the) contract * * * involve a risk of public liability," and thus Price-Anderson indemnification is mandated. The right to Price-Anderson indemnification at the time of award is balanced by the A–E contractor's obligation to comply with DOE's rules, orders, and regulations concerning nuclear safety while preparing the design and the potential civil penalties for violations of these requirements. This result is logical and reflects the PAAA statutory framework. Accordingly, the proposed clause at 952.250–72 has been deleted, and the regulatory coverage at 950.7006, 950.7007, and 970.2870 (c) and (d) has been revised.

Three comments discussed paragraphs (i) and (j) of the NHIA clause at 952.250–70, which inform the contractor that it is subject to the civil and criminal penalty provisions of the PAAA, respectively. These comments expressed concerns about the need for these portions of the NHIA clause, whether these paragraphs must be included in a contract before a contractor may be liable for civil and criminal penalties, and the procedural framework for the assessment of civil and criminal penalties.

The inclusion of paragraphs (i) and (j) is not prerequisite for the imposition of civil or criminal penalties established by the PAAA. DOE currently is developing a proposed rulemaking concerning civil and criminal penalties that will address procedural and substantive questions about these penalties. However, since the persons indemnified by DOE are subject to these penalties, DOE believes it appropriate to set forth explicitly in indemnification agreements the potential liability, as described under the PAAA, of these persons for civil penalties, and of their officers and employees for criminal penalties.

One comment addressed the treatment of DOE clean-up contractors under the Price-Anderson indemnity framework. This comment urged DOE to (1) state explicitly that the Price-Anderson indemnity covered clean-up contractors, (2) extend Price-Anderson indemnity to all liabilities caused by mixed radioactive/hazardous wastes, and (3) coordinate nuclear and non-nuclear indemnification policies to avoid inadvertent gaps in coverage.

Price-Anderson indemnity clearly is available to DOE "clean-up contractors." DOE finds no reason, however, to list the types of DOE contractors covered by the Price-Anderson indemnity since the coverage results not from the type of contractor but rather from the presence of a risk of public liability from a nuclear incident in the work to be performed under the contract. With respect to mixed wastes, DOE cannot extend Price-Anderson indemnification beyond the statutory limits that are set forth in the definitions of "public liability" and "nuclear incident."

With regard to coordination of indemnification policies, the Department is conscious of the importance of the extent of indemnification, including the

application of Price-Anderson indemnification, in the context of site clean-up. It will continue to assure that the issue is treated appropriately and within the authorities of the Department in the context of individual efforts.

One comment raised two issues concerning paragraph (h), "Effect of Other Clauses," in the NHIA clause at 952.250–70. The comment indicated the phrase "agreements of this type" could be ambiguous. To avoid any misunderstanding, the phrase has been changed to "Nuclear Hazards Indemnity Agreements." The comment also questioned the inclusion of "regulations" in the list of actions that could require the modification of the contract. DOE believes the inclusion of "regulations" is proper since an agency can exercise by regulation any statutory authority it is granted, including the authority to modify contracts.

Many of the comments addressed the definition of "public liability" at 950.7001, including the use of "legal" to modify "liabilities"; the exception for claims under workmen's compensation; and the provision regarding "licensed activities." DOE does not find any reason to change the definition of public liability since it is exactly the same as the definition in the Act.

In a related matter, one comment indicated the use of "for a nuclear incident" after "public liability" in proposed §§ 950.7001 and 970.2870(a) was unnecessary, redundant, and possibly misleading. After consideration of this comment, DOE has decided to add the phrase "or precautionary evacuation" since the definition of "public liability" was amended by the PAAA to include explicit references to "nuclear incident" and "precautionary evacuation." This addition should remove any ambiguity. The term "public liability" is defined in the Act to mean any legal liability arising out of or resulting from "a nuclear incident or precautionary evacuation." Therefore, the use of the phrase "for a nuclear incident or precautionary evacuation" after "public liability" is unnecessary. However, we believe that using this phrase will be helpful to contracting officers in carrying out their duties pursuant to the Act. Two comments expressed concern about the inclusion in proposed section 950.7006 of the phrase "this clause shall not be included in contracts in which the contractor is subject to Nuclear Regulatory Commission (NRC) financial requirements under section 17b. of the Act or NRC agreements of indemnification under section 170c. or k. of the Act for activities to be performed under the contract." This phrase merely sets forth the prohibition in section 170d. of the Atomic Energy Act against indemnification agreements by DOE for "activities under a contract * * * that are * * * subject to financial protection requirements under subsection b. or agreements of indemnification under subsection c. or k." DOE finds no substantive difference between the wording in section 170d. of the Atomic Energy Act and section 950.7006 of the regulations, as revised to implement the PAAA. Both make clear the intent of the PAAA to avoid any dual coverage for activities.

Three comments objected to the statement in proposed subparagraph (d)(1) of the NHIA clause at 952.250–70 that limits DOE's Price-Anderson indemnification to $100 million for a precautionary evacuation occurring outside the United States. These comments rely on the fact that section 170d.(5) of the Act refers only to nuclear incidents and not precautionary evacuations outside the United States as being subject to the $100 million limit.

Section 11 of the Act indicates a precautionary evacuation could not take place outside the United States since the evacuation must be "initiated by an official of a State or a political subdivision of a State who is authorized by State law to initiate such an evacuation * * *." Therefore, reference to precautionary evacuation occurring outside the United States has been deleted from subparagraph (d)(1).

Three comments addressed the paragraph (e), "Waiver of Defenses," at 952.250–70. One comment requested clarification of the difference in treatment of nuclear waste activities as opposed to other activities. Another comment questions the scope of "conduct of the claimant * * * or fault of persons indemnified." A third issue relates to the use of the term "contract location" in paragraph (e)(2)(vi). The final comment questions the use of the phrase "10 CFR 840, as amended by the Price-Anderson Amendments Act of 1988" at the end of paragraph (e)(2)(v).

DOE proposed to modify the Waiver of Defenses coverage of the NHIA clause in order to take into account the changes made by the PAAA. With respect to the treatment of nuclear waste activities, the PAAA added section 170d.(B)(i)(II) of the Act to provide for waiver of defenses as to charitable or governmental immunity in the event of a nuclear incident. This provision is set forth in subparagraph (e)(1) of the NHIA clause. In the event of an extraordinary nuclear occurrence, nuclear waste activities are included in the list of activities of section 170n(1)(F) of the Act to which the comprehensive waiver of defenses applies. The list of activities, including nuclear waste activities, subject to the comprehensive waiver of defenses, is set forth in subparagraph (e)(2) of the NHIA clause.

With respect to the waiver of defenses for conduct of claimant or fault of person indemnified, the PAAA made no change. Accordingly, DOE reviewed the existing waiver of defenses coverage in paragraph (e) relating to conduct of the claimant and found no reason to delete the actions covered by subparagraph (e)(2).

With regard to paragraph (e)(2)(vi) and its definition of the term "contract location," section 11j. of the Act requires DOE to define "contract location," in the indemnity agreement for purposes of determining the meaning of "offsite." After reviewing the comment and the proposed coverage, DOE has revised subparagraphs (e)(2)(vi) of the NHIA clause of define "contract location," in terms of "offsite," the term used both in the statute and in 10 CFR part 840, the DOE regulations that define an "extraordinary nuclear occurrence."

With respect to the phrase "as amended by the Price-Anderson Amendments Act of 1988" at the end of subparagraph (e)(2)(v), the comment notes no knowledge of any amendment to 10 CFR part 840. Having made the adjustment above with regard to "contract location," we have deleted the phrase.

One comment questioned the use of "may" in the third sentence of paragraph (f) of the NHIA clause. The comment suggests that DOE should be obligated to collaborate with the persons indemnified. DOE believes that collaboration could well be beneficial; however, section 170d. does not make such collaboration mandatory. Accordingly, DOE has determined not to bind the agency contractually to collaborate and has chosen to allow, not require, such collaboration.

II. Procedural Requirements

A. Review Under Executive Order 12291

This Executive order, entitled "Federal Regulations," requires that a regulatory impact analysis be prepared prior to the promulgation of a "major rule." DOE has concluded that this action is not a "major rule" because its promulgation will not result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects

on competition, employment, investment, productivity, innovation, or on the ability of United States based enterprises to compete in domestic or export markets.

Other regulations are subject to review by the Office of Management and Budget (OMB); however, OMB Bulletin 85–7 exempts all but specified types of procurement regulations from that review. This proposed rule does not involve any of the topics that remain subject to such review.

B. Review Under the Regulatory Flexibility Act

This final rule was reviewed under the Regulatory Flexibility Act of 1980, Public Law 96–354, which requires preparation of regulatory flexibility analysis for any rule which is likely to have significant economic impact on a substantial number of small entities. The DOE certifies that this final rule will not have a signficant economic impact on a substantial number of small entities and, therefore, no regulatory flexibility analysis has been prepared.

C. Review Under the Paperwork Reduction Act

No new information collection or recordkeeping requirements are imposed by this final rule. Accordingly, no OMB clearance is required by the Paperwork Reduction Act of 1980 (44 U.S.C. 3501, *et seq.*).

D. Review Under the National Environmental Policy Act

The DOE has concluded that promulgation of this rule would not represent a major Federal action having significant impact on the human environment under the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. *et seq.* (1976)), or the Council on Environmental Quality regulations (40 CFR parts 1500–1508) and DOE guidelines (10 CFR part 1021), and, therefore, does not require an environmental impact statement or an environmental assessment pursuant to NEPA.

E. Review Under Executive Order 12612

Executive Order 12612, 52 FR 41685 (October 30, 1987), requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the National Government and the States, or in the distribution of power and responsibilities among various levels of government. If there are sufficient substantial direct effects, then the Executive order requires preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action.

Today's final rule will revise certain policy and procedural requirements. However, DOE has determined that none of the revisions will have a substantial direct effect on the institutional interests or traditional functions of States.

List of Subjects in 48 CFR Parts 950, 952, 970

Government contracts, Government procurement, Indemnification of DOE contractors, Management and operating contractors.

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

Berton J. Roth,

Acting Director, Office of Procurement, Assistance and Program Management.

Chapter 9 of title 48 Code of Federal Regulations is amended as set forth below:

PART 950—EXTRAORDINARY CONTRACTUAL ACTIONS

1. The authority citation for part 950 continues to read as follows:

Authority: 42 U.S.C. 7254; 40 U.S.C. 486(c).

Subpart 950.70 [Amended]

2. The heading of subpart 950.70 is amended by inserting "Nuclear" before "Indemnification."

950.7000 [Amended]

3. Section 950.7000 is amended by removing "(a)" as it appears in the sentence, substituting a period for the comma after "activity," and removing the remainder of the sentence.

4. Section 950.7001 is revised to read as follows:

950.7001 Applicability.

The policies and procedures of this subpart shall govern DOE's entering into agreements of indemnification with recipients of a contract whose work under the contract involves the risk of public liability for a nuclear incident or precautionary evacuation.

950.7002 [Amended]

5. Section 950.7002 is amended, as follows:

a. By removing the term and definition of "Construction contractor."

b. By revising the definition of "Nuclear incident" to read as follows:

Nuclear incident means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material. The term includes any such occurrence outside the United States if such occurrence involves source, special nuclear, or byproduct material owned by, and used by or under contract with, the United States.

c. By revising the definition of "Person indemnified" to read as follows:

Person indemnified means:

(1) With respect to a nuclear incident occurring within the United States or outside the United States as the term is defined above and with respect to any nuclear incident in connection with the design, development, construction, operation, repair, maintenance, or use of the nuclear ship Savannah, the person with whom an indemnity agreement is executed or who is required to maintain financial protection, and any other person who may be liable for public liability; or

(2) With respect to any other nuclear incident occurring outside the United States, the person with whom an indemnity agreement is executed and any other person who may be liable for public liability by reason of his activities under any contract with the Secretary of Energy or any project to which indemnification under the provisions of section 170d. of the Atomic Energy Act of 1954, as amended, has been extended or under any subcontract, purchase order, or other agreement, or any tier under any such contract or project.

d. By removing the term and definition of "Nuclear reactor."

e. By removing the term and definition of "Production facility."

f. By revising the definition of "Public liability" to read as follows:

Public liability means any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation (including all reasonable additional costs incurred by a State, or a political subdivision of a State, in the course of responding to a nuclear incident or precautionary evacuation), except: (1) Claims under State or Federal workmen's compensation acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs; (2) claims arising out of an act of war; and (3) whenever used in subsections a., c., and k. of section 170 of the Atomic Energy Act of 1954, as amended, claims for loss of, or damage to, or loss of use of

property which is located at the site of and used in connection with the licensed activity where the nuclear incident occurs. *Public liability* also includes damage to property of persons indemnified: Provided, that such property is covered under the terms of the financial protection required, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs.

g. By removing the term and definition of "Utilization facility."

6. Section 950.7003 is revised to read as follows:

950.7003 Nuclear Hazards Indemnity.

(a) Section 170d. of the Atomic Energy Act, as amended, requires DOE "to enter into agreements of indemnification with any person who may conduct activities under a contract with (DOE) that involve the risk of public liability * * *." However, DOE contractors whose activities are already subject to indemnification by the Nuclear Regulatory Commission are not eligible for such statutory indemnity. See 950.7006 below.

(b) Heads of Contracting Activities shall assure that contracts subject to this requirement contain the appropriate nuclear hazards indemnity provisions.

950.7004 and 950.7005 [Removed and Reserved]

7. Sections 950.7004 and 950.7005 are removed and reserved.

8. Section 950.7006 is revised to read as follows:

950.7006 Statutory nuclear hazards indemnity agreement.

(a) The contract clause contained in § 952.250–70 shall be incorporated in all contracts in which the contractor is under risk of public liability for a nuclear incident or precautionary evacuation arising out of or in connection with the contract work, including such events caused by a product delivered to a DOE-owned facility for use by DOE or its contractors. The clause at § 952.250–70 shall be included in contracts with architect-engineer contractors for the design of a DOE facility, the construction or operation of which may involve the risk of public liability for a nuclear incident or a precautionary evacuation.

(b) However, this clause shall not be included in contracts in which the contractor is subject to Nuclear Regulatory Commission (NRC) financial protection requirements under section 170b. of the Act or NRC agreements of indemnification under section 170c. or k. of the Act for activities to be performed under the contract.

950.7007 and 950.7008 [Removed and Reserved]

9. Sections 950.7007 and 950.7008 are removed and reserved.

950.7009 [Amended]

10. Section 950.7009 is amended by inserting "nuclear hazards" after "statutory" as it appears in the paragraph.

11. Section 950.7010 is revised to read as follows:

950.7010 Financial protection requirements.

DOE contractors with whom statutory nuclear hazards indemnity agreements under the authority of section 170d. of the Atomic Energy Act of 1954, as amended, are executed will not normally be required or permitted to furnish financial protection by purchase of insurance to cover public liability for nuclear incidents. However, if authorized by the DOE Headquarters office having responsibility for contractor casualty insurance programs, DOE contractors may be (a) permitted to furnish financial protection to themselves or (b) permitted to continue to carry such insurance at cost to the Government if they currently maintain insurance for such liability.

950.7011 [Redesignated as 950.7101]

12. Section 950.7011 is redesignated as 950.7101 and the section heading is revised to read "Applicability." A new subpart heading 950.71, "General contract authority indemnity," is added preceding the newly redesignated section 950.7101.

PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

13. The authority citation for part 952 continues to read as follows:

Authority: 42 U.S.C. 7254; 40 U.S.C. 486(c).

14. Section 952.250–70 is revised to read as follows:

952.250–70 Nuclear hazards indemnity agreement.

Insert the following clause in accordance with section 950.7006.

Nuclear Hazards Indemnity Agreement (Nov. 1991)

(a) *Authority.* This clause is incorporated into this contract pursuant to the authority contained in subsection 170d. of the Atomic Energy Act of 1954, as amended (hereinafter called the Act.)

(b) *Definitions.* The definitions set out in the Act shall apply to this clause.

(c) *Financial protection.* Except as hereafter permitted or required in writing by DOE, the contractor will not be required to provide or maintain, and will not provide or maintain at Government expense, any form of financial protection to cover public liability, as described in paragraph (d)(2) below. DOE may, however, at any time require in writing that the contractor provide and maintain financial protection of such a type and in such amount as DOE shall determine to be appropriate to cover such public liability, provided that the costs of such financial protection are reimbursed to the contractor by DOE.

(d)(1) *Indemnification.* To the extent that the contractor and other persons indemnified are not compensated by any financial protection permitted or required by DOE, DOE will indemnify the contractor and other persons indemnified against (i) claims for public liability as described in subparagraph (d)(2) of this clause; and (ii) such legal costs of the contractor and other persons indemnified as are approved by DOE, provided that DOE's liability, including such legal costs, shall not exceed the amount set forth in section 170e.(1)(B) of the Act in the aggregate for each nuclear incident or precautionary evacuation occurring within the United States or $100 million in the aggregate for each nuclear incident occurring outside the United States, irrespective of the number of persons indemnified in connection with this contract.

(2) The public liability referred to in subparagraph (d)(1) of this clause is public liability as defined in the Act which (i) arises out of or in connection with the activities under this contract, including transportation; and (ii) arises out of or results from a nuclear incident or precautionary evacuation, as those terms are defined in the Act.

(e)(1) *Waiver of Defenses.* In the event of a nuclear incident, as defined in the Act, arising out of nuclear waste activities, as defined in the Act, the contractor, on behalf of itself and other persons indemnified, agrees to waive any issue or defense as to charitable or governmental immunity.

(2) In the event of an extraordinary nuclear occurrence which:

(i) Arises out of, results from, or occurs in the course of the construction, possession, or operation of a production or utilization facility; or

(ii) Arises out of, results from, or occurs in the course of transportation of source material, by-product material, or special nuclear material to or from a production or utilization facility; or

(iii) Arises out of or results from the possession, operation, or use by the contractor or a subcontractor of a device utilizing special nuclear material or by-product material, during the course of the contract activity; or

(iv) Arises out of, results from, or occurs in the course of nuclear waste activities, the contractor, on behalf of itself and other persons indemnified, agrees to waive:

(A) Any issue or defense as to the conduct of the claimant (including the conduct of persons through whom the claimant derives its cause of action) or fault of persons indemnified, including, but not limited to:

1. Negligence;

2. Contributory negligence;

3. Assumption of risk; or

4. Unforeseeable intervening causes, whether involving the conduct of a third person or an act of God;

(B) Any issue or defense as to charitable or governmental immunity; and

(C) Any issue or defense based on any statute of limitations, if suit is instituted within 3 years from the date on which the claimant first knew, or reasonably could have known, of his injury or change and the cause thereof. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. The waiver shall be judicially enforceable in accordance with its terms by the claimant against the person indemnified.

(v) The term *extraordinary nuclear occurrence* means an event which DOE has determined to be an extraordinary nuclear occurrence as defined in the Act. A determination of whether or not there has been an extraordinary nuclear occurrence will be made in accordance with the procedures in 10 CFR part 840.

(vi) For the purposes of that determination, "offsite" as that term is used in 10 CFR part 840 means away from "the contract location" which phrase means any DOE facility, installation, or site at which contractual activity under this contract is being carried on, and any contractor-owned or controlled facility, installation, or site at which the contractor is engaged in the performance of contractual activity under this contract.

(3) The waivers set forth above:

(i) Shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action;

(ii) Shall be judicially enforceable in accordance with its terms by the claimant against the person indemnified;

(iii) Shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages;

(iv) Shall not apply to injury or damage to a claimant or to a claimant's property which is intentionally sustained by the claimant or which results from a nuclear incident intentionally and wrongfully caused by the claimant;

(v) Shall not apply to injury to a claimant who is employed at the site of and in connection with the activity where the extraordinary nuclear occurrence takes place, if benefits therefor are either payable or required to be provided under any workmen's compensation or occupational disease law;

(vi) Shall not apply to any claim resulting from a nuclear incident occurring outside the United States;

(vii) Shall be effective only with respect to those obligations set forth in this clause and in insurance policies, contracts or other proof of financial protection; and

(viii) Shall not apply to, or prejudice the prosecution or defense of, any claim or portion of claim which is not within the protection afforded under (A) the limit of liability provisions under subsection 170e. of the Act, and (B) the terms of this agreement and the terms of insurance policies, contracts, or other proof of financial protection.

(f) *Notification and litigation of claims.* The contractor shall give immediate written notice to DOE of any known action or claim filed or made against the contractor or other person indemnified for public liability as defined in paragraph (d)(2). Except as otherwise directed by DOE, the contractor shall furnish promptly to DOE, copies of all pertinent papers received by the contractor or filed with respect to such actions or claims. DOE shall have the right to, and may collaborate with, the contractor and any other person indemnified in the settlement or defense of any action or claim and shall have the right to (1) require the prior approval of DOE for the payment of any claim that DOE may be required to indemnify hereunder; and (2) appear through the Attorney General on behalf of the contractor or other person indemnified in any action brought upon any claim that DOE may be required to indemnify hereunder, take charge of such action, and settle or defend any such action. If the settlement or defense of any such action or claim is undertaken by DOE, the contractor or other person indemnified shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

(g) *Continuity of DOE obligations.* The obligations of DOE under this clause shall not be affected by any failure on the part of the contractor to fulfill its obligation under this contract and shall be unaffected by the death, disability, or termination of existence of the contractor, or by the completion, termination or expiration of this contract.

(h) *Effect of other clauses.* The provisions of this clause shall not be limited in any way by, and shall be interpreted without reference to, any other clause of this contract, including the clause entitled Contract Disputes, provided, however, that this clause shall be subject to the clauses entitled Covenant Against Contingent Fees, Officials Not to Benefit, and Examination of Records by the Comptroller General, and any provisions that are later added to this contract as required by applicable Federal law, including statutes, executive orders and regulations, to be included in Nuclear Hazards Indemnity Agreements.

(i) *Civil penalties.* The contractor and its subcontractors and suppliers who are indemnified under the provisions of this clause are subject to civil penalties, pursuant to 234A of the Act, for violations of applicable DOE nuclear-safety related rules, regulations, or orders.

(j) *Criminal penalties.* Any individual director, officer, or employee of the contractor or of its subcontractors and suppliers who are indemnified under the provisions of this clause are subject to criminal penalties, pursuant to 223(c) of the Act, for knowing and willful violation of the Atomic Energy Act of 1954, as amended, and applicable DOE nuclear safety-related rules, regulations or orders which violation results in, or, if undetected, would have resulted in a nuclear incident.

(k) *Inclusion in subcontracts.* The contractor shall insert this clause in any subcontract which may involve the risk of public liability, as that term is defined in the Act and further described in paragraph (d)(2) above. However, this clause shall not be included in subcontracts in which the subcontractor is subject to Nuclear Regulatory Commission (NRC) financial protection requirements under section 170b. of the Act or NRC agreements of indemnification under section 170c. or k. of the Act for the activities under the subcontract.

Effective date

( ) See Note II below for instructions related to this section on Effective Date.

Relationship to general indemnity

( ) See Note III below for instructions related to this section on Relationship to General Indemnity.

(End of clause)

Note I

Paragraph (i) of the clause will be replaced with "Reserved" in contracts specifically exempted from civil penalties by section 234 of the Act. That subsection provides that the following DOE contractors are not subject to the assessment of civil penalties:

(1) The University of Chicago (and any subcontractors or suppliers thereto) for activities associated with Argonne National Laboratory;

(2) The University of California (and any subcontractors or suppliers thereto) for activities associated with Los Alamos National Laboratory, Lawrence Livermore National Laboratory, and Lawrence Berkeley National Laboratory;

(3) American Telephone and Telegraph Company and its subsidiaries (and any subcontractors or suppliers thereto) for activities associated with Sandia National Laboratories;

(4) Universities Research Association, Inc. (and any subcontractors or suppliers thereto) for activities associated with FERMI National Laboratory;

(5) Princeton University (and any subcontractor or suppliers thereto) for activities associated with Princeton Plasma Physics Laboratory;

(6) The Associated Universities, Inc. (and any subcontractors or suppliers thereto) for activities associated with the Brookhaven National Laboratory; and

(7) Battelle Memorial Institute (and any subcontractors or suppliers thereto) for activities associated with Pacific Northwest Laboratory.

(End of note)

Note II

Contracts with an effective date after the date of (date to be that of the Final Rule resulting from the proposed rule herein), do not require the effective date provision in this clause. Delete the title.

Use the EFFECTIVE DATE title and the following language, for those contracts:

"( ) This indemnity agreement shall be applicable with respect to nuclear incidents occurring on or after ——."

(1) Those that contained an indemnity pursuant to Public Law 85–840 prior to August 20, 1988, include the effective date provision above, inserting the effective date of the contract modification that replaced the Public Law 85–804 indemnity with an interim Price-Anderson based indemnity. Pursuant to the Price-Anderson Amendments Act, this substitution must have taken place by February 20, 1989.

(2) Those that contained, and continue to contain, either of the previous Nuclear Hazards Indemnity clauses, include the effective date provision above, inserting "August 20, 1988."

(3) Those with an effective date between August 20, 1988, and the date of the Final Rule, that (a) had "interim coverage" or (b) did not have "interim coverage" but have now been determined to be covered under the PAAA, include the effective date provision above, inserting the contract effective date.

Note III

The following alternate will be added to the above Nuclear Hazards Indemnity Agreement clause for all contracts that contain a general authority indemnity pursuant to 950.7101. Caution: Be aware that for contracts that will have this provision added which do not contain an effective date provision, this paragraph shall be marked (1). In the event an Effective Date provision has been included, it shall be market (m).

"( ) To the extent that the contractor is compensated by any financial protection, or is indemnified pursuant to this clause, or is effectively relieved of pubic liability by an order or orders limiting same, pursuant to 170e of the Act, the provisions of the clause providing general authority indemnity shall not apply."

(End of note)

952.250–71 [Removed and Reserved]

15. Section 952.250–71 is removed and reserved.

952.250–72 [Removed and Reserved]

16. Section 952.250–72 is removed and reserved.

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

17. The authority citation for part 970 continues to read as follows:

Authority Sec. 161 of the Atomic Energy Act of 1954 (42 U.S.C. 2201), sec. 644 of the Department of Energy Organization Act, Pub. L. 95–91 (42 U.S.C 7254), sec. 201 of the Federal Civilian Employee and Contractor Travel Expenses Act of 1985 (41 U.S.C. 420) and section 1534 of the Department of Defense Authorization Act, 1986, Public Law 99–45 (42 U.S.C. 7256a), as amended.

18. Section 970.2870 is revised to read as follows:

970.2870 Indemnification.

(a) Section 170d. of the Atomic Energy Act of 1954, as amended, requires DOE to enter into agreements of indemnity with contractors whose work involves the risk of public liability for the occurrence of a nuclear incident or precautionary evacuation.

(b) Details of such indemnification are discussed in more detail at § 950.70.

(c) The clause at § 970.5204–6 shall be included in all management and operating contracts involving the risk of public liability for the occurrence of a nuclear incident or precautionary evacuation arising out of or in connection with the contract work, including such events caused by a product delivered to a DOE-owned, facility for use by DOE or its contractors. The clause at § 970.5204–6 also shall be included in any management and operating contract for the design of a DOE facility, the construction or operation of which may involve the risk of public liability for a nuclear incident or a precautionary evacuation.

(d) However, the clause at § 952.250–70 shall not be included in contracts in which the contractor is subject to Nuclear Regulatory Commission (NRC) financial protection requirements under section 170b. of the Act or NRC agreements of indemnification under section 170 c. or k. of the Act for activities to be performed under the contract.

(e) DOE contractors with whom statutory nuclear hazards indemnity agreements under the authority of section 170d. of the Atomic Energy Act of 1954, as amended, are executed will not normally be required or permitted to furnish financial protection by purchase of insurance to cover public liability for nuclear incidents. However, if authorized by the DOE headquarters office having responsibility for contractor casualty insurance programs, DOE contractors may be (1) permitted to furnish financial protection to themselves or (2) permitted to continue to carry such insurance at cost to the Government if they currently maintain insurance for such liability.

970.5204–7 [Removed and Reserved]

19. Section 970.5204–7 is removed and reserved.

970.5204–8 [Amended]

20. Section 970.5204–8 is amended by replacing the phrase "production or utilization" in the section heading with "nuclear."

[FR Doc. 91–27239 Filed 11–13–91; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 572

[Docket No. 89–03; Notice 02]

RIN 2127–AC09

Anthropomorphic Test Dummies—6-Year-Old Child

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Final rule.

SUMMARY: This notice establishes specifications for a 6-year-old child test dummy to be used in testing restraints (i e., booster seats) for older children. The 6-year-old dummy is instrumented for measuring inertial responses due to impact forces. This rule sets performance criteria as calibration checks to assure the repeatability and reproducibility of the dummy's dynamic performance. NHTSA believes that standardizing the dummy used to test booster seats will enable NHTSA and the child passenger safety community to evaluate the restraints in a fuller and more uniform manner. Adding the dummy to part 572 is a possible first step toward using the dummy to test the compliance of booster seats and other types of child restraint systems with Safety Standard 213, Child Restraint Systems. The issue of using the dummy in FMVSS 213 testing will be explored in future rulemaking.

DATES: The amendment is effective on May 12, 1992. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of May 12, 1992.

Petitions for reconsideration of the final rule must be received by December 16, 1991.

ADDRESSES: Petitions for reconsideration should refer to the docket number and notice number of the notice and be submitted to: Administrator, room 5220, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Stan Backaitis, Office of Vehicle Safety Standards, NRM–12, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590, (202) 366–4912.

SUPPLEMENTARY INFORMATION: This notice amends part 572, Anthropomorphic Test Dummies, to establish specifications and performance criteria for a dummy representing a 6-year-old child. Child test dummies such as the 6-year-old one enable NHTSA to dynamically test child restraint systems in a manner that is both measurable and repeatable. The 6-year-old dummy will help NHTSA and the child passenger safety community test restraints for older children in a fuller and more uniform manner.

NHTSA already has two child dummies specified in part 572 for testing child restraint systems. The two dummies, a 6-month-old and a 3-year-old child dummy, are used to dynamically test restraint systems to the requirements of Federal Motor Vehicle Safety Standard 213, Child Restraint Systems (49 CFR 571.213; SS7.1, 7.2).

Today's final rule is part of NHTSA's effort to add to the child dummies specified in part 572. In addition to proposing specifications for the 6-year-old dummy, NHTSA has proposed a 9-month-old child dummy (54 FR 53425; December 21, 1989), and intends to propose a newborn infant dummy. NHTSA plans to initiate rulemaking on the desirability of amending Standard 213 to specify the use of these additional dummies in compliance tests. Whether and how to proceed with such rulemaking will be decided after NHTSA adds the new dummies to part 572.

Summary of the Final Rule

The specifications for the 6-year-old dummy (commercially known as SA106C) consist of a drawing package that: Shows the component parts, the subassemblies, and the assembly of the complete dummy; defines materials and material treatment process of all the dummy's component parts; and specifies the dummy's instrumentation and instrument installation methods. The specifications also include a set of master patterns for all molded and cast parts of the dummy. Those patterns make possible the rapid reproduction of those parts. In addition, there is a user's manual containing disassembly, inspection, and assembly procedures, and a dummy drawing list. These drawings and specifications ensure that the dummies will vary little from each other in their construction.

The dummy is capable of being instrumented with accelerometers for measurement of accelerations in the head and chest during dynamic testing. The rule specifies the manner and location of instrumentation installation to reduce variability in measurements resulting from differences in location and mounting. In addition, the rule has provisions for mounting load cells in the femurs to measure impact forces transmitted through the knees.

Impact performance criteria serve as calibration checks and further assure that the dummy is appropriately assembled, adjusted and instrumented for repeatable impact response. The dummies are equipped with photographic targets attached to the head and knees to facilitate the recording of its kinematic motions.

Drawings and specifications for the dummy are available for examination in Docket 78–09 in NHTSA's Docket Section. Copies of those materials and the user's manual can be obtained form Reprographic Technologies, 1111 14th Street, NW., Washington, DC, 20005, telephone (202) 628–6667 or (202) 408–8789. In addition, patterns for all cast and molded parts are available for loan from NHTSA's Office of Vehicle Safety Standards.

Background

NHTSA published a notice of proposed rulemaking (NPRM) for the 6-year-old dummy on April 6, 1989 (54 FR 23901). The agency explained in the NPRM that the proposed test dummy is base don a Humanoid Systems (now First Technologies, Inc.) 6-year-old child dummy. The proposed dummy was chosen over other available test dummies that represent a 6-year-old child: The Alderson Research Laboratories dummy, the Sierra Engineering dummy, and the TNO P–6 dummy used by Economic Commission for Europe (ECE) countries. These dummies were evaluated by NHTSA and found unsuitable for the reasons fully discussed in the NPRM.

The agency determined that the SA106C dummy, which in general concept is a reduced version of the 50th percentile Hybrid II test dummy (referenced in 49 CFR part 572, subpart B), was suitable as produced by its manufacturer in most, but not all aspects. For example, the anthropometric measurements compared well with a 50th percentile 6-year-old child. However, NHTSA found that the dummy's head, neck, chest and lumbar spine needed some minor modifications to give more human-like (biofidelic) responses during dynamic tests. At the request of NHTSA, Humanoid adjusted the dummy and made some minor modifications to achieve the sought-after dynamic impact responses.

The agency issued the proposal because NHTSA believed a standardized 6-year-old-dummy is necessary to obtain better information about the protection afforded by child restraints to an under-examined child age/size group. Having a series of child dummies representing a fuller range of ages/sizes is important because the ability of a restraint to protect a child depends in part on the size of that child. A child restraint is designated by its manufacturer as being suitable for use by children of particular specified sizes and weight. For example, an infant seat may be designated for newborns to about 20 pounds; a convertible seat, from birth to about 40 pounds; and a booster seat, from about 40 to 60 pounds. Booster seats are commonly tested with the 3-year-old (33 pounds) test dummy, because that dummy is the larger of the two dummies currently

specified in part 572. While booster seats are useful for restraining children who have outgrown a convertible or toddler seat but who cannot be properly restrained by the vehicle's belts, not enough is known about the ability of all booster seats and other designated restraint systems to provide adequate crash protection to children older and larger than a 3-year-old.

This rulemaking responds in part to the desire expressed through the years by the safety community for the agency to explore the issues concerning the protection of these older children. In a 1986 Standard 213 rulemaking, commenters voiced the concern that the shields on shield-type booster seats were too small to protect an older child's head and upper body in a crash. In a final report issued in 1988, the agency reported results of dynamic tests of short-shield booster seats. The test data showed that when the seats were tested with a 6-year-old dummy, some performance measurements exceeded the maximum values permitted by Standard 213 for restraints tested with the 3-year-old dummy. ("Evaluation of the Performance of Child Restraint Systems," DTNH22–82–A–47046.)

The need for testing child restraints with child surrogates representing low, middle and upper weight ranges was a concern echoed in 1988 at two public meetings on child passenger safety. (See 53 FR 24934, June 28, 1988, and Docket 88–11.) A number of commenters suggested that the surrogates would encourage the development of child restraint systems that safely perform for the largest practical range of weights. NHTSA issued the April 1989 proposal in the belief that specifying a 6-year-old dummy is a step in that direction.

Comments on the NPRM

NHTSA received comments on the proposal from Chrysler Motors, the Insurance Institute for Highway Safety, General Motors Corporation (GM), Ford Motor Company, and Volvo Cars of North America. All the commenters generally supported establishing specifications for a 6-year-old child test dummy for testing child seats. However, Ford and GM expressed concerns about particular aspects of the proposed NHTSA/Humanoid dummy.

After reviewing the comments on the NPRM, NHTSA conducted additional sled and component testing of the test dummy to address the issues raised in the comments. ("Technical Support to the Six-Year-Old Dummy NPRM, VRTC–80–0161, October 1990.") This notice refers to these additional tests as the "post-NPRM" tests. Six sled tests were performed using the specified dummy restrained in two types of booster restraint systems. The boosters were designed for use with either the vehicle's three-point belt system or lap-belt only. A number of dummy components were also tested, including necks, lumbar spines and abdominal inserts. This final rule is based on the data discussed in the NPRM, data and information submitted in the comments, and data from the post-NPRM sled and component test program.

Biofidelity

Ford and GM believed that the NHTSA/Humanoid dummy lacks biofidelity. (Biofidelity refers to how well a test dummy duplicates the responses of a human in an impact.) GM said that it obtained two Humanoid 6-year-old dummies in 1987 that had the same basic design as the NHTSA/Humanoid dummy. GM said that, based on its tests of one of the dummies in belt restraint systems and on "the dummy's development history," the dummy lacks a reasonable and appropriate level of biofidelity. GM believed that the dummies upon which the NHTSA/Humanoid dummy is based, the Hybrid-II and the 3-year-old dummy (49 CFR part 572, subparts B and C), lack sufficient biofidelity. GM also said there were "inherent limitations of the dummy design that limited the benefit of the information the dummy provided in testing." The commenter said that the dummy's pelvis hindered assessment of a child's "submarining" out of a child restraint, because the pelvis design is that of a standing child. (Submarining refers to a child sliding, feet first, forward and under a restraining belt during a crash.) In addition, GM said that the dummy is "not sophisticated enough to permit other important injury assessment (e.g., neck injury)."

Ford was concerned about the dummy's thorax and neck. Ford said that the proposed thorax limitation of 60 g's is based on repeatability and reproducibility studies rather than on biomechanical data from children. The commenter said that the dummy's ribs were not designed to account for the lower stiffness that child ribs have compared to an adult. Ford believed the dummy's neck lacks biofidelity because the neck is scaled from the neck of the Hybrid-II dummy, which, Ford believes, is not human-like. The commenter said that "the lack of child-like biofidelity would result in incorrect dummy head excursions and overall dummy kinematics, which could lead to child restraint system designs which met excursion criteria for the dummy, but were not protective of children."

Based on their belief that the NHTSA/Humanoid dummy is not sufficiently human-like, Ford and GM suggested that the dummy should be discarded in favor of a new 6-year-old child dummy that is being developed at Ohio State University (OSU). The OSU dummy is based on the Hybrid-III 50th percentile adult male dummy, which Ford and GM believed has a better biomechanical basis for its frontal impact responses than the Hybrid-II dummy. Ford said that OSU has improved the biofidelity of the child dummy's thorax by established scaling techniques from the 50th percentile adult male Hybrid-III dummy. With respect to the neck, the commenter said that the response of the Hybrid-III neck is closer to human neck response than is the Hybrid-II neck. Ford and GM suggested that NHTSA should delay adding specifications for a 6-year-old child dummy until the OSU program is completed and the Hybrid-III child dummy is evaluated.

NHTSA believes that the proposed SA106C dummy is an appropriate child surrogate for establishing the adequacy of a designated restraint. GM objected to the dummy because the surrogate's design specifications and performance requirements are similar in type to the part 572 3-year-old dummy. GM expressed a general objection to the 3-year-old dummy, stating that "the history of (that dummy's) development indicates to us that it also lacked biofidelity * * *," without elaborating on the statement. By way of background information, the agency notes that Humanoid based the development of specifications for the SA106C dummy on those of the 3-year-old dummy, and also integrated the best available anthropometric, mass distribution and motion range data appropriate for that age population. The impact responses take into account the larger masses and longer limbs of a 6-year-old, and the differences in neck and spine stiffness and in the mass to stiffness ratio of the thorax. The specifications for the SA106C dummy also adjust the head skin and flesh relative to the mass of the skull to produce the required impact response.

The agency believes the 3-year-old child dummy was an appropriate starting base for the 6-year-old dummy. The 3-year-old dummy has been considered a valid child surrogate for child restraint testing for over a decade. GM did not provide any information to support its claim that the 3-year-old dummy lacks biofidelity or is otherwise inadequate for the evaluation of child restraint systems.

The accelerometers in the head and chest of the SA106C are of the same class as in the head and chest of the 3-year-old. NHTSA does not know of any reason why the injury assessment parameters recorded by the 3-year-old child surrogate would be inappropriate for the 6-year-old dummy. The design of the SA106C dummy, by virtue of having correct anthropometry, mass distribution and correct motion ranges between body segments, ensures that the dummy will load the system as a 6-year-old child would, with appropriate inertial forces and in proper kinematic sequence. If, in a crash test, the specified injury limits were exceeded, it would be reasonable to assume that the 6-year-old dummy loaded the restraint system with enough severity to injure a real world child occupant.

The accelerometer data provide useful information on how the restraint system responds to impact loading. In the post-NPRM dynamic tests, the dummy showed an excellent ability to correlate excessive head excursions and high HIC values. See Table 13 of VRTC–80–0161, October 1990.

Ford and GM might be correct that the Hybrid-III type 6-year-old dummy (which has yet to be completed and evaluated) might eventually have potential advantages over the NHTSA/Humanoid dummy in the number of parameters the dummies can measure. However, NHTSA does not believe that this rulemaking should be delayed to further consider the potential advantages of future dummies. The SA106C dummy's ability to measure HIC, chest acceleration and femur loads, and its ability to replicate the impact motions and excursions of a child in a crash are sufficient to provide valid assessment of the injury potential of child restraint systems in a reliable manner. Since the SA106C dummy is ready now, and a final rule specifying the dummy will help improve safety, the agency believes it is appropriate to proceed with adding the dummy to part 572. NHTSA intends to evaluate the Hybrid-III type 6-year-old dummy after the dummy's design and development are completed and the dummy is commercially available.

Repeatability

Ford commented that the test report referenced in the NPRM appeared to show that the NHTSA/Humanoid dummy provides repeatable results in sled and calibration tests. (Repeatability refers to the reproduction of impact responses for the same dummy.) However, Ford said that some of the sled test head and chest data have pulse shapes that are not "unimodal." ("Unimodal" refers to an acceleration-time curve that has only one prominent peak and a smooth transition from initiation of acceleration to peak and from peak to end of acceleration. Sharp, extremely short-time signal disturbances in the curve are called "spikes." A unimodal curve suggests a single causative force acting on the dummy's head, while the presence of a spike(s) superimposed on a unimodal curve may suggest the possibility of either multiple forces acting on the head, or other types of data distortions. Some of the distortions may be caused by non-crash events, such as electrical interferences, static discharges, amplifier missettings, overloaded sensors, etc. They also may be of mechanical origin. These non-crash spikes, if they occur during the crash event and cannot be removed by appropriate filtering, may complicate the dummy's ability to provide useful data.)

Ford asked whether the spikes it had noted in the data were noise, or whether they were caused by a crash event. NHTSA conducted 12 sled tests in the post-NPRM program to study the acceleration-time curves. In impacts of a 3-point belt restrained dummy, spikes occurred in the head and chest acceleration signals in the 64 to 68 millisecond range, and were caused by the dummy's chin impacting the chest. Chin to chest impacts have also been observed with the part 572 adult dummies. The spike in the 6-year-old dummy data raised the Head Injury Criterion (HIC) value only by about 30 points in an average response of approximately 500 HIC. The chest response was not affected by this small impact response distortion.

The agency does not believe that the spikes caused by the chin to chest impacts negatively affect the dummy's usefulness as a child restraint system test device. The chin-to-chest contacts only occurred with 3-point belts, and not with booster seats and other child restraint systems. Moreover, even with 3-point belt systems, the spike appears to be of negligible consequence because it increases what seems to be relatively low HIC numbers by only a small amount. Of course, the agency will take appropriate action to address problems with the data spikes if they occur and are critical in the resolution of the problem.

Reproducibility

GM said that it did not conduct performance calibration tests on its second dummy to evaluate reproducibility. ("Reproducibility" refers to the variation of dummy responses among different dummies.) However, GM asked about apparent "larger than desirable * * * dispersions in some of the dummy-to-dummy performance measurement comparisons" that the commenter noted in a report referenced in the NPRM. ("Establishment of the Repeatability of Performance of the Six-Year Old Child Test Dummies," DOT HS 806–741, September 1984.) GM said that the report shows that some coefficients of variation were greater than 10 percent.

The data in question were generated when NHTSA tested four test dummies. The data showed that the results for five dummy parameters (head acceleration, chest acceleration, femur load, neck bending, and lumbar spine bending) were reproducible within 11.6 percent. As noted in the NPRM, those test results compare favorably with the performance of the 3-year-old dummy and adult part 572 subpart B dummy. NHTSA believes the 11.6 percent variability is within the acceptable bounds of performance of other dummies. NHTSA also expects the variability to improve once the dummy is built in volume from production tooling.

Calibration Procedures

Head/Neck

GM said that the procedure for locating the test probe relative to the impact point on the dummy forehead should be clarified, because as written, the probe contacts the dummy's nose and not its forehead.

The agency agrees. GM's comment was confirmed in NHTSA's post-NPRM testing. The impactor location problems were caused by conflicts in definitions of the "Z" axis (inferior-superior) of the dummy's head. In one section of the NPRM (§ 572.52(c)(2)(i)), the Z axis was described as the longitudinal centerline of the skull anchor, while in another (Figure 6C–1 in the NPRM, now Figure 40), it was described as the tangent line between the dummy's back and the buttocks, in the transverse vertical plane. The head test procedure calls for the test probe to be adjusted so that its longitudinal centerline is 2.8 ± 0.1 inches below the top of the head measured along the Z axis. When the probe is positioned according to the first definition of the Z axis, the probe contacts the bridge of the dummy's nose before it hits the forehead.

The agency believes the problem will be corrected by slight revisions to the procedure. The probe is properly positioned using the Z axis described in Figure 40. Accordingly, NHTSA has removed the words "longitudinal center line of the skull anchor" from

§ 572.72(c)(2)(i). (§ 572.52 of the NPRM.) Further, the impact location is changed from 2.6±0.1 to 2.7±0.1 inches below the top of the head. Also, § 572.52(c)(3) of the NPRM has been removed. That section had specified that the dummy should be adjusted "so that the surface area of the forehead immediately adjacent to the projected longitudinal center line of the test probe is vertical." If the dummy is not adjusted, the head is forward about 15 degrees, which, together with the other changes to the dummy's positioning and the test procedure, ensures probe contact with the forehead and not the nose.

As mentioned above, GM said that there was variation in the pendulum pulse for the head-neck calibration procedure. GM said that the ability to decelerate the pendulum on which the head/neck assembly is mounted appears to depend on the number of aluminum hexcel cells. GM believed that the proper deceleration pulse could be obtained most of the time, but not every time using 27 cells. GM suggested NHTSA improve the consistency of obtaining the specified deceleration.

In response to this comment, NHTSA tested six head-neck assemblies in the post-NPRM program. Except for the decaying portion of the acceleration-time curve (T_4-T_3), all tests showed the pendulum crush pulse to be highly repeatable. The agency could not improve the T_4-T_3 portion of the curve, because T_4-T_3 is not controlled by either the type, number of cells or thickness of the hexcell. However, the agency believes that allowing for more time to get from T_4 to T_3—from "not more than 4 milliseconds (ms)" to "not more than 6 ms"—would address the problem of the repeatability of the deceleration rate. In all of NHTSA's tests, T_4-T_3 was not more than 6 ms. The agency does not believe that the change would have any significant effect on the rotation of the neck because at time T_3, nearly all of the pendulum's forward translational motion has ceased.

In its comment, GM said that its dummy did not meet the proposed peak neck rotation requirement, and surmised that this was because the dummy's neck may have stiffened with age.

In NHTSA's post-NPRM program, the agency found that most of the necks rotated less than the amount that had been specified in the NPRM. However, the agency does not want to specify more flexibility of the neck because a more flexible neck would increase the frequency of the dummy head-to-chest impacts in dynamic tests. Instead, the agency has changed the neck rotation criteria to better reflect the actual performance of the dummy's neck. Accordingly, the peak rotation angle is changed from 83±6 to 78±6 degrees, and the time specified to reach 60 degrees of rotation is changed from 39±5.1 to 44±5 milliseconds.

Thorax Assembly

GM said that its dummy did not meet the proposed lateral acceleration limit of 5g for the thorax assembly in pendulum tests. GM believed that the inability was due to resonances in the thorax lateral accelerometer. (A resonance is a natural vibrational state of a system or a subsystem (e.g., an accelerometer mount), that can magnify the acceleration readings of the test dummy and thus prevent accurate measurement of true accelerations.)

NHTSA found in its post-NPRM testing that there was evidence of resonance in the lateral accelerometer signal. However, the resonance was not great enough to cause the lateral acceleration to exceed 5g, after being filtered to channel class 180. Nevertheless, the agency decided to further minimize the effects of resonance by use of a 0.25 inch thick pad of Ensolite AL material placed between the dummy's chest flesh and sternum, which is used routinely in other part 572 dummies. A specification for the pad has been added to the drawings for the dummy.

The Ensolite pad reduced the lateral accelerometer ringing problem to well below the specified 5g response limit. NHTSA also determined that the pad had the effect of decreasing the dummy's peak resultant spine accelerations from an average of 55g to 48g, with a coefficient of variation of 5.4 percent. In accordance with that change in performance, the agency has adjusted specifications for the peak resultant accelerations from the 50g–60g range, to not less than 43g and not more than 53g.

Femurs

GM said that its dummy generally met the proposed femur force calibration performance specifications. However, GM noted that in one of its initial tests of a femur, the force recorded was below the minimum proposed in the NPRM. In subsequent tests, the force recorded was higher, within the proposed corridor. GM believed that the low impact response value in the first test was caused by excessive clearance (a loose fit) between the load cells and the bolts that attach the load cells to the femurs. GM believed that the first impact that had resulted in the low response value may have closed up the clearance, which accounted for the higher values in the subsequent tests. GM suggested that using shoulder bolts, rather than straight shank bolts with threads cut all the way to the bolt head, may remove some of the clearance and produce more consistent results.

The agency has not experienced the "clearance" effects in its own tests and doesn't believe the rule need to require the use of special design bolts. If low femur values are widely recorded in the future, and if correcting those values with a second impact is determined to be undesirable or ineffective, NHTSA will consider the appropriateness of specifying the above noted shoulder bolts.

Lumbar Spine and Abdomen

Ford believed a complex lumbar spine calibration test is unnecessary to measure the flexion torque. Ford argued that the spine can vary considerably in stiffness without having a significant effect on the kinematics of the dummy's head and chest because bending moments imposed by these components during impact are considerably larger than those measured in quasi-static testing. Ford recommended that the rule specify a simple bench test of the spine assembly, in which the assembly is rotated in 90 degree increments and a moment is applied to the assembly by applying a force at the end of an arm. "This would ensure that the spine has neither internal structural cracks nor excessive deviations from nominal characteristics."

The agency believes the proposed lumbar spine stiffness test should be retained in the rule. The importance of differences in spine stiffness on a dummy's bending kinematics is probably reduced when the spine is subjected to the considerable forces generated by the head and chest in a crash test. However, NHTSA has observed that spine stiffness is important to enable the dummy to sit properly upright during its set-up with the car seat and also during the instant prior to impact. The stiffness requirement would make the dummy easier to use in the laboratory in a uniform manner. Also, NHTSA has observed that spine stiffness is important for controlling the rotational kinematics around the vertical axis of the dummy's upper torso relative to the lower torso. Thus, a spine stiffness test would help ensure consistency in rotational kinematics in dynamic tests, which may have a positive effect on the dummy's overall repeatability and reproducibility.

The spine stiffness test procedure proposed in the NPRM is based on the lumbar spine, abdomen and pelvis

specifications for the already existing 3-year-old child dummy (49 CFR 572.19). Since NHTSA is not aware that the test is unduly burdensome or problematic for the 3-year-old, the agency has adopted that test procedure also for the SA106C dummy.

GM suggested that the abdominal insert should be softer than the proposed insert to allow the dummy to bend more. However, GM did not provide, and NHTSA is not aware of, any information showing the superiority of one level of abdominal softness over another.

The design of the abdominal insert and the material selection are based on the Hybrid-II dummy. The insert's purpose is to fill the space between the ribcage and the pelvic bone with a reasonably flexible medium, that would provide some support for the belt system, help retain the alignment between upper and lower halves of the torso, and provide the least resistance to flexion between the two torso halves around the lumbar spine. The proposed abdominal insert meets those goals.

Foot Support

During dummy calibration tests, NHTSA observed that the 12.7 inches floor plane was too low to support the feet of the seated dummy as specified in Figure 44 (Figure 6C–4 in the NPRM). To assure that the dummy's feet rest on the floor as specified in the calibration procedure, the floor plane elevation is changed to 11 inches.

Instrumentation

Ford suggested that NHTSA modify the specifications for the dummy's accelerometers to make them "comparable to the specifications for the Hybrid-II and Hybrid-III accelerometers." The proposed specifications call for a two-arm piezoresistive bridge in the accelerometer, which Ford said would be incompatible with the Ford On-board Data Acquisition System. Ford suggested that the rule specify a four-arm bridge, to facilitate compatibility with the Ford system.

NHTSA declines to make the suggested changes, in order to avoid further complications of the already very complex accelerometer and instrumentation specifications issues. All of the agency's evaluations of the SA106C dummy were carried out with the designated accelerometer system. Further, given that the same sensors are specified for use in the part 572 3-year-old dummy, NHTSA knows that the designated senors will perform satisfactorily in dynamic tests. It is unclear why Ford would experience hardship with the accelerometer system for the 6-year-old when, to the agency's knowledge, Ford does not have a problem with the same sensor system specified for the 3-year-old child dummy. The agency also points out that a manufacturer may use a different sensor system if it so chooses. If in fact the manufacturer's preferred system produces the same test results as the specified system, as is the case for the four-arm versus two-arm bridge systems, there appears to be no compelling need to specify the manufacturer's preferred system in the regulation.

Other Issues

Anthropometry Values

Ford noted that the anthropometric values provided in Safety Standard 208, Occupant Crash Protection (49 CFR 571.208) for a 6-year-old child differ slightly from the values provided in the NPRM for the NHTSA/Humanoid dummy. Ford believed the values should be consistent to avoid confusion.

The commenter is correct that there are small differences in the hip breath, hip circumference and waist circumference measurements provided in the NPRM and in Standard 208. The NPRM dimensions (hip circumference smaller by 1.8 inches, waist by 0.7 inches) generally specify a slightly more slender dummy torso. NHTSA plans to update the Standard 208 dimensions in a separate rulemaking.

Pelvis

NHTSA concurs with GM that the NHTSA/Humanoid dummy's pelvis does not appear to realistically assess the submarining potential of a lap belt system. This is because there is a gap at the pelvis-femur juncture into which the lap belt can wedge. The agency does not believe the gap will be a problem for testing child restraints, because shield-type restraints and "Y" harnesses do not wedge into the gap. For those restraint systems that use lap belts or three-point belt restraints to contain the child dummy, an apron-like shield covering the gap can be used to prevent the lap belt from becoming wedged into the pelvis-femur gap.

Air Bag and Pedestrian Safety

Ford believed that the SA106C dummy should not be used to evaluate the performance of passenger air bag systems because the dummy is not sensitive enough to detect forces that could harm a child. The commenter believed that the Hybrid-III based dummy would also lack specialized instrumentation needed to evaluate the performance of air bag systems. The commenter also expressed concern about the use of the NHTSA/Humanoid dummy in pedestrian research. According to Ford, the dummy's thorax is not biofidelic in frontal or lateral impacts and the legs lack instrumentation to measure knee and leg bending moments.

NHTSA anticipates using the dummy for child restraint testing purposes only. The next step in the agency's rulemaking plan for the dummy is to consider whether to amend Standard 213 to require use of the dummy in compliance testing. Ford's comments on how the dummy should or should not be used are premature and are not germane to today's final rule.

Harmonization

Ford stated that international harmonization would be furthered by adopting the Hybrid-III type 6-year-old (OSU) dummy. According to the commenter, while the ECE 6-year-old dummy has biofidelic limitations, "a common ground for harmonization could be provided by specifying the Ohio State 6-year-old child dummy."

NHTSA does not understand why Ford believes the OSU dummy would further harmonization. In any event, if information becomes available that shows that the OSU dummy will benefit harmonization, the agency will give this matter further consideration.

Terminology

NHTSA is amending "unimodal" as defined in § 572.4(c) to apply the term to subpart I, the specifications for the 6-year-old dummy. "Unimodal" means an acceleration-time curve that has only one prominent peak. Subpart I uses the term "unimodal" in a fashion similar to the way it is used in subpart C, the specifications for the 3-year-old child dummy. That is, both specify that the acceleration-time curve for the head assembly test is "unimodal at or above the 50g level," and for the thorax assembly test, "unimodal at or above the 30g level." However, § 572.4(c) applies by its terms only to subpart C. This amendment applies the term to both subparts C and I.

Rulemaking Analyses and Notices

Executive Order 12291 (Federal Regulation) and DOT Regulatory Policies and Procedures

NHTSA has considered costs and other factors associated with this rule, and concludes that this rule is neither major within the meaning of Executive Order 12291 nor significant within the meaning of the Department of

Transportation's regulatory policies and procedures.

The specifications established by this final rule are intended to facilitate the evaluation of crash protection afforded to children of the height and weight of an average 6-year-old. The dummy will provide better test data on protection of older children (approximately 4 through 8 years old) than any other currently-specified part 572 child dummies. Today's final rule does not require any manufacturer to produce or use the dummy. Further, it does not specify the use of that dummy by the agency in Standard 213 compliance testing. The agency will not undertake such use without first thoroughly evaluating and discussing such use and its costs and other impacts and seeking public comments in a separate rulemaking.

The 1991 price of an uninstrumented SA106C dummy is $15,350. (The currently specified 3-year-old dummy costs about $10,840.) Since the dummy is designed to be reusable, its cost can be amortized over a number of tests. Adopting the 6-year-old dummy specifications would impose no requirements on vehicle or child restraint manufacturers, and would result only in a nominal cost increase in products if manufacturers choose to test with the device. For these reasons, the agency has determined that the economic effects of the proposed amendments are so minimal that a full regulatory evaluation is not required.

Regulatory Flexibility Act

NHTSA has considered the impact of this rulemaking action under the Regulatory Flexibility Act. I hereby certify that this rule would not have a significant economic impact on a substantial number small entities. The SA106C dummy is commercially available from First Technology Safety Systems in Plymouth, Michigan, which is currently the sole manufacturer of this dummy. Adopting the dummy into part 572 will have no impact on the manufacturers of motor vehicles or restraint systems, since the dummy is not required in any compliance requirements in this rulemaking. If and when the SA106C dummy is adopted for Standard 213 testing, there would not be a significant impact on a substantial number of small entities, because NHTSA anticipates that only nine to 15 dummies would be procured in the first year, with replacements of only approximately three dummies every year thereafter. NHTSA believes this number is so small that it would be unlikely that other companies, including small businesses, would find production of this dummy profitable. NHTSA also believes that use of the dummy would not affect the sales or use of other currently-specified part 572 child dummies, since the latter ones would continue to be used in testing child restraint systems. Small organizations and small governmental jurisdictions that deal with automotive child safety will not be significantly affected since the rule will not affect the purchase price of child restraint systems. In view of the above, the agency has not prepared a final regulatory flexibility analysis.

Executive Order 12612

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

National Environmental Policy Act

NHTSA has analyzed this rulemaking action for the purposes of the National Environmental Policy Act. The agency has determined that implementation of this action will not have any significant impact on the quality of the human environment.

Regulatory Information Number

A regulatory information number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 572

Motor vehicle safety, Incorporation by reference.

In consideration of the foregoing, NHTSA amends 49 CFR part 572 as follows:

PART 572—[AMENDED]

1. The authority citation for part 572 continues to read as follows:

Authority: 15 U.S.C. 1392, 1401, 1403, and 1407; delegation of authority at 49 CFR 1.50.

2. Subpart A is amended by revising § 572.4(c) to read as follows:

§ 572.4 Terminology.

* * * * *

(c) The term "unimodal," when used in subparts C and I, refers to an acceleration-time curve which has only one prominent peak.

3. Subpart I, consisting of §§ 572.70 through 572.78, is added to read as follows:

Subpart I—6-Year-Old Child

572.70 Incorporation by reference.
572.71 General description.
572.72 Head assembly and test procedure.
572.73 Neck assembly and test procedure.
572.74 Thorax assembly and test procedure.
572.75 Lumbar spine, abdomen, and pelvis assembly and test procedure.
572.76 Limbs assembly and test procedure.
572.77 Instrumentation.
572.78 Performance test conditions.
Figures to subpart I

Subpart I—6-Year-Old Child

§ 572.70 Incorporation by reference.

(a) The drawings and specifications referred to in §§ 572.71(a) and 572.71(b) are hereby incorporated in subpart I by reference. These materials are thereby made part of this regulation. The Director of the Federal Register approved the materials incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the materials may be inspected at NHTSA's Docket Section, 400 Seventh Street, SW., room 5109, Washington, DC, or at the Office of the Federal Register, 1100 L St., NW., room 8401, Washington, DC.

(b) The incorporated material is available as follows:

(1) Drawing number SA 106 C001 sheets 1 through 18, and the drawings listed in the parts lists described on sheets 8 through 17, are available from Reprographic Technologies, 1111 14th Street, NW., Washington, DC 20005, (202) 628–6667.

(2) A User's Manual entitled, "Six-Year-Old Size Child Test Dummy SA106C," October 28, 1991, is available from Reprographic Technologies at the address in paragraph (b)(1) of this section.

(3) SAE Recommended Practice J211, Instrumentation for Impact Test, June 1988, is available from the Society of Automotive Engineers, Inc., 400 Commonwealth Drive, Warrendale, PA 15096–0001.

§ 572.71 General description.

(a) The representative 6-year-old dummy consists of a drawings and specifications package that contains the following materials:

(1) Technical drawings and specifications package SA 106C 001, containing drawing number SA 106 C001 sheets 1 through 18, and the drawings listed in the parts lists described on sheets 8 through 17; and,

(2) A user's manual entitled, "Six-Year-Old Size Child Test Dummy SA106C," October 28, 1991.

(b) The dummy is made up of the component assemblies set out in the following Table A:

TABLE A

	Drawing title
SA 106C 010	Head Assembly.
SA 106C 020	Neck Assembly.
SA 106C 030	Thorax Assembly.
SA 106C 041	Arm Assembly (Right Arm).
SA 106C 042 (also includes picture of assembled parts).	Arm Assembly (Left Arm).
SA 106C 050	Lumbar Spine Assembly.
SA 106C 060 (also includes picture of assembled parts).	Pelvis Assembly.
SA 106C 071	Leg Assembly (Right Leg).
SA 106C 072 (also includes picture of assembled parts).	Leg Assembly (Left Leg).

(c) Adjacent segments are joined in a manner such that except for contacts existing under static conditions, there is no contact between metallic elements throughout the range of motion or under simulated crash-impact conditions.

(d) The structural properties of the dummy are such that the dummy conforms to this Part in every respect both before and after its use in any test similar to those specified in Standard 213, Child Restraint Systems.

§ 572.72 Head assembly and test procedure.

(a) *Head assembly.* The head consists of the assembly designated as SA 106 010 on drawing No. SA 106C 001, sheet 2, and conforms to each drawing listed on SA 106C 001, sheet 8.

(b) *Head assembly impact response requirements.* When the head is impacted by a test probe conforming to § 572.77(a)(1) at 7 feet per second (fps) according to the test procedure in paragraph (c) of this section, then the resultant head acceleration measured at the location of the accelerometer installed in the headform according to § 577.77(b) is not less than 130g and not more than 160g.

(1) The recorded acceleration-time curve for this test is unimodal at or above the 50g level, and lies at or above that level for an interval not less than 1.0 and not more than 2.0 milliseconds.

(2) The lateral acceleration vector does not exceed 5g.

(c) *Head test procedure.* The test procedure for the head is as follows:

(1) Seat and orient the dummy on a seating surface having a back support as specified in § 572.78(c), and adjust the joints of the limbs at any setting (between 1g and 2g) which just supports the limbs' weight when the limbs are extended horizontally and forward.

(2) Adjust the test probe so that its longitudinal center line is—

(i) At the forehead at the point of orthogonal intersection of the head midsagittal plane and the transverse plane which is perpendicular to the Z axis of the head as shown in Figure 40;

(ii) Located 2.7±0.1 inches below the top of the head measured along the Z axis, and;

(iii) Coincides within 2 degrees with the line made by the intersection of the horizontal and midsagittal planes passing through this point.

(3) Impact the head with the test probe so that at the moment of contact the probe's longitudinal center line falls within 2 degrees of a horizontal line in the dummy's midsagittal plane.

(4) Guide the test probe during impact so that there is no significant lateral, vertical, or rotational movement.

(5) Allow at least 60 minutes between successive head tests.

§ 572.72 Neck assembly and test procedure.

(a) *Neck assembly.* The neck consists of the assembly designated as SA 106C 020 on drawing SA 106C 001, sheet 2, and conforms to each drawing listed on SA 106C 001, sheet 9.

(b) *Neck assembly impact response requirements.* When the head-neck assembly (SA 106C 010 and SA 106C 020) is tested according to the test procedure in § 572.73(c), the head:

(1) Shall rotate, while translating in the direction of the pendulum preimpact flight, in reference to the pendulum's longitudinal center line a total of 78 degrees±6 degrees about the head's center of gravity; and

(2) Shall rotate to the extent specified in Table B at each indicated point in time, measured from time of impact, with the chordal displacement measured at the head's center of gravity.

(i) Chordal displacement at time "T" is defined as the straight line distance between the position relative to the pendulum arm of the head's center of gravity at time "zero;" and the position relative to the pendulum arm of the head's center of gravity at time T as illustrated by Figure 3 in § 572.11.

(ii) The peak resultant acceleration recorded at the location of the accelerometers mounted in the headform according to § 572.77(b) shall not exceed 30g.

TABLE B

Rotation (degrees)	Time (ms)±(2+.08T)	Chordal displacement (inches)±0.8
0	0	0
30	26	2.7
60	44	4.3
Maximum	68	5.8
60	101	4.4
30	121	2.4
0	140	0

(3) The pendulum shall not reverse direction until the head's center of gravity returns to the original "zero" time position relative to the pendulum arm.

(c) *Neck test procedure.* The test procedure for the neck is as follows:

(1) Mount the head and neck assembly on a rigid pendulum as specified in § 572.21, Figure 15, so that the head's midsagittal plane is vertical and coincides with the plane of motion of the pendulum's longitudinal center line. Attach the neck directly to the pendulum as shown in § 572.21, Figure 15.

(2) Release the pendulum and allow it to fall freely from a height such that the velocity at impact is 17.00±1.0 fps, measured at the center of the accelerometer specified in § 572.21, Figure 15.

(3) Decelerate the pendulum to a stop with an acceleration-time pulse described as follows:

(i) Establish 5g and 20g levels on the a-t curve.

(ii) Establish t_1 at the point where the rising a-t curve first crosses the 5g level; t_2 at the point where the rising a-t curve first crosses the 20g level; t_3 at the point where the decaying a-t curve last crosses the 20g level; and t_4 at the point where the decaying a-t curve first crosses the 5g level.

(iii) $t_2 - t_1$ shall not be more than 3 milliseconds.

(iv) $t_3 - t_2$ shall not be more than 22 milliseconds, and not less than 19 milliseconds.

(v) $t_4 - t_3$ shall not be more than 6 milliseconds.

(vi) The average deceleration between t_2 and t_3 shall not be more than 26g, or less than 22g.

(4) Allow the neck to flex without the head or neck contacting any object other than the pendulum arm.

(5) Allow at least 60 minutes between successive tests.

§ 572.74 Thorax assembly and test procedure.

(a) *Thorax assembly.* The thorax consists of the part of the torso

assembly designated as SA 106C 030 on drawing SA 106C 001, sheet 2, and conforms to each applicable drawing on SA 106C 001, sheets 10 and 11.

(b) *Thorax assembly requirements.* When the thorax is impacted by a test probe conforming to § 572.77(a) to 20±0.3 fps according to the test procedure in paragraph (c) of this section, the peak resultant accelerations at the accelerometers mounted in the chest cavity according to § 572.77(c) shall not be less than 43g and not more than 53g.

(1) The recorded acceleration-time curve for this test shall be unimodal at or above the 30g level, and shall lie at or above that level for an interval not less than 4 milliseconds and not more than 6 milliseconds.

(2) The lateral accelerations shall not exceed 5g.

(c) *Thorax test procedure.* The test procedure for the thorax is as follows:

(1) Seat and orient the dummy on a seating surface without back support as specified in § 572.78(c), and adjust the joints of the limbs at any setting (between 1g and 2g) which just supports the limbs' weight when the limbs are extended horizontally and forward, parallel to the midsagittal plane.

(2) Establish the impact point at the chest midsagittal plane so that the impact point is 2.25 inches below the longitudinal center of the clavicle retainer screw, and adjust the dummy so that the longitudinal center line of the No. 3 rib is horizontal.

(3) Place the longitudinal center line of the test probe so that it coincides with the designated impact point, and align the test probe so that at impact, the probe's longitudinal center line coincides (within 2 degrees) with the line formed at the intersection of the horizontal and midsagittal planes and passing through the designated impact point.

(4) Impact the thorax with the test probe so that at the moment of contact the probe's longitudinal center line falls within 2 degrees of a horizontal line in the dummy's midsagittal plane.

(5) Guide the test probe during impact so that there is no significant lateral, vertical, or rotational movement.

(6) Allow at least 30 minutes between successive tests.

§ 572.75 Lumbar spine, abdomen, and pelvis assembly and test procedure.

(a) *Lumbar spine, abdomen, and pelvis assembly.* The lumbar spine, abdomen, and pelvis consist of the part of the torso assembly designated as SA 106C 50 and 60 on drawing SA 106C 001, sheet 2, and conform to each applicable drawing listed on SA 106C 001, sheets 12 and 13.

(b) *Lumbar spine, abdomen, and pelvis assembly response requirements.* When the lumbar spine is subjected to a force continuously applied according to the test procedure set out in paragraph (c) of this section, the lumbar spine assembly shall—

(1) Flex by an amount that permits the rigid thoracic spine to rotate from the torso's initial position, as defined in (c)(3), by 40 degrees at a force level of not less that 46 pounds and not more than 52 pounds, and

(2) Straighten upon removal of the force to within 5 degrees of its initial position when the force is removed.

(c) *Lumbar spine, abdomen, and pelvis test procedure.* The test procedure for the lumbar spine, abdomen, and pelvis is as follows:

(1) Remove the dummy's head-neck assembly, arms, and lower legs, clean and dry all component surfaces, and seat the dummy upright on a seat as specified in Figure 42.

(2) Adjust the dummy by—

(i) Tightening the femur ballflange screws at each hip socket joint to 50 inch-pounds torque;

(ii) Attaching the pelvis to the seating surface by a bolt D/605 as shown in Figure 42.

(iii) Attaching the upper legs at the knee joints by the attachments shown in drawing Figure 42.

(iv) Tightening the mountings so that the pelvis-lumbar joining surface is horizontal; and

(v) Removing the head and neck, and installing a cylindrical aluminum adapter (neck adapter) of 2.0 inches diameter and 2.60 inches length as shown in Figure 42.

(3) The initial position of the dummy's torso is defined by the plane formed by the rear surfaces of the shoulders and buttocks which is three to seven degrees forward of the transverse vertical plane.

(4) Flex the thorax forward 50 degrees and then rearward as necessary to return the dummy to its initial torso position, unsupported by external means.

(5) Apply a forward pull force in the midsagittal plane at the top of the neck adapter so that when the lumbar spine flexion is 40 degrees, the applied force is perpendicular to the thoracic spine box.

(i) Apply the force at any torso deflection rate between 0.5 and 1.5 degrees per second, up to 40 degrees of flexion.

(ii) For 10 seconds, continue to apply a force sufficient to maintain 40 degrees of flexion, and record the highest applied force during the 10 second period.

(iii) Release all force as rapidly as possible, and measure the return angle 3 minutes after the release.

§ 572.76 Limbs assembly and test procedure.

(a) *Limbs assembly.* The limbs consist of the assemblies designated as SA 106C 041, SA 106C 042, SA 106C 071, and SA 106C 072, on drawing No. SA 106C 001, sheet 2, and conform to each applicable drawing listed on SA 106C 001, sheets 14 through 17.

(b) *Limbs assembly impact response requirement.* When each knee is impacted at 7.0±0.1 fps, according to paragraph (c) of this section, the maximum force on the femur shall not be more than 1060 pounds and not less than 780 pounds, with a duration above 400 pounds of not less than 0.8 milliseconds.

(c) *Limbs test procedure.* The test procedure for the limbs is as follows:

(1) Seat and orient the dummy without back support on a seating surface that is 11±0.2 inches above a horizontal (floor) surface as specified in § 572.78(c).

(i) Orient the dummy as specified in Figure 43 with the hip joint adjustment at any setting between 1g and 2g.

(ii) Place the dummy legs in a plane parallel to the dummy's midsagittal plane with the knee pivot center line perpendicular to the dummy's midsagittal plane, and with the feet flat on the horizontal (floor) surface.

(iii) Adjust the feet and lower legs until the line between the midpoint of each knee pivot and each ankle pivot is within 2 degrees of the vertical.

(2) If necessary, reposition the dummy so that at the level one inch below the seating surface, the rearmost point of the dummy's lower legs remains not less than 3 inches and not more than 6 inches forward of the forward edge of the seat.

(3) Align the test probe specified in § 572.77(a) with the longitudinal center line of the femur force gauge, so that at impact, the probe's longitudinal center line coincides with the sensor's longitudinal center line within ±2 degrees.

(4) Impact the knee with the test probe moving horizontally and parallel to the midsagittal plane at the specified velocity.

(5) Guide the test probe during impact so that there is no significant lateral, vertical, or rotational movement.

§ 572.77 Instrumentation.

(a)(1) *Test probe.* For the head, thorax, and knee impact test, use a test probe that is rigid, of uniform density and weighs 10 pounds and 6 ounces, with a

diameter of 3 inches; a length of 13.8 inches; and an impacting end that has a rigid flat right face and edge radius of 0.5 inches.

(2) The head and thorax assembly may be instrumented either with a Type A or Type B accelerometer.

(i) Type A accelerometer is defined in drawing SA 572 S1.

(ii) Type B accelerometer is defined in drawing SA 572 S2.

(b) *Head accelerometers.* (1) Install accelerometers in the head as shown in drawing SA 106C 001 sheet 1 using suitable spacers or adaptors as needed to affix them to the horizontal transverse bulkhead so that the sensitive axes of the three accelerometers intersect at the point in the midsagittal plane located 0.4 inches below the intersection of a line connecting the longitudinal center lines of the roll pins in either side of the dummy's head with the head's midsagittal plane.

(2) The head has three orthogonally mounted accelerometers aligned as follows:

(i) Align one accelerometer so that its sensitive axis is perpendicular to the horizontal bulkhead in the midsagittal plane.

(ii) Align the second accelerometer so that its sensitive axis is parallel to the horizontal bulkhead, and perpendicular to the midsagittal plane.

(iii) Align the third accelerometer so that its sensitive axis is parallel to the horizontal bulkhead in the midsagittal plane.

(iv) The seismic mass center for any of these accelerometers may be at any distance up to 0.4 inches from the axial intersection point.

(c) *Thoracic accelerometers.* (1) Install accelerometers in the thoracic assembly as shown in drawing SA 106C 001, sheet 1, using suitable spacers and adaptors to affix them to the frontal surface of the spine assembly so that the sensitive axes of the three accelerometers intersect at a point in the midsagittal plane located 0.95 inches posterior of the spine mounting surface, and 0.55 inches below the horizontal centerline of the two upper accelerometer mount attachment hole centers.

(2) The sternum-thoracic assembly has three orthogonally mounted accelerometers aligned as follows:

(i) Align one accelerometer so that its sensitive axis is parallel to the attachment surface in the midsagittal plane.

(ii) Align the second accelerometer so that its sensitive axis is parallel to the attachment surface, and perpendicular to the midsagittal plane.

(iii) Align the third accelerometer so that its sensitive axis is perpendicular to the attachment surface in the midsagittal plane.

(iv) The seismic mass center for any of these accelerometers may be at any distance up to 0.4 inches of the axial intersection point.

(d) *Femur-sensing device.* Install a force-sensing device SA 572–S10 axially in each femur shaft as shown in drawing SA 106C 072 and secure it to the femur assembly so that the distance measured between the center lines of two attachment bolts is 3.00 inches.

(e) *Limb joints.* Set the limb joints at lg, barely restraining the limb's weight when the limb is extended horizontally, and ensure that the force required to move the limb segment does not exceed 2g throughout the limb's range of motion.

(f) *Recording outputs.* Record the outputs of acceleration and force-sensing devices installed in the dummy and in the test apparatus specified in this Part, in individual channels that conform to the requirements of SAE Recommended Practice J211, October 1988, with channel classes as set out in the following Table C.

TABLE C

Device	Channel
Head acceleration	Class 1000
Pendulum acceleration	Class 60
Thorax acceleration	Class 180
Femur-force	Class 600

The mountings for sensing devices shall have no resonance frequency within a range of 3 times the frequency range of the applicable channel class.

§ 572.78 Performance test conditions.

(a) Conduct performance tests at any temperature from 66 °F to 78 °F, and at any relative humidity from 10 percent to 70 percent, but only after having first exposed the dummy to these conditions for a period of not less than 4 hours.

(b) For the performance tests specified in § 572.72 (head), § 572.74 (thorax), § 572.75 (lumbar spine, abdomen, and pelvis), and § 572.76 (limbs), position the dummy as set out in paragraph (c) of this section.

(c) Place the dummy on a horizontal seating surface covered by teflon sheeting so that the dummy's midsagittal plane is vertical and centered on the test surface.

(1) The seating surface is flat, rigid, clean, and dry, with a smoothness not exceeding 40 microinches, a length of at least 16 inches, and a width of at least 16 inches.

(2) For head impact tests, the seating surface has a vertical back support whose top is 12.4±0.2 inches above the horizontal surface, and the rear surfaces of the dummy's back and buttocks touch the back support as shown in Figure 40.

(3) For the thorax, lumbar spine, and knee tests, the horizontal surface is without a back support as shown in Figure 41 (for the thorax); Figure 42 (for the lumbar spine); and Figure 43 (for the knee).

(4) Position the dummy's arms and legs so that their center lines are in planes parallel to the midsagittal plane.

(5) Adjust each shoulder yoke so that with its upper surface horizontal, a yoke is at the midpoint of its anterior-posterior travel.

(6) Adjust the dummy for head and knee impact tests so that the rear surfaces of the shoulders and buttocks are tangent to a transverse vertical plane.

(d) The dummy's dimensions are specified in drawings SA 106C 001, sheets 3 through 6.

(e) Unless otherwise specified in this regulation, performance tests of the same component, segment, assembly or fully assembled dummy are separated in time by a period of not less than 20 minutes.

(f) Unless otherwise specified in this regulation, the surfaces of the dummy components are not painted.

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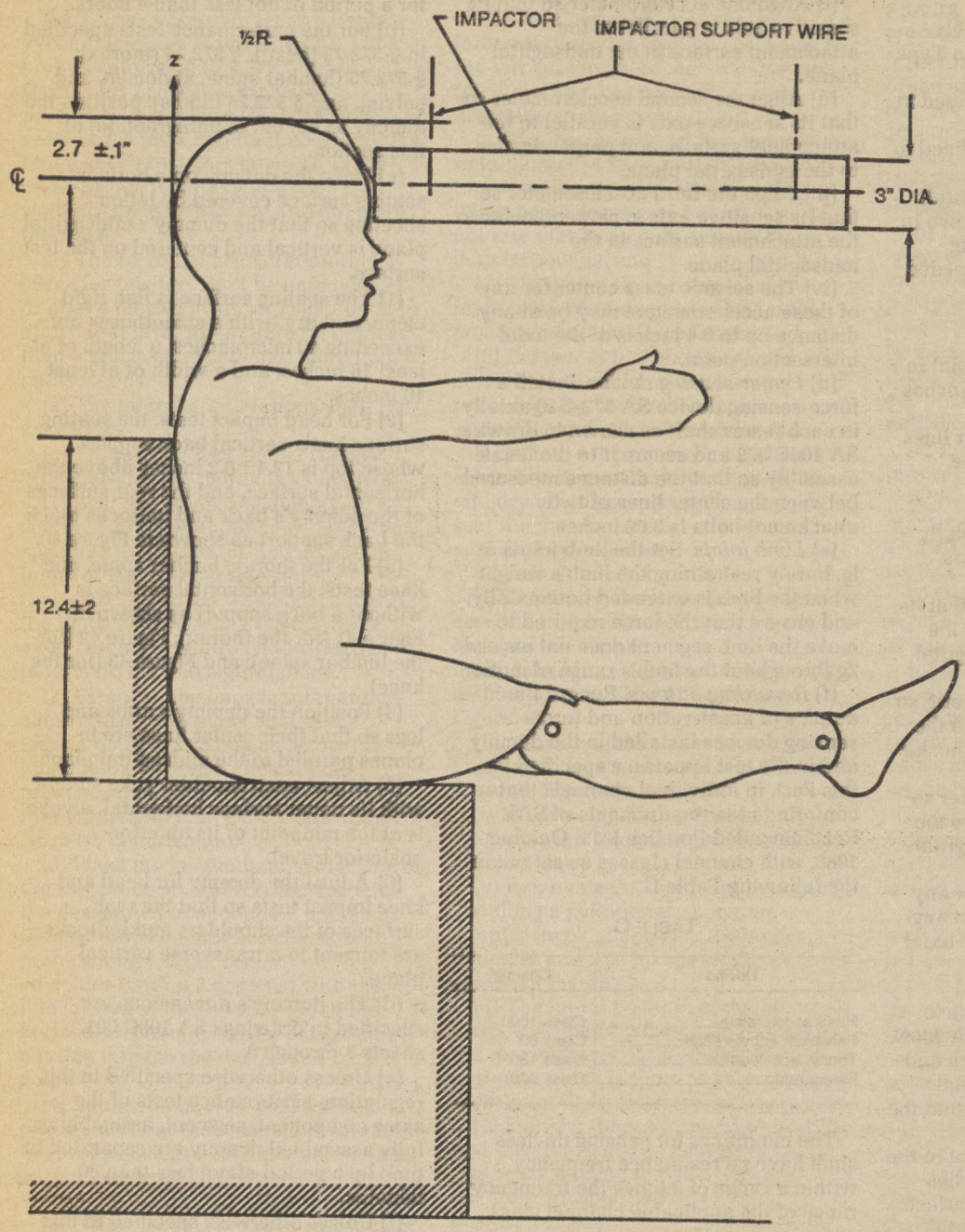
FIGURE 40
HEAD IMPACT TEST SET-UP

43



NOTES: 1. DUMMY IMPACT SENSORS NOT USED IN THIS TEST MAY BE REPLACED BY EQUIVALENT DEAD WEIGHTS.

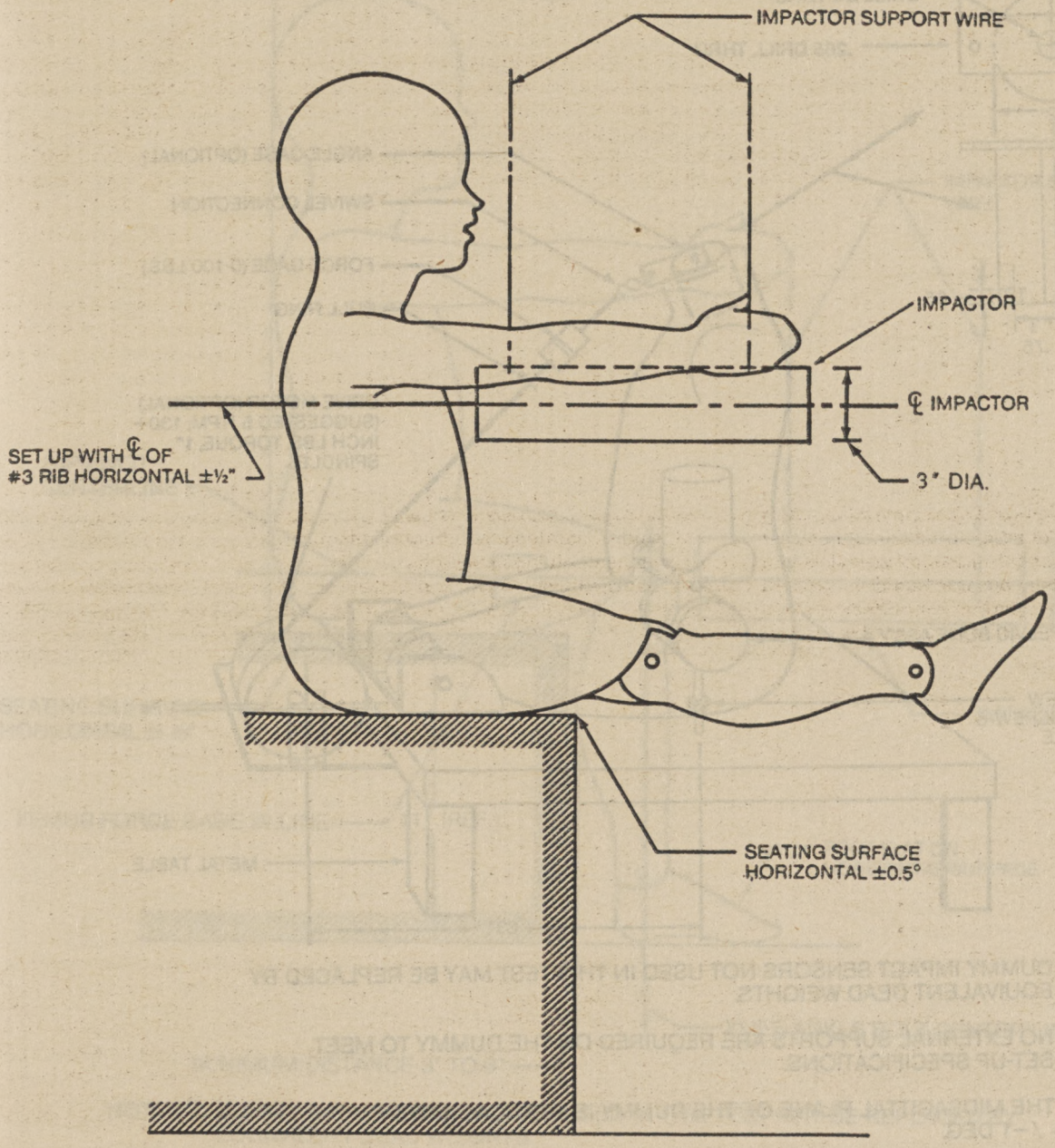
2. NO EXTERNAL SUPPORTS ARE REQUIRED ON THE DUMMY TO MEET SET-UP SPECIFICATIONS.

3. THE MIDSAGITTAL PLANE OF THE DUMMY IS VERTICAL WITHIN +/−1 DEG.

4. THE MIDSAGITTAL PLANE OF THE HEAD IS CENTERED WITH RESPECT TO THE LONGITUDINAL CENTERLINE OF THE PENDULUM WITHIN 0.12 IN.

44

FIGURE 41
THORAX IMPACT TEST SET-UP



NOTES: 1. DUMMY IMPACT SENSORS NOT USED IN THIS TEST MAY BE REPLACED BY EQUIVALENT DEAD WEIGHTS.

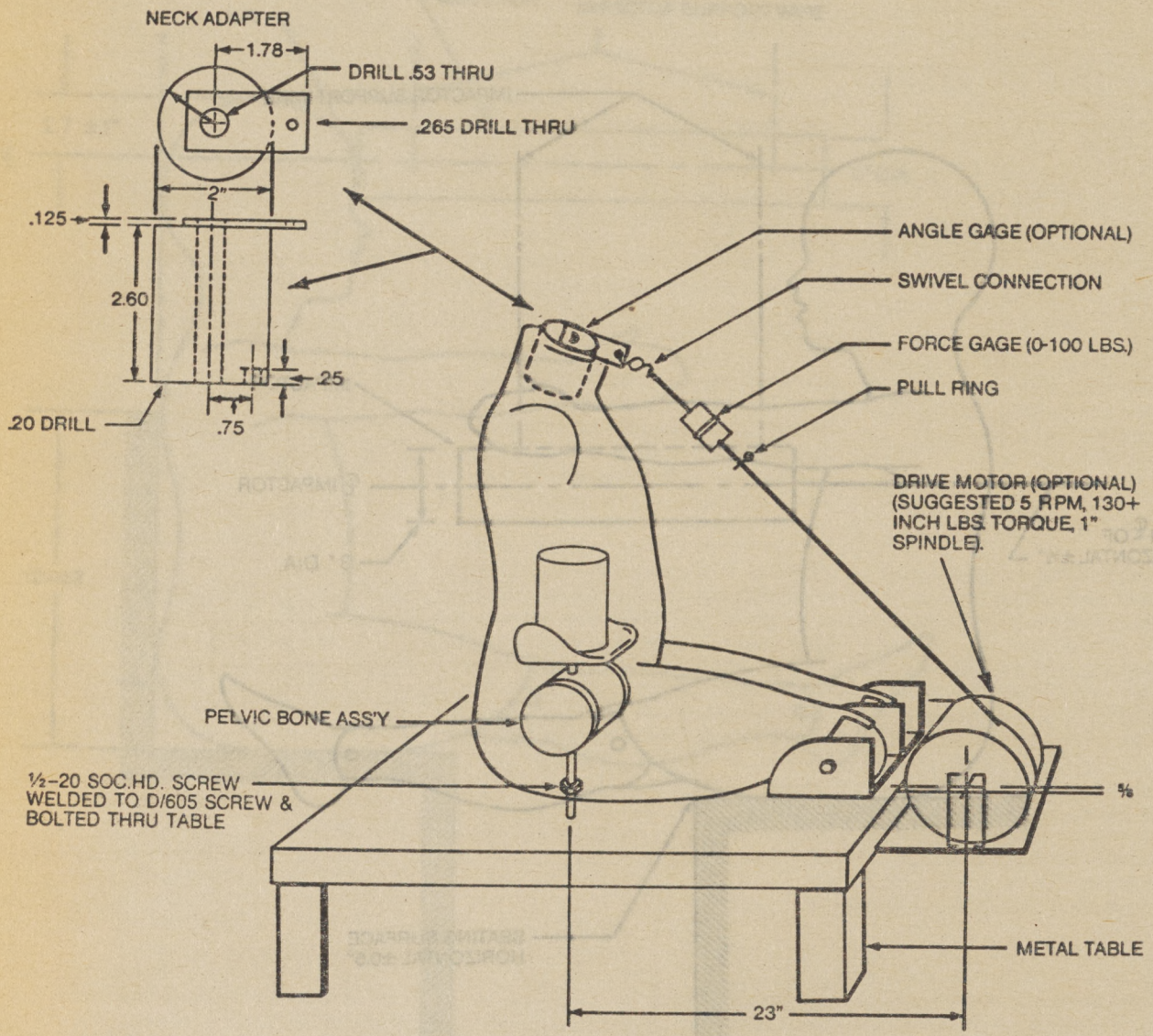
2. NO EXTERNAL SUPPORTS ARE REQUIRED ON THE DUMMY TO MEET SET-UP SPECIFICATIONS.

3. THE MIDSAGITTAL PLANE OF THE DUMMY IS VERTICAL WITHIN +/−1 DEG.

4. THE MIDSAGITTAL PLANE OF THE THORAX IS CENTERED WITH RESPECT TO THE LONGITUDINAL CENTERLINE OF THE PENDULUM WITHIN 0.12 IN.

45

FIGURE 42
LUMBAR SPINE FLEXION TEST SET-UP



NOTES: 1. DUMMY IMPACT SENSORS NOT USED IN THIS TEST MAY BE REPLACED BY EQUIVALENT DEAD WEIGHTS.

2. NO EXTERNAL SUPPORTS ARE REQUIRED ON THE DUMMY TO MEET SET-UP SPECIFICATIONS.

3. THE MIDSAGITTAL PLANE OF THE DUMMY IS VERTICAL WITHIN + /−1 DEG.

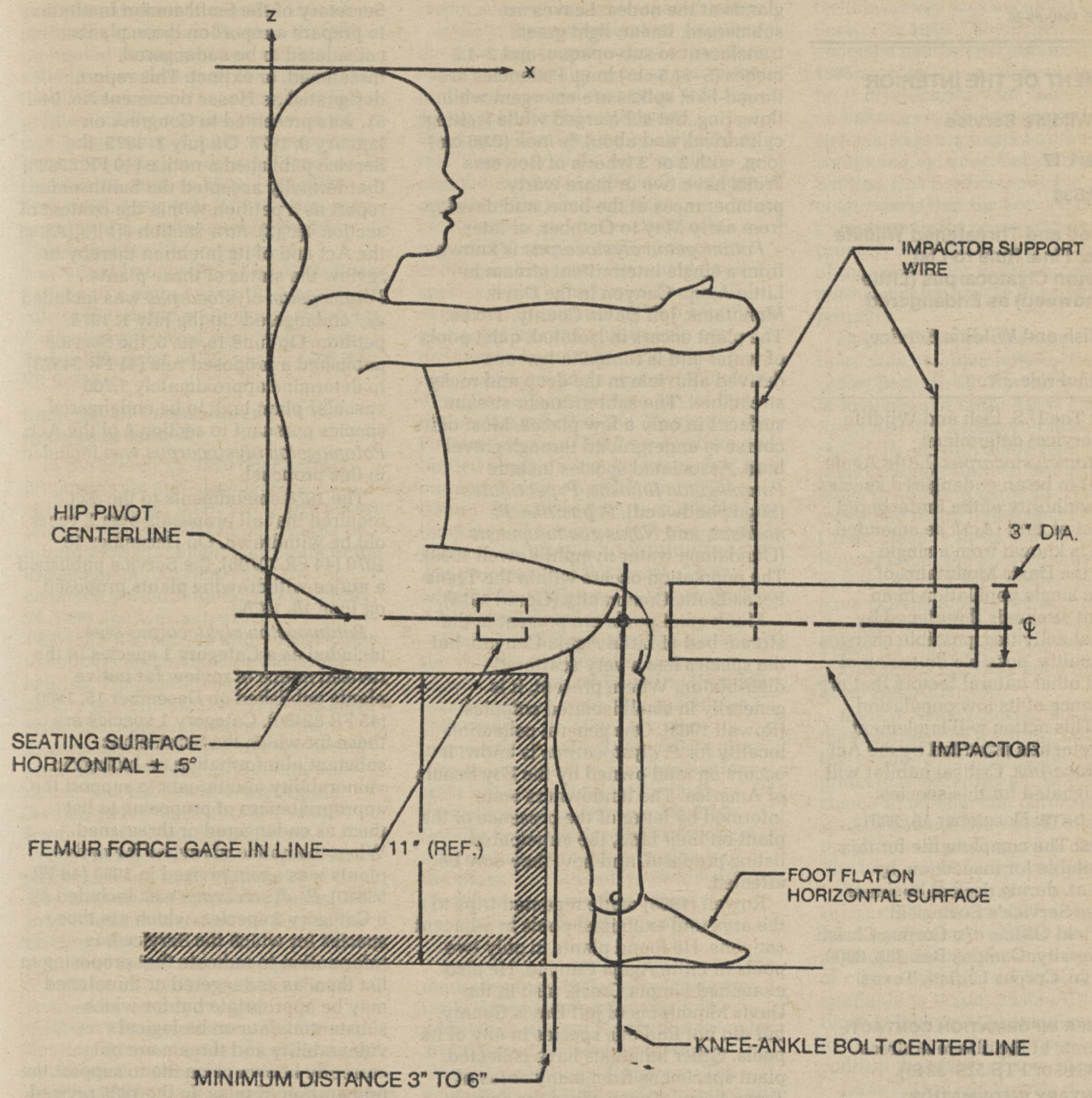
4. THE DUMMY IN THE SEATED POSITION IS FIRMLY AFFIXED TO THE TEST BENCH AT THE PELVIC BONE AND AT THE KNEES.

5. THE PULL-FLEXION FORCE, APPLIED THROUGH A RIGID NECK ADAPTOR WHICH IS MOUNTED ON TOP OF THE THORACIC STERNUM ASSEMBLY (C/601), IS ALIGNED WITH THE MIDSAGITTAL PLANE OF THE DUMMY WITHIN +/−1 DEG.

6. THE SWIVEL FOR THE FORCE MEASURING SENSOR MUST NOT BIND OR BOTTOM OUT THROUGH THE ENTIRE LOADING CYCLE.

46

FIGURE 43
KNEE IMPACT TEST SET-UP



NOTES: 1. DUMMY IMPACT SENSORS NOT USED IN THIS TEST MAY BE REPLACED BY EQUIVALENT DEAD WEIGHTS.

2. NO EXTERNAL SUPPORTS ARE REQUIRED ON THE DUMMY TO MEET SET-UP SPECIFICATIONS.

3. THE MIDSAGITTAL PLANE OF THE DUMMY IS VERTICAL WITHIN +/−1 DEG.

4. CENTERLINE OF THE IMPACTED FEMUR IS ALIGNED WITH THE CENTERLINE OF THE IMPACTOR AND THE PLANE OF THE IMPACTOR MOTION WITHIN +/−1 DEG.

BILLING CODE 4910-59-C

Issued on November 6, 1991.

Jerry Ralph Curry,

Administrator.

[FR Doc. 91-27099 Filed 11-13-91; 8:45 am]

BILLING CODE 4910-59-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AB38

Endangered and Threatened Wildlife and Plants; Final Rule to List Potamogeton Clystocarpus (Little Aguja Pondweed) as Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service) determines *Potamogeton clystocarpus* (Little Aguja pondweed) to be an endangered species under the authority of the Endangered Species Act of 1973 (Act), as amended. This plant is known from a single canyon in the Davis Mountains of Texas. The single population in an intermittent stream is threatened by recreational activities, possible changes in water quality, possible diversion of water, and other natural factors that are a consequence of its low population numbers. This action will implement Federal protection provided by the Act for *P. clystocarpus*. Critical habitat will not be designated for this species.

EFFECTIVE DATE: December 16, 1991.

ADDRESSES: The complete file for this rule is available for inspection, by appointment, during normal business hours at the Service's Ecological Services Field Office, c/o Corpus Christi State University, Campus Box 338, 6300 Ocean Drive, Corpus Christi, Texas 78412.

FOR FURTHER INFORMATION CONTACT: Rogelio Perez, at the above address (512/888-3346 or FTS 529-3346).

SUPPLEMENTARY INFORMATION:

Background

Potamogeton clystocarpus is a member of the pondweed family (Potamogetonaceae). It was first collected in 1931 by Moore and Steyermark. The species was described by Fernald (1932) based on its large sepaloid connectives and distinctive fruit having swollen and tuberculate bases (Haynes 1974). The only other species with fruits similar to *P. clystocarpus* occur in Eurasia and Africa.

Potamogeton clystocarpus is an aquatic plant with a slender, branched, rounded to slightly compressed stem, usually with a pair of small translucent glands at the nodes. Leaves are submerged, linear, light green, translucent to sub-opaque, and 2–4.5 inches (5–11.5 cm) long. Peduncles are thread-like; spikes are emergent while flowering, but submerged while fruiting; cylindrical, and about ⅜ inch (0.95 cm) long, with 2 or 3 whorls of flowers. Fruits have two or more warty protuberances at the base, and develop from early May to October, or later.

Potamogeton clystocarpus is known from a single intermittent stream in Little Aguja Canyon in the Davis Mountains, Jeff Davis County, Texas. The plant occurs in isolated, quiet pools of water and is rooted in igneous derived alluvium in the deep and rocky streambed. The subterranean stream surfaces in only a few places. Most of its course is underground through gravel bars. Associated species include *Potamogeton foliosus, P. pectinatus* (Sago pondweed), *P. pusillus, P. nodosus,* and *Najas guadalupensis* (Guadalupe water nymph) Rowell 1983). The population occurs within the Trans Pecos Biotic Community (Gould 1975).

Many quiet pools are present in the stream bed of Little Aguja Canyon, but the species has a very scattered distribution. Where present, it is generally in small isolated colonies (Rowell 1983). One general collection locality for *P. clystocarpus* is know. It occurs on land owned by the Boy Scouts of America. The landowners were informed by letter of the presence of the plant on their land, the anticipated listing proposal, and how they may be affected.

Rowell (1983) made repeated trips to the area and examined pools in adjacent canyons. He found plants in only two pools in Little Aguja Canyon. He also examined Limpia Creek, also in the Davis Mountains of Jeff Davis County, but did not find this species in any of its pools. Other botanists have collected plant specimens from many areas of Trans-Pecos, Texas, since the species was named in 1931, but to date the species is known only from Little Aguja Canyon.

The single population of *P. clystocarpus* is threatened by periodic floods and droughts that may reduce plant numbers to levels below which the species can naturally recover and by possible recreational activities that could damage plants and their habitat. The low number of plants and limited distribution of the species contribute to its vulnerability from any present or anticipated threats.

Federal government actions on this species began with section 12 of the Endangered Species Act of 1973 (16 U.S.C. 1531 *seq.*), which directed the Secretary of the Smithsonian Institution to prepare a report on those plants considered to be endangered, threatened, or extinct. This report, designated as House document No. 94-51, was presented to Congress on January 9, 1975. On July 1. 1975, the Service published a notice (40 FR 27823) that formally accepted the Smithsonian report as a petition within the context of section 4(c)(2), now section 4(b)(3)(A), of the Act and of its intention thereby to review the status of those plants. *Potamogeton clystocarpus* was included as "endangered" in the July 1, 1975, petition. On June 16, 1976, the Service published a proposed rule (41 FR 24523) to determine approximately 1,700 vascular plant taxa to be endangered species pursuant to section 4 of the Act; *Potamogeton clystocarpus* was included in this proposal.

The 1978 amendments to the Act required that all proposals over 2 years old be withdrawn. On December 10, 1979 (44 FR 70796), the Service published a notice withdrawing plants proposed on June 16, 1976.

Potamogeton clystocarpus was included as a Category 1 species in the revised notice of review for native plants published on December 15, 1980 (45 FR 82480). Category 1 species are those for which the Service has substantial information on biological vulnerability and threats to support the appropriateness of proposing to list them as endangered or threatened. When the notice of review for native plants was again revised in 1983 (48 FR 53640), *P. clystocarpus* was included as a Category 2 species, which are those species for which the Service has information to indicate that proposing to list them as endangered or threatened may be appropriate but for which substantial data on biological vulnerability and threats are not currently known or on file to support the preparation of rules. In the 1985 revised notice of review for native plants (50 FR 39526), *P. clystocarpus* was returned to Category 1. The Service funded a status survey to determine the status of *P. clystocarpus*, and the final report for this survey was accepted by the Service in 1983. Additional information on the status of the species throughout its range and on threats to its continued existence have now been obtained by the Service.

All plants included in the comprehensive plant notices are treated as under petition. Section 4(b)(3)(B) of

the Act, as amended in 1982, requires the Secretary to make certain findings on pending petitions within 12 months of their receipt. Section 2(b)(1) of the 1982 amendments further requires that all petitions pending on October 13, 1982, be treated as having been newly submitted on that date. Because the 1975 Smithsonian report was accepted as a petition, all the taxa contained in the notice, including *P. clystocarpus*, were treated as being newly petitioned on October 13, 1982. In 1983, 1984, 1985, 1986, 1987, 1988, and 1989 the Service found that the petitioned listing of *Potamogeton clystocarpus* was warranted but precluded by other listing actions of a higher priority. A proposed rule to determine endangered status for *P. clystocarpus* was published in the **Federal Register** on March 15, 1990 (55 FR 9741).

Summary of Comments and Recommendations

In the March 15, 1990 (55 FR 9741) proposed rule and associated notifications, all interested parties were requested to submit factual reports or information that might contribute to the development of a final rule. The comment period originally closed May 14, 1990, but was extended to August 6, 1990 (55 FR 27662), to allow individuals to submit comments after the public hearing. Appropriate state agencies, county governments, Federal agencies, scientific organizations, and other interested parties were contacted and requested to comment. A newspaper notice was published in the Alpine Avalanche on April 19, 1990, which invited general public comment.

The Service received a request for a public hearing and scheduled one for July 19, 1990, in Fort Davis, Texas. Interested parties were notified of the hearing, and notices of the hearing were published in the **Federal Register** on July 5, 1990 (55 FR 27662), and the Alpine Avalanche on July 12, 1990.

About 150 people attended the hearing. A transcript of this hearing is available for inspection (see ADDRESSES). Oral or written comments were received from 23 parties at the hearing; all 23 opposed the proposed listing.

In total, 37 comments were received, 1 from a state agency and 36 from private organizations, companies, and individuals. Three comments supported the proposed listing and 34 opposed the proposed listing. Some individuals or organizations submitted more than one comment, but they were only counted as one. Written and oral comments presented at the public hearing and received during the comment period are covered in the following summary. Comments of a similar nature or point are grouped into a number of general issues. These issues and the Service's response to each, are discussed below.

Issue 1: Some commenters questioned the accuracy or sufficiency of the data used to support the conclusions in the proposed rule and requested that the listing proposal be withdrawn. *Response:* The Service, as detailed in the "Summary of Factors" section, concludes there is sufficient evidence to determine that *Potamogeton clystocarpus* meets the standards required to receive protection as an endangered species. An endangered species is one which is in danger of extinction throughout all or a significant portion of its range. With only one population known, *Potamogeton clystocarpus* is in danger of extinction throughout its range from any of the threats described in the "Summary of Factors" section. The low numbers and limited range of this species makes it more vulnerable to extinction from threats that might have a relatively low incidence of occurrence. If a proposal is withdrawn, section 4(b)(6)(B)(ii) of the Act provides that the finding upon which the withdrawal is based shall be subject to judicial review.

Issue 2: Some commenters questioned the validity of scientific findings, especially those attributed to Kenneth Wurdack. *Response:* The specimens collected by Mr. Wurdack were incorrectly identified. Therefore, the threats attributed to his observations were not considered in the final determination on this species. The Service has considered all sources of information on the distribution and threats or lack thereof to *Potamogeton clystocarpus* in making a final determination that the species is endangered.

Issue 3: Some commenters stated the mere presence of *P. clystocarpus* in Little Aguja Creek indicates it is adapted to natural floods and droughts and thus not threatened by these climatic conditions. *Response:* The magnitude and timing of natural events that reduce populations cannot be predicted. The fact that extinction has not already occurred does not mean that events acting on presently small populations will not cause extinction in the foreseeable future.

Issue 4: Some commenters were concerned that illegally obtained information was used as a basis for initiating the proposed listing. *Response:* The scientific information upon which the Service relied concerning this species was initially provided by the Smithsonian Institution in a report to Congress on January 9, 1975 (House document no. 94–51). The Service also funded a survey to determine the status of *P. clystocarpus*, and the final report for this survey was accepted by the Service in 1983. The alleged unlawfully collected specimens, obtained between 1985 and 1987, were determined not to be *P. clystocarpus* and, therefore, have no bearing on the decision to list this species. In every aspect of the business conducted by, or on behalf of the Service, it is Service policy to advise cooperators that the Service cannot grant permission to enter onto private property and that it is the responsibility of the cooperator to obtain landowner permission for access to private property.

Issue 5: Some commenters stated that there was no objectivity in the status report because Dr. Rowell was told not to look beyond Little Aguja Canyon. *Response:* According to the status report, Dr. Rowell made repeated trips to Little Aguja Canyon and examined pools in adjacent canyons. He also examined many crossings of Limpia Creek. Despite these searches, Dr. Rowell found the plant in only two pools of little Aguja Creek. Other botanists have collected plant specimens throughout the Trans-Pecos Region of Texas for many years, yet *P. clystocarpus* has only been found in Little Aguja Canyon.

Issue 6: Some commenters stated that the plant may be a hybrid, which they felt would make it ineligible for protection under the act, and that chemotaxonomic and chromosomal studies had not been done to verify that the plant is a good species. *Response:* The best scientific information available indicates that *P. clystocarpus* is a good species. The vast majority of species have been named without use of chemotaxonomy, chromosome analysis, or other sophisticated techniques now available to taxonomists. Although these techniques are sometimes helpful to taxonomists, they are not required to confirm the status of a species.

Issue 7: One commenter indicated that a statement in Johnston (1988) under *P. clystocarpus* that, "recent workers indicate this may be only a form of one of the other species," casts doubt on the validity of *P. clystocarpus* as a good species. *Response:* Such doubts about species are common when there are few specimens available to study. *Potamogeton clystocarpus* differs from other closely related species by several character differences involving several different parts of the plant, which indicates it is not merely a form of a more common species. No studies have

been published that question the status of *P. clystocarpus* as a species.

Issue 8: Some commenters stated that the plant really is not rare or that it is just naturally rare and no direct or indirect human action has caused this rarity to occur. *Response:* The best scientific information available to the Service indicates *P. clystocarpus* is restricted to Little Aguja Creek. The rarity of this plant makes it more vulnerable to extinction from a variety of threats that might have a relatively low incidence of occurrence. It is not necessary to show that the rarity of a species is the result of any direct or indirect human action. It is only necessary to find that the species is now vulnerable to extinction from any of the five listing factors stated in the Endangered Species Act.

Issue 9: Some commenters raised the question of the effect javelina, deer, elk, and exotic game might have on *P. clystocarpus. Response:* Wild as well as domestic animals could constitute threats to *P. clystocarpus.*

Issue 10: Some commenters claimed that listing *P. clystocarpus* would increase threats to the species from botanists wanting specimens for their collections. *Response: Potamogeton clystocarpus* was already know as rare to botanists prior to the Service's listing proposal. The Service does not believe listing will increase threats to this species from scientific or other collectors. In addition, listing will make it a violation of the Act to collect plants from private lands if done in violation of State criminal trespass laws.

Issue 11: Some commenters questioned the success of any management techniques that can be used to protect *P. clystocarpus. Response:* The potential for management and recovery of *P. clystocarpus* is addressed briefly in the "Available Conservation Measures" section of this rule and will be addressed in detail in the development of a recovery plan for this species. The Service cannot base listing on the potential for recovery, which is not one of the factors considered in the listing process.

Issue 12: Some commenters questioned why the government should proceed with the listing when the plant only occurs on private property and the landowner does not want government assistance in protecting or managing the plant. *Response:* The listing of a species is based only on the five criteria in the Act. The potential for recovery and management will be addressed following the listing process.

Issue 13: Some commenters believed there is limited support for listing within the scientific community, so *P. clystocarpus* should not be listed. *Response:* The listing of species is based on the five factors stated in the Act. Comments from the scientific community in support or opposition to a listing are considered for their contribution to the biological understanding of the species and for their bearing on the listing factors.

Issue 14: Some commenters raised the question of why the Service disregarded the recommendation in the status report made by Dr. Rowell to list the species as threatened instead of endangered. *Response:* The Service has considered the listing recommendations of all parties, including Dr. Rowell. The decision to list this species as endangered was based on the Service's assessment of available data. This assessment, which is applied to the five listing factors, may not always agree with the assessment of the contractor doing the status survey. Listing this species as threatened would not be appropriate. Threatened species are ones that will become endangered if their numbers are further reduced. With only one known population, *P. clystocarpus* must be listed as endangered because its numbers could not be reduced without becoming extinct.

Issue 15: Some commenters expressed the possibility of listing this species on Subcategory 3C of the plant notice of review. Category 3C includes species that have proven to be more abundant or widespread than previously believed and/or those that are not subject to any identifiable threats. *Response:* The Service has determined that based on the best scientific information available, *P. clystocarpus* qualifies to be listed as endangered as explained in the "Summary of Factors" section of this rule.

Issue 16: Some commenters stated that the Federal government can always use an emergency listing to protect the plant if an unforeseen threat appears instead of listing it as endangered now. *Response:* The Service is listing *P. clystocarpus* at this time due to the threats explained in the "Summary of Factors" section and finds no reason for delay.

Issue 17: One commenter stated that the Texas Parks and Wildlife Department (TPWD) never comments in opposition to Federal proposed plant listings because listings qualify TPWD to receive Federal money. *Response:* The Service is unaware of any basis of TPWD comments other than its biological evaluation of the listing proposal.

Issue 18: Some commenters stated that recovery teams are self-serving. Team members suggest more listings to keep their jobs. *Response:* Recovery team members are only reimbursed for the costs of travel to and from meetings, and no salary is paid for their services.

Issue 19: Some commenters questioned the value of the plant. *Response:* The Act states that, "species of * * * plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." The Act also requires species be listed on the basis of threats without consideration of relative value.

Issue 20: Some commenters believed there was insufficient notice to landowners prior to the publication of the proposed rule and insufficient public notice prior to the hearing. *Response:* The Service sent a letter to the landowners on June 30, 1988, informing them that *P. clystocarpus* was under consideration for proposed listing. The Service mailed letters to individuals announcing the proposed rule and hearing. Newspaper notices were published in the Alpine Avalanche announcing the proposed rule and the hearing, and a local paper ran a story on the proposed listing including details on the public hearing. The Service has complied fully with all notification requirements.

Issue 21: Some commenters stated that additional threats to the species were described at the public hearing that were not included in the listing proposal. Since the public was unaware of these threats, it was unable to comment and the proposal should therefore be withdrawn. *Response:* Time was available from the date of the public hearing (July 19, 1990) until August 6, 1990 to comment on any issues or information brought forth in the public hearing.

Issue 22: Some commenters questioned what recreational activities will be impacted on the Boy Scout Ranch. *Response:* No activities will be impacted unless the landowner voluntarily agrees that actions might be needed to recover the species after listing.

Issue 23: Some landowners stated that the listing would result in loss of their ability to develop their land and that this should be considered confiscation of privately-owned property without just compensation. *Response:* Listing of a species as endangered or threatened does not constitute confiscation of property. Section 7 duties to consult and to avoid jeopardy apply only to Federal activities, funds and permits. Section 9

prohibitions on taking species are subject to a number of exceptions.

Issue 24: One commenter believed that the listing was an action that requires a Takings Implication Assessment (TIA) as directed by Executive Order 12630, and requested that the Service conduct such an assessment. *Response:* Listing decisions are confined to the consideration of biological factors only. Therefore, TIA's are prepared after, rather than before, the agency finalizes the decision upon which its discretion is restricted.

Such TIA's shall not be considered in the making of administrative decisions which must, by law, be made without regard to their economic impact upon the public or the agency.

Issue 25: Some commenters stated that if listed, the Service would use the Act to exercise control of the land by regulating species that look like *P. clystocarpus. Response:* The Service may by regulation of commerce or taking, treat an unlisted species as an endangered species if there is such a similarity of appearance between the unlisted species and the listed species that law enforcement personnel would have difficulty in distinguishing between them, if the effect of this difficulty would be an additional threat to the endangered species, and if such treatment of the unlisted species would substantially facilitate the enforcement and further the policies of the Endangered Species Act. It is not believed that the difficulty in distinguishing *Potamogeton clystocarpus* from other species adds to the threats to its existence. Nor is it believed that treatment of similar species as endangered will further the goal of conserving *P. clystocarpus.* Therefore, the Service has no plans to treat any other species as endangered or threatened based on similarity of appearance to *P. clystocarpus.*

Issue 26: One commenter asked if the Service pre-determines areas that need protection and then finds species to list. *Response:* The Service lists species based on the five criteria in the Act and not on location of occurrence.

Issue 27: Some commenters believe the Service has singled out the Davis Mountains-West Texas area and is purposely finding species to list in an attempt to acquire land. *Response:* Listing of a species is based on consideration of rarity and threats only and not because it occurs in the Davis Mountains-West Texas area or any other particular area.

Issue 28: Some commenters stated that the Service would use the listing of *P. clystocarpus* to acquire private land through condemnation. *Response:* Section 5 of the Act gives the Service authority to acquire land for protection and recovery of endangered species. The Service, however, prefers to recover species on private land through cooperation with landowners because this is the most cost effective means of recovery. With the nature of the threats to *P. clystocarpus,* recovery would not be enhanced by Service land acquisition. The Service, therefore, has no plans to acquire land for the recovery of this species.

Issue 29: One commenter asked if someone participates in an Agricultural Stabilization and Conservation Service (ASCS) program, even if it is beneficial to a species on the list, does the Service still have to be consulted. *Response:* ASCS would be responsible for consulting informally with the Service to obtain information about the presence of listed species within the area affected by the project. If listed species occur within the project area, ASCS must then determine if the project might adversely affect the species. If ASCS determines the action will not adversely affect the species and the Service concurs, no formal consultation with the Service is required.

Summary of Factors Affecting the Species

After a thorough review and consideration of all information available, the Service has determined that *Potamogeton clystocarpus* should be classified as an endangered species. Procedures found at section 4(a)(1) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and regulations (50 CFR part 424) promulgated to implement the listing provisions of the Act were followed. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1). These factors and their application to *Potamogeton clystocarpus* Fernald (Little Aguja pondweed) are as follows:

A. *The present or threatened destruction, modification, or curtailment of its habitat or range.* The known range of *P. clystocarpus* is restricted to two pools of water within several miles of the intermittent stream course in Little Aguja Canyon. This distribution is smaller than described in the proposed rule because two specimens attributed to *P. clystocarpus* were found to be misidentified. The entire known range of the species is within a Boy Scout ranch.

Both horses and wildlife occur on the scout ranch. Animals drinking or grazing near the water may affect water quality through deposition of manure and subsequent nutrient enrichment of the water promoting algal blooms that smother aquatic vegetation. The likelihood of this occurring is greatest when water levels are low and water temperatures are warm during summer months. If the number of horses is increased or wildlife herds are not controlled by hunting or predators, deterioration of water quality in Little Aguja Canyon could be significant.

Dam construction to enlarge pools in the creek for recreation or livestock use would change water depth, water temperature, and substrate characteristics likely making that portion of the stream unsuitable for *P. clystocarpus.* Dam construction in portions of the creek not presently occupied by the plant would reduce the amount of habitat available to the species.

Petrochemical or pesticide spillage upstream from the *P. clystocarpus* population could have a serious impact on water quality or on the plants themselves. Any such spillage downstream from the population could make that portion of the stream unsuitable for establishment by the plant.

Water is a precious asset in a desert environment. Landowners upstream from the *P. clystocarpus* site have indicated they intend no changes in water use that might affect the amount or quality of water in Little Aguja Canyon. However, land ownership and land management can change and future managers may wish to improve their property through development of impoundments or wells that could affect the amount of water available downstream for *P. clystocarpus,* particularly during periods of drought.

B. *Overutilization for commercial, recreational, scientific, or educational purposes.* None known, although unregulated scientific collecting could have adverse effects on this plant.

C. *Disease or predation.* None known.

D. *The inadequacy of existing regulatory mechanisms.* No existing Federal or State law specifically protects *P. clystocarpus* or provides for its recovery. The Act will offer additional protection to the species because it is a violation of the Act for any person to remove, cut, dig up, damage, or destroy an endangered plant in an area not under Federal jurisdiction in knowing violation of State law or regulation or in the course of any violation of a State criminal trespass law. In addition, the Act requires that recovery actions be undertaken for listed species as discussed below under "Available Conservation Measures."

E. *Other natural or manmade factors affecting its continued existence.* The

intermittent stream in which *P. clystocarpus* exists is subject to complete drying during extended droughts and scouring during floods, which usually occur in conjunction with violent summer thunderstorms. These events reduce the population of *P. clystocarpus* to stem segments and seeds imbedded in mud and rock cracks. The entire population must then regenerate from these propagules. Despite floods and droughts, the species has historically maintained its marginal existence. However, future events could reduce the population to such low numbers that it can no longer recover.

Natural dispersal of this species to a more suitable environment is highly unlikely. Dispersal by water only carries plants to more unfavorable and intermittent habitat downstream. Aquatic plants are typically transported to different watersheds by waterfowl that either ingest seeds or carry plant parts on their feet or feathers. Since Little Aguja Creek is small and intermittent, it provides little suitable habitat to attract waterfowl. Even if waterfowl are present, the scarcity of *P. clystocarpus* within the stream reduces the chance that the plant will be transported. Thus, present conditions make it unlikely *P. clystocarpus* can expand its range naturally to the point where it is safe from extinction.

When the number of organisms of a species is reduced to very low levels and remains so for several generations, the species passes through a genetic "bottleneck" caused by inbreeding and genetic drift. This can reduce the genetic variability within a species, thus limiting its adaptability to changing environmental conditions. The habitat for *P. clystocarpus* is subject to drastic fluctuations. The continued existence of *P. clystocarpus* in small numbers may reduce its ability to adapt to these fluctuations.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species in determining to make this rule final. Based on this evaluation, the preferred action is to list *Potamogeton clystocarpus* as endangered. Listing as threatened would not be appropriate. A threatened species is one that is likely to become endangered if its numbers and distribution become further reduced. With only one known population, the numbers of *P. clystocarpus* could not be reduced without extinction. Critical habitat is not being designated for the reasons discussed below.

Critical Habitat

Section 4(a)(3) of the Act, as amended, requires, to the maximum extent prudent and determinable, that the Secretary propose critical habitat at the time a species is proposed to be endangered or threatened. The population of this species is small, and loss of even a few individuals to activities such as collection for scientific purposes could extirpate the species from some locations. Publication of a critical habitat description and maps would increase the vulnerability of the species without significantly increasing protection. The population of *Potamogeton clystocarpus* is found on private land where Federal involvement in land-use activities does not generally occur. In general, additional protection resulting from critical habitat designation is often achieved through the section 7 Consultation process. Since section 7 would not apply to the majority of land-use activities occurring within critical habitat in this instance, its designation would not appreciably benefit the species. For these reasons, the Service concludes that it is not prudent to designate critical habitat for *P. clystocarpus* at this time.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Endangered Species Act provides for cooperation with the States and possible land acquisition, although under present circumstances this is not believed necessary for the recovery of *P. clystocarpus*. Recovery actions for *P. clystocarpus* might include monitoring, particularly following floods or during periods of prolonged drought, to determine how the species survives such events; propagation of plants off-site in an established refugium to provide materials for research or for reintroduction should the natural population be lost; and education to teach scout camp visitors and others about the sensitivity of the species and the need to protect it. Some of these recovery activities may require greater resources or technical capability than the landowner can provide, and their successful accomplishment may require cooperation between the landowner and outside groups or individuals. Recovery activities will be addressed in detail in the recovery plan for this species. The Service will seek the participation of interested individuals and parties in plan development, and the draft plan will be available for public review and comment. The protection required of Federal agencies and the prohibitions against certain activities involving listed plants, are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service. The known population of *Potamogeton clystocarpus* is on privately-owned land. There are no known current or planned Federal activities that may affect this species.

The Act and its implementing regulations found at 50 CFR 17.61, 17.62, and 17.63 set forth a series of general prohibitions and exceptions that apply to all endangered plants. All trade prohibitions of Section 9(a)(2) of the Act, implemented by 50 CFR 17.61, apply. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale this species in interstate or foreign commerce, or to remove and reduce to possession the species from areas under Federal jurisdiction. In addition, for listed plants, the 1988 amendments (Pub. L. 100–478) to the Act prohibit the malicious damage or destruction on Federal lands and the removal, cutting, digging up, or damaging or destroying of listed plants in knowing violation of any State law or regulation, including State criminal trespass law. Certain exceptions apply to agents of the Service and State conservation agencies. The Act and 50 CFR 17.62 and 17.63 also provide for the issuance of permits to carry out otherwise prohibited activities involving endangered species under certain circumstances.

It is anticipated that few trade permits would ever be sought or issued because

the species is not common in cultivation or in the wild. Requests for copies of the regulations on plants and inquiries regarding them may be addressed to the Office of Management Authority, U.S. Fish and Wildlife Service, P.O. Box 3507, Arlington, Virginia 22201 (703/358–2104).

National Environmental Policy Act

The U.S. Fish and Wildlife Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

Gould, F.W. 1975. Texas Plants: a checklist and ecological summary. Texas Agricultural Experiment Station, Texas A&M University, College Station, Texas.

Haynes, R.R. 1974. A revision of North American *Potamogeton* subsection Pusilli (Potamogetonaceae). Rhodora 76: 624–626.

Johnston, M.C. 1988. The vascular plants of Texas: A list updating the manual of the vascular plants of Texas. Published by the author, Austin, Texas. 120 pp.

Rowell, C.M., Jr. 1983. Status report, *Potamogeton clystocarpus* Fern. U.S. Fish and Wildlife Service, Albuquerque, New Mexico. 9 pp.

Author

The primary author of this final rule is Charles McDonald, U.S. Fish and Wildlife Service, P.O. Box 1306, Albuquerque, New Mexico (505/766–3972 or FTS 474–3972).

List of Subjects in 50 CFR Part 17

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

Regulation Promulgation

PART 17—[AMENDED]

Accordingly, part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, is amended as set forth below:

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

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

2. Amend § 17.12(h) by adding the following, in alphabetical order under the family Potamogetonaceae, to the List of Endangered and Threatened Plants:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	When listed	Status	Critical habitat	Special rules
Scientific name	Common name					
*	*	*	*	*	*	
Potamogetonaceae—Pondweed family:						
Potamogeton clystocarpus	Little Aguja pondweed	U.S.A. (TX)	450	E	NA	NA
*	*	*	*	*	*	

Dated: September 27, 1991.

Richard N. Smith,

Acting Director, Fish and Wildlife Service.

[FR Doc. 91–27399 Filed 11–13–91; 8:45 am]

BILLING CODE 4310–55–M

Proposed Rules

Federal Register
Vol. 56, No. 220
Thursday, November 14, 1991

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1004

[Docket No. AO-160-A65-RO-2; DA-90-003]

Milk in the Middle Atlantic Marketing Area; Decision on Proposed Amendments to Tentative Marketing Agreement and Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This decision incorporates into the Middle Atlantic Federal milk order a plan for pricing milk on the basis of its nonfat solids content, as well as its volume and butterfat content. The differential value of milk used in Class I and Class II would be pooled to determine producers' shares of the higher-valued uses, and the value of nonfat solids uses in Classes II and III would be pooled with the value of skim milk used in Class I to determine the value of nonfat solids in producer milk.

The decision is based on industry proposals considered at a public hearing held July 17–18, 1990, in Philadelphia, Pennsylvania. The changes are necessary to reflect current marketing conditions, to maintain orderly marketing in the Middle Atlantic marketing area, and to recognize the value of nonfat milk solids contained in milk pooled under the order.

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

SUPPLEMENTARY INFORMATION: 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.

The Regulatory Flexibility Act (5 U.S.C. 601–612] requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this action will not have a significant economic impact on a substantial number of small entities. The amended order will promote orderly marketing of milk by producers and regulated handlers.

Prior document in this proceeding:

Notice of Hearing: Issued June 29, 1990; published July 9, 1990 (55 FR 28052).

Recommended Decision: Issued May 23, 1991; published May 31, 1991 (56 FR 24746).

Preliminary Statement

A public hearing was held upon a proposed amendment to the marketing agreement and the order regulating the handling of milk in the Middle Atlantic marketing area. The hearing was held, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674) and the applicable rules of practice (7 CFR part 900), at Philadelphia, Pennsylvania, on July 17–18, 1990. Notice of the hearing was issued on June 29, 1990, and published July 9, 1990 (55 FR 28052).

Upon the basis of the evidence introduced at the hearing and the record thereof, the Administrator, Agricultural Marketing Service, on May 23, 1991, filed with the Hearing Clerk, United States Department of Agriculture, his recommended decision containing notice of the opportunity to file written exceptions thereto.

The material issues, findings and conclusions, rulings, and general findings of the recommended decision are hereby approved and adopted and are set forth in full herein, subject to the following modifications:

1. The first sentence of paragraph 47 is modified.

2. Six paragraphs are added at the end of the decision.

3. Minor modifications in order language changes, to better reflect the intent of the decision, are made in §§ 1004.60(d)(2) and 1004.71(b)(2), and a change to section references in § 1004.85 is added.

The material issues on the record of hearing relate to multiple component pricing.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

A proposal that the Middle Atlantic order be amended to accommodate a multiple component plan using values of nonfat milk solids and butterfat to adjust the value of milk used in Class II and Class III products and payments to producers should be adopted. Under the component pricing plan adopted herein, handlers' obligations for producer milk used in Class I will not be affected by the nonfat solids content of the milk.

At the present time under the Middle Atlantic order, and under nearly all of the other Federal milk orders, milk received by handlers is priced according to the pounds of producer milk allocated to each class of use multiplied by the prices per hundredweight of milk testing 3.5 percent butterfat, as determined under the orders for each class of use. Adjustments for such items as overage, reclassified inventory, location and other source milk allocated to Class I are added to or subtracted from the classified use value of the milk. The resulting amount is divided by the total producer milk in the pool to calculate a price per hundredweight of milk testing 3.5 percent butterfat to be paid to producers for the approved milk they have delivered to handlers. The price paid to each producer is then adjusted according to the specific butterfat test of the producer's milk by means of a butterfat differential. The butterfat differential is computed by multiplying the wholesale selling price of Grade A (92-score) bulk butter per pound on the Chicago Mercantile Exchange, as reported for the month by the U.S. Department of Agriculture, by 0.138 and subtracting the Minnesota-Wisconsin price at test, also as reported for the month by the U.S. Department of Agriculture, multiplied by .0028.

The component pricing plan was proposed by Pennmarva Dairymen's Federation, Inc., (Pennmarva) a federation of cooperatives composed of Atlantic Dairy Cooperative, Mid-Atlantic Division of Dairymen, Inc., Maryland and Virginia Milk Producers Cooperative Association, Inc., and

Valley of Virginia Cooperative Milk Producers Association. A witness for the Federation testified in favor of the proposed pricing plan on behalf of Pennmarva, Mount Joy Farmers Cooperative Association and Eastern Milk Producers Cooperative Association, Inc. The members of these organizations market 90 percent of the producer milk associated with the Middle Atlantic order.

Pennmarva's witness testified that the adoption of component pricing under the Middle Atlantic order is justified on the basis that its incorporation under the order will result in a better recognition of the economic value of all producer milk than either the order's current provisions or any existing industry-sponsored component pricing programs within the Middle Atlantic market, and thereby contribute to orderly marketing. The witness explained that under the current provisions of the order, prices vary only for differences in the butterfat component content of milk, even though it has been demonstrated that other components have value. He indicated that without multiple component pricing under the order, industry-sponsored programs, which suffer from serious economic defects, will continue to proliferate. The witness stated that under the industry-sponsored plans prices cannot be adjusted downward for milk of less than average component content. In addition, he continued, the plans generally are not available to all producers, resulting in a situation in which producers to not receive uniform prices for their milk and handlers do not pay uniform prices. As a consequence, the witness testified, producers on the Middle Atlantic market are not receiving appropriate pricing signals regarding the value of their milk.

The representative of Pennmarva testified that Pennmarva has chosen to follow the multiple component pricing plan in the Great Basin order. He stated that the plan excludes adjustments in Class I prices for the nonfat component while dividing the Class III value between the fat and nonfat solids prices. Use of the plan, according to the witness, will maintain price alignment between the Middle Atlantic market and neighboring Federal order markets because purchasers of Class II and Class III milk will experience no appreciable change in their prices. The witness maintained that the plan works well and helps maintain orderly marketing. He pointed out that the plan results in revenue neutrality. The current handler reporting structure would be maintained, he said. Finally, the witness stated, the plan prices Class II and Class III milk according to the relationship that exists between component content and product yield.

Pennmarva's witness explained that due to the U.S. Food and Drug Administration's standards of identity requiring fluid milk products to have only a minimum nonfat solids content of 8.25 percent, Pennmarva does not support having component pricing apply to Class I milk in the Middle Atlantic market. He indicated that Pennmarva does not want to create an incentive to lower the current nonfat solids content of fluid milk, which is generally somewhat higher than the required minimum. The witness stated that fluid milk handlers do not want to create a situation in which their competitors may gain a competitive advantage by paying less for Class I milk containing a lower percentage of nonfat solids. He testified further that fluid milk handlers are reluctant to pay for milk on the basis of multiple components because of a general perception that consumers are unwilling to pay a higher price for milk containing a higher-than-average percentage of nonfat solids.

Proponent witness proposed that the multiple component pricing plan used in the Great Basin Federal milk order be adapted for use in the Middle Atlantic order by making four basic modifications. The Great Basin pricing plan would be modified by incorporating the current Middle Atlantic seasonal base-excess plan, by using nonfat solids and butterfat as the components rather than protein and butterfat, by using the Class III price rather than the basic formula price to derive the nonfat solids price, and by deriving the nonfat solids price from the current month's nonfat solids content rather than the previous month's.

The Pennmarva witness presented several reasons for using nonfat solids instead of protein as the component for pricing producer milk and milk used in Class II and Class III by handlers. According to the witness, a preponderance of the milk pooled under the Milk Atlantic order and used in Class II and Class III is used in products whose economic value depends on the nonfat solids content of the milk rather than on the protein content. Therefore, the Pennmarva witness argued, the use of protein to determine the value of milk used by handlers in most Order 4 manufactured products would result in price variations to handlers that would exceed the value of the component in the products manufactured. Finally, the witness stated, a greater redistribution of money among producers would occur if prices to producers are adjusted on the basis of the protein content of their milk rather than on the basis of the nonfat solids content.

Pennmarva's witness further explained why Pennmarva proposes using the Class III price rather than the basic formula price to derive the nonfat solids price. According to the witness, the Middle Atlantic Class III price differs from the basic formula price due to the use of seasonal adjustments to the basic formula price. He indicated that maintaining these seasonal adjustments requires using the Class III price to derive the nonfat solids price.

Pennmarva's representative explained that use of the current month's average nonfat solids content of producer milk to derive the nonfat solids price, rather than the previous month's content, will provide a better measure of the current month's component values than using the previous month's tests. He indicated that nonfat solids tests for the current month are available at the same time as butterfat tests for the current month. The witness stated that under Pennmarva's proposal the nonfat solids prices for the current month will be announced by the 13th of the following month.

A witness appearing on behalf of Dietrich's Milk Products, Inc. (Dietrich's), a non-regulated handler under the Middle Atlantic order, testified that Dietrich's supports Pennmarva's position that the Middle Atlantic order should be amended to provide incentives to producers to produce milk that has a greater value in the marketplace. He testified that Dietrich's would prefer nonfat solids pricing to protein pricing because the handler mainly produces whole milk powder, a major manufacturing use of milk in the Middle Atlantic market. Therefore, the witness stated, nonfat solids pricing would better fit Dietrich's operations. The witness also testified that Dietrich's has found that it is more difficult to accurately determine the protein content of milk than the nonfat solids content. He observed that the Minnesota-Wisconsin price largely reflects protein values because it is primarily driven by the cheese market, and argued that since the nonfat solids price as proposed by Pennmarva would be derived from the Minnesota-Wisconsin price, the resulting nonfat solids price would include the value of protein as well as the value of nonfat solids.

However, Dietrich's witness expressed some concerns about the proposal and its impact. He indicated that Dietrich's is concerned about transfers between handlers and between markets. Specifically, he

testified that Dietrich's ships fluid skim milk from its non-pool plant to pool plants under the New York-New Jersey order on an agreed-upon Class II basis. He expressed concern about the treatment of these shipments under an amended Middle Atlantic order, and about how shrinkage would be handled under the order if component pricing were adopted.

A witness representing National All-Jersey, Inc., a national organization of dairy farmers, and appearing on behalf of the American Jersey Cattle Club, the breed association for owners of Jersey cattle, stated that both organizations support Pennmarva's proposal because the current butterfat-skim milk pricing system is not equitable to dairy farmers. He explained that under the current pricing plan, producers receive the same price for the skim portion of their milk regardless of its nonfat solids content. In other words, he said, producers are paid the same price for a pound of water as for a pound of nonfat solids.

The witness for the Jersey organizations testified that the organizations also support the proposal because it would give dairy farmers more appropriate economic signals. He opined that the current milk pricing system does not give dairy farmers the proper incentives to produce the kind of milk that consumers are demanding. Through the types of dairy products they are purchasing, according to the witness, consumers are placing a greater emphasis and value on the nonfat solids portion of milk. However, the witness stated, an increase in the value of the skim portion of milk, without component pricing, only gives dairy farmers an incentive to increase the volume of milk that they produce without regard to the components or water contained in it.

A consultant for the Jersey organizations stated that their organizations' purpose in testifying is to support Pennmarva's proposal. He suggested that the most important reason for implementing a multiple component pricing plan is to reflect back to producers the fact that the value of skim milk varies depending on the percentage of solids it contains. According to the witness, differences in the value of skim milk stem from the fact that milk with higher levels of nonfat solids has a greater nutritional value and produces higher yields of manufactured products. He stated that producers cannot achieve maximum efficiency in the use of their resources in satisfying consumer wants so long as they are being paid under the present pricing system that tells them that it makes no difference what level of nonfat solids or water their milk contains.

The consultant, who also has direct experience with the pricing plan effective under the Great Basin order, further testified that differences in milk costs among fluid milk handlers on the Great Basin market would have been rather small even if the order had priced Class I milk on the basis of its protein content, because the variation in the protein content among handlers was not great. These differences would have been even less, according to the witness, if pricing had been based on the nonfat solids content of the milk. The consultant also testified that fluid milk handlers on the Great Basin market are beginning to pay much more attention to the level of solids in the skim milk that they receive. He stated that they are objecting more and more to receiving milk with lower solids.

Although the Jersey consultant testified that charging handlers for the nonfat solids content of the milk they use in Class I is feasible and economically justifiable, he stated that the Jersey organizations do not advocate that component pricing under the Middle Atlantic order apply to Class I milk at this time. Such an approach would not be appropriate, according to the witness, until handlers begin to insist on receiving higher nonfat solids milk for which they pay no more.

The witness testifying on behalf of the National Farmers Organization (NFO), a producer cooperative, stated that NFO supports the concept of multiple component pricing of milk in Federal milk orders because by pricing milk according to its values in the marketplace, component pricing makes it possible for producers to respond to the demands of the marketplace and to be properly rewarded for their efforts. However, the witness stated that NFO supports component pricing based on protein rather than nonfat solids for several reasons. He said that NFO has found that protein is the component most demanded by handlers and the component handlers are most willing to pay for directly. Further, he stated, although protein and lactose, the major components of nonfat solids, have very different economic values, nonfat solids pricing would result in assigning them equal value.

The NFO witness testified that producers have become attuned to the protein content of their milk as part of their herd management. The witness concluded that adjoining Federal order markets with overlapping procurement areas likely will adopt multiple component pricing plan based on protein, with the result that a Middle Atlantic multiple component pricing plan based on nonfat solids would be isolated and out-of-step with adjacent orders. As a result, he stated, producers and handlers within the substantial area of overlapping supplies among these neighboring markets would be presented with a confusing and difficult marketing situation.

The witness for NFO also testified that the cooperative association recently negotiated a contract with a fluid milk handler in which the handler agreed to pay premiums for high protein content. According to the witness, the handler agreed to pay an incentive for high protein milk in order to procure a milk supply, not because he wanted high protein milk.

The witness representing Dean Foods Company, a non-regulated handler under the Middle Atlantic order, testified that Dean favors protein and quality pricing rather than nonfat solids pricing. However, the witness indicated that if Dean had had more time to compare the effect on Dean of nonfat solids pricing with the effect of protein pricing, Dean may have favored nonfat solids pricing. According to the witness, Dean is concerned that the adoption of nonfat solids pricing in the Middle Atlantic market and protein pricing in adjacent markets will cause milk used in the same Class II (and Class III) products to have differing costs.

The witness representing Kraft General Foods, a non-regulated handler under the Middle Atlantic order, testified that Kraft is not opposed to the concept of multiple component pricing as part of the Federal milk order system, but is opposed to Pennmarva's proposal. The witness explained that Kraft is opposed to Pennmarva's proposal because (1) nonfat solids rather than protein would be used to adjust handler and producer prices, (2) the value of the non-butterfat component would not be uniform among markets, and (3) prices would not be adjusted for somatic cell count.

Kraft's witness presented several reasons for protein to be used as a component instead of nonfat solids. In surrounding markets, the witness stated, the predominant use of surplus milk is in cheese rather than nonfat dry milk (and related products), and these markets' procurement areas overlap that of the Middle Atlantic market. The witness testified that producers in the Middle Atlantic area select herd sires on the basis of potential protein production, that voluntary multiple component pricing plans in the area use protein, and that protein is the component that gives

manufactured dairy products, including nonfat dry milk, their value. He stated further that if nonfat solids are used as a basis for pricing milk, the addition of whey powder or lactose to producer milk for the purpose of enhancing producer returns may be a problem.

According to Kraft's witness, the price of components other than butterfat should be the same among markets as are butterfat prices. Otherwise, he contended, market disorder and handler inequity would result because of different raw product costs among competing handlers. The witness stated that the use of each market's average protein or nonfat solids content would result in different values for the component among markets.

Kraft's witness further testified that somatic cell counts must be included in any multiple component pricing plan. He explained that the presence of high somatic cells has a negative value on milk because it reduces cheese yields. According to the witness, other countries that use multiple component pricing adjust their prices for somatic cell count, and somatic cell count adjustments are used in most voluntary multiple component pricing plans.

The witness representing Dairylea Cooperative, a producer cooperative marketing the milk of "less than a handful" of producers under Order 4, testified that Dairylea agrees that the time has come for multiple component pricing since the value of the nonfat components of milk are greater in the marketplace than the fat component in milk. He indicated, however, that the cooperative has no position regarding multiple component pricing in the Middle Atlantic order.

In Pennmarva's brief, the cooperative federation argued that Kraft's position favoring the use of protein rather than nonfat solids as a pricing component rests upon the unsupportable supposition that intermarket alignment is more important than market characteristics, and therefore should be rejected. Pennmarva's brief stated that there is substantial record evidence concerning the characteristics of the Middle Atlantic market, but no evidence in the record that the use of nonfat solids pricing would create misalignment. Furthermore, Pennmarva contended, Kraft's data concern other marketing areas with very different market characteristics than the Middle Atlantic market. Pennmarva pointed out, for example, that while the manufacture of cheese is more substantial in the neighboring New York-New Jersey marketing area, nonfat dry milk is the principal surplus milk product manufactured in the Middle Atlantic market.

The Pennmarva brief contended that the Federal milk order program is a producer program and, absent substantial evidence of disorderly marketing as a result of proposals favored by a great majority of the market's producers, such proposals should be adopted. Pennmarva stated that the preference of Kraft, a non-pool handler utilizing approximately 4 percent of the producer milk pooled under the order, for protein pricing does not justify ignoring the fact that 90 percent of the market's producers, who would be directly affected by the provision, favor nonfat solids pricing. Pennmarva argued that handlers would not be directly affected by adoption of nonfat solids pricing because the Federation's proposal would not affect basic class price levels. Finally, Pennmarva noted that Kraft is familiar with nonfat solids pricing since Kraft operates three plants in California that are subject to such pricing and manufacture products that compete with products manufactured at plants regulated under Federal orders.

In the brief filed on behalf of the Jersey organizations, the organizations maintained that the hearing record contains abundant evidence for the Secretary to adopt Pennmarva's proposal. The brief stated that the hearing record is replete with testimony from experts and corroborating data showing the need for multiple component pricing in the Middle Atlantic market. The brief also stated that the hearing record contains several reasons for Pennmarva's proposal to be adopted. The Jersey organizations indicated that the record shows that most of the producers on the Middle Atlantic market support the proposal, while it is opposed by a cooperative with only about 50 producers on the market and a handler with no producers on the market. The brief conceded, however, that the opposition's position that it would be better to pay producers for the skim portion of milk based on protein rather that nonfat solids may very well prove to be a better approach in the long run. Finally, the brief indicated that while the Jersey organizations support the proposal, they believe that the multiple component pricing plan in the Great Basin order can be improved by (1) changing the method for calculating the protein or nonfat solids price, (2) providing for the same price in all orders, and (3) pricing protein or nonfat solids in Class I milk. The brief stated that the Jersey organizations do not advocate that these changes be made at this time.

In the brief filed on behalf of NFO, the cooperative association argued that the intrinsic merits of nonfat solids pricing are not superior to protein pricing, and that there are no unique conditions in the Middle Atlantic market that require nonfat solids pricing. NFO therefore opposed an action the cooperative characterized as isolating the Middle Atlantic market and placing it out of step with national dairy trends by adopting nonfat solids pricing. NFO contended that pricing milk on the basis of its nonfat solids content does not make economic sense. The cooperative stated that such a pricing plan would have the effect of assigning the same value to lactose and protein and assuming that the mineral content of milk is constant, and denigrated the choice of nonfat solids as a pricing component on the basis that it would result in less variation in producer prices than would protein.

In the brief filed on behalf of Kraft, the handler concluded that Pennmarva's proposal should not be adopted because the value of milk to manufacturers in the Middle Atlantic area results from its protein content rather than its nonfat solids content. Kraft maintained that even a protein pricing plan should not be adopted for the Middle Atlantic marketing area unless the same protein price is used in all Federal milk orders, and the resulting protein price is adjusted for somatic cell content.

Kraft's brief contained a number of proposed findings (42) that detailed the interrelationship between the Middle Atlantic market and other Federal order markets, suggested that the milk products manufactured in the separate markets be considered on a combined basis, and insisted that adoption of nonfat solids pricing for the Middle Atlantic marketing area would create disorderly marketing conditions throughout the region. In support of arguments related to intermarket competition and alignment, Kraft requested official notice be taken of the Order 2 Market Administrator's Bulletin Quarterly "D" for 1989. Accordingly, official notice of this publication is taken. The brief argued that dairy herd improvement information about sire selection offers information on the protein-transmitting ability of sires, but not on their nonfat solids-transmitting ability. Kraft's arguments included an overview of multiple component pricing plans throughout the nation, and stressed the prevalence of protein pricing in such plans in the northeastern United States. The brief also included a

number of proposed findings regarding the relatively greater importance of protein over nonfat solids as a dairy product ingredient.

Kraft's brief argued that protein testing is more precise than nonfat solids testing, and that the integrity of a nonfat solids pricing plan could be compromised by the undetectable addition of low-cost dairy solids such as lactose to producer milk. The brief characterized the determination of a component price on the basis of marketwide tests and residual skim value as defective, and urged that component values be computed on the basis of the component content in the milk included in the survey from which the Minnesota-Wisconsin price is derived.

It is apparent that a multiple component pricing plan is appropriate for the Middle Atlantic milk order. The record of the proceeding shows that the level of nonfat solids or protein contained in producer milk strongly influences the quantity of manufactured dairy product obtained from the milk. In addition, it is apparent that independent pricing plans within the marketing area for nonfat solids and protein are resulting in nonuniform prices paid to producers and paid by handlers.

Notwithstanding the objections to nonfat solids pricing raised by NFO and by Kraft, the Middle Atlantic order should be amended to include nonfat solids as one of the factors used in calculating handler obligations to the marketwide pool for milk used in Class II and Class III, and in paying producers for the milk they deliver to handlers. The regulatory language by which Pennmarva proposed the multiple component pricing plan be incorporated in the order also should be adopted, with minor adjustments to accommodate other order amendments that have been adopted since the hearing in this proceeding.

Three factors should be present before the pricing of a milk component can be economically justified. First, the component should have economic value. Second, the variability of the component within milk should be of such magnitude that the economic value of the milk changes because of changes in the economic value of the component. Third, the variability of the component should be measurable.

The record in this proceeding demonstrates that industry-sponsored premium programs for both nonfat solids and protein are operating within the Middle Atlantic marketing area. The fact that handlers are paying more for milk with higher nonfat solids or protein content is sufficient to demonstrate that these components have economic value.

The record also shows that the nonfat solids and protein contents of milk can vary among individual producers to the extent that the economic value of the milk would be affected. For example, an employee of the Market Administrator of the Middle Atlantic order testified regarding a study conducted by the Market Administrator's office on what effect price adjustments to producers paid under the Middle Atlantic order for differences in the protein or nonfat solids content of each producer's milk would have on the price received by each producer. The results of the study indicated that in March 1988 differences in payments to producers would have ranged from at least minus 43 cents per hundredweight to plus 43 cents per hundredweight for both nonfat solids and protein.

The record shows that tests to measure the nonfat solids or protein content of milk are sufficiently accurate and reliable for pricing purposes. An expert witness testified that several methods for the determination of butterfat, protein, lactose, and nonfat solids are contained in the current edition of the Official Methods of Analysis of the Association of Official Analytical Chemists (AOAC). For a procedure to be recognized as an official method by the AOAC its results must be reproducible, not only in the laboratory of origin but in different laboratories, and the test must be found to be accurate. The witness indicated that the purpose of getting the AOAC's approval is to give the procedure recognition as a proven method that can be used for regulatory purposes.

The record also demonstrates that component pricing is specifically needed in the Middle Atlantic order. As previously indicated, industry-sponsored premium programs for nonfat solids and protein are operating in the market. Testimony indicates that not only do these programs differ from one to another, but that they do not apply to all producers or handlers on the market. As a result, handlers are not paying uniform prices and producers are not receiving uniform prices. Inclusion of a component pricing plan under the Middle Atlantic order will help assure that orderly marketing conditions are maintained in the Middle Atlantic market.

The four modifications to the Great Basin multiple component pricing plan proposed by the Pennmarva witness should be adopted. The plan should be adapted to incorporate the current Middle Atlantic seasonal base-excess plan. The multiple component pricing plan for the Middle Atlantic market should use nonfat solids and butterfat as the pricing components, rather than protein and butterfat, with the nonfat solids price derived from the Class III price rather than the basic formula price, and from the nonfat solids content for the current month rather than for the previous month. Use of the current month's marketwide nonfat solids test and the Class III price will assure that producer returns for a particular month are more closely related to the actual value of milk used in manufactured products during that month. The record indicates that the only opposition to the Federation's proposal was to the use of nonfat solids rather than protein as a pricing component.

In the Middle Atlantic market, a far greater quantity of milk is used in manufactured dairy products of which the yield depends on the nonfat solids content of the milk than in dairy products of which the yield depends on protein. In 1989, 1.6 billion pounds of milk were used to make condensed and powdered milk products, frozen desserts and yogurt in the Middle Atlantic market, while 0.8 billion pounds of milk were used in cottage cheese, and American, Swiss and Italian cheeses. This 2.0–to–1 1989 ratio has been relatively constant for the 1980–89 period, ranging from a high of 2.1–to–1 in 1986 to a low of 1.6–to–1 in 1984.

In Kraft's testimony and in its brief, the handler proposed that for purposes of determining how milk is used in manufactured dairy products, the uses of such milk in the Middle Atlantic market and the adjacent markets should be combined. Kraft contended that if such use were combined, cheese would be the principal use of milk used in manufactured dairy products manufactured in the region. Kraft, however, provided no persuasive reasoning for combining the manufacturing uses of milk in these three markets.

The Kraft brief also contended that protein, since it constitutes over one-third of the nonfat solids in milk, is the predominant ingredient in manufactured products made from milk pooled under the Middle Atlantic order. Kraft's approach would require combining the protein in nonfat dry milk and other products of which the yield is dependent on nonfat solids with the protein in cheese and other products in which yield is determined by protein to conclude that protein is the most important factor in manufactured products produced in the marketing area. Such an approach would make economic sense only if the protein in the

milk used to produce nonfat dry milk is priced separately from other constituents of the nonfat solids contained in the milk. Since the record indicates that the nonfat constituents in nonfat dry milk are not valued individually, there is no basis for considering Kraft's contention.

According to the record, nonfat solids pricing is the principal method employed under the industry-sponsored component pricing plans operating in the Middle Atlantic market. Three producer cooperative associations qualified under the Middle Atlantic order (all of which support Pennmarva's proposal for nonfat solids pricing) charge some handlers and pay some of their producers some form of component premium. The record indicates that Atlantic Dairy Cooperative has a nonfat solids premium plan, Dairymen, Inc., had a protein premium plan but has changed to nonfat solids, and Eastern has a protein premium plan.

Although the testimony of an expert witness indicated that the protein component of the nonfat solids component of milk has a much greater nutritional, functional, and economic value than lactose, the witness also stated that protein is only rarely priced according to its intrinsic values. Conclusions based on an examination of the functional values of components do not necessarily apply to relative economic values. Except for Kraft's, most of the testimony in the record supports a conclusion that purchasers of manufactured milk products such as dry milk powder and condensed milk do not base their purchasing decisions on prices paid on the protein content of the products.

The casein and lactose prices which are part of the record do not represent the economic values of these components in producer milk. While it might be possible to derive a producer price for these products from their wholesale prices, the record is devoid of the facts that one would need to do it.

Aside from the testimony of one witness regarding premiums paid for nonfat solids content, the record contains no testimony about the amount of premiums paid for protein and nonfat solids. It is unlikely that a price for lactose would exist at the producer level because it is impractical to separate lactose from milk other than as a byproduct of cheesemaking. Furthermore, since the issue is whether milk should be paid for on the basis of its protein or nonfat solids components, comparisons between protein and lactose have no relevance. Although nonfat solids contain both lactose and protein, such a comparison is invalid because other components are contained in the nonfat solids portion, and because nonfat solids are not simply the sum of their parts. Nonfat solids constitute a distinct component with its own economic value apart from any of its constituents.

Although the Secretary generally adopts uniform pricing provisions in orders where significant inter-market competition among handlers exists, exceptions are made when warranted by local marketing conditions. Such an exception, for example, can be found in the present Middle Atlantic order. In nearly all orders, the basic formula price is the Class III price. However, in the Middle Atlantic order, the Class III price is the basic formula price adjusted for seasonality. There is no evidence in this record that the price difference has led to disorderly marketing between the Middle Atlantic market and adjacent marketing areas.

In order to cause disorderly marketing conditions, price differences between maketing areas would have to be of a great enough magnitude to overcome inherent institutional differences such as cooperative membership and relationships between suppliers and distributors. Such differences would also have to be readily discernable.

Although the nonfat solids and protein percentages of milk vary between individual producers, the variation in component content of the milk supply purchased by individual handlers is less marked, as the milk of a number of producers is commingled. Therefore, handlers procuring milk supplies from a milkshed shared by more than one marketing area are unlikely to see much difference in the component content of their milk receipts. If they are paying for different components under two different orders, it is also unlikely that such differing payment bases will result in significant differences in their obligations for producer milk as long as the prices for the components are calculated from the market's lowest class use price. Handlers such as Kraft, who see a decided advantage in procuring milk high in a particular component, likely will continue to pay premiums for a supply of such milk.

In the case of neighboring producers, the substantially higher quantity of nonfat solids in a hundredweight of milk in comparison to the quantity of protein in that milk would be balanced by a lower price for nonfat solids than for protein, resulting in essentially the same total impact on an average producer's payments. In addition, the relationship of the level of nonfat solids and protein content in the milk of any individual producer can be expected to vary seasonally. It is unlikely that producers would want, or be able, to change the order under which their milk is regulated to take advantage of variations in their relative component levels from month to month.

The fact that existing information on sire selection includes the potential in cow progeny for volume of milk, butterfat and protein, rather than nonfat solids, should not be given primary consideration. There is some relationship between the levels of protein and nonfat solids in milk. In addition, ninety percent of the producers on the Middle Atlantic market are represented by the cooperative associations that proposed incorporation of nonfat solids pricing in the order for the Middle Atlantic market. To conclude that pricing producer milk on the basis of its protein content would be more appropriate for the Middle Atlantic market than nonfat solids pricing would require finding that producers are incapable of determining their own best interests. In any event, it is difficult to envision a situation where a component is specifically being priced when it had not been before, and producers respond by reducing their production of it.

It is not necessary to find that testing for nonfat solids is more accurate than protein testing in order to adopt pricing on the basis of nonfat solids. The question is not whether protein tests are more accurate than nonfat solids tests but whether nonfat solids tests are sufficiently accurate, reliable and affordable to allow nonfat solids pricing. The record indicates that while the testing procedures for any component, including butterfat, are not exact, testing procedures for nonfat solids are accurate, repeatable, and affordable for any size operation.

Kraft's concern that nonfat solids pricing would enable producers to add cheap nonfat solids such as lactose to their milk to enhance their income with little fear of detection could not be alleviated by adopting protein pricing. Under a protein pricing plan, producers would have an incentive to add cheap protein, dry whey for example, which also would be difficult to detect.

It is therefore concluded that under the multiple component pricing plan adopted for the Middle Atlantic order, prices for milk should be adjusted for the nonfat solids content of the milk rather than for the protein content. A far greater quantity of milk pooled under the order is used in manufactured dairy products of which the yield depends on the nonfat solids content of the milk than is used in products of which the

yield depends on the protein content of the milk. In addition, nonfat solids pricing plans are the principal industry-sponsored component pricing plans operating in the Middle Atlantic market. It cannot be shown that the adoption of nonfat solids pricing in the Middle Atlantic market will result in disorderly marketing conditions within this market or between the Middle Atlantic and adjoining marketing areas.

Since it has been determined that nonfat solids pricing will be adopted under the Middle Atlantic order, it is not necessary to deal with the issues regarding protein pricing raised by Kraft in its testimony and brief: Namely, a uniform protein among all orders and price adjustments for somatic cell count. This proceeding provides no basis for concluding that the presence of somatic cells affects the value of nonfat milk solids in milk in the same way that the value of the protein content is affected by somatic cells.

Incorporation of the proposed multiple component pricing plan in the Middle Atlantic order will necessitate amending provisions of the order dealing with handler reports, class (and component) prices, the computation of handler's obligations and payments to the producer-settlement fund, and the determination of payments to producers. As in the Great Basin order, the assumption is made that the nonfat solids contained in skim milk will remain evenly distributed within the skim milk portion of milk receipts. This assumption will allow the proration of nonfat solids to skim milk in the shrinkage and allocation procedures of the order.

In addition to the information that the order already require handlers to report monthly to the Market Administrator, each handler will be required to report the average nonfat solids content of milk received from each producer during the month, the amount of nonfat solids in the handler's other receipts, except receipts of other source milk, and the nonfat solids contained in bulk transfers of milk and cream to other handlers. Partially regulated distributing plant operators will not be required to report information regarding the nonfat solids of their milk receipts unless they elect to have their obligations calculated under the provision that would determine obligations on the same basis as those of fully regulated handlers.

The amended order will contain definitions for a skim milk price, a butterfat price and a nonfat milk solids price in addition to defining the usual Class I, Class II and Class III prices, and producer prices. The skim milk price will be used to determine the value of the skim milk portion of producer milk that is allocated to Class I. Value adjustments for determining payments by handlers for milk used in Class II and Class III, and to producers, will be made by prices per pound for the butterfat and nonfat solids contained in their milk. The skim milk price, the butterfat price and the nonfat milk solids price will be derived from the Class III price and the butterfat differential.

The butterfat price in the amended order will be determined by adding the value of the butterfat differential expressed in pounds (the butterfat differential×10) to the value of skim milk per pound (the skim milk price per hundredweight divided by 100). The use of the skim milk price and the butterfat price will result in no changes form the present pricing procedures in the value of skim milk or butterfat to producers or handlers.

The nonfat solids price will be determined as proposed by Pennmarva. The value of the skim milk portion in milk priced at the Class III price, determined by subtracting from the Class III price the result of multiplying the butterfat price by 3.5, will be divided by the average pounds of nonfat solids in producer milk for the current month.

Payments to producers for deliveries of milk and the nonfat solids portion of milk will be determined through the operation of two marketwide pools. The differential pool will be used to determine the price to be paid producers for their share of the fluid milk market and the skim milk-nonfat solids pool will be used to determine the price to be paid producers for the nonfat solids in their milk. Each handler's net obligation to the two pools (and consequently the handler's payment to the producer settlement fund) will be determined by subtracting the differential and nonfat solids values due to the handler's producers from the differential and nonfat solids values of the producers' milk used by the handler. The value of butterfat used by the handler will not be pooled, but will be paid directly to the producers from which the handler received the milk in which the butterfat was contained.

The differential value of each handler's receipts of producer milk assigned to Class I and Class II will be calculated by multiplying the hundredweights of producer milk allocated to these classes by the difference between the respective class prices applicable at the location of the plant and the Class III price. In addition, the adjustments to the class values of producer milk that currently are included in determining a handler's obligation would be included in the differential value. The adjustments include the values of overage, beginning Class III inventory allocated to a higher class, other source and filled milk receipts allocated to Class I, and certain receipts from unregulated supply plants that are allocated to Class I. Each handler's differential value will be combined and then divided by the hundredweight of producer base milk in the differential pool to determine the weighted average differential price for base milk, and by the hundredweight of producer milk in the differential pool to determine the weighted average differential price.

Currently, the price for excess milk may reflect some of the value of a higher class if the volume of excess milk in the marketwide pool exceeds the amount of Class III milk. Under the amended order, all of the excess milk would be valued solely on its component basis, as derived from the Class III price. As a result, the base value of producer milk under the amended order would have the potential of exceeding the base value under the current order. The change should result in little material change in the relationship of the values of base and excess milk, and reflects the intent of proponents.

The weighted average differential price for base milk and the weighted average differential price will equal the portion of the present base price, and the uniform or blend price, respectively, that exceed the Class III price because the butterfat, skim milk and nonfat milk solids prices will be derived from the Class III price. As a result, it will be possible to compute and announce a base price and a uniform price (for informational and comparison purposes) by simply adding the weighted average differential price for base milk or the weighted average differential price to the Class III price.

Each handler's skim milk-nonfat solids value will be determined by combining the skim milk value of the handler's producer milk in Class I with the nonfat solids value of the handler's milk in Class II and Class III. The skim milk value will be determined by multiplying the skim milk in producer milk assigned to Class I by the skim milk price. The nonfat solids value will be determined by multiplying the nonfat solids in producer milk assigned to Class II and Class III by the nonfat milk solids price. The amount of nonfat solids in each class will be determined by multiplying the skim milk portion of producer milk allocated to each class by the nonfat solids content of the skim milk portion of all of the handler's producer milk. The price to be paid

producers for the nonfat solids in their milk will be determined by combining the individual handler values of skim milk in Class I milk and nonfat solids in Class II and Class III milk, and dividing the resulting total by the pounds of nonfat solids in all producer milk. The resulting price will be the producer nonfat milk solids price.

As a result of the order amendments described, payments to producers will be based on three factors. First, they will receive payment for their base milk equal to the hundredweight of base milk delivered to handlers multiplied by the weighted average differential price for base milk. Second, they will be paid for the nonfat solids contained in their milk in an amount equal to the pounds of nonfat solids contained in their milk deliveries multiplied by the producer nonfat milk solids price. And third, they will be paid for the butterfat in their production in an amount determined by the pounds of butterfat contained in their milk deliveries multiplied by the butterfat price.

The concerns expressed by the Dietrich's witness do not provide an adequate basis for altering the pricing and pooling plan described herein. Sales of skim milk as Class II (of Class III) to fluid milk handlers in the New York City area would not need to be treated differently than any other Class II or Class III use under the amended order. Because the component prices are derived from the Class III price, there should not be a great deal of difference between the pool value of Class III milk at a hundredweight price and a corresponding value at component prices. Dietrich's may be concerned that its receipts of high-solids milk will result in greater costs that may not be covered by payment from Order 2 handlers at Class III prices. However, if the skim milk is delivered by Dietrich's to fluid milk handlers in the New York metropolitan area, it is unlikely that Dietrich's receives only the order's lowest class price for such sales.

The equitable treatment of handlers in shrinkage computation, a question raised by the Dietrich's witness, should present no problems. The proportion of each handler's receipts represented by nonfat solids will be presumed to be reflected in the handler's shrinkage, and the handler's classified use of milk will be determined accordingly. The record provides no basis for assigning a different percentage of nonfat solids in skim milk lost in shrinkage than the handler receives in the skim milk portion of producer receipts.

Industry responses to the recommended decision included positive comments filed on behalf of Pennmarva Dairymen's Federation and on behalf of The American Jersey Cattle Club and National All-Jersey, Inc. The Jersey organizations' comments stated that the proposed amendments will give dairy farmers the economic incentive to breed, feed, and manage their herds over the long term to increase their production of milk components with the greatest demand and value. According to the Jersey groups, and changes will provide the dairy industry with a milk pricing system that can adapt to future technologies and changes in dairy product consumption.

Exceptions to the recommended decision filed by National Farmers Organization (NFO) focused on four findings of the recommended decision with which NFO disagreed. NFO first took exception to the finding that to conclude that pricing milk on the basis of its protein content would be more appropriate than nonfat solids pricing for the Middle Atlantic market would require finding that producers are incapable of determining their own best interests. NFO argued that such a position implies that minority cooperatives and handlers should not waste time expressing concerns about or opposition to a dominant cooperative's position, rather than that decisions should be based on the merits of a proposal. The decision in this proceeding to price milk on the basis of its nonfat solids content rather than its protein content was discussed thoroughly in the decision on the basis of the relative merits of the two pricing alternatives with regard to the primary manufactured products produced in the market and the prevailing basis for over order payments. The argument that a large majority of producers favored nonfat solids pricing was intended to answer NFO's assertion that such a pricing plan was counter to producers' interests.

A second exception included in NFO's comments stated that the record evidence shows that the testing equipment commonly used to test large volumes of milk samples does not test for minerals or mineral ash, but that a standard factor of .7 percent is used to represent this component. The record establishes that, indeed, minerals or mineral ash are not measured in testing, and that the standard deviation from the .7 percent factor is .12. However, the record also indicates that the standard deviation for measurements of protein is .05. Because protein represents less than half of the nonfat solids in milk, a similar pricing plan using protein would result in a protein price per pound more than twice as great as that obtained for nonfat solids. Therefore, it is unlikely that producer payments for milk protein will be significantly more accurate for individual producers than payments for nonfat milk solids. With regard to pricing milk on the basis of protein, the issue of whether true protein or crude protein is the appropriate measure also raises the question of accuracy in measurement and payment. In any case, the testing procedures discussed in the record are all AOAC-approved, and therefore suitable for establishing a basis upon which to pay producers.

NFO's complaint that the decision contains a finding that casein and lactose prices cited in the record are not wholesale prices is justified, and the decision has been revised to remove the inaccuracy. However, the point made in the decision is that the cited prices do not reflect the value of those components in producer milk, and that any of the information that would be necessary to derive producer prices for them from the market prices is not contained in the hearing record.

Finally, NFO disputed the finding that adoption of nonfat solids pricing would not cause disorderly and confusing marketing conditions in areas overlapping milksheds in which protein pricing is used. NFO's exceptions cited an exhibit from the hearing record that showed significant differences in returns to a number of individual producers under protein and nonfat solids payment plants, and expressed concern about the effect such differences would have when the blend price differences between Order 2 and Order 4 are considered.

At the present time, there are no adjoining Federal order areas in which protein pricing has been adopted, although a hearing has been held on a protein pricing plan for the Eastern Ohio-Western Pennsylvania order. Therefore, the concern expressed by NFO relates to a situation that does not currently exist. In addition, the decision deals with the potential for the disorderly conditions anticipated by NFO, and finds such a result unlikely. In the future, if the existence of different neighboring pricing plans proves to result in disorderly marketing conditions, the situation can be dealt with at that time.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and

conclusions filed by interested parties are inconsistent with the finding and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The finding and determinations hereinafter set forth supplement those that were made when the Middle Atlantic order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) The tentative marketing agreement and the order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum drives specified in the tentative marketing agreement and the order, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The tentative marketing agreement and the order, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, a marketing agreement upon which a hearing has been held.

Rulings on Exceptions to Rulings of the Administrative Law Judge

Execptions to four rulings by the Administrative Law Judge (the ALJ) which excluded or limited proffered evidence were filed by counsel on behalf of Kraft General Foods.

Counsel challenged the ALJ's decision not to allow cross-examination of the Atlantic Dairy Cooperative's expert witness on the Department's usual pre-hearing procedures. Counsel argued that this ruling was clearly wrong because parties were not afforded the amount of time upon which they are accustomed to rely to prepare for the hearing. Counsel contended insufficient notice adversely affected the quality of the record evidence.

The Department's review of the proceeding supports the ALJ's decision. The Department's regulations (7 CFR 900.4) set forth the requirements for the institution of proceedings to amend a marketing order. A notice of hearing must be filed with the Hearing Clerk. The time of a hearing on an amendment to a marketing order can not be less than 3 days after the notice is published in the **Federal Register**. The notice of hearing for this proceeding was published on July 9, 1990. The hearing began on July 17, 1990, more than the required 3 days after the publication date. (Tr. p. 5, Exhibit 1). Next, the Administrator is required to provide notice of the hearing to all interested parties and to the Governors of the States who, in the public interest, should be notified. Exhibits 1–4 establish that the Administrator fulfilled all the requirements of 7 CFR 900.4.

Counsel complained that the record is deficient because the notice to the parties was insufficient. There is no merit to this argument. The purpose of § 900.4 is to ensure adequate notice to all parties. Since the requirements of that section were satisfied, Counsel's suggestion that the parties did not have ample time to prepare for the hearing is of no consequence. The common practices of the Department were not an issue in this proceeding. The ALJ was correct to exclude this testimony because it was irrelevant.

Even if this inquiry had been relevant, an economist for a dairy cooperative is not the proper witness to testify about Department practices. A witness may not testify about a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. There is no evidence in the record to suggest that this witness had personal knowledge of the Department's common pre-hearing practice.

Counsel also challenged the ALJ's decision to exclude portions of Department studies because they contained opinion. The people who had prepared the studies were not present to testify at the hearing. The exhibits in question are Exhibits 29, 30 and 38, entitled "Multiple Component Pricing Report" and "Industry Sponsored Multiple Component Pricing Programs Applicable to Federal Milk Order Procedures May 1989 Update", and "Upper Midwest Marketing Area Analysis of Component Levels on Individual Herd Milk at the Farm Level 1984 and 1985", respectively. The first report was prepared by a Task Force of USDA Market Administrators, the second by the Missouri Market Administrator's Office, and the third by Victor Halverson and H. Paul Kyburz of the Upper Midwest Market Administrator's Office.

Although the studies are hearsay, the ALJ admitted portions of them into evidence under the public records exception to the hearsay rule. The ALJ also ruled that the parts of the reports which stated opinions or conclusions were not admissible. This decision was correct. The opinions of the Market Administrators and their employees who prepared these studies are expert testimony. The public records exception does not extend to expert opinion testimony or evidence.

Counsel also claimed that these opinions should have been admitted into evidence under the "learned treatise" exception to the hearsay rule. The exception upon which counsel relies states that to the extent material called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, is established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice, it is admissible. The exception also states that if such publication is admitted, the statement may be read into evidence but may not be received as an exhibit. The opinions contained in these exhibits do not fit this exception. The witness through whom counsel sought to introduce these exhibits was not an expert witness. There is no evidence in the record upon which to find that he is an expert in a particular field. The exception does not extend to a non-expert witness who relies on a publication.

Counsel's third argument in favor of admitting this hearsay opinion evidence is based upon a general exception to the hearsay rule. To fit that exception, hearsay must be offered as evidence of material fact, be more probative on the point for which it is offered than any other evidence, and its admission must serve the interest of justice. This exception is not applicable to opinions contained in reports. The most probative evidence would certainly be the testimony of those experts whose opinions are sought to be introduced.

The ALJ excluded a portion of Exhibit 37, "Great Basin Market Average Protein Content in Producer Milk and Average Producer Protein Price/Pound", as well. Specifically, he excluded the table entitled "Difference in Handling Cost Pricing compared to Skim Milk Under Component Pricing" located on the third page of the exhibit. In his exceptions, counsel stated that this chart was excluded because "it was specially prepared for information to the industry rather than prepared every month on a routine basis." This reason is not the one the ALJ gave for excluding the table.

Rather, he excluded it because the table did not contain volume information and therefore was potentially misleading. (Tr. p. 454). This ruling was proper because without the volume information, the table's probative value was negligible.

Counsel also challenged the ALJ's ruling that summaries of statistical data concerning somatic cell count in Pennsylvania and Wisconsin DHIA herds were not admissible. The ALJ based his ruling on the fact that the document contained only conclusions. Counsel did not present a witness who could explain the exhibit or answer questions about it. This ruling was correct. Without information about how the information was collected, the sample of herds on which the information was based, and other vital information, the tables had little probative value.

Evidence related to any modification of a multiple component pricing plan to include adjustments for somatic cell counts was excluded from the record by the ALJ on the basis that such a modification was well beyond the scope of the hearing notice. Kraft's two exceptions to rulings of the ALJ of this issue are based on its assertion that pricing adjustments for somatic cell content is generally recognized as an integral part of multiple component pricing programs.

No mention of any kind of quality adjustment was included in the hearing notice for this proceeding. The record clearly supports a finding that other parties to the hearing did not expect to address any issue related to quality adjustments in general or somatic cell counts in particular. While the question of what, if any, milk components should be included in a pricing plan for the Middle Atlantic market clearly was an issue in this proceeding, there was no basis for any parties to the proceeding to assume that quality adjustments would be considered.

Rulings on Exceptions

In arriving at the findings and conclusions, and the regulatory provisions of this decision, each of the exceptions received was carefully and fully considered in conjunction with the record evidence. To the extent that the findings and conclusions and the regulatory provisions of this decision are at variance with any of the exceptions, such exceptions are hereby overruled for the reasons previously stated in this decision.

Marketing Agreement and Order Amending the Order

Annexed hereto and made a part hereof are two documents, a Marketing Agreement regulating the handling of milk, and an Order amending the order regulating the handling of milk in the Middle Atlantic marketing area, which have been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered that this entire decision and the two documents annexed hereto be published in the **Federal Register.**

Determination of Producer Approval and Representative Period

May 1991 is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the order, as amended and as hereby proposed to be amended, regulating the handling of milk in the Middle Atlantic marketing area is approved or favored by producers, as defined under the terms of the order as amended and as hereby proposed to be amended, who during such representative period were engaged in the production of milk for sale within the aforesaid marketing area.

List of Subjects in 7 CFR Part 1004

Milk marketing orders.

Signed at Washington, DC, on November 5, 1991.

Jo Ann R. Smith,

Assistant Secretary, Marketing and Inspection Services.

Order Amending the Order Regulating the Handling of Milk in the Middle Atlantic Marketing Area

(This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketings agreements and marketing orders have been met.)

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) Findings. A public hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the Middle Atlantic marketing area. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure (7 CFR part 900).

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

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

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the said marketing area; and the minimum prices specified in the order as hereby amended are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The said order as hereby amended regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held.

Order Relative to Handling

It is therefore ordered that on and after the effective date hereof, the handling of milk in the Middle Atlantic marketing area shall be in conformity to and in compliance with the terms and conditions of the order, as amended, and as hereby amended, as follows:

The provisions of the proposed marketing agreement and order amending the order contained in the recommended decision issued by the Administrator on may 23, 1991 and published in the **Federal Register** on May 31, 1991 (56 FR 24746), shall be and are the terms and provisions of this order, amending the order and are set forth in full herein.

PART 1004—[AMENDED]

1. The authority citation for 7 CFR part 1004 continues to read as follows:

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

2. Section 1004.30 is revised to read as follows:

§ 1004.30 Reports of receipts and utilization.

(a) On or before the eighth day after the end of each month each handler with respect to each of the handler's pool plants shall report for the month to the market administrator in the detail and on forms prescribed by the market administrator as follows:

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

(i) Receipts of producer milk (including such handler's own production) and milk received from a cooperative association for which it is a handler pursuant to § 1004.9(c), and the pounds of nonfat milk solids contained in such receipts;

(ii) Receipts of fluid milk products and bulk fluid cream products from other pool plants; and

(iii) Receipts of other source milk;

(2) the quantities of skim milk and butterfat in inventories at the beginning and end of the month of fluid milk products and products specified in § 1004.40(b)(1); and

(3) The utilization or disposition of all skim milk and butterfat required to be reported pursuant to this paragraph, showing separately in-area route disposition, except filled milk, and filled milk route disposition in the marketing area;

(b) Each handler who operates a partially regulated distributing plant shall report as required in paragraph (a) of this section, except that receipts of milk from dairy farmers shall be reported in lieu of producer milk and that the market administrator may waive the reporting of nonfat milk solids; such report shall include a separate statement showing the quantity of reconstituted skim milk in fluid milk products disposed of on routes in the marketing area;

(c) Each producer-handler and each handler pursuant to § 1004.9(e) shall make reports to the market administrator at such time and in such manner as the market administrator may prescribe; and

(d) On or before the eighth day after the end of each month, each cooperative association and/or a federation of cooperative associations shall report with respect to milk for which it is a handler pursuant to § 1004.9 (b) or (c) as follows:

(1) Receipts of skim milk, butterfat and nonfat milk solids from producers;

(2) Utilization of skim milk, butterfat and nonfat milk solids diverted to nonpool plants; and

(3) The quantities of skim milk, butterfat and nonfat milk solids delivered to each pool plant of another handler.

3. Section 1004.32 Other reports, is amended by revising paragraphs (a)(1)(iii), (a)(2) and (d)(2) to read as follows:

§ 1004.32 Other reports.

(a) * * *

(1) * * *

(iii) The average butterfat content and average nonfat milk solids content of such milk; and

* * * * *

(2) Such other information with respect to receipts and utilization of butterfat, skim milk and nonfat milk solids as the market administrator shall prescribe.

(b) * * *

(d) * * *

(2) The total pounds of milk involved in the transaction, and the average butterfat and nonfat milk solids content of such milk; and

* * * * *

4. Section 1004.50 Class and component prices, is amended by adding new paragraphs (d)–(f) to read as follows:

§ 1004.50 Class and component prices.

* * * * *

(d) *Butterfat price.* The butterfat price per pound shall be a figure computed as follows:

(1) Compute a butterfat differential per 1 percent butterfat by multiplying the simple average for the month of the daily prices per pound of Grade A (92-score) butter by 1.38, and subtract from the result an amount determined by multiplying the average price per hundredweight, at test, for manufacturing grade milk, f.o.b. plants in Minnesota and Wisconsin, as reported by the Department for the month, by 0.028.

The butter price means the simple average for the month of the daily prices per pound of Grade A (92-score) butter. The prices used shall be those of the Chicago Mercantile Exchange as reported and published weekly by the Dairy Division, Agricultural Marketing Service. The average shall be computed by the Director of the Dairy Division using the price reported each week as the daily price for that day and for each following day until the next price is reported.

(2) Multiply the butterfat differential obtained in paragraph (d)(1) of this section by 3.5, and subtract the resulting amount from the Class III price;

(3) Divide the value obtained from the calculations of paragraph (d)(2) of this section by 100; and

(4) Add to the resulting amount the butterfat differential computed in paragraph (d)(1) of this section. The sum thereof shall be the price per pound for producer butterfat for the month.

(e) *Nonfat milk solids price.* The price per pound for nonfat milk solids shall be computed by subtracting from the Class III price the butterfat price multiplied by 3.5, and dividing the result by the average percentage of nonfat milk solids in all producer milk for the month.

(f) *Skim milk price.* The skim milk price per hundredweight shall be the Class III price for the month adjusted to remove the value of 3.5 percent butterfat and rounded to the nearest cent. Such adjustment shall be computed by multiplying the butterfat differential pursuant to paragraph (d)(1) of this section by 3.5 and subtracting the result from the Class III price.

§ 1004.51 Basic formula price.

5. Section 1004.51 Basic formula prices, is amended by revising the last sentence of paragraph (a) to read as follows: "For such adjustment the butterfat differential pursuant to § 1004.50(d)(1), rounded to the nearest cent, shall be used."

6. Section 1004.53 is amended by revising paragraph (a)(3) to read as follows:

§ 1004.53 Announcement of class prices and component prices.

* * * * *

(a) * * *

(3) The prices for butterfat and skim milk computed pursuant to § 1004 50 (d) and (f).

* * * * *

7. Section 1004.54 is revised to read as follows:

§ 1004.54 Equivalent prices or indexes.

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

8. The heading "Uniform Prices" before § 1004.60 is changed to read "Differential Pool and Handler Obligations."

9. Section 1004.60 is revised to read as follows:

§ 1004.60 Handler's value of milk for computing uniform prices.

The market administrator shall compute each month for each handler defined in § 1004.9 (a) with respect to each of such handler's pool plants, and for each handler defined in § 1004.9 (b) and (c), an obligation to the pool computed by adding the following values:

(a) The pounds of milk received from a cooperative association as a handler pursuant to § 1004.9(c) and allocated to Class I pursuant to § 1004.44(a)(14) and the corresponding step of § 1004.44(b), and the pounds of producer milk in

Class I as determined pursuant to § 1004.44, both multiplied by the difference between the Class I price (adjusted pursuant to § 1004.52) and the Class III price;

(b) The pounds of milk received from a cooperative association as a handler pursuant to 1004.9(c) and allocated to Class II pursuant to § 1004.44(a)(14) and the corresponding step of § 1004.44(b), and the pounds of producer milk in Class II as determined pursuant to § 1004.44, both multiplied by the difference between the Class II price and the Class III price;

(c) The value of the product pounds, skim milk, and butterfat in overage assigned to each class pursuant to § 1004.44(a)(15) and the value of the corresponding pounds of nonfat milk solids associated with the skim milk subtracted from Class II and Class III pursuant to § 1004.44(a)(15), by multiplying the skim milk pounds so assigned by the percentage of nonfat milk solids in the handler's receipts of producer skim milk during the month, as follows:

(1) The hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1004.44(a)(15) and the corresponding step of § 1004.44(b), multiplied by the difference between the Class I price adjusted for location and the Class III price, plus the hundredweight of skim milk subtracted from Class I pursuant to § 1004.44(a)(15) multiplied by the skim milk price, plus the butterfat pounds of overage subtracted from Class I pursuant to § 1004.44(b) multiplied by the butterfat price;

(2) The hundredweight of skim milk and butterfat subtracted from Class II pursuant to § 1004.44(a)(15) and the corresponding step of § 1004.44(b) multiplied by the difference between the Class II price and the Class III price, plus the pounds of nonfat milk solids in skim milk subtracted from Class II pursuant to § 1004.44(a)(15) multiplied by the nonfat milk solids price, plus the butterfat pounds of overage subtracted from Class II pursuant to § 1004.44(b) multiplied by the butterfat price;

(3) The pounds of nonfat milk solids in skim milk overage subtracted from Class III pursuant to § 1004.44(a)(15) multiplied by the nonfat milk solids price, plus the butterfat pounds of overage subtracted from Class II pursuant to § 1004.44(b) multiplied by the butterfat price;

(d) For the first month that this paragraph is effective, the value of the hundredweight of skim milk and butterfat subtracted from Class I and Class II pursuant to § 1004.44(a)(10) and the corresponding step of § 1004.44(b), as follows:

(1) The value of the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1004.44(a)(10) and the corresponding step of § 1004.44(b) applicable at the location of the pool plant at the difference between the current month's Class I price and the previous month's Class III price;

(2) The value of the hundredweight of skim milk and butterfat subtracted from Class II pursuant to § 1004.44(a)(10) and the corresponding step of § 1004.44(b) at the difference between the current month's Class II price and the Class III price for the previous month;

(e) For the second and subsequent months that this paragraph is effective, the value of the product pounds, skim milk, and butterfat subtracted from Class I or Class II pursuant to § 1004.44(a)(10) and the corresponding step of § 1004.44(b), and the value of the pounds of nonfat milk solids associated with the skim milk subtracted from Class II pursuant to § 1004.44(a)(10), computed by multiplying the skim milk pounds so subtracted by the percentage of nonfat milk solids in the handler's receipts of producer skim milk during the previous month, as follows:

(1) The value of the product pounds, skim milk and butterfat subtracted from Class I pursuant to § 1004.44(a)(10) and the corresponding step of § 1004.44(b) applicable at the location of the pool plant at the current month's Class I–Class III price difference and the current month's skim milk and butterfat prices, less the Class III value of the milk at the previous month's nonfat milk solids and butterfat prices;

(2) The value of the hundredweight of skim milk and butterfat subtracted from Class II pursuant to § 1004.44(a)(10) and the corresponding step of § 1004.44(b) at the current month's Class II–Class III price difference and the current month's nonfat milk solids and butterfat prices, less the Class III value of the milk at the previous month's nonfat milk solids and butterfat prices;

(f) The value of the product pounds, skim milk and butterfat subtracted from Class I pursuant to § 1004.44(a)(8)(i) through (iv), and the corresponding step of § 1004.44(b), excluding receipts of bulk fluid cream products from another order plant, applicable at the location of the pool plant at the current month's Class I–Class III price difference;

(g) The value of the product pounds, skim milk and butterfat subtracted from Class I pursuant to § 1004.44(a)(8)(v) and (vi) and the corresponding step of § 1004.44(b) applicable at the location of the transferor-plant at the current month's Class I–Class III price difference;

(h) The value of the product pounds, skim milk and butterfat subtracted from Class I pursuant to § 1004.44(a)(12) and the corresponding step of § 1004.44(b), excluding such hundredweight in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent quantity disposed of to such plant by handlers fully regulated by any Federal order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order, applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received at the current month's Class I–Class III price difference.

(i) The pounds of skim milk received from a cooperative association as a handler pursuant to § 1004.9(c) and allocated to Class I pursuant to § 1004.44(a)(14), and the pounds of producer milk in Class I as determined pursuant to § 1004.44, both multiplied by the skim milk price for the month computed pursuant to § 1004.50(f).

(j) The pounds of nonfat milk solids in skim milk in receipts allocated to Class II and Class III pursuant to § 1004.44(a)(14) and in producer milk classified as Class II and Class III pursuant to § 1004.44, computed by multiplying the skim milk pounds so assigned by the percentage of nonfat milk pounds so assigned by the percentage of nonfat milk solids in the handler's receipt of producer skim milk during the month for each report filed, separately, the result to be multiplied by the nonfat milk solids price for the month computed pursuant to § 1004.50(e).

10. Section 1004.61 is revised to read as follows:

§ 1004.61 Computation of weighted average differential price, weighted average differential price for base milk, and producer nonfat milk solids price.

For each month the market administrator shall compute a "weighted average differential price", a "weighted average differential price for base milk" received from producers, and a "producer nonfat milk solids price", as follows:

(a) The "weighted average differential price" shall be the result of the following computations:

(1) Combine into one total:

(i) The value computed pursuant to § 1004.60(a) through (h) for all handlers who filed the reports prescribed by § 1004.30 for the month and who made

the payments pursuant to § 1004.71 for the preceding month;

(ii) An amount equal to the total value of the location differentials computed pursuant to § 1004.75;

(iii) An amount equal to not less than one-half of the unobligated balance in the producer-settlement fund.

(2) Divide the total value calculated under paragraph (a)(1) of this section by the sum of the following for all handlers:

(i) The total hundredweight of producer milk pursuant to § 1004.13 represented by the value established pursuant to (1)(i) of this paragraph; and

(ii) The total hundredweight for which value is computed pursuant to § 1004.60(h).

(3) Subtract not less than 4 cents nor more than 5 cents per hundredweight. The result shall be the "Weighted average differential price."

(b) Compute the "Weighted average differential price for base milk" as follows:

(1) Subtract from the total value calculated pursuant to paragraph (a)(1) of this section an amount computed by multiplying the hundredweight of milk for which a value is computed pursuant to § 1004.60(h) by the weighted average differential price computed pursuant to paragraph (a) of this section; and

(2) Divide the result obtained in (b)(1) by the total hundredweight of base milk for handlers included in the computations pursuant to paragraph (a)(1)(i) of this section and subtract not less than 4 cents nor more than 5 cents per hundredweight. The result shall be the "weighted average differential price for base milk."

(c) The "Producer nonfat milk solids price" to be paid to all producers for the pounds of nonfat milk solids contained in their milk shall be computed by the market administrator each month as follows:

(1) Combine into one total the values computed pursuant to § 1004.60 (i) and (j) for all handlers who made reports pursuant to § 1004.30 and who made payments pursuant to § 1004.71 for the preceding month:

(2) Divide the resulting amount by the total pounds of nonfat milk solids in producer milk; and

(3) Round by subtracting a positive amount not to exceed one cent. The result is the "Producer nonfat milk solids price."

11. Section 1004.62 is revised to read as follows:

§ 1004.62 Computation of uniform price.

A uniform price for producer milk containing 3.5 percent butterfat shall be computed by adding the weighted average differential price determined pursuant to § 1004.61(a) to the Class III price.

12. A new Section 1004.61(a) is added under the heading "Differential Pool and Handler Obligations" to read as follows:

§ 1004.63 Announcement of weighted average differential price, weighted average differential price for base milk, nonfat milk solids price and producer nonfat milk solids price.

On or before the 13th day of each month, the market administrator shall publicly announce for the preceding month by posting in a conspicuous place in his office and by such other means as he deems appropriate, the weighted average differential price, the weighted average differential price for base milk and the producer nonfat milk solids price computed pursuant to § 1004.61, and the price for nonfat milk solids computed pursuant to § 1004.50(e).

13. Section 1004.71 is amended by revising paragraph (b) to read as follows and removing paragraph (c):

§ 1004.71 Payments to the producer-settlement fund.

* * * * *

(b) The sum of:

(1) The value of milk received by such handler from producers and from cooperative association handlers pursuant to § 1004.9(c) at the applicable price(s) pursuant to § 1004.61 adjusted by applicable location differentials, less in the case of a cooperative association on milk for which it is a handler pursuant to § 1004.9(c), the amount due from other handlers pursuant to § 1004.74(d); and

(2) The value at the weighted average differential price, computed pursuant to § 1004.62, adjusted by the applicable location differential on nonpool milk pursuant to § 1004.75(b), with respect to other source milk for which a value was computed pursuant to § 1004.60(h),

14. Section § 1004.74 is removed, § 1004.73 is re-designated as § 1004.74 and amended by revising paragraphs (a)(2), (c), (d)(2) and (e)(2), and a new § 1004.73 is added, to read as follows:

§ 1004.73 Value of producer milk.

The total value of milk received from producers during any month shall be the sum of the following calculations:

(a) The value of a producers' base milk shall be the sum of the following:

(1) The weighted average differential price for base milk computed pursuant to § 1004.61(b) subject to the appropriate plant location adjustment times the total hundredweight of base milk received from the producer;

(2) The total nonfat milk solids contained in the producer milk received from the producer multiplied by the producer nonfat milk solids price computed pursuant to § 1004.61; and

(3) The total butterfat contained in the producer milk received from the producer times the butterfat price computed pursuant to § 1004.50(d).

(b) The value of a producer's excess milk shall be the sum of the values computed pursuant to paragraphs (a)(2) and (3) of this section.

§ 1004.74 Payments to producers and to cooperative associations.

(a)* * *

(2) On or before the 20th of the following month at not less than the total amount computed in accordance with the provisions set forth in § 1004.73 with respect to such milk, subject to the following adjustments:

* * * * *

(c) In the case of milk received by a handler from a cooperative association in its capacity as the operator of a pool plant such handler shall on or before the second day prior to the date on which payments are due individual producers, pay to such cooperative association for milk so received during the month, an amount not less than the value of such milk computed at the applicable class and/or component prices for the location of the plant of the buying handler; and

(d)* * *

(2) A final payment equal to the total value of such milk computed pursuant to § 1004.73, adjusted by the applicable differentials pursuant to § 1004.75, less the amount of partial payment on such milk.

(e)* * *

(2) The total pounds, average butterfat test and average test of nonfat milk solids of milk delivered by the producer;

* * * * *

15. Section 1004.75 is revised to read as follows:

§ 1004.75 Location differentials to producers and on nonpool milk.

(a) For milk received from producers and from cooperative association handlers pursuant to § 1004.9(c) at a plant located 55 miles or more from the city hall in Philadelphia, Pa., and also at least 75 miles from the nearer of the zero milestone in Washington, DC, or the city hall in Baltimore, Md. (all distances to be the shortest highway distance as determined by the market administrator), the weighted average differential price for base milk computer pursuant to § 1004.61(b) shall be reduced 1.5 cents for each 10 miles distance or fraction thereof that such plant is from the nearest of such basing points.

(b) For purposes of computations pursuant to §§ 1004.71 and 1004.74, the weighted average differential price computed pursuant to § 1004.61(a) shall be reduced at the rate set forth in paragraph (a) of this section applicable at the location of the nonpool plant from which the milk was received, except that the adjusted weighted average differential price shall not be less than zero.

16. Section 1004.76 is amended by changing the reference "1004.60(f)" in paragraph (a)(1)(i) to "1004.60(h)", and revising paragraph (b)(5) to read as follows:

§ 1004.76 Payments by a handler operating a partially regulated distributing plant.

* * * * *

(b) * * *

(5) From the value of such milk at the Class I price, subtract its value at the uniform price computed pursuant to § 1004.62, and add for the quantity of reconstituted skim milk specified in paragraph (b)(3) of this section its value computed at the Class I price less the value of such milk at the Class III price (except that the Class I price and the uniform price shall be adjusted for the location of the nonpool plant and shall not be less than the Class III price.)

§ 1004.85 [Amended]

17. Section 1004.85 paragraph (a) is amended by changing the reference "§ 1004.60(d) and (f)" to "§ 1004.60(f) and (h)."

18. Section 1004.86 is revised to read as follows:

§ 1004.86 Deductions for marketing services.

(a) Except as set forth in paragraph (b) of this section, each handler, making payments directly to producers for milk (other than milk of his own production) pursuant to § 1004.74(a) shall deduct 5 cents per hundredweight or such lesser amount as the Secretary may prescribe and shall pay such deductions to the market administrator on or before the 20th day after the end of the month. Such money shall be expended by the market administrator to provide market information and to verify or establish the weights, samples and tests of milk of producers who are not receiving such service from a cooperative association; and

(b) In the case of producers for whom the Secretary determines a cooperative association is actually performing the services set forth in paragraph (a) of this section, each handler shall make, in lieu of the deduction specified in paragraph (a) of this section, such deductions from the payments to be made directly to such producer pursuant to § 1004.74(a) as are authorized by such producers on or before the 18th day after the end of each month and pay such deductions to the cooperative rendering such services.

Marketing Agreement Regulating the Handling of Milk in the Middle Atlantic Marketing Area

The parties hereto, in order to effectuate the declared policy of the Act, and in accordance with the rules of practice and procedure effective thereunder (7 CFR part 900), desire to enter into this marketing agreement and do hereby agree that the provisions referred to in paragraph I hereof as augmented by the provisions specified in paragraph II hereof, shall be and are the provisions of this marketing agreement as if set out in full herein.

I. The findings and determinations, order relative to handling, and the provisions of § § 1004.1 to 1004.95, all inclusive, of the order regulating the handling of milk in the Middle Atlantic marketing area (7 CFR part 1004) which is annexed hereto; and

II. The following provisions:

§ 1004.96 Record of milk handled and authorization to correct typographical errors.

(a) Record of milk handled. The undersigned certifies that he handled during the month of May 1991, _____ hundredweight of milk covered by this marketing agreement.

(b) Authorization to correct typographical errors. The undersigned hereby authorizes the Director, or Acting Director, Dairy Division, Agricultural Marketing Service, to correct any typographical errors which may have been made in this marketing agreement.

§ 1004.97 Effective date. This marketing agreement shall become effective upon the execution of a counterpart hereof by the Secretary in accordance with § 900.14(a) of the aforesaid rules of practice and procedure.

In Witness Whereof, The contracting handlers, acting under the provisions of the Act, for the purposes and subject to the limitations herein contained and not otherwise, have hereunto set their respective hands and seals.

(Signature)

(Seal)

By

(Name)

(Title)

(Address)

Attest

Date

[FR Doc. 27272 Filed 11-13-91; 8:45 am]

BILLING CODE 3410-02-M

FEDERAL ELECTION COMMISSION

11 CFR Part 106

[Notice 1991-21]

Allocation of Federal and Non-Federal Expenses

AGENCY: Federal Election Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Election Commission is seeking comments on three proposed amendments to 11 CFR part 106, regarding allocation by state and local party committees of expenses that jointly benefit both federal and non-federal candidates. Under the first proposal, committees would be allowed to add one additional non-federal point to the ballot composition ratio computed under 11 CFR 106.5(d). They would also be allowed to include non-federal point(s) for local offices if partisan local candidates were expected on the ballot in any regularly scheduled election during the two-year congressional election cycle. Second, the current 40-day "window" for transfers from a committee's non-federal to its federal account, to reimburse the federal account for the non-federal portion of joint expenditures, would be expanded from 40 to 70 days. 11 CFR 106.5(g)(2)(ii)(B). Third, committees would specifically be allowed, under 11 CFR 106.5(f), to recalculate the federal/non-federal ratio for a particular fundraising program or event within 60 days after the program or event, and make corresponding transfers between their federal and non-federal accounts. Given the nature of the latter two changes, they would apply to national party committees, separate segregated funds, and nonconnected committees as well. Further information is provided in the supplementary information which follows.

DATES: Comments must be received on or before December 16, 1991.

ADDRESSES: Comments must be in writing and addressed to: Ms. Susan E. Propper, Assistant General Counsel, 999 E Street NW., Washington, DC 20463.

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, 999 E Street NW., Washington, DC 20463, (202) 219-3690 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: On March 26, 1991, the Commission received a petition for rulemaking from the Association of State Democratic Chairs ("ASDC"). The petition requested reconsideration of three aspects of the regulations governing allocation of expenses by state and local party committees between their federal and non-federal accounts: (1) The ballot composition ratio, 11 CFR 106.5(d); (2) the payment, recordkeeping and reporting requirements, 11 CFR 104.10, 106.5(g); and (3) the requirement that state parties allocate their administrative expenses between federal and state elections before July of a federal election year.

The Commission published a notice of availability seeking comments on this rulemaking petition on April 24, 1991. 56 FR 18780. It received 45 comments in response to this notice.

The Commission first notes that the current allocation rules are the result of a lengthy and carefully considered rulemaking process. They serve the dual purposes of curbing the use of money raised outside of the Federal Election Campaign Act's ("FECA" or "the Act") requirements (so-called "soft money") in federal elections, and of allowing the Commission and the public to monitor compliance with these requirements. The Commission believes that, with limited exceptions, it would be premature to reopen this rulemaking process before the end of the 1991-92 election cycle. At that time both the Commission and the regulated entities will be in a better position to evaluate what future adjustments might be needed.

However, after consideration of the petition and comments, the Commission has now determined to reopen the allocation rulemaking in three areas. First, state and local party committees, which are required to allocate their administrative expenses and generic voter drive costs using the "ballot composition method" set forth at 11 CFR 106.5(d), would be allowed to add an additional non-federal point in computing this ratio. They would also be allowed to include non-federal point(s) for local offices if partisan local candidates were expected on the ballot in any regularly scheduled election during the two-year congressional election cycle. Second, the 40-day "window" for transfers from a committee's non-federal to its federal account, to reimburse the federal account for the non-federal share of joint expenditures, would be expanded from 40 to 70 days. 11 CFR 106.5(g)(2)(ii)(B). Finally, committees would specifically be allowed, under 11 CFR 106.5(f), to recalculate the federal/non-federal ratio for a particular fundraising program or event within 60 days after that program or event, and make corresponding transfers between their federal and non-federal accounts. Given the nature of the latter two changes, they would apply to all party committees, including national party committees. In addition, the Commission is proposing that 11 CFR 106.6, which parallels the 106.5 requirements but applies to separate segregated funds ("SSF's") and nonconnected committees, be similarly amended for continued consistency in these areas. The Commission welcomes comments on these issues.

Also, while the Commission does not intend to amend its allocation reporting requirements during the 1991-92 election cycle, it anticipates that some future adjustments may be needed in that area. It therefore invites comments from those using the current H Schedules as to what modifications might streamline these requirements, while still permitting effective Commission and public monitoring of the allocation process.

Ballot Composition Ratio

The ballot composition method for allocating administrative and generic voter drive expenses is "based on the ratio of federal offices expected on the ballot to total federal and non-federal offices expected on the ballot in the next general election to be held in the committee's state or geographic area." 11 CFR 106.5(d)(1)(i). However, not all offices are included in this calculation. Rather, the Commission has specified various categories of offices which are assigned points to be used in computing the ratio.

The Commission received a wide range of comments in response to the petition's request that the current ballot composition formula be more heavily weighted towards non-federal offices. While some committees expressed satisfaction with the current formula, others provided examples of instances where they believe the rules do not accurately reflect their non-federal expenditures in the current election cycle—that is, where they anticipate that their spending on state and local races, partisan judicial races, and ballot questions will utilize a higher percentage of funds than the non-federal percentage computed under this formula.

The Commission notes that the ballot composition ratio was never anticipated to precisely reflect all state and local party activity in all states in all election cycles. It believes that its use of the "average ballot concept," which reflects variations in different states and localities in each election, as well as the special rules for states that hold state and local election in non-federal election years, provide the necessary flexibility in this area. This approach represents a reasoned balance between the need for greater standardization, required by a federal district court in *Common Cause* versus *FEC*, 692 F. Supp. 1391 (D.D.C. 1987) (which struck down the "any reasonable (allocation) method" standard then in use), and the need to reflect differences between different states and types of political committees.

Also, while most comments on the petition requested that greater weight be given to the non-federal share of expenses, they offered no viable suggestion as to how this might be done. The petition and some of the comments requested that all state and local offices, partisan judicial offices, and ballot questions should be included in the ratio. However, this approach could lead to a miniscule federal percentage, and thereby permit "soft" money to enter federal campaigns, especially in areas where the ballot contains large numbers of local offices or numerous ballot questions, and only two or three federal offices.

Nevertheless, after reviewing the petition and accompanying comments, the Commission is proposing that state and local party committees be allowed to add one additional non-federal point in computing their ballot composition ratios, to compensate for possible underrepresentation of non-federal offices in the current formula. Because state situations differ widely, this point would not be tied to particular elections, such as partisan judicial elections or ballot questions. Rather, it would be a generic point available to all state and local party committees.

In addition to the generic point, the Commission is proposing that 11 CFR 106.5(d)(1)(ii) be amended to allow state and local party committees to include non-federal point(s) for local offices in their ballot composition ratios, if partisan local candidates are expected on the ballot in any regularly scheduled election during the two-year congressional election cycle. Under the current rules, the committees compute their ratios based on the "next general election." The rules do not contemplate the situation in states where statewide offices are elected in even-numbered years, but local offices are elected in odd-numbered years. Advisory Opinion 1991–25 authorized state party committees in those states to include a non-federal point for local offices in their ballot composition ratio. The draft NPRM would amend 106.5(d)(1)(ii), consistent with that ruling. It would also clarify that local party committees are entitled to include up to two non-federal points for local offices under these same circumstances.

Reimbursement Period

The Commission is also requesting comments on whether the "window" during which funds must be transferred from a non-federal to a federal account, to reimburse the federal account for the non-federal share of joint activities, should be increased. This "window" is currently 40 days, extending from 10 days before until 30 days after payment is made from the Federal account for a particular allocable expense. 11 CFR 106.5(g)(2)(ii)(B).

The Commission notes that this 40-day limit was adopted in place of the 10-day limitation contained in the notice of proposed rulemaking ("NPRM"), 53 FR 38012, 38017 (September 29, 1988), and exceeds the 30-day limit advocated by comments to the NPRM. As explained in the Explanation and Justification to the final allocation rules, this deadline was increased from that suggested in the NPRM to allow committees to consolidate monthly payments, rather than requiring every expense to be paid with two separate checks, since "(s)uch flexibility is indispensable for committees paying large numbers of bills from many different vendors." 55 FR 26058, 26066 (June 26, 1990).

However, the petition and some of the comments indicate that some further expansion of the reimbursement period may be justified. For example, a committee that pays its bills once a month may face cash flow problems under the current deadline. For this reason, the Commission is proposing that the reimbursement "window" be extended to 70 days, from 10 days before until 60 days after the payment from the federal account. This approach would allow still greater consolidation of payments than is possible under the current system, and thus ease possible compliance problems in this area. It would also conform with this notice's proposed amendment to 11 CFR 106.5(f), under which committees would be allowed 60 days following a fundraising program or event to recalculate their allocation ratio based on the funds received from that program or event.

The Commission is also proposing that the word "payment" in 11 CFR 106.5(g)(2)(ii)(B) be amended to read, "payments." This would clarify that one check from the non-federal to the federal account could be used to reimburse the federal account for the non-federal share of more than one allocable expenditure.

Section 106.5 applies not only to state and local party committees, but to national committees as well. The Commission is also proposing that 11 CFR 106.6, which parallels 11 CFR 106.5 on these topics but applies to nonconnected committees and SSF's, be amended in similar fashion, so that these two sections remain consistent.

Allocation of Fundraising Expenses

Under 11 CFR 106.5(f), party committees allocate the direct costs of each fundraising program or event, where both Federal and non-federal funds are collected by one committee through such an activity, according to the funds received method. The committee estimates the Federal/non-federal ratio for each program or event prior to the first disbursement made in connection with that activity, and later adjusts this ratio to reflect the actual ratio of funds received. The current regulation does not specify at what points these adjustments must be made.

The Commission is now proposing that committees specifically be allowed 60 days following each fundraising program or event to recalculate the appropriate ratio based on funds received, to apply the recalculated ratio to program or event expenditures, and to transfer funds between the federal and non-federal accounts to reflect the adjusted ratio. However, the Commission notes that this amendment does not extend the 60 day time limit under 11 CFR 106.5(g)(2)(ii)(B), for non-federal committees to reimburse federal committees for the non-federal share of joint expenditures.

As discussed with regard to the reimbursement "window," this proposed amendment would apply to all party committees, including national party committees. In addition, the Commission is proposing that 11 CFR 106.6 be amended in a like manner, to insure continued uniformity between rules affecting party committees, nonconnected committees and SSF's.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) Regulatory Flexibility Act

The attached proposed rules, if promulgated, will not have a significant economic impact on a substantial number of small entities. The basis of

this certification is that the proposed rules would modify provisions governing how state and local political party committees allocate certain joint expenditures between their federal and non-federal accounts. This does not impose a significant economic burden, because any small entities affected are already required to comply with the Act's requirements in this area.

List of Subjects in 11 CFR Part 106

Campaign funds, Political candidates, Political committees and parties.

For the reasons set out in the preamble, it is proposed to amend subchapter A, chapter I of title 11 of the Code of Federal Regulations as follows:

PART 106—ALLOCATIONS OF CANDIDATE AND COMMITTEE ACTIVITIES

1. The authority citation for part 106 would continue to read as follows:

Authority: 2 U.S.C. 438(a)(8), 441a(b), 441a(g).

2. Section 106.5 would be amended by revising the final two sentences and adding an additional sentence to paragraph (d)(1)(ii), revising paragraph (f), and revising paragraph (g)(2)(ii)(b), to read as follows:

§ 106.5 Allocation of expenses between federal and non-federal activities by party committees.

* * * * *

(d)(1) * * *

(ii) * * * State party committees shall also include in the ratio one additional non-federal office if any partisan local candidates are expected on the ballot in any regularly scheduled election during the two-year congressional election cycle. Local party committees shall also include in the ratio a maximum of two additional non-federal offices if any partisan local candidates are expected on the ballot in any regularly scheduled election during the two-year congressional election cycle. State and local party committees shall also include in the ratio one additional non-federal office.

* * * * *

(f)(1) *All party committees; method for allocating direct costs of fundraising.* If federal and non-federal funds are collected by one committee through a joint activity, that committee shall allocate its direct costs of fundraising, as described in paragraph (a)(2) of this section, according to the funds received method. Under this method, the committee shall allocate its fundraising costs based on the ratio of funds received into its federal account to its total recipts from each fundraising program or event. This ratio shall be estimated prior to each such program or event based upon the committee's reasonable prediction of its federal and non-federal revenue from that program or event, and shall be noted in the committee's report for the period in which the first disbursement for such program or event occurred, submitted pursuant to 11 CFR 104.5. Any disbursements for fundraising costs made prior to the actual program or event shall be allocated according to this estimated ratio.

(2) The committee shall adjust its estimated allocation ratio within 60 days following each fundraising program or event from which both federal and non-federal funds are collected, to reflect the actual ratio of funds received. If the non-federal account has paid more than its allocable share, the committee shall transfer funds from its federal to its non-federal account, as necessary, to reflect the adjusted allocation ratio. If the federal account has paid more than its allocable share, the committee shall make any transfers of funds from its non-federal to its federal account to reflect the adjusted allocation ratio within the time required under paragraph (g)(2)(ii)(B) of this section. The committee shall make note of any such adjustments and transfers in its report for the period in which the fundraising program or event occurred.

(g) * * *

(2) * * *

(ii) * * *

(B) Such funds may not be transferred more than 10 days before or more than 60 days after the payments for which they are designated are made.

* * * * *

3. Section 106.6 is amended by revising paragraphs (d) and (e)(2)(ii)(B), to read as follows:

§ 106.6 Allocation of expenses between federal and non-federal activities by separate segregated funds and nonconnected committees.

* * * * *

(d)(1) *Method for allocating direct costs of fundraising.* If federal and non-federal funds are collected by one committee through a joint activity, that committee shall allocate its direct costs of fundraising according to the funds received method. Under this method, the committee shall allocate its fundraising costs based on the ratio of funds received into its federal account to its total receipts from each fundraising program or event. This ratio shall be estimated prior to each such program or event based upon the committee's reasonable prediction of its federal and non-federal revenue from that program or event, and shall be noted in the committee's report for the period in which the first disbursement for such program or event occurred, submitted pursuant to 11 CFR 104.5. Any disbursements for fundraising costs made prior to the actual program or event shall be allocated according to this estimated ratio.

(2) The committee shall adjust its estimated allocation ratio within 60 days following each fundraising program or event from which both federal and non-federal funds are collected, to reflect the actual ratio of funds received. If the non-federal account has paid more than its allocable share, the committee shall transfer funds from its federal to its non-federal account as necessary, to reflect the adjusted allocation ratio. If the federal account has paid more than its allocable share, the committee shall make any transfers of funds from its non-federal to its federal account to reflect the adjusted allocation ratio within the time required under paragraph (e)(2)(ii)(B) of this section. The committee shall make note of any such adjustments and transfers in its report for the period in which the fundraising program or event occurred.

(e) * * *

(2) * * *

(ii) * * *

(B) Such funds may not be transferred more than 10 days before or more than 60 days after the payments for which they are designated are made.

* * * * *

Dated: November 8, 1991.

John Warren McGarry,

Chairman, Federal Election Commission.

[FR Doc. 91-27374 Filed 11-13-91; 8:45 am]

BILLING CODE 6715-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 91-AGL-12]

Proposed Alteration of Transition Area; Austin, Minnesota

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to amend the Austin, Minnesota transition area to accommodate two (2) new Standard Instrument Approach Procedures (SIAPs)—VOR Runway 18 and VOR Runway 36 to Austin Municipal Airport. This notice also

updates the entire transition area and deletes certain portions and extensions that are no longer required. The intended effect of this action is to ensure segregation of the aircraft using approach procedures in instrument conditions from other aircraft operating under visual weather conditions in controlled airspace.

DATES: Comments must be received on or before December 16, 1991.

ADDRESSES: Send comments on the proposal in triplicate to: Federal Aviation Administration, Office of the Assistant Chief Counsel, AGL-7, Attn: Rules Docket No. 91-AGL-12, 2300 East Devon Avenue, Des Plaines, Illinois 60018.

The official docket may be examined in the Office of the Assistant Chief Counsel, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois.

An informal docket may also be examined during normal business hours at the Air Traffic Division, System Management Branch, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois.

FOR FURTHER INFORMATION CONTACT: Douglas F. Powers, Air Traffic Division, System Management Branch, AGL-530, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018, telephone (312) 694-7568.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposal. Communications should identify the airspace docket and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard in which the following statement is made: "Comments to Airspace Docket No. 91-AGL-12". The postcard will be date/time stamped and returned to the commenter. All communications received on or 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, FAA, Great Lakes Region, Office of the Assistant Chief Counsel, 2300 East Devon Avenue, Des Plaines, Illinois 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 Information Center, APA-430, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 426-8058. 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 § 71.181 of part 71 of the Federal Aviation Regulations (14 CFR part 71) to alter a transition area near Austin, MN. The transition area would be altered to accommodate two (2) new SIAPs—a VOR Runway 18 and a VOR Runway 36 to Austin Municipal Airport. This notice would also update the entire transition area and delete certain portions and extensions that are no longer required.

The development of the procedures requires that the FAA alter the designated airspace to ensure that the procedures will be contained within controlled airspace. The minimum descent altitude for these procedures may be established below the floor of the 700-foot controlled airspace.

Aeronautical maps and charts will reflect the defined area which will enable other aircraft to circumnavigate the area in order to comply with applicable visual flight rule requirements.

Section 71.181 of part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6G dated September 4, 1990.

The FAA had 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 the 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, Transition 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 (24 CFR part 71) as follows:

PART 71—[AMENDED]

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

Authority: 49 U.S.C. App. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-499, January 12, 1983); 14 CFR 11.69.

§ 71.181 [Amended]

2. Section 71.181 is amended as follows:

Austin, MN [Revised]

That airspace extending upward from 700 feet above the surface within a 7.5 statute mile radius of the Austin Municipal Airport, (lat. 43°40'00" N., long. 92°56'00" W.). Austin, MN, and within 4 statute miles each side of the Austin VOR/DME 189° radial extending from the 7.5 statute mile radius to 8 statute miles south of the VOR/DME.

Issued in Des Plains, Illinois on October 25, 1991.

Teddy W. Burcham,

Manager, Air Traffic Division.

[FR Doc. 91-27385 Filed 11-13-91; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 71

[Airspace Docket No. 91-AGL-11]

Proposed Transition Area Modification; Rice Lake Municipal Airport, Rice Lake, WI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to modify the Rice Lake Municipal Airport, WI, transition area to accommodate VOR runway 36, VOR runway 18 and NDB runway 36 Standard Instrument Approach Procedures (SIAP) to Rice Lake Municipal Airport, Rice Lake, WI.

The intended effect of this action is to ensure segregation of the aircraft using approach procedures in instrument conditions from other aircraft operating under visual weather conditions in controlled airspace.

DATES: Comments must be received on or before December 17, 1991.

ADDRESSES: Send comments on the proposal in triplicate to: Federal Aviation Administration, Office of the Assistant Chief Counsel, AGL-7, Attn: Rules Docket No. 91-AGL-11, 2300 East Devon Avenue, Des Plaines, Illinois 60018.

The official docket may be examined in the Office of the Assistant Chief Counsel, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois.

An informal docket may also be examined during normal business hours at the Air Traffic Division, System Management Branch, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois.

FOR FURTHER INFORMATION CONTACT: Douglas F. Powers, Air Traffic Division, System Management Branch, AGL-530, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018, telephone (312) 694-7568.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposal. Communications should identify the airspace docket and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 91-AGL-11". The postcard will be date/time stamped and returned to the commenter. All communications received on or 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, FAA, Great Lakes Region, Office of the Assistant Chief Counsel, 2300 East Devon Avenue, Des Plaines, Illinois 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 Information Center, APA-430, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 426-8058. 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 § 71.181 of part 71 of the Federal Aviation Regulations (14 CFR part 71) to modify a transition area airspace near Rice Lake Municipal Airport, Rice Lake, WI. The transition area would be amended to accommodate VOR runway 36, VOR runway 18, and NDB runway 36 SIAP's to Rice Lake Municipal Airport, Rice Lake, WI. The modification would change the radius from 5 statute miles to 7 nautical miles and eliminates the previous extension.

The development of the procedures requires that the FAA alter the designated airspace to insure that the procedures will be contained within controlled airspace. The minimum descent altitude for these procedures may be established below the floor of the 700-foot controlled airspace.

Aeronautical maps and charts will reflect the defined area which will enable other aircraft to circumnavigate the area in order to comply with applicable visual fight rule requirements.

Section 71.181 of part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6G dated September 4, 1990.

The FAA had 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. It is certified that the 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, Transition 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—[AMENDED]

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

Authority: 49 U.S.C. App. 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.

§ 71.181 [Amended]

2. Section 71.181 is amended as follows:

Rice Lake Municipal Airport, WI [Revised]

(Lat. 45°28'45" N., Long. 91°43'20" W.) That airspace extending upward from 700 feet above the surface within a 7 nautical miles radius of the Rice Lake Municipal Airport, WI.

Issued in Des Plaines, Illinois on October 28, 1991.

Teddy W. Burcham,

Manager, Air Traffic Division.

[FR Doc. 91-27386 Filed 11-13-91; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 925

[Docket No. 901064-0264]

RIN 0648-AC63

Olympic Coast National Marine Sanctuary Regulations; Extension of Comment Period

AGENCY: Office of Ocean and Coastal Resource Management (OCRM), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Commerce (DOC).

ACTION: Proposed rule; notice of extension of public comment period.

SUMMARY: In the Federal Register on September 20, 1991, NOAA, as required by section 205(a)(4) of Public Law No. 100–627, proposed to designate an approximately 2,605 square nautical mile area of coastal and ocean waters and the submerged lands thereunder, off the Olympic Peninsula of the State of Washington as the Olympic Coast National Marine Sanctuary (56 FR 47836). That notice published the proposed regulations and Designation Document, and summarized the draft management plan for the proposed Sanctuary. The summary of the draft management plan set forth the goals and objectives, management responsibilities, research activities, interpretive and educational programs, and enforcement activities, including surveillance, proposed for the Sanctuary. In addition, the notice set forth proposed regulations to implement the designation and regulate activities consistent with the provisions of the proposed Designation Document. Finally, the notice announced the public availability of the Draft Environmental Impact Statement/Management Plan (DEIS/MP) prepared for the designation, and informed the public that comments are invited and would be considered if submitted in writing to the address below by November 27, 1991. Because of requests for extending the comment period from the State of Washington and the coastal counties, and because the State and local agencies are currently responding to other proposed Federal initiatives affecting the coastal area, NOAA, by this notice, is extending the period for submitting comments from November 27, 1991 to December 13, 1991.

DATES: This action extends the public comment period to December 13, 1991.

ADDRESSES: Comments should be submitted to Rafael V. Lopez, Regional Manager, Sanctuaries and Reserves Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, 1825 Connecticut Avenue, NW., suite 714, Washington, DC 20235.

Copies of the DEIS/MP are available upon request to the Sanctuaries and Reserves Division.

FOR FURTHER INFORMATION CONTACT: Mr. Rafael V. Lopez, Regional Manager, or Mr. Chris Ostrom, Senior Project Manager, Sanctuaries and Reserves Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, 1825 Connecticut Avenue, NW., suite 714, Washington, DC 20235, (202/606–4126); or Ms. Linda Maxson, On-site Liaison, Sanctuaries and Reserves Division, National Oceanic and Atmospheric Administration, 7600 Sand Point Way, NE., Seattle, WA 98115, (206/526–6304).

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: November 7, 1991.

Frank W. Maloney,

Acting Deputy Assistant Administrator for Ocean Services and Coastal Zone Management.

[FR Doc. 91–27327 Filed 11–13–91; 8:45 am]

BILLING CODE 3510–08–M

Technology Administration

15 CFR Part 1150

A Public Meeting on Proposed Amendments and Changes to the Safety Marking System for Toy, Look-Alike and Imitation Firearms

AGENCY: Technology Administration, U.S. Department of Commerce.

ACTION: Notice of public meeting.

SUMMARY: The Technology Administration published for public comment in a separate notice in the Federal Register, on November 7, 1991 (56 FR 56953) proposed revisions to its rules governing the safety marking system for toy, look-alike and imitation firearms provided for in 15 CFR 1150.1. This notice announces a public meeting to be held by the Technology Administration in cooperation with the U.S. Customs Service to seek consultation with and comments of interested persons in connection with the proposed changes to improve its regulations. The public meeting will be held on December 2, 1991 from 9 a.m. until noon at the address shown below. Representatives of the Department and the U.S. Customs Service will begin the hearing with a report on recent enforcement activities of Federal agencies in implementation of the law.

DATES: The public meeting will convene December 2, 1991 at 9 a.m. and will adjourn at 12 noon.

ADDRESSES: The public meeting will be held at the Greater Los Angeles World Trade Center, One World Trade Center, suite 298, Long Beach, California 90831.

FOR FURTHER INFORMATION CONTACT: James V. Lacy, Chief Counsel for Technology, United States Department of Commerce, room 4410, Washington, DC 20230, telephone number (202) 377–1984.

SUPPLEMENTARY INFORMATION: The purpose of the public meeting will be to gather information from interested parties relevant to proposed revisions of the Department of Commerce's regulation of Toy, Look-Alike and Imitation Firearms found at 15 CFR 1150.

Dated: November 7, 1991.

Robert M. White,

Under Secretary for Technology.

[FR Doc. 91–27424 Filed 11–13–91; 8:45 am]

BILLING CODE 3510–18–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

24 CFR Part 10

[Docket No. R–91–1568; FR–3115–P–01]

Rulemaking Policies and Procedures—Public Comment Periods

AGENCY: Office of the Secretary, HUD.

ACTION: Proposed rule.

SUMMARY: This rule proposes to amend 24 CFR 10.1, the "Policy" section in the Department's policies and procedures related to rulemaking. The purpose of this rule is to provide greater flexibility to the Department in providing time periods for public comment on rules published by the Department.

DATES: Comments must be received by January 16, 1991.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Rules Docket Clerk, Office of General Counsel, room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the above address.

As a convenience to commenters, the Rules Docket Clerk will accept brief public comments transmitted by facsimile ("FAX") machine. The telephone number of the FAX receiver is (202) 708–4337. Only public comments of six or fewer total pages will be accepted via FAX transmittal. This limitation is necessary in order to assure reasonable access to the equipment. Comments sent by FAX in excess of six pages will not be accepted. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Rules Docket Clerk ((202) 708–2084). (These are not toll-free numbers.)

FOR FURTHER INFORMATION CONTACT: Grady J. Norris, Assistant General Counsel for Regulations, Office of the

General Counsel, room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW,. Washington, DC 20410–0500, telephone (voice) (202) 708–3055, (TDD) 708–3259. (These are not tollfree numbers.)

SUPPLEMENTARY INFORMATION: In 1979, the Department of Housing and Urban Development adopted its basic "rule on rules" at 24 CFR part 10 (44 FR 1606, January 5, 1979). Along with a number of other federal agencies during this same time period, HUD responded to public sentiment to the effect that agencies administering loan and grant programs exempt from notice and comment rulemaking under 5 U.S.C. 553 (the Administrative Procedure Act) (APA) should not exclude themselves from comparable limitations on their authority to promulgate regulations. These rules recognized that public participation in agency rulemaking was an effective means of assuring rules that were responsive to the needs of the affected public, and pledged, in essence, that HUD would follow procedures very similar to those in the APA for its informal rulemakings.

While the Department continues to believe that the public participation in rulemaking engendered by notice-and-comment procedures is both protective of the public interest and helpful to the Department, HUD is occasionally frustrated in its efforts to promulgate timely rules for effect by the strict language in § 10.1 governing the time allotted for public comment. HUD's rulemaking policy as expressed in § 10.1 states, in part:

> It is the policy of the Department that its notices of proposed rulemaking are to afford the public not less than sixty days for submission of comments.

While the Department intends to continue, in most instances, to provide the public with not less than sixty days for comment on its rules, part 10 as currently written does not purport to afford HUD and discretion with reference to public comment time. In this respect, part 10 is more stringent in its requirements than is the Administrative Procedure Act itself—the statutory model for HUD's rulemaking procedures. Although 60 days has become something of a norm as a period for public comment, the APA does not provide for any set amount of time. Clearly, the amount of time allotted for comment should be sufficient for interested parties to respond effectively to the issues. It need not, as HUD's rule at 24 CFR part 10 currently provides, always be 60 days or more.

Frequently, HUD is confronted with new statutes or program amendments that authorize new programs or revised procedures, and that require immediate implementation (for example) of grant allocation machinery so that grants for the intended purpose may be made in that same fiscal year. Authorizing legislation or related appropriation acts may place extreme pressure on the grant-administering agency to promulgate rules are great speed, in order to provide a mechanism for awarding grants before the expiration of the fiscal year. This and other similar time-related pressures (including, frequently, express statutory deadlines for promulgation of rules) are compounded when the Department must provide, mechanistically, for a minimum of 60 days of public comment without reference to the complexity of the issues presented or the competing time-sensitive priorities of production that may be at stake.

Accordingly, this rule proposes a change in 24 CFR 10.1 to permit the Department to exercise discretion in providing periods for public comment in a manner similar to that permitted by the Administrative Procedure Act. The revision would continue to provide for 60-day public comment periods as a HUD norm, but would add to § 10.1 a basis for abbreviating the public comment period, for good cause, to not less than 30 days.

Other Matters

National Environmental Policy Act

This rule is categorically excluded from the NEPA requirements of HUD categorically excluded from the NEPA requirements of HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969. The rule involves internal administrative procedures whose content does not constitute a developmental decision nor affect the physical condition of project areas or building sites. It relates, instead, only to the performance of functions analogous to the management activities excluded from environmental review under 24 CFR 50.20(k).

Executive Order 12291

This rule would not constitute a "major rule" as that term is defined in section 1(d) of the Executive order 12291 on Federal Regulations issued by the President on February 17, 1981. An analysis of the rule 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-States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Regulatory Flexibility Act

In accordance with 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the undersigned hereby certifies that this rule would not have a significant economic impact on a substantial number of small entities. This is a procedural rule limited to the subject of time for public comments on HUD rules. The time permitted for public comments will, in all instances, be adequate to permit a reasonable response in writing, and, accordingly, the rule should not affect 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 the policies contained in this rule would not have substantial direct effects on states or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. As a result, the rule is not subject to review under the Order.

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 for significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the Order. The rule involves procedural requirements only and should have no effects, direct or indirect, on family-related concerns.

Semiannual Agenda

This rule was listed as item 1317 in the Department's Semiannual Agenda of Regulations published on October 21, 1991 (56 FR 53380, 53388), pursuant to Executive Order 12291 and the Regulatory Flexibility Act.

There is no Catalog of Federal Domestic Assistance program listing for this rule.

List of Subjects in 24 CFR Part 10

Administrative practice and procedure.

Accordingly, 24 CFR part 10 is proposed to be amended as follows:

PART 10—RULEMAKING: POLICY AND PROCEDURES

1. The authority citation for part 10 would be revised to read as follows:

Authority: Sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

2. In § 10.1, the third sentence would be removed and two new sentences added in its place, to read as follows:

§ 10.1 Policy.

* * * It is the general policy of the Department that rules published for public comment will afford the public not less than 60 days for the submission of comments. The Department may, however, provide for a public comment period of not less than 30 days, upon a finding of good cause.* * *

Dated: October 10, 1991.

Jack Kemp,

Secretary of Housing and Urban Development.

[FR Doc. 91-27298 Filed 11-13-91; 8:45 am]

BILLING CODE 4210-32-M

Office of the Assistant Secretary for Public and Indian Housing

24 CFR Part 961

[Docket No. R-91-1555; FR-2993-C-02]

RIN 2577—AA98

Public and Indian Housing Youth Sports Program; Correction

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Proposed rule; correction.

SUMMARY: On October 8, 1991, HUD published, at 56 FR 50772, a proposed rule to establish the Public and Indian Housing Youth Sports Program (YSP) in accordance with Section 520 of the Crantson-Gonzalez National Affordable Housing Act (NAHA), approved November 28, 1990, Public Law 101-625. The purpose of this correction is to publish the certification required under 5 U.S.C. 605(b), (the Regulatory Flexibility Act) that was inadvertently omitted in the proposed rule.

FOR FURTHER INFORMATION CONTACT: Jose Marquez or Malcolm Main, Drug Free Neighborhoods Division, Office of Resident Initiatives, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW. room 10241, Washington, DC 20410, telephone (202) 708-1197 or 708-3502. A telecommunications device for hearing impaired persons (TDD) is available at (202) 708-0850. (These are not toll-free telephone numbers.)

SUPPLEMENTARY INFORMATION: The purpose of this correction is to publish the certification required under 5 U.S.C. 605(b), (the Regulatory Flexibility Act) that was inadvertently omitted in the proposed rule published on October 8, 1991, 56 From 50772, to establish the Public and Indian Housing Youth Sports Program (YSP) in accordance with Section 520 of the Cranston-Gonzalez National Affordable Housing Act (NAHA), approved November 28, 1990, Public Law 101-625. The certification for this purpose is added to the preamble under the heading entitled, "Other Matters."

Accordingly, FR Doc. 91-24001, published in the **Federal Register** on Tuesday, October 8, 1991 (56 FR 50772) is corrected by adding the following certification to the preamble under the heading "Other Matters" that begins on page 50775, to read as follows:

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Undersigned certifies that this rule does not have a significant economic impact on a substantial number of small entities. The rule would provide grants to PHAs, including IHAs, to fund activities designed to appeal to youth in public and Indian housing as an alternative to the drug environment. While the resulting social impact may be significant, because of the limited amount of total funding and limits on funding per applicant, the economic impact on small entities will not be significant.

Dated: November 7, 1991.

Joseph G. Schiff,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 91-27296 Filed 11-13-91; 8:45 am]

BILLING CODE 4210-33-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 91-221, DA 91-1277]

Broadcast Service; Changing Video Marketplace

AGENCY: Federal Communications Commission.

ACTION: Notice of inquiry; extension of comment period.

SUMMARY: This action extends the period for filing initial comments in the Commission's review of the policy implications of the changing video marketplace, from October 22, 1991, to November 21, 1991, and for filing reply comments from November 21, 1991, to December 19, 1991. See notice of inquiry at 56 FR 40847 (August 16, 1991), FR Doc. 91-19439. The extension is granted in response to a motion filed by the Motion Picture Association of America and the Association of Independent Television Stations, to allow interested parties sufficient time to compile and submit complex economic and technical evidence and analyses on a broad range of issues.

DATES: Comments are now due on November 21, 1991, and reply comments on December 19, 1991.

ADDRESSES: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Beverly McKittrick, Policy and Rules Division, Mass Media Bureau, (202) 632-7792.

SUPPLEMENTARY INFORMATION:

Order Granting Extension of Time

In the Matter of Review of the Policy Implications of the Changing Video Marketplace

Adopted: October 10, 1991.

Released: October 11, 1991.

By the Chief, Mass Media Bureau:

1. On July 11, 1991, the Commission adopted a notice of inquiry in MM Docket No. 91-221, 6 FCC Rcd 4961 (1991) (notice), in the above-captioned proceeding in order to seek wide-ranging comments on changes in the state of the video marketplace and the public policy implications that flow from these changes. The inquiry sought comment on several apparent trends, including the increasing competition in, and fragmentation of, the video marketplace; technological advances such as digital signal compression techniques; the ability of some competitors to rely on revenue from direct viewer payment instead of, or in addition to, advertising; and the rapid increase in the availability of national sources of programming. The Commission established a deadline of October 22, 1991, for filing comments and a deadline of November 21, 1991, for filing reply comments.

2. Before the Commission is a motion for extension of time filed by the Motion Picture Association of America and the Association of Independent Television Stations (MPAA/INTV) on October 3, 1991. The motion requests an extension of time to file comments until November

21, 1991, and reply comments until December 19, 1991. Both motions are unopposed.

3. MPAA/INTV requests an extension to permit full evaluation of the broad, complex issues raised in the notice. While MPAA and INTV member companies have been reviewing these issues, they will not have sufficient time before the current due date for comments to assemble their members and analyze the issues in depth.

4. As set forth in § 1.46 of the Commission's rules, 47 CFR 1.46, it is our policy that extensions of time not be routinely granted. In order to evaluate current industry circumstances and apparent trends in the video marketplace, however, we expect interested parties to provide complex economic and technical evidence and analyses on a broad range of issues. It appears reasonable to provide parties with an additional brief period of time to compile and analyze the data and determine the apparent trends and their implications for Commission policies. Therefore, we will grant the motion and extend the deadline for filing initial comments to November 21, 1991, and the deadline for filing replies to December 19, 1991.

5. Accordingly, *it is ordered,* That the Motion for Extension of Time filed by the Motion Picture Association of America and the Association of Independent Television Stations is granted.

6. *It is therefore ordered,* That the time for filing comments and reply comments in this proceeding are extended to November 21, 1991, and December 19, 1991, respectively.

7. This action is taken pursuant to authority found in sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and §§ 0.204(b), 0.283, and 1.46 of the Commission's rules.

8. For further information concerning this proceeding, contact Beverly McKittrick, Policy and Rules Division, Mass Media Bureau, (202) 632–5414.

Federal Communications Commission.

Roy J. Stewart,

Chief, Mass Media Bureau.

[FR Doc. 91–27416 Filed 11–13–91; 8:45 am]

BILLING CODE 6712–01–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Parts 12, 13, 14, 20, and 21

Notice of Intent To Review

AGENCY: Fish and Wildlife Service.

ACTION: Notice of intent to review 50 CFR parts 12, 13, 14, 20, 21, and 22.

SUMMARY: The purpose of this notice is to advise those who are impacted by changes in Federal wildlife regulations, that certain regulations will be undergoing review and revision by the U.S. Fish and Wildlife Service (Service). Specifically, the review process will focus on 50 CFR parts 12, 13, 14, 20, 21, and 22. Revisions and updating will occur in areas affecting the seizure and forfeiture process, migratory bird hunting, general permit procedures, importation, exportation, and transportation of wildlife. Permitting procedures relating to some migratory bird activity and some activities relating to bald and golden eagles will be reviewed.

DATES: The Service requests written comments by interested parties on or before March 13, 1992.

ADDRESSES: Written comments by interested parties concerning this notice of intent may be sent to the following location: U.S. Fish and Wildlife Service, Division of Law Enforcement, P.O. Box 3247, Arlington, Virginia 22203–3247.

FOR FURTHER INFORMATION CONTACT: Deputy Chief Thomas L. Striegle of the U.S. Fish and Wildlife Service, Division of Law Enforcement at the address given above; Telephone 703/358–1949, (FTS) 921–1949.

SUPPLEMENTARY INFORMATION:

Background

In February of 1990, a six-member commission was appointed to evaluate the Service's law enforcement program. Its report, issued on June 15, 1990, contained 54 recommendations ranging from enforcement policies and priorities, to staffing and budget. Contained in the Commission's report was a recommendation for a review of the regulations enforced by Service agents. In conjunction with the implementation of the Commission's report, the Service is undertaking a review of these regulations for the purpose of updating and clarifying those areas identified as being in need of such action.

The purpose of 50 CFR part 14, Importation, Exportation, and Transportation of Wildlife, is to provide uniform rules and procedures for these activities. Due to recent changes in the U.S. Customs Service (Customs) importation systems and the implementation of the Customs Automated Commercial System (ACS), the Service import and export regulations contained in 50 CFR part 14, subpart I, require modification. The Service proposes to examine the user fee structure and the process by which the payment of fees is made. Because of interfacing by the Service with Customs ACS, accommodations must be made on the part of the Service for the collection of wildlife inspection fees.

No review of 50 CFR part 12, Seizure and Forfeiture Procedures, has occurred since 1974, and a general review is needed to determine if this section is in need of changes.

In 1988, 50 CFR part 13, General Permit Procedures, was reviewed. Several changes occurred in this section, which provides for uniform rules and general administration of all permits issued by the Service pursuant to this subchapter. Several changes occurred in areas defining the basis upon which permits are revoked, denied or suspended by the Service. Permit disqualification factors were defined.

Of particular interest to the Service in its intent to review 50 CFR part 13, is to determine the extent to which the last changes are functioning well, and to examine any further measures which may be taken to improve the overall administration of the permit process.

The regulations affecting migratory bird hunting are contained in 50 CFR part 20. This section was specifically addressed in the Commission's 1990 report as a section which is perceived by many hunters as being unclear. The Service, therefore, would like to clarify those areas of 50 CFR part 20, which have traditionally caused concern.

Activities involving the taking, possession, sale, importation, and banding or marking of migratory birds, are regulated by 50 CFR part 21. This section is of particular interest to those involved in the sport of falconry and those who raise captive-bred waterfowl. As in 1988, when 50 CFR part 21 was last reviewed, the Service is soliciting suggestions from those affected by these regulations, for ways to clarify them.

The Service also wishes to examine its policy toward Native Americans as affected by the framework of 50 CFR part 22. This section authorizes the use of eagle parts and feathers by Native Americans for religious purposes.

Authority: The authority citation for 50 CFR Part 12 is, 5 U.S.C. 301; 16, U.S.C. 668–668b; 16 U.S.C. 668dd(e)–(f); 16 U.S.C. 704, 706–707, 712; 16 U.S.C. 718f–718b; 16 U.S.C. 742j–1(d)–(f); 16 U.S.C. 852d–853; 16 U.S.C. 1375–1377, 1382; 16 U.S.C. 1540; 18 U.S.C. 43, 44; 95 Stat. 1073–1080, 16 U.S.C. 3371 et seq.; 19 U.S.C. 1602–1624; 16 U.S.C. 7421; E.O. 11987, 42 FR 26949; 42 U.S.C. 1996.

The authority citation for 50 CFR part 13 is, 16 U.S.C. 668a; 16 U.S.C. 704, 712; 16 U.S.C.

742j–1; 16 U.S.C. 1382; 16 U.S.C. 1538(d); 16 U.S.C. 1539, 1540(f), 16 U.S.C. 3374; 18 U.S.C. 42; 19 U.S.C. 1202; E.O. 11911, 41 FR 15683; 31 U.S.C. 9701.

The authority citation for 50 CFR part 14 is, 18 U.S.C. 42; 16 U.S.C. 3371–3378; 16 U.S.C. 1538(d)–(f); 16 U.S.C. 1382; 16 U.S.C. 704, 712; 31 U.S.C. 31 U.S.C. 483(a); 16 U.S.C. 4223–4244

The authority citation for 50 CFR part 20 is Pub. L. 65–186, 40 Stat. 755 (16 U.S.C. 701–708h); sec. 3(h), Pub. L. 95–616, 92 Stat. 3112 (16 U.S.C. 712).

The authority citation for 50 CFR part 21 is, Pub. L. 95–616, 92 Stat. 3112 (16 U.S.C. 712(2)).

The authority citation for 50 CFR part 22 is, Sec. 2, Chapter 278, 54 Stat. 251; Pub. L. 87–884, 76 Stat. 1246; sec. 2, Pub. L. 92-535, 86 Stat. 1065 sec. 9, Pub. L. 95–616, 92 Stat. 3114 (16 U.S.C. 668a)

List of Subjects

50 CFR Part 12

Administrative practice and procedures, Exports, Fish, Imports, Plants, Seizures and forfeitures, Surety bonds, Transportation, Wildlife.

50 CFR Part 13

Administrative practice and procedure, Exports, Fish, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wild life.

50 CFR Part 14

Animal welfare, Exports, Fish, Imports, Labeling, Reporting and recordkeeping requirements, Transportation, Wildlife.

50 CFR Part 20

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

50 CFR Part 21

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

50 CFR Part 22

Exports, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

Dated: November 1, 1991.

Bruce Blanchard,

Acting Director.

[FR Doc. 91–27425 Filed 11–13–91; 8:45 am]

BILLING CODE 4310–55–M

Notices

Federal Register
Vol. 56, No. 220
Thursday, November 14, 1991

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

Forms Under Review by Office of Management and Budget

November 8, 1991.

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) 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, DC 20250, (202) 447–2218.

New Collection

• Food and Nutrition Service
Study of Food Service Management Companies in School Nutrition Program.
One time survey.
State or local governments; 1,071 responses; 1,529 hours.
Carol Kelly, (703) 756–3133.

Donald E. Hulcher,

Deputy Departmental Clearance Officer.

[FR Doc. 91–27406 Filed 11–13–91; 8:45 am]

BILLING CODE 3410–01–M

ARCTIC RESEARCH COMMISSION

Notice of Meeting

November 5, 1991.

Notice is hereby given that the United States Arctic Research Commission will hold its 25th Meeting in Monterey, California, on December 5–6, 1991. On Thursday, December 5, a business meeting open to the public will be held starting at 9 a.m. in Spanagel Hall, 101A, at the Naval Postgraduate School and continuing Friday, December 6, starting at 8:30 a.m. Agenda items include: (1) Chairman's Report; (2) Comments from the Interagency Arctic Research Policy Committee; (3) Comments from the, Alaska Congressional Delegation; (4) Arctic Marine Research; (5) International Arctic Ocean Experiment, 1991; (6) Priorities in Arctic Geoscience; (7) International Arctic Project, 1992–4; (8) Lease Planning and Research Priorities; and (9) Oil Spill Prevention, Containment and Cleanup Research for the Arctic. The Commission will meet in Executive Session following the conclusion of the public meeting to consider budget and related items.

Any person intending to attend this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs.

Contact Person for More Information: Philip L. Johnson, Executive Director, U.S. Arctic Research Commission, 202–371–9631 or TDD 202–357–9867.

Philip L. Johnson,

Executive Director, U.S. Arctic Research Commission.

[FR Doc. 91–27404 Filed 11–13–91; 8:45 am]

BILLING CODE 7555–01–M

CIVIL RIGHTS COMMISSION

Agenda and Public Meeting to the Rhode Island State Advisory Committee

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that a meeting of the Rhode Island State Advisory Committee will convene at 2 p.m. and adjourn at 6 p.m. on December 2, 1991, at the Providence Marriott, Enterprise Room, Charles & Orm Streets, Providence, RI 02904. The purpose of the meeting is (1) to receive a report from the Redistricting Subcommittee and make plans for FY '92; and (2) to receive a report from the Planning Subcommittee on "Affirmative Action in the Providence Public Schools" and make plans for a community forum.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committee chairperson Sarah Murphy at 401/331–4290 or John I. Binkley, Director, ERD at (202/523–5264); or TDD (202/3376–8117). Hearing impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the regional division at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, November 7, 1991.

Carol-Lee Hurley,

Chief, Regional Programs Coordination Unit.

[FR Doc. 91–27331 Filed 11–13–91; 8:45 am]

BILLING CODE 6335–01–M

DEPARTMENT OF COMMERCE

Agency Form Under Review by the Office of Management and Budget (OMB)

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: International Trade Administration.

Title: Quality Assurance Survey: ITA Products and Services.

Form Numbers: Agency—ITA—OMB.

Type of Request: New collection.

Burden: 7,500 respondents; 375 reporting hours.

Average Hours Per Request: 3 minutes.

Needs and Uses: ITA provides information and counseling products and services to U.S. companies. There is currently no way to determine user satisfaction with most of these ITA products and services. This evaluation form will provide offices throughout ITA with a flexible collection form to send out to customers following any transaction. Information collected will be used by individual offices within ITA

to improve their ability to deliver services or enhance products. The information will enable staff to set priorities, maximize resources, develop base performance measures, and establish indicators for use with other available benchmarks.

Affected Public: Businesses or other for profit; small businesses or organizations.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Gary Waxman, 395–7340.

Copies of the above information collection proposal can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 377–3271, Department of Commerce, room 5327, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Gary Waxman, OMB Desk Officer, room 3208, New Executive Office Building, Washington, DC 20503.

Dated: November 8, 1991.

Edward Michals,

Departmental Clearance Officer, Office of Management and Organization.

[FR Doc. 91–27420 Filed 11–13–91; 8:45 am]

BILLING CODE 3510–25–M

Bureau of Export Administration

Action Affecting Export Privileges; Peter Walascheck

In the matter of Peter Walaschek, Marzellenstrasse, 5000 Cologne, Germany, and Chemco, Siegburger Strasse 223, 5000 Cologne 21, Germany, and Colimex, Mozartstrasse, 7, 5000 Cologne 1, Germany, and Far-Trade Pharma—Vertrieb GmbH, Am Probsthof 15, 5300 Bonn, Germany.

Related Party Order

On Bebruary 24, 1989, I issued an Order denying Peter Walaschek permission to apply for or use any export license until August 26, 1998. 54 FR 8582 (March 1, 1989). The Order was based on Walaschek's August 26, 1988 conviction for violating the Export Administration Act of 1979, as amended (currently codified at 50 U.S.C.A. app. 2401–2420 (1991)) (the EAA).[1]

Section 11(h) of the EAA provides that any person related, through affiliation, ownership, control, or position of responsibility, to a person who had been denied export privileges because of his conviction for violating the EAA may also be denied export privileges. On September 19, 1991, I notified Far-Trade Pharm-Vertrieb BmbH (Far-Trade), a German company, that I had received information that it was related to Walaschek through affiliation, ownership, control, or position of responsibility. I also advised Far-Trade that, after consulting with the Director, Office of Export Enforcement, I intended to deny it permission to apply for or use any export license, including any general license, because of its relationship with Walaschek, as provided by the EAA and § 770.15(h) of the Export Administration Regulations (currently codified at 15 CFR parts 768–799 (1991)) (the Regulations).

My notification to Far-Trade also advised Far-Trade of its right to request a hearing or to submit written comments concerning its relationship with Walaschek within 20 days of its receipt of my letter. Although Far-Trade received that notice,[2] it did not request a hearing or file any comments concerning any of the matters set forth in the notice.

Accordingly, I hereby find that Far-Trade Pharma-Vertrieb GmbH, Am Probsthof 15, 5300 Bonn, Germany, is related to Peter Walaschek, a person denied all U.S. export privileges until August 26, 1998, through affiliation, ownership, control, or position of responsibility.

Accordingly, the Order of February 24, 1989 denying Walaschek permission to apply for or use any export license, including any general license, is hereby amended to read as follows;[3]

Ordered

I. All outstanding individual validated licenses in which Peter Walaschek or any of the related persons, Chemco, Colimex, or Far-Trade, appears or participates, in any manner or capacity, are hereby revoked and shall be returned forthwith to the Office of Export Licensing for cancellation. Further, all of Walaschek's, Chemco's, Colimex's, and Far Trade's privileges of participating, in any manner of capacity, in any special licensing procedure, including, but not limited to, distribution licenses, are hereby revoked.

II. Until August 26, 1998, Peter Walaschek, Marzellenstrasse, 5000 Cologne, Germany, and the related persons, Chemco, Siegburger Strass 223, 5000 Cologne 21, Germany; Colimex, Mozartstrasse 7, 5000 Cologne 1, Germany; and Far-Trade Pharma-Vertrieb GmbH, Am Probsthof 15, 5300 Bonn, Germany, hereby are denied all privileges of participating, directly or indirectly, in any manner or capacity, in any transaction in the United States or abroad involving any commodity or technical data exported or to be exported from the United States, in whole or in part, and subject to the Regulations. Without limiting the generality of the foregoing, participation, either in the United States or abroad, shall include participation, directly or indirectly, in any manner or capacity: (i) As a party or as a representative of a party to any export license application submitted to the Department; (ii) in preparing or filing with the Department any export license application or request for reexpot authorization, or any document to be submitted therewith; (iii) in obtaining from the Department or using any validated or general export license, reexport authorization, or other export control document; (iv) in carrying on negotiations with respect to, or in receiving, ordering, buying, selling, delivering, storing, using, or disposing of, in whole or in part, any commodities or technical data exported or to be exported from the United States, in whole or in part, and subject to the Regulations; and (v) in financing, forwarding, transporting, or other servicing of such commodities or technical data.

III. After notice and opportunity for comment as provided in § 770.15(h) of the Regulations, any person, firm, corporation, or business organization related to Walaschek, Chemco, Colimex, or Far-Trade by affiliation, ownership, control, or position of responsibility may also be subject to the provisions of this Order.

IV. As provided in § 787.12(a) of the Regulations, without period disclosure of the facts to and specific authorization of the Office of Export Licensing, in consultation with the Office of Export Enforcement, no person may directly or indirectly, in any manner or capacity: (i) Apply for, obtain, or use any license, Shipper's Export Declaration, bill of lading, or other export control document relating to an export or reexport of commodities or technical data by, to, or for another person then subject to an order revoking or denying his export privileges or then excluded from practice before the Bureau of Export Administration; or (ii) order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance, or otherwise service or participate: (a) In any transaction which may involve any

[1] The EAA expired on September 30, 1990. Executive Order 12730 (55 FR 40373, October 2, 1990) continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C.A. 1701–1706 (1991)).

[2] Far-Trade received my notification on or about September 29, 1991.

[3] On August 7, 1989 (54 FR 33253, August 14, 1989), the Order was amended by adding two companies, Chemco and Colimex, as persons related to Walaschek.

commodity or technical data exported or to be exported from the United States; (b) in any reexport thereof; or (c) in any other transaction which is subject to the Export Administration Regulations, if the person denied export privileges may obtain any benefit or have any interest in, directly or indicretly, any of these transactions.

V. This Order is effective immediately and shall remain in effect until August 26, 1998.

VI. A copy of this Order shall be delivered to Walaschek and to the related person, Far-Trade. This Order shall be published in the **Federal Register**.

Dated: November 5, 1991.

Iain S. Baird,

Director, Office of Export Licensing.

[FR Doc. 91-27299 Filed 11-13-91; 8:45 am]

BILLING CODE 3510-DT-M

International Trade Administration

Export Trade Certificate of Review

ACTION: Notice of Issuance of an Amended Export Trade Certificate of Review, Application No. 90-A0017.

SUMMARY: The Department of Commerce has issued an amendment to the Export Trade Certificate of Review granted to the Brass and Bronze Ingot Manufacturers ("BBIM") on March 21, 1991. Notice of issuance of the Certificate was published in the **Federal Register** on April 2, 1991 (56 FR 13451).

FOR FURTHER INFORMATION CONTACT: George Muller, Director, Office of Export Trading Company Affairs, International Trade Administration, 202-377-5131. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. 4001-21) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. The regulations implementing title III are found at 15 CFR part 325 (1990) (50 FR 1804, January 11, 1985).

The Office of Export Trading Company Affairs is issuing this notice pursuant to 15 CFR 325.6(b), which requires the Department of Commerce to publish a summary of a Certificate in the **Federal Register**. Under section 305(a) of the Act and 15 CFR 325.11(a), any person aggrieved by the Secretary's determination may, within 30 days of the date of this notice, bring an action in any appropriate district court of the United States to set aside the determination on the ground that the determination is erroneous.

Description of Amended Certificate

BBIM's Export Trade Certificate of Review has been amended to:

1. Add R. Lavin & Sons, Inc., Chicago, Illinois, as a "Member" within the meaning of § 325.2(1) of the Regulations (15 CFR § 325.2(1)); and

2. Include Canada in the Export Markets to which BBIM and its Members export or intend to export their goods and services.

A copy of the amended Certificate will be kept in the International Trade Administration's Freedom of Information Records Inspection Facility, room 4102, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

Dated: November 7, 1991.

George Muller,

Director, Office of Export Trading, Company Affairs.

[FR Doc. 91-27421 Filed 11-13-91; 8:45 am]

BILLING CODE 3510-DR-M

Importers and Retailers' Textile Advisory Committee; Partially Closed Meeting

A meeting of the Importers and Retailers' Textile Advisory Committee will be held on Tuesday, December 10, 1991, Herbert C. Hoover Building, room H3407, 14th Street and Constitution Avenue, NW., Washington, DC 20230. (The Committee was established by the Secretary of Commerce on August 13, 1963 to advise Department officials of the effects on import markets and retailing of cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles.)

General Session: 10:30 a.m. Review of import trends, international activities, report on conditions in the market, and other business.

Executive Session: 11 a.m. Discussion of matters properly classified under Executive Order 12356 (3 CFR, 1982 Comp. p. 166) and listed in 5 U.S.C. 552b(c)(1).

The general session will be open to the public with a limited number of seats available. A Notice of Determination to close meetings or portions of meetings to the public on the basis of 5 U.S.C. 552b(c)(1) has been approved in accordance with the Federal Advisory Committee Act. A copy of the notice is available for public inspection and copying in the Central Facility Room H6628, U.S. Department of Commerce, (202) 377-3031.

For further information or copies of the minutes, contact Theresa Stuart (202) 377-3737.

Dated: November 7, 1991.

Augustine D. Tantillo,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc.91-27422 Filed 11-13-91; 8:45 am]

BILLING CODE 3510-DR-F

Management-Labor Textile Advisory Committee; Partially Closed Meeting

A meeting of the Management-Labor Textile Advisory Committee will be held on Tuesday, December 10, 1991, Herbert C. Hoover Building, room H3407, 14th Street and Constitution Avenue, NW., Washington, DC 20230. (The Committee was established by the Secretary of Commerce on October 18, 1961 to advise officials of problems and conditions in the textile and apparel industry.)

General Session: 1:30 p.m. Review of import trends, report on conditions in the domestic market, and other business.

Executive Session: 2 p.m. Discussion of matters properly classified under Executive Order 12356 (3 CFR, 1982 Comp. p. 166) and listed in 5 U.S.C. 552b(c)(1).

The general session will be open to the public with a limited number of seats available. A Notice of Determination to close meetings or portions of meetings to the public on the basis of 5 U.S.C. 552b(c)(1) has been approved in accordance with the Federal Advisory Committee Act. A copy of the notice is available for public inspection and copying in the Central Facility Room H6628, U.S. Department of Commerce, (202) 377-3031.

For further information or copies of the minutes, contact Theresa Stuart (202) 377-3737.

Dated: November 7, 1991.

Augustine D. Tantillo,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc.91-27423 Filed 11-13-91; 8:45 am]

BILLING CODE 3510-DR-F

National Oceanic and Atmospheric Administration

North Pacific Fishery Management Council; Public Hearing

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

ACTION: Notice of a public hearing, and request for comments.

SUMMARY: The North Pacific Fishery Management Council will hold a public hearing in Anchorage, Alaska. The purpose of the hearing is to take public comment on the proposed implementation plan for individual fishery quotas in the sablefish and halibut fisheries off Alaska.

DATES: The hearing will begin at 9 a.m., local time, Monday, December 2, 1991. Comments will be accepted during the hearing.

ADDRESSES: The hearing will be held in the Aleutian Room of the Anchorage Hilton Hotel, 500 W. Third Avenue, at E Street, Anchorage, AK.

FOR FURTHER INFORMATION CONTACT: Chris Oliver, Fishery Biologist, North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, AK 99510, (907) 271–2809.

Dated: November 7, 1991.

David S. Crestin,

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

[FR Doc. 91–27329 Filed 11–13–91; 8:45 am]

BILLING CODE 3510-22-M

National Technical Information Service

Government-Owned Inventions; Availability for Licensing

The inventions listed below are owned by agencies of the U.S. Government and are available for licensing in the U.S. in accordance within 35 U.S.C. 207 to achieve expeditious commercialization of results of federally funded research and development. Foreign patents are filed on selected inventions to extend market coverage for U.S. companies and may also be available for licensing.

Licensing information may be obtained by writing to: National Technical Information Service, Center for Utilization of Federal Technology—Patent Licensing, U.S. Department of Commerce, P.O. Box 1423, Springfield, VA 22151. All patent applications may be purchased, specifying the serial number listed below, by writing NTIS, 5285 Port Royal Road, Springfield, VA 22161 or by telephoning the NTIS Sales Desk at (703) 487–4650. Issued patents may be obtained from the Commissioner of Patents, U.S. Patent (703) 487–4650. Issued patents may be obtained from the Commissioner of Patents, U.S. Patent and Trademark Office, Washington, DC 20231.

Please cite the number and title of inventions of interest.

Douglas J. Campion,

Patent Licensing Specialist, Center for the Utilization of Federal Technology.

Department of Health and Human Services

7–090,363 (U.S. 5,039,801) Thermal Fragmentation of Methylbenzylurea Disastereomers or Secondary Amines and Preparation of Optically Active Secondary Amines)
7–216,088 (U.S. 5,028,425) Synthetic Vaccine Against P. Falciparum Malaria
7–222,684 (U.S. 5,030,449) Synthetic Vaccine Against AIDS Virus
7–222,882 (U.S. 5,037,376) Apparatus and Method for Transmitting Prosthetic Information to the Brain
7–266,038 (U.S. 5,041,372) Probe to Identify Enteroinvasive E. Coli and Shigella Species
7–273,569 (U.S. 5,026,826) Human Neutrophilic Granulocyte End-Stage Maturation Factor and Its Preparation and Use
7–278,355 (U.S. 5,025,796) Apparatus and Methods for Determining in Vivo Response to Thermal Stimulation in an Unrestrained Subject
7–332,606 Regioselective Substitutions in Cyclodextrins
7–351,042 (U.S. 5,026,785) Avidin & Streptavidin Modified Water-Soluble Polymers Such As Polacrylamide, and the Use Thereof In the Construction of Soluble Multivalent Macromolecular Conjugates
7–377,334 (U.S. 5,030,578) A Process for the Purification of C1-Inhibitor
7–397,226 (U.S. 5,027,694) Variable Air Flow Eddy Control (for ventilation systems)
7–409,552 (U.S. 5,039,705) Anti-Hypertensive Compositions of Secondary Amine-Nitric Oxide Adducts and Use Thereof
7–460,490 (U.S. 5,026,687) Treatment of Human Retroviral Infections With 2',3' Dideoxyinosine
7–496,144 (U.S. 5,024,758) Horizontal Flow-Through Coil Planet Centrifuge With Multilayer Plural Coils in Eccentric Synchronous Rotation, Suitable for Countercurrent Chromatography
7–544,546 Preparation of Specifically Substituted Cyclodextrins

Department of Commerce

7–414,213 (U.S. 5,039,872) Digitally Synthesized Audio Frequency Voltage Source

Department of the Interior

7–408,586 (U.S. 5,035,722) Method of Extracting Coal from a Coal Refuse Pile
7–434,062 (U.S. 5,033,795) Method of Mining a Mineral Deposit Seam
7–490,899 Process for Recovery of Gallium
7–548,337 (U.S. 5,035,060) Method of Mapping Underground Mines
7–602,491 Scrap Treatment Method
7–628,873 Selenate Removal From Waste Water
7–692,889 Teleoperated Control System for Underground Room and Pillar Mining
7–696,805 Method for Locating Metallic Nitrideww Inclusions in Metallic Alloy Ingots
7–698,031 Cyanide Leaching Method for Recovering Platinum Group Metals
7–704,832 Microwave Induced Plasma Process for Producing Tungsten Carbide
7–707,541 Deep-Well Thermal Flowmeter
7–721,805 Method and Means for Safely Preserving Aqueous Field Samples Using Either Acid or Base

Department of Agriculture

7–128,836 (U.S. 4,996,152) Avian Herpesvirus Amplicon as a Eucaryotic Expression Vector
7–207,592 (U.S. 5,030,562) Method for Screening Bacteria and Application Thereof for Field Control of the Weed Downy Brome
7–271,825 (U.S. 5,026,646) Bovine Monoclonal Antibodies to Bovine Herpesvirus I From Sequential Fusion Heterohybridomas
7–275,863 (U.S. 5,011,683) Aggregation of Pheromones of Driedfruit Beetle
7–338,680 (U.S. 5,034,328) Control of Hemp Sesbania with a Fungal Pathogen
7–496,579 (U.S. 5,034,315) Oligonucleotide Probes Complementary to Treponema Hyodysenteriae RNA Sequence
7–532,294 (U.S. 5,039,947) Microwave Technique for Single Kernel, Seed, Nut, or Fruit Moisture Content Determination
7–711,221 Methods and Apparatus for Making Grids from Fibers
7–717,235 Taenia Antigens for Use as Immunodiagnostic Reagents for Bovine or Swine Cysticercosis
7–718,716 Process and Apparatus to Improve the Properties and Value of Forage Crops
7–723,118 Aromatic Compounds as Potato Tuber Sprout Inhibitors
7–726,097 Improved Sweet Potato Products
7–730,161 Listeria monocytogenes Growth in Refrigerated Foods
7–730,763 Methods and Compositions of Adherent Starch Granules for Encapsulating Pest Control Agents
7–733,512 Cytotoxic Protein(s) from the Yeast Pichia insitovora
7–745,796 Biological Control of Diseases of Harvested Agricultural Commodities Using Strains of the Yeast Candida sake (Saito and Ota) van Uden and Buckley

[FR Doc. 91–27300 Filed 11–13–91; 8:45 am]

BILLING CODE 3510-04-M

Government-Owned Inventions; Availability for Licensing

The inventions listed below are owned by agencies of the U.S. Government and are available for licensing in the U.S. in accordance with

35 U.S.C. 207 to achieve expeditious commercialization of results of federally funded research and development. Foreign patents are filed on selected inventions to extend market coverage for U.S. companies and may also be available for licensing.

Licensing information may be obtained by writing to: National Technical Information Service, Center for Utilization of Federal Technology-Patent Licensing, U.S. Department of Commerce, P.O. Box 1423, Springfield, Virginia 22151. All patent applications may be purchased, specifying the serial number listed below, by writing NTIS, 5285 Port Royal Road, Springfield, Virginia 22161 or by telephoning the NTIS Sales Desk at (703) 487–4650. Issued patents may be obtained from the Commissioner of Patents, U.S. Patent and Trademark Office, Washington, DC 20231.

Please cite the number and title of inventions of interest.

Douglas J. Campion,

Patent Licensing Specialist, Center for the Utilization of Federal Technology.

Department of Health and Human Services

7–189,164 Process for Producing a Human Neutrophil Chemotactic Factor Polypeptide and a Recombinant Expression Vector for the said Polypeptide.
7–564,877 Method and Apparatus for Assessing Metabolic and Behavior Physiology of Animals.
7–585,793 Complexes of Nitric Oxide With Polyamines.
7–620,939 Recombinant Immunotoxin Composed of a Single Chain Antibody Reacting With the Human Transferrin Receptor and Diptheria Toxin
7–623,826 Inhibition of Human Immunodeficiency Virus by an Adeno-associated Virus Gene in Human Cells.
7–635,889 A Method for Constructing Antigens (quantity production method for difficult-to-prepare antigens).
7–640,694 Liposome-Incorporation of Polyenes (anti-HIV activity of liposomal Nystatin and Amphotericin B).
7–663,455 Recombinant Chimeric Proteins Deliverable Across Cellular Membranes Into Cytosol of Target Cells.
7–667,170 Polysaccharide-Protein Conjugates (as vaccine for Group B meningococcal meningitis).
7–669,090 Monoclonal Antibodies to Cytochrome B5.
7–669,731 Modified RNA Template-Specific Polymerase Chain Reaction.
7–672,577 The Use of Hydroxamic Acid Derivatives to Inhibit Viral Replication.
7–676,174 Octopamine Receptor.
7–677,429 Pharmaceutical Compositions and Methods for Preventing Skin Tumor Formation and Causing Regression of Existing Tumors.
7–688,087 Activity-Dependent Neurothropic Factor.
7–696,923 Method for Designing Cancer Treatment Regimens and Methods and Pharmaceutical Compositions for the Treatment of Cancer.
7–707,501 Three Highly Informative Microsatellite Repeat Polymorphic DNA Markers.
7–710,180 Transfected Mammalian Cell Lines Expressing the A1 Adenosine Factor.
7–716,827 Super Glucocorticoid Receptors.
7–718–666 Fiber Optic Devices.
7–720,174 Osteogenic Composite Implants.
7–721,784 Method and Device for Reversible Sterilization.
7–732,021 Apparatus for Fluorescent Excitation and Detection from Potentiometric Dyes with a Single-Ended Optical Fiber.
7–737,872 System and Method for Performing Simultaneous Bilateral Measurements on a Subject in Motion (illumination for simultaneous video recording of movement in 2 or 3 dimensions).
7–749,240 Stopcock Holder.
7–751,090 Interleukin-2 Stimulated T Lymphocyte Cell Death for the Treatment of Autoimmune Diseases, Allergic Disorders, and Graft Rejection.

[FR Doc. 91–27377 Filed 11–13–91; 8:45 am]
BILLING CODE 3510–04–M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Amendment of an Import Limit and Restraint Period for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Pakistan

November 7, 1991.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs amending a limit and restraint period.

EFFECTIVE DATE: November 15, 1991.

FOR FURTHER INFORMATION CONTACT: Anne Novak, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377–4212. For information on the quota status of this limit, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 343–6498. For information on embargoes and quota re-openings, call (202) 377–3715. For information on categories on which consultations have been requested, call (202) 377–3740.

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).

Inasmuch as no agreement has been reached in consultations on a mutually satisfactory solution on Category 237, the United States Government has decided to control imports in this category for the prorated period beginning on November 4, 1991 and extending through December 31, 1991. In order to facilitate administration, this limit is being combined with the ninety-day limit established in the letter of September 17, 1991.

The United States remains committed to finding a solution concerning Category 237. Should such a solution be reached in consultations with the Government of Pakistan, further notice will be published in the **Federal Register.**

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 55 FR 50756, published on December 10, 1990). Also see 56 FR 47937, published on September 23, 1991

Auggie D. Tantillo,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 7, 1991.

Commissioner of Customs,
Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on September 17, 1991, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of cotton and man-made fiber textile products in Category 237, produced or manufactured in Pakistan and exported during the ninety-day period which began on August 6, 1991 and extended through November 3, 1991.

Effective on November 15, 1991, you are directed to amend the September 17, 1991 directive to extend the restraint period through December 31, 1991 at an increased level of 37,380 dozen [1].

[1] The limit has not been adjusted to account for any imports exported after August 5, 1991.

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,

Auggie D. Tantillo,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 91-27418 Filed 11-13-91; 8:45 am]

BILLING CODE 3510-DR-F

Establishment of an Import Limit for Certain Silk Blend and Other Vegetable Fiber Textile Products Produced or Manufactured in Taiwan

November 7, 1991.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing a limit.

EFFECTIVE DATE: November 15, 1991.

FOR FURTHER INFORMATION CONTACT: Kim-Bang Nguyen, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212. For information on the quota status of this limit, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 566-8791. For information on embargoes and quota re-openings, call (202) 377-3715. For information on categories on which consultations have been requested, call (202) 377-3740.

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 American Institute in Taiwan (AIT) and the Coordination Council for North American Affairs (CCNAA) agreed to establish a specific limit for silk blend and other vegetable fiber textile products in Category 835 for the twelve-month period which began on January 1, 1991 and extends through December 31, 1991.

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 55 FR 50756, published on December 10, 1990). Also see 55 FR 50862, published on December 11, 1990; and 56 FR 36054, published on July 30, 1991.

Auggie D. Tantillo,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 7, 1991.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on December 5, 1990, 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 Taiwan and exported during the twelve-month period which began on January 1, 1991 and extends through December 31, 1991.

Effective on November 15, 1991, you are directed to amend further the December 5, 1990 directive to establish a limit for silk blend and other vegetable fiber textile products in Category 835 at a level of 16,000 dozen [1]. Category 835 shall remain subject to the current Group II limit.

Further, you are directed to retain import charges already made to Category 835 in Group II.

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,

Auggie D. Tantillo,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 91-27419 Filed 11-13-91; 8:45 am]

BILLING CODE 3510-DR-F

DEPARTMENT OF DEFENSE

Department of the Air Force

Intent To Prepare an Environmental Impact Statement for the Deactivation of 150 Minuteman II Missile Sites at Whiteman AFB, MO

The United States Air Force is issuing this notice to advise the public that an Environmental Impact Statement (EIS) will be prepared for the deactivation of 150 Minuteman II missile sites at Whiteman AFB, Missouri.

The National Environmental Policy Act encourages agencies to conduct public scoping meetings to obtain input to assist in determining the nature, extent and scope of the issues and concerns to be addressed in the EIS. The Air Force has tentatively scheduled a public scoping meeting for December 10, 1991. Notice of the exact time and place of the meeting will be published in the news media.

The United States Air Force invites comments and suggestions from all interested parties on the scope of the EIS. If concerned persons are not able to attend this scoping meeting, written suggestions and comments will be accepted. To assure the Air Force will have sufficient time to fully consider public inputs on issues, written comments should be mailed to ensure receipt no later than January 10, 1992. However, the Air Force will accept comments at anytime during the environmental impact analysis process. Comments or requests for further information concerning this EIS should be addressed to: Mr. George Gauger, Environmental Planning, HQ SAC/DEVP, Offutt AFB NE, 68113-5000, phone: 402-294-3684.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 91-27301 Filed 11-13-91; 8:45 am]

BILLING CODE 3910-01-M

DEPARTMENT OF EDUCATION

National Assessment Governing Board; Meeting

AGENCY: National Assessment Governing Board.

ACTION: Notice of partially closed meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of forthcoming meetings of the National Assessment Governing Board and its committees. 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. This document is intended to notify the public of their opportunity to attend the open portions of the meeting.

DATES: November 14, 15, and 16, 1991.

TIMES: November 14, 1991—Ad Hoc Committee on NAEP and National Exams—1 p.m. to 3 p.m. (open); Design and Analysis Committee—3 p.m. to 5 p.m. (open); Subject Area Committee #1 (U.S. History and Geography)—5 p.m. to 7 p.m. (open); Executive Committee—7 p.m. to 10 p.m. (open). November 15, 1991—Full Board—8:30 a.m. to 3:30 p.m. (open); 3:30 p.m.—5 p.m. (closed). November 16, 1991—Full Board—8:30 a.m. until adjournment, approximately, 1:30 p.m. (open).

Location: Marriott Hotel and Marina, 333 West Harbor Drive, San Diego , CA, 92101-7700.

[1] The limit has not been adjusted to account for any imports exported after December 31, 1990.

FOR FURTHER INFORMATION CONTACT: Roy Truby, Executive Director, National Assessment Governing Board, U.S. Department of Education, 1100 L Street, NW., suite 7322, Washington, DC, 20005–4013. Telephone: (202) 357–6938.

SUPPLEMENTARY INFORMATION: The National Assessment Governing Board (NAGB) is established under section 406(i) of the General Education Provisions Act (GEPA) as amended by section 3403 of the National Assessment of Educational Progress Act (NAEP Improvement Act), title III–C of the Augustus F. Hawkins—Robert T. Stafford Elementary and Secondary school Improvement Amendments of 1988 (Pub. L. 100–297); (20 U.S.C. 1221e-1).

The Board is established to advise the Commissioner of the National Center for Education Statistics on policies and actions needed to improve 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 comparison. On November 14, four committees of the Board will be in session. The Ad Hoc Committee on NAEP and a national examination system will meet from 1 to 3 p.m. to finalize a proposed Board statement on the relationship between NAEP and a national examination system. The Design and Analysis Committee will meet from 3 p.m. until 5 p.m. to discuss issues related to the design of future NAEP assessments and the analyses of the resulting data. Subject Area Committee #1 will meet from 5 p.m. until 7 p.m. to review and discuss plans for the U.S. History 1994 consensus process. Between 7 p.m. and 10 p.m. the Executive Committee will convene to discuss and consider various recommendations concerning Board business, including matters pertaining to 1992 and 1993 budget recommendations, a memorandum of understanding between NAGB and the Department of Education, and other routine matters.

The meeting of the full Board will begin on Friday, November 15, at 8:30 a.m. when newly appointed members will be sworn-in by the Acting Commissioner of NCES. At 8:45 a.m., there will be a report from the Executive Director. Between 9 a.m. and 10:30 a.m., a presentation on assessment initiatives in California will be discussed by the State Superintendent of Public Instruction and San Diego Unified School District Superintendent. During the period 10:30 a.m. to noon, subcommittees of the Board will hold meetings. The Subject Area Committee #2 (Science and Math) will meet to review and discuss plans for the consensus process for the 1994 math and science assessments. The Reporting and Dissemination Committee will meet to discuss what has been learned from the reporting and dissemination experiences of the reporting of the 1990 NAEP data, and how future reporting and dissemination activities might be improved. The Achievement Levels Committee will meet to hear a briefing by American College Testing staff on implementation plans for setting of achievement levels in reading, writing, and science. The full Board will reconvene at 12 noon for a briefing on the technical report of the achievement levels for the 1990 Mathematics Assessment. Beginning at 1 p.m. the Board will hear an update on NAEP activities, and reports on NAEP issues: student motivation, the relationship of NAEP to a National Examination System, and plans for the arts assessment.

The Board will meet in closed session from 3:30 p.m. until 5 p.m. to be briefed on and discuss a draft report on the cross-sectional study of student performance in reading, math, and science based on data from the 1990 NAEP. The draft report is still undergoing technical review and analysis and there is a significant possibility that the draft report may be misinterpreted or incomplete. Further, the presentation and discussion may include reference to specific NAEP test items. Therefore, the premature disclosure of the draft report would significantly frustrate implementation of a proposed agency action. Such matters are protected by 5 U.S.C. 552b(c)(9)(B). On November 16, the full Board will meet from 8:30 a.m. until adjournment, approximately 1:30 p.m. for the Board to hear reports from the subcommittees.

A summary of the activities at the closed sessions and related matters, which are informative to the public and consistent with the policy of section 5 U.S.C. 552b, will be available to the public within 14 days after the meeting. Records are kept of all Board proceedings and are available for public inspection at the Department of Education, National Assessment Governing Board, 1100 L Street, NW., suite 7322, Washington, DC, from 8:30 a.m. to 5 p.m.

The public is being given less than fifteen days notice of this meeting because of difficulties encountered in scheduling the participants who are essential to the actions described in this notice.

Dated: November 12, 1991.

Diane Ravitch,

Assistant Secretary and Counselor to the Secretary.

[FR Doc. 91–27544 Filed 11–13–91; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. QF88–142–004]

Montenay Energy Resources of Montgomery County, Inc.; Application for Commission Recertification of Qualifying Status of a Small Power Production Facility

November 7, 1991.

On October 30, 1991, Montenay Energy Resources of Montgomery County, Inc. (Applicant), a Delaware corporation with its principal offices at Montgomery County Resource Recovery Facility, 1155 Conshohoken Road, Plymouth Township, PA 19428, submitted for filing an application for recertification of a facility as a qualifying small power production facility pursuant to § 292.207 of the Commission's regulations. No determination has been made that the submittal constitutes a complete filing.

The small power production facility will be located in Plymouth Township, Montgomery County, Commonwealth of Pennsylvania. The original certification was issued on February 23, 1988, [42 FERC ¶ 62,144 (1988)] and recertification was issued on October 9, 1991 [56 FERC ¶ 62,017 (1991)]. The instant recertification is requested due to changes to the partnership agreement in regard to allocation of benefits between the partners of Montenay Montgomery Limited Partnership.

Any person desiring to be heard or objecting to the granting of qualifying status 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 must be filed within 30 days after the date of publication of this notice in the **Federal Register** and must be served on the Applicant 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 petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D Cashell,

Secretary.

[FR Doc. 91-27356 Filed 11-13-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. TQ92-1-22-000 and RP90-143-007]

CNG Transmission Corporation; Proposed Changes in FERC Gas Tariff

November 7, 1991

Take notice that CNG Transmission Corporation (CNG) on November 1, 1991, tendered for filing the following revised tariff sheets to be a part of its FERC Gas Tariff, First Revised Volume No. 1, to be effective December 1, 1991:

Fourteenth Revised Sheet No. 31
Ninth Revised Sheet No. 34
Alternate Fourteenth Revised Sheet No. 31
Alternate Ninth Revised Sheet No. 34

CNG states that in addition to its regular quarterly PGA filing, CNG proposes by this filing to implement a voluntary reduction in its sales, non-gas commodity rates in order to reflect the rates that CNG ultimately expects will be approved in Docket No. RP90-143 pursuant to a Stipulation and Agreement filed on October 29, 1991, in that proceeding.

CNG states that copies of the filing are being mailed to CNG's customers and interested state commissions.

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 18 CFR 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before November 14, 1991. 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 in the public reference room.

Lois D. Cashell,

Secretary.

[FR Doc. 91-27358 Filed 11-13-91 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TQ92-1-15-000]

Mid Louisiana Gas Company; Proposed Change of Rates

November 7, 1991.

Take notice that Mid Louisiana Gas Company (Mid Louisiana) on November 1, 1991, tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1 the following tariff sheets to become effective December 1, 1991:

Eighty-Eighth Revised sheet No. 3A

Mid Louisiana states that the purpose of the filing of Eighty-Eighth Revised Sheet No. 3a is to reflect a $.7426 per Mcf increase in its current cost of gas.

Mid Louisiana states that copies of the filing have been mailed to Mid Louisiana's jurisdictional customers and interested state commissions.

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 18 CFR 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before November 15, 1991. 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 in the public reference room.

Lois D. Cashell,

Secretary.

[FR Doc. 91-27357 Filed 11-13-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TQ92-3-25-000]

Mississippi River Transmission Corp.; Rate Change Filing

November 7, 1991.

Take notice that on October 31, 1991 Mississippi River Transmission Corporation (MRT) tendered for filing Sixty-Seventh Revised Sheet No. 4, and Twenty-Sixth Sheet No. 4.1 to its FERC Gas Tariff, Second Revised Volume No. 1, to be effective November 1, 1991. MRT states that the purpose of the instant filing is to reflect an out-of-cycle purchase gas cost adjustment (PGA).

MRT states that Sixty-Seventh Revised Sheet No. 4 and Twenty-Sixth Revised Sheet No. 4.1 reflect an increase of 3.09 cents per MMBtu in the commodity cost of purchased gas from PGA rates filed to be effective September 1, 1991 in Docket No. TQ91-6-25-001. MRT also states that since the September 1, 1991 filing date, MRT has experienced increases in purchase and transportation costs for its system supply that could not have been reflected in that filing under current Commission regulations.

MRT states that a copy of the filing has been mailed to each of MRT's jurisdictional sales customers and to the State Commissions of Arkansas, Missouri, and Illinois.

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 18 CFR 385.214 and 385.211 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before November 15, 1991. Protests will be considered by the Commission in determining the appropriate action to be taken, but 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 in the public reference room.

Lois D. Cashell,

Secretary.

[FR Doc. 91-27359 Filed 11-13-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP92-23-000]

Natural Gas Pipeline Company of America, Notice of Proposed Changes in FERC Gas Tariff

November 7, 1991.

Take notice that on November 1, 1991, Natural Gas Pipeline Company of America (Natural) tendered for filing the tariff sheets listed on appendix A attached to the filing to be part of its FERC Gas Tariff, Third Revised Volume No. 1, to be effective December 1, 1991.

Natural states that the tariff sheets are being submitted to reflect changes in rates and quantity entitlements associated with Natural's sales services for the Second Year of the Gas Inventory Demand Charge (GIDC) provision of the General Terms and Conditions of its tariff.

Natural states that a copy of the filing is being mailed to Natural's jurisdictional sales customers and interested state regulatory agencies.

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 18 CFR 385.214 and § 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before November 14, 1991. 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 in the public reference room.

Lois D. Cashell,

Secretary.

[FR Doc. 91-27352 Filed 11-13-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP92-24-000]

Natural Gas Pipeline Co. of America; Proposed Changes in FERC Gas Tariff

November 7, 1991.

Take notice that on November 1, 1991, Natural Gas Pipeline Company of America (Natural) tendered for filing the tariff sheets listed on Appendix A attached to the filing to be part of its FERC Gas Tariff, Third Revised Volume No. 1, to be effective December 1, 1991.

Natural states that the tariff sheets are being submitted to update Monthly Demand Surcharge to reflect interest accrued for the period of August through November 1991 on the outstanding balance of transaction costs incurred by Natural, and to reflect additional take-or-pay settlement costs that have not been previously included in earlier filings.

Natural states that a copy of the filing is being mailed to Natural's jurisdictional sales customers and interested state regulatory agencies and all parties set out on the official service list at Docket Nos. RP91-22, RP91-31 and CP89-1281, *et al.*

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 18 CFR 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before November 14, 1991. 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 available for public inspection in the public reference room.

Lois D. Cashell,

Secretary.

[FR Doc. 91-27353 Filed 11-13-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TM92-3-37-000]

Northwest Pipeline Corporation; Proposed Change in FERC Gas Tariff

November 7, 1991.

Take notice that on November 1, 1991, Northwest Pipeline Corporation ("Northwest") tendered for filing and acceptance Fourteenth Revised Sheet No. 10 to be a part of its FERC Gas Tariff, Second Revised Volume No. 1.

Northwest states that the purpose of this filing is to implement a rate for its Gas Inventory Charge ("GIC"), effective January 1, 1992, consistent with Section 21.2 of the General Terms and Conditions of Northwest's FERC Gas Tariff, Second Revised Volume No. 1.

Northwest states that the proposed GIC rate is 16.30¢ per MMBtu effective for the twelve-month period commencing January 1, 1992 for Rate Schedule ODL-1 and DS-1 customers. The GIC rate is calculated using the methodology approved by the Commission in Opinion Nos. 344 and 344-A.

Northwest states that a copy of this filing is being served upon Northwest's affected jurisdictional customers and affected state commissions.

Any person desiring to be heard or 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 §§ 385.214 and 385.211 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before November 15, 1991. 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 in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 91-27355 Filed 11-13-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP92-135-000]

Tennessee Gas Pipeline Co.; Request Under Blanket Authorization

November 7, 1991.

Take notice that on October 30, 1991, Tennessee Gas Pipeline Company (Tennessee), P.O. Box 2511, Houston, Texas 77252, filed in Docket No. CP92-135-000, a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act and Tennessee's blanket authority granted in Docket No. CP82-413-000 to operate a jurisdictional receipt point as a delivery point for Bishop Pipeline Corporation (Bishop), all as more fully set forth in the request on file with the Commission and open to public inspection.

Tennessee states that it currently transports natural gas for Bishop pursuant to § 284.223 of the Regulations, but Bishop has now requested that Tennessee modify a jurisdictional receipt point in order to effectuate delivery of natural gas to Bishop for gas lift purposes. Tennessee proposes to make the auxillary modification pursuant to § 2.55 of the Regulations.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 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. 91-27360 Filed 11-13-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP89-160-000]

Trunkline Gas Company; Informal Settlement Conference

November 7, 1991.

Take notice that an informal settlement conference will be convened in this proceeding on Thursday, November 14, 1991, at 10 a.m., at the

offices of the Federal Energy Regulatory Commission, 810 First Street, NE., Washington, DC, for the purpose of exploring the possible settlement of the above-referenced docket.

Any party, as defined in 18 CFR 385.102(c) (1991), or any participant, as defined in 18 CFR 385.102(b) (1991), is invited to attend. Persons wishing to become a party must move to intervene and receive intervenor status pursuant to the Commission's regulations, 18 CFR 385.214 (1991).

For additional information, contact Carmen Gastilo at (202) 208–2182 or Donald Heydt at (202) 208–0740.

Lois D. Cashell,

Secretary.

[FR Doc. 91–27354 Filed 11–13–91; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. ID–2618–001]

Louis J. Willie; Filing

November 7, 1991.

Take notice that on September 20, 1991, Louis J. Willie, (Applicant) tendered for filing an application under section 305(b) of the Federal Power Act to hold the following positions:

Director

Alabama Power Company

President

L&K Management, Inc. (general partner of L&K Electrical Supply Co., Ltd.)

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 and 18 CFR 385.214). All such motions or protests should be filed on or before November 22, 1991. 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. 91–27361 Filed 11–13–91; 8:45 am]

BILLING CODE 6717–01–M

Office of Fossil Energy

[FE Docket No. 91–48–NG]

Wester Marketing Co.; Order Granting Blanket Authorization To Import Natural Gas From Canada

AGENCY: Department of Energy, Office of Fossil Energy.

ACTION: Notice of an order granting blanket authorization to import natural gas.

SUMMARY: The Office of Fossil Energy of the Department of Energy gives notice that it has issued an order granting Westar Marketing Company blanket authorization to import up to 50 Bcf of natural gas from Canada over a two-year period beginning on the date of first delivery.

A copy of this order is available for inspection and copying in the Office of Fuels Programs Docket Room, 3F–056, Forrestal Building, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–9478. The docket room is open between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays

Issued in Washington, DC, October 25, 1991.

Clifford P. Tomaszewski,

Acting Deputy Assistant Secretary for Fuels Programs, Office of Fossil Energy.

[FR Doc. 91–27400 Filed 11–13–91; 8:45 am]

BILLING CODE 6450–01–M

Office of Hearings and Appeals

Issuance of Decisions and Orders; Week of September 2 Through September 6, 1991

During the week of September 2 through September 6, 1991, the decisions and orders summarized below were issued with respect to appeals and applications for other relief filed with the Office of Hearings and Appeals of the Department of Energy. The following summary also contains a list of submissions that were dismissed by the Office of Hearings and Appeals.

Appeals

Charles Case Tire Company, 09/05/91; LFA–0138

Charles Case Tire Company (Case) filed an Appeal from a determination issued by the Nevada Operations Office (NOO), denied in part Case's request for information made under the Freedom of Information Act (the FOIA). In considering the Appeal, the DOE found that the information which Case requested was not contained in an agency record, and therefore, the FOIA did apply. Therefore, the Appeal was denied. However, Reynolds Electrical and Engineering Co., the managing and operating contractor at NOO, decided to release a portion of the information Case requested.

Ronald B. O'Dowd, 09/06/91; LFA–0117

Ronald B. O'Dowd (O'Dowd), Assistant Chief Counsel, Albuquerque Operations Office (AOO) of the Department of Energy (DOE), filed a Motion for Reconsideration in which he requested that the Office of Hearings and Appeals (OHA) rescind its Decision and Order in Keith D. Britt, 21 DOE ¶ 80,111 (1991) (*Britt*), and issue a new Decision and Order affirming AOO's determination in that case. In its determination, AOO denied a request for information submitted by Keith D. Britt (Britt) under the Privacy Act, 5 U.S.C. § 552a. Britt had sought access to a copy of a personnel security background investigation report prepared by the Office of Personnel Management (OPM) as part of a routine reevaluation of Britt's fitness to retain his DOE security clearance. AOO denied Britt's request pursuant to § 552a(d)(5) of the Privacy Act and section 552(b)(7)(A) of the Freedom of Information Act, and Britt appealed that determination to OHA. In considering Britt's appeal, OHA determined that the report Britt sought was actually the property of the Office of Personnel Management (OPM) and concluded that AOO ought to have consulted with OPM in processing Britt's request. Because AOO had failed to consult with OPM, OHA remanded the case to AOO for further proceedings. In his Motion for Reconsideration, O'Dowd claimed that it was unnecessary for AOO to consult with OPM concerning the report and requested that OHA amend its Decision in *Britt*. Subsequent to OHA's receipt of O'Dowd's Motion, AOO referred Britt's request to OPM, which then released the background investigation report to him. Because AOO ultimately referred Britt's request to OPM for release, and because Britt received the report that he initially sought, the issues O'Dowd raised in his submission became moot, and the Motion for Reconsideration was dismissed.

Remedial Order

Kenco Refining, Inc., 09/05/91; KRO–0540

Kenco Refining, Inc. objected to a Proposed Remedial Order (PRO) that the DOE's Economic Regulatory Administration (ERA) issued to Kenco and Tesoro Petroleum Corporation

(Tesoro) on November 6, 1986. In the PRO, the ERA alleged that the firms received approximately $1.4 million in unwarranted entitlements benefits. As a result of a subsequent settlement between the ERA and Tesoro, the ERA requested that Kenco's alleged restitutionary obligation be reduced to one-half of the violation amount plus accrued interest. In considering Kenco's objections, the DOE found that Kenco's runs-to-stills included volumes properly attributable to Tesoro, which resulted in (i) the issuance of excessive small refiner bias benefits to Kenco and (ii) Tesoro's avoidance of an obligation to reduce its run-to-stills to reflect excess sales of residual fuel oil in the East Coast market. Accordingly, the PRO was issued as a final Remedial Order, which requires that Kenco refund one-half of the violation amount, plus accrued interest.

Implementation of Special Refund Procedures

Corum Energy Davis & Forbes, 09/06/91; LEF–0017, LEF–0021

The DOE issued a Decision and Order implementing procedures for the disbursement of $177,813.96, plus accrued interest, obtained by the DOE under the terms of a Consent Order entered into with Corum Energy (Corum) on January 3, 1990, and an Agreed Judgment entered into with Davis & Forbes on June 22, 1988. The DOE determined that these funds should be distributed pursuant to the Agency's Modified Statement of Restitutionary Policy. Accordingly, 20 percent of the funds, or $35,562 were reserved for direct refunds to claimants. The remaining 80 percent, or $142,251 were divided equally between the States and the federal government.

Refund Applications

Central Corporation, 09/06/91; RF272–69408

The DOE issued a Decision and Order denying an Application for Refund in the Subpart V crude oil overcharge refund proceeding submitted by the Centel Corporation. The Application was denied because CEC, a subsidiary of Centel, had executed a waiver in order to participate in the Stripper Well Electric Utilities refund proceeding. The waiver precluded not only CEC, but also its parents, affiliates, and subsidiaries from submitting a claim in the Subpart V crude oil refund proceedings. As CEC's parent, Centel was thus bound by the provisions of the waiver.

Gulf Oil Corporation/Black Eagle Gulf, T.L. "Jake" Ferguson's Gulf, Blowing Rock Gulf, 09/04/91; RR300–95, RR300–96, RR300–97

The DOE issued a Decision and Order concerning Motions for Reconsideration filed by Black Eagle Gulf, T.L. "Jake" Ferguson's Gulf and Blowing Rock Gulf. All three applicants had previously filed Applications for Refund in the Gulf Proceeding. In their initial Applications for Refund, all three were granted refunds based on a reduced gallonage figure. The DOE found that all three applicants were entitled to additional refunds based on clarified gallonage listing made available by Gulf Oil Corporation. They received refunds totaling $814.

Murphy Oil Corporation/Midwest Industrial Fuel, Inc., 09/06/91; RF309–683

The DOE issued a Decision and Order granting, in part, an Application for Refund filed in the Murphy Oil Corporation (Murphy) special refund proceeding by Midwest Industrial Fuel, Inc., a Wisconsin reseller of fuel oil and motor gasoline during the consent order period. Because Midwest's purchases of fuel oil were spot purchases, Midwest was presumed not injured by Murphy's alleged overcharges of fuel oil. Since Midwest did not rebut that presumption, it did not receive a refund for its purchases of fuel oil. Midwest was granted a refund of $2,909 based on its purchases of Murphy motor gasoline, which it purchased on a regular basis.

Shell Oil Company/Exeter Shell Service, 09/05/91; RF315–10160

The DOE issued a Decision and Order rescinding a $2,099 refund granted to Exeter Shell Service. The DOE found that Exeter failed to reveal that it had been a party to a DOE enforcement action and further found that the firm did not appear to have complied with a Remedial Order directing it to roll back its prices in order to refund overcharges to its customers.

Texaco Inc./Day & Zimmermann, Inc., 09/05/91; RF321–7420

The DOE issued a Decision and Order in the Texaco Inc. special refund proceeding concerning the Application for Refund filed by Day & Zimmermann, Inc. (D&Z). The DOE found that D & Z had been reimbursed on a dollar-for-dollar basis for its purchases of Texaco petroleum products through its contractual arrangements with the Department of Defense. Accordingly, the DOE determined that D & Z did not bear the effect of Texaco's alleged overcharges and its refund application was denied.

Texaco Inc./Maurice D. Fischer, Fischer Construction Co., Inc., 09/04/91; RF321–7536, RF321–8627

The DOE issued a Decision and Order in the Texaco Inc. special refund proceeding concerning the Applications for Refund filed on behalf of Maurice D. Fischer, a Texaco consignee and jobber, and on behalf of Fischer Construction Co., Inc. (FCC), an end-user that was supplied by the consignee/jobber. Maurice Fischer owns 50 percent of FCC and his brother, Dean Fischer, owns the other 50 percent. The DOE noted that applicants are entitled to only one refund for the same refined product purchases. In view of the common ownership of the Fischer consignee business and FCC, 50 percent of the volume purchased by FCC was excluded in calculating FCC's approved allocable share. The DOE found that Maurice Fischer should be granted a refund under the mid-level presumption of injury and that FCC should be granted a refund equal to its full approved allocable share. The sum of the refunds granted in this Decision was $17,886 ($14,176 principal plus $3,710 interest).

Texaco Inc./Mendon Leasing Corp., 09/05/91; RF321–8973

The DOE issued a Decision and Order concerning an Application for Refund filed in the Texaco Inc. special refund proceeding by Mendon Leasing Corp., a vehicle rental and leasing company. In its application, Mendon claimed that it was an end-user who purchased Texaco petroleum products and should therefore receive 100 percent of the per gallon volumetric refund amount in accordance with the presumptions of injury established in the *Texaco* Decision. In considering the application, the OHA found that the "per mile rental charge" imposed by Mendon in its contracts, served the same function as a selling price charged by petroleum product retailers. The DOE therefore concluded that in view of the restitutionary purposes of Subpart V proceedings, the applicant should receive a refund based upon the presumption levels established for petroleum product retailers. Mendon Leasing Corp. was granted a refund of $12,617.

Refund applications

The Office of Hearings and Appeals issued the following Decisions and Orders concerning refund applications, which are not summarized. Copies of the full texts of the Decisions and Orders are available in the Public Reference

Room of the Office of Hearings and Appeals.

Atlantic Richfield Company/Desmond R. Johns Oil Company.	RR304-1	09/05/91
Fitchburg Gas and Electric Light Company.	RF272-65001	09/06/91
Gulf Oil Corporation J&J Holiday Gulf et al.	RF300-15704	09/04/91
Leharve Owners Corporation.	RF272-82559	09/04/91
Murphy Oil Corp./Don McCoy.	RF309-1420	09/04/91
Shell Oil Company/ Winall Station #17.	RF315-8934	09/05/91
Winall Oil Company; Station #16.	RF315-8935	.....
Winall Oil Co., Station #14.	RF315-8936	
Winall Oil Co., Sta. #13.	RF315-8937	.....
Winall Oil Co. Sta. #4...	RF315-8938	.....
Texaco Inc./Charley's Texaco et al.	RF321-7093	09/04/91
Texaco Inc./Johnny Pate's Texaco et al.	RF321-10000	09/04/91
Texaco Inc./Texaco Service, Inc. et al.	RF321-6606	09/06/91

Dismissals

The following submissions were dismissed:

Name	Case No.
A&W Texaco	RF321-2656
A-1 Palmer's Texaco	RF321-2165
Adolph's Texaco	RF321-2923
Airline Texaco	RF321-2168
Al Block Texaco	RF321-2670
Albemarle Road Texaco	RF321-4133
Allen's Texaco	RF321-2173
Arthur Childs Texaco	RF321-2948
Ballard's Texaco Service Center	RF321-2663
Beeching Texaco	RF321-4482
Bentler Texaco Service	RF321-2669
Bill's Hollywood Texaco	RF321-2180
Blosser's Texaco	RF321-2177
Bob's Texaco	RF321-2705
Boonesboro Texaco	RF321-2874
Boulevard Texaco	RF321-2196
Bridgeview Service Station	RF321-2194
Bronson Way Texaco	RF321-4518
Bruce's Car Wash	RF321-2616
Cedar Arco	RF304-8775
Chandler & Martin Texaco	RF321-2945
Cockfield's Texaco	RF321-4188
Covered Bridge Texaco	RF321-2619
Cowdin Texaco	RF321-4189
Dewey Newton Texaco	RF321-4001
Dick's Texaco	RF321-1926
Dienes Service Station	RF321-1925
Dixie Texaco	RF321-1922
Doug's Texaco	RF321-1918
East Main Texaco	RF321-1945
Ed & Jim's Texaco	RF321-1943
Ed Carhart Texaco	RF321-1942
Ed Hamill Tire	RF321-4504
Eddie's Texaco	RF321-1940
Escalon Gulf	RF300-11145
Evans Tire Center	RF321-1938
Eyler's Texaco	RF321-1937
Fairlane Texaco	RF321-1936
Fashion Fair Texaco	RF321-4486
Feller's Texaco	RF321-4080
Gabardi Texaco	RF321-4065
Gayle Trollinger	RF321-1425
Gayle Trollinger	RF321-1426
Gene's Texaco	RF321-1930
George Hein Texaco	RF321-2898
Goetz Midway Texaco	RF321-2066
Gold Beach Texaco	RF321-4011
Gunderson's Texaco	RF321-2684
Haley-Power Texaco	RF321-2877
Hammons Indian Hills Texaco	RF321-1960
Hendrix Shell	RF315-6219
Hendrix Shell	RF315-6222
Hendrix Shell	RF315-6220
Hines Texaco	RF321-1949
Hiway Texaco	RF321-1951
Homewood Texaco	RF321-2921
Infotech Management, Inc	RF272-61039
Interstate Texaco	RF321-4069
Jack's Texaco	RF321-2863
Jensen Texaco	RF321-2079
Jerry Lowman Texaco	RF321-2076
Jerry's Texaco	RF321-2075
Jim's Texaco	RF321-2074
John T. Rijke	RF321-1432
John's Texaco	RF321-4012
Johnson Texaco	RF321-2920
K&M Texaco	RF321-2071
Katz & Sons Texaco	RF321-2878
Kline's Etna Avenue Texaco	RF321-2107
Kneller's Arco	RF304-11834
Lee Plaza Texaco	RF321-2100
Lee's Texaco	RF321-2098
Lee's Texaco	RF321-2097
Lee's Texaco	RF321-2872
Lincoln Village Texaco	RF321-2930
Lyman T. King Texaco	RF321-2093
Malone's Texaco	RF321-2090
Maple Avenue Texaco	RF321-2089
Metcalfe Oil Co	RF304-12022
Morrison Texaco	RF321-4079
Morton's Texaco	RF321-4006
Murphy's Texaco	RF321-4598
Nelms & Kelly Auto-Tech Inc	RF321-2134
North Main Texaco	RF321-2943
North Plains Arco	RF304-12302
Oak Hill Texaco	RF321-2124
Oakley's Texaco	RF321-2886
Odom's Texaco	RF321-2123
Okechobee Texaco	RF321-2122
Parker's Texaco	RF321-2950
Parker's Texaco Service	RF321-2153
Payne's Texaco	RF321-2956
Phillips Avenue Texaco	RF321-2947
Port Malabar Texaco	RF321-4500
Price Brothers Texaco	RF321-2140
Princess Anne Texaco	RF321-2949
Princess Anne Texaco	RF321-2139
Ralph's Texaco Service	RF321-2015
Raymond C. Waters	RF321-1479
Renton Hills Texaco	RF321-4007
Reynold's Texaco	RF321-2018
Riverbank Gulf	RF300-11144
Roland's Texaco	RF321-2028
Ron Von Striver's Texaco	RF321-4535
Ron Von Striver's Texaco	RF321-4536
Ron's Texaco	RF321-3441
Roth's Texaco Service	RF321-4512
Roxboro Texaco	RF321-2031
Rudy's Midtown Texaco	RF321-2033
Russell's Texaco	RF321-2034
Seymour Texaco	RF321-2037
Sherwood Texaco	RF321-2040
Shield's Arco	RF304-8907
Simpson's Texaco	RF321-4180
Skippy's Texaco	RF321-2043
Skippy's Texaco	RF321-2044
South Marion Texaco	RF321-2050
Southernmost Texaco	RF321-2052
Southland Park Texaco	RF321-2713
Spanish Fort Texaco	RF321-4071
Spring's Texaco	RF321-2056
Springridge Texaco	RF321-4064
Stan Wright's Texaco	RF321-4067
Stan's Texaco	RF321-2059
Sterling Texaco	RF321-2061
Stevenson Texaco Service	RF321-2063
Stinson Texaco Service	RF321-1962
Striplin Terrace Texaco	RF321-4499
Summer Street Garage	RF321-2889
Swanson's Texaco	RF321-1968
Tapp's Service Station	RF321-1970
Tel-Star Texaco	RF321-1913
Three Twenty One Texaco	RF321-2959
Tolbert's Arco	RF304-10043
Tully Liquors	RF321-4515
Union Texaco	RF321-4481
Upchurch & Barney Texaco	RF321-4479
Van Wilson Enterprise	RF321-1999
Van Wilson Texaco	RF321-1998
Victoria Texaco	RF321-4520
Village Texaco Service Center	RF321-3564
Vincent Ganduglia Trucking	RF328-3
W.O. Ward	RF321-1464
Wells Hurt	RF321-1489
West College Texaco	RF321-4003
West End Texaco	RF321-1986
West Gate Texaco	RF321-2710
Westbrook Texaco	RF321-2879
Westbury Texaco	RF321-1500
Wheeler's Texaco	RF321-1984
Wilson Oil Co., Inc	RF304-12020
Wood Texaco Service Station	RF321-2935
Woodland Texaco	RF321-1976
Yassar Texaco/Roy Curtis	RF321-1447
Young's Texaco	RF321-1972

Copies of the full text of these decisions and orders are available in the Public Reference Room of the Office of Hearings and Appeals, room 1E-234, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, Monday through Friday, between the hours of 1 p.m. and 5 p.m., except federal holidays. They are also available in Energy Management: Federal Energy Guidelines, a commercially published loose leaf reporter system.

Dated: November 7, 1991.

George B. Breznay,

Director, Office of Hearings and Appeals.

[FR Doc. 91-27402 Filed 11-13-91; 8:45 am]

BILLING CODE 6450-01-M

Issuance of Decisions and Orders; Week of September 30 Through October 4, 1991

During the week of September 30 through October 4, 1991 the decisions and orders summarized below were issued with respect to appeals and applications for other relief filed with the Office of Hearings and Appeals of the Department of Energy. The following summary also contains a list of submissions that were dismissed by the Office of Hearings and Appeals.

Appeals

International Brotherhood of Electrical Workers, 10/2/91; LFA 0148

On September 12, 1991, the International Brotherhood of Electrical Workers (IBEW) filed an Appeal from a determination issued to the firm on August 9, 1991 by the Assistant Administrator for Management of the Western Area Power Administration of the Department of Energy. In that determination, the Assistant Administrator denied the IBEW's request for information pursuant to the Freedom of Information Act (FOIA). Specifically, the Assistant Administrator released all documents related to certified payrolls for Brink Electric Company, but deleted all of the names, addresses, and social security numbers contained in the payroll records pursuant to Exemption 6 of the FOIA. In considering the Appeal, the DOE found that the Assistant Administrator properly withheld the requested information since the release of this information would pose a substantial threat to the employees' privacy and there was no public interest to balance against these factors. Consequently, the Appeal was denied.

James L. Schwab, 10/03/91; LFA–0142, LFA–0144

James L. Schwab (Schwab), a former employee of a DOE subcontractor, had filed a request for information under the Freedom of Information Act (FOIA) concerning an investigation by the Albuquerque Operations Office (AOO) into the termination of his employment. On May 1, 1991, AOO issued a determination concerning that request, which was appealed by Schwab. In a June 25, 1991 Decision, the Office of Hearings and Appeals (OHA) found that AOO's search was inadequate and remanded the matter back to AOO to conduct a new search for responsive documents. In response, AOO issued a second determination, dated August 14, 1991, in which the AOO released certain documents, stated that other documents were not found in its files, and withheld a copy of its Draft Panel Report pursuant to Exemption 5 of the FOIA. Schwab filed two Appeals from AOO's determination. In considering the first Appeal, OHA found that Schwab had provided evidence which indicated that additional responsive material may exist. The AOO's search and determination did not challenge the existence of the documents but failed to indicate whether they were agency records. Thus, the determination was inadequate and was not reasonably calculated to uncover the materials sought by the Appellant. For these reasons, OHA remanded this matter to the AOO to make a new search and determination. In considering the second Appeal, which concerned AOO's withholding of the draft version of its Panel Report, OHA found that the draft was a predecisional deliberative document that reflected only the personal views and recommendations of its authors. Because the final version of the Panel Report has already been provided to Schwab, the release of any factual information contained in the draft would disclose the agency's deliberative process, and was not in the public interest. OHA therefore, sustained AOO's determination that the draft Panel Report fell within the scope of Exemption 5. Accordingly, OHA granted Schwab's first Appeal, and denied the second Appeal.

Refund Applications

Atlantic Richfield Company/Kelley Williamson Co., Watkins Oil Co., Inc., 10/4/91; RR304–9, RR304–10

The DOE issued two Motions for Reconsiderations in the ARCO Special Refund proceeding filed by Kelley Williamson Co. and Watkins Oil Co., Inc. Both submissions were originally denied because the applicants made only spot purchases of ARCO products. In the respective Motions for Reconsideration, the applicants state the 1979 revision by the DOE of the base period allocation regulations, in which the base period was designated as November 1977—October 1978, had the effect of making spot purchases during the revised base period part of the firm's base period supply. In other words, based on spot purchases during the new base period, the applicants had an allocation right to ARCO product from March 1979 on. In the Decision and Order, the DOE again rejected the purchases made by the firms prior to March 1979 as spot purchases. However, refunds were granted on the basis of purchases made after March 1979 to which the firms had an allocation right. The total amount of the refund granted in this Decision was $2,716 ($1,820 in principal and $896 in interest).

Gulf Oil Corporation/Anderson & Watkins, Inc., 9/30/91; RF300–65

On September 30, 1991, the Department of Energy (DOE) issued a Decision and Order concerning an Application for Refund filed by Anderson and Watkins, Inc. (A&W) in the Gulf Oil Corporation special refund proceeding. In that Decision, the DOE granted A&W's claim for a full volumetric refund on 18,622,900 gallons of motor gasoline purchased from Gulf. The DOE determined that the cost banks and competitive disadvantage analysis submitted by A&W were sufficient to demonstrate that A&W was injured by its full volumetric share. The applicant received a total refund, including interest, of $18,436.

Gulf Oil Corporation/Crocker's Gulf, 10/1/91; RF300–17081

The Department of Energy (DOE) has rescinded a refund for the duplicate gallons that Crocker's Gulf received in the Gulf Oil Corporation (Gulf) special refund proceeding. In its first application, the applicant used internal accounting records to calculate its total gallonage. In its second application, the applicant used the Gulf customer listing. Because the second application indicated that the applicant had purchased more gallons than it had originally claimed, the OHA concluded that the applicant should only return the money that it had received for the duplicate gallons.

Matson Navigation Company, Inc., 10/3/91; RF272–27772, RD272–27772

The DOE issued a Decision and Order granting an Application for Refund filed by Matson Navigation Company, Inc. (Matson), a U.S.-flag ocean freight carrier serving the U.S. domestic offshore trade, in the Subpart V crude oil refund proceeding. Rejecting arguments raised by a group of state governments, the DOE concluded that the regulatory mechanisms of neither the Federal Maritime Commission nor the Interstate Commerce Commission operated so as to allow the Applicant automatically to pass through increased bunker fuel costs to its customers. Therefore, the DOE found that the States' filings were insufficient to rebut the presumption of injury for end-users in this case. Based upon Matson's purchases of 538,820,778 gallons of petroleum products, the DOE granted a refund of $431,057. The DOE also denied a Motion for Discovery filed by the States for reasons discussed in previous Decisions.

Texaco Inc./Edward's Texaco Service, Jim's Texaco, 10/4/91; RF321–5999, RF321–16947

On November 8, 1990, the DOE issued a Decision and Order in the Texaco Inc. refund proceeding concerning an Application for Refund filed by James Edwards on behalf of Jim's Texaco, a retail outlet. That refund was based upon the applicant's claim that he operated the retail outlet for the entire refund period, March 1973 to January 1981, and the volume of purchases at that location between those dates. Subsequently, the DOE determined that his actual dates of operation were December 1977 through October 1978. The DOE found that Mr. Edwards

should repay, with interest, that portion of its refund attributable to the time period in which he did not operate the station. The DOE also granted Mr. Edwards a refund for Edward's Texaco Service, another outlet that he operated. Accordingly, the DOE offset the repayment obligation for Jim's Texaco by the refund attributable to Edwards Texaco Service and ordered Mr. Edwards to repay the difference.

Werner Construction, Inc., 10/2/91; RF272–27568, RD272–27568

The DOE issued a Decision and Order granting an Application for Refund filed by Werner Construction, Inc. (Werner), a highway contractor, in the Subpart V crude oil refund proceeding. A group of States and Territories (States) objected to the application on the grounds that the applicant was able to pass through increased petroleum costs to its customers. In support of their objection, the States submitted an affidavit of an economist stating that, in general, construction firms were able to pass through increased petroleum costs. The DOE determined that the evidence offered by the States was insufficient to rebut the presumption of end-user injury and that the applicant should receive a refund. The DOE also denied the States' Motion for Discovery, finding that discovery was not warranted where the States had not presented evidence sufficient to rebut the applicant's presumption of injury. The refund granted to the applicant in this Decision was $48,686.

Refund Applications

The Office of Hearings and Appeals issued the following Decisions and Orders concerning refund applications, which are not summarized. Copies of the full texts of the Decisions and Orders are available in the Public Reference Room of the Office of Hearings and Appeals.

Atlantic Richfield Company/Auto Repair Center.	RF304–5211	10/02/91
Atlantic Richfield Company/Crowley Maritime Corporation et al.	RF304–4700	10/02/91
Atlantic Richfield Company/Glen Rock Car Wash.	RR304–8	10/02/91
Atlantic Richfield Company/Shirl T. Neilson et al.	RF304–4088	10/03/91
Atlantic Richfield Company/ Stenson's Arco Service et al.	RF304–3578	10/04/91
Atlantic Richfield Company/Westfield Arco.	RF304–12508	10/02/91
Davis Arco	RF304–12507	
Atlantic Richfield Company/White Fuel Co. et al.	RF304–3810	10/03/91
Charles Cripps	RF272–72630	09/30/91
Citronelle-Mobile Gathering/Rogers Corporation.	RF336–25	10/03/91
City of New Orleans	RF272–64277	10/03/91
Dri-Print Foils, Inc	RF272–8083	10/03/91
Forty-Seventh-Fifth Company.	RF272–89657	10/01/91
Gulf Oil Corporation/ Fuel Distributors, Inc..	RF300–6098	10/04/91
Hill Country Oil Co	RF300–17193	
Econ-o-Gas, Inc	RF300–17194	
Serv-N-Save Gasoline, Inc.	RF300–17195	
Herbert Slepoy Corporation Real Estate.	RF272–89669	10/03/91
Murphy Oil Corp./ Home Oil Stations, Inc.	RF309–555	09/30/91
Quantum Chemical Corporation/ Eastern Shore Oil Co. et al.	RF330–2	09/30/91
Texaco Inc./Atlantic Oil & Heating Co., Inc. et al.	RF321–10220	10/03/91
Texaco Inc./Bogers Oil Co. et al.	RF321–7	10/03/91
Texaco Inc./Buske Texaco et al.	RF321–916	10/01/91
Texaco Inc./D.J. Gorra.	RF321–16948	10/01/91
Texaco Inc./J.H. Conger & Son, Inc.	RF321–8556	10/03/91
Tom Womack, Inc	RF321–11138	
O. Harvey Griggs, Inc	RF321–11250	
The Vons Companies, Inc.	RF272–74026	09/30/91
The Vons Companies, Inc.	RD272–74026	
Uarco, Incorporated et al.	RF272–14962	09/30/91

Dismissals

The following submissions were dismissed:

Name	Case No.
A&G Materials, Inc	RF272–37141
Allen's Texaco	RF321–748
Anne Arundel County Public Schools.	RF272–15738
B&B Texaco	RF321–9277
B&C Texaco	RF321–773
Barbour Brothers, Inc	RF330–42
Basham Texaco	RF321–791
Basham Texaco	RF321–790
Bemis Service Station	RF321–57
Board of Police Commissioners	RF272–75917
Boyles Texaco	RF321–5249
Bradley's Texaco	RF321–5033
Bramlett Texaco	RF321–16747
Charlie's Texaco	RF321–966
Chubb's Texaco	RF321–109
Collins Texaco Service	RF321–139
Cottonwood Texaco	RF321–150
Cross Texaco	RF321–8799
Depriest Texaco	RF321–4934
Dill Shell Service	RF315–6835
Don la Croix Texaco	RF321–1921
Downtown Texaco	RF321–6906
Drew Park Texaco	RF321–13899
Ernest Kitching Texaco	RF321–4961
Evans Texaco	RF321–13639
Farris Texaco	RF321–217
Findlay House	RF272–57894
Findlay Plaza	RF272–57942
Florida Texaco	RF321–229
Grant Lamothe	RF321–4334
Jim's Texaco	RF321–1103
Jones Texaco	RF321–1142
Mesa Texaco	RF321–700
North Broadway Arco	RF304–11035
Perry's Texaco	RF321–5223
Piney Grove	RF321–16746
Relihan Texaco	RF321–1241
Seabrook Blanching Corporation	RF272–77336
St. Clair Arco	RF304–10465
Truck Harbor	RF321–6820
Underwood's Texaco	RF321–6920
Virgil Isaac	RF321–9563
Waldman Oil Corp	RF304–12012
Walls Shell Service	RF315–9097
West College Texaco	RR321–81
Whitaker Texaco Garage	RF321–6900
Woodland Texaco	RF321–7484

Copies of the full text of these decisions and orders are available in the Public Reference Room of the Office of Hearings and Appeals, room 1E–234, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, Monday through Friday, between the hours of 1 p.m. and 5 p.m., except federal holidays. They are also available in Energy Management: Federal Energy Guidelines, a commercially published loose leaf reporter system.

Dated: November 7, 1991.

George B. Breznay,

Director, Office of Hearings and Appeals.

[FR Doc. 91–27403 Filed 11–13–91; 8:45am]

BILLING CODE 6450–01–M

Proposed Refund Procedures

AGENCY: Office of Hearings and Appeals, Department of Energy.

ACTION: Notice of proposed implementation of special refund procedures.

SUMMARY: The Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) announces the proposed procedures for the disbursement of $1,141,628.14, plus accrued interest, obtained by the DOE under the terms of a consent order entered into with Energy Corporation of America, Inc. and Fuel Oil Supply & Terminaling, Inc. and the Estate of Eddie E. "Bud" Hadsell. The OHA has tentatively determined that the funds will be distributed in accordance with the DOE's Modified Statement of Restitutionary Policy Concerning Crude Oil Overcharges, 51 FR 27899 (August 4, 1986).

DATE AND ADDRESS: Comments must be filed in duplicate on or before December 16, 1991 and should be addressed to the

Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585. All comments should display a reference to case numbers LEF–0036 and LEF–0037.

FOR FURTHER INFORMATION CONTACT: Thomas L. Wieker, Deputy Director, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–2390.

SUPPLEMENTARY INFORMATION: In accordance with § 205.282(b) of the procedural regulations of the Department of Energy (DOE), 10 CFR 205.282(b), notice is hereby given of the issuance of the Proposed Decision and Order set out below. The Proposed Decision and Order sets forth the procedures that the DOE has tentatively formulated to distribute $1,141,628.14 that has been remitted by Energy Corporation of America, Inc. and Fuel Oil Supply & Terminaling, Inc. and the Estate of Eddie E. "Bud" Hadsell to the DOE. The DOE is currently holding the funds in an interest bearing account pending distribution.

The DOE has tentatively determined to distribute these funds in accordance with the DOE's Modified Statement of Restitutionary Policy Concerning Crude Oil Overcharges, 51 FR 27899 (August 4, 1986). Under the Modified Policy, crude oil overcharge monies are divided among the states, federal government, and injured purchasers of refined products. Under the plan we are proposing, refunds to the states would be in proportion to each state's consumption of petroleum products during the period of price controls. Refunds to eligible purchasers would be based on the number of gallons of petroleum products which they purchased and the extent to which they can demonstrate injury.

Applications for refund should not be filed at this time. Appropriate public notice will be given when the submission of claims is authorized.

Any member of the public may submit written comments regarding the proposed refund procedures. Commenting parties are requested to submit two copies of their comments. Comments should be submitted within 30 days of the publication in the Federal Register, and should be sent to the address set forth at the beginning of this notice. All comments received will be available for public inspection between the hours of 1 p.m. through 5 p.m., Monday through Friday, except federal holidays, in the Public Reference Room of the Office of Hearings and Appeals, located in room 1E–234, 1000 Independence Avenue SW., Washington, DC 20585.

Dated: November 7, 1991.

George B. Breznay,

Director, Office of Hearings and Appeals.

November 7, 1991.

Names of Firms: Energy Corporation of America, Inc., Fuel Oil Supply & Terminaling, Inc. and The Estate of Eddie E. "Bud" Hadsell.

Date of Filings: October 10, 1991.

Case Numbers: LEF–0036, LEF–0037

Under the procedural regulations of the Department of Energy (DOE), the Economic Regulatory Administration (ERA) may request that the Office of Hearings and Appeals (OHA) formulate and implement special refund procedures. 10 CFR 205.281. These procedures are used to refund monies to those injured by actual or alleged violations of the DOE price regulations.

In this Decision and Order, we consider two Petitions for Implementation of Special Refund Procedures filed by the ERA on October 10, 1991 for crude oil overcharge funds. The funds at issue in these Petitions were obtained from Energy Corporation of America, Inc. (ECA) (Case No. LEF–0036) and Fuel Oil Supply & Terminaling, Inc. and the Estate of Eddie E. "Bud" Hadsell (FOSTI) (Case No. LEF–0037). This Office issued a Remedial Order against ECA for violations of the crude oil price regulations during the period from September 1973 through July 1975. *Energy Corporation of America*, 9 DOE ¶ 83,030 (1982). ECA subsequently appealed the Remedial Order to the United States District Court for the Eastern District of Louisiana (the Court). On April 17, 1984, the Court approved an Agreed Final Judgement entered into by ECA and the DOE under which ECA agreed to remit $487,328, plus interest accruing on any unpaid amount beginning January 1, 1984, in various installments in settlement of the DOE's claims. The DOE collected a total of $650,566.54 from ECA. The Court subsequently approved a Modification of Agreed Final Judgement on August 18, 1987 that extended the period of payment. On December 5, 1985, the DOE issued a Remedial Order which found that FOSTI committed violations of the price regulations covering the resale of crude oil during the period July 1978 through September 1978. *Fuel Oil Supply and Terminaling, Inc.*, 13 DOE ¶ 83,054 (1985). FOSTI appealed the Remedial Order to the Federal Energy Regulatory Commission. In January 1990, the DOE and FOSTI entered into a Settlement Agreement which satisfied the DOE's claim against FOSTI. The DOE collected a total of $491,061.60 from FOSTI in settlement of this matter.

In sum, ECA and FOSTI remitted a total of $1,141,628.14 to the DOE. This Proposed Decision and Order sets forth the OHA's tentative plan to distribute those funds. Comments are solicited.

The general guidelines which the OHA may use to formulate and implement a plan to distribute refunds are set forth in 10 C.F.R. Part 205, Subpart V. The Subpart V process may be used in situations where the DOE cannot readily identify the persons who may have been injured as a result of actual or alleged violations of the regulations or ascertain the amount of the refund each person should receive. For a more detailed discussion of Subpart V and the authority of the OHA to fashion procedures to distribute refunds, see *Office of Enforcement*, 9 DOE ¶ 82,508 (1981), and *Office of Enforcement*, 8 DOE ¶ 82,597 (1981). We have considered the ERA's request to implement Subpart V procedures with respect to the monies received from ECA and FOSTI and have determined that such procedures are appropriate.

I. Background

On July 28, 1986, the DOE issued a Modified Statement of Restitutionary Policy Concerning Crude Oil Overcharges, 51 FR 27899 (August 4, 1986) (the MSRP). The MSRP, issued as a result of a court-approved Settlement Agreement in *In re: The Department of Energy Stripper Well Exemption Litigation*, M.D.L. No. 378 (D. Kan. 1986) (the Stripper Well Agreement), provides that crude oil overcharge funds will be divided among the states, the federal government, and injured purchasers of refined petroleum products. Under the MSRP, up to twenty percent of these crude oil overcharge funds will be reserved to satisfy valid claims by injured purchasers of petroleum products. Eighty percent of the funds, and any monies remaining after all valid claims are paid, are to be disbursed equally to the states and federal government for indirect restitution.

Shortly after the issuance of the MSRP, the OHA issued an Order that announced its intention to apply the Modified Policy in all Subpart V proceedings involving alleged crude oil violations. Order Implementing the MSRP, 51 Fed. Reg. 29689 (August 20, 1986). In that Order, the OHA solicited comments concerning the appropriate procedures to follow in processing refund applications in crude oil refund proceedings. On April 6, 1987, the OHA issued a Notice analyzing the numerous comments and setting forth generalized procedures to assist claimants that file refund applications for crude oil monies under the Subpart V regulations. 52 Fed. Reg. 11737 (April 10, 1987) (the April Notice).

The OHA has applied these procedures in numerous cases since the April Notice, i.e., *New York Petroleum, Inc.*, 18 DOE ¶ 85,435 (1988) (*NYP*); *Shell Oil Co.*, 17 DOE ¶ 85,204 (1988) (*Shell*); *Ernest A. Allerkamp*, 17 DOE ¶ 85,079 (1988) (*Allerkamp*), and the procedures have been approved by the United States District Court for the District of Kansas as well as the Temporary Emergency Court of Appeals (TECA). In the case *In re: The Department of Energy Stripper Well Exemption Litigation*, various states filed a Motion with the Kansas District Court, claiming that the OHA violated the Stripper Well Agreement by employing presumptions of injury for end-users and by improperly calculating the refund amount to be used in those proceedings. *In re: The Department of Energy Stripper Well Exemption Litigation*, 671 F. Supp. 1318 (D. Kan. 1987), *aff'd*, 857 F. 2d 1481 (Temp. Emer. Ct. App. 1988). On

August 17, 1987, Judge Theis issued an Opinion and Order denying the states' Motion in its entirety. The court concluded that the Stripper Well Agreement "does not bar [the] OHA from permitting claimants to employ reasonable presumptions in affirmatively demonstrating injury entitling them to a refund." *Id.* at 1323. The court also ruled that, as specified in the April Notice, the OHA could calculate refunds based on a portion of the M.D.L. 378 overcharges. *Id.* at 1323–24.

II. The Proposed Refund Procedures

A. Refund Claims

We not propose to apply the procedures discussed in the April Notice to the crude oil Subpart V proceeding that is the subject of the present determination. As noted above, an alleged crude oil violation amount of $1,141,628.14, plus interest, is covered by this proposed Decision. We have decided to reserve the full twenty percent of the alleged crude oil violation amount, or $228,325.63, plus interest, for direct refunds to claimants, in order to insure that sufficient funds will be available for refunds to injured parties.

The process which the OHA will use to evaluate claims based on alleged crude oil violations will be modeled after the process the OHA has used in Subpart V proceedings to evaluate claims based upon alleged overcharges involving refined products. *E.g., Mountain Fuel Supply Co.*, 14 DOE ¶ 85,475 (1986) (*Mountain Fuel*). As in non-crude oil cases, applicants will be required to document their purchase volumes and prove that they were injured as a result of the alleged violations. Applicants who were end-users or ultimate consumers of petroleum products, whose businesses are unrelated to the petroleum industry, and who were not subject to the DOE price regulations are presumed to have been injured by any alleged crude oil overcharges. In order to received a refund, end-users need not submit any further evidence of injury beyond the volume of petroleum products purchased during the period of price controls. *E.g., A. Tarricone, Inc.*, 15 DOE ¶ 85,495 at 88,893–96 (1987).

However, the end-user presumption of injury can be rebutted by evidence which establishes that the specific end-user in question was not injured by the crude oil overcharges. *E.g., Berry Holding Co.*, 16 DOE ¶ 85,405 at 88,797 (1987). If an interested party submits evidence that is sufficient to cast serious doubt on the end-user presumption, the applicant will be required to produce further evidence of injury. *E.g., NYP*, 18 DOE at 88,701–03.

Reseller and retailer claimants must submit detailed evidence of injury, and may not rely on the presumption of injury utilized in refund cases involving refined petroleum products. They can, however, use econometric evidence of the type employed in OHA Report to the District Court in the Stripper Well Litigation, *reprinted in* 6 Fed. Energy Guidelines ¶ 90,507. Applicants who executed and submitted a valid waiver pursuant to one of the escrows established in the Stripper Well Agreement have waived their rights to apply for crude oil refunds under Subpart V. *Mid-America Dairyman, Inc. v. Herrington*, 878 F. 2d 1448 (Temp. Emer. Ct. App. 1989); *accord, Boise Cascade Corp.*, 18 DOE ¶ 85,970 (1989).

Refunds to eligible claimants who purchased refined petroleum products will be calculated on the basis of a volumetric refund amount derived by dividing the alleged crude oil violation amounts involved in this determination ($1,141,628.14) by the total consumption of petroleum products in the United States during the period of price controls (2,020,997,335,000 gallons). *Mountain Fuel*, 14 DOE at 88,868 n.4. This yields a volumetric refund amount of $0.00000056 per gallon.

As we stated in previous Decisions, a crude oil refund applicant will be required to submit only one Application for crude oil overcharge funds. *E.g., Allerkamp*, 17 DOE at 88,176. Any party that has previously submitted a refund Application in the crude oil refund proceedings need not file another Application. That previously filed Application will be deemed to be filed in all crude oil proceedings as the procedures are finalized. The DOE has established June 30, 1992 as the latest deadline for filing an Application for Refund from the crude oil funds. *Quintana Energy Corp.*, 21 DOE ¶ 85,032 (1991). It is the policy of the DOE to pay all crude oil refunds claims filed within this deadline at the rate of $.0008 per gallon. However, while we anticipate that applicants that filed their claims within the original June 30, 1988 deadline will receive a supplemental refund payment, we will decide in the future whether claimants that filed later Applications should receive additional refunds. *E.g., Seneca Oil Co.*, 21 DOE ¶ 85,327 (1991). Notice of any additional amounts available in the future will be published in the Federal Register.

B. Payments to the States and Federal Government

Under the terms of the MSRP, we propose that eighty percent of the alleged crude oil violation amounts subject to this Proposed Decision, or $913,302.51, plus interest, should be disbursed in equal shares to the states and federal government for indirect restitution. Refunds to the states will be in proportion to the consumption of petroleum products in each state during the period of price controls. The share or ratio of the funds which each state will receive is contained in Exhibit H of the Stripper Well Agreement. When disbursed, these funds will be subject to the same limitations and reporting requirements as all other crude oil monies received by the states under the Stripper Well Agreement.

It Is Therefore Ordered That:

The refund amounts remitted to the Department of Energy by Energy Corporation of America pursuant to the Agreed Final Judgement approved on April 17, 1989 and by Fuel Oil Supply & Terminaling, Inc. and The Estate of Eddie E. "Bud" Hadsell pursuant to the Settlement Agreement approved on July 23, 1990 will be distributed in accordance with the foregoing Decision.

[FR Doc. 91–27401 Filed 11–13–91; 8:45 am]

BILLING CODE 6450–01–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–4030–4]

Agency Information Collection Activities Under OMB Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected cost and burden.

DATES: Comments must be submitted on or before December 16, 1991.

FOR FURTHER INFORMATION CONTACT: Sandy Farmer at EPA, (202) 260–2740.

SUPPLEMENTARY INFORMATION:

Office of Pesticides and Toxic Substances

Title: Notice of Supplemental Registration of a Distributor (EPA ICR No.: 0278.04; OMB No.: 2070–0044). This is an extension of the expiration date of a previously approved collection.

Abstract: Under section 3(e) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), pesticide registrants may distribute or sell their registered products under another person's name instead of, or in addition to, their own name. Such distribution and sale is termed "Supplemental Distribution." To participate in this program pesticide registrants must complete, and submit to the Agency, a notice of distribution or sale of their registered product. The Agency must be notified each time a registrant makes his product available for supplemental distribution, and the form used to notify the Agency must be signed by the product's original registrant as well as by the distributor, and both are required to store, file or maintain the information. The Agency uses these data to ensure that all distributors of pesticide, as well as the original product registrants, are registered with the EPA.

Burden Statement: The burden for this collection of information is estimated to average 0.17 hour per response for reporting and 0.08 hour per recordkeeper annually. This estimate includes the time needed to review instructions, complete the form, and review the collection of information.

Respondents: Pesticide Registrants and Distributors.
Estimated No. of Respondents: 17,000.
Estimated No. of Responses Per Respondent: 1.
Estimated Total Annual Burden on Respondents: 4,250 hours.
Frequency of Collection: On occasion.

Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden to:

Sandy Farmer, U.S. Environmental Protection Agency, Information Policy Branch (PM 223Y), 401 M Street SW., Washington, DC 20460,

and

Matthew Mitchell, Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th Street NW., Washington, DC 20503.

Dated: November 7, 1991.

Paul Lapsley,

Director, Regulatory Management Division.

[FR Doc. 91-27390 Filed 11-13-91; 8:45 am]

BILLING CODE 6560-50-M

[FRL 4029-7]

Agency Information Collection Activities Under OMB Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected cost and burden.

DATES: Comments must be submitted on or before December 16, 1991.

FOR FURTHER INFORMATION CONTACT: Sandy Farmer at EPA, (202) 260-2740.

SUPPLEMENTARY INFORMATION:

Office of Pesticides and Toxic Substances

Title: Long Term Lead-Based Paint Comprehensive Abatement Performance Study (EPA No. 1598.01). This ICR is a new information collection.

Abstract: Under section 566 of the Housing and Community Development Act of 1987 and under the Steward B. McKinney Homeless Assistance Act of 1988, the EPA and the Department of Housing and Urban Development (HUD) have been tasked to work jointly on a lead-based abatement project. As part of the project, the EPA and HUD are conducting a follow-on study to evaluate the abatement methods used to remove lead-based paint from houses over time and under normal occupancy conditions. The data will be used by EPA and HUD officials to (1) determine the success and relative effectiveness of different abatement methods in controlling the lead in household dust and exterior soil of abated houses to levels at, or below, the lead standard (1 milligram per square centimeter) and (2) determine if household sources of lead, other than paint, contribute significantly to lead levels in a home. Ultimately, the information will be used by EPA and HUD to make decisions regarding the selection of lead abatement methods for future efforts.

The project is a three year field study involving 100 houses that have already been tested for lead levels. Of these houses, 70 were determined to have lead levels exceeding the standard and have been subjected to techniques of lead abation. The remaining houses will act as a control group. Once a year, EPA representatives will (1) physically sample interior household dust and exterior soil, and chemically analyze the samples for their lead content; (2) perform visual observations to qualitatively assess the condition of previous abatement measures; and (3) administer, either through a telephone interview or in person, a questionnaire to an adult member of a participating housing unit. The respondent will be asked to answer questions concerning demographics, lead-related occupational activities, lead-related hobbies, activities of pets, and the housekeeping practices of residents.

Burden Statement: Public reporting burden for this collection of information is estimated to average 2.46 hours per response including time listening to recruitment information, reviewing instructions, responding to questions, completing and reviewing the information, and providing access to the housing unit for environmental sample collection.

Respondents: Households.
Estimated Number of Respondents: 90.
Frequency of Collection: Annual.
Estimated Number of Responses Per Respondent: 1.

Send comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, to:

Sandy Farmer, U.S. Environmental Protection Agency, Information Policy Branch (PM-223Y), 401 M Street SW, Washington, DC 20460,

and

Matt Mitchell, Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th St., NW., Washington, DC 20503.

Dated: October 25, 1991.

Paul Lapsley,

Director, Regulatory Management Division.

[FR Doc. 91-27391 Filed 11-13-91; 8:45 am]

BILLING CODE 6560-50-M

[FRL-40298]

Agency Information Collection Activities Under OMB Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected cost and burden.

DATES: Comments must be submitted on or before December 16, 1991.

FOR FURTHER INFORMATION CONTACT: Sandy Farmer at EPA, (202) 260-2740

SUPPLEMENTARY INFORMATION:

Office of Pesticides and Toxic Substances

Title: Lead-Based Paint Abatement and Repair and Maintenance Study in Baltimore (EPA No. 1603.01). This ICR is a new information collection.

Abstract: Under the authority of the Toxic Substances Control Act, 15 U.S.C. 2601, and in accordance with a Memorandum of Understanding between the EPA and the U.S. Department of Housing and Urban Development (HUD), the EPA is responsible for providing technical and program development assistance to HUD in the area of lead paint abatement. The purpose of this study is to investigate lead paint abatement practices, and low cost repair and maintenance approaches for reducing lead-based paint hazards in homes. The data will be used to correlate various abatement and intervention methods to changes in the lead levels in household dust and in children's blood over time. Ultimately, the Agency will use the information to identify and recommend abatement, repair and maintenance methodologies that are the most practical, economical, and effective for future housing rehabilitation projects.

The study will take place the Baltimore and will consist of a two-year follow-up study of houses subjected to lead paint abatement performed since January, 1988, and an evaluation of repair and maintenance interventions in older lead-painted dwellings. A control group will consist of randomly selected modern urban dwellings. EPA representatives will: (1) collect and analyze interior household dust, exterior soil, and drinking water samples for lead content; (2) administer a questionnaire to an adult member of the participating housing unit; and (3) collect and analyze blood samples from selected children living in the housing unit. In completing the questionnaire the respondent will be asked questions concerning demographics, lead-related occupational activities, lead-related hobbies, child behavior, activities of pets, and food preparation practices. Respondents will also be asked to take their children, if selected, to a designated clinic for blood collection, and to allow EPA representatives access to homes for soil and dust sampling. All data from the study will be analyzed using Statistical Analysis Systems and stored on disk and hard copy for use by EPA and HUD.

Burden Statement: Public reporting burden for this collection of information is estimated to average 12 hours annually per response including 15 minutes for enrollment into the program and completing the provision of informed consent, 15 minutes for responding to the questionnaire, 3 hours per home visit for environmental sample collection by the study field team, and 2 hours per clinic visit for blood collection, including time for round-trip transportation.

Respondents: Households.

Estimated Number of Respondents: 125.

Estimated Number of Responses Per Respondent: 1.

Estimated Total Annual Burden on Respondents: 1,493 hours.

Frequency of Collection: On occasion.

Send comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, to:

Sandy Farmer, U.S. Environmental Protection Agency, Information Policy Branch (PM–223Y), 401 M Street, SW., Washington, D.C. 20460,
and
Matt Mitchell, Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th St., NW., Washington, D.C. 20503.

Dated: November 6, 1991.

Paul Lapsley,

Director Regulatory Management Division.

[FR Doc. 91–27392 Filed 11–13–91; 8:45 am]

BILLING CODE 6560–50–M

[FRL–4029–9]

Clean Air Act

Contractor Access To Confidential Business Information

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA has authorized the following contractors for access to information that has been, or will be, submitted to EPA under section 114 of the Clean Air Act (CAA) as amended. (1) Midwest Research Institute, (MRI) 401 Harrison Oaks Boulevard, Suite 350, Cary, North Carolina, contract number 68D10115; (2) Pacific Environmental Services, Inc., (PES), 3708 Mayfair Street, Suite 202, Durham, North Carolina, contract number 68D10116; (3) Radian Corporation, (RAD), 3200 E. Chapel Hill Road, Research Triangle Park, North Carolina, contract number 68D10117; (4) Research Triangle Institute, (RTI), Post Office Box 12194, Research Triangle Park, North Carolina, contract number 68D10118; (5) EC/R Inc., 600 Franklin Square, 1829 E. Franklin Street, Chapel Hill, North Carolina, contract number 68D10119; (6) Vigyan Inc., 5203 Leesburg Pike, Suite 900, Falls Church Virginia, Contract number 68D10073.

Some of the information may be claimed to be confidential business information (CBI) by the submitter.

DATES: Access to confidential data submitted to EPA will occur no sooner than October 1, 1991.

FOR FURTHER INFORMATION CONTACT: Gene W. Smith, Document Control Officer, Office of Air Quality Planning and Standards (MD–13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, (919) 541–5439.

SUPPLEMENTARY INFORMATION: The EPA is issuing this notice to inform all submitters of information under section 114 of the CAA that EPA may provide the above mentioned contractors access to these materials on a need-to-know basis. These contractors will provide technical support to the Office of Air Quality Planning and Standards (OAQPS) in source assessment or with a source category survey and proceed through development of standards for a Federal Air Pollution Control Regulation or Control Techniques Guidelines (CTG).

In accordance with 40 CFR 2.305(h), EPA has determined that each contractor requires access to CBI submitted to EPA under sections 112 and 114 of the CAA in order to perform work satisfactorily under the above noted contracts. The contractors' personnel will be given access to information submitted under section 114 of the CAA. Some of the information may be claimed or determined to be CBI. The contractors' personnel will be required to sign nondisclosure agreements and will be briefed on appropriate security procedures before they are permitted access to CBI. All access to CAA CBI under these contracts will take place at the contractors' facility.

Clearance for access to CAA CBI under each contract is scheduled to expire on August 1, 1996.

Dated: November 6, 1991.

Michael Shapiro,

Acting Assistant Administrator for Air and Radiation.

[FR Doc. 91–27393 Filed 11–13–91; 8:45 am]

BILLING CODE 6560–50–M

[FRL–4030–5]

Massachusetts Marine Sanitation Device Standard; Receipt of Petition

Notice is hereby given that a petition has been received from the State of Massachusetts requesting a determination by the Regional Administrator, Environmental Protection Agency, pursuant to Section 312(f)(3) of Public Law 92–500 as amended by Public Law 95–217 and Public Law 100–4, that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the coastal waters of the Town of Wareham, County of Plymouth, within the State of Massachusetts. The town of Wareham is located in Southeastern Massachusetts at the head of buzzards Bay and in close proximity to the southern end of the Cape Cod Canal. Wareham has approximately 57 miles of tidal shoreline, consisting primarily of bays, estuaries and inlets contiguous to Buzzards Bay.

The State of Massachusetts has certified that there are seven pump-out facilities available to service vessels in Wareham.

Pump-out facility No. 1 is located at Bevan's Marine, near the head of Buttermilk Bay. Service is limited to vessels less than seven feet in height because of two bridges crossing the

mouth of the Bay. This facility is open from 8 a.m. to 5 p.m., seven days a week, and has a $5 fee per pump-out.

Pump-out facility no. 2 is located at Onset Bay Marina, on the northern shore of Onset Bay, and will accommodate vessels with a draft of six feet. This facility is open from 7:30 a.m. to 6 p.m., Sunday through Friday, and 7:30 a.m. and to 7 p.m. on Saturday. There is a $5 fee per pump-out with a resident sticker or purchase of $10 or more at the marina store, or $15 fee per pump-out without those conditions.

Pump-out facility No. 3 is located at the Point Independence Yacht club, on the northern shore of Onset Bay, and will accommodate vessels with a draft of six feet. This facility is open from 9 a.m. to 5 p.m., seven days a week, and there is no charge per pump-out.

Pump-out facility No. 4 is located at Stonebridge Marina, on the northern shore of Onset Bay. Stonebridge Marina is located on East Avenue and the East River, just north of the Onset Avenue Bridge. The height of the bridge, 11 feet at low tide, prohibits some boats from using this marina. This facility is open from 9 a.m. to 7 p.m., seven days a week, and there is not charge per pump-out.

Pump-out facility No. 5 is located at the Onset Town Pier, on the northern shore of Onset Bay near the mouth of Sunset Cove, and will accommodate vessels with a draft of 16 feet. This facility is open from 8 a.m. to 4 p.m., seven days a week, and is free to the public.

Pump-out facility No. 6 is located at Warr's Marine, on the Wareham River, and can accommodate vessels with a draft of 6 feet. This facility is open from 8 a.m. to 4 p.m., and charges a $10 fee per pump-out.

Pump-out facility No. 7 is located at the Wareham Boat Yard, on the Weweantic River. The Wareham Boat Yard is located on Rose Point Avenue north of the Route 6 bridge. The bridge, which has a clearance of 5 feet, and the 4 foot water depth prohibit larger boats from accessing the marina. This facility is open from 9 a.m. to 5 p.m., seven days a week, and there is no charge per pump-out.

All pump-out facilities are tied into the municipal sewage system with the exception of Bevan's Marine, which is scheduled to be connected by Spring, 1992, and the Wareham Boat Yard, which treats its pump-out waste in an on-site septic system and which services primarily small vessels without MSDs. the Wareham Water Pollution Control Facility is located on Route 6, and discharges to the Agawam River. This facility, which was built in the early 1970s, provides secondary treatment and has consistently met EPA and Massachusetts Department of Environmental Protection effluent discharge standards.

Annual vessel usage of Warham coastal waters consists of approximately 1300 vessels, including 15 commercial and 200 transient recreational vessels. None of the these vessels will be excluded from using one or more of the existing pump-out facilities. More accurate data on the type and number of boats, and type and number of MSDs used, will be collected during mooring registration for the 1992 boating season.

Comments and views regarding this request for action may be filed on or before December 20, 1991. Such communications, or requests for information or a copy of the applicant's petition, should be addressed to Melville P. Cote, Jr., U.S. Environmental Protection Agency-Region I, Marine and Estuarine Protection Section (WQE–425), JFK Federal Building, Boston, MA, 02203. Telephone: 617/565–4870.

Dated: October 25, 1991.

Julie Belagg,

Regional Administrator.

PUMPOUT FACILITIES

Marina/location	Hours	Vessel limitations	Pumpout fee
M1 Bevan's Marine Rt. 28 Cranberry Hwy., Wareham, MA, 508–759–5451.	8 am–5 pm	7' Bridge Limit	$10.00 (1991) $5.00 (1972).
M2 Onset Bay Marina, Greene Avenue, Onset, MA, 508–295–0338.	Sun–Fri. 7:30–6 pm Sat. 7:30–7 pm	6' Draft	$5.00/resident or with purchase of $10.00 or more $15.00.
M3 Pt. Independence Yacht Club, Independence Lane, Onset, MA,508–295–3972.	9 am–5 pm	6' Draft	No Fee.
M4 Stonebridge Marine, 5 East Boulevard, Onset, MA, 508-295-0266.	9 am–7 pm	10.5' Bridge Limit High Tide	No Fee.
M5 Onset Town Pier, South Boulevard, Onset, MA, 508–295–8160.	8 am–4 pm	16' Draft	No Fee.
M6 Wareham Boat Yard, Rose Pt. Avenue, Wareham, MA, 508–748–1472.	9 am–5 pm	3' Draft/High Tide	No Fee.
M7 Warr's Marina, Lower Main Street, Wareham, MA, 508–295–0022,.	8 am–4 pm	6' Draft	$10.00.

All facilities have restrooms and can accommodate port-a-potty disposal.

Coastal Nonpoint Source Pollution Management Measures Guidance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Extension of comment period.

SUMMARY: Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) establishes authority for State-administered Coastal Nonpoint Pollution Control Programs to be approved by NOAA and EPA. On June 14, 1991, EPA announced the availability for public review and comment of proposed guidance under section 6217(g) that specifies management measures to control nonpoint source pollution in coastal waters. The comment period was to close on October 15, 1991. On October 16, 1991, EPA announced the availability for public review and comment of a proposed guidance on state coastal nonpoint pollution control programs, with a 60-day comment period ending on December 16, 1991. Furthermore, to provide the public an ample opportunity to consider the two proposed guidances together, EPA extended the comment period on the proposed management measures to November 14, 1991. See 56 FR 27618 (June 14, 1991) and 56 FR 51882 (Oct. 16, 1991).

EPA is today further extending the comment period on the proposed management measures guidance to December 16, 1991. EPA is taking this action in response to numerous members of the public that have made written and oral requests for an extension of time.

These requests have stressed the need for the public to have as much time as possible to review both the proposed

management measures guidance and the proposed state coastal nonpoint pollution control program guidance together. These commenters have argued that more than 30 days are necessary to consider both proposed documents together. The extension announced today is intended to fully address these commenters' concerns.

DATES: Written comments on the proposed management measures guidance; and written comments on the proposed state coastal nonpoint pollution program control guidance should be addressed by December 16, 1991.

ADDRESSES: Copies of the proposed management measures guidance may be obtained from, and written comments on the proposed management measures guidance should be addressed to Steve Dressing, Assessment and Watershed Protection Division (WH–553), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. Copies of the proposed state coastal nonpoint pollution control program guidance may be obtained from, and written comments on the proposed state nonpoint pollution control program guidance should be addressed to Marcella Jansen, Office of Ocean and Coastal Resource Management, National Oceanic and Atmospheric Administration, 1825 Connecticut Avenue NW., Washington, DC 20235. Copies of the proposed guidance documents are also available for public inspection and copying during normal business hours at: Coastal Zone Information Center, NOAA, room 729, 1825 Connecticut Avenue NW., Washington, DC 20235, and at the Public Information Reference Unit, U.S. Environmental Protection Agency, room 2404 (rear), 401 M Street SW., Washington, DC 20460. As provided in 40 CFR part 2, a reasonable fee may be charged for copying services. Copies of these documents are also available for review in the EPA Regional Office libraries.

FOR FURTHER INFORMATION CONTACT: On the management measures guidance, contact Dov Weitman or Steve Dressing of EPA at (202) 260–7085. On the state program guidance, contact Ann Beier (EPA) at (202) 382–7085, or Marcella Jansen (NOAA) at (202) 606–4130.

SUPPLEMENTARY INFORMATION: In November 1990, Congress enacted section 6217 of the Coastal Zone Reauthorization Amendments of 1990. This section requires all states with a federally approved coastal zone management program to develop, and submit to EPA and NOAA for approval, a Coastal Nonpoint Pollution Control Program. The statutory purpose of the program is "to develop and implement management measures for nonpoint source pollution to restore and protect coastal waters, working in close conjunction with other State and local authorities."

Under section 6217, State coastal nonpoint pollution control programs must contain a number of provisions in order to be approvable by EPA and NOAA. First and most relevant here, all State programs must provide for implementation of management measures "in conformity with" technology-based management measures guidance established by EPA under section 6217(g), to "protect coastal waters generally." Congress required that EPA's proposed management measures guidance for nonpoint sources be issued within six months after the statute was enacted (May 1991) and final guidance within eighteen months of enactment (May 1992). States will then implement the new programs through amendments to their existing State nonpoint source programs under section 319 of the Clean Water Act and their Coastal Zone Management programs.

As described above in the Summary section of this notice, EPA published proposed management measures guidance under section 6217(g) on June 14, 1991, and proposed state coastal nonpoint pollution control program guidance on October 16, 1991. In the October 16 notice, EPA also extended the comment period for the management measures guidance for 30 days, in recognition of the close relationship between the two proposed guidances and the need for the public to consider them together. Today, for the same reason and in response to public requests, EPA is further extending the comment period for the management measures guidance until December 16, 1991, to provide a full 60-day overlap between the comment periods on the management measures guidance and State program guidance.

Martha G. Prothro,

Acting Assistant Administrator for Water.

[FR Doc. 91–27394 Filed 11–13–91; 8:45 am]

BILLING CODE 6560–50–M

FEDERAL MARITIME COMMISSION

Port of San Francisco, et al., Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 224–002869–005.

Title: Port of San Francisco/Fred F. Noonan Company Terminal Agreement.

Parties:

Port of San Francisco ("Port")

Fred F. Noonan Company, Inc. ("Noonan").

Synopsis: The proposed amendment would increase the area of service in which Noonan currently operates at the Port's Seawall lot 349 and specifies a date upon which Noonan will submit information related to any permitted sub-leasing arrangements. The amendment would also add provisions related to certain provisions of the City of San Francisco Administrative Code.

Agreement No.: 224–200589.

Title: Jacksonville Port Authority ("JPA") /Green Cove Maritime, Inc., Terminal Agreement.

Parties:

Jacksonville Port Authority

Green Cove Maritime, Inc.

Synopsis: The Agreement, filed November 5, 1991, provides charges for wharfage, terminal use and land rental. The term of the Agreement is for five years.

Agreement No.: 224–200590.

Title: Port of San Francisco/Wallenius Lines North America, Inc., Terminal Agreement.

Parties:

San Francisco Port Authority

Fred F. Noonan Company, Inc.

Wallenius Lines North America, Inc.

Synopsis: The proposed Agreement would assign all rights and obligations of Fred F. Noonan Company, Inc., with respect to the management and operation of Seawall Lot No. 349 at the Port of San Francisco, to Wallenius Lines North America, Inc.

By Order of the Federal Maritime Commission.

Dated: November 8, 1991.

Joseph C. Polking,

Secretary.

[FR Doc. 91-27373 Filed 11-13-91; 8:45 am]

BILLING CODE 6730-01-M

FEDERAL RESERVE SYSTEM

The Fuji Bank, Limited, et al.; Acquisitions of Companies Engaged in Permissible Nonbanking Activities

The organizations listed in this notice have applied under § 225.23(a)(2) or (f) of the Board's Regulation Y (12 CFR 225.23(a)(2) or (f)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated for the application or the offices of the Board of Governors not later than December 5, 1991.

A. Federal Reserve Bank of New York (William L. Rutledge, Vice President) 33 Liberty Street, New York, New York 10045:

1. The Fuji Bank, Limited, Tokyo, Japan; to acquire Fuji Securities, Inc., Chicago, Illinois, and thereby engage in execution activities relating to the Simex and the Mutual Offset System pursuant to § 225.25(b)(18) of the Board's Regulation Y.

2. State Bancorp, Inc., New Hyde Park, New York; to acquire State Bancorp Interim Savings Bank, FSB, New Hyde Park, New York, and thereby engage in operating a savings association pursuant to § 225.25(b)(9) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, November 7, 1991.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 91-27336 Filed 11-13-91; 8:45 am]

BILLING CODE 6210-01-F

Independence Community Bank Corp.; Formation of, Acquisition by, or Merger of Bank Holding Companies; and Acquisition of Nonbanking Company

The company listed in this notice has applied under § 225.14 of the Board's Regulation Y (12 CFR 225.14) for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) to become a bank holding company or to acquire voting securities of a bank or bank holding company. The listed company has also applied under § 225.23(a)(2) of Regulation Y (12 CFR 225.23(a)(2)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies, or to engage in such an activity. Unless otherwise noted, these activities will be conducted throughout the United States.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 5, 1991.

A. Federal Reserve Bank of New York (William L. Rutledge, Vice President) 33 Liberty Street, New York, New York 10045:

1. Independence Community Bank Corp., Brooklyn, New York; to become a bank holding company by acquiring 100 percent of the voting shares of Independence Savings Bank, Brooklv New York.

In connection with this application, Applicant also proposes to acquire The Long Island City Financial Corporation, and its subsidiary, The Long Island City Savings and Loan Association, both of Long Island City, New York, and thereby engage in operating a savings association pursuant to § 225.25(b)(9) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, November 7, 1991.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 91-27337 Filed 11-13-91; 8:45 am]

BILLING CODE 6210-01-F

William Duncan MacMillan, et al.; Change in Bank Control Notice; Acquisition of Shares of Banks or Bank Holding Companies

The notificant listed below has applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notice is available for immediate inspection at the Federal Reserve Bank indicated. Once the notice has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for the notice or to the offices of the Board of Governors. Comments must be received not later than December 2, 1991.

A. Federal Reserve Bank of Kansas City (John E. Yorke, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. William Duncan MacMillan, Minneapolis, Minnesota; to acquire 33 percent of the voting shares of Rocky Mountain Bankshares, Inc., Aspen, Colorado, and thereby indirectly acquire The Bank of Aspen, Aspen, Colorado.

Board of Governors of the Federal Reserve System, November 7, 1991.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 91–27338 Filed 11–13–91; 8:45 am]

BILLING CODE 6210–01–F

Mid-South Bancshares, Inc., et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than December 5, 1991.

A. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. Mid-South Bancshares, Inc., Paragould, Arkansas; to acquire at least 98.58 percent of the voting shares of Far-Mer Bankshares, Inc., Reyno, Arkansas, and thereby indirectly acquire Farmers and Merchants Bank of Reyno, Reyno, Arkansas.

Board of Governors of the Federal Reserve System, November 7, 1991.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 91–27339 Filed 11–13–91; 8:45 am]

BILLING CODE 6210–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control

Board of Scientific Counselors, National Center for Infectious Diseases: Change in Meeting

This notice announces a change in the time of closed sessions of a previously announced meeting.

Federal Register Citation of Previous Announcement: November 1, 1991, 56 FR 56231.

Previously Announced Times and Dates: 8:30 a.m.-5:30 p.m., November 18–19, 1991. Closed: 4:30 p.m.–5:30 p.m., November 18, and 1 p.m.–3 p.m., November 19.

Change in Closed Meeting Times: The Board will have closed sessions from 4:30–5 p.m., November 18, and 1:30–4 p.m., November 19. All other portions of the November 18–19 meeting will be open to the public.

Dated: November 7, 1991.

Elvin Hilyer,

Associate Director for Policy Coordination, Centers for Disease Control.

[FR Doc. 91–27330 Filed 11–13–91; 8:45 am]

BILLING CODE 4160–18–M

Food and Drug Administration

Request for Nominations for Members on Public Advisory Committees; OTC Drugs Advisory Committee; Reopening of Nomination Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; reopening of nomination period.

SUMMARY: The Food and Drug Administration (FDA) is reopening the request for nominations of six voting members and one nonvoting representative of industry interests to serve on the OTC Drugs Advisory Committee in FDA's Center for Drug Evaluation and Research. A request for nominations was announced by notice in the **Federal Register** of September 24, 1991 (56 FR 48211). This notice requested that nominations be received on or before October 24, 1991. FDA has been asked to allow the submission of nominations beyond October 24, 1991. This action is being taken to allow additional time for the submission of nominations.

DATES: Nominations should be received on or before November 29, 1991.

FOR FURTHER INFORMATION CONTACT: John M. Treacy, Center for Drug Evaluation and Research (HFD–9), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–5455.

Dated: November 7, 1991.

David A. Kessler,

Commissioner of Food and Drugs.

[FR Doc. 91–27372 Filed 11–13–91; 8:45 am]

BILLING CODE 4160–01–M

[Docket No. 91M–0398]

Johnson & Johnson Interventional Systems Co.; Premarket Approval of the PALMAZ ™ Balloon-Expandable Stent

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing its approval of the application by Johnson & Johnson Interventional Systems Co., Warren, NJ, for premarket approval, under section 515 of the Federal Food, Drug, and Cosmetic Act (the act), of the PALMAZ™ Balloon-Expandable Stent. After reviewing the recommendation of the Circulatory System Device Panel, FDA's Center for Devices and Radiological Health (CDRH) notified the applicant, by letter of September 27, 1991, of the approval of the application.

DATES: Petitions for administrative review by December 16, 1991.

ADDRESSES: Written requests for copies of the summary of safety and effectiveness data and petitions for administrative review to the Dockets Management Branch (HFA–305), Food and Drug Administration, room 1–23, 12420 Parklawn Dr., Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Tara A. Ryan, Center for Devices and Radiological Health (HFZ–450), Food and Drug Administration, 1390 Piccard Dr., Rockville, MD 20850, 301–427–1197.

SUPPLEMENTARY INFORMATION: On September 5, 1989, Johnson & Johnson Interventional Systems Co., 35 Technology Dr., P.O. Box 4917, Warren, NJ 07059, submitted to CDRH an application for premarket approval of the PALMAZ™ Balloon-Expandable Stent. The device is an intravascular Stent and is indicated for use following

a technically successful but suboptimal angioplasty procedure. The PALMAZ™ Balloon-Expandable Stent is indicated in patients who are acceptable candidates for percutaneous transluminal angioplasty, in addition to meeting the following criteria: (1) A stenotic or occluded atherosclerotic lesion(s) (de novo or restenosis after a previous balloon angioplasty) of the common or external iliac arteries. The lesion(s) should be located in the segment of the iliac artery from the origin of the aortic bifurcation to the origin of the internal iliac or the segment of the external iliac from the origin of the internal iliac to the level of the internal inguinal ligament; and (2) the primary dilatation must produce an inadequate angiographic and/or hemodynamic result as defined by an intimal dissection and/or residual stenosis of >30 percent and or a transstenotic mean pressure gradient >5 mm Hg. The primary angioplasty result must be judged by the physician to be sub-optimal.

On October 29, 1990, the Circulatory System Devices Panel, an FDA advisory committee, reviewed and recommended approval of the application. On September 27, 1991, CDRH approved the application by a letter to the applicant from the Director of the Office of Device Evaluation, CDRH.

A summary of the safety and effectiveness data on which CDRH based its approval is on file in the Dockets Management Branch (address above) and is available from that office upon written request. Requests should be identified with the name of the device and the docket number found in brackets in the heading of this document.

Opportunity for Administrative Review

Section 515(d)(3) of the act (21 U.S.C. 360e(d)(3)) authorizes any interested person to petition, under section 515(g) of the act (21 U.S.C. 360e(g)), for administrative review of CDRH's decision to approve this application. A petitioner may request either a formal hearing under part 12 (21 CFR part 12) of FDA's administrative practices and procedures regulations or a review of the application and CDRH's action by an independent advisory committee of experts. A petition is to be in the form of a petition for reconsideration under § 10.33(b) (21 CFR 10.33(b)). A petitioner shall identify the form of review requested (hearing or independent advisory committee) and shall submit with the petition supporting data and information showing that there is a genuine and substantial issue of material fact for resolution through administrative review. After reviewing the petition, FDA will decide whether to grant or deny the petition and will publish a notice of its decision in the Federal Register. If FDA grants the petition, the notice will state the issue to be reviewed, the form to be used, the persons who may participate in the review, the time and place where the review will occur, and other details.

Petitioners may, at any time on or before December 16, 1991, file with the Dockets Management Branch (address above) two copies of each petition and supporting data and information, identified with the name of the device and the docket number found in brackets in the heading of this document. Received petitions may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

This notice is issued under the Federal Food, Drug, and Cosmetic Act (sections 515(d), 520(h) (21 U.S.C. 360e(d), 360j(h))) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Director, Center for Devices and Radiological Health (21 CFR 5.53).

Dated: November 1, 1991.

Elizabeth D. Jacobson,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 91-27427 Filed 11-13-91; 8:45 am]

BILLING CODE 4160-01-M

[Docket No. 91M-0420]

Baxter Healthcare Corp.; Premarket Approval of the Starr-Edwards® Silastic Ball Heart Valve Prosthesis Models 1260 (Aortic) and 6120 (Mitral)

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: Food and Drug Administration (FDA) is announcing its approval of the application by Baxter Healthcare Corp., Santa Ana, CA, for premarket approval, under section 515 of the Federal Food, Drug, and Cosmetic Act (the act), of the Starr-Edwards® Silastic Ball Heart Valve Prosthesis Models 1260 (aortic) and 6120 (mitral). After reviewing the recommendation of the Circulatory System Devices Panel, FDA's Center for Devices and Radiological Health (CDRH) notified the applicant, by letter of September 27, 1991, of the approval of the application.

DATES: Petitions for administrative review by December 16, 1991.

ADDRESSES: Written requests for copies of the summary of safety and effectiveness data and petitions for administrative review to the Dockets Management Branch (HFA-305), Food and Drug Administration, room, 1-23, 12420 Parklawn Dr., Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Diane MacCulloch, Center for Devices and Radiological Health (NFZ-450), Food and Drug Administration, 1390 Piccard Dr., Rockville, MD 20850, 301-427-1200.

SUPPLEMENTARY INFORMATION: On December 7, 1987, Baxter Healthcare Corp., P.O. Box 11150, Santa Ana, CA 92711-1150, submitted to CDRH an application for premarket approval of the Starr-Edwards® Silastic Ball Heart Valve Prosthesis Models 1260 (aortic) and 6120 (mitral). The Model 1260 valve is indicated for aortic valve replacement; the Model 6120 valve is indicated for mitral valve replacement in those patients sufficiently ill to warrant replacement of a diseased natural valve or a previously implanted prosthetic valve.

On April 29, 1988, the Circulatory System Devices Panel, of the Medical Devices Advisory Committee, an FDA advisory committee, reviewed and recommended approval of the application. On September 27, 1991, CDRH approved the application by a letter to the applicant from the Director of the Office of Device Evaluation, CDRH.

A summary of the safety and effectiveness data on which CDRH based its approval is on file in the Dockets Management Branch (address above) and is available from that office upon written request. Requests should be identified with the name of the device and the docket number found in brackets in the heading of this document.

Opportunity for Administrative Review

Section 515(d)(3) of the act (21 U.S.C. 360e(d)(3)) authorizes any interested person to petition, under section 515(g) of the act (21 U.S.C. 360e(g)), for administrative review of CDRH's decision to approve this application. A petitioner may request either a formal hearing under part 12 (21 CFR part 12) of FDA's administrative practices and procedures regulations or a review of the application and CDRH's action by an independent advisory committee of experts. A petition is to be in the form of a petition for reconsideration under § 10.33(b) (21 CFR 10.33(b)). A petitioner shall identify the form of review requested (hearing or independent advisory committee) and shall submit with the petition supporting data and information showing that there is a

genuine and substantial issue of material fact for resolution through administrative review. After reviewing the petition, FDA will decide whether to grant or deny the petition and will publish a notice of its decision in the **Federal Register.** If FDA grants the petition, the notice will state the issue to be reviewed, the form of review to be used, the persons who may participate in the review, the time and place where the review will occur, and other details.

Petitioners may, at any time on or before December 16, 1991, file with the Dockets Management Branch (address above) two copies of each petition and supporting data and information, identified with the name of the device and the docket number found in brackets in the heading of this document. Received petitions may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

This notice is issued under the Federal Food, Drug, and Cosmetic Act (sections 515(d), 520(h) (21 U.S.C. 360e(d), 360j(h))) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Director, Center for Devices and Radiological Health (21 CFR 5.53).

Dated: November 5, 1991.

Elizabeth D. Jacobson,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 91–27428 Filed 11–13–91; 8:45 am]

BILLING CODE 4160–01–M

National Institutes of Health

National Cancer Institute; Meeting of the Cancer Support Review Committee

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the Cancer Center Support Review Committee, National Cancer Institute, on November 21, 1991, Hyatt Regency Bethesda, 1 Bethesda Metro Center, Bethesda, MD 20814.

This meeting will be open to the public on November 21 from 12:30 p.m. to 1 p.m., to review administration details and other cancer center review issues. Attendance by the public will be limited to space available.

In accordance with the provisions set forth in section 552b(c)(4) and 552(c)(6), title 5, U.S.C. and section 10(d) of Public Law 92–463, the meeting will be closed to the public on November 21 from approximately 1 p.m. to adjournment for the review, discussion and evaluation of individual grant applications. These applications and the discussions could reveal confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Ms. Carole Frank, the Committee Management Officer, National Cancer Institute, Building 31, room 10A06, National Institutes of Health, Bethesda, Maryland 20892 (301/496–5708) will provide a summary of the meeting and the roster of committee members, upon request.

Dr. David E. Maslow, Scientific Review Administrator, Cancer Center Support Review Committee, National Cancer Institute, Westwood Building, room 804, National Institute of Health, Bethesda, Maryland 20892 (301/496–2330) will furnish substantive program information.

(Catalog of Federal Domestic Assistance Program Numbers: 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.197, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control)

Dated: November 1, 1991.

Raymond Bahor,

Acting Committee Management Officer, NIH.

[FR Doc. 91–27412 Filed 11–13–91; 8:45 am]

BILLING CODE 4140–01–M

National Center for Nursing Research; Meeting: Nursing Science Review Committee

Pursuant to Pub. L. 92-463, notice is hereby given of the meeting of the Nursing Science Review Committee, National Center for Nursing Research, November 20-22, 1991, Building 31C, Conference Room 9, National Institutes of Health, Bethesda, Maryland 20892.

This meeting will be open to the public on November 20 from 8:30 a.m. to 10 a.m. Agenda items to be discussed will include a Report from the Director, NCNR, an Administrative Report by the Chief, Office of Scientific Review, and a presentation on NIH Requirement for Instruction in the Responsible Conduct of Research by Dr. Walter Schaffer.

Attendance by the public will be limited to space available.

In accordance with the provisions set forth in sections 552b(c) (4) and 552b(c) (6), title 5, U.S. Code and section 10(d)) of Pub. L. 92-463, the meeting will be closed to the public on November 20 from 10 a.m. to adjornment on November 22 for the the review, discussion, and evaluation of individual grant applications. The applications and the discussions could reveal confidential trade secrets or commerical property such as patentable material, and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Dr. Ethel Jackson, Chief, Office of Scientific Review, National Center for Nursing Research, National Institutes of Health, Building 31, room 5B19, Bethesda, Maryland 20892, (301) 496-0472, will provide a summary of the meeting, and a roster of committee members upon request.

Dated: October 17, 1991.

Raymond Bahor,

Acting NIH Committee Management Officer.

[FR Doc. 91-27413 Filed 11-13-91; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WO-340-08-4333-02]

Information Collection Proposal Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). Copies of the proposed collection of information and related forms may be obtained by contacting the Bureau of Land Management's Clearance officer at the phone number listed below. Comments and suggestions be made directly to the Bureau Clearance Officer and to the Office of Management and Budget, Paperwork Reduction Project (1004-0147), Washington, DC 20503, telephone (202) 395–7340.

Title: Recreation Visitor Survey, 43 CFR 1601.5–3.

OMB Approval Number: 1004-0147.

Abstract: Respondents supply information on their use of recreation opportunities on public lands. This information issued during subsequent land use planning process to help the Bureau make decisions concerning future management of the surveyed area.

Bureau Form Number: 8310-8.

Frequency: Collected on one-time basis to solve specific planning and management problems.

Description of Respondents: Recreation visitors to public lands.

Estimated Completion Time: 12 minutes.

Annual Responses: 1800.

Annual Burden Hours: 360.
Bureau Clearance Officer (Alternate): Gerri Jenkins (202) 653-6105.

Dated: October 21, 1991.

Mike Penfold,

Assistant Director, Land and Renewable Resources.

[FR Doc. 91-27307 Filed 11-13-91; 8:45 am]

BILLING CODE 4310-84-M

[AZ-010-92-4410-08; 1784-010]

Arizona Strip District Advisory Council Meeting; Postponement

AGENCY: Bureau of Land Management, Arizona Strip District, Interior.

ACTION: Notice of postponement of Advisory Council Meeting.

SUMMARY: The Arizona Strip District Advisory Council Meeting previously set for November 20, 1991 at the Ramada Inn, 1440 E. St. George Blvd., St. George, Utah has been postponed until a later date to be determined later. Conflicting schedules of the Advisory Council members on the date set necessitated this change.

The Arizona Strip Grazing Board meeting will still be held as planned according to the Federal Register Notice of Thursday, October 24, 1991, page 55133.

FOR FURTHER INFORMATION CONTACT: G. William Lamb, District Manager, 390 N. 3050 E., St. George, Utah 84770 (Phone/673-3545).

Dated: November 4, 1991.

G. William Lamb,

District Manager.

[FR Doc. 91-27379 Filed 11-13-91; 8:45 am]

BILLING CODE 4310-32-M

[NV-930-92-4212-11; N-41568-16]

Realty Action; Lease/Purchase for Recreation and Public Purposes, Clark County, NV

This Notice of Realty Action supercedes the Notice published in the Federal Register as Document 91-22677, 56 FR 47802 on September 20, 1991.

The following described public land in Las Vegas, 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. 22 S., R. 61 E.,
sec. 23, NE¼NW¼SE¼NW¼, S½NW¼SE¼NW¼,
NE¼NE¼SE¼NW¼, W½NE¼SE¼NW¼.
Aggregating 15 acres (gross).

The Clark County School District intends to use the land for a senior high school. The adjacent parcel of land described as the S½NE¼NW¼, containing 20 acres was originally classified and identified as a junior high school site. The determination was made that a senior high school was needed instead of a junior high school. The original 20 acre site will be incorporated into this parcel. 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 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.

Dated: November 4, 1991.

Ben F. Collins,

District Manager, Las Vegas, NV.

[FR Doc. 91-27308 Filed 11-13-91; 8:45 am]

BILLING CODE 4310-HC-M

Fish and Wildlife Service

Intent To Prepare an Environmental Impact Statement and a Plan To Direct all Natural Resource and Public Use Management Activities on the Sheldon National Wildlife Refuge, Washoe and Humboldt Counties, NV, and Lake County, OR

AGENCY: Department of the Interior, Fish and Wildlife Service.

ACTION: Notice.

SUMMARY: This notice advises the public that the U.S. Fish and Wildlife Service (Service) intends to gather information necessary for the preparation of an Environmental Impact Statement (EIS) and a plan to direct all natural resource and public use management activities on the Sheldon National Wildlife Refuge, Washoe and Humboldt Counties, Nevada, and Lake County, Oregon. The public is invited to comment on the scope and content of the EIS. This notice is being furnished pursuant to the National Environmental Policy Act's (NEPA) Regulations (40 CFR 1501.7) to obtain suggestions and information from other agencies and the public on the scope of issues to be addressed in the EIS.

DATES: Written comments should be received by December 13, 1991.

ADDRESSES: Comments should be addressed to: Refuge Manager, Sheldon National Wildlife Refuge, P.O. Box 111, Lakeview, OR 97630.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Smith, Assistant Refuge Manager, Sheldon-Hart Mountain National Wildlife Refuge Complex, P.O. Box 111, Lakeview, OR 97630, telephone (503) 947-3315.

SUPPLEMENTARY INFORMATION: The Service proposes to examine alternatives for the management of fish and wildlife habitats and public use activities on the Sheldon National Wildlife Refuge. The purpose of this EIS is to analyze the refuge resources and, in full awareness of public viewpoints, to recommend a course of action to best guide the management of these resources in the future to benefit fish and wildlife. The EIS will provide decision-makers with a comprehensive analysis of alternative actions that will result in an integrated management plan.

The EIS also will include a determination of the compatibility of the alternative actions with the purposes for which the refuge was established and acquired, the goals of the National Wildlife Refuge System, and the refuge goals and objectives. As required by the National Wildlife Refuge Administration Act of 1966 as amended (16 U.S.C. 668dd *et seq.*), any use of a national wildlife refuge must be compatible with the primary purposes for which the refuge was established. Sheldon Refuge was established by Executive Order 5540 in 1931 "* * * as a refuge and breeding ground for wild animals and birds * * *" Additional lands were added by Executive Order 7522 in 1936 "* * * for the conservation and development of natural wildlife resources and for the protection and improvement of public grazing lands and natural forage resources * * *."

The purpose of and the need for action is that current management plans are outdated and fragmented. Until now, management has been guided by the Service's Refuge Manual, the Sheldon Renewable Natural Resources Management Plan prepared in 1980 to address vegetation manipulation, and individual management plans for activities such as hunting, fire, and law enforcement. The need for an integrated and comprehensive management plan has been recognized for many years.

The EIS will address a range of alternatives for future management of fish and wildlife and public use of the Sheldon Refuge. Alternatives will be examined for their potential benefits and impacts to the various fish and wildlife resources present on the refuge, the surrounding environment, and public use of the refuge. Potential social and economic impacts also will be analyzed.

The Service urges all interested parties to provide comments regarding the scope of this EIS, the alternatives to be developed, and the potential significant environmental impacts which many occur from implementation of alternative actions. Persons who have previously commented during scoping of this proposed management plan, which was initiated in January 1990, need not resubmit their comments. All comments currently in the project file will be used in development of this EIS. The ideas are concerns of interested parties may be expressed in writing to the address listed above. Written comments must be received by the Service by December 13, 1991.

The environmental review of this project will be conducted in accordance with the requirements of NEPA (42 U.S.C. 4371 *et seq.*), NEPA Regulations (40 CFR Part 1500, *et seq.*), other appropriate Federal regulations, and Service procedures for compliance with those regulations.

It is estimated that a Draft EIS will be made available for public review and comment during April 1994.

Dated: October 28, 1991.

John H. Doebel,

Acting Regional Director, Fish and Wildlife Service.

[FR Doc. 91-26585 Filed 11-13-91; 8:45 am]

BILLING CODE 4310-55-M

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-328]

Certain Bathtubs and Other Bathing Vessels and Materials Used Therein; Commission Determination Not to Review an Initial Determination Terminating the Investigation as to One Respondent on the Basis of a Consent Order; Issuance of Consent Order

AGENCY: International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's (ALJ) initial determination (ID) (Order No. 5) terminating the above-captioned investigation as to respondent EBI on the basis of a consent order.

FOR FURTHER INFORMATION CONTACT: Katherine M. Jones, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436; telephone 202-205-3097.

SUPPLEMENTARY INFORMATION: On September 6, 1991, complainant American Standard, Inc. and respondent EBI, Inc. filed a joint motion to terminate the investigation as to EBI on the basis of a proposed consent order, consent order agreement, and settlement agreement. On September 27, 1991, the presiding ALJ issued an ID (Order No. 5) terminating the investigation as to EBI on the basis of the consent order. No petitions for review or public comments were filed.

This action is taken pursuant to section 337 of the Tariff Act of 1930, as amended, (19 U.S.C. 1337) and Commission interim rules 210.53 and 211.21, (19 C.F.R. 210.53 and 211.21, as amended).

Copies of the nonconfidential version of the ID and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone 202-205-2000. Hearing-impaired persons are advised that information on the matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

Issued: November 4, 1991.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 91-27381 Filed 11-13-91; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 731-TA-497 (Final)]

Tungsten Ore Concentrates From the People's Republic of China

Determination

On the basis of the record [1] developed in the subject investigation, the Commission determines, pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)) (the act), that an industry in the United States is materially injured [2] or threatened with material injury [3] by reason of imports from the People's Republic of China of tungsten ore concentrates,[4] provided for in heading 2611.00.00 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce to be sold in the United States at less than fair value (LTFV).

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] Acting Chairman Brunsdale and Commissioner Lodwick determine that an industry in the United States is materially injured by reason of imports of the subject merchandise.

[3] Commissioners Rohr and Newquist determine that an industry in the United States is threatened with material injury by reason of imports of the subject merchandise. Pursuant to section 735(b)(4)(B) of the act (19 U.S.C. 735(b)(4)(B)), they further determine that they would not have found material injury by reason of the subject imports but for any suspension of liquidation of entries of that merchandise.

[4] For purposes of this investigation, tungsten ore concentrates are defined as any concentrated or upgraded form of raw tungsten ore, whether high- or low-grade. High-grade tungsten ore concentrates are defined as a concentrated form of tungsten ore containing 65 percent or more by weight of tungsten trioxide (WO_3). Low-grade tungsten ore concentrates are defined as a concentrated form of tungsten ore containing less than 65 percent by weight of WO_3. Low-grade tungsten ore concentrates include tungsten slimes, which have a concentration of less than 35 percent by weight of WO_3

Background

The Commission instituted this investigation effective July 9, 1991, following a preliminary determination by the Department of Commerce that imports of tungsten ore concentrates from the People's Republic of China were being sold at LTFV within the meaning of section 733(b) of the act (19 U.S.C. 1673b(b)). Notice of the institution of the Commission's investigation and of a public hearing to be held in connection therewith was given by posting copies of the notice of the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of July 31, 1991 (56 FR 36167). The hearing was held in Washington, DC, on September 26, 1991, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determination in this investigation to the Secretary of Commerce on November 5, 1991. The views of the Commission are contained in USITC Publication 2447 (November 1991), entitled "Tungsten Ore Concentrates from the People's Republic of China: Determination of the Commission in Investigation No. 731-TA-497 (Final) Under the Tariff Act of 1930, Together With the Information Obtained in the Investigation."

Issued: November 6, 1991.

By Order of the Commission:

Edward Carroll,

Acting Secretary.

[FR Doc. 91-27382 Filed 11-13-91; 8:45am]

BILLING CODE 7020-20-M

[Investigation 337-TA-329]

Certain Vacuum Cleaners; Initial Determination Terminating Respondent on the Basis of Settlement Agreement

AGENCY: U.S. International Trade Commission.

ACTION: Notice is hereby given that the Commission has received an initial determination from the presiding officer in the above captioned investigation terminating the following respondent on the basis of a settlement agreement: Iona Appliances, Inc. ("Iona").

SUPPLEMENTARY INFORMATION: This investigation is being conducted pursuant to section 337 of the Tariff Act of 1930 (19 U.S.C. 1337). Under the Commission's rules, the presiding officer's initial determination will become the determination of the Commission thirty (30) days after the date of its service upon the parties, unless the Commission orders review of the initial determination. The initial determination in this matter was served upon parties on November 7, 1991.

Copies of the initial determination, the consent order agreement, and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, DC 20436, telephone (202) 205-2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

WRITTEN COMMENTS: Interested persons may file written comments with the Commission concerning termination of the aforementioned respondents. The original and 14 copies of all such documents must be filed with the Secretary to the Commission, 500 E Street SW., Washington, DC 20436, no later than November 25, 1991. Any person desiring to submit a document (or portions thereof) to the Commission in confidence must request confidential treatment. Such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why confidential treatment should be granted. The Commission will either accept the submission in confidence or return it.

FOR FURTHER INFORMATION CONTACT: Ruby J. Dionne, Office of the Secretary, U.S. International Trade Commission, Telephone (202) 205-1802.

Issued: November 7, 1991.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 91-27383 Filed 11-13-91; 8:45 am]

BILLING CODE 7020-02-M

INTERSTATE COMMERCE COMMISSION

[Docket No. AB-32 (Sub. 46X)]

Boston and Maine Corporation and Springfield Terminal Railway Company—Abandonment and Discontinuance Exemption—in Middlesex County PA

Boston and Maine Corporation (B&M) and Springfield Terminal Railway Company (ST) have filed a notice of exemption under 49 CFR part 1152 Subpart F—*Exempt Abandonments and Discontinuances* for B&M to abandon and ST to discontinue service over a 0.40-mile limit of railroad between mileposts B-8.92 and B-9.32, In Watertown, Middlesex County, MA.

B&M and ST have 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 complaint 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 and discontinuance 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 December 14, 1991 (unless stayed pending reconsideration). Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file 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 November 25, 1991.[3] Petitions for reconsideration or requests for public use conditions under 49 CFR 1152.28 must be filed by December 4, 1991 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: John R. Nadolny, Boston and Maine Corporation, Springfield Terminal

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[1] A stay will be routinely issued by the Commission in those proceedings where an informed decision on environmental issues (whether raised by 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*, 5 I.C.C. 2d 377 (1989). 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).

[3] The Commission will accept a late-filed trail use statement so long it retains jurisdiction to do so.

Railway Company, Iron Horse Park, No. Billerica, MA 01862

If noticed of exemption contains 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 and discontinuance.

The Section of Energy and Environment (SEE) will prepare an environmental assessment (EA). SEE will issue the EA by November 19, 1991. Interested persons may obtain a copy of the EA from SEE by writing to it (Room 3219), Interstate Commerce Commission, Washington, DC 20323) or by calling Elaine Kaiser, 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 trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Decided: November 7, 1991.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 91–27363 Filed 11–13–91; 8:45 am]

BILLING CODE 7035–01–M

DEPARTMENT OF JUSTICE

Consent Judgment in Action To Enjoin and Penalize Violations of the Clean Air Act ("CAA")

In accordance with Departmental Policy, 28 CFR 50.7, 38 FR 19029, notice is hereby given that a Consent Decree in *United States* v. *City of Duluth* ("Duluth"), (D. Minn.), Civil Action No. 5–90–186 was lodged with the United States District Court for the District of Minnesota on October 30, 1991. The Consent Decree provides for penalties and corrective action for violating the emission control equipment anti-tampering provisions of the Clean Air Act, 42 U.S.C. 7522(a)(3)(B).

The Department of Justice will receive for thirty (30) days from the date of publication of this notice, written comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, Washington, DC 20530 and should refer to *United States* v. *City of Duluth,* D.O.J. Ref. No. 90–5–2–1–1507.

The proposed Consent Decree may be examined at the Environmental Enforcement Section Document Center, 601 Pennsylvania Avenue, NW., Washington, DC 20004 (202–347–2072). A copy of the proposed Consent Decree may be obtained in person or by mail from the Environmental Enforcement Section Document Center, 601 Pennsylvania Avenue, NW., Box 1097, Washington, DC 20004. In requesting a copy, please enclose a check in the amount of $2.50 (25 cents per page reproduction charge) payable to Consent Decree Library.

John C. Cruden,

Chief, Environmental Enforcement Section.

[FR Doc. 91–27309 Filed 11–13–91; 8:45 am]

BILLING CODE 4410–01–M

Lodging of Proposed Consent Decree Under the Federal Water Pollution Control Act

Notice is hereby given, in accordance with Departmental policy, 28 CFR 50.7, that on November 1, 1991 a proposed Consent Decree ("Decree") was lodged with the United States District Court for the Northern District of Indiana in *United States, et al.* v. *City of Gary, Indiana et al.*, Civil Action Nos. H 78–29 and H 86–540, between plaintiff United States—on behalf of the Environmental Protection Agency ("EPA")—and defendants City of Gary and the Gary Sanitary District. Also participating in the settlement are the State of Indiana, as a plaintiff, and the Independence Hill Conservancy District, as a limited intervener.

The subject of the proposed Decree is defendants' wastewater treatment works, located at 3600 West 3rd Avenue, Gary, Indiana. The proposed Decree would resolve the United States of America's two pending motions to secure compliance with the consent Decree entered in these civil actions in September 1987 ("1987 Decree"), which required defendants to undertake various compliance measures at and about their treatment works relating to: the Federal Water Pollution Control Act, regulations promulgated thereunder, applicable NPDES permits, the Toxic Substances Control Act, and regulations promulgated under that statute. Also addressed by the pending motions of the United States, and resolved by the proposed Decree, is the payment by the defendants of penalties—both civil and stipulated—provided for under the 1987 Decree.

Under the settlement embodied in the proposed Decree, defendants will undertake numerous compliance projects involving every significant facet of the treatment works, including: operations, maintenance, and equipment rehabilitation and replacement; stabilization and disposal of waste products now located in the Ralston Street Lagoon that originated in the treatment works; and the permitting, monitoring, enforcement, and allied activities called for to implement properly a pretreatment program for the treatment works.

To aid defendants in securing compliance with its terms, the proposed Decree provides for appointment of the Mayor of the City of Gary as a special officer of the District Court, known as a Special Administrator. The Special Administrator will use his authority to direct defendants toward the steps needs to comply with the terms of the proposed Decree and will report to the District Court concerning defendants' activities under the Decree.

Also under the proposed Decree, defendants will conduct a supplemental enforcement project: $1.7 million in sediment characterization and remediation on a stretch of the Grand Calumet River located near the treatment works. Defendants also will pay a civil penalty of $1.25 million under the proposed settlement.

The Department of Justice will receive comments relating to the proposed Decree for 30 days following the publication of this Notice. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States, et al.* v. *City of Gary, Indiana, et al.*, D.J. Ref. No. 90–5–1–1–2601A. The proposed Decree may be examined at the Office of the United States Attorney for the Northern District of Indiana, 1001 Main Street, suite A, Dyer, Indiana, or at the Environmental Enforcement Section Document Center, 601 Pennsylvania Ave, NW., Box 1097, Washington, DC 20004 (202–374–7829). A copy of the proposed Decree may be obtained in person or by mail from the Document Center. In requesting a copy, please enclose a check in the amount of $60.25 (25 cents per page reproduction costs) payable to Consent Decree Library.

John C. Cruden,

Environmental Enforcement Section, Environment and Natural Resources Division, United States Department of Justice.

[FR Doc. 91–27310 Filed 11–13–91; 8:45 am]

BILLING CODE 4410–10–M

Lodging of Consent Decree Pursuant to CERCLA

In accordance with Department Policy, 28 CFR 50.7, and pursuant to section 122(i) of CERCLA, 42 U.S.C. 9622(i), notice is hereby given that a

proposed consent decree in *United States* versus *Sherwood Medical Co., Inc.*, Civil Action No. 91–802–CIV–ORL–18 was lodged with the United States District Court for the Middle District of Florida on October 25, 1991. This agreement resolves a judicial enforcement action brought by the United States against the defendant pursuant to sections 106 and 107 of CERCLA, 42 U.S.C. 9606, 9607.

The proposed consent decree provides that Sherwood Medical will design a system to extract and treat contaminated groundwater from the surficial aquifer in the vicinity of its plant located on Volusia County, Florida. Sherwood Medical will also conduct groundwater monitoring to assess the effectiveness of this extraction and treatment system. The remedy to be performed by Sherwood Medical is an interim measure that is designed to prevent any further migration of hazardous substances from the Sherwood Medical Co. Site. Sherwood Medical is also performing a remedial investigation and feasibility study to determine a final remedy for the Site. Completion of this study is scheduled for mid-1992. The proposed Decree also requires that Sherwood Medical reimburse the Hazardous Substances Superfund in the amount of $283,677.55 for costs incurred by EPA at the Site.

The Department of Justice will receive for a period of (30) days from the date of this publication, comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States* versus *Sherwood Medical Co., Inc.*, D.O.J. Ref. 90–11–3–765.

This Consent Decree may be examined at the offices of the United States Attorney, Middle District of Florida, Orlando Division, 201 Federal Building, 30 North Hughey Avenue, Orlando, Florida 32801, at the Office Regional Counsel, EPA, 345 Courtland Street, NE., Atlanta, Georgia 30365, and at the Offices of the Environmental Enforcement Section, Environment and Natural Resources Division of the Department of Justice, room 1535, Ninth Street and Pennsylvania Avenue, NW., Washington, DC 20530. The proposed consent decree may also be examined at the Environmental Enforcement Section Document Center, 601 Pennsylvania Avenue, Building NW. Washington, DC 20004, 202–347–2072. A copy of the proposed consent decree may be obtained in person or by mail from the Document Center. In requesting a copy, please enclose a check in the amount of $12.75 (25 cents per page reproduction costs) payable to Consent Decree Library.

Barry M. Hartman,

Acting Assistant Attorney General, Environment and Natural Resource Division.

[FR Doc. 91–27311 Filed 11–13–91; 8:45 am]

BILLING CODE 4410–01–M

Lodging a Final Judgment by Consent Pursuant to the Resource Conservation and Recovery Act

Notice is hereby given that on October 30, 1991, a proposed consent decree in *United States* v. *Sterling Casket Hardware Company* was lodged with the United States District Court for the Western District of Virginia. The decree pertains to alleged violations of the Resource Conservation and Recovery Act ("RCRA") by Sterling Casket Hardware Company in Abingdon, Virginia, regarding the closure of impoundments which were used to store hazardous waste from the electroplating process and for failure to comply with a 1985 Consent Order.

The proposed consent decree requires Sterling Casket Hardware Company to certify closure of the subject impoundments in accordance with an approved closure plan, continue post-closure ground water monitoring and comply with all applicable Virginia Department of Waste Management and EPA regulations concerning post closure, as well as pay civil penalty of $5,000.

The Department of Justice will receive comments relating to the proposed consent decree for a period of thirty days from the date of publication of this notice. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, Department of Justice, Washington, DC, 20530, and should refer to *United States* v. *Sterling Casket Hardware Company* (W.D. Va.) and DOJ Ref. No. 90–7–1–473. The proposed consent decree may be examined at the office of the United States Attorney, Western District of Virginia, room 456, Poff Federal Building, 210 Franklin Road, SW., Roanoke, VA 24011, or at the Office of the Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, PA 19107. A copy of the proposed consent decree may also be examined at the Environmental Enforcement Section Document Center, 601 Pennsylvania Avenue Building, NW., Box 1097, Washington, DC 20004 (202) 347–2072. A copy of the proposed consent decree may be obtained in person or by mail from the Environmental Enforcement Section Document Center. In requesting a copy please enclose a check in the amount of $5.25 (25 cents per page reproduction costs) payable to "Consent Decree Library".

John C. Cruden,

Chief, Environmental Enforcement Section, Environmental and Natural Resources Division.

[FR Doc. 91–27312 Filed 11–13–91; 8:45 am]

BILLING CODE 4410–01–M

Antitrust Division

Notice Pursuant to the National Cooperative Research Act of 1984—Petrotechnical Open Software Corporation Joint Research and Development Venture

Notice is hereby given that, on October 21, 1991, pursuant to section 6(a) of the National Cooperative Research Act of 1984, 15 U.S.C. 4301, *et seq.* ("the Act"), Petrotechnical Open Software Corporation ("POSC") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of invoking the protections of the Act limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, the notification stated that the following additional parties have become new, non-voting members of POSC:

Kestrel Data Management Inc., 5249 Glenmont, Houston, TX 77081.

Integrated Computer Solutions, Inc., 201 Broadway, Cambridge, MA 02139.

Sysdrill Ltd., Wood Offshore Centre, Greenbank Crescent, Aberdeen AB1 4BG, United Kingdom.

Conoco Inc., 600 North Dairy Ashford, Houston, TX 77079.

International Business Machines Corporation, 1505 LBJ Freeway, Dallas, TX 75234.

Den norske stats oljeselskap a.s (STATOIL), P.O. Box 300, N–4001 STAVANGER, Norway.

Corelis S.A., 51, Rue Salvador Allende, 92027 Nanterre Cedex, France.

Petroleum Exploration Computer Consultants Ltd., Medway House, Lower Road, Forest Row, East Sussex, RH18 5HE, England.

No other changes have been made in either the membership or planned activity of POSC.

On January 14, 1991, POSC filed simultaneously with the Attorney

General and the Federal Trade Commission its original notifications pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on February 7, 1991 (56 FR 5021).

On April 12, 1991, POSC filed simultaneously with the Attorney General and the Federal Trade Commission notifications of the addition of members pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on May 7, 1991 (56 FR 21176).

On July 19, 1991, POSC filed simultaneously with the Attorney General and the Federal Trade Commission notifications of the addition of members pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on August 13, 1991 (56 FR 38465).

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 91-27313 Filed 11-13-91; 8:45 am]

BILLING CODE 4410-01-M

Notice Pursuant to the National Cooperative Research Act of 1984—Portland Cement Association

Notice is hereby given that, pursuant to section 6(a) of the National Cooperative Research act of 1984, 15 U.S.C. 4301 *et seq.* ("the Act"), the Portland Cement Association ("PCA") has filed written notificaitons simultaneously with the Attorney General and the Federal Trade Commission on October 15, 1991, disclosing that there have been changes in the membership of PCA. The notification was filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Essex Cement Company (of Port Newark, New Jersey) has beome a member, and Davenport Cement Company (of Davenport, Iowa), Missouri Cement Company (of Davenport, Iowa), and RMC Lonestar (of Pleasanton, California) are no longer members. South Dakota (of Rapid City, South Dakota) is now known as Dacotah Cement. A B B Raymond (of Lisle, Illinois) and Allis Mineral Systems (of Milwaukee, Wisconsin) have been added to the list of Participating Associates. Boliden-Allis, Inc., (of Milwaukee, Wisconsin) and C-E Raymond (of Lisle, Illinois) have been deleted from the list of Participating Associates.

No other changes have been made in either the membership or planned activities of PCA.

On January 7, 1985, PCA filed its original notification pursuant to section 6(a) of the Act. The Department of Justice (the "Department") published a notice in the **Federal Register** pursuant to section 6(b) of the Act on February 5, 1985, 50 FR 5015. On March 14, 1985, August 13, 1985, January 3, 1986, February 14, 1986, May 30, 1986, July 10, 1986, December 31, 1986, February 3, 1987, April 17, 1987, June 3, 1987, July 29, 1987, August 6, 1987, October 9, 1987, February 18, 1988, March 9, 1988, March 11, 1988, July 7, 1988, August 9, 1988, August 23, 1988, January 23, 1989, February 24, 1989, March 13, 1989, May 25, 1989, July 20, 1989, August 24, 1989, September 25, 1989, December 14, 1989, January 31, 1990, May 29, 1990, July 15, 1990, December 18, 1990, January 31, 1991, and May 28, 1991, PCA filed additional written notifications. The Department published notices in the **Federal Register** in response to these additonal notifications on April 10, 1985, (50 FR 14175), September 16, 1985 (50 FR 37594), November 15, 1985 (50 FR 47292), December 24, 1985 (50 FR 52568), February 4, 1986 (51 FR 4440), March 12, 1986 (51 FR 8573), June 27, 1986 (51 FR 23479), August 14, 1986 (51 FR 29173), February 3, 1987 (52 FR 3356), March 4, 1987 (52 FR 6635), May 14, 1987 (52 FR 18295), July 10, 1987 (52 FR 26103), August 26, 1987 (52 FR 32185), November 17, 1987 (52 FR 43953), March 28, 1988 (53 FR 9999), August 4, 1988 (53 FR 29397), September 15, 1988 (53 FR 35935), September 28, 1988 (53 FR 37883), February 23, 1989 (54 FR 7894), March 20, 1989 (54 FR 11455), April 25, 1989 (54 FR 17835), June 28, 1989 (54 FR 27220), August 23, 1989 (54 FR 35092), September 11, 1989 (54 FR 37513), October 20, 1989 (54 FR 43146), February 1, 1990 (55 FR 3497), March 7, 1990 (55 FR 8204), July 3, 1990 (55 FR 27518), July 19, 1990 (FR 29432), January 25, 1991 (56 FR 2950), March 15, 1991 (56 FR 11274), and July 1, 1991 (56 FR 29977), respectively.

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 91-27314 Filed 11-13-91; 8:45 am]

BILLING CODE 4410-01-M

Pursuant to the National Cooperative Research Act of 1984—Spray Drift Task Force

Notice is hereby given that, on October 11, 1991, pursuant to section 6(a) of the National Cooperative Research Act of 1984, 15 U.S.C. 4301 *et seq.* ("the Act"), the Spray Drift Task Force filed a written notification simultaneously with the Attorney General and the Federal Trade Commission disclosing a change in the membership of the parties to the Spray Drift Task Force Joint Data Development Agreement. The notification was filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. The change consists of the addition of the following party to the Spray Drift Task Force.

Micro-Flo Company, Located in Lakeland, Florida

No other changes have been made in either the membership, the objectives or the planned activities of the venture.

On May 15, 1990, the Spray Drift Task Force filed its original notification pursuant to section 6(a) of the Act. The Department of Justice ("the Department") published a notice in the **Federal Register** pursuant to section 6(b) of the Act on July 5, 1990, at 55 FR 27701. On July 16, 1990, September 17, 1990, April 1, 1991, and July 23, 1991, the Spray Drift Task Force filed additional written notifications. The Department of Justice published notices in the **Federal Register** in response to these additional notifications on August 22, 1990 at 55 FR 34357, October 18, 1990 at 55 FR 42281, April 24, 1991 at 56 FR 18837, and August 29, 1991 at 56 FR 42759, respectively.

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 91-27315 Filed 11-13-91; 8:45 am]

BILLING CODE 4410-01-M

Pursuant to the National Cooperative Research Act of 1984—Vehicle Recycling Partnership

Notice is hereby given that, on October 2, 1991, pursuant to section 6(a) of the National Cooperative Research Act of 1984, 15 U.S.C. 4301 *et seq.* ("the Act"), the Vehicle Recycling Partnership ("Partnership") has filed written notification simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties to the Partnership and (2) the Partnership's nature and objectives. The notification was filed for the purpose of invoking the Act's provisions limiting the potential recovery of antitrust plaintiffs to actual damages under specified circumstances. Pursuant to section 6(b) of the Act, the identities of the parties to the Partnership and its general area of planning activities are given below.

The current members to the Partnership are: Chrysler Corporation; Ford Motor Company; and General Motors Corporation.

The parties intend to identify opportunities for joining aspects of their independent research and development efforts pertaining to recycling, reuse and disposal of motor vehicles and of motor vehicle components. The objectives are to avoid inefficient duplication of effort and expense, improve general scientific knowledge in this area by answering fundamental questions, and accelerate the development of pertinent technology. To meet these objectives, the Partnership will collect, exchange and analyze research information regarding recycling, reuse and disposal of motor vehicles and motor vehicle components; conduct tests and develop basic engineering techniques for use in proof of theories and concepts in the relevant topics; interact with domestic or international entities involved in other issues of recycling research; begin the development of non-binding recycling, reuse and disposal guidelines for vehicle and component design and material selection; and perform further acts allowed by the National Cooperative Research Act that would advance the Partnership's objectives in this area. The parties intend to file additional written notification disclosing all changes in membership of this project.

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 91-27316 Filed 11-13-91; 8:45 am]

BILLING CODE 4410-01-M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-289]

GPU Nuclear Corporation; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of exemptions from the provisions of: (1) 10 CFR 50.46, which requires the calculation of emergency core cooling system (ECCS) performance for reactors with Zircaloy clad fuel; (2) 10 CFR 50.44, which gives requirements to control the hydrogen generated by Zircaloy clad fuel after a postulated loss-of-coolant-accident (LOCA); and (3) appendix K to 10 CFR part 50, which presumes the use of Zircaloy fuel when doing calculations for energy release, cladding oxidation and hydrogen generation after a postulated LOCA, to GPU Nuclear Corporation, the licensee for Three Mile Island Nuclear Generating Station, Unit No. 1 (TMI-1), located in Dauphin County, PA.

Environmental Assessment

Identification of Proposed Action

The proposed action would allow the licensee to use fuel assemblies whose cladding composition falls outside the definition of Zircaloy in the cited regulations. Two of these assemblies (lead test assemblies) would be loaded into the TMI-1 reactor core during the refueling outage in the fall of 1991.

The licensee informed the NRC of its intention to install these special assemblies during a meeting on January 18, 1991. The exemption is being undertaken on the Commission's own initiative.

The Need for the Proposed Action

The exemption under consideration is needed because 10 CFR 50.46(a)(1)(i) and appendix K to 10 CFR part 50 require the demonstration of adequate ECCS performance for light-water reactors that contain fuel consisting of uranium oxide pellets enclosed in Zircaloy tubes; furthermore, 10 CFR 50.44(a) addresses requirements to control hydrogen generated by Zircaloy fuel after a postulated LOCA. Since some of the cladding the licensee proposed to use in these lead test assemblies falls outside the definition of Zircaloy, the Commission, on its own initiative, took into consideration exemptions from 10 CFR 50.44, 10 CFR 50.46, and appendix K to 10 CFR part 50. The Commission believes that special circumstances exist since application of the rule in this case would not achieve the underlying purpose of the rule for those test assemblies. The underlying purpose of 10 CFR 50.46 and appendix K to 10 CFR part 50 is to establish requirements for emergency core cooling systems. The underlying purpose of 10 CFR 50.44 is to control hydrogen generated by the metal/water reaction after a postulated LOCA, regardless of whether that metal is Zircaloy or Zirlo. The licensee has addressed the safety impact of installing these assemblies under the provisions of 19 CFR 50.59. The staff has evaluated use of Zirlo in its Safety Evaluations regarding Westinghouse Topical Report WCAP-12610 dated July 1, 1991, and October 9, 1991. These evaluations concluded that facilities can continue to comply with the purpose of the appropriate regulations with Zirlo clad fuel. Therefore, the underlying purpose of the rule has been fulfilled.

Environmental Impacts of the Proposed Action

With regard to potential radiological impacts to the general public, the exemption under consideration involves features located entirely within the restricted area as defined in 10 CFR part 20. It does not affect the potential for radiological accidents and does not affect radiological plant effluents. The test fuel assemblies meet the same design bases as the fuel that is currently in the reactor. No safety limits have been changed or setpoints altered as a result of the use of these assemblies. The FSAR analyses are bounding for the test assemblies, as well as for the rest of the core. The advanced zirconium-based alloys have been shown through testing to perform satisfactorily under conditions representative of a reactor environment and the material properties of Zirlo and Zircaloy are very similar. The exemption under consideration, therefore, does not affect the consequences of radiological accidents; consequently, the Commission concludes that there are no significant radiological impacts associated with the exemption.

With regard to the potential environmental impact associated with the transportation of the Zirlo clad fuel assemblies, the advanced cladding has no impact on previous assessments determined in accordance with 10 CFR 51.52.

With regard to non-radiological impacts, the exemption under consideration does not affect non-radiological plant effluents and has no other environmental impact. Therefore, the Commission concludes that there are no significant non-radiological environmental impacts associated with the exemption.

Alternative to the Proposed Action

Since the Commission has concluded that there are no significant environmental effects that would result from the proposed action, any alternatives to this exemption will have either no significantly different environmental impact or greater environmental impact. The principal alternative would be to not allow the licensee to install the lead test assemblies. This would not reduce environmental impacts as a result of plant operations and would have no regulatory technical basis.

Alternative Use of Resources

This action does not involve the use of resources not previously considered in the "Final Environmental Statement Related to the Operation of Three Mile

Island Nuclear Station, Units 1 and 2," dated December 1972.

Agencies and Persons Consulted

The 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 exemption under consideration.

Based on the foregoing environmental assessment, the staff concludes that the proposed action will not have a significant effect on the quality of the human environment.

Dated at Rockville, Maryland this 7th day of November 1991.

For the Nuclear Regulatory Commission.

John F. Stolz,

Director, Project Directorate I-4, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 91-27376 Filed 11-13-91; 8:45 am]

BILLING CODE 7590-01-M

[Docket Nos. 030-00883; 030-06991; 030-00356; 070-00343; License Nos. 29-05218-28; 29-05218-29; 29-05218-30; SNM-314; EA No. 91-070]

Rutgers University; Order Imposing Civil Monetary Penalty

I

In the Matter of Rutgers University, New Brunswick, New Jersey 08903.

Rutgers University (Licensee) is the holder of Byproduct Material Licenses Nos. 29-05218-28, 29-05218-29, 29-05218-30 and Special Nuclear Material License No. 314 last renewed by the Nuclear Regulatory Commission (NRC or Commission) on January 18, 1990; February 13, 1987; March 20, 1990; and January 3, 1990, respectively. The licenses, in accordance with the conditions specified therein, authorize the Licensee to use byproduct materials for research and development, calibration of instruments, and in gauging devices; for irradiation studies; for storage only of a cobalt-60 irradiation source; and for calibration of instruments and research and development using special nuclear materials.

II

An inspection of the Licensee's activities was conducted during May 21-24, 1991. The results of the inspection indicated that the Licensee had not conducted its activities in full compliance with NRC requirements. A written Notice of Violation and Proposed Imposition of Civil Penalty (Notice) was served upon the Licensee by letter dated July 1, 1991. The Notice states the nature of the violations, the provision of the NRC's requirements that the Licensee had violated, and the amount of the civil penalty proposed for the violations. The Licensee responded to the Notice in two letters both dated July 29, 1991. In its response, the Licensee denied Violations A, C, D.2, D.4 in part, D.5, and G, and example E.1 of Violation E. The Licensee also stated that with respect to Violation F, it was unable to verify compliance. In addition, the Licensee protested the classification of the violations in the aggregate at Severity Level III and requested that the civil penalty, which was assessed equally among the eleven violations, be withdrawn.

III

After consideration of the Licensee's response and the statements of fact, explanation, and argument for mitigation contained therein, the NRC staff has determined, as set forth in the Appendix to this Order, that the violations, with the exception of Violation C and example E.1 of Violation E, occurred as stated; that the penalty proposed for the violations designated in the Notice should be mitigated by $715 based on the withdrawal of Violation C and example E.1 of Violation E.; and that a civil penalty of $5,535 should be imposed.

IV

In view of the foregoing and pursuant to section 234 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. 2282, and 10 CFR 2.205, *It is hereby ordered* That:

The Licensee pay a civil penalty in the amount of $5,535 within 30 days of the date of this Order, by check, draft, money order, or electronic transfer, payable to the Treasurer of the United States and mailed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, DC 20555.

The Licensee may request a hearing within 30 days of the date of this Order. A request for a hearing should be clearly marked as a "Request for an Enforcement Hearing" and shall be addressed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, DC 20555. Copies also shall be sent to the Assistant General Counsel for Hearings and Enforcement at the same address and to the Regional Administrator, NRC Region I, 475 Allendale Road, King of Prussia, Pennsylvania 19406.

If a hearing is requested, the Commission will issue an Order designating the time and place of the hearing. If the Licensee fails to request a hearing within 30 days of the date of this Order, the provisions of this Order shall be effective without further proceedings. If payment has not been made by that time, the matter may be referred to the Attorney General for collection.

In the event the Licensee requests a hearing as provided above, the issues to be considered at such hearing shall be:

(a) Whether the Licensee was in violation of the Commission's requirements as set forth in Violations A, D.2, D.4, D.5, F and G in the Notice referenced in Section II above, and

(b) Whether, on the basis of these violations and the violations admitted by the Licensee, this Order should be sustained.

Dated at Rockville, Maryland this 5th day of November 1991.

For the Nuclear Regulatory Commission

Hugh L. Thompson, Jr.,

Deputy Executive Director for Nuclear Materials Safety, Safeguards and Operations Support.

Appendix—Evaluations and Conclusion

On July 1, 1991, a Notice of Violation and Proposed Imposition of Civil Penalty (Notice) was issued for violations identified during an NRC inspection. Rutgers University (licensee) responded to the Notice on July 29, 1991. The licensee denied Violations A, C, D.2, D.4 in part, D.5, and G, and example E.1 of Violation E. The licensee also protested classification of the violations in the aggregate at Severity Level III, and requested that the civil penalty be withdrawn. The NRC's evaluation and conclusion regarding the licensee's requests are as follows:

Restatement of Violation A

10 CFR 20.207(a) requires that licensed material stored in an unrestricted area be secured against unauthorized removal from the place of storage. 10 CFR 20.207(b) requires that licensed materials in an unrestricted area and not in storage be under constant surveillance and immediate control of the licensee. As defined in 10 CFR 20.3(a)(17), an unrestricted area is any area access to which is not controlled by the licensee for the purpose of protection of individuals from exposure to radiation and radioactive materials.

Contrary to the above, at various times between May 21-24, 1991, quantities of licensed material stored in numerous unrestricted areas were not secured against unauthorized removal and were not under constant

surveillance and immediate control of the licensee. The specific cases of unsecured material consisted of:

1. Special Nuclear Material (consisting of uranium 235 (U–235) as 1 gram of uranium oxide) located in an unrestricted area of the Wright-Reiman Building, Laboratory No. 288, Chemistry Department, Busch Campus;

2. Undetermined amounts of licensed materials located in numerous research laboratories on the Busch, Kilmer, and Cook Campuses, unrestricted areas;

3. An unknown quantity of licensed material in a refrigerator located in a corridor outside Laboratory No. 513, Pharmacy Department, Busch Campus, an unrestricted area; and

4. An unknown quantity of licensed material located in two 55-gallon barrels on the REHS loading dock, an unrestricted area.

Summary of Licensee Response

The licensee denies all four examples of this violation. With respect to the first two examples of the violation, the licensee states that it considers these laboratories to be restricted areas in accordance with 10 CFR 20.3(a)(14) because: (1) The campus is isolated from urban areas, (2) warnings are posted on the laboratory door, (3) training of employees warn against entry or work in laboratories without clearance from the Radiation and Environmental Health and Safety (REHS) organization or the laboratory (lab) user, and (4) it would take malicious intent to become exposed to radioisotopes. The licensee states that security of radioisotopes inside restricted areas is emphasized during the training sessions, and this is further scrutinized by the Health/Safety Specialists, who conduct inspections in all University labs, not just those labs using radioisotopes or other licensed material. The licensee contends that these factors provide for control of access to these labs (and other labs) for purposes of protection of individuals from exposure to radiation and radioactive materials. With respect to the third example of the violation, the licensee also considers this corridor to be a restricted area.

With respect to the fourth example of this violation, the licensee states that barrels were mislabeled and did not contain radioactive material, and the contents were below the concentration defined by the NRC Regulation as being licensable.

NRC Evaluation of Licensee Response

With respect to the first two examples of the violation, the NRC disagrees with the statements in the licensee's response that Laboratory No. 288, Chemistry Department, Busch Campus, which contained special nuclear material (Uranium-235), as well as other numerous research laboratories containing licensed materials on the Busch, Kilmer and Cook campuses, were restricted areas on the dates of the inspection. As described in 10 CFR 20.3(a)(14), a restricted area is any area access to which is controlled by the licensee for purposes of protection of individuals from exposure to radiation and radioactive materials. In the cases described in this violation, access to the areas was not controlled on the dates of the inspection. Although the licensee argues that in the case of Laboratory (lab) 288, the lab is isolated from urban areas, that isolation does not provide control of access to the area. In addition, the fact that the laboratory doors were posted does not provide access control to the area; rather, it only provides a warning. Finally, the licensee's statement that it would take malicious intent to become exposed to radioisotopes does not lessen the fact that access to the area was not controlled.

When laboratory doors are not locked or positive access control is not otherwise maintained, and radioactive materials are stored in a hood or within an unlocked room in the lab, that area is considered unrestricted. With respect to Example 1 of this violation, the inspectors gained access to this area through an unsecured door and were not challenged by a student in the lab. The student had no knowledge of hazards in the area or that radioactive materials were located in the hood and in another unlocked room within the laboratory. With respect to Example 2 of the violation, doors to laboratories containing radioactive material were open and unlocked, and no individuals were present in the area to provide constant surveillance or immediate control of radioactive material that was not in storage or not secured. With respect to Example 3 of the violation, the access to the hallway in which the unlocked refrigerator containing licensed material was stored, was not controlled by any means.

With respect to Example 4 of the violation, the licensee provides conflicting information as to the contents of the barrels. On the one hand, the licensee states that the barrels contained no radioactive materials. On the other hand, the licensee implies that radioactive material was present in the barrels but, quoting the licensee, "below the concentration defined by the NRC Regulation as being licensable." Contrary to the licensee's assertion, material that has been received under an NRC license remains licensed material until it has been transferred or disposed of in accordance with NRC regulations. Without further information as to the exact nature of the material, and based on the labeling of the barrels, the NRC finds no basis for retraction of this example of the violation.

Based on the above, the licensee has not provided sufficient information to withdraw any examples of Violation A. Therefore, NRC maintains that the violation occurred as stated in the Notice.

Restatement of Violation C

10 CFR 19.12 requires, in part, that all individuals working in a restricted area be instructed in the precautions or procedures to minimize exposure to radioactive materials, in the purposes and functions of protective devices employed, and in applicable provisions of the Commission's regulations and licenses.

Contrary to the above, as of May 21, 1991, an individual working in Laboratory 288, Chemistry Department, Busch Campus, a restricted area, had not been instructed in the applicable provisions of the Commission's regulations and conditions of the license.

Summary of Licensee Response

The licensee denies this violation, stating that the person identified in the inspection report has never used radioactive isotopes or special nuclear materials. The licensee noted that the individual did attend a Radiation Safety Orientation session on June 4, 1991.

NRC Evaluation of Licensee Response

After further evaluation of this violation, the NRC is withdrawing this violation because Lab 288 was an unrestricted area based on example 1 of Violation A. The NRC notes, however, that 10 CFR 19.12 requires instruction of *all* workers who are working in or frequenting a restricted area, whether they use licensed materials or not. Thus, if the individual had actually worked in or frequented a restricted area without appropriate training, the citation would have been valid. Since the civil penalty was assessed equally among 11 violations, NRC is reducing the civil penalty by 1/11 or $570 based on the withdrawal of Violation C.

Restatement of Violation D.2

Condition 15 of License No. SNM–314 and Condition 24 of License No. 29–05218–28 require, in part, that licensed material be possessed and used in accordance with the statements,

representations, and procedures contained in a letter dated July 11, 1989, and its enclosed Radiation Safety Guide, Seventh Edition, July 1989 (Guide).

Appendix 4 of this Guide, requires, in part, that an Authoree (authorized user) comply with the specific conditions and limitations of his/her authorization.

Appendix 4 Item 5 of this Guide, states, in part, that each user should maintain a radioisotope log to record the receipt, use, and disposal of all radioisotopes he receives, and requires that REHS keep other records required by federal and state law.

Contrary to the above,

a. On May 21, 1991, the Authoree of Authorization No. 1222, which limits the possession of iodine–125 (I–125) to 20 millicuries at any one time, did not comply with the limitations of his authorization, in that the amount of I–125 on hand exceeded 20 millicuries. Specifically, records indicated that during April 1991, the Authoree possessed 25.9 millicuries of I–125, and had received three, 10 millicurie orders of I–125 during April 1991; and

b. as of May 21–24, 1991, computer records of receipt, transfer and disposal of radioisotopes maintained by REHS indicated that several other Authorees had materials on hand that exceeded the limits of their specific authorizations.

Summary of Licensee Response

The licensee denies both examples of Violation D.2.

With respect to the first example, the licensee indicates that its computer records indicated an over-possession that, in fact, did not exist. The licensee states that the activity possessed by the authoree at the time of the inspection was within authorized limits due to the fact that the waste records had not been entered into the program and thus subtracted from the total inventory. The licensee also states that the authoree had ordered three shipments of 10 mCi of I–125, and REHS computer records indicated these had been delivered; however, in fact, two of these deliveries contained no activity. The licensee states that its computer records had not been updated to reflect the appropriate activity in the laboratory.

With respect to the second example of the violation, the licensee states that in these cases, its computer records are used only as an internal control procedure. The licensee maintains that at the time of the inspection, its procedure was to not deliver radioisotopes to an authoree if the delivery would create possession above authorized limits, unless the authoree was contacted and advised the REHS that REHS' computer record was inaccurate or unless REHS had received a written request and had agreed to increase the authorization limit before delivery.

NRC Evaluation of Licensee Response

With respect to the first example (D.2.a) of the violation, the inspectors found that one Authoree, who was authorized to possess 20 millicuries of iodine-125, had 25.9 millicuries of iodine-125 on hand as of April 1, 1991. The licensee has provided no specific information, such as the Authoree's records of receipt, use and disposal, to refute this finding. Concerning the three subsequent shipments of 10 millicuries each of iodine-125 to the authoree during April 1991, NRC has verified the licensee's statement that two of these deliveries, in fact, contained no activity. However, this does not change the fact that the Authoree was in excess of his possession limit before any of the three shipments occurred. In the absence of records to the contrary, NRC considers this to be a valid example.

With respect to the second example (D.2.b) of this violation, the licensee's computer records indicated that other Authorees also exceeded their possession limits. For example, as noted in the inspection report, Authoree No. 1443 was authorized to possess 20 millicuries of tritium (H–3), but ordered and received 25 millicuries of H–3. The inspectors verified that this example involved actual physical possession of 25 millicuries of H–3 on the part of the Authoree. Further, the licensee has provided no specific information, such as the Authoree's records of receipt, use, and disposal, to refute this finding. Therefore, NRC considers this to be a valid example.

Restatement of Violation D.4

Condition 15 of License No. SNM–314 and Condition 24 of License No. 29–05218–28 require, in part, that licensed material be possessed and used in accordance with the statements, representations, and procedures contained in a letter dated July 11, 1989, and its enclosed Radiation Safety Guide, Seventh Edition, July 1989 (Guide).

Appendix 4 of this Guide requires, in part, that an Authoree comply with the procedures and practices outlined in this appendix.

Appendix 4, Item 12, of this Guide lists the "Rules for Working with Radioactive Materials," i.e., routine procedures.

Rule 1 states that eating, drinking, smoking, or using cosmetics is not permitted in laboratories using radioactive materials.

Rule 4 states that personnel always use rubber or plastic gloves when handling radioisotopes, and that lab coats shall be worn in the laboratory and left in the laboratory.

Rule 13 states that personnel never keep or store beverages or foods in Radioisotope labs, especially in refrigerators or freezers with radioisotopes.

Contrary to the above, during May 21–24, 1991, evidence of eating and drinking was observed in numerous laboratories using radioactive materials (the evidence included the presence of a coffee maker, food and soda cans); evidence of smoking (namely, cigarette packs, and trays with cigarette butts and ashes) was observed in one laboratory in Building 4127, REHS Department, Kilmer Campus; the majority of the persons observed working in these laboratories were not wearing lab coats; and refrigerators containing radioactive material in several of these posted laboratories also contained food or beverages.

This is a repeat violation with respect to Rule 1.

Summary of Licensee Response

The licensee admits the violation as it applies to Rule 13, but denies those aspects of the violation as they apply to Rule 1 and Rule 4.

With respect to Rule 1, the licensee states that no one was observed eating, drinking, smoking or using cosmetics in the laboratory. The licensee notes, however, that action is being taken to eliminate the circumstances that may indicate that the above activities took place, including (1) increased emphasis on the prohibition of eating, drinking, and smoking in laboratories in future Radiation Notes issued to all authorees throughout the year, (2) more frequent inspections by our Health/Safety Specialists, and (3) greater emphasis during training sessions. With respect to Rule 4, the licensee indicates that many people do not wear lab coats in radioisotope laboratories, contending that the Radiation Safety Officer never intended to require that all radioisotope workers use laboratory coats; rather, it was intended to require that where laboratory coats were worn, they should not be worn outside the laboratory.

NRC Evaluation of Licensee Response

As to Rule 1, the NRC agrees with the licensee's statement that no one was observed eating, drinking, or smoking in laboratories using radioactive materials. However, physical evidence was observed in numerous laboratories, including the presence of a coffee

maker, food and soda cans, and at least two individuals admitted to the inspector that they did in fact eat in these laboratories. Therefore, the NRC has concluded that eating and drinking in the labs did occur. Cigarette packages, and trays with cigarette butts and ashes were found in a laboratory in Building 4127, REHS Department, Kilmer Campus which indicates that smoking did occur.

As to Rule 4, the rule clearly states that laboratory coats shall be worn in the laboratory. This rule is part of the conditions on which the license was granted; consequently, the licensee may not unilaterally relax its commitment for wearing laboratory coats without amendment of its license. Therefore, the NRC maintains this example of the violation occurred as stated.

Restatement of Violation D.5

Condition 15 of License No. SNM–314 and Condition 24 of License No. 29–05218–28 require, in part, that licensed material be possessed and used in accordance with the statements, representations, and procedures contained in a letter dated July 11, 1989, and its enclosed Radiation Safety Guide, Seventh Edition, July 1989 (Guide).

Section 2.3 of this Guide requires, in part, that an Authoree, a person permitted to use radiation at Rutgers University by virtue of a written authorization, has the primary responsibility for the radiation safety associated with the use of the source of radiation, and must also supervise the use of his/her sources of radiation to conform to all safety conditions of his/her authorization and those of the Guide. Section 2.4 of this Guide requires that Supervised Users (i.e., a user that is not specifically authorized) use sources of radiation only under the supervision of an Authoree.

Contrary to the above, as of May 24, 1991, an Authoree did not supervise an individual using the sources of radiation under written Authorization No. 1422. Specifically, the Authoree left for a year of sabbatical leave approximately 2 months prior to the date of the inspection, and the individual Supervised User continued to use radioisotopes without the Authoree's supervision.

Summary of Licensee Response

The licensee denies this violation, claiming that "supervision" has been interpreted differently by the NRC and the licensee. The licensee does not believe that supervision requires the continual presence of the authoree for radioisotopes to be used.

NRC Evaluation of Licensee Response

The NRC agrees that "supervision" does not require the continual physical presence of the Authoree. However, supervisory responsibility does require, as defined in the preamble to Appendix 4 of the licensee's Radiation Safety Guide, that the Authoree "ascertain that all persons who use radioisotopes under the coverage of his/her authorization are supervised, properly trained and experienced, aware of the attendant radiation hazards, and observe the procedures of this Guide." Information gathered from the user in the Authoree's laboratory during the inspection, indicated that the Authoree left on sabbatical without providing for any supervision of the users covered by his/her authorization, and without either informing the RSO, or arranging for another Authoree to provide supervision for his/her users. Therefore, this Authoree could not ascertain that the users under his/her authorization were observing the procedures in the licensee's Radiation Safety Guide. The statements made by the licensee in its Radiation Safety Manual define what constitutes "supervision" and, on this basis, the NRC maintains the violation occurred as stated.

Restatement of Violation E

10 CFR 71.5(a) requires that each licensee who transports licensed material outside the confines of its facility or delivers licensed material to a carrier for transport comply with the applicable requirements of the regulations appropriate to the mode of transport of the Department of Transportation (DOT) in 49 CFR parts 170–189.

49 CFR 177.817(a) requires that a carrier may not transport a hazardous material unless it is accompanied by a shipping paper that is prepared in a accordance with §§ 172.200, 172.201, 172.202, and 172.203 of this subchapter.

49 CFR 172.403 requires that each package of radioactive material, unless excepted from labeling by Sections 143.421 through 173.425 of this subchapter, be labeled, as appropriate, with a RADIOACTIVE WHITE-I, a RADIOACTIVE YELLOW-II, or a RADIOACTIVE YELLOW-III label.

49 CFR 173.411 specifies that the general design requirements for packages containing radioactive materials. 49 CFR 173.412 specifies additional design requirements for Type A packages.

49 CFR 173.415(a) requires, in part, that each shipper of a Specification 7A package must maintain on file for at least one year after the latest shipment, a complete documentation of tests and an engineering evaluation or comparative data showing that the construction methods, packaging design and materials of construction comply with Specification 7A.

49 CFR 178.350–3 requires that packaging that meets Specification 7A be marked "USA DOT 7A TYPE A" on the outside of each package.

Contrary to the above, prior to May 21, 1991,

1. The licensee, acting as a carrier, transported packages of radioactive materials over public highways from Building 4127, Kilmer Campus, to the various Authorees throughout the campuses of Rutgers University, without being accompanied by shipping papers;

2. The licensee received packages of radioactive materials from suppliers which it opened, checked, removed from the original packaging, and then repackaged in a single, styrofoam box, which was not labelled with the appropriate RADIOACTIVE WHITE I, YELLOW–II OR YELLOW III label;

3. The licensee did not have on file documentation and an engineering evaluation or comparative data showing that a styrofoam box (which was used to transport radioactive material) met Specification 7A packaging requirements; and

4. The licensee did not mark the unlabeled, unevaluated styrofoam box as "USA DOT 7A Type A" on the outside of the package.

Summary of Licensee Response

The licensee admits examples E.2—E.4, but denies example E.1, stating that all shipping papers accompanied each transport. The licensee notes that the papers are kept by the individual authoree as demonstrated to the inspectors during their laboratory walk-through.

NRC Evaluation of Licensee Response

The NRC has reviewed the licensee's contention and agrees that all shipping papers did accompany the licensee's transport of radioactive materials. Therefore, the NRC is withdrawing this example of the violation. Since Violation E is one of 11 violations and contained four examples, the civil penalty is being reduced by 1/44, or $145, based on the withdrawal of example E.1.

Restatement of Violation F

10 CFR 19.11 (a) and (b) requires, in part, that the licensee post current copies of part 19, part 20, the license, license conditions, documents incorporated into the license, license amendments, and operating procedures,

or that a notice be posted describing these documents and where they may be examined. 10 CFR 19.11(d) requires, in part, that documents, notices or forms appear in a sufficient number of places to permit individuals engaged in licensed activities to observe them on the way to or from any particular licensed activity location to which the document applies.

Contrary to the above, as of May 21–24, 1991, the licensee did not post the documents or the notices in a sufficient number of places (some laboratories did not have any of the documents posted, while some other laboratories had only some of the required documents posted) to permit individuals engaged in licensed activities to observe them on the way to or from any particular licensed activity location.

Summary of Licensee Response

While the licensee does not specifically deny this violation, the licensee maintains that there were no specific locations noted in the inspection report, and therefore, it was unable to verify compliance with this violation. The licensee also states that determining compliance with this regulation requires judgment on the traffic plan in the building as well as the specific poster location. The licensee states that at times, due to vandalism or damage to the notices, some individual labs may not have posters; however, there are typically multiple postings of all required notices in common areas of the buildings on campus.

NRC Evaluation of Licensee Response

At the time of the inspection, the inspectors determined that the subject documents did not appear in a sufficient number of places in the buildings on the Busch, Kilmer, and Cook campuses so as to permit individuals engaged in licensed activities to observe them on the way to or from the particular licensed activity to which the document applies. For example, as pointed out to the licensee's Health Physicist during the inspection, in Lab B148 Nelson Building, Busch Campus; Lab 288, Chemistry, Busch Campus; CABM Lab 124, Busch Campus; and on either end of the corridor from Lab 513, Pharmacy; there were either no postings or the posting was not adequate to meet the requirement. The inspectors noted that in some laboratories using licensed material, no documents were posted, while in others, only some of the required documents were posted. Therefore, the NRC maintains that the violation occurred as stated in the Notice.

Restatement of Violation G

10 CFR 20.401(b) requires, in part, that the licensee maintain records in the same units used in part 20, showing results of surveys required by 10 CFR 20.201(b).

10 CFR 20.5 requires, in part, that units of radioactivity for purposes of the regulations in Part 20 be measured in terms of disintegrations per minute or in curies.

Contrary to the above, as of May 21–24, 1991, the licensee did not maintain iodine-125 bioassay records of surveys made to assure compliance with 10 CFR 20.103(b) in disintegrations per minute or curie units used in part 20, but rather in counts per minute.

This is a repeat violation.

Summary of Licensee Response

The licensee denies the violation stating that its procedures for documenting records require activity to be recorded only if it exceeds 10 nanocuries (which, apparently, due to the counting efficiency of the licensee's equipment, corresponds to 850 counts per minute).

NRC Evaluation of Licensee Response

As Condition 24 of License No. 29–05218–28 clearly states, the NRC's regulations govern the licensee's statements, representations, and procedures unless those statements, representations, and procedures are more restrictive than the regulations. The licensee maintained its records of bioassays in counts per minute, rather than disintegrations per minute. Counts per minute is not a unit allowed in Part 20 of the Commission's regulations. The licensee's response provides no basis for withdrawal of the violation. Therefore, the NRC maintains that the violation occurred as stated in the Notice.

Summary of Licensee Response Protesting Classification of the Violations in the Aggregate at Severity Level III and Requesting Revocation of the Civil Penalty

The licensee protests the civil penalty and the classification of the violations in the aggregate at Severity Level III, stating that: (1) The violations in no way jeopardized the health and safety of the people in and outside the University, and (2) review of the NMSS Licensee Newsletter indicates that fines of the magnitude of the civil penalty assessed in this case are assigned to incidents where there is a risk to the health of employees and/or the general public, such as loss of high activity sources, release of radioactivity to the environment above the established limit, overexposure of patients or personnel, etc. The licensee also stated that it has a 30 year impeccable record in radiation safety, as documented by NRC inspections.

The licensee, in disputing the classification of the violations in the aggregate at Severity Level III, also states that (1) the Rutgers' Radiation Safety Program did not suffer from a lack of management attention or oversight and it is committed to ALARA; (2) in 1990, management reorganized its Health and Safety Department, and (3) contrary to NRC claims, it has plans for resolving concerns with evidence of eating, drinking, and smoking in laboratories, and wearing of lab coats (the licensee states that in the future, all rules, including the eating, drinking and smoking issues, will be enforced through formal written notification of the authoree and his supervisor of the implications of rule violations noted by the licensee's staff during inspections, and if there is continued disregard of rules, the Radiation Safety Committee will act to suspend the authorization of the offender). The licensee also opines that the NRC inspection found only relatively minor violations and did not give due weight to the strengths of the Licensee's Radiation Safety program and its overall compliance with the performance standards of the NRC regulations.

NRC Evaluation of Licensee Response

The NRC disagrees with the licensee's assertion that the violations did not constitute a Severity Level III problem. The NRC views the cumulative effect of the cited violations and the lack of management attention and control that allowed the violations to occur and continue undetected and uncorrected to be more significant from a safety perspective than the individual violations if they were viewed independently.

Absent specific references for the cases that the licensee is referring to, and an understanding of how the escalation and mitigation factors in the Enforcement Policy were applied in those cases, it is not possible to address

the licensee's contention that the magnitude of the civil penalty proposed in this case is unnecessarily large when compared to other civil penalties noted in the NMSS newsletter. However, civil penalties are normally assessed in accordance with the examples, tables, and guidance in the Enforcement Policy, as is true for the civil penalty in the case at hand.

The NRC agrees that the record of the licensee's performance prior to the 1987 inspection was good. However, in accordance with Section V.B.3 of the Enforcement Policy, violations that occurred within the period covered by the previous two inspections were considered in evaluating the licensee's past performance.

The NRC agrees that, although the licensee denied the aspects of Violation D.4 that applied to Rule 1, the licensee's written response, dated July 29, 1991, does address corrective actions for eating, drinking and smoking in laboratories. However, as discussed in the Enforcement Policy, Section V.B.2, the NRC assesses corrective action based on, among other things, timeliness and degree of licensee initiative. In this case, at the Enforcement Conference, which took place June 12, 1991, the licensee did not have a plan of corrective action for the violation of this Rule, or Rule 4 of Violation D.4, or the security of licensed materials in unrestricted areas (Violation A). Further, the licensee did not describe its corrective action until after the issue was raised again in NRC's July 1, 1991, Notice.

Therefore, the licensee's corrective actions were judged to be neither prompt nor comprehensive.

NRC Conclusion

Based on the NRC's evaluation of the licensee's response, the NRC has concluded that the violations occurred as stated in the Notice with the exception of Violation C and example E.1 of Violation E; that the licensee has provided no information to alter the NRC's view that the violations in the aggregate are of significant regulatory concern and warrant classification at Severity Level III. However, based on the withdrawal of Violation C and example E.1 of Violation E, a reduction of the civil penalty in the amount of $715 is warranted. Consequently, a civil penalty in the amount of $5,535 should be imposed.

[FR Doc. 91-27375 Filed 11-13-91; 8:45 am]

BILLING CODE 7590-01-M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Trade Policy Staff Committee (TPSC); Generalized System of Preferences (GSP); Notice of Special Expedited Review To Consider Request To Remove Malaysia From the List of Countries Eligible for Duty-Free Treatment for Vulcanized Rubber Thread and Cord Under the GSP and Deadlines for Public Comment

AGENCY: Office of the United States Trade Representative.

ACTION: Initiation of expedited GSP review and solicitation of public comment with respect to expedited consideration of request to remove Malaysia from the list of beneficiary countries eligible for duty-free treatment on vulcanized rubber thread and cord.

SUMMARY: On June 1, 1991, North American Rubber Thread Company, Inc. ("North American") filed a petition with the GSP Subcommittee of the TPSC as part of the 1991 GSP Annual Review. The petition sought the removal from duty-free GSP status of Malaysian rubber thread imports classified in subheading 4007.00.00 of the Harmonized Tariff Schedule of the United States (HTS). On August 26, 1991, the TPSC announced that the petition to remove Malaysian rubber thread had been accepted for further review (see case 91-48, 56 FR 42080). On October 4, 1991, North American requested expedited consideration of its annual review petition pursuant to 15 CFR 2007.3(b)(1990). The TPSC has decided to accept the request for expedited consideration of the petition. Accordingly, this notice initiates an expedited review to consider the request from North American to remove GSP duty-free treatment from vulcanized rubber thread and cord from Malaysia provided for in HTS subheading 4007.00.00.

The GSP Subcommittee of the TPSC invites submissions in support of or in opposition to the case that is the subject of this notice. All such submissions should conform to 15 CFR 2007.0 et. seq.

Because the removal of Malaysian rubber thread in HTS subheading 4007.00.00 was considered in public hearings on October 1-4, 1991 under the 1991 GSP Annual Review (see case 91-48, 56 FR 42080), a public hearing will not be held in connection with this expedited review.

Interested parties may submit written briefs or statements in fourteen copies, in English, in connection with the article and country under consideration, provided that such submissions are filed by December 11, 1991. This will be the only opportunity to submit written comments.

All submissions should be submitted in fourteen copies, in English, to the Chairman of the GSP Subcommittee of the Trade Policy Staff Committee, 600 17th Street, NW., room 517, Washington, DC 20506. Information submitted in connection with the expedited review will be subject to public inspection by appointment with the staff of the USTR public reading room, except for information granted "business confidential" status pursuant to 15 CFR 2003.6 and other qualifying information submitted in confidence pursuant to 15 CFR 2007.7. Briefs or statements must be submitted in fourteen copies in English. If the document contains business confidential information, fourteen copies of the confidential version must be submitted. In addition, the document containing confidential information should be clearly marked "confidential" at the top and bottom of each page of the document. The version that does not contain business confidential information (the public version) should also be clearly marked at the top and bottom of every page (either "public version" or "non-confidential").

All communications with regard to this review should be addressed to the GSP Subcommittee, Office to the U.S. Trade Representative, 600 17th Street, NW., Washington, DC 20506. Questions may be directed to the GSP Information Center at (202) 395-6971.

David Weiss,

Chairman, Trade Policy Staff Committee.

[FR Doc. 91-27555 Filed 11-13-91; 8:45 am]

BILLING CODE 3190-01-M

PENSION BENEFIT GUARANTY CORPORATION

Pendency of Request for Exemption From the Bond/Escrow Requirement Relating to the Sale of Assets by an Employer Who Contributes to a Multiemployer Plan; Ryan-Walsh, Inc.

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of pendency of request.

SUMMARY: This notice advises interested persons that the Pension Benefit Guaranty Corporation has received a request from Ryan-Walsh, Inc. for an exemption from the bond/escrow requirement of section 4204(a)(1)(B) of the Employee Retirement Income Security Act of 1974, as amended. Section 4204(a)(1) provides that the sale of assets by an employer that contributes to a multiemployer pension plan will not result in a complete or partial withdrawal from the plan if

certain conditions are met. One of these conditions is that the purchaser post a bond or deposit money in escrow for the five-plan-year period beginning after the sale. The PBGC is authorized to grant individual and class exemptions from this requirement. Before granting an exemption the PBGC is required to give interested persons an opportunity to comment on the exemption request. The purpose of this notice is to advise interested persons of the exemption request and solicit their views on it.

DATES: Comments must be submitted on or before December 30, 1991.

ADDRESSES: All written comments (at least three copies) should be addressed to: Office of General Counsel (22500), Pension Benefit Guaranty Corporation, 2020 K Street, NW., Washington, DC 20006. The non-confidential portions of the request for an exemption and the comments received will be available for public inspection at the PBGC Communications and Public Affairs Department, suite 7100, at the above address, between the hours of 9 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Jeffrey S. Hops, Office of General Counsel (22500), Pension Benefit Guaranty Corporation, 2020 K Street, NW., Washington, DC 20006; telephone 202–778–8824 (202–956–5059 for TTY and TDD). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION:

Background

Section 4204 of the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980, ("ERISA" or "the Act"), provides that a bona fide arm's-length sale of assets of a contributing employer to an unrelated party will not result in a withdrawal if three conditions are met. These conditions, enumerated in section 4204(a)(1)(A)–(C), are that—

(A) The purchaser has an obligation to contribute to the plan with respect to the operations for substantially the same number of contribution base units for which the seller was obligated to contribute;

(B) The purchaser obtains a bond or places an amount in escrow, for a period of five plan years after the sale, in an amount equal to the greater of the seller's average required annual contribution to the plan for the three plan years preceding the year in which the sale occurred or the seller's required annual contribution for the plan year preceding the year in which the sale occurred (the amount of the bond or escrow is doubled if the plan is in reorganization in the year in which the sale occurred); and

(C) The contract of sale provides that if the purchaser withdraws from the plan within the first five plan years beginning after the sale and fails to pay any of its liability to the plan, the seller shall be secondarily liable for the liability the seller would have had but for section 4204.

The bond or escrow described above is payable to the plan if the purchaser withdraws from the plan or fails to make any required contributions to the plan within the first five plan years beginning after the sale.

Additionally, section 4204(b)(1) provides that if a sale of assets is covered by section 4204, the purchaser assumes by operation of law the contribution record of the seller for the plan year in which the sale occurred and the preceding four plan years.

Section 4204(c) of ERISA authorizes the Pension Benefit Guaranty Corporation ("PGBC") to grant individual or class variances or exemptions from the purchaser's bond/escrow requirement of section 4204(a)(1)(B) when warranted. The legislative history of section 4204 indicates a congressional intent that the sales rules be administered in a manner that assures protection of the plan with the least practicable intrusion into normal business transactions. Senate Committee on Labor and Human Resources, 96th Cong., 2nd Sess., S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Considerations 16 (Comm. Print, April 1980); 128 Cong. Rec. S10117 (July 29, 1980). The granting of an exemption or variance from the bond/escrow requirement does not constitute a finding by the PGGC that a particular transaction satisfies the other requirements of section 4204(a)(1). Such questions are to be decided by the plan sponsor in the first instance, and any disputes are to be resolved in arbitration. 29 U.S.C. 1382, 1399, 1401.

Under the PBGC's regulation on variances for sales of assets (29 CFR part 2643), a request for a variance or waiver of the bond/escrow requirement under any of the tests established in the regulation (§§ 2643.12–2643.14) is to be made to the plan in question. The PBGC will consider waiver requests only when the request is not based on satisfaction of one of the four regulatory tests or when the parties assert that the financial information necessary to show satisfaction of one of the regulatory tests is privileged or confidential financial information with the meaning of exception 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4).

Under § 2643.3 of the regulation, the PBGC shall approve a request for a variance or exemption if it determines that approval of the request is warranted, in that it—

(1) Would more effectively or equitably carry out the purposes of title IV of the Act; and

(2) Would not significantly increase the risk of financial loss to the plan.

Section 4204(c) of ERISA and § 2643.3(b) of the regulation require the PBGC to publish a notice of the pendency of a request for a variance or exemption in the **Federal Register**, and to provide interested parties with an opportunity to comment on the proposed variance or exemption.

The Request

The PBGC has received a request from Ryan-Walsh, Inc. ("the Buyer") for an exemption from the bond/escrow requirement of section 4204(a)(1)(B) as it applies to the purchase of assets of the Wilmington Shipping Co. ("the Seller") relating to the Seller's stevedoring operations at Wilmington and Morehead City, NC. In support of the request, the Buyer represents, among other things, that:

1. Effective July 1, 1991, Ryan-Walsh purchased from Wilmington Shipping Co. assets relating to stevedoring operations in Wilmington and Morehead City, North Carolina. The purchase price was about $1 million.

2. Employees at the purchased operations are covered by a multiemployer pension plan, the Employers-I.L.A.-North Carolina Ports Area Pension Plan ("the Plan").

3. The Seller has agreed to be secondarily liable for any withdrawal liability should the Buyer withdraw from the Fund within five years of the sale.

4. The Buyer has subcontracted with the Seller to have the Seller perform the stevedoring work at the operations acquired by the Buyer in the asset sale. Under the subcontract, the Seller has been delegated responsibility for supervising stevedoring labor, paying wages, and making required contributions to the Plan. The subcontract further provides that the Buyer is ultimately responsible for ensuring that the requisite contributions for the purchased operations are made to the Plan.

5. The Seller's potential withdrawal liability is estimated to be $1,869,961.

6. The amount of the bond/escrow that would be required of the Buyer under section 4204(a)(1)(B) is $892,292 (the annual contribution the Seller was required to make to the Plan for the plan

year preceding the plan year in which the sale of assets occurred).

7. The Buyer, which is a wholly-owned subsidiary of Vectura Group, Inc., meets the requirements of both the net income test and net tangible assets test described in 29 CFR 2643.14(a). In support of this assertion, the Buyer submitted a copy of Vectura Group's consolidated financial statements as of December 31, 1990. These financial statements indicate that the net tangible assets of the Buyer's controlled group exceed the estimated withdrawal liability of the Seller, and that the average net income of the Group for the 3 years preceding the sale exceeds 150 percent of the amount of the bond/escrow required under section 4204(a)(1)(B). The Buyer has requested confidential treatment of these statements on the ground they are confidential within the meaning of 5 U.S.C. 552(b)(4).

8. A copy of the request, excluding the consolidated financial statements, was sent to the Plan and to the bargaining representatives of the Seller's employees.

Comments

All interested persons are invited to submit written comments on the pending exemption request to the above address. All comments will be made a part of the record. Comments received, as well as the relevant non-confidential information submitted in support of the request, will be available for public inspection at the address set forth above.

Issued at Washington, DC, on this 6th day of November, 1991.

James B. Lockhart III,

Executive Director.

[FR Doc. 91-27405 Filed 11-13-91; 8:45 am]

BILLING CODE 7708-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-29904; File No. S7-8-90]

Options Price Reporting Authority; Order Approving Proposed Amendments to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information

November 5, 1991.

I. Introduction

On June 17, 1991, the parties to the Plan, collectively referred to as the Options Price Reporting Authority ("OPRA"),[1] for Reporting of Consolidated Options Last Sale Reports and Quotation Information ("Plan"), submitted an amendment to the Plan pursuant to Rule 11Aa3-2 under the Securities Exchange Act of 1934 ("Act").[2] The proposed amendment establishes a fee to be paid by persons who provide back-up facilities to OPRA subscribers, including access to current options market information.

Notice of the original proposed rule change was given in Securities Exchange Act Release No. 29465 (July 26, 1991), 56 FR 34231. The Commission received no comments on the proposal. This order approves the rule change.

II. Description of the Amendment and OPRA Rationale

Persons wishing to provide back-up facilities to OPRA subsribers, including access to current options market information, will be required to enter into a "Back-Up Facility Provider Agreement" and to pay a Back-Up Facility Access Fee and, under certain circumstances, additional device charges.

The purpose of the Back-Up Facility Provider Agreement and related fees is to permit persons to provide back-up facilities to their customers, who are OPRA subscribers, to be used by subscribers in the event the subscribers' own facilities are unavailable as a result of a natural disaster or other calamity. The Back-Up Facility Access Fee is payable by every person whose business is limited to offering back-up facilities to its customers. In addition, a device charge equal to the regular professional subscriber fee must be paid for each device actually used as a back-up facility during any month.

OPRA will implement the Back-Up Facility arrangement upon its approval by the Commission, pursuant to Rule 11Aa3-2(c)(2), by requiring every person who wishes to offer this service to execute a Back-Up Facility Provider Agreement and to pay the fees provided for therein. The Agreement describes the terms and conditions governing the service.

III. Discussion

The Commission finds that the proposed amendment is consistent with the Act and the rules and regulations thereunder applicable to OPRA. Specifically the proposal is appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, or otherwise in the furtherance of the purposes of the Act. The Commission believes that the proposal addresses OPRA's legitimate desire to provide an economical means through which firms can provide back-up facilities.

It Is Therefore Ordered, pursuant to rule 11Aa3-2(c)(2) of the Act, that File No. S7-8-90 be, and hereby is, approved.

For the Commission, by the Division of Market Regulation pursuant to delegated authority. 17 CFR 200.30-3(a)(27).

Jonathan G. Katz,

Secretary.

[FR Doc. 91-27365 Filed 11-13-91; 8:45 am]

BILLING CODE 8010-01-M

[1] OPRA is a registered exclusive securities information processor.

[2] The parties to the Plan are the American Stock Exchange, Inc., Chicago Board Options Exchange, Inc., New York Stock Exchange, Inc., Pacific Stock Exchange, Inc., and Philadelphia Stock Exchange, Inc.

[Release No. 34-29916; File No. SR-NASD-91-56]

Self-Regulatory Organizations; Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Payment of NASDAQ Entry Fees With Listing Application

November 7, 1991.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on October 28, 1991, the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NASD is proposing to amend part IV of Schedule D to the NASD By-Laws to require companies which apply for listing on the NASDAQ Stock Market to pay all entry fees at the time application is made. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

Schedule D

Part IV—Listing Fees The NASDAQ Stock Market—National Market System

A. Entry Fee

1. [Each] *When an* issuer [that] submits an application for inclusion of any *class* of its securities in the National Market System, *it* shall pay *to the Corporation;*

a. A one-time company listing fee of $5,000 (which shall include a $1,000 non-refundable processing fee) [with respect to each application, to be credited against the issuer's entry fee.]

[2. The issuer of each class of security which is listed in the National Market System shall pay to the Corporation:]

[a. Upon initial entry, a one-time original company listing fee of $5,000]; and

b. for each class of security listed, a fee calculated on a graduated rate of $.005 per share for the first 5 million shares, $.0025 per share for each share between 5,000,001 and 15 million, inclusive, and $.001 per share for each share over 15 million, based on the total number of shares outstanding. Entry fees paid by a company for all classes of securities listed on the National Market System, regardless of the date those securities are listed, shall not exceed $50,000 (inclusive of the $5,000 company listing fee).[1]

[3.] *2.* The entry fee shall be based on the total number of outstanding securities of the class to be included in the National Market System as shown in the issuer's most recent periodic report or, in the case of new issues, as shown in the offering circular, required to be filed with the issuer's appropriate regulatory authority and received by the Nasdaq Stock Market.

[4.] *3.* The Board of Governors or its designee[,] may, in its discretion, *defer or* waive all or any part of the entry fee prescribed herein.

4. If the application is withdrawn or is not approved, the entry fee (less the non-refundable processing fee) shall be refunded.

B. Annual Fee

The issuer of each class of [security which] *securities that* is listed in the National Market System shall pay [annually to the Corporation] *to the Corporation* an annual fee [for each such class of security] to be computed as follows with a maximum annual fee of $8,000 per issuer:

a. A $2,000 National Market System participation fee; and,

b. The sum of $500 or $.0005 per share outstanding, whichever is higher, up to a maximum of $6,000 for each [security] *class of securities* listed in the National Market System.[2]

2. The annual fee shall be based on the total number of outstanding securities of the class included in the National Market System as shown in the issuer's most recent periodic report required to be filed with the issuer's appropriate regulatory authority and received by the Nasdaq Stock Market.

3. The Board of Governors[,] or its designee[,] may, in its discretion, *defer or* waive all or any part of the annual fee prescribed herein.

4. If a [security] *class of securities* is removed from the National Market System, that portion of the annual fees for such [security] *class of securities* attributable to the months following the date of removal shall not be refunded.

Regular NASDAQ System

C. Entry Fee

1. [Each] *When an* issuer [that] submits an application for inclusion of any class of its securities in the Regular Nasdaq System, *it* shall pay *to the Corporation:*

a. A one-time company listing fee of $5,000 (which shall include a $1,000 non-refundable processing fee [with respect to each application, to be credited against the issuer's entry fee.]); *and*

[2. The issuer of each class of security which is listed in the Regular Nasdaq System shall pay to the Corporation upon initial entry of any of the issuer's securities into the Regular Nasdaq System a one-time original company listing fee of $5,000. In addition,]

b. For each class of securities listed [in the Regular Nasdaq System, the issuer shall pay an entry] *a* fee to be computed as follows, with a maximum entry fee for all classes of securities listed, regardless of the date those securities are listed, of $10,000 per issuer (inclusive of the $5,000 company listing fee):

(i) Equity Securities—$1,000 or $.001 per share outstanding, whichever is higher. For purposes of this section, the term "equity securities" includes all securities eligible for inclusion in the Regular Nasdaq System not covered by subparagraph (ii) of this section.[3]

(ii) Convertible Debentures—$1,000 or $50 per million dollars face amount of debentures outstanding, whichever is higher.

[3.] *2.* The Board of Governors or its designee[,] may, in its discretion, *defer or* waive all or any part of the entry fee prescribed herein.

[4.] *3.* The entry fee shall be based on the total number of outstanding securities of the class to be included in the Regular Nasdaq System as shown in the issuer's most recent periodic report or, in the case of new issues, as shown in the offering circular, required to be filed with the issuer's appropriate regulatory authority and received by the Nasdaq Stock Market.

4. If the application is withdrawn or is not approved, the entry fee (less the non-refundable processing fee) shall be refunded.

D. Annual Fee

1. The issuer of each class of [security which] *securities that* is listed in the Regular Nasdaq System shall pay [annually to the Corporation] *to the Corporation* an annual fee [for each such class of security] to be computed as follows with a maximum annual fee of $6,000 per issuer;

(i) Equity Securities— $500 or $.0005 per share outstanding, whichever is higher. For purposes of this section, the term "equity securities" includes all securities eligible for inclusion in the Regular Nasdaq System not covered by subparagraph

(ii) [provision] of this section.[4]

(ii) Convertible Debentures— $500 or $25 per million dollars face amount of debentures outstanding, whichever is higher.

2. The annual fee shall be based on the total number of outstanding securities of the class included in the Regular Nasdaq System as shown in the issuer's most recent periodic report required to be filed with the issuer's appropriate regulatory authority and received by the Nasdaq Stock Market.

3. The Board of Governors or its designee[,] may, in its discretion, *defer or* waive all or any part of the annual fee prescribed herein.

4. If a [security] *class of securities* is removed from the Regular Nasdaq System, that portion of the annual fees for such [security] *class of securities* attributable to the months following the date of removal shall not be refunded.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASD included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The NASD currently collects fees from applicants for inclusion in the NASDAQ Stock Market in two steps: First, the $1,000 non-refundable application processing fee; and second, the entry fee, which is collected on or after the company's entry into the system. The NASD has determined that collecting the processing and entry fee at the time an application is submitted would allow issuers entering the NASDAQ Stock Market through a public offering to incorporate the entry fee into the syndicate expenses of the offering. The New York and American Stock Exchanges currently employ a similar process for applicant companies. The NASD has also determined that collecting the processing and entry fees at the time an application is submitted would reduce its administrative burden and avoid the delisting of companies which enter the system but subsequently fail to pay the entry fee.

Accordingly, the NASD is proposing to amend sections A and C, Part IV of Schedule D to the Association's By-Laws to provide that all processing and

[1] For purposes of this part, the term "shares" shall include common and preferred stock, American Depositary Receipts (ADRs), warrants, partnership interests, or any other security listed on the National Market System.

[2] *Id.*

[3] Id. In the case of units, each component, but not the unit itself, shall be considered separately as an "equity security" for fee purposes.

[4] *See supra* notes 1 and 3.

entry fees set forth under those sections must be paid by the applicant at the time an application for inclusion is submitted. The NASD is also proposing to amend sections A and C to add new subsections providing that if an application is withdrawn or not approved, the entry fee, except for the $1,000 non-refundable processing fee, will be refunded. Additionally, the NASD is proposing to amend sections B and D of part IV relating to annual fees to conform the language to that in sections A and C as proposed to be amended.

The NASD believes that the proposed rule change is consistent with the provisions of section 15A(b)(5) of the Act, which requires that the rules of the Association provide for the equitable allocation of reasonable dues, fees, and other charges among issuers and other persons using any facility or system which the Association operates or controls.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASD does not believe that the proposed rule change imposes any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or others

Comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comment

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to the file number in the caption above and should be submitted by December 5, 1991.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Jonathan G. Katz,

Secretary.

[FR Doc. 91-27364 Filed 11-13-91; 8:45 am]

BILLING CODE 8010-01-m

[Release No. 34-29909; File No. SR-PSE-91-35]

Self-Regulatory Organizations; Pacific Stock Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Extending Effectiveness of Ten-Up Pilot Program

November 6, 1991.[1]

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] the Pacific Stock Exchange, Inc. ("PSE" or "Exchange"), on November 1, 1991, filed with the Securities and Exchange Commission ("Commission") a proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The PSE proposes to extend the Exchange's Trading Crowd Firm Disseminated Market Quote ("Ten-Up Rule") pilot program through February 14, 1992.[3] The text of the proposed change is as follows (brackets indicate language to be deleted, italics indicate language to be added):

Rule 6.84

Trading Crowd Firm Disseminated Market Quotes (a) through (e) no change.

(f) This rule is effective May 16, 1990, and shall continue in effect to and including [November 15, 1991] *February 14, 1992.*

Commentary .01 through .04 no change.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In May 1990, the Commission approved the Exchange's Ten-Up Rule on a one-year basis.[4] In June 1991, the Commission approved the Exchange's request to extend the effectiveness of the Ten-Up Rule until November 15, 1991.[5] The PSE is now requesting a three-month extension of the current program through February 14, 1992, in order to complete its assessment of the effectiveness of the program. Upon completion of its evaluation, the PSE will submit a proposal requesting permanent approval of the rule.

The PSE represents that, since its inception, the Ten-Up Rule has enhanced the Exchange's marketplace in several ways. First, the implementation and enforcement of the rule has resulted in greater protection of public investors as they are guaranteed executions of their orders. Second, the program has aided the Exchange in maintaining its competitiveness as a marketplace.

The PSE believes the proposed rule change is consistent with section 6(b)(5) of the Act, in that it promotes just and

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[1] 15 U.S.C. 78s(b)(1) (1982).

[2] 17 CFR 240.19b-4 (1989).

[3] The Exchange's Ten-Up Rule requires PSE trading crowds to provide a depth of ten contracts for all non-broker/dealer customer orders, at the disseminated market quote at the time such orders are announced or displayed at a trading post. See Securities Exchange Act Release No. 28021 (May 16, 1990), 55 FR 21131 (Ten-Up Approval Order).

[4] *Id.*

[5] See Securities Exchange Act Release No. 29325 (June 17, 1991), 56 FR 29300 (Ten-Up Extension Order).

equitable principles of trade and protects the investing public.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes a burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has requested that the proposed rule change be given accelerated approval pursuant to section 19(b)(2) of the Act. The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder, and, in particular, the requirements of sections 6, 11(b), and 11A thereunder, in that it will improve the quality of the PSE's options markets and contribute to better market maker performances. The Ten-Up Rule provides public customers with the assurance of order execution to a minimum depth of ten contracts at the best disseminated bid or offer. This results in better executions of small customer orders by ensuring greater depth to the PSE options markets.[6]

In granting a six-month extension of the effectiveness of the Ten-Up Rule, the Commission directed the Exchange to study the operation of the Ten-Up Rule and its effect, if any, on the PSE's options market.[7] Specifically, the Commission stated that the Exchange should study the effect of the Ten-Up Rule on the speed of execution of trades, its impact on average bid/ask spreads and any increase or decrease in market depth. The Commission also stated its expectation that the Exchange would provide a report to the Commission of its findings on these matters, along with any violations of the Ten-Up Rule and any complaints about its operations, prior to filing a proposal for permanent approval of the Rule. The Exchange represented that it has substantially completed its study and that it will provide the Commission with a report in the near future.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register** because of the importance that the Ten-Up pilot program continue uninterrupted. A three-month extension of the pilot also will provide the PSE with additional time to complete its study of the effectiveness of the Ten-Up Rule in improving the quality of PSE options markets and market maker performance. The PSE's study would be a significant factor in the Commission's analysis of any PSE filing proposing permanent approval of the Ten-Up Rule. The Commission believes, therefore, that granting accelerated approval of the proposed rule change is appropriate and consistent with section 6 of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the PSE. All submissions should refer to File No. SR-PSE-91-35 and should be submitted by December 5, 1991.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[8] that the proposed rule change (File No. SR-PSE-91-35) is approved until February 14, 1992, on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 91-27366 Filed 11-13-91; 8:45 am]

BILLING CODE 8010-01-M

[6] See also, Ten-Up Approval Order, *supra* note 3.

[7] See also, Ten-Up Extension Order, *supra* note 5.

[8] 15 U.S.C. 78s(b)(2) (1982).

[Release No. 34-29908; File No. SR-PHLX-91-36]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amending the PHLX's Schedule of Fees and Charges Respecting Foreign Currency Options Transactions

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on October 21, 1991, the Philadelphia Stock Exchange, Inc. ("PHLX") or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in items I, II, and III below, which items have been prepared by the PHLX. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The PHLX proposes to amend its Schedule of Fees and Charges regarding fees for foreign currency options transactions. A description of the proposed amendments is set forth in Section II.A., below. A copy of the text of the proposed amendments is available in the offices of the PHLX and the Commission.

II. Self-Regulatory Organization's Statement Regarding the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change

Effective November 1, 1991, all foreign currency option floor Customers, Firms, Market Makers, and Specialists will be subject to revision of the Transaction Value Charge, to be renamed the Option Comparison Charge and the Option Transaction Charge.

The new Option Comparison Charge will consist of a flat fee of $.05 per

contract assessed to Customers, Firms and Market Makers. Specialists are exempt. The Option Transaction Charge will be increased for Firms, Market Makers and Specialists to $.23, $.07 and $.07, respectively, and decreased for Customers to $.28.

Volume discounts will be available based upon total Customer and Firm activity per billing period. The discount will apply to the number of contracts executed within the following specified ranges: $.10 reduction per contract for the first 200,000–400,000 contracts per month and $.20 reduction per contract for all contracts over the first 400,000 per month.

The European Currency Unit Option Charges will be subject to similar revisions. The new Option Comparison Charge will consist of a flat fee of $.05 per contract assessed to Customers, Firms and Market Makers. Specialists are exempt. The Option Transaction Charge will be increased for Firms, Market Makers and Specialists to $.25, $.09 and $.09, respectively, and decreased for Customers to $.34.

The purpose of the proposed rule change is to amend the PHLX Schedule of Fees and Charges. The revisions reflect an intention of the PHLX to competitively align Customer fees. In this regard, the revisions constitute an increase in the Firm fee schedule and a reduction in Customer fees. In authorizing the fee changes, the PHLX will substantially eliminate any incentive for firms, under pressure from institutional customers to lower costs, to enter orders for customers as firm orders in order to benefit from differences between fees for each group under the old rate schedule.

Additionally, the old rate schedule required cumbersome calculations to account for the variance in charges in a single billing, *i.e.*, scaled rates per $1,000 based upon premium amount. The new schedule eliminates these calculations by instituting a per contract charge. The PHLX has structured this proposed fee to achieve a revenue neutral simplification of billing for Customers, Firms and Market Makers. This simplification through the institution of a per contract charge will enable brokers to readily ascertain their fees and charges.

The proposed fee schedule creates an incentive for firms with larger volumes of transactions by providing discounts.

The proposed rule change is consistent with section 6(b)(4) of the Act in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The PHLX does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were either received or requested.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule changes establishes or changes a due, fee or other charge imposed by the Exchange, it has become effective pursuant to section 19(b)(3)(A) of the Act and subparagraph (e) of rule 19(b)(4) thereunder. At any time within 60 days of the date of filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to File No. SR–PHLX–91–36 and should be submitted by December 5, 1991.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 91–27367 Filed 11–13–91; 8:45 am]

BILLING CODE 8010–01–M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Pacific Stock Exchange, Inc.

November 7, 1991.

The above named national securities exchange has filed applications with the Securities and Exchange Commission ("Commission") pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and rule 12f–1 thereunder for unlisted trading privileges in the following security:

Jenny Craig, Inc.
Common Stock, $.001 Par Value (File No. 7–7498).

This security is listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before December 2, 1991, written data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 5th Street, N.W., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the application if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 91–27323 Filed 11–13–91; 8:45 am]

BILLING CODE 8010–01–M

[Rel. No. IC–18398; 812–7809]

Robert W. Baird & Co. Inc.; Application

November 6, 1991.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Temporary order and notice of application for permanent order of exemption under the Investment Company Act of 1940 (the "Act").

APPLICANT: Robert W. Baird & Co. Incorporated ("Baird").

RELEVANT ACT SECTION: Exemption from section 9(a) under section 9(c).

SUMMARY OF APPLICATION: Applicant has been granted a temporary, conditional order and has requested a

permanent, conditional order exempting it from the provisions of section 9(a) to relieve it from any ineligibility resulting from applicant's employment of an individual who was convicted of a misdemeanor within the last ten years as a result of the individual's conduct while an employee of a bank.

FILING DATE: The application was filed on October 23, 1991, and was amended on October 29, 1991 and on November 5, 1991.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 2, 1991, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. Applicant, Robert W. Baird & Co. Incorporated, 777 East Wisconsin Avenue, Milwaukee, WI 53202.

FOR FURTHER INFORMATION CONTACT: Elizabeth G. Osterman, Staff Attorney, at (202) 504–2524, or Barry D. Miller, Branch Chief, at (202) 272–3018 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicant's Representations

1. Baird is a registered broker-dealer and registered investment adviser. Baird is a wholly-owned subsidiary of The Regis Group Incorporated, which is a majority-owned subsidiary of The Northwestern Mutual Life Insurance Company.

2. Baird serves as the principal underwriter and sub-adviser for Baird Capital Development Fund, Inc., an open-end, diversified management company with approximately $27 million of total assets on September 30, 1991.

3. Baird serves as the principal underwriter and investment adviser for Baird Blue Chip Fund, Inc., an open-end, diversified management investment company with approximately $47 million of total assets on September 30, 1991.

4. Baird currently employs Gerald M. Falci as a registered representative in Baird's Milwaukee, Wisconsin branch office. Mr. Falci has been employed by Baird since July, 1984.

5. Mr. Falci pleaded guilty to a misdemeanor on July 1, 1988. The violation occurred in 1983 when Mr. Falci was employed as an officer of Heritage Bank, Milwaukee, Wisconsin. It involved Mr. Falci's failure to cause Heritage Bank to file a Currency Transaction Report (IRS Form 4789) with the Internal Revenue Service as required by law in connection with a cash withdrawal from a personal joint savings account. This conduct was unrelated to providing investment advice or acting as depositor or underwriter for any registered investment company. His continuing association with Baird as a registered representative was approved by the New York Stock Exchange, effective on August 31, 1989. The National Association of Securities Dealers concurred in this action.

6. As a result of the conviction described above, Mr. Falci is subject to the provisions of section 9(a)(1) of the Act. The existence of the conviction disables Baird, under section 9(a)(3) of the Act, from acting as an investment adviser or depositor of any registered investment company, or principal underwriter for any registered open-end investment company, registered unit investment trust, or registered face-amount certificate company, unless an exemption is obtained pursuant to section 9(c).

7. Since the conviction described in paragraph 5 above, Mr. Falci has not been convicted of any securities related felony or misdemeanor, enjoined by any court or sanctioned by the SEC, any self-regulatory organization, or any state securities commission.

8. Baird's general counsel and compliance department have reviewed Mr. Falci's employment history and have determined that only one customer complaint has been filed against Mr. Falci since the conviction discussed in paragraph 5 above; a customer complained of lack of service to his account in July, 1988, which complaint was resolved to the customer's satisfaction.

9. Mr. Falci is not employed by any Baird affiliate other than Baird, does not serve in any capacity related to providing investment advice to, or acting as depositor for, any registered investment company, or acting as principal underwriter for any registered open-end investment company, or registered unit investment trust. Mr. Falci does not have any management or supervisory responsibilities.

10. By letter dated October 16, 1991, Baird advised the SEC that Mr. Falci was placed on administrative leave, effective immediately, pending disposition of the relief requested. If temporary relief is granted, Baird will permit Mr. Falci to return to work pending the disposition of the request for permanent relief.

11. Although Baird knew of the existence of Mr. Falci's conviction when it arose, Baird claims not to have become aware of its significance under section 9(a) until the publication of Investment Company Act Release No. 18055 (Mar. 20, 1991).

12. Baird has instructed each of Baird Blue Chip Fund, Inc. and Baird Capital Development Fund to pay the investment advisory and sub-advisory fees due Baird into escrow accounts established with each fund and First Wisconsin Trust Company. Baird also has deposited into such escrow accounts the investment advisory and sub-advisory fees paid to it since July 1, 1990.

13. Baird has had procedures in place for many years to screen for and detect the existence of certain statutory violations. Since the publication of Investment Company Act Release No. 18055, these procedures have been enhanced and include, among other things, notification of Baird's Compliance Department whenever a statutory disqualification is disclosed in an employment application for a prospective employee. Baird has also filed an application (Investment Company File No. 812–7771) with respect to one other employee subject to the ineligibility provisions of section 9(a), which application is pending.

Applicant's Legal Analysis

1. Section 9(a) prohibits, among other things, "any person who within ten years has been convicted of any * * * misdemeanor * * * arising out of such person's conduct as an * * * employee of any * * * bank" from serving or acting in the capacity of "employee, officer, director, member of an advisory board, investment adviser, or depositor of any registered investment company or principal underwriter for any registered open-end company, registered unit investment trust, or registered face-amount certificate company." A company with an employee or other "affiliated person" ineligible to serve in any of these capacities under section 9(a)(1) is similarly disqualified pursuant to section 9(a)(3) from serving in any

such capacity, unless it obtains an exemption under section 9(c).

2. Baird asserts that the strict application of the prohibitions of section 9(a) to Baird is unduly and disproportionately severe and that the conduct of Baird and Mr. Falci has been such as to make it not against the public interest or the protection of investors to grant the requested relief. The requested relief is appropriate because Mr. Falci does not serve in any capacity related to providing investment advice to or acting as depositor for, any registered investment company or acting as principal underwriter for any registered open-end investment company, registered unit investment trust, or registered face-amount certificate company. Further, Mr. Falci has not been subject to any injunction or other criminal or disciplinary action since his conviction, nor, to the best of Baird's knowledge, have any complaints been filed against Mr. Falci with the SEC, any self-regulatory organization or any state securities commission since that time. In addition, Baird is aware of only one customer complaint filed with respect to Mr. Falci, which is described in paragraph 5 of Applicant's Representations.

3. Baird asserts that it would be appropriate to grant the relief on a temporary basis to allow Mr. Falci to continue to perform his duties for Baird pending final disposition of the requested relief.

Conditions to the Relief

1. As a condition to both the temporary and permanent relief, Mr. Falci will not serve in any capacity directly related to providing investment advice to, or acting as depositor for, any registered investment company or acting as principal underwriter for any registered open-end company, registered unit investment trust, or registered face-amount certificate company without making further application to the SEC.

2. As a condition to the temporary relief, Baird will continue to escrow all investment advisory fees and sub-advisory fees payable to it from Baird Blue Chip Fund, Inc. and Baird Capital Development Fund, Inc. as described in the application until the grant of a permanent order.

3. As a condition to the permanent relief, Baird will take the necessary steps to confirm that no other employee is subject to a statutory disqualification.

4. As a condition to the permanent relief, Baird's general counsel will attest that he has reviewed Baird's compliance procedures designed to screen for and detect statutory disqualification, reasonably believes such compliance procedures have been fully implemented, and that such procedures are reasonable and appropriate to prevent persons subject to a statutory disqualification from becoming affiliated with Baird in the future.

Temporary Order

The Commission has considered the matter and finds, under section 9(c) of the Act, that Baird's conduct has been such as not to make it against the public interest or protection of investors to grant a temporary exemption. Accordingly,

It is ordered, under section 9(c) of the Act, that, with respect to the employment of Mr. Falci, Baird is hereby temporarily exempted from the provisions of section 9(a) of the Act for the shorter of 90 days or until final action is taken on the application for an order for a permanent exemption from the provisions of section 9(a).

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 91–27362 Filed 11–13–91; 8:45 am]

BILLING CODE 8010–01–M

DEPARTMENT OF STATE

[Public Notice 1521]

Presidential Task Force on Government International Broadcasting; Change in Meeting Schedule

The Task Force announces that it will meet in executive session on November 18, 1991.

The meeting will take place less than fifteen days from the publication of this notice. It will permit discussion of information received at public meetings and issues discussed at other meetings in time to assure completion of work by the deadline set for the Task Force.

The November 18 meeting will not be open to the public. In accordance with section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. app. I, section 10(d), it has been determined to involve discussion of matters exempt from disclosure under 5 U.S.C. 55b(c)(1). The Task Force will discuss and examine materials properly classified under the terms of Executive Order 12065 of June 28, 1978, and the effect of such materials on the deliberations of the Task Force in carrying out the tasks assigned to it by the President in the White House statement of April 29, 1991 establishing the Task Force.

Dated: November 4, 1991.

C. Edward Dillary,

Executive Director, Task Force on U.S. Government International Broadcasting.

[FR Doc. 91–27317 Filed 11–13–91; 8:45 am]

BILLING CODE 4710–01–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: SR 522, SR 9 to SR 2, Snohomish County, WA

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an environmental impact statement (EIS) will be prepared for a proposed highway project in Snohomish County, Washington.

FOR FURTHER INFORMATION CONTACT: Barry F. Morehead, Federal Highway Administration, Evergreen Plaza Building, 711 South Capitol Way, suite 501, Olympia, Washington 98501, Telephone: (206) 753–2120; E.R. Burch, State Design Engineer, Department of Transportation, Transportation Building, Olympia, Washington 98504, telephone: (206) 753–6141; or Ronald Q. Anderson, District Administrator, Washington State Department of Transportation, District 1, 15325 SE 30th Place, Bellevue, Washington 98007–6538, Telephone: (206) 764–4020.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Washington State Department of Transportation, will prepare an EIS on a proposal to widen approximately 10 miles of State Route (SR) 522 between the cities of Woodinville and Monroe (SR 9 to SR 2).

Improvements to the corridor are needed to provide for the existing and projected traffic demand. Also included in the proposal is construction of a new bridge across the Snohomish River and/or widening the existing bridge, and new interchanges at Paradise Lake and Fales Roads. Alternatives under consideration include (1) taking no action; (2) using alternate travel modes; and (3) widening the existing two lane roadway to a four-lane, limited access highway. Incorporated into and studied with the various build alternatives will be design variations of grade and alignment.

The proposed project was originally to have been funded with state funds only. Letters describing the proposed action and soliciting comments were sent to

the appropriate state and local agencies, as well as to citizens and organizations that expressed interest in the project. A series of public and agency scoping meetings were held during 1991 and will continue throughout the remainder of the year and into early 1992. Following the decision to utilize federal funds for the proposed project, additional letters describing the proposed action and soliciting comments have been sent to the appropriate federal agencies. A second agency scoping meeting for all interested federal, state, and local agencies will be held during the last quarter of 1991. A public hearing will be held during the draft EIS circulation period. Public notice will be given of the time and place of all meetings and the hearing.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: November 1, 1991.

Sharon R. Price,

Area Engineer, Olympia, Washington.

[FR Doc. 91–27380 Filed 11–13–91; 8:45 am]

BILLING CODE 4901–22–M

Federal Railroad Administration

[BS–AP–No. 3075]

CSX Transportation; Public Hearing

The CSX Transportation Company has petitioned the Federal Railroad Administration (FRA) seeking approval of the following: The proposed discontinuance and removal of the existing automatic block and traffic control signal system, between Howell, Indiana, milepost 323.4 and the end of track, milepost 470.87, on the St. Louis Subdivision, Chicago Division.

This proceeding is identified as FRA Block Signal Application Number 3075.

The FRA has issued a public notice seeking comments of interested parties and conducted a filed investigation in this matter. After examining the carrier's proposal and the available facts, the FRA has determined that a public hearing is necessary before a final decision is made on this proposal.

Accordingly, a public hearing is hereby set for 10 a.m. on Thursday, December 5,1991, in room 377 of the United States Courthouse Building located at 101 Northwest Martin Luther King Drive in Evansville, Indiana. Interested parties are invited to present oral statements at the hearing.

The hearing will be an informal one and will be conducted in accordance with Rule 25 of the FRA rules of practice (49 CFR 211.250) by a representative designated by the FRA.

The hearing will be a nonadversary proceeding and, therefore, there will be no cross-examination of persons presenting statements. The FRA representative will make an opening statement outlining the scope of the hearing. After all initial statements have been completed, those persons wishing to make brief rebuttal statements will be given the opportunity to do so in the same order in which they made their initial statements. Additional procedures, if necessary for the conduct of the hearing, will be announced at the hearing.

Issued in Washington, DC on November 6, 1991.

Grady C. Cothen, Jr.,

Association Administrator for Safety.

[FR Doc. 91–27396 Filed 11–13–91; 8:45 am]

BILLING CODE 4910–06–M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

November 7, 1991.

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, Public Law 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 3171 Treasury Annex, 1500 Pennsylvania Avenue NW., Washington, DC 20220.

Office of Thrift Supervision

OMB Number: 15500035.
Form Number: None.
Type of Review: Extension.
Title: Securities Offering Disclosure.
Description: It provides necessary information, including financial disclosure, to persons to make an informed investment decision regarding possible purchase or sale of securities of savings associations. It sets standards for disclosure to reduce the risk of fraudulent securities offerings, which could adversely affect the public and the safety and soundness of savings associations.
Respondents: Businesses or other for-profit.
Estimated Number of Respondents: 116.
Estimated Burden Hours Per Response: 535 hours.
Frequency of Response: On occasion.
Estimated Total Reporting Burden: 62,094.
Clearance Officer: John Turner, (202) 906–6840, Office of Thrift Supervision, 2nd Floor, 1700 G Street NW., Washington, DC 20552.
OMB Reviewer: Gary Waxman, (202) 395–7340, Office of Management and Budget, room 3208, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 91–27340 Filed 11–13–91; 8:45 am]

BILLING CODE 4810–25–M

UNITED STATES INFORMATION AGENCY

Management of English Teaching Fellow Program

AGENCY: United States Information Agency.

ACTION: Notice, Request for proposals.

SUMMARY: The U.S. Information Agency (USIA) solicits interest from U.S. professional, not-for-profit institutions/organizations in conducting the recruitment and placement of 11–16 English Teaching Fellows (ETFs) and attendant administration for payment and placement of the fellows in selected countries around the world. The exact number of ETFs will be contingent upon the amount of cost sharing by overseas posts who wish to host a fellow and by the availability of funds. The fellows will serve as full-time teachers of English as a Foreign Language and as materials or test developers or as teacher trainers. The grantee institution/organization will be expected to manage the English Teaching Fellow program during the period February 1, 1992 to August 31, 1993.

DATES: Deadline for proposals: All copies must be received at the U.S. Information Agency by 5 p.m. EST on December 15, 1991. Faxed documents will not be accepted, nor will documents postmarked on December 15, but received at a later date. It is the

responsibility of each grant applicant to ensure that proposals are received by the above deadline. Grants should begin on February 1, 1992.

ADDRESSES: The original and 10 copies of the completed application, including required forms, should be submitted by the deadline to: U.S. Information Agency, Ref.: Management of English Teaching Fellows Program, Office of the Executive Director, E/X, room 336, 301 4th St., SW., Washington, DC 20547.

FOR FURTHER INFORMATION CONTACT: Interested organizations/institutions should contact William B. Royer, Jr. at U.S. Information Agency, 301 4th St., SW., Office of Cultural Centers and Resources, English Language Programs Division, E/CE, room 304, Washington, DC 20547, Telephone (202) 619–5869 to request detailed application packets, which include award criteria additional to this announcement, all necessary forms, and guidelines for preparing proposals, including specific budget preparation information.

SUPPLEMENTARY INFORMATION: Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social and cultural life.

Overview

The U.S. Information Agency (USIA) is soliciting proposals from U.S. professional, not-for-profit institutions/organizations to recruit and place 11–16 English Teaching Fellows who will serve as full-time teachers of English as a Foreign Language, as materials or test developers or as teacher trainers in countries around the world.

The English Teaching Fellow Program is designed to increase the American presence and to enhance standards at local English teaching institutions in selected countries around the world. These include binational centers (BNCs) or other United States Information Service post-selected institutions with English teaching programs. The ETF program enables recipients of M.A.'s in teaching English as a foreign/second language (TEFL/TESL) to acquire overseas teaching experience while providing the BNC or other host institution with their professional expertise in current methods and theory of English teaching.

Guidelines

An English Teaching Fellow is an American citizen who has received a Master's degree in TEFL/TESL and has had little or no overseas teaching experience. The ETF spends a full twelve months (typically September to August) in a BNC or English teaching institution, with the possibility of a one-year extension. Extensions will be granted only under exceptional circumstances, and require agreement of the Agency, Post, BNC/Institution and Fellow. An ETF is the employee of the BNC or teaching institution, not of USIA. ETFs normally serve as full-time teachers (classroom teaching should be limited to 20 hours per week). They may also be assigned to duties such as materials development and teacher training. However, the ETF's overall weekly work load should not exceed 40 hours, nor should they be assigned administrative duties.

Among the organization's responsibilities will be:

1. Recruit candidates and assist overseas posts in the selecting process. This will include the following:

—Disseminate information through domestic and international mailings and other means concerning the English Teaching Fellow program; place an advertisement in the TESOL Placement Bulletin; answer "curriculum vitae" (CVs) and letters of inquiry with 'applicant package' of application materials, designed by the grantee institution/organization in consultation with USIA; enter data from applications/CVs into an ETF applicant database, preferably on Paradox, sorting for experience, language, area preference, degree; print summary report on each post's nominees from database; compile and dispatch candidate dossiers, cover letter, summaries to post for prioritization; contact candidates in priority order for acceptances; print and mail Terms and Conditions of the EFT grant to successful applicants, letter of appointment, tax information, health insurance information and certificate to the nominee and secure the signed terms and conditions and the health certificate.

2. Work with overseas posts and potential host institutions in the selection process by ensuring that they understand parameters of ETF activities/duties; by supplying the post with a sample contract and model letter of appointment for potential ETF; by notifying post once a candidate has accepted an appointment, and by securing the ETF contract from host institution, with a copy to The English Language Programs Division of USIA (E/CE); by monitoring visa process and contracting post/host institution re: any problems.

3. Process the payments and financial arrangements and distribute the stipend checks to Fellows. Maintain budget figures for the program on a spreadsheet.

4. Make all travel arrangements for the fellows including finalizing their itineraries, booking, and mailing tickets and orientation letter to them. Finalize costs and update budget spreadsheet with final amount.

5. Arrange for and implement three-day orientation program for fellows in Washington and oversee their departure for post. Finalize the agenda; design, type, and print handouts; type insurance cards for ETFs.

6. Both the English Teaching Fellows and the grantee organization will be required to submit periodic reports. The grantee organization will provide E/CE with monthly statistics on the progress of recruitment and placement and on expenditures.

Qualifications Required of the Responding Organization

To carry out the above tasks the institution/organization must be incorporated in the U.S. as a 501(c)(3), not-for-profit organization as determined by IRS, and must possess a proven ability to network that provides and allows for the greatest dissemination of information to and among the profession of Teachers of English as a Second or Foreign Language; must be able to provide knowledgeable, TEFL-qualified, experienced staff capable of interviewing candidates and evaluating their qualifications for teaching, and/or for developing materials, or for conducting teacher-training in the context of English as a foreign language, in accord with criteria established by USIA.

Proposed Budget

The grantee organization will be required to submit a comprehensive line item budget for which specific details are available in the application packet. Grants awarded to eligible organizations with less than four years experience in conducting international exchange programs will be limited to $60,000, and their budget submissions should reflect this limitation.

Review Process

USIA will acknowledge receipt of all proposals and will review them for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines established herein and in the application packet. Eligible proposals will be forwarded to panels of USIA officers for advisory review. All eligible proposals wil also

be reviewed by the Agency's Office of General Counsel, the appropriate geographic area office, and the budget and contracts offices. Funding decisions are at the discretion of the Associate Director for Educational and Cultural Affairs. Final technical authority for grant awards resides with USIA's contracting officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the following criteria:

1. Quality of program plan and adherence of the proposed activity to the criteria and conditions described above.

2. Reasonable, feasible, and flexible objectives. Proposals should clearly demonstrate how the institution will meet the program's objectives and plan.

3. Cost effectiveness. The overhead and administrative components of grants, as well as salaries and honoraria, should be kept as low as possible. All other items should be necessary and appropriate. Proposals should maximize cost-sharing through other private sector support as well as institutional direct funding contributions.

4. Clear evidence of the ability to efficiently recruit suitable grantees for an ETF program. Proposals should demonstrate potential for program excellence and/or track record of applicant institution. The Agency will consider the past performance of prior grantees and the demonstrated potential of new applicants.

5. Demonstrated ability to gain access to and network with EFL/ESL professionals and programs.

6. Proposed personnel and institutional resources should be adequate and appropriate to achieve the program or project's goals. The proposal should include evidence of strong administrative and managerial capabilities and project management experience.

7. Proposal should provide for a quarterly formative evaluation by the grantee institution and a summative evaluation at the conclusion of the project.

8. Evaluation Plan. Proposals should provide a plan for evaluation by the grantee institution.

Notice

The terms and conditions published in this RFP are binding and may not be modified by any USIA representative. Explanatory information provided by the Agency that contradicts published language will not be binding. Issuance of the RFP does not constitute an award commitment on the part of the Government. Final award cannot be made until funds have been fully appropriated by Congress, allocated and committed through internal USIA procedures.

Notification

All applicants will be notified of the results of the review process on or about February 1, 1992. Awarded grants will be subject to periodic reporting and evaluation requirements.

Dated: November 6, 1991.

William P. Glade,

Associate Director, Bureau of Educational and Cultural Affairs.

[FR Doc. 91-27319 Filed 11-13-91; 8:45 am]

BILLING CODE 8230-01-M

University Affiliations Program; Administrative Services

AGENCY: United States Information Agency.

ACTION: Notice, request for proposals.

SUMMARY: The Bureau of Educational and Cultural Affairs seeks to secure the services of a non-profit organization to assist in the administration of the FY 1992 University Affiliations Program competition. The organization shall review proposals submitted to the Agency for compliance with the technical requirements published in the Request for Proposals (RFP) for the FY 1992 University Affiliations Program. The organization also shall coordinate the academic review of technically eligible proposals and provide the Agency with panel recommendations and assessments on each proposal based on academic review criteria published in the RFP.

The University Affiliations Program promotes partnerships between American and foreign institutions of higher education through grants for the exchange of faculty and staff.

DATES: Deadline for proposals: Proposals must be received at the U.S. Information Agency by 5 p.m. EST on December 5, 1991. Proposals received by the Agency after this deadline will not be eligible for consideration. Faxed documents will not be accepted, nor will documents be accepted which are postmarked on December 5, 1991 but received at a later date. It is the responsibility of each grant applicant to ensure that the proposal is received by the above deadline. Grants should begin February 10, 1991.

ADDRESS: The original and fifteen (15) copies of the completed application, including required forms, should be submitted by the deadline to: U.S. Information Agency, Ref.: University Affiliations Program, Office of the Executive Director, E/X, room 357, 301 4th St., SW., Washington, DC 20547.

FOR FURTHER INFORMATION CONTACT: Interested organizations should contact Ms. Camille Barone or Ms. Aleta Wenger at the U.S. Information Agency, 301 4th Street, SW., University Affiliations Program, Office of Academic Programs, room 349, (202) 619-5289, to request detailed application packets, which include program requirements, award criteria additional to this announcement, all necessary forms, and guidelines for preparing proposals, including specific budget preparation information.

SUPPLEMENTARY INFORMATION:

Overview

Authority for the University Affiliations Program is contained in the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87-256 (Fulbright-Hays Act). The Fulbright Program seeks to increase mutual understanding between the people of the United States and people of other countries. USIA strives to accomplish this goal by promoting affiliations between U.S. and foreign institutions of higher education.

Pursuant to the Bureau's authorizing legislation, programs must maintain their scholarly integrity and a non-political character, and should be balanced and representative of the diversity of American political, social and cultural life.

Guidelines

Eligibility

Non-profit organizations based in the Washington, DC metropolitan area with experience in international education, with emphasis on educational exchanges, are invited to submit proposals for a cooperative agreement award from the Agency.

Proposed Budget

A comprehensive line item budget must be submitted with the proposal by the deadline. Specific guidelines for budget preparation are available in the application packet.

Note: Grants awarded to eligible organizations with fewer than four years' experience in conducting international exchange programs will be limited to $60,000. Budget submissions from these organizations should not exceed this amount.

Review Process

USIA will acknowledge receipt of all proposals and will review them for technical eligibility. Proposals will be deemed ineligible if they do not adhere to the guidelines established herein and in the application packet. Eligible proposals will be forwarded to a panel of USIA officers for advisory review. All eligible proposals will also be reviewed by the Agency's budget and contracts offices, and the Office of the General Counsel. Funding decisions are at the discretion of the Associate Director for Educational Cultural Affairs. Final technical authority for grant awards resides with USIA's contracting officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the following criteria:

1. Quality/responsiveness—Quality of administrative plan and adherence of the proposed activity to the criteria and conditions described in the application packet. Proposals should clearly demonstrate how the organization will meet the program's objectives and plan.

2. Institutional capacity—Proposed personnel and institutional resources should be adequate and appropriate to achieve the program's goals.

3. Cost-effectiveness—The overhead and administrative components of grants, as well as salaries and honoraria, should be kept as low as possible. All budget items should be necessary and appropriate. Proposals should demonstrate cost-sharing and in-kind support.

4. Track record/potential—Proposals should demonstrate potential for excellence and/or track record of applicant organization. The Agency will consider the past performance of prior grantees and the demonstrated potential of new applicants.

5. Evaluation plan—Proposals should provide a plan for evaluation by the grantee organization.

Notice

The terms and conditions published in their RFP are binding and may not be modified by any USIA representative. Explanatory information provided by the Agency that contradicts published language will not be binding. Issuance of the RFP does not constitute an award commitment on the part of the Government. Final award cannot be made until funds have been fully appropriated by Congress, allocated and committed through internal USIA procedures.

Notification

All applicants will be notified of the results of the review process on or about January 22, 1992. Awarded grants will be subject to periodic reporting and evaluation requirements.

Dated: November 4, 1991.

William P. Glade,

Associate Director, Bureau of Educational and Cultural Affairs.

[FR Doc. 91-27318 Filed 11-13-91; 8:45 am]

BILLING CODE 8230-01-M

DEPARTMENT OF VETERANS AFFAIRS

Information Collection Under OMB Review

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

The Department of Veterans Affairs has submitted to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). This document lists the following information: (1) The title of the information collection, and the Department form number(s), if applicable; (2) a description of the need and its use; (3) who will be required or asked to respond; (4) an estimate of the total annual reporting hours, and recordkeeping burden, if applicable; (5) the estimated average burden hours per respondent; (6) the frequency of response; and (7) an estimated number of respondents.

ADDRESSES: Copies of the proposed information collection and supporting documents may be obtained from Janet G. Byers, Veterans Benefits Administration (20A5), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 (202) 233-3021.

Comments and questions about the items on the list should be directed to VA's OMB Desk Officer, Joseph Lackey, NEOB, room 3002, Washington, DC 20503 (202) 395-7316. Do not send requests for benefits to this address.

DATES: Comments on the information collection should be directed to the OMB Desk Officer on or before December 16, 1991.

Dated: November 6, 1991.

By direction of the Secretary.

Frank E. Lalley,

Associate Deputy, Assistant Secretary for Information Resources Policies and Oversight.

Extension

1. Designation of Beneficiary, VA Form 29-336.
2. The form is used by the insured to designate a beneficiary and select an optional settlement to be used when the insurance matures by death. The information is requested to determine the claimants eligibility to receive the proceeds.
3. Individuals or households.
4. 13,917 hours.
5. 10 minutes.
6. On occasion.
7. 83,500 respondents.

[FR Doc. 91-27332 Filed 11-13-91; 8:45 am]

BILLING CODE 8320-01-M

Information Collection Under OMB Review

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

The Department of Veterans Affairs has submitted to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). This document lists the following information: (1) The title of the information collection, and the Department form number(s), if applicable; (2) a description of the need and its use; (3) who will be required or asked to respond; (4) an estimate of the total annual reporting hours, and recordkeeping burden, if applicable; (5) the estimated average burden hours per respondent; (6) the frequency of response; and (7) an estimated number of respondents.

ADDRESSES: Copies of the proposed information collection and supporting documents may be obtained from Patti Viers, Records Management Service (723), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 (202) 233-3172.

Comments and questions about the items on the list should be directed to VA's OMB Desk Officer, Joseph Lackey, NEOB, room 3002, Washington, DC 02503 (202) 395-7316. Do not send requests for benefits to this address.

DATES: Comments on the information collection should be directed to the OMB Desk Officer on or before December 16, 1991.

Dated: November 6, 1991.

By direction of the Secretary.

Frank E. Lalley,

Associate Deputy, Assistant Secretary for Information Resources Policies and Oversight.

Reinstatement

1. Age Discrimination Complaints, 38 CFR 18.542, AND Notice of Subrecipients, 38 CFR 18.532.
2. This information collection pertains to the recordkeeping requirement that Federally funded recipients process complaints of age discrimination in their respective programs and that these recipients notify subrecipients of their obligations under the law and VA's implementing regulations.
3. Individuals or households; State or local governments; Businesses or other for-profit; Non-profit institutions.
4. 5 minutes.
5. 1½ hours.
6. On occasion.
7. 4,644 recordkeepers.

[FR Doc. 91-27333 Filed 11-13-91; 8:45 am]

BILLING CODE 8320-01-M

Information Collection Under OMB Review

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

The Department of Veterans Affairs has submitted to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). This document lists the following information: (1) The title of the information collection, and the Department form number(s), if applicable; (2) a description of the need and its use; (3) who will be required or asked to respond; (4) an estimate of the total annual reporting hours, and recordkeeping burden, if applicable; (5) the estimated average burden hours per respondent; (6) the frequency of response; and (7) an estimated number of respondents.

ADDRESSES: Copies of the proposed information collection and supporting documents may be obtained from Janet G. Byers, Veterans Benefits Administration (20A5), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 (202) 233-3021.

Comments and questions about the items on the list should be directed to VA's OMB Desk Officer, Joseph Lackey, NEOB, room 3002, Washington, DC 20503 (202) 395-7316. Do not send requests for benefits to this address.

DATES: Comments on the information collection should be directed to the OMB Desk Officer on or before December 16, 1991.

Dated: November 6, 1991.

By direction of the Secretary.

Frank E. Lalley,

Associate Deputy, Assistant Secretary for Information Resources Policies and Oversight.

Extension

1. Request for Confidential Verification of Birth, VA Form 21-4504.
2. The form is used to secure verification of birth from the Registrar of Vital Statistics in order to establish age or relationship. The failure to collect this data may result in a delay in payment of benefits.
3. State or local governments.
4. 788 hours.
5. 30 minutes.
6. On occasion.
7. 1,575 respondents.

[FR Doc. 91-27334 Filed 11-13-91; 8:45 am]

BILLING CODE 8320-01-M

Sunshine Act Meetings

Federal Register
Vol. 56, No. 220
Thursday, November 14, 1991

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 ELECTION COMMISSION

"FEDERAL REGISTER" NUMBER: 91–2715.4

PREVIOUSLY ANNOUNCED DATE AND TIME: Wednesday, November 13, 1991, 10:00 a.m., Meeting Open to the Public.

The Following Item is Added to the Agenda:

Status Report on the Presidential Election Campaign Fund (continued from meeting of November 7, 1991)

DATE AND TIME: Tuesday, November 19, 1991, 10:00 a.m.

PLACE: 999 E Street, N.W., Washington, D.C.

STATUS: This Meeting Will Be Closed to the Public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. § 437g.
Audits conducted pursuant to 2 U.S.C. § 437g, § 438(b), and Title 26, U.S.C.
Matters concerning participation in civil actions or proceedings or arbitration.
Internal personnel rules and procedures or matters affecting a particular employee.

DATE AND TIME: Thursday, November 21, 1991, 10:00 a.m.

PLACE: 999 E Street, N.W., Washington, D.C. (Ninth Floor).

STATUS: This Meeting Will Be Open to the Public.

ITEMS TO BE DISCUSSED:

Title 26 Certification Matters

Jack Kemp for President Committee, and the Kemp/Dannemeyer and Victory '88 Joint Fundraising Committees Request for Oral Presentation
Administrative Matters

PERSON TO CONTACT FOR INFORMATION: Mr. Fred Eiland, Press Officer, Telephone: (202) 219–4155.

Delores R. Harris,
Administrative Assistant.

[FR Doc. 91–27561 Filed 11–12–91; 3:09 pm]
BILLING CODE 6715–01–M

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

November 8, 1991.

TIME AND DATE: 10:00 a.m., Wednesday, November 13, 1991.

PLACE: Room 600, 1730 K Street, NW., Washington, DC.

STATUS: Open.

CHANGES IN THE MEETING: The item listed for consideration at this time has been postponed. No date has been rescheduled.

1. *Explosives Technologies International, Inc.*, Docket No. CENT 90–95–M.

It was determined that the above postponement was necessary at this time, and that no earlier announcement of the change was possible.

CONTACT PERSON FOR MORE INFO: Jean Ellen (202) 653–5629/(202) 708–9300 for TDD Relay.

Jean H. Ellen,
Agenda Clerk.

[FR Doc. 91–27483 Filed 11–12–91; 11:43 am]
BILLING CODE 6735–01–M

LEGAL SERVICES CORPORATION BOARD OF DIRECTORS

Audit and Appropriations Committee Meeting: Notice of Changes

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: FR Doc. 91–26163.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: November 17, 1991 at 1:00 p.m.

PREVIOUSLY ANNOUNCED LOCATION OF MEETING: The Madison Hotel, 15th and "M" Streets, N.W., Drawing Rooms I & II, Washington, D.C. 20005, (202) 862–1600.

CHANGES:

DATE AND TIME: (No Change)

PLACE: (No Change)

AGENDA: In lieu of a hearing, the Audit and Appropriations Committee will hold a meeting during which the public comment solicited previously will be received. In addition to the receipt of public comment on the Fiscal Year 1993 budget mark of the Legal Services Corporation, the Committee will consider other matters as reflected in the agenda presented below.

STATUS OF MEETING: Open.

MATTERS TO BE CONSIDERED:

1. Approval of Agenda.
2. Approval of Minutes of September 16, 1991 Meeting.
3. Consideration of Budget and Expenses Through September 1991.
4. Review of Fiscal Year 1991 Audit Plan and Related Procedures.
5. Consideration of Fiscal Year 1992 Management and Administration Budget.
6. Public Comment on the Fiscal Year 1993 Budget Mark of the Legal Services Corporation.
7. Consideration of Public Comment on the Proposed Fiscal Year 1993 Budget Mark of the Legal Services Corporation.
8. Consideration of an Analysis of Space Needs of the Legal Services Corporation.
9. Consideration of Guidelines Used for Unsolicited Proposals for Corporation Grants.

CONTACT PERSON FOR INFORMATION: Patricia Batie (202) 863–1839.

Date Issued: November 12, 1991.

Patricia D. Batie,
Corporate Secretary.

[FR Doc. 91–27545 Filed 11–12–91; 2:36 p.m.]
BILLING CODE 7050–01–M

LEGAL SERVICES CORPORATION BOARD OF DIRECTORS

MEETING; NOTICE

TIME AND DATE: A meeting of the Board of Directors will be held on November 18, 1991. The meeting will commence at 9:00 a.m.

PLACE: The Madison Hotel, 15th and "M" Streets, N.W., Drawing Rooms I & II, Washington, D.C. 20005 (202) 862–1600.

STATUS OF MEETING: Open, except that a portion of the meeting may be closed pursuant to a vote of a majority of the Board of Directors. At the closed session, subject to the aforementioned majority vote, the Board of Directors will hear and consider the report of the General Counsel on litigation to which the corporation is a party, and will consider, in consultation with its counsel, pending personnel actions and personnel-related rules and practices, including matters related to current investigations being undertaken by the Corporation's Office of the Inspector General. The Board of Directors will also receive and consider a report on current investigations from the Inspector General. Finally, the Board of Directors will consider and vote to approve the minutes of a portion of the closed session of the Board's October 21, 1991 meeting. The closing is authorized by the relevant sections of the Government in the Sunshine Act [5 U.S.C. Sections 552b(c) (2), (6), and (10)], and the corresponding regulation of the Legal Services Corporation [45 C.F.R. Sections 1622.5 (a), (e), and (h)]. The closing will be certified by the Corporation's General Counsel as authorized by the

above-cited provisions of law. A copy of the General Counsel's certification will be posted for public inspection at the Corporation's headquarters. located at 400 Virginia Avenue, S.W., Washington, D.C., 20024, in its three reception areas, and will otherwise be available upon request.

MATTERS TO BE CONSIDERED:

OPEN SESSION:

1. Approval of Agenda.
2. Approval of Minutes of September 15–16, 1991 Meeting.
3. Chairman's and Members' Reports.
4. President's Report.
5. Legislative Report.
6. Inspector General's Report.
7. Consideration of Audit and Appropriations Committee Report.
8. Consideration of Report by Staff on the Status of Applications for Migrant Funding.

CLOSED SESSION:[2]

9. Consideration of Report by Inspector General on Current Investigations and Other Matters.
10. Consideration of Pending Personnel Actions and Personnel-Related Rules and Practices and Consultation with Board's Special Counsel.
11. Consideration of the General Counsel's Report on Pending Litigation to which the Corporation is a Party.
12. Approval of Minutes of a Portion of the Closed Session of the Board of Directors October 21, 1991 Meeting.

OPEN SESSION:

13. Consideration of Operations and Regulations Committee Report.
14. Consideration of Other Business.

CONTRACT PERSON FOR INFORMATION:
Patricia D. Batie, Executive Office, (202) 863–1839.

Date Issued: November 12, 1991.

Patricia D. Batie,

Corporate Secretary.

[FR Doc. 91–27546 Filed 11–12–91; 2:36 pm

BILLING CODE 7050–01–M

[2] It is anticipated that the executive session will conclude at approximately 2:00 p.m. The open session will reconvene immediately thereafter.

RAILROAD RETIREMENT BOARD

Notice of Public Meeting

Notice is hereby given that the Railroad Retirement Board will hold a meeting on November 19, 1991, 9:00 a.m., at the Board's meeting room on the 8th floor of its headquarters building, 844 North Rush Street, Chicago, Illinois, 60611. The agenda for this meeting follows:

(1) Contract on Investment Practices (presentation by Dr. French).
(2) Claims Examiners' Classifications (presentation by task force).
(3) Computer Aided Software Engineering (CASE) Study.
(4) Fiscal Year 1992 FTE Allocation.
(5) Fiscal Year 1992 Budget.
(6) Special Management Improvement (SMI) Monthly Reporting.
(7) Regulations—Parts 202 and 301, Employers Under the Railroad Retirement Act and Railroad Unemployment Insurance Act.
(8) Regulations—Part 203, Employees Under the Act.
(9) Regulations—Part 230, Reduction and Non-Payment of Annuities by Reason of Work.

The entire meeting will be open to the public. The person to contact for more information is Beatrice Ezerski, Secretary to the Board, COM No. 312–751–4920, FTS No. 386–4920.

Dated: November 8, 1991.

Beatrice Ezerski,

Secretary to the Board.

[FR Doc. 91–27569 Filed 11–12–91; 3:20 pm]

BILLING CODE 7905–01–M

federal register

Thursday
November 14, 1991

Part II

Department of Health and Human Services

Social Security Administration

20 CFR Parts 404 and 416
Evaluation of Symptoms, Including Pain; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Parts 404 and 416

[Regulations Nos. 4 and 16]

RIN 0960-AB41

Evaluation of Symptoms, Including Pain

AGENCY: Social Security Administration, HHS.

ACTION: Final rules.

SUMMARY: We are expanding our disability regulations pertaining to how we evaluate symptoms, including pain. We are including in these regulations additional explanations of the factors we consider for the purpose of establishing the existence of pain or other symptoms and functional limitations resulting from the symptoms in determining disability under titles II and XVI of the Social Security Act (the Act). These expanded regulations incorporate the terms of the statutory standard for evaluating pain and other symptoms contained in section 3 of the Social Security Disability Benefits Reform Act of 1984 (Pub. L. 98-460). They also incorporate related statements of policy and interpretation now set forth in Social Security Rulings and program operating instructions.

EFFECTIVE DATE: These rules are effective November 14, 1991.

FOR FURTHER INFORMATION CONTACT: Martin Sussman, Legal Assistant, Office of Regulations, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235, 301-965-1758.

SUPPLEMENTARY INFORMATION: We published proposed rules in a Notice of Proposed Rulemaking in the **Federal Register** on September 14, 1988 (53 FR 35516). These final rules take into consideration and respond to the comments we received from interested individuals and public and private organizations and groups.

Section 223(d)(5) of the Act states that to be considered under a disability, an individual must furnish medical and other evidence of the existence of such disability as we may require. This section did not specifically discuss the evaluation of symptoms, such as pain, until amended by Public Law 98-460. Section 3(a) of Public Law 98-460 codified our policy for the evaluation of pain and other symptoms for determinations of disability made prior to January 1, 1987, by adding language to section 223(d)(5) of the Act that embodied our existing policy, and by amending section 1614(a)(3) of the Act to make the provision applicable to title XVI as well as title II of the Act. Although the statutory standard has expired, the Agency policy that it reflected remained in effect under our prior regulations and our existing operating instructions for determinations made on and after January 1, 1987. We are amending our prior regulations, however, to include a more detailed description of the policy that we follow in evaluating symptoms, such as pain. Because the statutory standard codified earlier Social Security policies for evaluating pain and other symptoms, and because the regulatory amendment expressly adopts and incorporates those same policies, these final rules make no substantive change in our policy.

Sections 221(k) and 1614(a)(3)(G) of the Act require the Secretary to publish regulations setting forth uniform standards for determining disability at all levels of adjudication. To carry out the intent of Congress, as provided in section 3(a) of Public Law 98-460 to define clearly and set forth our policies on the evaluation of pain and other symptoms in determining disability, and to comply with the requirements of sections 221(k) and 1614(a)(3)(G) of the Act, we are expanding 20 CFR 404.1529 and 416.929. The changes to these sections will ensure that claimants, the public, and our adjudicators clearly understand the policy set forth in these sections.

At the same time that section 3(a) of Public Law 98-460 codified our present policy for the evaluation of symptoms, such as pain, section 3(b) of Public Law 98-460 called for the establishment of a Commission on the Evaluation of Pain to conduct a study, in consultation with the National Academy of Sciences, concerning the evaluation of pain in determining disability. A 20-member Commission, consisting of experts in the fields of medicine, law, insurance, and disability program administration, with significant concentration of expertise in the field of clinical pain, was appointed by the Secretary on April 1, 1985. In its report, which the Secretary transmitted to the Congress on September 11, 1986, the Commission made 13 recommendations, including specific recommendations for additional research to obtain more reliable and valid data about pain, to study chronic illness behavior and disability, and to fund projects to develop and compare methods to assess pain early in the disability determination process. This research effort is underway. The Commission also recommended in its report that the temporary statutory standard in section 3(a)(1) of Public Law 98-460 for the evaluation of pain and other symptoms be continued until the research could be completed and for one year thereafter.

The statutory language in section 3(a)(1) stated that "[a]n individual's statement as to pain or other symptoms shall not alone be conclusive evidence of disability" but that "* * * there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged * * *." The statute also stated that there must be medical signs and findings which, "* * * when considered with all evidence * * * (including statements of the individual or his physician as to the intensity and persistence of such pain or other symptoms which may reasonably be accepted as consistent with the medical signs and findings), would lead to a conclusion that the individual is under a disability."

The policy for the evaluation of pain and other symptoms, as expressed in the statutory standard and clearly set forth in these final rules, requires that: (1) For pain or other symptoms to contribute to a finding of disability, an individual must first establish, by medical signs and laboratory findings, the presence of a medically determinable physical or mental impairment which could reasonably be expected to produce the pain or other symptoms alleged; and (2) once such an impairment is established, allegations about the intensity and persistence of pain or other symptoms must be considered in addition to the medical signs and laboratory findings in evaluating the impairment and the extent to which it may affect the individual's capacity for work.

We have added a new paragraph (f) to §§ 404.1525 and 416.925 which explains when an individual's impairment is determined to meet the criteria of an impairment in the Listing of Impairments in part 404. New paragraph (f) explains how a symptom, such as pain, is considered when it appears as a criterion in the Listing of Impairments. It explains that, generally, when a symptom appears as a criterion, it is necessary only that the symptom be present in combination with the other listed criteria to determine that the individual's impairment meets the requirements of the listed impairment. It

is not necessary, unless the listing specifically states otherwise, to determine the intensity, persistence, or limiting effects of the symptom as long as all other findings required by the specific listing are present. The proposed rule gave the listing for ischemic heart disease (Listing 4.04), which includes a requirement of chest pain of cardiac origin, as an example of how, in general, a symptom is considered when it appears as a criterion in a listing. However, 4.00E of the Listing of Impairments requires a detailed description of chest pain when adjudicating under Listing 4.04 to verify that the chest pain is of cardiac origin. In the final rules, we have deleted this example.

The revision of §§ 404.1529 and 416.929 of our regulations provides a more detailed discussion of our policy on the evaluation of pain and other symptoms. In response to comments we received on the proposed regulations, we have made additional clarifying changes in §§ 404.1529 and 416.929 of the final rules.

Paragraph (a) is a general statement of how symptoms, such as pain, are considered in determining disability. It explains that we will consider, in deciding disability, a claimant's symptoms along with the objective medical evidence and other evidence relating to the claimant's condition. The paragraph further explains that objective medical evidence means medical signs and laboratory findings as defined in §§ 404.1528 (b) and (c) and 416.928 (b) and (c). It clarifies that other evidence refers to the kinds of evidence described in §§ 404.1512 (b) (2) through (6); 404.1513 (b) (1), (4), and (5) and (e); 416.912(b) (2) through (6); and 426.913(b) (1), (4), and (5) and (e). We explain that other evidence includes statements or reports by the claimant, his or her treating or examining physician or psychologist, or others concerning the claimant's medical history, daily activities, and other matters relating to the claimant's condition. However, as we explain in paragraph (a), such statements by the individual about his or her pain or other symptoms, standing alone, will not be a basis for a finding of disability. Paragraph (a) also explains that we follow the rules set out in §§ 404.1527 and 416.927 to evaluate treating source and other medical opinions about an individual's pain or other symptoms.

Paragraph (b) explains that pain or other symptoms will not be found to affect an individual's ability to do basic work activities unless the individual first establishes that he or she has a medically determinable physical or mental impairment, as evidenced by medical signs and laboratory findings, to which the allegations or reports of pain or other symptoms can reasonably be related. The paragraph explains that at the initial and reconsideration steps of the administrative review process (except in disability hearings), a medical or psychological consultant participates in making the determination of whether the individual's medically determinable impairment(s) could reasonably be expected to produce the alleged symptoms. In the disability hearing process, a medical or psychological consultant may provide an advisory assessment to assist the disability hearing officer in determining whether the individual's impairment(s) could reasonably be expected to produce the alleged symptoms. At the administrative law judge hearing or the Appeals Council level, the administrative law judge or the Appeals Council may ask for and consider the opinion of a medical advisor designated by the Secretary as to whether the established medically determinable impairment(s) could reasonably be expected to produce an alleged symptom. The paragraph also explains that a finding that the established medically determinable impairment could reasonably be expected to produce an alleged symptom, such as pain, is not a finding as to the intensity, persistence, or functional effects of the symptom. Paragraph (b) further explains that we will develop evidence regarding the possibility of a mental impairment to which the individual's symptoms may be related when we have information to suggest that such an impairment might exist and the medical signs and laboratory findings do not substantiate any physical impairment(s) capable of producing the symptoms.

Paragraph (c) explains how we evaluate the intensity and persistence of symptoms, such as pain, once it is established that an individual has a medically determinable physical or mental impairment that could reasonably be expected to produce the pain or other symptoms. It also describes what types of evidence we will consider in our assessment of the degree to which symptoms limit the individual's capacity for work activities. In the final rules, paragraph (c) makes clear that medical opinions will be considered in accordance with the rules in §§ 404.1527 and 416.927.

Paragraph (c) also explains that we consider objective medical evidence, such as evidence of reduced joint motion, muscle spasm, sensory deficit or motor disruption, as a useful indicator to assist us in making reasonable conclusions about the effects of pain or other symptoms on the individual's ability to work. We will always attempt to obtain this type of evidence, and when it is obtained, we will consider it in the disability evaluation. For further clarification, and to avoid any misunderstanding, in the final rules the paragraph explains that we will not reject an individual's allegations as to the intensity, persistence, or limiting effects of pain or other symptoms solely because the available objective medical evidence does not substantiate his or her statements.

We will also attempt to obtain statements about how the symptoms affect the claimant from the claimant, his or her treating or examining physician or psychologist, and other persons. Of particular value are statements that address the effect of the alleged pain or other symptoms on a person's work history and activities of daily living, as well as descriptions by the claimant, his or her treating or examining physician or psychologist, and other persons about pain and other symptoms; the precipitating and aggravating factors; and the medication taken or course of treatment which may have been followed. We will consider these statements and descriptions in conjunction with all other evidence of record in assessing any limitations imposed on the individual over and above those limitations which can be demonstrated by the objective medical evidence in the record.

Paragraph (c) explains that we will determine pain or other symptoms to diminish the individual's capacity for basic work activities to the extent that the individual's alleged functional limitations and restrictions due to pain or other symptoms can reasonably be accepted as consistent with the medical signs and laboratory findings and other evidence. The medical signs and laboratory findings need not fully substantiate the individual's statements. The paragraph explains that medical opinions are considered in evaluating the limitations or restrictions imposed by symptoms, such as pain. In the final rules, paragraph (c) explains that, in determining the extent to which pain or other symptoms limit an individual's capacity for basic work activities, we will consider whether there are any inconsistencies in the evidence and the extent to which there are any conflicts between the individual's statements and any other evidence, including the objective medical evidence.

Paragraph (d) discusses how symptoms are evaluated in the sequential evaluation process. First, an individual who is not engaging in substantial gainful activity must have a medically determinable severe physical or mental impairment(s). Symptoms (for example, pain), signs and laboratory findings are considered in determining whether the impairment or combination of impairment(s) is severe.

Second, once a severe physical or mental impairment(s) is established, it must be determined whether it is the same as one of the impairment(s) in the Listing of Impairments. (See 20 CFR part 404, subpart P, appendix 1.) The Listing of Impairments sets forth criteria for certain conditions which are considered severe enough to prevent a person from doing gainful activity and to be disabling, provided the individual is not performing substantial gainful activity. Symptoms may be criteria for certain listed impairment(s). Generally, if a symptom, such as pain, is a criterion, it need only be present along with the other requisite criteria. It is usually not necessary to determine whether there is functional loss associated with the pain or other symptoms.

Third, if a severe physical or mental impairment(s) does not meet the listed criteria, it is necessary to determine whether the impairment(s) is equivalent to a listed impairment. Symptoms along with medical signs and laboratory findings are considered in making this determination. In the final rule, we have expanded paragraph (d)(3) to explain how we consider medical signs, symptoms, and laboratory findings in making decisions of equivalency.

When we determine whether an individual's impairment(s) is medically equivalent to a listed impairment, as set forth in §§ 404.1526 (a) and (b), 416.926 (a) and (b), and 416.926a(b) (1) and (2), an allegation of pain or other symptoms cannot be substituted for a missing or deficient medical sign or laboratory finding to raise impairment severity to equate medically with a listed impairment. In title XVI cases for children under age 18, however, if we cannot find medical equivalence, we will consider pain and other symptoms under § 416.926a(b)(3) in determining whether the child has an impairment(s) causing functional limitations that are the same as the disabling functional consequences of a listed impairment.

Fourth, when a severe physical or mental impairment(s) does not meet or equal a listed impairment, the individual's remaining functional capacity for work-related activities must be established. We do not apply this step in determining eligibility for title XVI disabled child's benefits. In disabled childs' cases under title XVI, we apply a comparable step, considering how the physical or mental impairment(s) and related symptoms, such as pain, affect the child's ability to engage in age-appropriate activities, and when appropriate, whether he or she can do these things on a sustained, age-appropriate basis. In determining an individual's residual functional capacity, we must evaluate the limitations and restrictions imposed by the individual's impairment(s) and related symptoms. In determining the degree to which such symptoms limit the individual's capacity for work, we must consider his or her allegations and the statements of his or her physician, psychologist, or other persons, together with the medical signs and laboratory findings, to draw a reasonable conclusion as to the individual's remaining capacity for work. If the claim is at the initial or reconsideration level, the program medical or psychological consultant is responsible for this assessment. In the disability hearing process, the disability hearing officer (or when appropriate, the Associate Commissioner for Disability or his or her delegate) makes this assessment after considering any advisory assessment provided by a program medical or psychological consultant. At the administrative law judge and Appeals Council levels, the administrative law judge or Appeals Council, as appropriate, makes this assessment.

We also made changes to §§ 404.1545 and 416.945 to clarify how we evaluate symptoms, such as pain, in assessing residual functional capacity. We modified and expanded paragraphs (a), (b), (c), and (d) of §§ 404.1545 and 416.945. In addition, we added a new paragraph (e) to explain that we consider the total limiting effects of all physical and mental impairment(s) and any related symptoms in determining residual functional capacity.

Also, section 3 of Public Law 98-460 made clear that pain is a symptom of an impairment and not an impairment in itself. To emphasize this, we have added §§ 404.1569a and 416.969a to clarify how we apply the medical-vocational guidelines in appendix 2 of 20 CFR part 404, subpart P, when pain or other symptoms are considerations. Paragraph (a) of §§ 404.1569a and 416.969a explains that an individual's impairment(s) and related symptoms, such as pain, may cause limitations of function or restrictions which may be exertional, nonexertional, or a combination of both. Limitations are exertional if they limit an individual's exertional capabilities, that is, affect his or her ability to meet the strength demands of jobs. The classification of a limitation as exertional is related to the United States Department of Labor's classification of jobs by various exertional levels (sedentary, light, medium, heavy, and very heavy) in terms of the strength demands for sitting, standing, walking, lifting, carrying, pushing and pulling. Sections 404.1567, 404.1569, 416.967 and 416.969 describe how we use the classification of jobs by exertional levels (strength demands) which is contained in the Dictionary of Occupational Titles published by the Department of Labor, to determine the exertional requirements of work which exists in the national economy, and explain that this classification of jobs is incorporated into the rules in the medical-vocational guidelines.

In paragraph (a) of §§ 404.1569a and 416.969a, we explain that limitations which affect an individual's ability to meet the strength demands of jobs, that is, limitations which affect an individual's ability to sit, stand, walk, lift, carry, push, or pull, are considered exertional. We also explain in paragraph (a) that limitations or restrictions which affect an individual's ability to meet the demands of jobs other than the strength demands, are considered nonexertional. Seeing, hearing, climbing, crawling, crouching, maintaining attention, and understanding instructions are some examples of nonexertional activities.

Paragraphs (b), (c), and (d) of §§ 404.1569a and 416.969a explain how we apply the medical-vocational guidelines in determining disability, depending on whether the limitations or restrictions imposed by an individual's impairment(s) and related symptoms, such as pain, are exertional, nonexertional, or a combination of both. Paragraph (b) explains that the rules in the medical-vocational guidelines directly apply when the impairment(s) and any related symptoms, such as pain, impose only exertional limitations. Paragraph (c) explains that the rules in the medical-vocational guidelines do not direct factual conclusions of disabled or not disabled when the impairment(s) and related symptoms, such as pain, impose only nonexertional limitations and restrictions and that, in such cases, the determination is made under the appropriate sections of the regulations, giving consideration to the rules in the medical-vocational guidelines. Paragraph (d) explains that, when the limitations and restrictions imposed by the impairment(s) and any related symptoms, such as pain, are both

exertional and nonexertional, the rules in the medical-vocational guidelines are used to direct a decision if the exertional limitations, by themselves, permit a finding of disability. If a rule does not direct a finding of disability, both the exertional and nonexertional limitations or restrictions imposed by the impairment(s) and any related symptoms, such as pain, are considered, and the medical-vocational guidelines may be used as a frame of reference to guide our decision.

Sections 404.1501(g) and 416.901(j) have been revised to include a brief description of the provisions in §§ 404.1569a and 416.969a on when we consider a limitation exertional, nonexertional, or a combination of both for purposes of applying the medical-vocational guidelines.

Public Comments

We published proposed rules to expand our disability regulations pertaining to how we evaluate symptoms, including pain, in the **Federal Register** on September 14, 1988 (53 FR 35516). Interested persons, organizations, Government agencies, and other groups were given 60 days to comment. The comment period closed November 14, 1988.

We received comments from individuals and organizations, including attorneys, physicians, regional and national medical associations, and State government agencies. We received no comments from disabled persons individually, but we did receive comments from many legal services organizations which represent the interests of disabled individuals. One such organization responded on behalf of an advisory committee composed of disabled citizens and advocates.

Many of the comments we received were favorable. These commenters, including legal advocates, believed that the expanded discussion of the evaluation of symptoms, including pain, would have a positive effect on the understanding and application of our policy. Other commenters did not object to the content of the Notice of Proposed Rulemaking, but disagreed with our view that the proposed regulations did not contain any new policy. Several commenters believed the proposed rules were inconsistent with case law in one or more circuits. Other commenters believed that the proposed regulations relied too heavily on the consideration of objective medical evidence in determining disability. Still other comments reflected a misunderstanding of our policy.

We have carefully considered all of the comments and have adopted many of the recommendations. In response to the comments, we have expanded and clarified some of the explanations and discussions of our policy published in the Notice of Proposed Rulemaking. We believe the final regulations are an improvement over the rules published in the Notice of Proposed Rulemaking and will ensure that the public, as well as our adjudicators, better understand the policy set forth in these final rules.

The following is a discussion of the issues raised in the comments. Many of the written comments, by necessity, had to be condensed, summarized or paraphrased. In doing this, we believe we have expressed everyone's views adequately and responded to the issues raised. For ease of comprehension, the discussion is organized by issue.

Regulatory Expression of Policy Reflected in Section 3(a) of the Social Security Disability Benefits Reform Act of 1984 (Pub. L. 98–460) and Amplified in Related Statements of Agency Policy and Interpretation

Comment: Some commenters disagreed with our statement that no substantive change in policy is intended by these regulations.

Response: The statement, "no substantive change in policy is intended," is correct and properly reflects our intent. Section 3 of Public Law 98–460 did not represent a change in our policy, but rather incorporated in the statute our existing policy for the evaluation of pain and other symptoms contained in our regulations. These final rules incorporate the terms of the statutory standard for evaluating pain and other symptoms in section 3, and related statements of policy and interpretation set forth in Social Security Rulings and program operating instructions. While we have expanded the regulations to include more detailed explanations of the factors we consider in evaluating pain and other symptoms, no substantive new policy is embodied in the final rules.

Comment: Several commenters believed that the preamble to the regulations was deficient by failing to note and/or discuss various court decisions with respect to our policy on the evaluation of pain. One commenter believed that statements in the Summary and Supplementary Information to the effect that the regulations expressly adopt and incorporate existing policies for the evaluation of pain are a clear indication that the regulations are inconsistent with judicial interpretations of the statute.

Response: In general, we do not believe it is necessary to cite or discuss court actions in the preamble to a regulation. Our policy on the evaluation of pain was expressly included in the statute by section 3 of Public Law 98–460. It is true that many courts have issued decisions concerning the evaluation of pain in disability cases. However, we do not read these decisions to hold that our policy is invalid.

Two-Step Process in Evaluating Symptoms, Such as Pain

Comment: Some commenters believed that the two-step process for the evaluation of pain conflicts with section 3 of Public Law 98–460 and ignores the recommendations of the Commission on the Evaluation of Pain.

Response: The two-step process for the evaluation of pain or other symptoms does not conflict with section 3 of Public Law 98–460 or ignore the recommendations of the Commission on the Evaluation of Pain. Section 3 incorporated into the statute, on a temporary basis, our policy for the evaluation of symptoms, including pain. The Commission on the Evaluation of Pain recommended that the statute be extended. The two-step process, which is described in detail in these final regulations, is consistent with the process set forth in section 3 of Public Law 98–460. In brief, this process requires, first, the presence of a medically determinable impairment which could reasonably be expected to produce the pain or other symptoms, and, second, that when such an impairment is established, allegations about the intensity and persistence of the pain or other symptoms must be considered in evaluating the impairment and its effects on the individual's capacity for work.

Comment: One commenter stated that the description of objective medical evidence in §§ 404.1529(c)(2) and 416.929(c)(2) referred only to the "first prong" of the statutory standard set forth in section 3 of Public Law 98–460. This commenter suggested that to be complete, this section should include specific tests used to establish the existence of individual impairment(s). Two commenters believed that §§ 404.1529(d)(4) and 416.929(d)(4) confused the need for objective medical evidence of an underlying medically determinable impairment with the need for evidence of the intensity, persistence, and functional effects of symptoms, such as pain.

Response: Objective medical evidence, that is, medical signs and laboratory findings, must show the existence of the requisite, underlying

impairment(s), and once the impairment(s) is established, we consider this evidence along with all other evidence in evaluating the intensity, persistence, and functionally limiting effects of an individual's pain or other symptoms. Thus, the description of objective medical evidence in paragraph (c)(2) of §§ 404.1529 and 416.929 is correct. While we do not require objective medical evidence to corroborate statements about the intensity, persistence, and functional effects of pain or other symptoms, we must always attempt to obtain objective medical evidence and will consider such evidence when it is obtained. In the final rules, we have amended paragraph (c) to make clear that once an underlying impairment is established, we will not reject the statements of the individual about the intensity, persistence, or limiting effects of his or her symptoms, such as pain, solely because the available objective medical evidence does not substantiate these statements. In addition, the final rules revise the first sentence of §§ 404.1529(d)(4) and 416.929(d)(4) to explain clearly that the functionally limiting effects of the individual's impairment(s) and related symptoms are considered in determining residual functional capacity. We have also deleted the remaining two sentences of these sections of the proposed rules because the information provided in these two sentences is contained elsewhere in the rules. We believe that these changes to §§ 404.1529(d)(4) and 416.929(d)(4) will permit a clearer understanding of our policy.

Need for a Medically Determinable Impairment

Comment: One commenter suggested that we substitute "medically determinable physical or mental impairment" for "medical impairment" and "medically determinable impairment" wherever the latter terms appear to ensure that adjudicators understand that the impairment may be physical or mental.

Response: We made several changes in the final rules to make it clear that the individual's medically determinable impairment may be physical or mental. We also provided further explanation in the preamble to the final rules.

Comment: One commenter stated that the first sentence of proposed §§ 404.1529(b) and 416.929(b) contravenes the language in section 3 of Public Law 98–460 by precluding the consideration of pain until after a medically determinable impairment is established. Another commenter believed that §§ 404.1529(c)(1) and 416.929(c)(1) violated the language both in section 3 and in the settlement agreement in *Polaski* v. *Heckler* (Eighth Circuit, 1984) by requiring the claimant to first prove the existence of a medically determinable impairment before giving consideration to the intensity or persistence of symptoms.

Response: Sections 404.1508 and 416.908 of our regulations make clear that we consider signs, symptoms, and laboratory findings to establish the existence of a medically determinable impairment. However, an individual's statement of symptoms alone is insufficient to establish that a medically determinable impairment is present. As §§ 404.1529(a) and 416.929(a) in these final rules explain more fully, a medically determinable impairment cannot be established on the basis of symptoms alone. This is consistent with the statutory requirement that an impairment must result from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques. Moreover, our existing regulations on the evaluation of pain and other symptoms provide for the evaluation of the effects of symptoms, including pain, when medical signs or findings show the existence of a medical impairment that could reasonably be expected to produce the pain or other symptoms. This is consistent with the language of section 3 of Public Law 98–460 which codified our policy for evaluating pain and other symptoms. We believe the clarifying changes we have made in §§ 404.1529 and 416.929 will avoid any misunderstanding of how we consider the severity or limiting effects of symptoms once the existence of an underlying medically determinable impairment is established. We believe that the policy set out in these final rules is consistent with the language in section 3 of Public Law 98–460 as well as the terms of the settlement agreement in *Polaski* v. *Heckler* (Eighth Circuit, 1984).

Terms Used in the Regulations

Comment: We received numerous comments questioning what we meant by "reasonable" and expressing concern about the extent to which objective medical evidence is needed to establish and/or confirm the relationship of the individual's symptoms to a medically determinable impairment. One commenter believed that the phrase "may reasonably be accepted as consistent with" appears to require that the claimant must prove a causal relationship between the individual's underlying medically determinable impairment and his or her allegations about pain or other symptoms. Other commenters believed this language is inconsistent with section 3 of Public Law 98–460 and/or case law. Some commenters believed that the language could be interpreted as stating that if the individual's allegations of pain or other symptoms are not corroborated by objective medical evidence, adjudicators can ignore such allegations. Still other comments concerned the extent to which objective medical evidence is required to establish and/or confirm the severity, persistence, or functional effects of pain or other symptoms.

Response: We believe our policy, as expressed in these final rules, is consistent with circuit court rulings with respect to the extent to which objective medical evidence is required to corroborate the existence, severity, persistence, or functional effects of pain or other symptoms. Once adjudicators determine that the individual has an impairment which is reasonably expected to produce some pain, they must consider all of the evidence relevant to the individual's allegations of pain, even if the alleged pain is more severe or persistent than would be expected. We do not require objective medical evidence to establish a direct cause and effect relationship between the individual's medically determinable impairment and the intensity, persistence, or functional effects of his or her symptoms, nor do we disregard the individual's allegations about his or her symptoms simply because the allegations are not fully corroborated by objective medical evidence. However, we agree that the language in the Notice of Proposed Rulemaking could be misconstrued to mean that allegations of pain or other symptoms must be corroborated by objective medical evidence to be considered. Therefore, we have changed §§ 404.1529 (c)(2) and (c)(4) and 416.929 (c)(2) and (c)(4) of the final rules to make clear that, once the existence of the requisite underlying impairment is established, we will always consider statements by the individual about the intensity, persistence, or functional effects of a symptom, such as pain.

Comment: Some commenters were concerned that adjudicators are being required to determine an acceptable or normal level of pain for a particular impairment. Several commenters believed that the proposed regulations improperly place the burden of determining whether the pain or other symptoms are consistent with the objective medical evidence and other

evidence on lay persons rather than on medical professionals. One commenter stated that the decision of whether symptoms, such as pain, are consistent with the objective medical evidence must be based on the opinions of the examining physicians. This commenter recommended that we require statements from treating or consulting physicians to include an opinion as to the degree to which reported symptoms are consistent with the objective medical evidence and other evidence, and the degree to which the alleged symptoms affect the individual's residual functional capacity. The commenter further recommended that consultative examination reports must include a medical assessment of the ability to perform work-related activities. Another commenter suggested that the decision of reasonableness could only be made by a nonexamining physician through review and consideration of the opinions of treating or consulting physicians who had examined the individual.

Response: In evaluating pain, we do not apply a "standard" of acceptable levels of pain. We recognize that individuals with the same impairment may experience different levels of pain. Therefore, we consider all of the available evidence and evaluate each case individually.

Based on medical knowledge and our experience with the disability programs, we know there are many medically determinable impairment(s) for which pain is a reasonable and/or expected result. However, we agree that there are situations in which medical judgment is needed to decide whether an individual's medically determinable impairment could reasonably be expected to produce the pain or other symptoms alleged. We have revised §§ 404.1529(b) and 416.929(b) to explain that at the initial and reconsideration steps in the administrative review process (except in disability hearings), a medical or psychological consultant participates in making this determination; at the disability hearing level, a medical or psychological consultant may provide an advisory assessment to assist the disability hearing officer in making this determination; and at the administrative law judge hearing or Appeals Council level, the administrative law judge or Appeals Council may ask a medical advisor designated by the Secretary for a medical opinion as to whether the alleged symptom, such as pain, could reasonably be expected to be produced by an individual's underlying medically determinable impairment(s) Sections 404.1513, 404.1519n, 416.913, and 416.919n explain that medical reports from treating sources and medical and psychological consultants should contain opinions and observations about an individual's symptoms and the effect of the symptoms on the individual's ability to perform work-related activities. Sections 404.1527 and 416.927 explain how we evaluate medical opinions of treating and consulting sources in determining if the reported intensity and persistence of symptoms are reasonably consistent with the medical signs and laboratory findings. In the final rules, we make clear that medical opinions will always be considered in accordance with the rules in §§ 404.1527 and 416.927. However, at the initial and reconsideration steps in the administrative review process (except in disability hearings) the responsibility for making findings of fact about the medical issues involved in determining the extent to which an individual's alleged functional limitations and restrictions due to pain or other symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence rests with the program medical or psychological consultant. At the disability hearing, administrative law judge hearing, or Appeals Council level, the disability hearing officer, administrative law judge, or the Appeals Council, as appropriate, will be responsible for making these findings of fact, but they will consider the opinions of program consultants, referred to above, in addition to considering all other evidence in the file, including opinions from treating and examining sources.

Comment: Two commenters wanted a definition of "other evidence." Another commenter wanted assurance that the term "other persons" as used in the preamble pertains to a family member or other significant person.

Response: We have amended §§ 404.1529(a) and 416.929(a) to include a definition of "other evidence." Generally, "other evidence" includes statements or reports from the claimant, reports from treating or examining physicians or psychologists, and statements or reports from other persons about the claimant's medical condition(s) and daily activities. The term "other persons" as used in the preamble and in the final rules pertains to any person other than the individual or his or her treating or examining physician or psychologist.

Comment: One commenter recommended deleting the term "objective medical evidence" because signs are, in part, not objective since they include abnormalities which are not laboratory findings. Alternatively, this commenter suggested that, rather than cross-reference the regulatory definition, we include a definition of signs in §§ 404.1529(a) and 416.929(a) to ensure uniform understanding.

Response: We disagree with this commenter's view that medical signs are not objective because they include abnormalities demonstrated by techniques other than laboratory findings. Medical signs, as defined in §§ 404.1528(b) and 416.928(b), are separate and apart from laboratory findings. Although distinct from laboratory findings, medical signs are objective medical evidence shown by medically acceptable clinical and diagnostic techniques and can be observed by trained professionals. Further, we do not believe it is necessary to repeat the regulatory definition of signs in §§ 404.1528(b) and 416.928(b) to ensure uniform understanding of what we mean by objective medical evidence.

Comment: One commenter stated that §§ 404.1529(c)(2) and 416.929(c)(2) are at variance with the language and spirit of the requirement in section 3 of Public Law 98–460 that the underlying medically determinable impairment be one which could reasonably be expected to produce the alleged pain because they incorrectly tie the degree of pain to the objective medical evidence.

Response: We disagree. Sections 404.1529(b) and 416.929(b) address the issue of whether an individual's established medically determinable impairment(s) could reasonably be expected to produce the alleged symptoms. The decision as to whether the symptom could reasonably be expected to be produced by the impairment does not require a decision as to the reasonableness of the intensity, persistence, or functional effects of the symptom.

Consideration of the Possibility of a Mental Impairment

Comment: Several commenters believed that §§ 404.1529(b) and 416.929(b) do not explain clearly when and how we consider the possibility of a mental impairment. Other commenters wanted the regulations to mandate mental development or review by a psychiatrist or psychologist in all cases in which the objective medical evidence does not substantiate any physical impairment(s) which could account for the alleged pain. Another suggested such a review in all cases in which there are allegations of pain accompanied by

anxiety or depression. In contrast, one commenter was concerned that we were requiring mental development in all cases, regardless of whether there was any reason to believe a mental impairment existed.

Response: We have amended §§ 404.1529(b) and 416.929(b) to explain that we will develop evidence regarding the possibility of a mental impairment as the basis for the allegations of pain or other symptoms when we have reason to believe a mental impairment exists. The presence of mental symptoms, such as anxiety and depression, does not, of itself, indicate the existence of a medically determinable mental impairment. We do not require development of a mental impairment when there is no reason to believe such an impairment exists. Whether or not a mental impairment exists is established in the same way as we decide whether a physical impairment exists. When the existence of a mental impairment is established, it will be evaluated in accordance with §§ 404.1520a and 416.920a of our regulations. In such cases, we will make every reasonable effort to have a qualified psychiatrist or psychologist complete the medical portion of the case review and, where applicable, the assessment of residual functional capacity.

Consideration of Objective Medical Evidence and Other Evidence To Determine Disability

Comment: Several commenters believed that the proposed rules placed too much emphasis on the need for objective medical evidence, or did not make clear that other evidence has to be considered along with objective medical evidence.

Response: We believe that the final rules make clear the importance of considering all of the evidence, including objective medical evidence and other evidence.

Comment: Several commenters believed that the proposed rules place undue emphasis on objective medical evidence as a usually reliable indicator from which we could draw reasonable conclusions about the intensity, persistence and functional effects of symptoms. One commenter noted that many painful conditions do not exhibit muscle spasm, atrophy, etc. Others believed that the proposed rules implied that in the absence of objective medical evidence of muscle spasm, reduced joint motion, etc., adjudicators could question or even disregard an individual's alleged symptoms. Two commenters suggested that we amend the language in §§ 404.1529(c)(2) and 416.929(c)(2) by adding "when available." One commenter suggested that these sections include a statement that subjective evidence can also be a reliable indicator of the intensity of pain. Other commenters suggested that we add a statement that the absence of objective medical evidence of the intensity and persistence of a symptom would not preclude consideration of the alleged symptom.

Response: We fully consider and evaluate all of the evidence in determining disability. Objective medical evidence is considered reliable in that it is verifiable and reproducible. Subjective evidence, by its very nature, lacks these qualities. However, we agree that not all painful conditions will produce muscle spasm, reduced joint motion, or sensory and motor disruption. We also agree that objective medical evidence from which we can draw reasonable conclusions about the intensity, persistence, or functional effects of alleged symptoms may not be available in all cases. In those cases in which such evidence is available, the evidence must be obtained and considered in evaluating an individual's allegations about the intensity and persistence of symptoms. We have amended §§ 404.1529(c)(2) and 416.929(c)(2) to clarify that we will not reject an individual's allegations as to the intensity, persistence, or functional effects of pain or other symptoms solely because the available objective medical evidence does not substantiate these allegations.

Comment: Some commenters recommended amending the language in §§ 404.1529(c)(3) and 416.929(c)(3) to clarify the responsibility of adjudicators at each adjudicative level to obtain the type of evidence described in these sections. Another commenter believed the first sentence of these sections would mislead adjudicators into expecting that allegations of symptoms, such as pain, would be exaggerated in the absence of objective medical evidence of the symptom itself and, therefore, suggested that the sentence be amended by substituting "usually" or "generally" for "sometimes."

Response: We believe the final rules state very clearly the responsibility of adjudicators at all steps in the administrative review process to develop and consider relevant evidence from medical and lay sources, and thus we did not adopt the suggested amendments to §§ 404.1529(c)(3) and 416.929(c)(3). We have no reason to believe that adjudicators will be misled by this language to assume in any such case that an individual is exaggerating his or her symptoms. We believe the sections, as written, are accurate and straightforward and, if anything, they indicate that symptomatology may indicate greater severity of impairment than would be expected solely on the basis of the objective medical evidence.

Comment: One commenter believed that the proposed regulations take pain and other symptoms into consideration only in the context of the Listing of Impairments in Appendix I of 20 CFR Part 404, Subpart P. This commenter interpreted the proposed rule in §§ 404.1525(f) and 416.925(f) as an amendment to the Listing of Impairments and suggested that the presumed amendment is inadequate and in violation of the Social Security Act in that it failed to provide a separate listing for disability primarily or solely due to pain when the pain cannot be proven by clinical or laboratory diagnostic techniques.

Response: While sections of these rules discuss the evaluation of symptoms with respect to the Listing of Impairments, and in terms of the requirements of a listed impairment, these final rules do not amend the Listing of Impairments or any specific listing. Rather, the rules provide additional explanations of the factors which we consider for the purpose of establishing the existence of pain or other symptoms, and functional limitations resulting from such symptoms, in determining disability. We believe these final rules are consistent with the provisions of the Social Security Act.

Comment: One commenter stated that the proposed regulations failed to require adjudicators to make specific findings of fact in cases in which pain is an element in the decision, while another commenter urged us to include a regulatory requirement that decisionmakers at all levels of adjudication address the issue of pain and state explicitly the basis for all findings regarding the nature, extent, and severity of pain.

Response: The commenters suggest that we include in our regulations specific instructions for writing decision rationales in disability cases with allegations of pain or other symptoms. However, we generally do not include in the body of our regulations specific operating procedures of the type recommended in these suggestions. Rather, we set forth these types of procedures in Social Security Rulings or other operating instructions. Moreover, we already require all Agency adjudicators to do as the commenters suggest. Specifically, Social Security Rulings 88–13 and 90–1p, as appropriate, require that "in all cases in which pain

is alleged, the determination or decision rationale is to contain a thorough discussion and analysis of the objective medical evidence and the nonmedical evidence, including the individual's subjective complaints and the adjudicator's personal observations. The rationale is then to provide a resolution of any inconsistencies in the evidence as a whole and set forth a logical explanation of the individual's capacity to work." Social Security Rulings are binding on all components of the Social Security Administration and are to be relied upon as precedents in adjudicating other cases. Therefore, we believe our policy fully addresses the commenters' concerns.

Evaluation of the Extent to Which the Objective Medical Evidence and Other Evidence Corroborates Allegations of Symptoms, Such as Pain

Comment: Many commenters were concerned that the proposed regulations require objective medical evidence of the degree or intensity of pain. They contended that the rules would preclude consideration of evidence other than objective medical evidence or do not make clear that other evidence must also be considered. Some stated that this undue focus on objective medical evidence conflicts with case law, section 3 of Public Law 98–460, related regulations, and Social Security Ruling 88–13.

Response: We do not disregard an individual's allegations about the intensity, persistence, or functional effects of symptoms, such as pain, solely because those allegations are not substantiated by objective medical evidence. The absence of objective medical evidence of reduced joint motion, muscle spasm, etc., is just one factor we consider in evaluating an individual's allegations as to the intensity, persistence, and functional effects of symptoms, such as pain. As we explain in our final rules, objective medical evidence, such as evidence of muscle spasm, reduced joint motion, sensory deficit or motor disruption, is a useful indicator to assist us in making conclusions about the effect of pain on the individual. Rather than precluding consideration of other evidence, paragraph (c)(3) of §§ 404.1529 and 416.929 explains how we consider evidence other than objective medical evidence in evaluating the intensity and persistence of symptoms, such as pain. Paragraph (c)(4) makes clear that we consider all of the evidence, the objective medical evidence and other evidence, to determine the extent to which symptoms, such as pain, affect the individual's capacity to perform basic work activities. To avoid any misunderstanding, we have made changes in §§ 404.1529 (c)(2) and (c)(4) and 416.929 (c)(2) and (c)(4) of the final rules to make clear that we will consider all of the individual's statements about the intensity, persistence, or functional effects of his or her symptoms, such as pain. In addition, we have added language to §§ 404.1529(c)(4) and 416.929(c)(4) to explain that in determining the extent to which pain or other symptoms affect an individual's capacity to perform basic work activities, we evaluate the statements of the individual in relation to the rest of the evidence. We also explain in these sections that we will consider whether there are any inconsistencies in the evidence and the extent to which there are any conflicts between the individual's statements and the rest of the evidence, including the individual's medical history, the objective medical evidence, and statements from treating or examining physicians or psychologists or other persons about how the symptoms affect the individual. We believe the final rules are clearly consistent with the statutory standard, the cited ruling and various court decisions.

Comment: One commenter expressed concern that there are situations in which pain is alleged, but that currently there is a lack of medical knowledge, understanding, or appropriate medical procedures to diagnose, evaluate, or treat the pain.

Response: We are aware that there are situations in which medical knowledge, understanding, or appropriate medical procedures with regard to pain are inadequate. While we currently know of no valid and reliable method to measure pain, we are interested in development of such a method, and are currently funding research toward this goal. Further exploration of appropriate documentation of claims in the situation described by this commenter is included in the area of consideration of this research.

Weight to Accord Objective Medical Evidence and Other Evidence

Comment: Several commenters noted that nowhere in the proposed regulations is there an indication of the weight to be accorded to various types of evidence. Some commenters wanted us to include more discussion of the consideration to be given to the statements of the claimant, his or her physicians, psychologists, or others. Other commenters stated that the proposed regulations are inconsistent with case law with respect to the weight to be given to a treating physician's opinion. One commenter recommended that we determine the degree and functional effect of symptoms, such as pain, based on the factors listed in §§ 404.1529(c)(3) and 416.929(c)(3).

Response: We believe the final rules adequately cover the issue of how we weigh all evidence. We consider information, such as the individual's medical history, efforts to work, daily activities, types of treatment received, etc., in addition to objective medical evidence. Sections 404.1527 and 416.927 of our regulations discuss the weight to be given to treating source and other medical opinion evidence about the nature and severity of a person's impairment, including the existence and severity of any related symptoms, such as pain. These sections also set forth rules for considering and evaluating nonexamining source opinion. To avoid any misunderstanding, we have added information in the final rules about how we consider treating physician and other medical opinions in the discussions in §§ 404.1529(a), 404.1529(c)(3), 416.929(a), and 416.929(c)(3) and have included in these sections cross-references to §§ 404.1527 and 416.927, as appropriate. As §§ 404.1527 and 416.927 explain, generally, we will give a treating source's opinion more weight than a similar opinion from a nontreating source. If a treating source's opinion on the issue(s) of the nature and severity of an individual's impairment(s) is well documented by objective medical evidence and is not inconsistent with other substantial evidence in the file, we will give it controlling weight. However, as explained in those sections, we are responsible for the determination or decision as to whether an individual is disabled. Therefore, a statement by a treating physician or other medical source that an individual is "disabled" or "unable to work" due to a symptom, such as pain, does not mean that we will determine that the individual is disabled.

Symptoms as Criteria of Listed Impairments

Comment: One commenter agreed in principle with the proposed §§ 404.1525(f) and 416.925(f), but stated that no listing should require information about the intensity, persistence, or limiting effects of pain so long as all requirements for the listing are met, on the basis that the Social Security Administration recognizes a listed impairment as severe enough to prevent a person from doing any gainful activity.

Response: Each listing in the Listing of Impairments sets forth one or more sets of medical findings. The set of medical findings and the interrelationship of the medical findings, not the individual criteria, establish the level of severity. Information about the intensity, persistence, or limiting effects of a symptom, such as pain, is appropriate in the context of certain listings to establish the required level of severity.

Comment: Two commenters questioned our use in §§ 404.1525(f) and 416.925(f) of the listing for ischemic heart disease (Listing 4.04) as an example of how a symptom is considered when it appears as a criterion. They pointed out that 4.00E of the Listing of Impairments requires a detailed description of chest pain to establish that it is of cardiac origin; hence, in this particular listing it is necessary to describe the pain.

Response: We agree with the commenters. We have, therefore, deleted the example in the final rules. We believe that the rule is clear without an example.

Consideration of Symptoms, Such as Pain, in Determining Whether a Listing Is Equaled

Comment: Several commenters were concerned that under §§ 104.1529(d)(3) and 416.929(d)(3) of the proposed rules the intensity and persistence of a symptom, such as pain, could not be substituted for a missing medical sign or laboratory finding to establish equivalence. Many interpreted this to mean that symptoms, such as pain, could not be considered in determining equivalency. Other commenters interpreted §§ 404.1529(d)(3) and 416.929(d)(3) to mean that pain or other symptoms could not be considered in determining medical equivalency for purposes of determining disability for individuals applying for title II widows' or widowers' benefits or title XVI childhood disability payments. One commenter believed it would disadvantage individuals under age 45.

Response: We consider allegations of pain and other symptoms in determining equivalency. We do so in cases of individuals of any age applying for disability benefits and the cases of individuals applying for title II widows' or widowers' benefits or title XVI childhood disability benefits. It is true that under our longstanding rules for determining medical equivalence, allegations of pain or other symptoms cannot be substituted for a missing or deficient sign or laboratory finding to raise the severity of an impairment(s) to that of a listed impairment. However, this does not mean that we do not consider symptoms when determining equivalence. If the listing we use for comparison includes symptoms among its criteria, we will consider the individual's symptoms when determining medical equivalence.

Furthermore, several significant events, which obviate the commenters' concerns about how we decide disability in title XVI childhood claims and in title II widows' and widowers' disability claims, have occurred since we published the proposed rules.

Specifically, in response to the decision of the United States Supreme Court in *Sullivan* v. *Zebley*, ___ U.S. ___ 110 S.Ct. 885 (1990), we have revised and expanded our rules for determining disability in title XVI childhood disability cases. See 56 FR 5534 (February 11, 1991). These rules establish a concept of "functional equivalence" in title XVI children's cases that includes consideration of the impact of pain and other symptoms on a child's functioning and that permits findings of equivalence based upon this impact. Moreover, the new title XVI rules provide an additional step at which children whose impairment(s) does not meet or equal in severity any listing may be found disabled based on an individualized assessment of their functioning; here, too, the impact of symptoms, including pain, plays a significant role in the determination.

There also has been a change for widows, widowers, and surviving divorced spouses claiming benefits based on disability under title II. Section 5103 of Public Law 101–508, the Omnibus Budget Reconciliation Act of 1990, removed the more restrictive definition of disability formerly in the law for these claimants and extended to them the basic "substantial gainful activity" definition. Hence, when these individuals have severe impairment(s) that do not meet or equal in severity any listing, we will proceed to assess their residual functional capacity and make a determination at the last steps of the sequential evaluation process. As in workers' claims, the impact of symptoms plays a significant role in assessing residual functional capacity.

The result of the foregoing changes with respect to title XVI childhood disability cases and claims for widow's, widower's, and surviving divorced spouse's benefits based on disability is that we no longer use the "meets or equals" step of evaluation as the sole basis for an unfavorable determination or decision for any disability claim under title II or title XVI. The final rules make this clear by providing that if an individual has a medically determinable severe impairment(s) that does not meet or equal a listing, we will go on to consider the functional effects of his or her impairment(s), including the impact on functioning of any related symptoms. Therefore, the fact that we cannot substitute pain or other symptoms for missing signs or laboratory findings when we determine whether there is medical equivalence will not disadvantage any claimant.

For this reason, we also disagree with the commenter who suggested that the medical equivalence policy would disadvantage individuals under age 45. We believe that our medical-vocational rules enable us to identify any individual whose functional limitations are so great as a result of pain or other symptoms that, regardless of age, he or she is unable to engage in any substantial gainful activity.

Comment: Some commenters felt that §§ 404.1529(d)(3) and 416.929(d)(3) of our proposed rules prohibit consideration of certain mental disorders in which pain is a predominant feature in determining whether an individual's impairment equals a listed mental impairment. One commenter recommended that these sections be deleted.

Response: As explained early in the preamble, we have modified §§ 404.1529(d)(3) and 416.929(d)(3) of the final rules. We did not adopt, however, the suggestion to delete these sections. We agree that pain may be a predominant feature of certain mental disorders. In §§ 404.1529(b) and 416.929(b), we explain that when the objective medical evidence does not substantiate any physical impairment capable of producing the pain or other symptoms alleged, we will develop evidence regarding the possibility of a medically determinable mental impairment as the basis for the symptoms when we have reason to believe that a mental impairment exists. If an individual has a medically determinable mental impairment, we follow a special procedure, as explained in §§ 404.1520a and 416.920a.

Comment: One commenter felt that there was no difference between the "meets" and "equals" steps since both required medical signs and laboratory findings.

Response: The Listing of Impairments (the Listing) describes, for each of the major body systems, impairment(s) which are considered severe enough to prevent a person from doing any gainful activity in adults or age-appropriate activities in children. An impairment is determined to meet a listing when the medical signs, symptoms, and laboratory findings are the same as those specifically described in the

Listing. However, the Listing does not include all impairment(s) or all possible sets of medical signs, symptoms, and laboratory findings severe enough to prevent a person from doing any gainful activity. The "equals" step provides a basis for determining disability where an impairment is not specifically listed, but the impairment or combination of impairment(s) is of equal severity.

Exertional and Nonexertional Limitations

Comment: One commenter interpreted §§ 404.1569a and 416.969a to say that we only considered an individual's nonexertional limitations or restrictions in determining whether the individual could do work other than his or her past work. This commenter stated that such a statement of policy is wrong since consideration of all of an individual's limitations or restrictions is also relevant and essential in determining whether the individual can do his or her past work. Another commenter believed that the Social Security Rulings adequately explain exertional and nonexertional limitations and, therefore, further regulatory elaboration is unnecessary. This commenter also believed that these sections are not necessarily related to the evaluation of symptoms and suggested that they be promulgated separately if we deemed the rulings insufficient.

Response: We agree that consideration of all of an individual's limitations and restrictions is relevant and essential in assessing residual functional capacity and in determining whether the individual can do his or her past work. We believe the commenter's interpretation arose from the statement that the distinction between exertional and nonexertional limitations is important only when we are deciding whether an individual can do work other than his or her past work. This statement is confusing and we are deleting it from the final rules. While Social Security Rulings discuss exertional and nonexertional limitations, we believe that regulatory elaboration is appropriate under section 221(k) of the Act which was added by section 10 of Public Law 98–460 and which requires us to publish significant evaluation policies in regulations to ensure uniform standards for determining disability. In compliance with section 221(k), §§ 404.1569a and 416.969a include our long-standing policy on how we evaluate symptom-related limitations and restrictions in the discussion of exertional and nonexertional limitations.

Comment: Two commenters noted that we specifically mentioned pain in paragraph (b) of §§ 404.1569a and 416.969a, but not in paragraph (c) or (d), and felt this was a subtle way to imply that pain only affects exertional abilities, in contrast to court interpretations of section 3 of Public Law 98–460.

Response: We have amended paragraphs (c) and (d) of §§ 404.1569a and 416.969a in the final rules to parallel the language in paragraph (b). In the final rules, we cite pain as an example of a symptom which may impose exertional, nonexertional, or both exertional and nonexertional limitations.

Application of the Medical-Vocational Guidelines in Appendix 2

Comment: Several commenters stated that various courts have held pain to be a nonexertional impairment which precludes the use of the medical-vocational rules (the "grids") in appendix 2 of 20 CFR part 404, subpart P, even as a framework to deny a disability claim. These commenters stated that the courts have held that the presence of pain requires the Secretary to call a vocational expert rather than rely on the rules in appendix 2. One commenter requested clarification as to the weight to be given to the rules in appendix 2 when the rules are not applicable.

Response: As we read the many circuit court decisions that have examined our policy on the evaluation of pain, we believe no court has stated a rule concerning how the medical-vocational guidelines may be used in a particular case that is inconsistent with the policy for application of those guidelines as explained in paragraphs (b), (c), and (d) of §§ 404.1569a and 416.969a of these final rules. Pain is a symptom, the individual's own perception and description of his or her physical or mental impairment. Symptoms, such as pain, are considered in establishing the existence of impairment(s), but are not impairment(s) in and of themselves. As we explain in §§ 404.1569a and 416.969a of these final rules, the application of the medical-vocational guidelines in appendix 2 depends on the nature of the limitations and restrictions imposed by an individual's impairment(s) and related symptoms. When the impairment(s) and related symptoms impose only exertional limitations, i.e., affect only the ability to meet the strength demands of jobs (sitting, standing, walking, lifting, carrying, pushing, or pulling), the advice of vocational experts or other specialists may be elicited, when appropriate. When the impairment(s) and related symptoms impose only nonexertional limitations or a combination of exertional and nonexertional limitations, a decision of disability is not directed by a rule in appendix 2, and we may use the services of a vocational expert or other specialist. At the administrative law judge hearing level, the administrative law judge may request the testimony of a vocational expert if the administrative law judge needs assistance to determine a vocational finding of fact. The vocational expert may identify what occupations, if any, an individual can perform and may provide a statement of the incidence of these occupations as individual jobs in the national economy. However, the administrative law judge has the ultimate responsibility for determining disability. As at other levels of adjudication, the administrative law judge must adhere to the principles upon which the rules in appendix 2 are based. If the impairment(s) and related symptoms impose only exertional limitations and the findings of fact meet the criteria of a specific rule in Appendix 2, that rule directs a decision of disabled or not disabled.

Comment: One commenter read §§ 404.1569a and 416.969a as saying that pain is a solely exertional limitation causing adjudicators to apply the medical-vocational guidelines in appendix 2 to direct a decision even when pain affects postural, manipulative, or mental functions.

Response: We have reviewed the language in these sections in light of the comment and do not believe the sections make this statement. Paragraph (a) of §§ 404.1569a and 416.969a explains that how we apply the medical-vocational guidelines in Appendix 2 depends on whether an individual's limitations or restrictions are exertional or nonexertional. The sections very clearly point out that the determination of symptom-related limitations or restrictions of function as exertional, nonexertional, or a combination of exertional and nonexertional, is predicated on the nature of the limitations or restrictions imposed by the symptom, not on the symptom itself. The sections do not state that symptoms, such as pain, cause solely exertional limitations, nor do they state that the rules in Appendix 2 direct a decision regardless of the nature of the limitations caused by the individual's symptoms. Paragraphs (c) and (d) explain how we apply the rules in appendix 2 when an individual's symptom-related limitations or restrictions are nonexertional or a combination of exertional and nonexertional.

The Reports of the Commission on the Evaluation of Pain and the Committee on Pain and Disability of the National Academy of Sciences Institute of Medicine

Comment: One commenter suggested that we incorporate the Minority Opinion reported by the Commission on the Evaluation of Pain in these regulations. A few commenters suggested we adopt the recommendation of a minority of members of the Commission to include a listing for impairment due primarily to pain in the Listing of Impairments.

Response: The majority of Commission members specifically recommended against adoption of a listing for impairment due primarily to pain as did the National Academy of Sciences Institute of Medicine in its 1987 report, Pain and Disability: Clinical, Behavioral, and Public Policy Perspectives. Further, the Commission recommended that the pain policy, as codified in section 3 of Public Law 98–460, be retained pending further research. We agree that this is the appropriate action at this time.

Comment: One commenter questioned why we did not specifically incorporate the findings and recommendations of the Commission on the Evaluation of Pain in the proposed regulations. Another commenter contended that we are ignoring the findings of the Commission.

Response: The Commission on the Evaluation of Pain recommended that our pain policy remain unchanged until further research was concluded and could be acted upon. We have accepted that recommendation in publishing these regulations. These final rules make clear that we do not require objective medical evidence to fully corroborate an individual's statements as to the existence, intensity, or persistence of pain.

Comment: One commenter inquired as to the status of the reactivation/vocational rehabilitation research proposal of the Commission on the Evaluation of Pain.

Response: In response to recommendations of both the Commission on the Evaluation of Pain and the Committee on Pain and Disability of the National Academy of Sciences Institute of Medicine, we initiated a multi-step research program in 1987. The first step has been completed with the design of instruments and methods to enable us to identify and assess claims in which evaluation of pain is a factor and to allow us to obtain data about the nature and extent of pain in our disability claimant population. We awarded a contract in June 1990 to test the reliability and validity of these instruments and to pilot test them.

Comment: One commenter recommended that our regulations incorporate the recommendation of the Commission on the Evaluation of Pain to remand to the State agency any case in which pain is alleged for the first time at the administrative law judge hearing level and the administrative law judge is unable to make a fully favorable decision on the available evidence or to deny the claim on a technical basis.

Response: We did not adopt this recommendation because we believe our current regulations adequately address the issue raised by the commenter. Specifically, §§ 404.941 and 416.1441 provide a procedure for forwarding a case to the State agency for a prehearing review and possible revised determination when additional evidence, such as an allegation of pain, is submitted for the first time at the administrative law judge level.

Comment: One commenter suggested that we adopt the recommendations of the Commission on the Evaluation of Pain to do additional training and to redesign our forms and questionnaires.

Response: In response to the comments and recommendations of the Commission on the Evaluation of Pain, we have been engaged in an extensive training effort for all Federal and State disability examiners and medical and psychological consultants to ensure uniform understanding and application of our policy on the evaluation of pain. In addition, administrative law judges and Appeals Council members participated in a special satellite teletraining broadcast and were provided the same written training materials issued to the State agencies and other Federal personnel. Training on the evaluation of pain is a part of the continuing legal education program sponsored by our Office of Hearings and Appeals. With respect to the Commission's recommendation for redesign of our forms, we routinely review the disability application forms as well as the standard forms used to obtain information from claimants, treating sources, and others. For example, we recently revised the Form SSA–4734–F4 (Residual Functional Capacity Assessment). The new form stresses the importance of a description of an individual's limitations and the need for a discussion of how symptoms, such as pain, were considered in the assessment of residual functional capacity. We are also redesigning the Form SSA–3368–F8 (Disability Report), which is the standard form completed at the time of application, to elicit more complete information early in the case development. Finally, as previously explained, our current research effort is designed, in part, to develop appropriate instruments to obtain data about an individual's pain.

Comment: One commenter noted that the requirement that an individual have a medically determinable impairment which could reasonably be expected to produce the alleged symptoms is inconsistent with the National Academy of Sciences Institute of Medicine Committee on Pain and Disability's recommendation that a primary complaint of significant pain, even in the absence of clinical findings to account for the pain, should trigger a functional assessment.

Response: We have not adopted the Committee on Pain and Disability's recommendation in the final rules. The Committee's recommendation would not be consistent with the statutory requirements for establishing disability. By law, an individual must have a medically determinable impairment, demonstrable by medically acceptable clinical and laboratory findings, to be found disabled.

Use of Pain Specialists and Pain Centers or Clinics

Comment: We received several comments advocating the use of pain specialists or pain centers to provide information about pain. One commenter recommended that independent pain consultants be used to assess a symptom when its alleged intensity is extremely disproportionate to the objective medical evidence. Others believed that statements from pain experts should constitute the basis for a finding of disability in cases in which pain is an issue.

Response: We do not agree that routine referral to independent pain specialists is warranted for all cases in which the alleged pain is much greater than would be expected. Under our existing procedures, reports from pain specialists and/or pain centers are considered as part of the evidence in the disability decisionmaking process. However, the ultimate responsibility for the determination or decision of disability rests with the State agency (or other designee of the Secretary) at the initial and reconsideration levels, with the administrative law judge at the administrative law judge hearing level, or with the Appeals Council at the Appeals Council level. In situations in which the evaluation of pain is essential to the determination of disability, adjudicators at all levels of adjudication may arrange for a consultative

examination by a source described in §§ 404.1519 and 416.919, including a qualified pain specialist or pain center, if such a source is available and meets all the necessary regulatory and State requirements for consultative examiners. Since pain specialists and/or pain centers are not universally available, for practical purposes a pain specialist or pain center consultative examination is generally only requested in those cases where the alleged pain-related limitations or restrictions could affect the determination or decision of disability; i.e., a fully favorable decision is not possible on the basis of the evidence in the case record, additional development of the individual's alleged pain might result in a favorable decision, and the necessary information is not available from other sources.

Comment: One commenter stated that a final determination or decision of disability should not be made until an individual has received a comprehensive evaluation and treatment by a pain specialist or pain center to determine if the individual can be rehabilitated and reactivated into the work force.

Response: This proposal is similar in some ways to the Commission on the Evaluation of Pain's recommendation that we explore the possibility of including, as part of our adjudicative process, a program of reactivation and vocational rehabilitation to assess pain. At present, we have insufficient information about chronic pain and our disability population to determine the value of such a program or to institute the necessary studies to determine the feasibility and cost-effectiveness of incorporating this type of program in our adjudicative process. However, we are currently funding a multi-step research effort. We hope that the results of this research effort will allow us to assess better the Commission's recommendation for inclusion of a reactivation and vocational rehabilitation program as part of our evaluation of disability in certain cases.

Other Comments

Comment: One commenter questioned whether the proposed regulations apply to determinations of entitlement to title II disabled widow's or widower's benefits or title XVI disabled child's benefits.

Response: As we have explained earlier in this preamble, our policy for the evaluation of pain and other symptoms applies to determinations of entitlement to disability benefits under titles II and XVI of the Social Security Act. This includes determinations of entitlement to disabled widow's or widower's benefits under title II of the Act. It also includes determinations of eligibility for benefits in childhood disability cases under title XVI.

For childhood disability cases under title XVI, we consider how the physical or mental impairment(s) and related symptoms affect the child's ability to engage in age-appropriate activities and, when applicable, whether the child can do these activities on a sustained, age-appropriate basis. We assess the impact of the child's impairment(s) on his or her overall ability to function independently, appropriately, and effectively in an age-appropriate manner to decide whether he or she has an impairment(s) that would disable an adult. We have clarified this in § 416.929(d)(4).

As previously noted, section 5103 of Public Law 101–508 extends to claimants for widow's and widower's benefits the same definition of disability applicable to workers who apply for disability benefits. Therefore, the concern of the commenter about whether these regulations apply to widow's and widower's benefits is no longer an issue.

Comment: One commenter noted that fatigue is a frequent complaint with certain impairment(s) and believed that our failure to mention fatigue, specifically, in the regulations would cause adjudicators to tend to ignore allegations of fatigue in decisionmaking.

Response: To avoid any misinterpretation, we have included fatigue, along with pain, shortness of breath, weakness, and nervousness, as an example of a symptom. We have made this change in §§ 404.1529(b) and (d)(1) and 416.929(b) and (d)(1).

Comment: One commenter recommended that we delay implementation of this regulation absent scientifically validated, reliable sets of objective medical evidence to correlate with different levels of pain.

Response: While we agree with the commenter that scientifically validated methods to assess pain and other symptoms are desirable because of the reliability and repeatability of such methods, we cannot agree to delay the publication of these regulations until such methods become available. We believe these regulations are necessary to ensure that all adjudicators, at all adjudicative levels, clearly understand our policy on the evaluation of symptoms, the factors we consider in this evaluation, and the importance of documenting the case record as to the consideration given to symptoms in determining disability. At the same time, we have funded research for the development of instruments to identify and assess individuals with chronic pain and will be funding reliability and validity testing of these instruments. In the future this research may lead to changes in our policy for evaluating pain and other symptoms.

Comment: One commenter suggested that the final sentence of proposed §§ 404.1529(a) and 416.929(a) be rewritten to clarify that symptoms are evaluated to determine how they affect an individual's capacity for work over a sustained period. The commenter suggests that this is necessary because some adjudicators may not recognize that the term "work" means work over a sustained period. Another commenter believed that the last sentence of these sections might be offensive to individuals with chronic pain by implying that we doubt the authenticity of their complaint.

Response: We believe that adjudicators will understand the meaning of "work" as it is used here and elsewhere in this and other sections of our regulations. We do not agree that individuals with chronic pain will take this sentence to mean that we doubt the authenticity of their complaint.

Comment: One commenter suggested we amend §§ 404.1529(c)(2) and 416.929(c)(2) to include reference to medical history.

Response: Sections 404.1529(c)(2) and 416.929(c)(2) specifically address the evaluation of objective medical evidence. Objective medical evidence is limited to medical signs and laboratory findings as defined in §§ 404.1528 (b) and (c) and 416.928 (b) and (c). Medical history is other evidence. We have modified §§ 404.1529(c)(3) and 416.929(c)(3) in the final rules to make clear that medical history is part of the other information which is considered in evaluating the intensity and persistence of an individual's symptoms, such as pain.

Comment: One commenter noted that, in §§ 404.1545(a) and 416.945(a), residual functional capacity is described as an "assessment" rather than a "medical assessment." This commenter stated that this represents a substantial, but unexplained, change in policy which would allow non-medical staff to evaluate residual functional capacity.

Response: The description of residual functional capacity as an "assessment," rather than a "medical assessment," appears in the revised version of §§ 404.1545(a) and 416.945(a) that was promulgated as part of the final regulations pertaining to "Standards for Consultative Examinations and Existing Medical Evidence" which were published in the **Federal Register** on August 1, 1991 at 56 FR 36932. The

responsibility for deciding residual functional capacity is discussed in §§ 404.1546 and 416.946 of our regulations; these sections also were revised as part of the final regulations on "Standards for Consultative Examinations and Existing Medical Evidence."

Comment: One commenter recommended that the example in §§ 404.1545(e) and 416.945(e) be deleted since it implies that complaints of pain alone can reduce residual functional capacity which could lead to incorrect conclusions about the effect of pain on the individual's residual functional capacity. Another commenter recommended that we expand the example to show how symptoms, such as pain, could further reduce an individual's capacity for sustained work activity to less than the full exertional range of sedentary work.

Response: The example is provided solely to demonstrate that individuals with the same disorder may differ in the extent to which they are functionally limited due to differences in symptomatology and to make clear that any functional limitations due to symptoms may reduce an individual's capacity for work activity. The determination is not based solely on the individual's statements, but is made only after consideration of all of the evidence pertaining to an individual's impairment(s) and any related symptoms, i.e., medical and nonmedical evidence, including the information described in §§ 404.1529(c) and 416.929(c) of the final rules. Sections 404.1529(c)(4) and 416.929(c)(4) in the final rules make clear that any inconsistencies in the evidence and any conflicts between the individual's statements and the rest of the evidence, the objective medical evidence and other evidence, will be considered in determining the extent to which an individual's symptoms, such as pain, affect his or her capacity for work. While we did not adopt the commenters' suggestions, we have made changes in §§ 404.1545(e) and 416.945(e) to reflect that the assessment of residual functional capacity is done on an individualized case-by-case basis taking into account all medical and nonmedical evidence of record. In addition, we have added the words, "and related symptoms," to the last sentences of §§ 404.1545(e) and 416.945(e) to clarify that we evaluate the total limiting effects of an individual's impairment(s) and related symptoms. This change also serves to clarify the cross references to §§ 404.1529(c) and 416.929(c) contained in the last sentences of §§ 404.1545(e) and 416.945(e). We also have modified §§ 404.1529(d)(4) and 416.929(d)(4) to clarify that we consider the limiting effects of an individual's impairment(s) and related symptoms, including pain, in determining the individual's residual functional capacity.

Comment: One commenter, noting personal experience with the use of regional thermography, suggested that we consider including this procedure as an acceptable method to ascertain the basis for an individual's pain.

Response: We are not adopting this suggestion. We know of no technique to measure reliably the existence and intensity of an individual's pain. Although, as this commenter noted, regional thermography is used clinically as a simple, painless, and safe indicator of sympathetic function, the value of thermography as a valid and reliable technique for the evaluation of pain is still not widely accepted. When thermographic evidence is part of the medical record, we will consider the results of the thermography in evaluating the severity of an individual's impairment(s) and related symptoms.

Additional Changes

In addition to the revisions discussed above, we revised §§ 404.1529(c)(2) and 416.929(c)(2) to acknowledge that sensory problems and motor problems may occur independently of each other. We did this by changing the language "evidence of reduced joint motion, muscle spasm, and sensory and motor disruption," to read, "evidence of reduced joint motion, muscle spasm, sensory deficit or motor disruption."

In addition, we have revised the heading for paragraph (c) of §§ 404.1529 and 416.929 to reflect the content of paragraph (c)(4), which discusses how we determine the extent to which symptoms affect an individual's capacity for work. Also, we have added language to paragraphs (c)(1) and (c)(4) of §§ 404.1529 and 416.929 of the final rules to explain clearly how the provisions of paragraphs (c)(1) through (c)(4) relate to each other.

We also revised §§ 404.1569a (a) and (c) and 416.969a (a) and (c) to delete the word "nonstrength" in the phrase "the nonstrength demands of jobs." In its place we are using the phrase, "the demands of jobs other than the strength demands." We believe this better conveys that any demands of jobs other than the seven strength demands delineated in the Dictionary of Occupational Titles published by the Department of Labor are considered nonexertional activities. Thus, demands of jobs such as climbing, stooping, crawling, seeing, hearing, maintaining attention, etc., are considered to be nonexertional activities.

Regulatory Procedures

Executive Order 12291

These changes will have little or no effect on title II or title XVI benefit payments or administrative costs since no change in current policy is involved. These regulations do not meet any of the criteria for a major rule. Therefore, a regulatory impact analysis is not required.

Regulatory Flexibility Act

We certify that these regulations will not have a significant economic impact on a substantial number of small entities because they only affect disability claimants and beneficiaries under title II and title XVI of the Social Security Act. Therefore, a regulatory flexibility analysis as provided in Public Law 96–354, the Regulatory Flexibility Act, is not required.

Paperwork Reduction Act

These regulations impose no reporting/recordkeeping requirements necessitating clearance by the Office of Management and Budget. All information necessary to make the disability decisions discussed in these regulations is presently collected using forms which have the Office of Management and Budget clearance.

(Catalog of Federal Domestic Program Nos. 93.802, Social Security Disability Insurance; 93.807, Supplemental Security Income Program)

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Death benefits, Disability benefits, Old-Age, Survivors and Disability Insurance.

20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Supplemental Security Income.

Dated: August 5, 1991.

Gwendolyn S. King,

Commissioner of Social Security.

Approved: October 3, 1991.

Louis W. Sullivan,

Secretary of Health and Human Services.

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

For the reasons set out in the preamble, part 404, subpart P, chapter III

of title 20, Code of Federal Regulations, is amended as set forth below.

20 CFR part 404, subpart P is amended as follows:

1. The authority citation for Subpart P is revised to read as follows:

Subpart P—Determining Disability and Blindness

Authority: Secs. 202, 205 (a), (b), and (d)–(h), 216(i), 221 (a) and (i), 222(c), 223, 225, and 1102 of the Social Security Act; 42 U.S.C. 402, 405 (a), (b), and (d)–(h), 416(i), 421 (a) and (i), 422(c), 423, 425, and 1302; sec. 505(a) of Pub. L. 96–265, 94 Stat 473; secs. 2(d)(2), 5, 6, and 15 of Pub. L. 98–460, 98 Stat. 1797, 1801, 1802, and 1808.

2. Paragraph (g) of § 404.1501 is revised to read as follows:

§ 404.1501 Scope of subpart.

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(g) Our rules on vocational considerations are found in §§ 404.1560 through 404.1569a. We explain when vocational factors must be considered along with the medical evidence, discuss the role of residual functional capacity in evaluating your ability to work, discuss the vocational factors of age, education, and work experience, describe what we mean by work which exists in the national economy, discuss the amount of exertion and the type of skill required for work, describe and tell how to use the Medical-Vocational Guidelines in appendix 2 of this subpart, and explain when, for purposes of applying the guidelines in appendix 2, we consider the limitations or restrictions imposed by your impairment(s) and related symptoms to be exertional, nonexertional, or a combination of both.

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3. Section 404.1525 is amended by changing "impairments" to "Impairments" in the heading of the section, and by adding paragraph (f) to read as follows:

§ 404.1525 Listing of impairments in appendix 1.

* * * * *

(f) *Symptoms as criteria of listed impairment(s).* Some listed impairment(s) include symptoms usually associated with those impairment(s) as criteria. Generally, when a symptom is one of the criteria in a listed impairment, it is only necessary that the symptom be present in combination with the other criteria. It is not necessary, unless the listing specifically states otherwise, to provide information about the intensity, persistence or limiting effects of the symptom as long as all other findings required by the specific listing are present.

4. Section 404.1529 is revised to read as follows:

§ 404.1529 How we evaluate symptoms, including pain.

(a) *General.* In determining whether you are disabled, we consider all your symptoms, including pain, and the extent to which your symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence. By objective medical evidence, we mean medical signs and laboratory findings as defined in § 404.1528 (b) and (c). By other evidence, we mean the kinds of evidence described in §§ 404.1512(b) (2) through (6) and 404.1513(b) (1), (4), and (5) and (e). These include statements or reports from you, your treating or examining physician or psychologist, and others about your medical history, diagnosis, prescribed treatment, daily activities, efforts to work, and any other evidence showing how your impairment(s) and any related symptoms affect your ability to work. We will consider all of your statements about your symptoms, such as pain, and any description you, your physician, your psychologist, or other persons may provide about how the symptoms affect your activities of daily living and your ability to work. However, statements about your pain or other symptoms will not alone establish that you are disabled; there must be medical signs and laboratory findings which show that you have a medical impairment(s) which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all of the other evidence (including statements about the intensity and persistence of your pain or other symptoms which may reasonably be accepted as consistent with the medical signs and laboratory findings), would lead to a conclusion that you are disabled. In evaluating the intensity and persistence of your symptoms, including pain, we will consider all of the available evidence, including your medical history, the medical signs and laboratory findings and statements about how your symptoms affect you. (Section 404.1527 explains how we consider opinions of your treating source and other medical opinions on the existence and severity of your symptoms, such as pain.) We will then determine the extent to which your alleged functional limitations and restrictions due to pain or other symptoms can reasonably be accepted as consistent with the medical signs and laboratory findings and other evidence to decide how your symptoms affect your ability to work.

(b) *Need for medically determinable impairment that could reasonably be expected to produce your symptoms, such as pain.* Your symptoms, such as pain, fatigue, shortness of breath, weakness, or nervousness, will not be found to affect your ability to do basic work activities unless medical signs or laboratory findings show that a medically determinable impairment(s) is present. Medical signs and laboratory findings, established by medically acceptable clinical or laboratory diagnostic techniques, must show the existence of a medical impairment(s) which results from anatomical, physiological, or psychological abnormalities and which could reasonably be expected to produce the pain or other symptoms alleged. At the initial or reconsideration step in the administrative review process (except in disability hearings), a State agency medical or psychological consultant (or other medical or psychological consultant designated by the Secretary) directly participates in determining whether your medically determinable impairment(s) could reasonably be expected to produce your alleged symptoms. In the disability hearing process, a medical or psychological consultant may provide an advisory assessment to assist a disability hearing officer in determining whether your impairment(s) could reasonably be expected to produce your alleged symptoms. At the administrative law judge hearing or Appeals Council level, the administrative law judge or the Appeals Council may ask for and consider the opinion of a medical advisor concerning whether your impairment(s) could reasonably be expected to produce your alleged symptoms. The finding that your impairment(s) could reasonably be expected to produce your pain or other symptoms does not involve a determination as to the intensity, persistence, or functionally limiting effects of your symptoms. We will develop evidence regarding the possibility of a medically determinable mental impairment when we have information to suggest that such an impairment exists, and you allege pain or other symptoms but the medical signs and laboratory findings do not substantiate any physical impairment(s) capable of producing the pain or other symptoms.

(c) *Evaluating the intensity and persistence of your symptoms, such as pain, and determining the extent to which your symptoms limit your capacity for work*—(1) *General.* When the medical signs or laboratory findings

show that you have a medically determinable impairment(s) that could reasonably be expected to produce your symptoms, such as pain, we must then evaluate the intensity and persistence of your symptoms so that we can determine how your symptoms limit your capacity for work. In evaluating the intensity and persistence of your symptoms, we consider all of the available evidence, including your medical history, the medical signs and laboratory findings, and statements from you, your treating or examining physician or psychologist, or other persons about how your symptoms affect you. We also consider the medical opinions of your treating source and other medical opinions as explained in § 404.1527. Paragraphs (c)(2) through (c)(4) of this section explain further how we evaluate the intensity and persistence of your symptoms and how we determine the extent to which your symptoms limit your capacity for work, when the medical signs or laboratory findings show that you have a medically determinable impairment(s) that could reasonably be expected to produce your symptoms, such as pain.

(2) *Consideration of objective medical evidence.* Objective medical evidence is evidence obtained from the application of medically acceptable clinical and laboratory diagnostic techniques, such as evidence of reduced joint motion, muscle spasm, sensory deficit or motor disruption. Objective medical evidence of this type is a useful indicator to assist us in making reasonable conclusions about the intensity and persistence of your symptoms and the effect those symptoms, such as pain, may have on your ability to work. We must always attempt to obtain objective medical evidence and, when it is obtained, we will consider it in reaching a conclusion as to whether you are disabled. However, we will not reject your statements about the intensity and persistence of your pain or other symptoms or about the effect your symptoms have on your ability to work solely because the available objective medical evidence does not substantiate your statements.

(3) *Consideration of other evidence.* Since symptoms sometimes suggest a greater severity of impairment than can be shown by objective medical evidence alone, we will carefully consider any other information you may submit about your symptoms. The information that you, your treating or examining physician or psychologist, or other persons provide about your pain or other symptoms (e.g., what may precipitate or aggravate your symptoms, what medications, treatments or other methods you use to alleviate them, and how the symptoms may affect your pattern of daily living) is also an important indicator of the intensity and persistence of your symptoms. Because symptoms, such as pain, are subjective and difficult to quantify, any symptom-related functional limitations and restrictions which you, your treating or examining physician or psychologist, or other persons report, which can reasonably be accepted as consistent with the objective medical evidence and other evidence, will be taken into account as explained in paragraph (c)(4) of this section in reaching a conclusion as to whether you are disabled. We will consider all of the evidence presented, including information about your prior work record, your statements about your symptoms, evidence submitted by your treating, examining or consulting physician or psychologist, and observations by our employees and other persons. Section 404.1527 explains in detail how we consider and weigh treating source and other medical opinions about the nature and severity of your impairment(s) and any related symptoms, such as pain. Factors relevant to your symptoms, such as pain, which we will consider include:

(i) Your daily activities;

(ii) The location, duration, frequency, and intensity of your pain or other symptoms;

(iii) Precipitating and aggravating factors;

(iv) The type, dosage, effectiveness, and side effects of any medication you take or have taken to alleviate your pain or other symptoms;

(v) Treatment, other than medication, you receive or have received for relief of your pain or other symptoms;

(vi) Any measures you use or have used to relieve your pain or other symptoms (e.g., lying flat on your back, standing for 15 to 20 minutes every hour, sleeping on a board, etc.); and

(vii) Other factors concerning your functional limitations and restrictions due to pain or other symptoms.

(4) *How we determine the extent to which symptoms, such as pain, affect your capacity to perform basic work activities.* In determining the extent to which your symptoms, such as pain, affect your capacity to perform basic work activities, we consider all of the available evidence described in paragraphs (c)(1) through (c)(3) of this section. We will consider your statements about the intensity, persistence, and limiting effects of your symptoms, and we will evaluate your statements in relation to the objective medical evidence and other evidence, in reaching a conclusion as to whether you are disabled. We will consider whether there are any inconsistencies in the evidence and the extent to which there are any conflicts between your statements and the rest of the evidence, including your medical history, the medical signs and laboratory findings, and statements by your treating or examining physician or psychologist or other persons about how your symptoms affect you. Your symptoms, including pain, will be determined to diminish your capacity for basic work activities to the extent that your alleged functional limitations and restrictions due to symptoms, such as pain, can reasonably be accepted as consistent with the objective medical evidence and other evidence.

(d) *Consideration of symptoms in the disability determination process.* We follow a set order of steps to determine whether you are disabled. If you are not doing substantial gainful activity, we consider your symptoms, such as pain, to evaluate whether you have a severe physical or mental impairment(s), and at each of the remaining steps in the process. Sections 404.1520 and 404.1520a explain this process in detail. We also consider your symptoms, such as pain, at the appropriate steps in our review when we consider whether your disability continues. Sections 404.1579 and 404.1594 explain the procedure we follow in reviewing whether your disability continues.

(1) *Need to establish a severe medically determinable impairment(s).* Your symptoms, such as pain, fatigue, shortness of breath, weakness, or nervousness, are considered in making a determination as to whether your impairment or combination of impairment(s) is severe. (See § 404.1520(c).)

(2) *Decision whether the Listing of Impairments is met.* Some listed impairment(s) include symptoms, such as pain, as criteria. Section 404.1525(f) explains how we consider your symptoms when your symptoms are included as criteria for a listed impairment.

(3) *Decision whether the Listing of Impairments is equaled.* If your impairment is not the same as a listed impairment, we must determine whether your impairment(s) is medically equivalent to a listed impairment. Section 404.1526 explains how we make this determination. Under § 404.1526(b), we will consider equivalence based on medical evidence only. In considering whether your symptoms, signs, and laboratory findings are medically equal

to the symptoms, signs, and laboratory findings of a listed impairment, we will look to see whether your symptoms, signs, and laboratory findings are at least equal in severity to the listed criteria. However, we will not substitute your allegations of pain or other symptoms for a missing or deficient sign or laboratory finding to raise the severity of your impairment(s) to that of a listed impairment. If the symptoms, signs, and laboratory findings of your impairment(s) are equivalent in severity to those of a listed impairment, we will find you disabled. If it does not, we will consider the impact of your symptoms on your residual functional capacity. (See paragraph (d)(4) of this section.)

(4) *Impact of symptoms (including pain) on residual functional capacity.* If you have a medically determinable severe physical or mental impairment(s), but your impairment(s) does not meet or equal an impairment listed in Appendix 1 of this subpart, we will consider the impact of your impairment(s) and any related symptoms, including pain, on your residual functional capacity. (See § 404.1545.)

5. Section 404.1545 is revised to read as follows:

§ 404.1545 Your residual functional capacity.

(a) *General.* Your impairment(s), and any related symptoms, such as pain, may cause physical and mental limitations that affect what you can do in a work setting. Your residual functional capacity is what you can still do despite your limitations. If you have more than one impairment, we will consider all of your impairment(s) of which we are aware. We will consider your ability to meet certain demands of jobs, such as physical demands, mental demands, sensory requirements, and other functions, as described in paragraphs (b), (c), and (d) of this section. Residual functional capacity is an assessment based upon all of the relevant evidence. It may include descriptions (even your own) of limitations that go beyond the symptoms, such as pain, that are important in the diagnosis and treatment of your medical condition. Observations by your treating or examining physicians or psychologists, your family, neighbors, friends, or other persons, of your limitations, in addition to those observations usually made during formal medical examinations, may also be used. These descriptions and observations, when used, must be considered along with your medical records to enable us to decide to what extent your impairment(s) keeps you from performing particular work activities. This assessment of your remaining capacity for work is not a decision on whether you are disabled, but is used as the basis for determining the particular types of work you may be able to do despite your impairment(s). Then, using the guidelines in §§ 404.1560 through 404.1569a, your vocational background is considered along with your residual functional capacity in arriving at a disability determination or decision. In deciding whether your disability continues or ends, the residual functional capacity assessment may also be used to determine whether any medical improvement you have experienced is related to your ability to work as discussed in § 404.1594.

(b) *Physical abilities.* When we assess your physical abilities, we first assess the nature and extent of your physical limitations and then determine your residual functional capacity for work activity on a regular and continuing basis. A limited ability to perform certain physical demands of work activity, such as sitting, standing, walking, lifting, carrying, pushing, pulling, or other physical functions (including manipulative or postural functions, such as reaching, handling, stooping or crouching), may reduce your ability to do past work and other work.

(c) *Mental abilities.* When we assess your mental abilities, we first assess the nature and extent of your mental limitations and restrictions and then determine your residual functional capacity for work activity on a regular and continuing basis. A limited ability to carry out certain mental activities, such as limitations in understanding, remembering, and carrying out instructions, and in responding appropriately to supervision, co-workers, and work pressures in a work setting, may reduce your ability to do past work and other work.

(d) *Other abilities affected by impairment(s).* Some medically determinable impairment(s), such as skin impairment(s), epilepsy, impairment(s) of vision, hearing or other senses, and impairment(s) which impose environmental restrictions, may cause limitations and restrictions which affect other work-related abilities. If you have this type of impairment(s), we consider any resulting limitations and restrictions which may reduce your ability to do past work and other work in deciding your residual functional capacity.

(e) *Total limiting effects.* When you have a severe impairment(s), but your symptoms, signs, and laboratory findings do not meet or equal those of a listed impairment in Appendix 1 of this subpart, we will consider the limiting effects of all your impairment(s), even those that are not severe, in determining your residual functional capacity. Pain or other symptoms may cause a limitation of function beyond that which can be determined on the basis of the anatomical, physiological or psychological abnormalities considered alone; e.g., someone with a low back disorder may be fully capable of the physical demands consistent with those of sustained medium work activity, but another person with the same disorder, because of pain, may not be capable of more than the physical demands consistent with those of light work activity on a sustained basis. In assessing the total limiting effects of your impairment(s) and any related symptoms, we will consider all of the medical and nonmedical evidence, including the information described in § 404.1529(c).

6. A new § 404.1569a is added to read as follows:

§ 404.1569a Exertional and nonexertional limitations.

(a) *General.* Your impairment(s) and related symptoms, such as pain, may cause limitations of function or restrictions which limit your ability to meet certain demands of jobs. These limitations may be exertional, nonexertional, or a combination of both. Limitations are classified as exertional if they affect your ability to meet the strength demands of jobs. The classification of a limitation as exertional is related to the United States Department of Labor's classification of jobs by various exertional levels (sedentary, light, medium, heavy, and very heavy) in terms of the strength demands for sitting, standing, walking, lifting, carrying, pushing, and pulling. Sections 404.1567 and 404.1569 explain how we use the classification of jobs by exertional levels (strength demands) which is contained in the Dictionary of Occupational Titles published by the Department of Labor, to determine the exertional requirements of work which exists in the national economy. Limitations or restrictions which affect your ability to meet the demands of jobs other than the strength demands, that is, demands other than sitting, standing, walking, lifting, carrying, pushing or pulling, are considered nonexertional. Sections 404.1520(f) and 404.1594(f)(8) explain that if you can no longer do your past relevant work because of a severe medically determinable impairment(s), we must determine whether your impairment(s), when considered along with your age, education, and work experience, prevents you from doing any

other work which exists in the national economy in order to decide whether you are disabled (§ 404.1520(f)) or continue to be disabled (§ 404.1594(f)(8)). Paragraphs (b), (c), and (d) of this section explain how we apply the medical-vocational guidelines in Appendix 2 of this subpart in making this determination, depending on whether the limitations or restrictions imposed by your impairment(s) and related symptoms, such as pain, are exertional, nonexertional, or a combination of both.

(b) *Exertional limitations.* When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain, affect only your ability to meet the strength demands of jobs (sitting, standing, walking, lifting, carrying, pushing, and pulling), we consider that you have only exertional limitations. When your impairment(s) and related symptoms only impose exertional limitations and your specific vocational profile is listed in a rule contained in Appendix 2 of this subpart, we will directly apply that rule to decide whether you are disabled.

(c) *Nonexertional limitations.* (1) When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain, affect only your ability to meet the demands of jobs other than the strength demands, we consider that you have only nonexertional limitations or restrictions. Some examples of nonexertional limitations or restrictions include the following:

(i) You have difficulty functioning because you are nervous, anxious, or depressed;

(ii) You have difficulty maintaining attention or concentrating;

(iii) You have difficulty understanding or remembering detailed instructions;

(iv) You have difficulty in seeing or hearing;

(v) You have difficulty tolerating some physical feature(s) of certain work settings, e.g., you cannot tolerate dust or fumes; or

(vi) You have difficulty performing the manipulative or postural functions of some work such as reaching, handling, stooping, climbing, crawling, or crouching.

(2) If your impairment(s) and related symptoms, such as pain, only affect your ability to perform the nonexertional aspects of work-related activities, the rules in appendix 2 do not direct factual conclusions of disabled or not disabled. The determination as to whether disability exists will be based on the principles in the appropriate sections of the regulations, giving consideration to the rules for specific case situations in appendix 2.

(d) *Combined exertional and nonexertional limitations.* When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain, affect your ability to meet both the strength and demands of jobs other than the strength demands, we consider that you have a combination of exertional and nonexertional limitations or restrictions. If your impairment(s) and related symptoms, such as pain, affect your ability to meet both the strength and demands of jobs other than the strength demands, we will not directly apply the rules in appendix 2 unless there is a rule that directs a conclusion that you are disabled based upon your strength limitations; otherwise the rules provide a framework to guide our decision.

Appendix 2—[Amended]

7. Appendix 2 (Medical-Vocational Guidelines) of subpart P is amended by revising paragraph (c) of 200.00 to read as follows:

200.00 *Introduction*

* * * * *

(c) In the application of the rules, the individual's residual functional capacity (i.e., the maximum degree to which the individual retains the capacity for sustained performance of the physical-mental requirements of jobs), age, education, and work experience must first be determined. When assessing the person's residual functional capacity, we consider his or her symptoms (such as pain), signs, and laboratory findings together with other evidence we obtain.

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PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED.

For the reasons set out in the preamble, part 416, subpart I, chapter III of title 20, Code of Federal Regulations, is amended as set forth below.

20 CFR part 416, subpart I is amended as follows:

1. The authority citation for subpart I is revised to read as follows:

Subpart I—Determining Disability and Blindness

Authority: Secs. 1102, 1614(a), 1619, 1631(a) and (d)(1), and 1633 of the Social Security Act; 42 U.S.C. 1302, 1382c(a), 1382h, 1383(a) and (d) (1), and 1383b; secs. 2, 5, 6, and 15 of Pub. L. 98–460, 98 Stat. 1794, 1801, 1802, and 1808.

2. Paragraph (j) of § 416.901 is revised to read as follows:

§ 416.901 Scope of subpart.

* * * * *

(j) Our rules on vocational considerations are found in §§ 416.960 through 416.969a. We explain when vocational factors must be considered along with the medical evidence, discuss the role of residual functional capacity in evaluating your ability to work, discuss the vocational factors of age, education, and work experience, describe what we mean by work which exists in the national economy, discuss the amount of exertion and the type of skill required for work, describe how the Guidelines in appendix 2 of subpart P of part 404 of this chapter apply to claims under part 416, and explain when, for purposes of applying the guidelines in appendix 2, we consider the limitations or restrictions imposed by your impairment(s) and related symptoms to be exertional, nonexertional, or a combination of both.

* * * * *

3. Section 416.925 is amended by changing "impairments" to "Impairments" in the heading of the section, and by adding paragraph (f) to read as follows:

§ 416.925 Listing of impairments in Appendix 1 of Subpart P of Part 404 of this chapter.

* * * * *

(f) *Symptoms as criteria of listed impairment(s).* Some listed impairment(s) include symptoms usually associated with those impairment(s) as criteria. Generally, when a symptom is one of the criteria in a listed impairment, it is only necessary that the symptom be present in combination with the other criteria. It is not necessary, unless the listing specifically states otherwise, to provide information about the intensity, persistence or limiting effects of the symptom as long as all other findings required by the specific listing are present.

4. Section 416.929 is revised to read as follows:

§ 416.929 How we evaluate symptoms, including pain.

(a) *General.* In determining whether you are disabled, we consider all your symptoms, including pain, and the extent to which your symptoms can reasonably be accepted as consistent with the objective medical evidence, and other evidence. By objective medical evidence, we mean medical signs and laboratory findings as defined in § 416.928 (b) and (c). By other evidence, we mean the kinds of evidence described in §§ 416.912(b) (2) through (6) and 416.913 (b) (1), (4), and

(5) and (e). These include statements or reports from you, your treating or examining physician or psychologist, and others about your medical history, diagnosis, prescribed treatment, daily activities, efforts to work, and any other evidence showing how your impairment(s) and any related symptoms affect your ability to work (or if you are a child, to function independently, appropriately, and effectively in an age-appropriate manner). We will consider all of your statements about your symptoms, such as pain, and any description you, your physician, your psychologist, or other persons may provide about how the symptoms affect your activities of daily living and your ability to work (or if you are a child, to function independently, appropriately, and effectively in an age-appropriate manner). However, statements about your pain or other symptoms will not alone establish that you are disabled; there must be medical signs and laboratory findings which show that you have a medical impairment(s) which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all of the other evidence (including statements about the intensity and persistence of your pain or other symptoms which may reasonably be accepted as consistent with the medical signs and laboratory findings), would lead to a conclusion that you are disabled. In evaluating the intensity and persistence of your symptoms, including pain, we will consider all of the available evidence, including your medical history, the medical signs and laboratory findings and statements about how your symptoms affect you. (Section 416.927 explains how we consider opinions of your treating source and other medical opinions on the existence and severity of your symptoms, such as pain.) We will then determine the extent to which your alleged functional limitations and restrictions due to pain or other symptoms can reasonably be accepted as consistent with the medical signs and laboratory findings and other evidence to decide how your symptoms affect your ability to work (or if you are a child, to function independently, appropriately, and effectively in an age-appropriate manner).

(b) *Need for medically determinable impairment that could reasonably be expected to produce your symptoms, such as pain.* Your symptoms, such as pain, fatigue, shortness of breath, weakness, or nervousness, will not be found to affect your ability to do basic work activities unless medical signs or laboratory findings show that a medically determinable impairment(s) is present. Medical signs and laboratory findings, established by medically acceptable clinical or laboratory diagnostic techniques, must show the existence of a medical impairment(s) which results from anatomical, physiological, or psychological abnormalities and which could reasonably be expected to produce the pain or other symptoms alleged. At the initial or reconsideration step in the administrative review process (except in disability hearings), a State agency medical or psychological consultant (or other medical or psychological consultant designated by the Secretary) directly participates in determining whether your medically determinable impairment(s) could reasonably be expected to produce your alleged symptoms. In the disability hearing process, a medical or psychological consultant may provide an advisory assessment to assist a disability hearing officer in determining whether your impairment(s) could 'reasonably be expected to produce your alleged symptoms. At the administrative law judge hearing or Appeals Council level, the administrative law judge or the Appeals Council may ask for and consider the opinion of a medical advisor concerning whether your impairment(s) could reasonably be expected to produce your alleged symptoms. The finding that your impairment(s) could reasonably be expected to produce your pain or other symptoms does not involve a determination as to the intensity, persistence, or functionally limiting effects of your symptoms. We will develop evidence regarding the possibility of a medically determinable mental impairment when we have information to suggest that such an impairment exists, and you allege pain or other symptoms but the medical signs and laboratory findings do not substantiate any physical impairment(s) capable of producing the pain or other symptoms.

(c) *Evaluating the intensity and persistence of your symptoms, such as pain, and determining the extent to which your symptoms limit your capacity for work or for functioning in an age-appropriate manner*—(1) *General.* When the medical signs or laboratory findings show that you have a medically determinable impairment(s) that could reasonably be expected to produce your symptoms, such as pain, we must then evaluate the intensity and persistence of your symptoms so that we can determine how your symptoms limit your capacity for work. In evaluating the intensity and persistence of your symptoms, we consider all of the available evidence, including your medical history, the medical signs and laboratory findings, and statements from you, your treating or examining physician or psychologist, or other persons about how your symptoms affect you. We also consider the medical opinions of your treating source and other medical opinions as explained in § 416.927. Paragraphs (c)(2) through (c)(4) of this section explain further how we evaluate the intensity and persistence of your symptoms and how we determine the extent to which your symptoms limit your capacity for work (or if you are a child, to function independently, appropriately, and effectively in an age-appropriate manner), when the medical signs or laboratory findings show that you have a medically determinable impairment(s) that could reasonably be expected to produce your symptoms, such as pain.

(2) *Consideration of objective medical evidence.* Objective medical evidence is evidence obtained from the application of medically acceptable clinical and laboratory diagnostic techniques, such as evidence of reduced joint motion, muscle spasm, sensory deficit or motor disruption. Objective medical evidence of this type is a useful indicator to assist us in making reasonable conclusions about the intensity and persistence of your symptoms and the effect those symptoms, such as pain, may have on your ability to work. We must always attempt to obtain objective medical evidence and, when it is obtained, we will consider it in reaching a conclusion as to whether you are disabled. However, we will not reject your statements about the intensity and persistence of your pain or other symptoms or about the effect your symptoms have on your ability to work (or if you are a child, to function independently, appropriately, and effectively in an age-appropriate manner) solely because the available objective medical evidence does not substantiate your statements.

(3) *Consideration of other evidence.* Since symptoms sometimes suggest a greater severity of impairment than can be shown by objective medical evidence alone, we will carefully consider any other information you may submit about your symptoms. The information that you, your treating or examining physician or psychologist, or other persons provide about your pain or other symptoms (e.g., what may precipitate or aggravate your symptoms, what medications, treatments or other

methods you use to alleviate them, and how the symptoms may affect your pattern of daily living) is also an important indicator of the intensity and persistence of your symptoms. Because symptoms, such as pain, are subjective and difficult to quantify, any symptom-related functional limitations and restrictions which you, your treating or examining physician or psychologist, or other persons report, which can reasonably be accepted as consistent with the objective medical evidence and other evidence, will be taken into account as explained in paragraph (c)(4) of this section in reaching a conclusion as to whether you are disabled. We will consider all of the evidence presented, including information about your prior work record, your statements about your symptoms, evidence submitted by your treating, examining or consulting physician or psychologist, and observations by our employees and other persons. If you are a child, we will also consider all of the evidence presented, including evidence submitted by your treating, examining or consulting physician or psychologist, information from educational agencies and personnel, statements from parents and other relatives, and evidence submitted by social welfare agencies, therapists, and other practitioners. Section 416.927 explains in detail how we consider and weigh treating source and other medical opinions about the nature and severity of your impairment(s) and any related symptoms, such as pain. Factors relevant to your symptoms, such as pain, which we will consider include:

(i) Your daily activities;

(ii) The location, duration, frequency, and intensity of your pain or other symptoms;

(iii) Precipitating and aggravating factors;

(iv) The type, dosage, effectiveness, and side effects of any medication you take or have taken to alleviate your pain or other symptoms;

(v) Treatment, other than medication, you receive or have received for relief of your pain or other symptoms;

(vi) Any measures you use or have used to relieve your pain or other symptoms (e.g., lying flat on your back, standing for 15 to 20 minutes every hour, sleeping on a board, etc.); and

(vii) Other factors concerning your functional limitations and restrictions due to pain or other symptoms.

(4) *How we determine the extent to which symptoms, such as pain, affect your capacity to perform basic work activities (or to function in an age-appropriate manner).* In determining the extent to which your symptoms, such as pain, affect your capacity to perform basic work activities (or if you are a child, to function independently, appropriately, and effectively in an age-appropriate manner), we consider all of the available evidence described in paragraphs (c)(1) through (c)(3) of this section. We will consider your statements about the intensity, persistence, and limiting effects of your symptoms, and we will evaluate your statements in relation to the objective medical evidence and other evidence, in reaching a conclusion as to whether you are disabled. We will consider whether there are any inconsistencies in the evidence and the extent to which there are any conflicts between your statements and the rest of the evidence, including your medical history, the medical signs and laboratory findings, and statements by your treating or examining physician or psychologist or other persons about how your symptoms affect you. Your symptoms, including pain, will be determined to diminish your capacity for basic work activities (or if you are a child, age-appropriate activities) to the extent that your alleged functional limitations and restrictions due to symptoms, such as pain, can reasonably be accepted as consistent with the objective medical evidence and other evidence.

(d) *Consideration of symptoms in the disability determination process.* We follow a set order of steps to determine whether you are disabled. If you are not doing substantial gainful activity, we consider your symptoms, such as pain, to evaluate whether you have a severe physical or mental impairment(s), and at each of the remaining steps in the process. Sections 416.920 and 416.920a (for adults) and 416.924 (for children) explain this process in detail. We also consider your symptoms, such as pain, at the appropriate steps in our review when we consider whether your disability continues. The procedure we follow in reviewing whether your disability continues is explained in § 416.994 (for adults) and § 416.994a (for children).

(1) *Need to establish a severe medically determinable impairment(s).* Your symptoms, such as pain, fatigue, shortness of breath, weakness, or nervousness, are considered in making a determination as to whether your impairment or combination of impairment(s) is severe. (See § 416.920(c) for adults and § 416.924(d) for children.)

(2) *Decision whether the Listing of Impairments is met.* Some listed impairment(s) include symptoms, such as pain, as criteria. Section 416.925(f) explains how we consider your symptoms when your symptoms are included as criteria for a listed impairment.

(3) *Decision whether the Listing of Impairments is equaled.* If your impairment is not the same as a listed impairment, we must determine whether your impairment(s) is medically equivalent to a listed impairment. Sections 416.926 and 416.926a explain how we make this determination. Under §§ 416.926(b) and 416.926a(b) (1) and (2), we will consider equivalence based on medical evidence only. In considering whether your symptoms, signs, and laboratory findings are medically equal to the symptoms, signs, and laboratory findings of a listed impairment, we will look to see whether your symptoms, signs, and laboratory findings are at least equal in severity to the listed criteria. However, we will not substitute your allegations of pain or other symptoms for a missing or deficient sign or laboratory finding to raise the severity of your impairment(s) to that of a listed impairment. (If you are a child and we cannot find equivalence based on medical evidence only, we will consider pain and other symptoms under § 416.926a(b)(3) in determining whether you have an impairment(s) that results in overall functional limitations that are the same as the disabling functional consequences of a listed impairment.) Regardless of whether you are an adult or a child, if the symptoms, signs, and laboratory findings of your impairment(s) are equivalent in severity to those of a listed impairment, we will find you disabled. (If you are a child and your impairment(s) is equivalent in severity to a listed impairment under the rules in § 416.926a(b)(3), we also will find you disabled.) If they are not, we will consider the impact of your symptoms on your residual functional capacity if you are an adult or, if you are a child, on your ability to function in an age-appropriate manner. (See paragraph (d)(4) of this section.)

(4) *Impact of symptoms (including pain) on residual functional capacity or individualized functional assessment.* If you have a medically determinable severe physical or mental impairment(s), but your impairment(s) does not meet or equal an impairment listed in Appendix 1 of subpart P of part 404 of this chapter, we will consider the impact of your impairment(s) and any related symptoms, including pain, on your residual functional capacity, or if you are a child, on your ability to function independently, appropriately, and effectively in an age-appropriate manner. (See §§ 416.945 and 416.924a through 416.924d.)

5. Section 416.945 is revised to read as follows:

§ 416.945 Your residual functional capacity.

(a) *General.* Your impairment(s), and any related symptoms, such as pain, may cause physical and mental limitations that affect what you can do in a work setting. Your residual functional capacity is what you can still do despite your limitations. If you have more than one impairment, we will consider all of your impairment(s) of which we are aware. We will consider your ability to meet certain demands of jobs, such as physical demands, mental demands, sensory requirements, and other functions, as described in paragraphs (b), (c), and (d) of this section. Residual functional capacity is an assessment based upon all of the relevant evidence. It may include descriptions (even your own) of limitations that go beyond the symptoms, such as pain, that are important in the diagnosis and treatment of your medical condition. Observations by your treating or examining physicians or psychologists, your family, neighbors, friends, or other persons, of your limitations, in addition to those observations usually made during formal medical examinations, may also be used. These descriptions and observations, when used, must be considered along with your medical records to enable us to decide to what extent your impairment(s) keeps you from performing particular work activities. This assessment of your remaining capacity for work is not a decision on whether you are disabled, but is used as the basis for determining the particular types of work you may be able to do despite your impairment(s). Then, using the guidelines in §§ 416.960 through 416.969a, your vocational background is considered along with your residual functional capacity in arriving at a disability determination or decision. In deciding whether your disability continues or ends, the residual functional capacity assessment may also be used to determine whether any medical improvement you have experienced is related to your ability to work as discussed in § 416.994.

(b) *Physical abilities.* When we assess your physical abilities, we first assess the nature and extent of your physical limitations and then determine your residual functional capacity for work activity on a regular and continuing basis. A limited ability to perform certain physical demands of work activity, such as sitting, standing, walking, lifting, carrying, pushing, pulling, or other physical functions (including manipulative or postural functions, such as reaching, handling, stooping or crouching), may reduce your ability to do past work and other work.

(c) *Mental abilities.* When we assess your mental abilities, we first assess the nature and extent of your mental limitations and restrictions and then determine your residual functional capacity for work activity on a regular and continuing basis. A limited ability to carry out certain mental activities, such as limitations in understanding, remembering, and carrying out instructions, and in responding appropriately to supervision, coworkers, and work pressures in a work setting, may reduce your ability to do past work and other work.

(d) *Other abilities affected by impairment(s).* Some medically determinable impairment(s), such as skin impairment(s), epilepsy, impairment(s) of vision, hearing or other senses, and impairment(s) which impose environmental restrictions, may cause limitations and restrictions which affect other work-related abilities. If you have this type of impairment(s), we consider any resulting limitations and restrictions which may reduce your ability to do past work and other work in deciding your residual functional capacity.

(e) *Total limiting effects.* When you have a severe impairment(s), but your symptoms, signs, and laboratory findings do not meet or equal those of a listed impairment in appendix 1 of subpart P of part 404 of this chapter, we will consider the limiting effects of all your impairment(s), even those that are not severe, in determining your residual functional capacity. Pain or other symptoms may cause a limitation of function beyond that which can be determined on the basis of the anatomical, physiological or psychological abnormalities considered alone; e.g., someone with a low back disorder may be fully capable of the physical demands consistent with those of sustained medium work activity, but another person with the same disorder, because of pain, may not be capable of more than the physical demands consistent with those of light work activity on a sustained basis. In assessing the total limiting effects of your impairment(s) and any related symptoms, we will consider all of the medical and nonmedical evidence, including the information described in § 416.929(c).

6. A new § 416.969a is added to read as follows:

§ 416.969a Exertional and nonexertional limitations.

(a) *General.* Your impairment(s) and related symptoms, such as pain, may cause limitations of function or restrictions which limit your ability to meet certain demands of jobs. These limitations may be exertional, nonexertional, or a combination of both. Limitations are classified as exertional if they affect your ability to meet the strength demands of jobs. The classification of a limitation as exertional is related to the United States Department of Labor's classification of jobs by various exertional levels (sedentary, light, medium, heavy, and very heavy) in terms of the strength demands for sitting, standing, walking, lifting, carrying, pushing, and pulling. Sections 416.967 and 416.969 explain how we use the classification of jobs by exertional levels (strength demands) which is contained in the Dictionary of Occupational Titles published by the Department of Labor, to determine the exertional requirements of work which exists in the national economy. Limitations or restrictions which affect your ability to meet the demands of jobs other than the strength demands, that is, demands other than sitting, standing, walking, lifting, carrying, pushing or pulling, are considered nonexertional. Sections 416.920(f) and 416.994(b)(5)(viii) explain that if you can no longer do your past relevant work because of a severe medically determinable impairment(s), we must determine whether your impairment(s), when considered along with your age, education, and work experience, prevents you from doing any other work which exists in the national economy in order to decide whether you are disabled (§ 416.920(f)) or continue to be disabled (§ 416.994(b)(5)(viii)). Paragraphs (b), (c), and (d) of this section explain how we apply the medical-vocational guidelines in appendix 2 of subpart P of part 404 of this chapter in making this determination, depending on whether the limitations or restrictions imposed by your impairment(s) and related symptoms, such as pain, are exertional, nonexertional, or a combination of both.

(b) *Exertional limitations.* When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain, affect only your ability to meet the strength demands of jobs (sitting, standing, walking, lifting, carrying, pushing, and pulling), we consider that you have only exertional limitations. When your impairment(s) and related symptoms only impose exertional limitations and your specific vocational profile is listed in a rule

contained in Appendix 2, we will directly apply that rule to decide whether you are disabled.

(c) *Nonexertional limitations.* (1) When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain, affect only your ability to meet the demands of jobs other than the strength demands, we consider that you have only nonexertional limitations or restrictions. Some examples of nonexertional limitations or restrictions include the following:

(i) You have difficulty functioning because you are nervous, anxious, or depressed;

(ii) You have difficulty maintaining attention or concentrating;

(iii) You have difficulty understanding or remembering detailed instructions;

(iv) You have difficulty in seeing or hearing;

(v) You have difficulty tolerating some physical feature(s) of certain work settings, e.g., you cannot tolerate dust or fumes; or

(vi) You have difficulty performing the manipulative or postural functions of some work such as reaching, handling, stooping, climbing, crawling, or crouching.

(2) If your impairment(s) and related symptoms, such as pain, only affect your ability to perform the nonexertional aspects of work-related activities, the rules in appendix 2 do not direct factual conclusions of disabled or not disabled. The determination as to whether disability exists will be based on the principles in the appropriate sections of the regulations, giving consideration to the rules for specific case situations in appendix 2.

(d) *Combined exertional and nonexertional limitations.* When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain, affect your ability to meet both the strength and demands of jobs other than the strength demands, we consider that you have a combination of exertional and nonexertional limitations or restrictions. If your impairment(s) and related symptoms, such as pain, affect your ability to meet both the strength and demands of jobs other than the strength demands, we will not directly apply the rules in appendix 2 unless there is a rule that directs a conclusion that you are disabled based upon your strength limitations; otherwise the rules provide a framework to guide our decision.

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federal register

Thursday
November 14, 1991

Part III

Department of Agriculture

Cooperative State Research Service

7 CFR Part 3200

National Competitive Research Initiative Grants Program; Administrative Provisions; Final Rule

DEPARTMENT OF AGRICULTURE

Cooperative State Research Service

7 CFR Part 3200

National Competitive Research Initiative Grants Program; Administrative Provisions

AGENCY: Cooperative State Research Service, USDA.

ACTION: Final rule; amendment.

SUMMARY: This final rule amends the Cooperative State Research Service (CSRS) regulations relating to the administration of the Competitive Research Grants Program that prescribe the procedures to be followed annually in the solicitation of competitive grant proposals, the evaluation of such proposals, and the award of competitive research grants under this program. This rule amends those regulations by changing references from the Competitive Research Grants Program to the National Competitive Research Initiative Grants Program; by accounting for the additional categories of competitive grants added by the Food, Agriculture, Conservation, and Trade Act of 1990; by providing CSRS the option of selecting different proposal evaluation criteria for specific program areas and/or types of grant projects for proper evaluation of proposals; by providing CSRS the option of selecting various means of publishing program solicitations; by indicating that the format for grant proposals applies unless otherwise stated in the program solicitation; by adding references to applicable regulations that have been implemented since these provisions were established, and by making a few additional changes.

EFFECTIVE DATE: November 14, 1991.

FOR FURTHER INFORMATION CONTACT: Terry J. Pacovsky, Director, Awards Management Division, Office of Grants and Program Systems, Cooperative State Research Service, U.S. Department of Agriculture, room 322, Aerospace Center, Washington, DC 20250–2200. Telephone: (202) 401–5024.

SUPPLEMENTARY INFORMATION:

Paperwork Reduction

The Office of Management and Budget has previously approved the information collection requirements contained in the current regulations at 7 CFR part 3200 under the provisions of 44 U.S.C. chapter 35 and OMB Document No. 0524–0022 has been assigned. The information collection requirements of the final rule at 7 CFR part 3200 have been submitted to the Office of Management and Budget for review and approval in accordance with the Paperwork Reduction Act of 1980. The public reporting burden for the information collections contained in these regulations is estimated to vary from ½ hour to 3 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. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Department of Agriculture, Clearance Officer, OIRM, room 404–W, Washington, DC 20250; and to the Office of Management and Budget, Paperwork Reduction Project (OMB Document No. 0524–0022), Washington, DC 20503.

Classification

This rule has been reviewed under Executive Order 12291, and it has been determined that it is not a major rule because it does not involve a substantial or major impact on the Nation's economy or on large numbers of individuals or businesses. There will be no major increase in cost or prices for consumers, individual industries, Federal, State, or local governmental agencies, or geographical regions. It will not have a significant economic impact on competitive employment, investment, productivity, innovation, or on the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets. In addition, it will not have a significant impact on a substantial number of small entities as defined in the Regulatory Flexibility Act, Public Law No. 96–534 (5 U.S.C. 601 *et. seq.*).

Regulatory Analysis

Not required for this rulemaking.

Environmental Impact Statement

This regulation does not significantly affect the environment. Therefore, an environmental impact statement is not required under the National Environmental Policy Act of 1969, as amended. (42 U.S.C. 4321 *et. seq.*)

Catalog of Federal Domestic Assistance

The National Competitive Research Initiative Grants Program, formerly the Competitive Research Grants Program, is listed in the Catalog of Federal Domestic Assistance under No. 10.206. For reasons set forth in the Final Rule-related Notice to 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983), this program is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Background and Purpose

Under the authority of section 2(b) of the Act of August 4, 1965, as amended by section 1615 of the Food, Agriculture, Conservation, and Trade Act of 1990 (FACT Act) (7 U.S.C. 450i(b)), the Secretary of Agriculture is authorized to make competitive grants for research to facilitate or expand promising breakthroughs in areas of the food and agricultural sciences of importance to the United States to State agricultural experiment stations, all colleges and universities, other research institutions and organizations, Federal agencies, private organizations or corporations, and individuals. Section 2(b), as amended, also authorizes the Secretary of Agriculture to make a variety of competitive grants to improve research capabilities in the agricultural, food, and environmental sciences. 7 CFR 2.107(a)(3) delegates this authority to the Administrator of CSRS.

In the past, a Notice was published in the **Federal Register** annually announcing the availability of funds for competitive research grants and soliciting proposals. In addition, the Notice set forth the procedures and criteria for the evaluation of proposals and procedures and conditions relating to the award and administration of these grants. On February 13, 1984, the Department published a Final Rule in the **Federal Register** (49 FR 5570), which established and codified such procedures, criteria, and conditions to be employed annually. It standardized the rules applicable to the administration of the Competitive Research Grants Program and eliminated the need to republish them annually. On August 19, 1991, the Department published a Notice in the **Federal Register** (56 FR 41190) proposing the amendment of this rule and inviting comments from interested individuals and organizations. Written comments were requested by September 18, 1991. During the comment period, nine responses were received. Comments suggest revisions, additions, or clarifications to the proposed rule. No commentators opposed the proposed rulemaking.

Discussion of Comments

Section 3200.1 Applicability of Regulations

One respondent noted that the proposed rule did not include a reference to multidisciplinary team research with the eventual goal of

technology transfer. Section 2(b) of the Act of August 4, 1965, as amended, authorizes funds for this purpose. CSRS acknowledges this oversight and has included a reference to this type of research in § 3200.1(a) of the rule.

One respondent suggested that the rule address how priorities are determined under this program. CSRS agrees with this suggestion and has expanded the discussion in § 3200.1(a) regarding input from various sources in determining program priorities.

Several comments were received suggesting a wider dispersion of the solicitation of applications. CSRS is of the opinion that the methodology in the proposed rule for notifying the public of the availability of grant funds is sufficient; therefore, no change in the rule has been made in this regard.

Several comments were received suggesting that the listing of purposes of agricultural research and extension found in section 1402 of the National Agricultural Research, Extension, and Teaching Policy Act of 1977, as amended by section 1602 of the FACT Act (1977 Act), should be mentioned or contained in the rule. CSRS agrees with these comments and has added the relevance of an application to one or more of such purposes as part of an evaluation factor in § 3200.15 of the final rule. In addition, CSRS will reflect the purposes, as appropriate, in the annual solicitation for applications.

Section 3200.2 Definitions

Several comments were received regarding the lack of definitions for certain terms contained in the proposed rule, such as "individuals who are beginning their research careers" and "mission-linked research." CSRS chooses not to define such terms in the rule, but will define them in the annual solicitation of applications so that CSRS may construct definitions responsive to changing programmatic needs.

Multiple comments were received regarding the need to include in the evaluation process individuals capable of evaluating applications based on relevance to the research purposes contained in section 1402 of the 1977 Act or other factors. In this regard, CSRS has amended § 3200.2 of the rule to redefine the terms "peer review group" and "ad hoc reviewers" to include relevance to one or more of the research purposes.

One respondent recommended that serious consideration be given to the development of a separate review process for "relevance" to U.S. agriculture. CSRS is of the opinion that this is unnecessary given that the evaluation of relevance to U.S. agriculture is part of the peer review process.

Section 3200.4 How to Apply for a Grant

One respondent observed that, in § 3200.4(c)(3) of the proposed rule, a 15-page maximum was placed on the "Project Description," which, as written, included only the "Introduction" and "Progress Report" as subsections. The proposed rule was incorrectly numbered. The numbering has been corrected in the final rule to reflect that the "Project Description" found at § 3200.4(c)(3) is comprised of the following four subsections: (i) Introduction, (ii) Progress Report, (iii) Rationale and Significance, and (iv) Experimental Plan. It should be noted that the 15-page limitation applies to § 3200.4(3)(c) as a whole. The remainder of § 3200.4 has been renumbered accordingly.

Multiple comments were received recommending that sustainability be addressed by applicants in the "Project Description" and "Rationale and Significance" sections of applications. CSRS agrees with this recommendation and has amended § 3200.4(c)(2)(iii) and the renumbered § 3200.4(c)(3)(iii) of the rule accordingly.

One respondent recommended that potential applicants should be directed to describe how the results of the proposed project may be transferred to onfarm or inmarket practice. CSRS agrees that technology transfer should be addressed in the experimental plan where appropriate and has amended the renumbered § 3200.4(c)(3)(iv) of the rule accordingly.

Several respondents recommended that the curriculum vitae of investigators also include evidence of direct service to farmers, involvement in extension-type activities, etc. CSRS is of the opinion that the description of the requirements for the curriculum vitae found at the renumbered § 3200.4(c)(7)(ii) of the rule clearly allows the investigator to discuss all activities pertinent to the project, including the items identified by the respondents; therefore, the rule is unchanged in this regard.

Several respondents recommended that applicants be required to list all publications, regardless of the type of journal in which they appear. CSRS agrees that all relevant publications may be included and has amended the renumbered § 3200.4(c)(7)(iii) of the rule accordingly.

Section 3200.11 Composition of Peer Review Groups

Several respondents suggested that the composition of peer review groups be expanded to include reviewers who are able to assess the relevance of the proposed research to the fulfillment of the research purposes contained in section 1402 of the 1977 Act, and to other purposes, in addition to reviewers from relevant technical and scientific fields. CSRS agrees with this concept and asserts that, by expanding the selection criteria for composition of peer review groups in § 3200.11(a)(1) to include relevant experience and relevant activities, the respondents' suggestion will be incorporated. The rule is amended accordingly.

Several respondents suggested that a separate peer review group be assembled for review of multidisciplinary applications or that peer review groups be expanded to include individuals with multidisciplinary knowledge. CSRS is of the opinion that the current rule adequately allows for the identification and selection of peer reviewers with multidisciplinary backgrounds. Further, the composition of each panel will reflect a broad range of multidisciplinary backgrounds, thus facilitating the review of applications of all types. In addition, when each application is reviewed, written reviews will be solicited from *ad hoc* reviewers; thus, bringing to bear the broadest range of disciplines.

Section 3200.14 Proposal Review

One respondent suggested that the rule address how the allocation of funds for research categories authorized by section 2(b) of the Act of August 4, 1965, as amended, will be accomplished. To retain maximum flexibility in the methodology used to annually allocate funds to categories, CSRS will not publish a methodology in the rule. However, CSRS will observe the percentage requirements contained in section 2(b)(10) of the Act of August 4, 1965, as amended.

Section 3200.15 Evaluation Factors

Multiple respondents suggested that evaluation factors be expanded to include an assessment of the relevance of the research to the purposes of agricultural research and extension, as described in section 1402 of the 1977 Act, and to sustainable agriculture. CSRS agrees. Accordingly, CSRS has amended § 3200.15 by expanding the evaluation factors to reflect an emphasis on sustainability and to emphasize

relevance of a project to one or more of the purposes referred to above.

One respondent suggested that the evaluation criteria include the probability of successful application of knowledge and the transfer of technology to the user. CSRS has taken this into account in § 3200.15(c), as amended above, and therefore, no further changes are necessary.

Several respondents suggested that a separate set of evaluation factors be established for mission-linked or multidisciplinary research. CSRS maintains that the evaluation factors, as amended, may be applied to all types of research applications, and that additional evaluation factors for this purpose are unnecessary.

Several respondents suggested that the evaluation factors be rewritten to include the phrase "enhance the quality of life for farmers and society as a whole" that was used to define further sustainable agriculture systems in the floor debate on the FACT Act. The research purposes stated in section 1402 of the 1977 Act, have been added to § 3200.15 of the rule. CSRS asserts that the addition of the above referenced purposes will adequately address this concern.

General Comments

One respondent recommended that 1–4% of funds from each component of the National Competitive Research Initiative Grant program be set aside to support technology assessment relevant to each of the components. CSRS agrees that technology assessment is an important activity. When appropriate, CSRS will include technology assessment as a research area within specific programs.

One respondent recommended that the comment period for the proposed rule be extended. CSRS is unable to comply with this request because delaying the publication of the final rule would seriously jeopardize the management and orderly processing of applications for funding in this fiscal year.

CSRS also has made a few additional changes to the proposed rule published in the **Federal Register** on August 19, 1991. These changes are of a clarifying or clerical nature.

List of Subjects in 7 CFR Part 3200

Grant programs—agriculture, Grants administration.

For the reasons set out in the preamble, title 7, chapter XXXII, part 3200 of the Code of Federal Regulations is revised to read as follows:

CHAPTER XXXII—OFFICE OF GRANTS AND PROGRAM SYSTEMS

PART 3200—NATIONAL COMPETITIVE RESEARCH INITIATIVE GRANTS PROGRAM

Subpart A—General

Sec.

3200.1 Applicability of regulations.
3200.2 Definitions.
3200.3 Eligibility requirements.
3200.4 How to apply for a grant.
3200.5 Evaluation and disposition of applications.
3200.6 Grant awards.
3200.7 Use of funds; changes.
3200.8 Other Federal statutes and regulations that apply.
3200.9 Other conditions.

Subpart B—Scientific Peer Review of Research Grant Applications

3200.10 Establishment and operation of peer review groups.
3200.11 Composition of peer review groups.
3200.12 Conflicts of interest.
3200.13 Availability of information.
3200.14 Proposal review.
3200.15 Evaluation factors.

Authority: Sec. 2(h) of the Act of August 4, 1965, as amended (7 U.S.C. 450i(h)).

Subpart A—General

§ 3200.1 Applicability of regulations.

(a) The regulations of this part apply to competitive research grants awarded under the authority of section 2(b) of the Act of August 4, 1965, as amended by section 1615 of the Food, Agriculture, Conservation, and Trade Act of 1990 (FACT Act), (7 U.S.C. 450i(b)), for the support of research to further the programs of the Department of Agriculture and to improve research capabilities in the agricultural, food, and environmental sciences in the following categories: Single investigators or coinvestigators in the same disciplines; teams of researchers from different disciplines; multidisciplinary teams for long-term applied research problems; multidisciplinary teams whose research has the eventual goal of technology transfer; institutions for improvement of research, development, technology transfer and education capacity through the acquisition of special research equipment and improvement of teaching and education, including fellowships; single investigators or coinvestigators who are beginning their research careers; and, faculty of small and mid-sized institutions not previously successful in obtaining competitive grants under this subsection. The National Competitive Research Initiative Grants Program (NCRIGP) Board of Directors was established by the Assistant Secretary for Science and Education to advise the Assistant Secretary on policy issues concerning NCRIGP. The Board is comprised of the Assistant Secretary for Science and Education; the Administrators of the Cooperative State Research Service, the Agricultural Research Service, the Extension Service, and the Economic Research Service; the Deputy Chief for Research of the Forest Service; the Chief Scientist of the NCRIGP; and the Director of the National Agricultural Library. Any determinations made by the Joint Council on Food and Agricultural Sciences, including recommendations made by the Agricultural Science and Technology Review Board, and the National Agricultural Research and Extension Users Advisory Board, will be taken into consideration by the Board in recommending policies and priorities for the NCRIGP. The advice of other individuals is also encouraged; that advice also is provided to the Board of Directors. The Administrator of CSRS shall determine and announce, through publication of a Notice in such publications as the **Federal Register**, professional trade journals, agency or program handbooks, the Catalog of Federal Domestic Assistance, or any other appropriate means, high-priority research areas and categories to improve research capabilities for which proposals will be solicited and the extent that funds are available therefor.

(b) The regulations of this part do not apply to grants awarded by the Department of Agriculture under any other authority.

§ 3200.2 Definitions.

As used in this part:

(a) *Administrator* means the Administrator of the Cooperative State Research Service (CSRS) and any other officer or employee of the Department of Agriculture to whom the authority involved may be delegated.

(b) *Department* means the Department of Agriculture.

(c) *Principal investigator* means a single individual who is responsible for the scientific and technical direction of the project, as designated by the grantee in the grant application and approved by the Administrator.

(d) *Grantee* means the entity designated in the grant award document as the responsible legal entity to whom a grant is awarded under this part.

(e) *Grant* means the award by the Administrator of funds to a grantee to assist in meeting the costs of conducting, for the benefit of the public, an identified project which is intended and designed to establish, discover, elucidate, or confirm information or the

underlying mechanisms relating to a research program area identified in the program solicitation; it also means the award by the Administrator of funds to a grantee to strengthen its research capabilities relating to a research program area identified in the program solicitation;

(f) *Project* means the particular activity within the scope of one or more of the research program areas or the categories to improve research capabilities identified in the program solicitation that is supported by a grant under this part.

(g) *Project period* means the total time approved by the Administrator for conducting the proposed project as outlined in an approved grant application.

(h) *Budget period* means the interval of time (usually 12 months) into which the project period is divided for budgetary and reporting purposes.

(i) *Awarding official* means the Administrator and any other officer or employee of the Department to whom the authority to issue or modify grant instruments has been delegated.

(j) *Peer review group* means an assembled group of experts or consultants qualified by training and experience to give expert advice on the scientific and technical merit of grant applications or the relevance of those applications to one or more of the research purposes as contained in § 3200.15 of this part.

(k) *Ad hoc reviewers* means experts or consultant qualified by training and experience to render special expert advice, through written evaluations, on the scientific and technical merit of grant applications or the relevance of those applications to one or more of the research purposes contained in § 3200.15 of this part.

(l) *Research* means any systematic study directed toward new or fuller knowledge and understanding of the subject studied.

(m) *Methodology* means the project approach to be followed and the resources needed to carry out the project.

§ 3200.3 Eligibility requirements.

(a) Except where otherwise prohibited by law, State agricultural experiment stations, all colleges and universities, other research institutions and organizations, Federal agencies, private organizations or corporations, and individuals, shall be eligible to apply for and to receive a competitive grant award under this part, provided that the applicant qualifies as a responsible grantee under the criteria set forth in paragraph (b) of this section.

(b) To qualify as responsible, an applicant must meet the following standards as they relate to a particular project:

(1) Adequate financial resources for performance, the necessary experience, organizational and technical qualifications, and facilities, or a firm commitment, arrangement, or ability to obtain some (including by proposed subagreements);

(2) Ability to comply with the proposed or required completion schedule for the project;

(3) Satisfactory record of integrity, judgment, and performance, including, in particular, any prior performance under grants and contracts from the Federal government;

(4) Adequate financial management system and audit procedures that provide efficient and effective accountability and control of all funds, property, and other assets; and

(5) Otherwise qualified and eligible to receive a grant under the applicable laws and regulations; eligibility for specific program areas or categories of competitive grants to improve research capabilities will be outlined in the program solicitation.

(c) Any applicant who is determined to be not responsible will be notified in writing of such finding and the basis therefor.

§ 3200.4 How to apply for a grant.

(a) A program solicitation will be prepared and announced through publications such as the **Federal Register**, professional trade journals, agency or program handbooks, the Catalog of Federal Domestic Assistance, or any other appropriate means, as early as practicable each fiscal year. It will contain information sufficient to enable all eligible applicants to prepare competitive grant proposals and will be as complete as possible with respect to:

(1) Descriptions of the specific research areas and the categories of competitive grants to improve research capabilities that the Department proposes to support during the fiscal year involved, including anticipated funds to be awarded;

(2) Eligibility requirements;

(3) Obtaining application kits;

(4) Deadline dates for postmarking proposal packages;

(5) Name and mailing address to send proposals;

(6) Number of copies to submit;

(7) Special requirements.

(b) *Grant Application Kit.* A Grant Application Kit will be made available to any potential grant applicant who requests a copy. This kit contains required forms, certifications, and instructions applicable to the submission of grant proposals.

(c) *Format for grant proposals.* Specific instructions regarding page length, type of print, size of paper, and order of assembly, etc., of proposals will be provided in the program solicitation. However, unless otherwise stated in the program solicitation, the following general format applies:

(1) *Grant Application Cover Page.* All grant proposals submitted by eligible applicants should contain a Grant Application cover page, which must be signed by the proposing principal investigator(s) and endorsed by the cognizant authorized organizational representative who possesses the necessary authority to commit the applicant's time and other relevant resources. Investigators who do not sign the cover sheet will not be listed on the grant document in the event an award is made. The title of the proposal must be brief (80-character maximum), yet represent the major thrust of the project. Because this title will be used to provide information to those who may not be familiar with the proposed project, highly technical words or phraseology should be avoided where possible. In addition, phrases such as "investigation of" or "research on" should not be used.

(2) *Project Summary.* Each proposal must contain a project summary. This summary is not intended for the general reader; consequently, it may contain technical language comprehensible by persons in disciplines relating to the food and agricultural sciences. The project summary should be a self-contained, specific description of the activity to be undertaken and should focus on:

(i) Overall project goal(s) and supporting objectives;

(ii) Plans to accomplish project goal(s); and

(iii) Relevance of the project to potential long-range improvements in and sustainability of United States agriculture or to one or more of the research purposes contained in § 3200.15 of this part.

(3) *Project Description.* The specific aims of the project must be included in all proposals. The text of the project description may not exceed 15 single or double-spaced pages and must contain the following components:

(i) *Introduction.* A clear statement of the long-term goal(s) and supporting objectives of the proposed project should preface the project description. The most significant published work in the field under consideration, including the work of key project personnel on the current application, should be reviewed.

The current status of research in the particular field of sciences also should be described. All work cited, including that of key personnel, should be referenced.

(ii) *Progress Report.* If the proposal is a renewal of an existing project supported under this program (or its predecessor), include a clearly marked performance report describing results to date from the previous award. This section should contain the following information:

(A) A comparison of actual accomplishments with the goals established for the previous award;

(B) The reasons established goals were not met, if applicable; and

(C) A listing of any publications resulting from the award. Copies of reprints or preprints may be appended to the proposal if desired.

(iii) *Rationale and Significance.* Present concisely the rationale behind the proposed project. The objectives' specific relationship to potential long-range improvements in and sustainability of United States agriculture or relevance to one or more of the research purposes contained in § 3200.15 of this part should be shown clearly. Any novel ideas or contributions that the proposed project offers also should be discussed in this section.

(iv) *Experimental Plan.* The hypotheses or questions being asked and the methodology to be applied to the proposed project should be stated explicitly. Specifically, this section must include:

(A) A description of the investigations and/or experiments proposed and the sequence in which the investigations or experiments are to be performed;

(B) Techniques to be used in carrying out the proposed project, including the feasibility of the techniques;

(C) Results expected;

(D) Means by which experimental data will be analyzed or interpreted;

(E) Means of applying results or accomplishing technology transfer, where appropriate;

(F) Pitfalls that may be encountered;

(G) Limitations to proposed procedures; and

(H) A tentative schedule for conducting major steps involved in these investigations and/or experiments.

In describing the experimental plan, the applicant must explain fully any materials, procedures, situations, or activities that may be hazardous to personnel (whether or not they are directly related to a particular phase of the proposed project), along with an outline of precautions to be exercised to avoid or mitigate the effects of such hazards.

(4) *Facilities and equipment.* All facilities and major items of equipment that are available for use or assignment to the proposed project during the requested period of support should be described. In addition, items of nonexpendable equipment necessary to conduct and successfully conclude the proposed project should be listed.

(5) *Collaborative arrangements.* If the nature of the proposed project requires collaboration or subcontractual arrangements with other research scientists, corporations, organizations, agencies, or entities, the applicant must identify the collaborator(s) and provide a full explanation of the nature of the collaboration. Evidence (i.e., letters of intent) should be provided to assure peer reviewers that the collaborators involved have agreed to render this service. In addition, the proposal must indicate whether or not such collaborative arrangement(s) have the potential for conflicts of interest.

(6) *References to Project Descriptions.* All references cited should be complete, including titles, and should conform to an accepted journal format.

(7) *Personnel support.* To assist peer reviewers in assessing the competence and experience of the proposed project staff, all personnel who will be involved in the proposed project must be identified clearly. For each principal investigator involved, and for all senior associates and other professional personnel who expect to work on the project, whether or not funds are sought for their support, the following should be included:

(i) An estimate of the time commitments necessary;

(ii) Curriculum vitae. The curriculum vitae should be limited to a presentation of academic and research credentials, e.g., educational, employment and professional history, and honors and awards. Unless pertinent to the project, to personal status, or to the status of the organization, meetings attended, seminars given, or personal data such as birth date, marital status, or community activities should not be included. The vitae shall be no more than two pages each in length, excluding publications listings; and

(iii) Publication List(s). A chronological list of all publications in refereed journals during the past five years, including those in press, must be provided for each professional project member for whom a curriculum vitae is provided. Also list other non-refereed technical publications that have relevance to the proposed project. Authors should be listed in the same order as they appear on each paper cited, along with the title and complete reference as these usually appear in journals.

(8) *Budget.* A detailed budget is required for each year of requested support. In addition, a summary budget is required detailing requested support for the overall project period. A copy of the form which must be used for this purpose, along with instructions for completion, is included in the Grant Application Kit identified under § 3200.4(b) of the part and may be reproduced as needed by applicants. Funds may be requested under any of the categories listed, provided that the item or service for which support is requested may be identified as necessary for successful conduct of the proposed project, is allowable under applicable Federal cost principles, and is not prohibited under any applicable Federal statute or regulation. It should be noted, for example, that section 2(b)(7) of the Act of August 4, 1965, as amended, prohibits the use of funds under this program for the renovation or refurbishment of research spaces, purchases or installation of fixed equipment in such spaces, or for the planning, repair, rehabilitation, acquisition, or construction of a building or facility. Also, section 2(b)(8) of the Act of August 4, 1965, as amended, requires that all grants, except equipment grants authorized by section 2(b)(3)(D) of the same Act, awarded under this part, shall be used without regard to matching funds or cost sharing

(9) *Research involving special considerations.* A number of situations encountered in the conduct of research require special information and supporting documentation before funding can be approved for the project. If any such situation is anticipated, the proposal must so indicate. It is expected that a significant number of proposals will involve the following:

(i) *Recombinant DNA and RNA molecules.* All key personnel identified in a proposal and all endorsing officials of a proposed performing entity are required to comply with the guidelines established by the National Institutes of Health entitled, "Guidelines for Research Involving Recombinant DNA Molecules," as revised. The Grant Application Kit, identified above in § 3200.4(b), contains forms which are suitable for such certification of compliance.

(ii) *Human subjects at risk.* Applicable regulations which implement the Federal Policy for the Protection of Human Subjects have been issued by the Department under 7 CFR part 1c, Protection of Human Subjects. Responsibility for safeguarding the

rights and welfare of human subjects used in any proposed project supported with grant funds provided by the Department rests with the performing entity. The applicant must submit a statement certifying that the project plan has been reviewed and approved by the Institutional Review Board at the proposing organization or institution. The Grant Application Kit, identified above in § 3200.4(b), contains a form which is suitable for such certification.

(iii) *Experimental vertebrate animal care.* The responsibility for the humane care and treatment of any experimental vertebrate animal, which has the same meaning as "animal" in section 2(g) of the Animal Welfare Act of 1966, as amended (7 U.S.C. 2132(g)), used in any project supported with NCRIGP funds rests with the performing organization. In this regard, all key personnel associated with any supported project and all endorsing officials of the proposed performing entity are required to comply with applicable provisions of the Animal Welfare Act of 1966, as amended (7 U.S.C. 2131 *et seq.*) and the regulations promulgated thereunder by the Secretary of Agriculture in 9 CFR parts 1, 2, 3, and 4. In this regard, the applicant must submit a statement certifying that the proposed project is in compliance with the aforementioned regulations, and that the proposed project is either under review by or has been reviewed and approved by an Institutional Animal Care and Use Committee. The Grant Application Kit, identified above in § 3200.4(b), contains a form which is suitable for such certification.

(10) *Current and pending support.* All proposals must list any other current public or private research support (including in-house support) to which key personnel identified in the proposal have committed portions of their time, whether or not salary support for the person(s) involved is included in the budget. Analogous information must be provided for any pending proposals that are being considered by, or that will be submitted in the near future to, other possible sponsors, including other USDA programs or agencies. Concurrent submission of identical or similar proposals to other possible sponsors will not prejudice proposal review or evaluation by the Administrator or experts or consultants engaged by the Administrator for this purpose. However, a proposal that duplicates or overlaps substantially with a proposal already reviewed and funded (or that will be funded) by another organization or agency will not be funded under this program. The Grant Application Kit, identified above in § 3200.4(b), contains a form which is suitable for listing current and pending support.

(11) *Additions to project description.* Each project description is expected by the Administrator, the members of peer review groups, and the relevant program staff to be complete. However, if the inclusion of additional information is necessary to ensure the equitable evaluation of the proposal (e.g., photographs which do not reproduce well, reprints, and other pertinent materials which are deemed to be unsuitable for inclusion in the text of the proposal), the number of copies submitted should match the number of copies of the application requested in the program solicitation. Each set of such materials must be identified with the name of the submitting organization, and the name(s) of the principal investigator(s). Information may not be appended to a proposal to circumvent page limitations prescribed for the project description. Extraneous materials will not be used during the peer review process.

(12) *Organizational management information.* Specific management information relating to an applicant shall be submitted on a one-time basis prior to the award of a grant identified under this Part if such information has not been provided previously under this or another program for which the sponsoring agency is responsible. Copies of forms recommended for use in fulfilling the requirements contained in this section will be provided by the agency specified in this Part once a grant has been recommended for funding.

§ 3200.5 Evaluation and disposition of applications.

(a) *Evaluation.* All proposals received from eligible applicants and postmarked in accordance with deadlines established in the annual program solicitation shall be evaluated by the Administrator through such officers, employees, and others as the Administrator determines are uniquely qualified in the areas represented by particular projects. To assist in equitably and objectively evaluating proposals and to obtain the best possible balance of viewpoints, the Administrator shall solicit the advice of peer scientists, *ad hoc* reviewers, and/or others who are recognized specialists in the areas covered by the applications received and whose general roles are defined in §§ 3200.2(j) and 3200.2(k). Specific evaluations will be based upon the criteria established in subpart B, § 3200.15, unless CSRS determines that different criteria are necessary for the proper evaluation of proposals in one or more specific program areas, or for specific types of projects to be supported, and announces such criteria and their relative importance in the annual program solicitation. The overriding purpose of these evaluations is to provide information upon which the Administrator may make informed judgments in selecting proposals for ultimate support. Incomplete, unclear, or poorly organized applications will work to the detriment of applicants during the peer evaluation process. To ensure a comprehensive evaluation, all applications should be written with the care and thoroughness accorded papers for publication.

(b) *Disposition.* On the basis of the Administrator's evaluation of an application in accordance with paragraph (a) of this section, the Administrator will (1) approve support using currently available funds, (2) defer support due to lack of funds or a need for further evaluations, or (3) disapprove support for the proposed project in whole or in part. With respect to approved projects, the Administrator will determine the project period (subject to extension as provided in § 3200.7(c)) during which the project may be supported. Any deferral or disapproval of an application will not preclude its reconsideration or a reapplication during subsequent fiscal years.

§ 3200.6 Grant awards.

(a) *General.* Within the limit of funds available for such purpose, the awarding official shall make grants to those responsible, eligible applicants whose proposals are judged most meritorious in the announced program areas under the evaluation criteria and procedures set forth in this part. The date specified by the Administrator as the beginning of the project period shall be no later than September 30 of the Federal fiscal year in which the project is approved for support and funds are appropriated for such purpose, unless otherwise permitted by law. All funds granted under this part shall be expended solely for the purpose for which the funds are granted in accordance with the approved application and budget, the regulations of this part, the terms and conditions of the award, the applicable Federal cost principles, and the Department's "Uniform Federal Assistance Regulations" (part 3015 of this title) and the Department's "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments" (part 3016 of this title).

(b) *Grant award document and notice of grant award—(1) Grant award document.* The grant award document shall include at a minimum the following:

(i) Legal name and address of performing organization or institution to whom the Administrator has awarded a competitive grant under the terms of this part;

(ii) Title of project;

(iii) Name(s) and address(es) of principal investigator(s) chosen to direct and control approved activities;

(iv) Identifying grant number assigned by the Department;

(v) Project period, specifying the amount of time the Department intends to support the project without requiring recompetition for funds;

(vi) Total amount of Departmental financial assistance approved by the Administrator during the project period;

(vii) Legal authority(ies) under which the grant is awarded;

(viii) Approved budget plan for categorizing allocable project funds to accomplish the stated purpose of the grant award; and

(ix) Other information or provisions deemed necessary by the Department to carry out its granting activities or to accomplish the purpose of a particular grant.

(2) *Notice of grant award.* The notice of grant award, in the form of a letter, will be prepared and will provide pertinent instructions or information to the grantee that is not included in the grant award document.

(c) *Types of grant instruments.* The major types of grant instruments shall be as follows:

(1) *New grant.* This is a grant instrument by which the Department agrees to support a specified level of effort for a project that generally has not been supported previously under this program. This type of grant is approved on the basis of peer review recommendation.

(2) *Renewal grant.* This is a grant instrument by which the Department agrees to provide additional funding for a project period beyond that approved in an original or amended award, provided that the cumulative period does not exceed the statutory limitation. When a renewal application is submitted, it should include a summary of progress to date from the previous granting period. A renewal grant shall be based upon new application, *de novo* peer review and staff evaluation, new recommendation and approval, and a new award instrument.

(3) *Supplemental grant.* This is an instrument by which the Department agrees to provide small amounts of additional funding under a new or renewal grant as specified in paragraphs (c)(1) and (c)(2) of this section and may involve a short-term (usually six months or less) extension of the project period beyond that approved in an original or amended award, but in no case may the cumulative period for the project exceed the statutory limitation. A supplement is awarded only if required to assure adequate completion of the original scope of work and if there is sufficient justification to warrant such action. A request of this nature normally will not require additional peer review.

(d) *Funding mechanisms.* The two mechanisms by which new, renewal, and supplemental grants shall be awarded are as follows:

(1) *Standard grant.* This is a funding mechanism whereby the Department agrees to support a specified level of effort for a predetermined time period without the announced intention of providing additional support at a future date.

(2) *Continuation grant.* This is a funding mechanism whereby the Department agrees to support a specified level of effort for a predetermined period of time with a statement of intention to provide additional support at a future date, provided that performance has been satisfactory, appropriations are available for this purpose, and continued support would be in the best interests of the Federal government and the public. This kind of mechanism normally will be awarded for an initial one-year period, and any subsequent continuation project grants will also be awarded in one-year increments. The award of a continuation project grant to fund an initial or succeeding budget period does not constitute an obligation to fund any subsequent budget period. Unless prescribed otherwise by CSRS, a grantee must submit a separate application for continued support for each subsequent fiscal year. Requests for such continued support must be submitted in duplicate at least three months prior to the expiration date of the budget period currently being funded. Decisions regarding continued support and the actual funding levels of such support in future years usually will be made administratively after consideration of such factors as the grantee's progress and management practices and the availability of funds. Since initial peer reviews are based upon the full term and scope of the original special grant application, additional evaluations of this type generally are not required prior to successive years' support. However, in unusual cases (e.g., when the nature of the project or key personnel change or when the amount of future support requested substantially exceeds the grant application originally reviewed and approved), additional reviews may be required prior to approving continued funding.

(e) *Obligation of the Federal Government.* Neither the approval of any application nor the award of any project grant shall commit or obligate the United States in any way to make any renewal, supplemental, continuation, or other award with respect to any approved application or portion of an approved application.

§ 3200.7 Use of funds; changes.

(a) *Delegation of fiscal responsibility.* The grantee may not, in whole or in part, delegate or transfer to another person, institution, or organization the responsibility for use or expenditure of grant funds.

(b) *Change in project plans.* (1) The permissible changes by the grantee, principal investigator(s), or other key project personnel in the approved grant shall be limited to changes in methodology, techniques, or other aspects of the project to expedite achievement of the project's approved goals. If the grantee and/or the principal investigator(s) is uncertain whether a particular change complies with this provision, the question must be referred to the Administrator for a final determination.

(2) Changes in approved goals, or objectives, shall be requested by the grantee and approved in writing by the Department prior to effecting such changes. Normally, no requests for such changes that are outside the scope of the original approved project will be approved.

(3) Changes in approved project leadership or the replacement or reassignment of other key project personnel shall be requested by the grantee and approved in writing by the Department prior to effecting such changes.

(4) Transfers of actual performance of the substantive programmatic work in whole or in part and provisions for payment of funds, whether or not Federal funds are involved, shall be requested by the grantee and approved in writing by the Department prior to effecting such changes, except as may be allowed in the terms and conditions of a grant award.

(c) *Changes in project period.* The project period determined pursuant to § 3200.5(b) may be extended by the Administrator without additional financial support, for such additional

period(s) as the Administrator determines may be necessary to complete, or fulfill the purposes of, an approved project. Any extension, when combined with the originally approved or amended project period, shall not exceed five (5) years (the limitation established by statute) and shall be further conditioned upon prior request by the grantee and approval in writing by the Department, except as may be allowed in the terms and conditions of a grant award.

(d) *Changes in approved budget.* The terms and conditions of a grant will prescribe circumstances under which written Departmental approval must be requested and obtained prior to instituting changes in an approved budget.

§ 3200.8 Other Federal statutes and regulations that apply.

Several other Federal statutes and/or regulations apply to grant proposals considered for review or to grants awarded under this part. These include but are not limited to:

7 CFR 1.1—USDA implementation of Freedom of Information Act;

7 CFR part 1c—USDA implementation of the Federal Policy for the Protection of Human Subjects;

7 CFR part 15, subpart A—USDA implementation of title VI of the Civil Rights Act of 1964;

7 CFR part 3—USDA implementation of OMB Circular A–129 regarding debt collection;

7 CFR part 3015—USDA Uniform Federal Assistance Regulations, implementing OMB directives (i.e., Circular Nos. A–110, A–21, and A–122) and incorporating provisions of 31 U.S.C. 6301–6308 (formerly, the Federal Grant and Cooperative Agreement Act of 1977, Public Law No. 95–224), as well as general policy requirements applicable to recipients of Departmental financial assistance;

7 CFR part 3016—USDA Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (i.e., Circular Nos. A–102 and A–87);

7 CFR part 3017—USDA implementation of Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants);

7 CFR part 3018—USDA implementation of New Restrictions on Lobbying. Imposes new prohibitions and requirements for disclosure and certification related to lobbying on recipients of Federal contracts, grants, cooperative agreements, and loans;

7 CFR part 3407—CSRS procedures to implement the National Environmental Policy Act;

29 U.S.C. 794, section 504—Rehabilitation Act of 1973, and 7 CFR part 15B (USDA implementation of statute), prohibiting discrimination based upon physical or mental handicap in Federally assisted programs;

35 U.S.C. 200 *et. seq.*—Bayh-Dole Act, controlling allocation of rights to inventions made by employees of small business firms and domestic nonprofit organizations, including universities, in Federally assisted programs (implementing regulations are contained in 37 CFR part 401).

§ 3200.9 Other conditions.

The Administrator may, with respect to any grant or to any class of awards, impose additional conditions prior to or at the time of any award when, in the Administrator's judgment, such conditions are necessary to assure or protect advancement of the approved project, the interests of the public, or the conservation of grant funds.

Subpart B—Scientific Peer Review of Research Grant Applications

§ 3200.10 Establishment and operation of peer review groups.

Subject to § 3200.5, the Administrator shall adopt procedures for the conduct of peer reviews and the formulation of recommendations under § 3200.14. Peer reviews of all responsive applications will be made by assembled groups of reviewers and/or by written comments solicited from *ad hoc* reviewers.

§ 3200.11 Composition of peer review groups.

(a) Peer review group members and *ad hoc* reviewers will be selected based upon their training and experience in relevant scientific or technical fields, taking into account the following factors:

(1) The level of formal scientific or technical education and other relevant experience of the individual and the extent to which an individual is engaged in relevant research and other relevant activities;

(2) The need to include as peer reviewers experts from various areas of specialization within relevant scientific or technical fields;

(3) The need to include as peer reviewers experts from a variety of organizational types (e.g., universities, industry, private consultant(s)) and geographic locations; and

(4) The need to maintain a balanced composition of peer review groups related to minority and female representation and an equitable age distribution.

§ 3200.12 Conflicts of interest.

Members of peer review groups covered by this part are subject to relevant provisions contained in title 18 of the United States Code relating to criminal activity, Departmental regulations governing employee responsibilities and conduct (part O of this title), and Executive Order 11222, as amended.

§ 3200.13 Availability of information.

Information regarding the peer review process will be made available to the extent permitted under the Freedom of Information Act (5 U.S.C. 552), the Privacy Act (5 U.S.C. 552a.), and Departmental implementing regulations (part 1 of this title).

§ 3200.14 Proposal review.

(a) All grant applications will be acknowledged. Prior to technical examination, a preliminary review will be made for responsiveness to the program solicitation (e.g., relationship of application to announced program area). Proposals which do not fall within the guidelines as stated in the program solicitation will be eliminated from competition and will be returned to the applicant.

(b) All applications will be carefully reviewed by the Administrator, qualified officers or employees of the Department, the respective peer review group, and *ad hoc* reviewers, as required. Written comments will be solicited from *ad hoc* reviewers when required, and individual written comments and indepth discussions will be provided by peer review group members prior to recommending applications for funding. Applications will be ranked and support levels recommended with the limitation of total available funding for each research program area as announced in the program solicitation.

(c) No awarding official will make a grant based upon an application covered by this part unless the application has been reviewed by a peer review group and/or *ad hoc* reviewers in accordance with the provisions of this part and said reviewers have made recommendations concerning the merit of such application.

(d) Except to the extent otherwise provided by law, such recommendations are advisory only and are not binding on program officers or on the awarding official.

§ 3200.15 Evaluation factors.

Subject to the varying conditions and needs of States, Federally funded agricultural research supported under

this program shall be designed to, among other things, accomplish one or more of the following purposes: Continue to satisfy human food and fiber needs; enhance the long-term viability and competitiveness of the food production and agricultural system of the United States within the global economy; expand economic opportunities in rural America and enhance the quality of life for farmers, rural citizens, and society as a whole; improve the productivity of the American Agricultural system and develop new agricultural crops and new uses for agricultural commodities; develop information and systems to enhance the environment and the natural resource base upon which a sustainable agricultural economy depends; or enhance human health. Therefore, in carrying out its review under § 3200.14, the peer review group shall take into account the following factors unless, pursuant to § 3200.5(a), different evaluation criteria are specified in the program solicitation:

(a) Scientific merit of the proposal.

(1) Conceptual adequacy of hypothesis;

(2) Clarity and delineation of objectives;

(3) Adequacy of the description of the undertaking and suitability and feasibility of methodology;

(4) Demonstration of feasibility through preliminary data;

(5) Probability of success of project; and

(6) Novelty, uniqueness and originality.

(b) Qualifications of proposed project personnel and adequacy of facilities.

(1) Training and demonstrated awareness of previous and alternative approaches to the problem identified in the proposal, and performance record and/or potential for future accomplishments;

(2) Time allocated for systematic attainment of objectives;

(3) Institutional experience and competence in subject area; and

(4) Adequacy of available or obtainable support personnel, facilities, and instrumentation.

(c) Relevance of project to long-range improvements in and sustainability of United States agriculture or to one or more of the research purposes outlined in the first paragraph of this section.

(1) Scientific contribution of research in leading to important discoveries or significant breakthroughs in announced program areas; and

(2) Relevance of the research to agricultural, environmental, or social needs.

Done at Washington, DC, this 5th day of November, 1991.

William D. Carlson,

Associate Administrator, Cooperative State Research Service.

[FR Doc. 91–27100 Filed 11–13–91; 8:45 am]

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federal register

Thursday
November 14, 1991

Part IV

Department of Health and Human Services

Food and Drug Administration

Order for Transitional Class III Devices; Submission of Safety and Effectiveness Information; Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 91N-0291]

Order for Transitional Class III Devices; Submission of Safety and Effectiveness Information Under Section 520(1)(5)(A) of the Federal Food, Drug, and Cosmetic Act

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is issuing an order requiring manufacturers of transitional class III devices to submit to FDA a summary of, and a citation to, any information known or otherwise available to the manufacturers respecting the devices, including adverse safety or effectiveness information which has not been submitted under section 519 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360i). This is the first step in the process of determining the appropriate classification of transitional devices under the Safe Medical Devices Act of 1990.

DATES: Summaries and citations must be submitted by January 13, 1992.

ADDRESSES: Summaries and citations to the Document Mail Center (HFZ-401), Food and Drug Administration, Center for Devices and Radiological Health, 1390 Piccard Dr., Rockville, MD 20850.

FOR FURTHER INFORMATION CONTACT: Charles H. Kyper, Center for Devices and Radiological Health (HFZ-400), Food and Drug Administration, 1390 Piccard Dr., Rockville, MD 20850, 301-427-1186.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Authority and Legislative History

The current regulatory framework for device classification requirements evolved from three statutes: (1) The Federal Food, Drug, and Cosmetic Act of 1938 (21 U.S.C. 321-394) (the act); (2) the Medical Device Amendments of 1976 (Pub. L. 94-295) (the 1976 amendments), which amended the act to establish the first comprehensive framework for the regulation of medical devices; and (3) the Safe Medical Devices Act of 1990 (the SMDA) (Pub. L. 101-629), which amended the act to correct problems of implementation and enforcement of the 1976 amendments.

The 1976 amendments broadened the definition of "device" in section 201(h) of the act (21 U.S.C. 321(h)) to include certain articles that were once regarded as drugs. To ensure that no regulatory gaps existed with respect to devices previously regarded as new drugs, Congress enacted section 520(l) of the act (21 U.S.C. 360j(l)), which classified as class III devices the articles formerly regulated as new drugs or antibiotic drugs.

These "transitional provisions" of the act are applicable to any product that is a device under the 1976 amendments: (1) For which an approved new drug application (NDA) was in effect on May 28, 1976; (2) for which an NDA was filed and no order of approval or refusal to approve had been issued by May 28, 1976; (3) for which a notice of claimed investigational exemption for a new drug was in effect on May 28, 1976; (4) which is substantially equivalent to a product described in item (1), (2), or (3) above; (5) which had been declared to be a new drug by a **Federal Register** notice before May 28, 1976; (6) which was the subject of a pending legal action for alleged violation of new drug requirements on May 28, 1976; or (7) which was an antibiotic drug. (See 21 U.S.C. 360j(l).)

1. Classification Categories

Section 513 of the act (21 U.S.C. 360c) requires that the Commissioner classify all devices intended for human use into one of three regulatory categories (classes), based on the extent of control necessary to ensure the safety and effectiveness of the device.

A class I device (general controls) is one for which general controls other than performance standards or premarket approval are sufficient to provide reasonable assurance of safety and effectiveness. General controls include prohibitions against adulterated and misbranded devices, the authority to ban devices, to issue current good manufacturing practice regulations, and to issue recordkeeping and reporting requirements.

A class II device (special controls) is one for which general controls are insufficient to provide reasonable assurance of safety and effectiveness and for which there is enough information known about the device to establish special controls.

A class III device (premarket approval) is one for which insufficient information exists to determine whether general controls or special controls would provide reasonable assurance of the device's safety and effectiveness and that is either purported or represented to be used for supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health, or presents a potential unreasonable risk of illness or injury. A class III device is required to have an approved application for premarket approval prior to commercial distribution.

2. Reclassification

In the **Federal Register** of December 16, 1977 (42 FR 63472), and September 5, 1980 (45 FR 58964), FDA published notices listing general types of devices previously regarded as drugs that are subject to the transitional provisions.

Section 520(l)(2) of the act (21 U.S.C. 360j(l)(2)) provides that the manufacturer or importer of a device classified in class III under the transitional provisions may file a petition for reclassification of the device into class I or class II. Procedures for filing and review of classification petitions are set forth in § 860.136 (21 CFR 860.136). Section 520(l)(3)(D)(ii) of the act provided special procedures for a manufacturer or importer to file a petition for reclassification or an application for premarket approval by July 28, 1976. Only one device sponsor invoked these special procedures and a decision on that petition has been made.

Since the enactment of the 1976 amendments, only seven transitional devices have been reclassified from class III into class II or class I. The legislative history of the SMDA reflects that Congress was concerned that many transitional devices were being unnecessarily retained in class III because the prescribed mechanism under the 1976 amendments for assignment of these devices to their appropriate regulatory classes was cumbersome and difficult. H. Rept. 808, 101st Cong., 2d sess. 26-27 (1990); S. Rept. 513, 101st Cong., 2d sess. 26-27 (1990). The retention of transitional devices in class III particularly concerned Congress because of the substantial commitment of FDA resources in processing the many premarket approval applications (PMA's) for transitional devices. In particular, Congress noted that approximately 50 percent of premarket approvals reviewed by FDA in a typical year relate to transitional contact lens products. S. Rept. 513, 101st Cong., 2d sess. 27 (1990). Congress concluded that appropriate reclassification of transitional devices would free up resources that could be devoted to products which present greater risks to the public. Accordingly, Congress enacted legislation amending section 520(1) of the act to provide a mechanism for revising or sustaining the classification of transitional devices

based on the definitions for classes I, II, and III devices contained in section 513(a) of the act (21 U.S.C. 360c(a)).

Section 4(b)(2) of the SMDA adds section 520(l)(5) of the act, which states that before December 1, 1991, the Secretary of Health and Human Services (the Secretary) shall by order require manufacturers of transitional class III devices to submit a summary of, and citation to, any information known or otherwise available to the manufacturers respecting the devices, including adverse safety or effectiveness information which has not been submitted under section 519 of the act. The Secretary may require a manufacturer to submit the adverse safety and effectiveness data for which a summary and citation were submitted, if such data are available to the manufacturer. After issuance of the order, but before December 1, 1992, the Secretary shall publish a regulation in the **Federal Register** for each device which is classified in class III revising the classification of the device so that the device is classified into class I or class II, unless the regulation requires the device to remain in class III. Under section 520(l)(5)(c) of the act, as added by section 4(b) of the SMDA, the Secretary may by notice published in the **Federal Register** extend the period prescribed above for a device for an additional period not to exceed 1 year. Section 520(l)(5)(B) of the act, added by section 4(b) of the SMDA, states that before the publication of a regulation requiring a device to remain in class III, the Secretary shall publish a proposed regulation respecting the classification of a device and provide an opportunity for the submission of comments on any such regulation. No regulation requiring a device to remain in class III or revising its classification may take effect before the expiration of 90 days from the date of the publication in the **Federal Register** of the proposed regulation.

Section 4(b)(3) of the SMDA also states that, notwithstanding the provisions for reclassification of other transitional devices, the Secretary shall not retain daily wear soft or daily wear nonhydrophylic plastic contact lenses in class III unless the Secretary determines they meet the statutory criteria for remaining in class III. This finding and the grounds for such finding must be published in the **Federal Register.** The Secretary must make this determination within 24 months of the date of the enactment of the SMDA. If the Secretary has not reclassified the above specified contact lenses within 36 months of the date of enactment, the Secretary shall issue an order placing the lenses in class II.

B. Statutory Authority and Enforcement

In addition to the provisions of section 520(l), as added by section 4(b) of the SMDA, described above, this order is issued under section 519 of the act (21 U.S.C. 360i), as implemented by § 860.7(g)(2). This regulation enables FDA to require certain reports bearing on device classification and on device effectiveness.

Failure to comply with this order will result in a violation of section 301(q) of the act, which prohibits the failure or refusal to furnish any material or information required under section 519 of the act (including information required under § 860.7(g)(2)). Failure to comply with this order may also result in violating sections 301 (a), (b), (c), (g), and (k) of the act, which prohibit several actions with respect to interstate commerce of devices that are misbranded under section 502(t)(2) (21 U.S.C. 352(t)(2)) because of a failure to furnish any material or information respecting a device required under section 519 of the act (again, including information required under § 860.7(g)(2)). Persons who violate section 301 of the act may be restrained, under section 302 of the act (21 U.S.C. 332), or may be imprisoned or fined under section 303 of the act (21 U.S.C. 333). FDA may also seize misbranded devices under section 304 of the act (21 U.S.C. 334).

C. Information Required and Requested by This Order

The information required by the order shall include citation to, and summary of, reports in the scientific literature concerning the device or related devices that are known to or that reasonably should be known to the firm; and a summary of the safety and effectiveness information obtained from continuing evaluation of the device for its intended use imposed as a condition of approval of the firm's PMA or otherwise conducted by the firm. This information includes data currently required in postapproval reports for approved devices under 21 CFR 814.82 and 814.84.

To aid FDA in making determinations as to the appropriate classification of transitional devices, FDA may also require manufacturers to submit the safety and effectiveness information identified in the summaries. FDA encourages manufacturers to provide such information, prior to a specific request, in their responses to the order herein. FDA also encourages holders of approved PMA's to provide, or authorize FDA to reference, safety and effectiveness information in their PMA's. Although the summaries provided will be available for public disclosure, all other information provided, whether such information is required by FDA or is submitted voluntarily by the manufacturer will be subject to the provisions of 21 CFR part 20 governing the disclosure of information. Thus, 21 CFR part 20 will govern disclosures.

II. Order

The agency is hereby issuing this order under sections 519 and 520(l)(5)(A) of the act (21 U.S.C. 360i and 360j(l)(5)(A)) and § 860.7(g)(l) of the regulations. Under the order, safety and effectiveness information must be submitted within 60 days after the date of the order so that FDA may begin promptly the process established by section 520(l)(5)(B) of the act to either revise or sustain the class III status of the transitional class III devices.

III. Applicability

This order applies to all manufacturers of class III transitional devices. These devices are as follows:

1. Polymethylmethacrylate (PMMA) bone cement (21 CFR 888.3027)
2. Absorbable and nonabsorbable surgical sutures
3. Absorbable powder for lubricating a surgeon's glove (21 CFR 878.4480)
4. Absorbable hemostatic agent and dressing (21 CFR 878.4490)
5. Injectable polytetrafluoroethylene (Teflon)
6. Gonococcal antibody test (GAT) (21 CFR 866.3290)
7. Biologically derived in vitro diagnostic substances for the identification or analysis of carcinoembryonic antigen (CEA) or alpha-fetoprotein (AFP) for use as aids for the detection or management of cancer in humans
8. Vascular grafts of animal (including human) origin
9. Intraocular lens (21 CFR 886.3600)
10. Intraocular fluid (21 CFR 886.4275)
11. Soft (hydrophilic) contact lens (21 CFR 886.5925)
12. Soft (hydrophilic) contact lens solution (21 CFR 886.5928)
13. Rigid gas permeable contact lens (21 CFR 886.5916)
14. Rigid gas permeable contact lens solution (21 CFR 886.5918)
15. Contact lens heat disintection unit (21 CFR 886.5933)
16. Triphosphate granules for dental bone repair (21 CFR 872.3930)
17. Cervical smear processing devices
18. Hysteroscopy fluid
19. Injectable silicone

20. Bone heterografts (21 CFR 888.3015)

21. Gases used within the eye to place pressure on a detached retina (21 CFR 886.4270)

22. Biologically derived in vitro diagnostic substances for the identification or analysis of tumor-associated antigen (TAA) and tumor-associated polypeptide antigen (TPA) for use as aids for the detection or management of cancer in humans

23. Ophthalmic devices for measuring intraocular pressure if subject to IND or NDA

24. Pregnancy test kits (nonimmunological tests).

This order is not applicable to transitional devices that were previously subject to premarket approval but have been subsequently reclassified into class I or II. These devices are:

1. Antimicrobial susceptibility test disc (21 CFR 866.1620)

2. Antimicrobial susceptibility test powder (21 CFR 866.1640)

3. Absorbable surgical gut suture (21 CFR 878.4830)

4. Nonabsorbable polypropylene suture (21 CFR 878.5010)

5. Nonabsorbable poly (ethylene terephthalate) surgical suture (21 CFR 878.5000)

6. Nonabsorbable polyamide (nylon) surgical suture (21 CFR 878.5020)

7. Natural nonabsorbable silk suture (21 CFR 878)[1]

8. Absorbable poly (glycolide/*L*-lactide) surgical suture (21 CFR 878.4493)

9. Stainless steel surgical suture (21 CFR 878)[1]

IV. Mandatory Requirements Under the Order

Within 60 days after publication of this **Federal Register** notice, all manufacturers currently marketing the transitional class III devices subject to this order shall provide a summary of, and citation to, any information known or otherwise available to the manufacturers respecting the devices, including adverse safety and effectiveness data which has not been submitted under section 519 of the act.

V. Permissive Requirements Under the Order

Under section 520(l)(5)(A) of the act, as added by section 4(b)(5) of the SMDA, FDA may require the submission of the adverse safety and effectiveness information identified in the summary and citation submitted in response to this order, if such information is available to the manufacturer. Manufacturers, however, may voluntarily include this adverse information in their responses to facilitate FDA review. This information will be considered along with other safety and effectiveness information available to FDA in determining whether to propose that a transitional class III device remain in class III or be reclassified. To assist FDA in making this determination, holders of approved PMA's for these devices may voluntarily provide, or authorize FDA to reference, safety and effectiveness information in their PMA's. PMA holders may provide such information or authorization in their response to this order or by amending their approved PMA's in one or more of the following ways:

1. Authorize FDA's use, or provide a summary, of all or specified safety and effectiveness information in their PMA's, including supplements and reports thereto;

2. Provide a summary of the safety and effectiveness information in postapproval reports to their PMA's submitted under section 519 of the act; and/or

3. Authorize FDA's use of all or specified safety and effectiveness information in the summary of safety and effectiveness data included in the firms' approved PMA and/or made publicly available by FDA under section 520(h)(3) of the act when their PMA was approved.

To further assist FDA in determining whether a transitional device should remain in class III or be reclassified, manufacturers of these devices in their responses to this order under section 520(l)(5)(A) of the act or in separate correspondence addressed to the above identified contact person may voluntarily include a discussion with appropriate justification as to the appropriate classification of their device. In preparing such a discussion, manufacturers should consider the following provisions under the SMDA affecting the premarket approval and reclassification processes:

1. *Sections 513 (a)(1)(B), (a)(1)(C), and 514(a)(1) of the act (21 U.S.C. 360c (a)(1)(B), (a)(1)(C), and 360d(a)(1))—Redefinition of class II devices to provide for special controls rather than performance standards alone, and the conforming redefinition of class III devices.* Under section 513(a)(1)(B) of the act as revised by section 5(a) of the SMDA, class II devices are no longer exclusively defined to be those devices for which a performance standard is required and could be developed to provide reasonable assurance of safety and effectiveness. Section 513(a)(1)(B) of the act now defines class II devices as those devices, which cannot be classified as class I devices because general controls by themselves are insufficient to provide reasonable assurance of the safety and effectiveness of the device, and for which there is sufficient information to establish special controls to provide such assurance. Special controls to provide such assurance include the issuance of performance standards, postmarket surveillance, patient registries, development and dissemination of guidelines, recommendations, and other appropriate actions. Any special control, by itself or in combination with others, can provide the basis for placing a device into Class II. For a device that is purported or represented to be for a use in supporting or sustaining human life, the Secretary shall examine and identify the special controls, if any, that are necessary to provide reasonable assurance of safety and effectiveness and describe how the control will provide such assurance.

2. *Section 513(f)(2)(A), 520(l)(2) (21 U.S.C. 360c(f)(2)(A), 360j(l)(2) of the act—Initiation of reclassification.* These provisions, added by section 5(c) of the SMDA, grant FDA the authority to initiate the reclassification of a device classified into class III.

3. *Section 522 of the act (21 U.S.C. 3601)—Postmarket surveillance.* Section 522 of the act, added by section 10 of the SMDA, states that manufacturers that introduce into interstate commerce for the first time after January 1, 1991, a permanently implantable device, which may cause serious, adverse health consequences or death by failure, a life-supporting or life-sustaining device, or a device that potentially presents a serious risk to health, are required to conduct postmarket surveillance of the device. Additionally, FDA may in its discretion require postmarket surveillance for any other device.

4. *Section 520(h) of the act (21 U.S.C. 360(h))—FDA use of PMA information to reclassify devices, approve other PMA's and establish performance standards.* This provision, as added by section 11 of the SMDA, provides that 1 year after the fourth device of a kind has been approved under section 515 of the act (21 U.S.C. 360e), FDA may use any information contained in the PMA application filed under 515(c), including clinical and preclinical tests or studies, but excluding descriptions of methods of manufacture and product composition, that demonstrates the safety and effectiveness of a device, in evaluating a subsequent application for approval, determining whether a product

[1] Reclassifications of these sutures will be codified.

development protocol can be approved under section 515 of the act or in reaching a reclassification decision under sections 513(e), 513(f)(2), or 520(l)(2) of the act.

VI. Submission of Required Information

Summary of, and a citation to, any information required by the act must be submitted by January 13, 1991 to the Document Mail Center (address above).

Dated: November 8, 1991.

Michael R. Taylor,

Deputy Commissioner for Policy.

[FR Doc. 91-27426 Filed 11-13-91; 8:45 am]

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federal register

Thursday
November 14, 1991

Part V

The President

Proclamation 6373—Hire a Veteran Week, 1991

Part V

The President

Federal Register
Vol. 56 No. 220
Thursday, November 14, 1991

Presidential Documents

Title 3—

The President

Proclamation 6373 of November 12, 1991

Hire a Veteran Week, 1991

By the President of the United States of America

A Proclamation

During the past year, America's service men and women demonstrated, once again, the extraordinarily high standards of professionalism and skill that we have come to expect of the United States Armed Forces. Working together with remarkable precision and speed, they ensured the resounding success of our military operations in the Persian Gulf—from the massive deployments of Operations Desert Shield and Desert Storm to the large-scale humanitarian relief efforts of Operation Provide Comfort and Operation Sea Angel. This month, as we salute our Persian Gulf veterans and, indeed, all those who have served in our Nation's armed forces, we also recognize the wealth of knowledge and experience that they have to offer as members of the civilian work force.

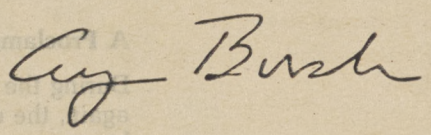
From the beginning of Operation Desert Shield, the American military showed that it is capable of planning and executing tremendously complex and sensitive operations. Our success in the Persian Gulf highlighted not only the superiority of American technology but also our troops' ability to employ these remarkable tools. Moreover, the conflict in the Gulf reminded all Americans that we can rely on our citizen-soldiers, the Reservists and National Guard members who responded so well when called upon to stand shoulder-to-shoulder with their comrades in the regular components of the active duty military forces. We also saw that the American employer is prepared to stand behind the employee who is called to active military service and to safeguard that individual's employment rights while he or she is away.

This month, as we honor our Nation's veterans, let us also recognize the value of recruiting and hiring these Americans in the workplace. Our veterans have developed special knowledge and skills through their military service, and they clearly possess the drive and the discipline that are needed to help keep American business competitive in the international arena.

The Congress, by House Joint Resolution 280, has designated the week of November 10 through November 16, 1991, as "Hire a Veteran Week" and has authorized and requested the President to issue a proclamation in observance of this week.

NOW, THEREFORE, I, GEORGE BUSH, President of the United States of America, do hereby proclaim the week of November 10 through November 16, 1991, as Hire a Veteran Week. I encourage all Americans—in particular, employers, labor leaders, and public officials—to support the campaign to increase the employment of men and women who have served our country in the armed forces.

IN WITNESS WHEREOF, I have hereunto set my hand this twelfth day of November, in the year of our Lord nineteen hundred and ninety-one, and of the Independence of the United States of America the two hundred and sixteenth.



[FR Doc. 91-27627
Filed 11-13-91; 10:49 am]
Billing code 3195-01-M

Editorial note: For the President's remarks commemorating Veterans Day, see issue No. 46 of the *Weekly Compilation of Presidential Documents*.

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