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Rules and Regulations

Federal Register
Vol. 62, No. 204
Wednesday, October 22, 1997

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Parts 71 and 78

[Docket No. 96–041–3]

Interstate Movement of Livestock; Technical Amendment

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule; technical amendment.

SUMMARY: In a final rule published in the **Federal Register** on May 22, 1997, and effective June 23, 1997, we amended the regulations governing the interstate movement of livestock by combining the provisions for the approval of livestock markets for cattle and bison, horses, and swine into a single section. We also removed the regulations that restrict the movement of swine and swine products from areas quarantined for hog cholera and the regulations that provide for the payment of compensation to the owners of swine destroyed because of hog cholera. Since the publication of the final rule, three issues arising from omissions or a lack of clarity in the final rule have been brought to our attention. We are publishing this technical amendment to resolve those issues.

DATES: This amendment is effective October 22, 1997.

FOR FURTHER INFORMATION CONTACT: Dr. James P. Davis, Senior Staff Veterinarian, Surveillance and Animal Identification Team, National Animal Health Programs, VS, APHIS, 4700 River Road Unit 36, Riverdale, MD 20737–1231, (301) 734–5970; or E-mail: jdavis@aphis.usda.gov.

SUPPLEMENTARY INFORMATION:

Background

In a proposed rule published in the **Federal Register** on October 31, 1996 (61 FR 56155–56165, Docket No. 96–041–1), we proposed to amend the regulations regarding the interstate movement of livestock by combining the provisions for the approval of livestock markets for cattle and bison, horses, and swine into a single section. In the same document, we proposed to remove the regulations that restrict the movement of swine and swine products from areas quarantined for hog cholera and that provide for the payment of compensation to the owners of swine destroyed because of hog cholera.

In a final rule published in the **Federal Register** on May 22, 1997 (62 FR 27930–27937, Docket No. 96–041–2), and effective June 23, 1997, we adopted the provisions of the proposed rule as a final rule with certain specified changes that were based on comments received in response to the proposed rule. Since the publication of the final rule, three issues arising from omissions or a lack of clarity in the final rule have been brought to our attention. We are publishing this technical amendment to resolve those issues, each of which is explained below.

Animal Identification

In the May 1997 final rule, we provided for the use of premises identification numbers to identify livestock. When used alone, a premises identification number will allow an animal to be traced back to its farm or premises of origin. That degree of traceback specificity is sufficient for certain classes of livestock, such as slaughter swine and feeder swine. However, a premises identification number can also be combined with a producer's own livestock production numbering system to provide a unique identification number for an animal. Such unique individual identification is necessary for other classes of livestock, such as breeder swine, which often require follow-up testing after being moved interstate.

Unique animal identification is most often provided through the use of official eartags, and in our May 1997 final rule, we amended the definition of *official eartag* to provide for the use of premises identification numbers on official eartags. In amending that definition, we failed to specify that a premises identification number must be combined with a producer's livestock production numbering system to provide animal-specific, rather than just premises-specific, identification if that number is to be used on an official eartag. In this document, therefore, we have amended the definition of *official eartag* in §§ 71.1 and 78.1 to clarify that an official eartag bearing a premises identification number must provide a unique identification number. We have also amended § 71.19(b), which lists the means of swine identification approved by the Administrator, to make it clear that a ''regular'' premises identification number (i.e., a premises-specific number) is approved for the identification of slaughter swine and feeder swine, the two classes of swine that, as noted above, do not require animal-specific identification for interstate movement.

Pseudorabies Provisions

In the May 1997 final rule, we added pseudorabies to the list in § 71.3(a) of diseases considered to be endemic to the United States; that paragraph concludes by stating that animals affected with those endemic diseases shall not be moved interstate. However, paragraph (c) of § 71.3 provides for the interstate movement of animals affected with certain diseases if the animals are moved in accordance to our specific regulations that provide for such interstate movement. Specific regulations do exist that provide for the movement of swine affected with pseudorabies, but we neglected to note those regulations in § 71.3(c) when we added pseudorabies to the list in § 71.3(a). Therefore, in this document we have added a new paragraph § 71.3(c)(4), which reads ''Swine infected with or exposed to pseudorabies may be moved interstate in accordance with part 85 of this chapter.''

Approved Livestock Facilities for Swine

When we developed the single livestock market approval agreement in § 71.20 to replace the five agreements that had been located in parts 75, 76, and 78, it was our intent to eliminate duplication while retaining any necessary species-specific provisions. With regard to the approval of livestock markets for swine, we stated in our

October 1996 proposed rule that we would incorporate the provisions of § 76.18, ''Approval of Livestock Markets,'' into the single agreement in § 71.20 with four exceptions, three of which were related to the now-removed hog cholera regulations and one that dealt with recordkeeping. We have found that we failed to include one of the disease prevention requirements of § 76.18—i.e., that the pens, alleys, and sales rings for holding, inspecting, and otherwise handling swine in an approved market for swine must be imperviously surfaced—when we incorporated the agreement from § 76.18 into the single agreement in § 71.20. To correct that omission, we have amended the swine-specific provisions of the approved livestock facility agreement in § 71.20(a) to restore the impervious surface requirement.

List of Subjects

9 CFR Part 71

Animal diseases, Livestock, Poultry and poultry products, Quarantine, Reporting and recordkeeping requirements, Transportation.

9 CFR Part 78

Animal diseases, Bison, Cattle, Hogs, Quarantine, Reporting and recordkeeping requirements, Transportation.

Accordingly, 9 CFR parts 71 and 78 are amended as follows:

PART 71—GENERAL PROVISIONS

1. The authority citation for part 71 continues to read as follows:

Authority: 21 U.S.C. 111–113, 114a, 114a–1, 115–117, 120–126, 134b, and 134f; 7 CFR 2.22, 2.80, and 371.2(d).

2. In § 71.1, the definition of *official eartag* is revised to read as follows:

§ 71.1 Definitions.

* * * * *

Official eartag. An identification eartag approved by APHIS as being tamper-resistant and providing unique identification for each animal. An official eartag may conform to the alpha-numeric National Uniform Eartagging System, or it may bear a valid premises identification number that is used in conjunction with the producer's livestock production numbering system to provide a unique identification number.

* * * * *

3. In § 71.3, a new paragraph (c)(4) is added to read as follows:

§ 71.3 Interstate movement of diseased animals and poultry generally prohibited.

* * * * *

(c) * * *

(4) Swine infected with or exposed to pseudorabies may be moved interstate in accordance with part 85 of this chapter.

* * * * *

4. In § 71.19, paragraph (b)(7) is revised to read as follows:

§ 71.19 Identification of swine in interstate commerce.

* * * * *

(b) * * *

(7) For slaughter swine and feeder swine, an eartag or tattoo bearing the premises identification number assigned by the State animal health official to the premises on which the swine originated.

* * * * *

5. In § 71.20, paragraph (a), in the sample agreement, paragraphs (15)(ii) through (15)(v) are redesignated as paragraphs (15)(iii) through (15)(vi) and a new paragraph (15)(ii) is added to read follows:

§ 71.20 Approval of livestock facilities.

(a) * * *

(15) * * *

(ii) Pens, alleys, and sales rings for holding, inspecting, and otherwise handling swine shall be imperviously surfaced.

* * * * *

PART 78—BRUCELLOSIS

6. The authority citation for part 78 continues to read as follows:

Authority: 21 U.S.C. 111–114a–1, 114g, 115, 117, 120, 121, 123–126, 134b, and 134f; 7 CFR 2.22, 2.80, and 371.2(d).

7. In § 78.1, the definition of *official eartag* is revised to read as follows:

§ 78.1 Definitions.

* * * * *

Official eartag. An identification eartag approved by APHIS as being tamper-resistant and providing unique identification for each animal. An official eartag may conform to the alpha-numeric National Uniform Eartagging System, or it may bear a valid premises identification number that is used in conjunction with the producer's livestock production numbering system to provide a unique identification number.

* * * * *

Done in Washington, DC, this 14th day of October 1997.

Craig M. Reed,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 97–27953 Filed 10–21–97; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Parts 318 and 381

[Docket No. 95–032F]

RIN 0583–AB93

Elimination of Prior Approval Requirements for Establishment Drawings and Specifications, Equipment, and Certain Partial Quality Control Programs; Correction

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Correction to final rule.

SUMMARY: This document contains corrections to the final rule (Docket No. 95–032F) which was published Monday, August 25, 1997 (62 FR 45016). The final rule concerned the elimination of prior approval requirements for establishment drawings and specifications, equipment, and certain partial quality control programs.

EFFECTIVE DATE: October 22, 1997.

FOR FURTHER INFORMATION CONTACT: Patricia F. Stolfa, Assistant Deputy Administrator, Office of Policy, Program Development, and Evaluation, FSIS, Room 402 Annex Building, Washington DC 20250–3700: (202) 205–0699.

SUPPLEMENTARY INFORMATION:

Background

The final rule that is the subject of these corrections eliminates requirements for establishments applying for inspection to submit to FSIS multiple sets of drawings and specifications of facilities for the preparation of meat or poultry products. The final rule also eliminates requirements for Agency prior approval of equipment and utensils to be used in preparing edible product and of most partial quality control programs used for the control of food processing or for other purposes.

Need for Correction

As published, the final rule contained errors rendering the regulatory text inconsistent with the preamble explanation.

Correction of Publication

Accordingly, the publication on August 25, 1997, of the final rule (Docket No. 95–032F), which was the subject of FR Doc. 97–21882, is corrected as follows:

§ 318.4 [Corrected]

Paragraph 1. On page 45025, in the second column, in § 318.4, in the

paragraph (g) heading, the word ''Establishment'' is corrected to read ''Plant''.

* * * * *

§ 381.145 [Corrected]

Paragraph 1. On page 45026, in the third column, the § 381.145 heading is corrected to read ''Poultry products and other articles entering or at official establishments; examination and other requirements.''

Paragraph 2. On page 45027, in the first column, in § 381.145, the paragraph (g) heading is corrected to read ''Termination of Quality Control Systems''.

* * * * *

Dated: October 10, 1997.

Thomas J. Billy,

Administrator.

[FR Doc. 97–27926 Filed 10–21–97; 8:45 am]

BILLING CODE 3410–10–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Parts 506, 545, 556, 557, 561, 563, 563g

[No. 97–108]

RIN 1550–AB00

Deposits

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: The Office of Thrift Supervision (OTS) is issuing a final rule streamlining its deposit-related regulations. The final rule will eliminate duplicative, overlapping, and outdated regulations, and those that micromanage savings associations. The final rule also codifies the OTS position on federal preemption of state laws affecting deposit-related activities.

EFFECTIVE DATE: January 1, 1998.

FOR FURTHER INFORMATION CONTACT: Edward J. O'Connell, III, Project Manager, (202) 906–5694, Supervision Policy; Robyn H. Dennis, Manager, Thrift Policy, (202) 906–5751; Christine Harrington, Counsel (Banking and Finance), (202) 906–7957; or Karen Osterloh, Assistant Chief Counsel, (202) 906-6639, Regulations and Legislation Division, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, D.C. 20552.

SUPPLEMENTARY INFORMATION:

I. Background of the Proposal

OTS published a notice of proposed rulemaking (NPR) on April 2, 1997 proposing to amend its deposit-related regulations.[1] The NPR proposed to streamline the regulations by eliminating duplicative, overlapping, and outdated regulations, and those that micromanage savings associations. Additionally, OTS sought to codify its long-standing position on federal preemption of state laws affecting deposit-related activities. Finally, OTS proposed to remove regulations that merely restate existing statutory authority or universally recognized incidental deposit-related powers.

With these goals in mind, OTS proposed to consolidate all remaining deposit-related regulations in a new part 557. OTS predicted that this change would make deposit-related regulations easier to locate and follow. OTS issued the NPR pursuant to the Regulatory Reinvention Initiative of the Vice President's National Performance Review and section 303 of the Riegle Community Development and Regulatory Improvement Act of 1994.

II. General Discussion of the Comments

Eight commenters responded to the NPR including five federal thrift institutions and three trade associations. The commenters generally supported the proposal to remove unnecessary, duplicative, or outdated regulations. They specifically endorsed the removal of OTS regulations duplicating areas covered by the Federal Reserve Board's (FRB) Regulation D and Regulation DD.[2] Commenters also generally endorsed the proposed consolidation of the remaining deposit-related regulations at new part 557. Comments addressing specific regulations are discussed in the section-by-section analysis below.

III. Section-by-Section Analysis

A. Disposition of Existing Deposit-Related Regulations

The OTS proposed to delete certain existing regulations, and consolidate the remaining relevant provisions in a new part. Sections proposed for deletion included: § 545.10 (Savings Deposits or Shares); § 545.11 (Issuance of Accounts); § 545.12 (Demand Deposit Accounts); § 545.13 (Account Records); § 545.14 (Determination and Distribution of Earnings); § 556.12 (Deposit Assurance of Direct Deposit of Social Security Payments); § 563.2 (Simple Form of Certificate; Passbooks); § 563.3 (Long Form of Membership Certificate); § 563.6 (Payment of Accounts on Demand); § 563.7 (Fixed-Term Accounts); § 563.9 (Eurodollar Deposits); and § 563.10 (Earnings-Based Accounts).

OTS received comments supporting the deletion of most of the cited sections. These sections are deleted as proposed. Comments opposing the deletion of specific sections, however, are discussed below. Comments received on existing provisions that were retained and incorporated into the new part 557 are discussed in connection with the relevant section under that part. A derivation chart has been provided at the end of this preamble.

OTS emphasizes that the changes made in this final rule are not intended to reduce, in any way, the scope of federal thrifts' authority to conduct deposit activities.

Section 545.12 Demand Deposit Accounts. Existing § 545.12(b) prohibits a federal association from paying interest on demand deposits and specifically states that finders' fees, as defined in § 561.16(b), are not interest. OTS proposed to delete this paragraph and to include the finders' fees exception in the Thrift Activities Handbook (''Handbook''). One commenter supported retaining the finders' fee provisions in OTS regulations. This commenter argued that the Handbook would not override the statutory prohibition on interest on demand deposits at 12 U.S.C. 1464(b)(1)(B)(i), and feared that the Handbook may not be issued until after the effective date of the new deposit regulation. Another commenter supported deleting the finders' fee provision.

OTS regulations at § 561.16 define ''demand accounts'' for the purposes of 12 U.S.C. 1464(b) and the implementing regulations. This definition specifically states that fees paid by a savings association to a person who introduces a depositor to the savings association shall not be deemed an interest payment, if the fee meets certain criteria. OTS believes this definition is sufficient to qualify for the statutory prohibition. Accordingly, the final rule deletes § 545.12(b) as proposed.

Like section 5 of the HOLA, section 11 of the Banking Act of 1933 (12 U.S.C. 371a) and section 18(g) of the Federal Deposit Insurance Act (12 U.S.C. 1828(g)) prohibit the payment of interest on demand deposits. The Federal Reserve Board (FRB) and the Federal Deposit Insurance Corporation (FDIC)

[1] 62 FR 15626 (April 2, 1997). (Notice of Proposed Rulemaking on Deposits and Advance Notice of Proposed Rulemaking on Electronic Banking). OTS has separately published a proposed rule on Electronic Banking. 62 FR 51817 (October 3, 1997).

[2] Regulation D addresses the Reserve Requirements of Depository Institutions. 12 CFR part 204 (1997). Regulation DD implements the Truth in Savings Act (TISA). 12 CFR part 230 (1997).

have issued regulations implementing this prohibition at 12 CFR part 217 (1997) and 12 CFR part 329 (1997), and have issued interpretive rules describing when premiums will not be considered to be interest within the scope of this prohibition. *See* 12 CFR 217.101 (1997) and 12 CFR 329.103 (1997). These interpretations permit premiums to be paid, *inter alia*, if the premium is given only when the depositor opens a new account, or adds to, or renews an existing account. As a result of this guidance, FRB- and FDIC-regulated institutions were constrained from offering incentives to use their products, including the use of new services such as automated teller machines (ATM) or debit cards.[3]

To address this issue, FRB and the FDIC recently revised their interpretive guidance to permit regulated institutions to pay any premium that is not, directly or indirectly, related to or dependent on the balance in a demand deposit account and the duration of the account balance.[4] While OTS has no interpretive rule specifically addressing premiums, OTS agrees that premiums under such circumstances are not interest and will generally follow the FRB and FDIC interpretations on this point.

Section 556.12 Deposit Assurance of Direct Deposit of Social Security Payments. The OTS policy statement at § 556.12 states that a federal association has implied powers to provide deposit assurance in connection with the Social Security Administration's direct deposit program. This policy statement also includes advice on safeguards and controls required to address the risks of the direct deposit program. OTS proposed to delete the policy statement.

Two commenters supported this deletion, but noted that additional regulatory guidance would be helpful to address such issues as safeguards and controls, and compliance with the FRB's Regulation E (Electronic Funds Transfers).[5] The OTS Compliance Handbook addresses Regulation E matters in section 330, Electronic Funds Transfer. OTS is reviewing whether the issuance of additional guidance is necessary.

Section 563.7 Fixed-Term Accounts (Term Accounts). Existing § 563.7(d) states that a certificate account may prohibit withdrawal prior to maturity, except under circumstances set forth in the certificate. This paragraph further provides that, in case of the accountholder's death or incompetence, a savings association may not prohibit early withdrawal and may not impose an early withdrawal penalty. OTS proposed to delete this paragraph because it duplicates Regulation D.[6]

Two commenters specifically addressed this paragraph. One supported deletion. The other argued that the section is not duplicative. This commenter argued that Regulation D neither authorizes an institution to prohibit early withdrawal nor forbids an institution from prohibiting early withdrawal. The commenter noted that § 563.7(d) correctly allows the matter to be addressed by the contract between the savings association and its depositors.

Unless restricted by statute or regulation, a federal savings association needs no specific authorization to enter into agreements establishing maturity dates for accounts and prohibiting early withdrawal under circumstances specified in those agreements. Regulation D does, however, limit this broad authority. For example, to meet the definition of time deposit under Regulation D, an institution must limit the depositor's right to withdraw his account unless the deposit is subject to a specified penalty for early withdrawal.[7]

The commenter correctly noted that, unlike existing § 563.7, Regulation D does not *require* a savings association to permit early withdrawal, subject to penalties, upon the death or incompetency of the accountholder. Rather, Regulation D merely *permits* the savings association to take such action under these and other circumstances.[8] However, in the interest of uniformity with other insured institutions, the OTS had determined that it is not necessary to impose this additional requirement on federal savings associations. Therefore, OTS concludes that existing § 563.7 may be deleted in this final rule.

Section 563.9 Eurodollar Deposits. Existing § 563.9 addresses the issuance of Eurodollar deposits. OTS proposed to delete this provision as unnecessary. Three commenters supported deleting this provision. One of these commenters, however, suggested that OTS reiterate, either in a regulation or the preamble, that savings associations have authority to accept Eurodollar deposits under their general authority to accept deposits. OTS has deleted this regulation as proposed, but notes that federal savings associations continue to be permitted to issue Eurodollar certificates as part of their deposit activities authorized by the HOLA.[9]

B. Proposed Part 557

OTS proposed to adopt a new part 557, which would include all of the agency's deposit-related regulations. Although OTS proposed part 557 in a traditional format, this final rule uses the plain language drafting techniques promoted by the Vice President's National Performance Review Initiative and new guidance in the Federal Register *Document Drafting Handbook* (January 1997 edition). The primary goal of plain language drafting is to make regulations more readily understandable. Plain language drafting emphasizes informative headings (often written as a question), non-technical language (including the use of ''you''), and sentences in the active voice.

Although commenters did not have an opportunity to comment on the plain language format prior to its use in this final rule, OTS believes that the benefits of the plain language format justify its use. The substance of the proposed regulation did not change as a result of the plain language drafting. OTS welcomes comments on the format and suggestions on how to improve this format.

Subpart A—General

Section 557.1 What does this part do? New § 557.1 states that part 557 applies to savings associations' deposit activities. Specifically, subpart B applies to federal savings associations, while subpart C applies to both federal and state chartered savings associations.

Subpart B—Deposit Activities of Federal Savings Associations

Section 557.10 What authorities govern the issuance of deposit accounts by a federal savings association? Proposed § 557.1 stated that a federal savings association may raise funds through accounts and may issue evidence of accounts under section 5(b)(1) of the HOLA, by the terms of its charter, and by part 557.

OTS received two comments on the proposed section. One commenter feared that savings association personnel may not realize that

[3] For example, one bank was prevented from offering incentives to existing demand customers who signed up for an ATM card because the incentives did not coincide with opening, adding to, or renewing an account. Similarly, another bank was prevented from offering incentives to encourage deposit customers to use an ATM card more than three times per month because premiums from the use of a debit card, which reduce the amount on deposit, would have been interest on the deposit under the FRB and FDIC interpretive guidance.

[4] 62 FR 26736 (May 15, 1997); 62 FR 40731 (July 30, 1997).

[5] 12 CFR part 204 (1997).

[6] 12 CFR 204.2(c)(1) n.1 (1997).

[7] *See* 12 CFR 204.2(c)(1) (1997).

[8] 12 CFR 204.2(c)(1)(i), n.1 (1997).

[9] 12 U.S.C. 1464(b)(1)(A).

Regulation D is applicable. This commenter suggested that the final rule specifically cite Regulation D. OTS believes this suggestion is helpful and has added a reference to Regulation D and Regulation DD in the new § 557.10.

Another commenter suggested deleting the reference to authority granted under the association's charter. The reference to the charter was included to maintain consistency with section 5(b) of the HOLA which authorizes a federal savings association to accept deposits ''[s]ubject to the terms of its charter and regulations of the [OTS].'' [10] To the extent that the commenter feared that retention of this reference would require charter amendments whenever a new deposit product is offered, the OTS notes that charters are broad authorizing documents that typically do not specifically address unique deposit products. The model federal stock and mutual charters, for example, contain no restrictions on permissible deposit products.[11]

Section 557.11 To what extent does federal law preempt state deposit-related law? Section 557.11 sets forth OTS's long-standing position on federal preemption of state laws purporting to affect deposit-related activities of federal savings associations. It explicitly states our intent to occupy the entire field of deposit-related regulations for federal savings associations, and sets forth the statutory and regulatory bases for preemption. *See* proposed § 557.2(a).

One commenter opposed the preemption provision as an infringement on the dual banking system. OTS disagrees. Deposit-taking is one of the most important functions of a savings association, and preemption is essential to OTS regulation of these activities. Section 557.11 merely restates long-standing preemption principles applicable to federal savings associations' operations, as developed in a long line of court cases and legal opinions issued by OTS and the FHLBB.[12]

This final rule should not be construed as evidencing, in any way, an intent by OTS to change its long-standing position on preemption. Moreover, whether OTS continues to have a specific regulation addressing a particular deposit activity or chooses to remove a federal regulation to streamline its regulations and reduce regulatory burden, OTS still intends to occupy the entire field of regulation of the deposit activities of federal savings associations.

One commenter argued that all preemption questions should be decided on a case-by-case basis, rather than by regulation. Sections 557.11 through 557.13 of the final rule set forth only well-settled principles of preemption and examples of preempted and non-preempted state laws. These are derived from statutory and regulatory authority, as interpreted in case law and prior FHLBB and OTS case-by-case determinations. While OTS will continue to address new questions by issuing interpretive guidance on a case-by-case basis, OTS is hopeful that the increased clarity and specificity of the final rule will reduce confusion and the need for frequent preemption inquiries to OTS.

Section 557.12 What are some examples of preempted state laws affecting deposits? Section 557.12 (proposed § 557.2(b)) contains an illustrative list of preempted state laws. Various commenters suggested additions to the list of preempted state laws. Some would expand the list to reference new types of preempted state laws (e.g., state laws addressing abandoned property, safe deposit boxes, licensing of deposit operations, and reporting requirements).[13]

Except as discussed below, OTS has not revised § 557.12 to add new items to the list of preempted state laws. As the section heading to this final rule emphasizes, the list of preempted state laws is not intended to be exhaustive. Failure to mention a particular state law that affects deposit-taking should not be deemed to constitute evidence of any intent to permit that type of state law to apply.[14] As state laws are addressed in future case law and agency opinions, OTS will consider appropriate revisions to this regulation.

OTS has decided to revise the regulation to include one suggested addition. On numerous occasions, the OTS, FHLBB and the courts, have concluded that states may not impose licensing or registration requirements on federal savings associations.[15] Accordingly, state licensing and registration laws have been added to the list in § 557.12.

One additional type of state law merits discussion—state escheat laws. Some commenters argued that escheat laws should be added to the list of preempted state laws. Other commenters suggested that these laws should be added to the list of laws that are *not* preempted. This agency has concluded in prior opinions that federal law does not preempt state laws requiring a federal savings association to remit the balance of an abandoned account to a state at a designated time. Additionally, the agency has opined that states may review the records of, or obtain reports from, a federal savings association only in very limited circumstances, including determining whether the federal savings association has complied with the escheat law.[16] On the other hand, certain other laws (e.g., state laws prohibiting a savings association from charging any fees for lack of activity during the designated escheat period) are subject to preemption.[17] Because some aspects of state escheat laws are preempted and other aspects are not, OTS declines to address these laws in the final regulation.

Section 557.13 What state laws affecting deposits are not preempted? Section 557.13 describes which state laws are not preempted. Specifically, this section states that OTS has not preempted certain types of laws to the extent that the laws only incidentally affect the deposit-related activities of federal savings associations or are otherwise consistent with the purposes of § 557.11. State laws that are not preempted include: Contract and commercial law, tort law, and criminal law. In addition, OTS will not preempt any other state law if OTS, upon review, finds that the law furthers a vital state interest and either has only an incidental effect on deposit-related activities or is not otherwise contrary to the purposes of § 557.11.

One commenter suggested that OTS should clarify that the phrase ''incidental effect on deposit-related activities'' requires that the state law must be directed at businesses in general, rather than at deposit-related activities in particular. Certainly, many state laws directed at businesses in general will not be preempted.

[10] 12 U.S.C. 1464(b)(1)(A).

[11] 12 CFR 552.3 and 544.1 (1997).

[12] For a discussion of general preemption principles applicable to the operations of federal thrifts, see 61 FR 50951 at 50965–50967 (September 30, 1996).

[13] Other commenters made suggestions that would merely add greater specificity to the proposed list of preempted laws. Commenters suggested adding state laws that address particular special purpose savings services, specific kinds of service charges or fees, or particular aspects of state funds availability laws. The OTS believes that its rule is sufficiently clear, and has not made these changes.

[14] To the contrary, the preemption rules are based on the premise that any state law that affects the deposit activities of federal thrifts is preempted unless it clearly falls within the parameters of § 557.13.

[15] *See e.g.*, OTS Op. Chief Counsel. (December 14, 1994) and opinions and case law cited therein.

[16] OTS Op. Chief Counsel (January 18, 1996) at 3; FHLBB Op. Dep. Chief Counsel (May 24, 1984).

[17] OTS Op. Chief Counsel (July 8, 1992).

However, the focus of this aspect of the preemption inquiry is the effect of a state law on federal associations, not on how many other businesses or industries the law may also affect.

Another commenter suggested that OTS should employ a presumption in favor of preempting state laws. When confronted by interpretative questions under the final rule, OTS will follow the same analytical format that it described in the preemption discussion to the recently issued lending regulation.[18] To determine whether a state law is preempted, the first step is to ascertain whether the law in question is of the type listed in § 557.12 as an example of preempted law. If it is, the analysis ends there; the law is preempted. If the law is not covered by § 557.12, the next question is whether the law affects deposit-taking. If so, then, in accordance with § 557.11, the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of § 557.13. For these purposes, § 557.13 is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption.

Section 557.14 What interest rate may I pay on savings accounts? New § 557.14 addresses interest payments on savings accounts. The proposed rule, entitled ''interest and earnings,'' stated that a savings association may pay interest on a savings account, whether in the form of a deposit or share, at any rate or anticipated rate of return determined when the account is accepted and as provided in the association's charter and bylaws and the terms of the account. *See* proposed § 557.3.

One commenter suggested that the proposed rule should be revised to delete the outdated term ''share'' and that the title of any new section should not include the term ''earnings.'' The term ''share'' is drawn from the HOLA.[19] OTS will continue to use this term in the final regulation to keep the regulation consistent with the statute. OTS dropped the reference to ''earnings'' since this term is not used in the regulation text.

One commenter noted that modern charters and bylaws do not address interest payments on savings accounts and suggested the final rule on interest should delete the references to these documents. Again, the reference to the association's charter is based on the statute, which authorizes a federal savings association to accept deposits subject to the terms of its charter.[20] In order to maintain consistency with this statutory authority, this reference is retained. OTS agrees that the reference to bylaws is unnecessary, and has deleted it from the final rule.

Another commenter suggested that the regulation should state that all interest payments must be consistent with the TISA and Regulation DD, which implements TISA. This change is unnecessary because OTS has included a citation to Regulation DD in § 557.10, which addresses the authorities governing federal savings associations' issuance of deposit accounts.

One commenter suggested that the proposed rule should be revised to delete the outdated term ''anticipated rate of return.'' Share type mutual associations use this term in making earnings distributions to account holders. Additionally, as discussed under § 557.15, rates may vary and may not be known with certainty when an account is opened. OTS believes the term anticipated rate of return is appropriate, and has retained this term in the final regulation.

The proposed regulation would have allowed federal savings associations to pay fixed rates on savings accounts, or pay rates that vary according to a schedule, index, or formula specified when the account is accepted. *See* proposed § 557.3.

One commenter was concerned that the proposed text would unnecessarily disallow ''bump-rate'' certificates of deposit. Bump-rate accounts provide the depositor with the option of changing the rate during the certificate's term. OTS did not intend to disallow ''bump-rates.'' Therefore, the final regulation does not require a federal association to fix interest rates on savings accounts when it accepts the accounts. Rather, the final rule requires that the schedule, index, or formula be specified in the account's terms.

Section 557.15 Who owns a deposit account? Section 557.15 provides that a federal association may treat the account holder of record as the owner, regardless of contrary notice, until the account is transferred on the association's records. *See* proposed § 557.4(b). OTS received one comment in support of the proposed rule. Accordingly, OTS adopts this provision without substantive change.

Subpart C—Deposit Activities of All Savings Associations

Section 557.20 What records should I maintain on deposit activities? Section 557.20 states that federal and state chartered savings associations should establish and maintain deposit documentation practices and records that demonstrate appropriate administration and monitoring of its deposit-related activities. These records should adequately evidence ownership, balances, and all transactions for each account. *See* proposed § 557.4(a). This section replaces the more specific deposit recordkeeping requirements contained in the existing regulations.

One commenter suggested that the recordkeeping requirements should apply only to federal savings associations. OTS specifically intends the recordkeeping requirements to apply to both federal and state chartered savings associations. To make this distinction clear, OTS has included this provision in subpart C which governs the deposit activities of all associations.

Another commenter suggested that the regulation should specifically state that electronic records are acceptable. OTS has recently issued a proposed regulation addressing the electronic operations of federal savings associations.[21] This regulation would permit federal savings associations to use electronic means and facilities to perform any authorized function, including recordkeeping. To clarify that electronic recordkeeping is available, the final rule states that savings associations may maintain records in any format consistent with standard business practices.

C. Related Regulations

Several commenters addressed regulations that were not covered by the NPR. For example, one commenter suggested that OTS delete § 561.28 (a)(2), (a)(3) and (b), which defines money market deposit accounts. This commenter argued that § 561.28(a)(2)(i) which authorizes no more than six transfers per calendar month or statement cycle, prohibits thrifts from offering money market deposit accounts with debit cards. The commenter believed that this restriction and the other restrictions at § 561.28 are unnecessary and may be deleted.

The cited restrictions were originally imposed to preserve uniform treatment of money market accounts between Federal Reserve System members and insured institutions,[22] and are based on the definitions contained in the FRB's Regulation D.[23] Even if the restrictions contained in 12 CFR 561.28 were removed, savings associations would still be subject to such restrictions by

[18] *See* 61 FR 50951, 50966–50967 (September 30, 1996).

[19] 12 U.S.C. 1461(b)(1)(A).

[20] 12 U.S.C. 1464(b)(1)(A).

[21] 62 FR 51817 (October 3, 1997).

[22] 51 FR 10810 at 10812 (March 31, 1986).

[23] *See* 12 CFR 204.2(d)(2) (1997).

Regulation D. Moreover, OTS notes that the FRB recently considered and rejected a proposal to increase the number of transfers permitted on corporate money market accounts.

While one of the purposes of this rulemaking was to remove OTS regulations that duplicate areas covered by the FRB's Regulation D, the regulatory definitions applicable to deposits at 12 CFR parts 541 and 561 were not proposed for revision in the proposed rule. Accordingly, OTS has left these provisions unchanged. The future regulatory restructuring rulemaking may review these definitions to determine if they should be modified or removed.

Several existing OTS regulations contain cross-references to provisions that are being removed.[24] Consequently, technical revisions to remove these cross-references are included in this rule.

One commenter suggested that OTS give thrifts parity with national banks in connection with selling annuities and insurance. Another commenter suggested that the equal housing lender logo should be required only for advertisements for residential mortgage loans, rather than in all advertisements. OTS will review these regulations for possible revision when they are scheduled for reconsideration.

IV. Executive Order 12866

The Director of OTS has determined that this final rule does not constitute a ''significant regulatory action'' for the purposes of Executive Order 12866.

V. Unfunded Mandates Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104–4 (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a federal mandate that may result in expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. This final rule simplifies existing procedures and reduces regulatory burden. OTS has determined that the final rule will not result in expenditures by state, local, or tribal governments or by the private sector of $100 million or more. Accordingly, this rulemaking is not subject to section 202 of the Unfunded Mandates Act.

VI. Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act, OTS certifies that the final rule does not have a significant impact on a substantial number of small entities. As discussed in the preamble, this final rule does not impose any additional burdens or requirements on small entities. Rather, the final rule reduces several paperwork and other burdens on all savings associations.

VII. Paperwork Reduction Act

The reporting and recordkeeping requirements contained in this final rule have been submitted to and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under OMB control No. 1550–0092. Comments on all aspects of this information collection should be sent to the Office of Management and Budget, Paperwork Reduction Project (1550), Washington, D.C. 20503, with copies to the OTS, 1700 G Street, N.W., Washington, D.C. 20552.

The recordkeeping requirements contained in this final rule are found at 12 CFR 557.20. The reporting requirements are found in the Federal Reserve Board's Regulation DD, 12 CFR part 230. In part 557, OTS relies on the disclosure requirements applicable to savings associations under Regulation DD. OTS needs the information to supervise savings associations and to develop regulatory policy. The likely respondents/recordkeepers are OTS-regulated savings associations.

Records are to be maintained for the period of time the account is open, plus three years.

Respondents/recordkeepers are not required to respond to this collection of information unless it displays a currently valid OMB control number.

VIII. Disposition of Existing Rules

Original provision	New provision	Comment
545.10		Removed.
545.11 (a) & (c)		Removed.
545.11(b)	557.10	Redesignated/modified.
545.12		Removed.
545.13 (a) & (b)(2)	557.20	Redesignated/modified.
545.13(b)(1)	557.15	Redesignated/modified.
545.14(a)	557.14	Redesignated/modified.
545.14(b)	557.14	Redesignated/modified.
545.14(c)		Removed.
556.12		Removed.
563.2		Removed.
563.3		Removed.
563.6		Removed.
563.7 (a), (c) & (d)		Removed.
563.7(b)	557.14	Redesignated/modified.
563.9		Removed.
563.10		Removed.

List of Subjects

12 CFR Part 506

Reporting and recordkeeping requirements.

12 CFR Part 545

Accounting, Consumer protection, Credit, Electronic funds transfers, Investments, Reporting and recordkeeping requirements, Savings associations.

12 CFR 556 and 561

Savings associations.

[24] 12 CFR 561.16, 561.42, 563g.1.

12 CFR Part 557

Consumer protection, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 563

Accounting, Advertising, Crime, Currency, Investments, Reporting and recordkeeping requirements, Savings associations, Securities, Surety bonds.

12 CFR 563g

Reporting and recordkeeping requirements, Savings associations, Securities.

Accordingly, the Office of Thrift Supervision hereby amends chapter V, title 12, as follows:

PART 506—INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT

1. The authority citation for part 506 continues to read as follows:

Authority: 44 U.S.C. 3501 *et seq.*

2. Section 506.1 is amended by adding one entry to the table in paragraph (b) in numerical order to read as follows:

§ 506.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) *Display.*

12 CFR part or section where identified and described	Current OMB control No.
* * * * *	
557.20	1550–0092
* * * * *	

PART 545—OPERATIONS

3. The authority citation for part 545 continues to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464, 1828.

§§ 545.10—545.14 [Removed]

4. Sections 545.10, 545.11, 545.12, 545.13, and 545.14 are removed.

PART 556—STATEMENTS OF POLICY

5. The authority citation for part 556 continues to read as follows:

Authority: 5 U.S.C. 552, 559; 12 U.S.C. 1464, 1701j–3; 15 U.S.C. 1693–1693r.

§ 556.12 [Removed]

6. Section 556.12 is removed.

7. Part 557 is added to read as follows:

PART 557—DEPOSITS

Subpart A—General

Subpart B—Deposit Activities of Federal Savings Associations

Subpart C—Deposit Activities of All Savings Associations

Authority: 12 U.S.C. 1462a, 1463, 1464.

Subpart A—General

§ 557.1 What does this part do?

This part applies to the deposit activities of savings associations. If you are a federal savings association, subpart B of this part applies to your deposit activities. Subpart C of this part applies to the deposit activities of all federal and state chartered-savings associations.

Subpart B—Deposit Activities of Federal Savings Associations

§ 557.10 What authorities govern the issuance of deposit accounts by a federal savings association?

A federal savings association (''you'') may raise funds through accounts and may issue evidence of accounts under section 5(b)(1) of the HOLA (12 U.S.C. 1464(b)(1)), your charter, and this part. Additionally, 12 CFR parts 204 and 230 apply to your deposit activities.

§ 557.11 To what extent does federal law preempt state deposit-related law?

(a) Under sections 4(a) and 5(b) of the HOLA, 12 U.S.C. 1463(a), 1464(b), OTS is authorized to promulgate regulations that preempt state laws affecting the operations of federal savings associations when appropriate to:

(1) Facilitate the safe and sound operations of federal savings associations;

(2) Enable federal savings associations to operate according to the best thrift institutions practices in the United States; or

(3) Further other purposes of HOLA.

(b) To further these purposes without undue regulatory duplication and burden, OTS hereby occupies the entire field of federal savings associations' deposit-related regulations. OTS intends to give federal savings associations maximum flexibility to exercise deposit-related powers according to a uniform federal scheme of regulation. Federal savings associations may exercise deposit-related powers as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise effect deposit activities, except to the extent provided in § 557.13. State law includes any statute, regulation, ruling, order, or judicial decision.

§ 557.12 What are some examples of preempted state laws affecting deposits?

The OTS preempts state laws that purport to impose requirements governing the following:

(a) Abandoned and dormant accounts;

(b) Checking accounts;

(c) Disclosure requirements;

(d) Funds availability;

(e) Savings account orders of withdrawal;

(f) Service charges and fees;

(g) State licensing or registration requirements; and

(h) Special purpose savings services.

§ 557.13 What state laws affecting deposits are not preempted?

(a) The OTS has not preempted the following types of state law, to the extent that the law only incidentally affects your deposit-related activities or is otherwise consistent with the purposes of § 557.11:

(1) Contract and commercial law;

(2) Tort law; and

(3) Criminal law.

(b) The OTS will not preempt any other state law if the OTS, upon review, finds that the law:

(1) Furthers a vital state interest; and

(2) Either only incidentally affects your deposit-related activities or is not otherwise contrary to the purposes expressed in § 557.11.

§ 557.14 What interest rate may I pay on savings accounts?

(a) You may pay interest at any rate or anticipated rate of return on savings accounts, either in deposit or in share form, as provided in your charter and the account's terms.

(b) You may pay fixed or variable rates. If you pay a variable rate, you must base it on a schedule, index, or formula that you specify in the account's terms.

§ 557.15 Who owns a deposit account?

You may treat the holder of record as the account owner, even if you receive contrary notice, until you transfer the account on your records.

Subpart C—Deposit Activities of All Savings Associations

§ 557.20 What records should I maintain on deposit activities?

All federal and state chartered savings associations (''you'') should establish and maintain deposit documentation practices and records that demonstrate that you appropriately administer and monitor deposit-related activities. Your records should adequately evidence ownership, balances, and all transactions involving each account. You may maintain records on deposit activities in any format that is consistent with standard business practices.

PART 561—DEFINITIONS

8. The authority citation for part 561 continues to read as follows:

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a.

§ 561.16 [Amended]

9. Section 561.16 is amended, in paragraph (a), by removing the phrase '', as provided in § 563.6(b) of this chapter''.

§ 561.42 [Amended]

10. Section 561.42 is amended by removing the phrase ''§§ 563.6 and 561.16'' and adding in its place ''§ 561.16''.

PART 563—OPERATIONS

11. The authority citation for part 563 continues to read as follows:

Authority: 12 U.S.C. 375b, 1462, 1462a, 1463, 1464, 1467a, 1468, 1817, 1820, 1828, 3806; 42 U.S.C. 4106.

§§ 563.2, 563.3, 563.6, 563.7, 563.9, 563.10 [Removed]

12. Sections 563.2, 563.3, 563.6, 563.7, 563.9, and 563.10 are removed.

PART 563g—SECURITIES OFFERINGS

13. The authority citation for part 563g continues to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464; 15 U.S.C. 78c(b), 78l, 78m, 78n, 78p, 78w.

§ 563g.1 [Amended]

14. Section 563g.1 is amended by removing the last sentence of paragraph (a)(13).

Dated: October 15, 1997.

By the Office of Thrift Supervision.

Nicolas P. Retsinas,

Director.

[FR Doc. 97–27842 Filed 10–21–97; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 913

[SPATS No. IL–081–FOR]

Illinois Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: OSM is approving a proposed amendment to the Illinois permanent regulatory program (hereinafter referred to as the ''Illinois program'') pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA). This amendment provides that areas revegetated following the removal of temporary structures such as sedimentation ponds, roads, and small diversions are not subject to a revegetation responsibility period and bond liability period separate from that of the permit area or increment thereof served by such facilities. The amendment is intended to clarify ambiguities in the State regulations and to improve operational efficiency.

EFFECTIVE DATE: October 22, 1997.

FOR FURTHER INFORMATION CONTACT:

Andrew R. Gilmore, Director, Indianapolis Field Office, Office of Surface Mining Reclamation and Enforcement, Minton-Capehart Federal Building, 575 North Pennsylvania Street, Room 301, Indianapolis, IN 46204–1521, Telephone: (317) 226–6700.

SUPPLEMENTARY INFORMATION:

I. Background on the Illinois Program

On June 1, 1982, the Secretary of the Interior conditionally approved the Illinois program. Background information on the Illinois program, including the Secretary's findings, the disposition of comments, and the conditions of approval can be found in the June 1, 1982 **Federal Register** (47 FR 23883). Subsequent actions concerning the conditions of approval and program amendments can be found at 30 CFR 913.15, 913.16, and 913.17.

II. Submission of the Proposed Amendment

By letter dated June 22, 1992 (Administrative Record No. IL–1192), Illinois submitted a proposed program amendment consisting of revisions to a number of its approved regulations. OSM announced receipt of the proposed amendment in the August 18, 1992, **Federal Register** (57 FR 37127) and, in the same notice, opened the public comment period and provided opportunity for a public hearing on the adequacy of the proposed amendment. The public comment period ended on September 17, 1992. Since no one requested an opportunity to testify at a public hearing, the hearing scheduled for September 14, 1992, was canceled.

By letter dated April 27, 1993 (Administrative Record No. IL–1207), Illinois submitted revisions to its proposed amendment in response to concerns raised by OSM in letters dated September 2, 1992, and October 2, 1992 (Administrative Record Nos. IL–1204 and IL–1205, respectively), and in response to comments received from other governmental agencies and individuals. OSM announced receipt of the revised amendment in the May 17, 1993, **Federal Register** (58 FR 28804) and, in the same notice, reopened the public comment period and again provided an opportunity for a public hearing. The public comment period closed on June 16, 1993. As with the previous submittal, no one requested an opportunity to testify at a public hearing; therefore, the hearing scheduled for June 11, 1993, was canceled.

OSM subsequently announced its decision on most provisions of the proposed amendment in the September 3, 1993, **Federal Register** (58 FR 46845). However, in the same document, OSM stated at 58 FR 46849–50 (finding 11(c)) and 30 CFR 913.15(o)(4) that it was deferring a decision on the proposed revisions to sections 1816.116(a)(2)(C) and 1817.116(a)(2)(C) of title 62 of the Illinois Administrative Code (IAC) until additional opportunity for public comment was provided in a separate **Federal Register** document. That commitment was fulfilled by the notice published on September 15, 1993 (58 FR 48333), which reopened the public comment period until October 15, 1993. This notice also included similar proposed revisions to the Kentucky and Ohio regulations as well as a discussion of OSM's proposed policy concerning restart of the revegetation responsibility period every time a small portion of the permit area requires reseeding or replanting. Subsequently, in the May 29,

1996, **Federal Register** (61 FR 26792), OSM approved similar proposed revisions to the Colorado regulations, based on the adoption of the proposed OSM policy published on September 15, 1993 (58 FR 48333).

Only Illinois' proposed revisions are under consideration in this final rule document. The Kentucky and Ohio proposals will be addressed in a separate final rule document. Since no one requested an opportunity to testify at a public hearing, no hearing was held.

The amendment revises two regulations defining normal husbandry practices and other activities that will not restart the liability period. It also includes a document explaining how the State intends to interpret and implement these rules. This policy document specifies that Illinois will consider the reseeding of areas from which temporary features such as sedimentation ponds, roads, and diversions have been removed after vegetation is established on the surrounding area to be non-augmentative.

III. Director's Findings

Set forth below, pursuant to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, are the Director's findings concerning the deferred revisions at 62 IAC 1816.116(a)(2)(C) and 1817.116(a)(2)(C) and the accompanying policy document that explains how the State intends to implement these rules.

A. *OSM's policy concerning the term of liability for reclamation of roads and temporary sediment control structures.* As outlined in the May 29, 1996, **Federal Register** (61 FR 26792), OSM has adopted the policy published for comment in the September 15, 1993, **Federal Register** (58 FR 48333). Section 515(b)(20) of SMCRA provides that the revegetation responsibility period shall commence ''after the last year of augmented seeding, fertilizing, irrigation, or other work'' needed to assure revegetation success. In the absence of any indication of Congressional intent in the legislative history, OSM interprets this requirement as applying to the increment or permit area as a whole, not individually to those lands within the permit area upon which revegetation is delayed solely because of their use in support of the reclamation effort on the planted area. As implied in the preamble discussion of 30 CFR 816.46(b)(5), which prohibits the removal of ponds or other siltation structures until two years after the last augmented seeding, planting of the sites from which such structures are removed need not itself be considered an augmented seeding necessitating an extended or separate liability period (48 FR 44038–44039, September 26, 1983).

The purpose of the revegetation responsibility period is to ensure that the mined area has been reclaimed to a condition capable of supporting the desired permanent vegetation. Achievement of this purpose will not be adversely affected by this interpretation of section 515(b)(20) of SMCRA since (1) the lands involved are relatively small in size and either widely dispersed or narrowly linear in distribution and (2) the delay in establishing revegetation on these sites is due not to reclamation deficiencies or the facilitation of mining, but rather to the regulatory requirement that ponds and diversions be retained and maintained to control runoff from the planted area until the revegetation is sufficiently established to render such structure unnecessary for the protection of water quality.

In addition, the areas affected likely would be no larger than those which could be reseeded (without restarting the revegetation period) in the course of performing normal husbandry practices, as that term is defined in 30 CFR 816.116(c)(4) and explained in the preamble to that rule (53 FR 34636, 34641; September 7, 1988; 52 FR 28012, 28016; July 27, 1987). Areas this small would have a negligible impact on any evaluation of the permit area as a whole. Most importantly, this interpretation is unlikely to adversely affect the regulatory authority's ability to make a statistically valid determination as to whether a diverse, effective permanent vegetative cover has been successfully established in accordance with the appropriate revegetation success standards. From a practical standpoint, it is usually difficult to identify precisely where such areas are located in the field once revegetation is established in accordance with the approved reclamation plan.

The above discussion of the rules in 30 CFR Part 816, which applies to surface mining activities, also pertains to similarly or identically constructed section in 30 CFR Part 817, which applies to underground mining activities.

B. *Comparison of Illinois' policy with OSM's policy clarification.* Illinois' policy document specifies that the State will consider limited reseeding and associated fertilization and liming of areas where features such as sediment ponds, roads, and small diversions have been removed as non-augmentative on agricultural and non-agricultural lands where the area is small in relation to the watershed of the area. The statement also stipulates that any minor reseeded area be revegetated under approved plans and that vegetation be fully established at the time of final bond release. Illinois' reference to roads in its statement is interpreted by OSM to mean those roads necessary for maintenance of sediment ponds, diversions, and reclamation areas. Ancillary roads used for maintenance do not include haul roads or other primary roads which should either have been removed upon completion of mining or approved to be retained for an approved postmining land use. On April 11, 1997 (Administrative Record No. IL–1243). OSM discussed the above interpretation of roads with Illinois. Illinois agreed with OSM's interpretation of the meaning of the term ''roads'' as used in its policy document.

Because Illinois' policy document stipulates that these small reclaimed areas must be revegetated under approved plans, the policy ensures that the vegetation of these areas would be subject to Illinois' counterparts to the Federal regulations at 30 CFR 816.111 and those portion of Illinois' counterparts to the Federal regulations at 30 CFR 816.116 related to the attainment of the postmining land use. Illinois' policy requirement that vegetation on these small areas be fully established at the time of final bond release would tend to discourage the removal of ponds, roads, or diversions toward the end of the liability period for the surrounding area. If removal of the structures occurs toward the end of the liability period for the larger reclaimed area, the areas where the ponds or diversions existed would not qualify for final bond release until diverse, effective, and permanent vegetative cover is established that meets the standards of Illinois' counterpart to 30 CFR 816.111.

Although Illinois' policy document is primarily concerned with the definition of normal husbandry practices, the term ''non-augmentative'' is used in reference to the removal of sediment ponds, roads, and small diversions that were used in support of reclamation. OSM interprets this to mean Illinois considers removal of these structures as non-augmentative, but not as a normal husbandry practice. OSM agrees that removal of such structures, while being non-augmentative, in not a normal husbandry practice.

Based on the above discussion, the Director finds that Illinois' policy is consistent with and no less effective than the Federal regulations at 30 CFR 816.46(b) (5) and (6), 816.150(f)(6), and sections 515(b) (19) and (20) of SMCRA,

as clarified by OSM in the September 15, 1993, **Federal Register** (58 FR 48333).

C. *Removal of Required Regulatory Program Amendment 30 CFR 913.16(o).* In the December 13, 1991, **Federal Register** (56 FR 64986), OSM placed required regulatory program amendment 30 CFR 913.16(o) on the Illinois program. It required Illinois to either submit revisions to 62 IAC 1816.116(a)(2)(C) and 1817.116(a)(2)(C) to require OSM approval of all normal husbandry practices other than those specifically listed in its approved program or delete the provisions providing Illinois with the authority to approve unspecified husbandry practices. By letter dated June 22, 1992 (Administrative Record No. IL–1192), Illinois submitted proposed changes to its program. As part of these revisions, at 62 IAC 1816.116(a)(2)(C) and 1817.116(a)(2)(C), Illinois proposed to revise its revegetation standards by specifying normal husbandry practices for the State. These included approved agricultural practices described in the Illinois Agronomy Handbook and those practices which are part of an approved conservation plan subject to the Food, Agriculture, Conservation and Trade Act of 1990 (7 U.S.C. 1421 *et seq.*). The Illinois Agronomy Handbook is published by the University of Illinois—Cooperative Extension Service, Office of Agricultural Communications and Education. It includes recommended fertility management practices for row crops and hayland, which are tailored for site specific soil conditions; crop rotation practices; tillage practices; and application practices on unmined land in Illinois.

Subsequently, by letter dated April 27, 1993 (Administrative Record No. IL–1207), Illinois submitted revisions to its proposed amendment in response to issue letters prepared by OSM on September 2, and October 2, 1992 (Administrative Record Nos. IL–1204 and IL–1205, respectively), and in response to comments received from other agencies and individuals. Included in these revisions was the policy document in which Illinois explained how it would determine what are normal husbandry practices and how it would judge management practices on mined land against the recommended agricultural management practices and soil conservation practices of the referenced documents.

These proposed revisions, which were approved in the September 3, 1993, **Federal Register** (58 FR 46849), and the policy document satisfy required regulatory program amendment 30 CFR 913.16(o). Therefore, the Director is taking this opportunity to remove it from the Illinois program.

IV. Summary and Disposition of Comments

Public Comments

The Director solicited public comments and provided an opportunity for a public hearing on Illinois' policy document and OSM's proposed policy.

Comments were received from the Illinois Department of Mines and Minerals (now the Illinois Department of Natural Resources—Office of Mines and Minerals), the Kentucky Coal Association, the Kentucky Resources Council, the Lignite Energy Council, the National Coal Association, and the North Dakota Public Service Commission. Except for the Kentucky Resources Council, all of the commenters were in favor of the policy.

In response to the Director's proposed clarification of OSM policy, the Kentucky Resources Council initiates its comments with the premise that OSM has proposed to treat the initial seeding and restoration of areas disturbed by diversions, roads and sedimentation ponds as ''normal husbandry practices.'' It then argues that the initial seeding of such areas is not normal husbandry practice, and any revegetation other than ''husbandry practices'' as defined by 30 CFR 816.116(c)(4) constitutes ''augmented seeding'' and would therefore require extension of the full liability period for the establishment of permanent vegetation. First, the Director did not base not restarting the liability period on the contention that revegetation of such areas is a normal husbandry practice. Second, the Director does not agree that any revegetation other than ''normal husbandry practices'' constitutes ''augmented seeding.'' The legislative history of the Act reveals no specific Congressional intent in the use of the term ''augmented seeding.'' Accordingly, OSM's interpretation of augmented seeding is given deference so long as it has a rational basis. OSM would not consider the seeding of small areas, such as ponds and their associated diversions and roads, as augmented seeding. For further discussion of such rationale, see the Director's Finding A. Under the proposed Illinois, Kentucky, and Ohio amendments, areas reclaimed following removal of temporary structures such as sedimentation ponds and associated structures and roads would not be subject to a separate or extended bond liability period apart form the applicable permit area served by such structures. The seeding of sedimentation ponds and their associated diversions and roads is not the result of reclamation failure, but because 30 CFR 816.46(b)(5) prohibits the removal of temporary sedimentation ponds until two years after the last augmented seeding.

The Kentucky Resources Council overlooks the fact that for the vast majority of the reclaimed area the revegetation responsibility period will be at least five years. Neither Congressional history nor the language of the statute distinguishes between initial overall reclamation of a mined area and the subsequent restoration of temporary structures like sedimentation ponds and maintenance roads. In the absence of such distinction, the Secretary is delegated discretion to determine whether a proposed state amendment is no less effective than the Act and consistent with the counterpart Federal regulation. The Director's stated interpretation of Section 515(b)(20) is that it applies ''to the increment or permit area as a whole, not individually to those lands within that area upon which revegetation is delayed solely because of their use in support of the reclamation effort of the planted area.'' See 58 FR 48333, September 15, 1993.

OSM has taken a consistent position in approving an amendment to the Colorado surface mining program which provided that reclaimed temporary drainage control facilities shall not be subject to the extended liability period for revegetative success or the related bond release criteria (61 FR 26792, May 29, 1996). The Director, therefore, does not agree with the commenter's interpretation of Section 515(b)(20) of SMCRA.

Because no one requested an opportunity to speak at a public hearing, no hearing was held.

Federal Agency Comments

Pursuant to 30 CFR 732.17(h)(11)(i), the Director solicited comments on the proposed amendment from various Federal agencies with an actual or potential interest in the Illinois program. Comments were received from the U.S. Forest Service and the U.S. Bureau of Mines. The U.S. Forest Service commented that it had reviewed OSM's proposed rule to clarify its policy towards revegetation and agreed with the proposed rule.

The U.S. Bureau of Mines suggested that OSM consider the significant differences in the reclamation of sediment structures and roads, since sediment structures generally possess characteristics necessary for successful reclamation, while roads generally require significant initial work to

develop a necessary growth environment. OSM agrees with the commenter. OSM's policy and Illinois' regulations and policy document require that when such structures are removed, the land on which they were located must be regraded and revegetated in accordance with approved plans and the requirements of 30 CFR 816.111 through 816.116, or state counterparts. Because the Illinois policy will be limited to small areas, roads posing significant potential for reclamation problems will be excluded.

Environmental Protection Agency (EPA)

Pursuant to 30 CFR 732.17(h)(11)(ii), OSM is required to obtain the written concurrence of the EPA with respect to those provisions of the proposed program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). The deferred provision from Illinois proposed amendment did not pertain to air or water quality standards. Therefore, OSM did not request the EPA's concurrence.

Pursuant to 732.17(h)(11)(I), OSM solicited comments on the proposed amendment from the EPA (Administrative Record No. IL–1225). It responded on October 18, 1993 (Administrative Record No. IL–1231), that it concurred without comment.

State Historical Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Pursuant to 30 CFR 732.17(h)(4), OSM is required to solicit comments on proposed amendments which may have an effect on historic properties from the SHPO and ACHP. OSM solicited comments on the proposed amendment from the SHPO and ACHP (Administrative Record Nos. IL–1226 and IL–1228). Neither the SHPO and ACHP responded to OSM's request.

V. Director's Decision

Based on the above finding, the Director approves Illinois' regulations at 62 IAC 1816.116(a)(2)(C) and 1817.116(a)(2)(C) and its policy document as submitted on June 22, 1992, and as revised on April 27, 1993.

The Federal regulations at 30 CFR Part 913, codifying decisions concerning the Illinois program, are being amended to implement this decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to bring their programs into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

VI. Procedural Determinations

Executive Order 12866

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

Executive Order 12988

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 (Civil Justice Reform) and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

National Environmental Policy Act

No environmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon corresponding Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the corresponding Federal regulations.

Unfunded Mandates

OSM has determined and certifies pursuant to the Unfunded Mandates Reform Act (2 U.S.C. 1502 *et seq.*) that this rule will not impose a cost of $100 million or more in any given year on local, state, or tribal governments or private entities.

List of Subjects in 30 CFR Part 913

Intergovernmental relations, Surface mining, Underground mining.

Dated: October 3, 1997.

Brent Wahlquist,

Regional Director, Mid-Continent Regional Coordinating Center.

For the reasons set out in the preamble, 30 CFR part 913 is amended as set forth below:

PART 913—ILLINOIS

1. The authority citation for part 913 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. Section 913.15 is amended in the table by adding a new entry in chronological order by ''Date of final publication'' to read as follows:

§ 913.15 Approval of Illinois regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
* * *	* * *	* * *
June 22, 1992	October 22, 1997.	62 IAC 1816.116(a)(2)(C); 1817.116(a)(2)(C); Non-augmentation Policy Statement.

§ 913.16 [Amended]

3. Section 913.16 is amended by removing and reserving paragraph (o).

[FR Doc. 97–27982 Filed 10–21–97; 8:45 am]

BILLING CODE 4310–05–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 157–0055a; FRL–5912–7]

Withdrawal of Direct Final Rule for Approval and Promulgation of Implementation Plans; California State Implementation Plan Revision, San Joaquin Valley Unified Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: Due to an adverse comment, EPA is withdrawing the direct final rule for the approval of a revision to the California State Implementation Plan. EPA published the direct final rule on August 25, 1997 at 62 FR 44909, approving revisions to a rule from the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD). As stated in that **Federal Register** document, if adverse or critical comments were received by September 24, 1997, the effective date would be delayed and notice would be published in the **Federal Register**. EPA subsequently received adverse comments on that direct final rule. EPA will address the comments received in a subsequent final action on this or a future revision of this rule in the near future. EPA will not institute a second comment period on this document.

DATES: The direct final rule published at 62 FR 44909 is withdrawn as of October 22, 1997.

FOR FURTHER INFORMATION CONTACT: Yvonne Fong, Rulemaking Office (AIR–4), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, Telephone: (415) 744–1199.

SUPPLEMENTARY INFORMATION: See the information provided in the direct final rule located in the final rules section of the August 25, 1997 **Federal Register**, and in the short informational document located in the proposed rule section of the August 25, 1997 **Federal Register**.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: October 9, 1997.

Felicia Marcus,

Regional Administrator.

Subpart F of part 52, Chapter I, Title 40 of the Code of Federal Regulations if amended as follows:

PART 52—[AMENDED]

Subpart F—California

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

Authority: 42 U.S.C. 7401–7671q.

§ 52.220 [Amended]

2. Section 52.220 is amended by removing paragraph (c)(224)(i)(D).

[FR Doc. 97–27978 Filed 10–21–97; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL–5911–8]

Final Determination To Extend Deadline for Promulgation of Action on Section 126 Petitions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is extending by an additional one month the deadline for taking final action on petitions that eight States have submitted to require EPA to make findings that sources upwind of those States contribute significantly to nonattainment problems in those States. Under the Clean Air Act (CAA or Act), EPA is authorized to grant this time extension if EPA determines that the extension is necessary, among other things, to meet the purposes of the Act's rulemaking requirements. By this document, EPA is making that determination. The eight States that have submitted the petitions are Connecticut, Maine, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, and Vermont.

EFFECTIVE DATE: This action is effective as of October 14, 1997.

FOR FURTHER INFORMATION CONTACT: Howard J. Hoffman, Office of General Counsel, MC–2344, 401 M St. SW, Washington, DC 20460, (202) 260–5892.

SUPPLEMENTARY INFORMATION:

I. Background

Today's action is procedural, and is set in the context of a series of actions EPA is taking to address the problem of the transport of tropospheric ozone and its precursors—especially oxides of nitrogen (NO_X)—across the eastern region of the United States.

The most recent step EPA has taken to address regional ozone transport was the signing of a proposed rulemaking that the State implementation plans (SIPs) of 22 States and the District of Columbia, all in the eastern half of the United States, must be revised under CAA sections 110(k)(5) and 110(a)(1) to include provisions reducing NO_X emissions because those emissions contribute significantly to ozone nonattainment or maintenance problems in downwind states. EPA Administrator Carol M. Browner signed this proposed rulemaking—referred to in this notice as the NO_X SIP call—on October 10, 1997. The proposal is designed to assure that SIPs meet the requirements of CAA section 110(a)(2)(D), which mandates that SIPs contain adequate provisions prohibiting emissions that significantly contribute to downwind nonattainment problems. This proposal is based on information indicating that emissions from those 23 jurisdictions have an adverse impact on downwind areas with respect to both of the ozone National Ambient Air Quality Standards (NAAQS)—the long-standing one-hour standard and the eight-hour standard that was promulgated by notice dated July 18, 1997 (62 FR 38856). EPA's proposals were based generally on recommendations and technical analyses from the Ozone Transport Assessment Group (OTAG), which was an organization comprising EPA, states,

industry, and citizens groups that was formed to focus on interstate ozone transport.

In contrast, today's action is based on a separate set of statutory tools designed to remedy interstate pollution transport that are found in CAA section 126. Section 126(b) authorizes States or political subdivisions to petition EPA for a finding that major stationary sources in upwind states emit in violation of the prohibition of section 110(a)(2)(D), by contributing significantly to nonattainment problems in downwind States.

Beginning on August 14, 1997, EPA received eight petitions under section 126 from eight states. These eight states (and the dates that EPA received the petitions), are:

Connecticut (August 15, 1997)
Maine (August 15, 1997)
Massachusetts (August 14, 1997)
New Hampshire (August 15, 1997)
New York (August 15, 1997)
Pennsylvania (August 15, 1997)
Rhode Island (August 14, 1997)
Vermont (August 15, 1997)

Taken together, the petitions ask EPA to find that major sources of NO_X emissions in States in the eastern half of the United States, from (and including) Louisiana in the southwest, Minnesota in the northwest, and Georgia in the southeast, contribute significantly to nonattainment in areas further to the east and north.

Under section 126(b), for each petition, EPA must make the requested finding, or deny the petition, within 60 days of receipt of the petition. Under section 126(c), with respect to any existing sources for which EPA makes the requested finding, those sources must cease operations within three months of the finding, except that those sources may continue to operate if they comply with emissions limitations and compliance schedules that EPA may provide to bring about compliance with the applicable requirements.

Section 126(b) provides that EPA must allow a public hearing for the submitted petitions. In addition, EPA's action under section 126 is subject to the procedural requirements of CAA section 307(d). *See* section 307(d)(1)(N). One of these requirements is notice-and-comment rulemaking, under section 307(d)(3).

In addition, section 307(d)(10) provides for a time extension, under certain circumstances, for rulemaking subject to section 307(d). Specifically, section 307(d)(10) provides:

> Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

Section 307(d)(10) applies, by its terms, to section 126 rulemakings because the 60-day time limit under section 126(b) necessarily limits the period after proposal to less than six months.

In accordance with section 307(d)(10), EPA is today determining that the 60-day period afforded by section 126(b) is not adequate to allow the public and the agency adequate opportunity to carry out the purposes of the section 307(d) procedures for developing an adequate proposal on whether the sources identified in the section 126 petitions contribute significantly to nonattainment problems downwind, and, further, to allow public input into the promulgation of any controls to mitigate or eliminate those contributions. The determination of whether upwind emissions contribute significantly to downwind nonattainment areas is highly complex. The NO_X SIP call, which proposes a somewhat comparable determination, relied on extensive computer modeling of air quality emissions and the ambient impacts therefrom in the large geographic region of the eastern half of the United States. This modeling was developed over a two-year period. It reflected the input of EPA, the 37 states east of the Rockies as well as numerous industry and citizen groups, all of whom participated in the OTAG. Moreover, EPA is allowing a 120-day comment period on the NO_X SIP call proposal, and expects to take final action on the NO_X SIP call in September, 1998, some 11 months after the date of proposal.

In acting on the section 126 petitions, EPA must make determinations that, generally, are at least as complex as those required for the NO_X SIP call, and EPA must do so for sources throughout the eastern half of the United States. Moreover, if EPA determines that the petitions should be granted, EPA must promulgate appropriate controls for the affected sources.

EPA is in the process of determining what would be an appropriate schedule for action on the section 126 petitions, in light of the complexity of the required determinations and the usefulness of coordinating generally with the procedural path for the NO_X SIP call. It is imperative that this schedule (i) afford EPA adequate time to prepare a notice that clearly elucidates the issues so as to facilitate public comment, as well as (ii) afford the public adequate time to comment. EPA is currently in the process of discussing an appropriate schedule with the section 126 petitioners and other interested parties.

Accordingly, extending the date for action on the section 126 petitions for another one month is necessary to determine the appropriate overall schedule for action, as well as to continue to develop the technical analysis needed to develop a proposal.

EPA is not, at this time, using the full six months provided under section 307(d)(10) for the extension. EPA reserves the right to apply the remaining five months, or a portion thereof, as an additional extension, if necessary, immediately following the conclusion of the one-month period, or to apply the remaining time to the period following EPA's proposed rulemaking.

II. Final Action

A. Rule

Today, EPA is determining, under CAA section 307(d)(10), that a one-month period is necessary to assure the development of an appropriate schedule for rulemaking on the section 126 petitions, which schedule would allow EPA adequate time to prepare a notice for proposal that will best facilitate public comment, as well as allow the public sufficient time to comment. Accordingly, EPA is granting a one-month extension to the time for rulemaking on the section 126 petitions. Under this extension, the dates for action on the section 126 petitions are:

Connecticut—November 15, 1997
Maine—November 15, 1997
Massachusetts—November 14, 1997
New Hampshire—November 15, 1997
New York—November 15, 1997
Pennsylvania—November 15, 1997
Rhode Island—November 14, 1997
Vermont—November 15, 1997

B. Notice-and-Comment Under the Administrative Procedures Act (APA)

This document is a final agency action, but may not be subject to the notice-and-comment requirements of the APA, 5 U.S.C. 553(b). EPA believes that because of the limited time provided to make a determination that the deadline for action on the section 126 petitions should be extended, Congress may not have intended such a determination to be subject to notice-and-comment rulemaking. However, to the extent that this determination is subject to notice-and-comment rulemaking, EPA invokes the good cause exception pursuant to the APA, 5 U.S.C. 553(b)(3)(B). Providing notice and

comment would be impracticable because of the limited time provided for making this determination, and would be contrary to the public interest because it would divert agency resources from the critical substantive review of the section 126 petitions.

C. Effective Date Under the APA

Today's action will be effective on October 14, 1997. Under the APA, 5 U.S.C. 553(d)(3), agency rulemaking may take effect before 30 days after the date of publication in the **Federal Register** if the agency has good cause to mandate an earlier effective date. Today's action—a deadline extension—must take effect immediately because its purpose is to move back by one month the October 14, 1997 deadlines for several of the section 126 petitions, and the deadlines for the other section 126 petitions that follow shortly thereafter. Moreover, EPA intends to use immediately the one-month extension period to continue to develop an appropriate schedule for ultimate action on the section 126 petitions, and to continue to develop the technical analysis needed to develop the notice of proposed rulemaking. These reasons support an effective date prior to 30 days after the date of publication.

D. Executive Order 12866

The Office of Management and Budget has exempted this regulatory action from Executive Order 12866 review.

E. Unfunded Mandates

Under the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*, EPA must undertake various actions in association with proposed or final rules that include a Federal mandate that may result in estimated costs of $100 million or more to the private sector or to State, local, or tribal governments in the aggregate. In addition, before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, EPA must have developed a small government agency plan. EPA has determined that these requirements do not apply to today's action because this rulemaking (i) is not a Federal mandate—rather, it simply extends the date for EPA action on a rulemaking; and (ii) contains no regulatory requirements that might significantly or uniquely affect small governments.

F. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 600 *et seq.*, EPA must propose a regulatory flexibility analysis assessing the impact on small entities of any rule subject to the notice-and-comment rulemaking requirements. Because this action is exempt from such requirements, as described above, it is not subject to RFA.

G. Submission to Congress and the General Accounting Office

Under 5 U.S.C. of the APA, 5 U.S.C. 801(a)(1)(A), as added by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), EPA submitted, by the date of publication of this rule, a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2), as amended.

H. Paperwork Reduction Act

This rule does not contain any information collection requirements which require OMB approval under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*)

I. Judicial Review

Under CAA section 307(b)(1), a petition to review today's action may be filed in the Court of Appeals for the District of Columbia within 60 days of October 22, 1997.

Dated: October 14, 1997.

Carol M. Browner,

Administrator.

[FR Doc. 97–27977 Filed 10–21–97; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–300560; FRL–5746–6]

RIN 2070–AB78

Spinosad; Pesticide Tolerances for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes time-limited tolerances for spinosad (Factors A and D) in or on fruiting vegetables (except cucurbits) crop group (8), tomato paste, leafy vegetables (except Brassica vegetables) crop group (4), and Brassica (cole) leafy vegetables crop group (5). This action is in response to EPA's granting of emergency exemptions under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act authorizing use of the pesticide on fruiting vegetables (except cucurbits) crop group (8), leafy vegetables (except Brassica vegetables) crop group (4), and Brassica (cole) leafy vegetables crop group (5). This regulation establishes maximum permissible levels for residues of spinosad in these food commodities pursuant to section 408(l)(6) of the Federal Food, Drug, and Cosmetic Act, as amended by the Food Quality Protection Act of 1996. The tolerances will expire and are revoked on September 30, 1998.

DATES: This regulation is effective October 22, 1997. Objections and requests for hearings must be received by EPA on or before December 22, 1997.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, [OPP–300560], must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled ''Tolerance Petition Fees'' and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk identified by the docket control number, [OPP–300560], must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring a copy of objections and hearing requests to Rm. 1132, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA.

A copy of objections and hearing requests filed with the Hearing Clerk may also be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov. Copies of objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Copies of objections and hearing requests will also be accepted on disks in WordPerfect 5.1 file format or ASCII file format. All copies of objections and hearing requests in electronic form must be identified by the docket control number [OPP–300560]. No Confidential Business Information (CBI) should be submitted through e-mail. Electronic copies of objections and hearing requests on this rule may be filed online at many Federal Depository Libraries.

FOR FURTHER INFORMATION CONTACT: By mail: Pat Cimino, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401

M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 308–9357, e-mail: cimino.pat@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: EPA, on its own initiative, pursuant to section 408(e) and (l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(e) and (l)(6), is establishing tolerances for residues of the insecticide spinosad (Factors A and D) in or on fruiting vegetables (except cucurbits) crop group (8), tomato paste, leafy vegetables (except Brassica vegetables) crop group (4), and Brassica (cole) leafy vegetables crop group (5) at 0.25, 0.50, 10.0 and 10.0 parts per million (ppm) respectively. These tolerances will expire and are revoked on September 30, 1998. EPA will publish a document in the **Federal Register** to remove the revoked tolerances from the Code of Federal Regulations.

I. Background and Statutory Authority

The Food Quality Protection Act of 1996 (FQPA) (Pub. L. 104–170) was signed into law August 3, 1996. FQPA amends both the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 301 *et seq.*, and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq*. The FQPA amendments went into effect immediately. Among other things, FQPA amends FFDCA to bring all EPA pesticide tolerance-setting activities under a new section 408 with a new safety standard and new procedures. These activities are described below and discussed in greater detail in the final rule establishing the time-limited tolerance associated with the emergency exemption for use of propiconazole on sorghum (61 FR 58135, November 13, 1996)(FRL–5572–9).

New section 408(b)(2)(A)(i) of the FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

Section 18 of FIFRA authorizes EPA to exempt any Federal or State agency from any provision of FIFRA, if EPA determines that ''emergency conditions exist which require such exemption.'' This provision was not amended by FQPA. EPA has established regulations governing such emergency exemptions in 40 CFR part 166.

Section 408(l)(6) of the FFDCA requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under section 18 of FIFRA. Such tolerances can be established without providing notice or period for public comment.

Because decisions on section 18-related tolerances must proceed before EPA reaches closure on several policy issues relating to interpretation and implementation of the FQPA, EPA does not intend for its actions on such tolerances to set binding precedents for the application of section 408 and the new safety standard to other tolerances and exemptions.

II. Emergency Exemption for Spinosad on Fruiting Vegetables (except Cucurbits) Crop Group (8), Leafy Vegetables (except Brassica Vegetables) Crop Group (4), and Brassica (Cole) Leafy Vegetables Crop Group (5) and FFDCA Tolerances

Florida Department of Agriculture & Consumer Services submitted a regional specific exemption request for Florida, Georgia and Arkansas for the use of spinosad (Spintor 2SC) to control Western Flower Thrips, *Frankliniella occidentalis*, on tomatoes, peppers, eggplant and other members of fruiting vegetable (excluding cucurbits) crop group (8). Season long control measures for western flower thrip and the disease that it vectors, tomato spotted wilt virus, are currently not available and significant economic losses have already occurred.

On July 15, 1997 the Arizona Department of Agriculture requested a specific exemption for use of spinosad (Success) to control beet armyworm on leafy vegetables (except Brassica) crop group (4) and Brassica leafy vegetables crop group (5). A specific exemption request for use of tebufenozide (Confirm) to control this pest on these crops in Arizona was granted earlier this year; however, the state indicates that tebufenozide alone will not provide adequate control of beet armyworm in the fall-season planted crops due to high pest pressure. Beet armyworm pest pressure on Arizona's fall-season planted crops is, on average, three times greater than pressure on its winter-season planted crops. Arizona indicates that both pesticides are needed for the fall-season planting and is recommending the following Integrated Pest Management (IPM) program for use of both pesticides: (1) spinosad and tebufenozide may be used where resistance to currently registered pesticides is occurring; (2) a total of three applications per crop of spinosad are permitted and may be used from plant emergence to thinning when beet armyworm populations exceed 1 larva per 100 plants and after head formation begins (and comparable susceptibility stage for non-head forming vegtables in these crop groups); a total of three applications per crop of tebufenozide are permitted from plant emergence to thinning if beet armyworm populations are less than 1 larva per 100 plants and from thinning to head formation. After having reviewed the requests, EPA concurs: that emergency conditions exist for the states and; with Arizona's IPM recommendations for use of both tebufenozide and spinosad for beet armyworm control under emergency exemption specifications.

As part of its assessment of this emergency exemption, EPA assessed the potential risks presented by residues of spinosad in or on fruiting vegetables (except cucurbits) crop group (8), tomato paste, leafy vegetables (except Brassica vegetables crop group (4), and Brassica (cole) leafy vegetables crop group (5). In doing so, EPA considered the new safety standard in FFDCA section 408(b)(2), and EPA decided that the necessary tolerance under FFDCA section 408(l)(6) would be consistent with the new safety standard and with FIFRA section 18. Consistent with the need to move quickly on the emergency exemption in order to address an urgent non-routine situation and to ensure that the resulting food is safe and lawful, EPA is issuing these tolerances without notice and opportunity for public comment under section 408(e), as provided in section 408(l)(6). Although these tolerances will expire and are revoked on September 30, 1998, under FFDCA section 408(l)(5), residues of the pesticide not in excess of the amounts specified in the tolerances remaining in or on fruiting vegetables (except cucurbits) crop group (8), tomato paste, leafy vegetables (except Brassica vegetables crop group (4), and Brassica

(cole) leafy vegetables crop group (5) after that date will not be unlawful, provided the pesticide is applied in a manner that was lawful under FIFRA. EPA will take action to revoke these tolerances earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

Because these tolerances are being approved under emergency conditions EPA has not made any decisions about whether spinosad meets EPA's registration requirements for use on fruiting vegetables (except cucurbits) crop group (8), leafy vegetables (except Brassica vegetables) crop group (4), and Brassica (cole) leafy vegetables crop group (5) or whether permanent tolerances for these uses would be appropriate. Under these circumstances, EPA does not believe that these tolerances serve as a basis for registration of spinosad by a State for special local needs under FIFRA section 24(c). Nor do these tolerances serve as the basis for any State other than Arizona, Florida, Georgia and Arkansas to use this pesticide on this crop under section 18 of FIFRA without following all provisions of section 18 as identified in 40 CFR part 166. For additional information regarding the emergency exemption for spinosad, contact the Agency's Registration Division at the address provided above.

III. Risk Assessment and Statutory Findings

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides based primarily on toxicological studies using laboratory animals. These studies address many adverse health effects, including (but not limited to) reproductive effects, developmental toxicity, toxicity to the nervous system, and carcinogenicity. Second, EPA examines exposure to the pesticide through the diet (e.g., food and drinking water) and through exposures that occur as a result of pesticide use in residential settings.

A. Toxicity

1. *Threshold and non-threshold effects.* For many animal studies, a dose response relationship can be determined, which provides a dose that causes adverse effects (threshold effects) and doses causing no observed effects (the ''no-observed effect level'' or ''NOEL'').

Once a study has been evaluated and the observed effects have been determined to be threshold effects, EPA generally divides the NOEL from the study with the lowest NOEL by an uncertainty factor (usually 100 or more) to determine the Reference Dose (RfD). The RfD is a level at or below which daily aggregate exposure over a lifetime will not pose appreciable risks to human health. An uncertainty factor (sometimes called a ''safety factor'') of 100 is commonly used since it is assumed that people may be up to 10 times more sensitive to pesticides than the test animals, and that one person or subgroup of the population (such as infants and children) could be up to 10 times more sensitive to a pesticide than another. In addition, EPA assesses the potential risks to infants and children based on the weight of the evidence of the toxicology studies and determines whether an additional uncertainty factor is warranted. Thus, an aggregate daily exposure to a pesticide residue at or below the RfD (expressed as 100 percent or less of the RfD) is generally considered acceptable by EPA. EPA generally uses the RfD to evaluate the chronic risks posed by pesticide exposure. For shorter term risks, EPA calculates a margin of exposure (MOE) by dividing the estimated human exposure into the NOEL from the appropriate animal study. Commonly, EPA finds MOEs lower than 100 to be unacceptable. This 100-fold MOE is based on the same rationale as the 100-fold uncertainty factor.

Lifetime feeding studies in two species of laboratory animals are conducted to screen pesticides for cancer effects. When evidence of increased cancer is noted in these studies, the Agency conducts a weight of the evidence review of all relevant toxicological data including short-term and mutagenicity studies and structure activity relationship. Once a pesticide has been classified as a potential human carcinogen, different types of risk assessments (e.g., linear low dose extrapolations or MOE calculation based on the appropriate NOEL) will be carried out based on the nature of the carcinogenic response and the Agency's knowledge of its mode of action.

2. *Differences in toxic effect due to exposure duration.* The toxicological effects of a pesticide can vary with different exposure durations. EPA considers the entire toxicity data base, and based on the effects seen for different durations and routes of exposure, determines which risk assessments should be done to assure that the public is adequately protected from any pesticide exposure scenario. Both short and long durations of exposure are always considered. Typically, risk assessments include ''acute,'' ''short-term,'' ''intermediate term,'' and ''chronic'' risks. These assessments are defined by the Agency as follows:

Acute risk, by the Agency's definition, results from 1-day consumption of food and water, and reflects toxicity which could be expressed following a single oral exposure to the pesticide residues. High end exposure to food and water residues are typically assumed.

Short-term risk results from exposure to the pesticide for a period of 1–7 days, and therefore overlaps with the acute risk assessment. Historically, this risk assessment was intended to address primarily dermal and inhalation exposure which could result, for example, from residential pesticide applications. However, since enaction of FQPA, this assessment has been expanded to include both dietary and non-dietary sources of exposure, and will typically consider exposure from food, water, and residential uses when reliable data are available. In this assessment, risks from average food and water exposure, and high-end residential exposure, are aggregated. High-end exposures from all three sources are not typically added because of the very low probability of this occurring in most cases, and because the other conservative assumptions built into the assessment assure adequate protection of public health. However, for cases in which high-end exposure can reasonably be expected from multiple sources (e.g. frequent and widespread homeowner use in a specific geographical area), multiple high-end risks will be aggregated and presented as part of the comprehensive risk assessment/characterization. Since the toxicological endpoint considered in this assessment reflects exposure over a period of at least seven days, an additional degree of conservatism is built into the assessment; i.e., the risk assessment nominally covers 1–7 days exposure, and the toxicological endpoint/NOEL is selected to be adequate for at least seven days of exposure. (Toxicity results at lower levels when the dosing duration is increased.)

Intermediate-term risk results from exposure for seven days to several months. This assessment is handled in a manner similar to the short-term risk assessment.

Chronic risk assessment describes risk which could result from several months to a lifetime of exposure. For this assessment, risks are aggregated considering average exposure from all sources for representative population subgroups including infants and children.

B. Aggregate Exposure

In examining aggregate exposure, FFDCA section 408 requires that EPA take into account available and reliable information concerning exposure from the pesticide residue in the food in question, residues in other foods for which there are tolerances, residues in groundwater or surface water that is consumed as drinking water, and other non-occupational exposures through pesticide use in gardens, lawns, or buildings (residential and other indoor uses). Dietary exposure to residues of a pesticide in a food commodity are estimated by multiplying the average daily consumption of the food forms of that commodity by the tolerance level or the anticipated pesticide residue level. The Theoretical Maximum Residue Contribution (TMRC) is an estimate of the level of residues consumed daily if each food item contained pesticide residues equal to the tolerance. In evaluating food exposures, EPA takes into account varying consumption patterns of major identifiable subgroups of consumers, including infants and children. The TMRC is a ''worst case'' estimate since it is based on the assumptions that food contains pesticide residues at the tolerance level and that 100% of the crop is treated by pesticides that have established tolerances. If the TMRC exceeds the RfD or poses a lifetime cancer risk that is greater than approximately one in a million, EPA attempts to derive a more accurate exposure estimate for the pesticide by evaluating additional types of information (anticipated residue data and/or percent of crop treated data) which show, generally, that pesticide residues in most foods when they are eaten are well below established tolerances.

Percent of crop treated estimates are derived from federal and private market survey data. Typically, a range of estimates are supplied and the upper end of this range is assumed for the exposure assessment. By using this upper end estimate of percent of crop treated, the Agency is reasonably certain that exposure is not understated for any significant subpopulation group. Further, regional consumption information is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups, to pesticide residues. For this pesticide, the most highly exposed population subgroup (non-hispanic other than black or caucasian subgroup) was not regionally based.

IV. Aggregate Risk Assessment and Determination of Safety

Consistent with section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action, EPA has sufficient data to assess the hazards of spinosad and to make a determination on aggregate exposure, consistent with section 408(b)(2), for time-limited tolerances for spinosad (Factors A and D) in or on fruiting vegetables (except cucurbits) crop group (8), tomato paste, leafy vegetables (except Brassica vegetables) crop group (4), and Brassica (cole) leafy vegetables crop group (5) at 0.25, 0.50, 10.0 and 10.0 ppm, respectively. EPA's assessment of the dietary exposures and risks associated with establishing the tolerance follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects caused by spinosad are discussed below.

1. *Acute toxicity.* None. For acute dietary risk assessment, the Agency did not select an endpoint based on available data and determined that this risk assessment is not required.

2. *Short - and intermediate - term toxicity.* No short- or intermediate-term toxicological endpoints have been identified. Therefore, a short- or intermediate-term aggregate risk assessment is not required.

3. *Chronic toxicity.* EPA has established the RfD for spinosad at 0.0268 milligrams/kilogram/day (mg/kg/day). The RfD was established based on a 1-year feeding study in dogs. The NOEL was 2.68 mg/kg/day with an uncertainty factor of 100. The LOEL of 8.22 mg/kg/day was based on increases in serum alanine aminotransferase, aspartate aminotransferase, and triglycerides levels, and the presence of tissue abnormalities including vacuolated cell aggregations, arteritis, and glandular cell vacuolation (parathyroid).

4. *Carcinogenicity.* The Agency determined that there was no evidence of carcinogenicity in two species.

B. Exposures and Risks

1. *From food and feed uses.* A time-limited tolerance which expires November 15, 1999 has been established (40 CFR 180.495) for the residues of spinosad (Factors A and D) in or on cottonseed at 0.02 ppm. There are no other tolerances established for spinosad. Risk assessments were conducted by EPA to assess dietary exposures and risks from spinosad as follows:

i. *Acute exposure and risk.* Acute dietary risk assessments are performed for a food-use pesticide if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1 day or single exposure. No acute dietary endpoint of concern was identified by the Agency, therefore this risk assessment is not required.

ii. *Chronic exposure and risk.* In conducting the chronic dietary risk assessment, the Agency used conservative TMRC assumptions as follows: 100% of the leafy vegetables (except Brassica vegetables) crop group commodities, Brassica (cole) leafy vegetables crop group commodities, fruiting vegetable (except cucurbits) crop group commodities, and cotton commodities tolerances will contain spinosad residues and those residues will be at the level of the tolerance.

2. *From drinking water.* Based on information in the EFED One-liner Database (updated 5/6/97), spinosad is not persistent and not mobile. There are no established Maximum Contaminant Levels (MCLs) for residues of spinosad in drinking water. No health advisory levels for spinosad in drinking water have been established. There is no entry for spinosad in EPA's Pesticides in Ground Water Database (9/92).

Because the Agency lacks sufficient water-related exposure data to complete a comprehensive drinking water risk assessment for many pesticides, EPA has commenced and nearly completed a process to identify a reasonable yet conservative bounding figure for the potential contribution of water-related exposure to the aggregate risk posed by a pesticide. In developing the bounding figure, EPA estimated residue levels in water for a number of specific pesticides using various data sources. The Agency then applied the estimated residue levels, in conjunction with appropriate toxicological endpoints (RfD's or acute dietary NOEL's) and assumptions about body weight and consumption, to calculate, for each pesticide, the increment of aggregate risk contributed by consumption of contaminated water. While EPA has not yet pinpointed the appropriate bounding figure for exposure from contaminated water, the ranges the Agency is continuing to examine are all below the level that would cause spinosad to exceed the RfD

if the tolerance being considered in this document were granted. The Agency has therefore concluded that the potential exposures associated with spinosad in water, even at the higher levels the Agency is considering as a conservative upper bound, would not prevent the Agency from determining that there is a reasonable certainty of no harm if the tolerance are granted.

3. *From non-dietary exposure.* Spinosad is currently registered for residential, outdoor, non-food sites, which include: ornamental turf, and ornamental herbaceous and woody plants. Under current Agency guidelines, these uses do not fall under a chronic scenario, but may constitute a short- and/or intermediate-term exposure scenario. However, no short- or intermediate-term toxicological endpoints of concern have been identified and the risk assessment is not required for short- and/or intermediate-term exposure.

4. *Cumulative exposure to substances with common mechanism of toxicity.* Section 408(b)(2)(D)(v) requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.'' The Agency believes that ''available information'' in this context might include not only toxicity, chemistry, and exposure data, but also scientific policies and methodologies for understanding common mechanisms of toxicity and conducting cumulative risk assessments. For most pesticides, although the Agency has some information in its files that may turn out to be helpful in eventually determining whether a pesticide shares a common mechanism of toxicity with any other substances, EPA does not at this time have the methodologies to resolve the complex scientific issues concerning common mechanism of toxicity in a meaningful way. EPA has begun a pilot process to study this issue further through the examination of particular classes of pesticides. The Agency hopes that the results of this pilot process will increase the Agency's scientific understanding of this question such that EPA will be able to develop and apply scientific principles for better determining which chemicals have a common mechanism of toxicity and evaluating the cumulative effects of such chemicals. The Agency anticipates, however, that even as its understanding of the science of common mechanisms increases, decisions on specific classes of chemicals will be heavily dependent on chemical specific data, much of which may not be presently available.

Although at present the Agency does not know how to apply the information in its files concerning common mechanism issues to most risk assessments, there are pesticides as to which the common mechanism issues can be resolved. These pesticides include pesticides that are toxicologically dissimilar to existing chemical substances (in which case the Agency can conclude that it is unlikely that a pesticide shares a common mechanism of activity with other substances) and pesticides that produce a common toxic metabolite (in which case common mechanism of activity will be assumed).

EPA does not have, at this time, available data to determine whether spinosad has a common mechanism of toxicity with other substances or how to include this pesticide in a cumulative risk assessment. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, spinosad does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that spinosad has a common mechanism of toxicity with other substances.

C. Aggregate Risks and Determination of Safety for U.S. Population

1. *Acute risk.* No acute dietary endpoint of concern was identified by the Agency, so this risk assessment is not required.

2. *Chronic risk.* Using the conservative TMRC exposure assumptions described above, EPA has concluded that aggregate exposure to spinosad from food will utilize 20% of the RfD for the U.S. population. The major identifiable subgroup with the highest aggregate exposure is non-hispanics other than blacks or caucasians and aggregate exposure to spinosad from food will utilize 32% of the RfD for this subpopulation. EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Despite the potential for exposure to spinosad in drinking water, EPA does not expect the aggregate exposure to exceed 100% of the RfD. Under current Agency guidelines, the registered residential non-dietary uses do not fall under a chronic scenario. EPA concludes that there is a reasonable certainty that no harm will result from chronic aggregate exposure to spinosad residues from food and water.

3. *Short- and intermediate-term risk.* Short- and intermediate-term aggregate exposure takes into account chronic dietary food and water (considered to be a background exposure level) plus indoor and outdoor residential exposure.

Under current Agency guidelines, the registered residential non-dietary uses do not fall under a chronic scenario, but may constitute a short- and/or intermediate-term exposure scenario. However, no short- or intermediate-term toxicological endpoints have been identified. Therefore, a short- or intermediate-term aggregate risk assessment is not required.

D. Aggregate Cancer Risk for U.S. Population

The Agency determined that there was no evidence of carcinogenicity in two species. Therefore, a cancer risk assessment is not required.

E. Aggregate Risks and Determination of Safety for Infants and Children

1. *Safety factor for infants and children.*— a. *In general.* In assessing the potential for additional sensitivity of infants and children to residues of spinosad, EPA considered data from developmental toxicity studies in the rat and rabbit and a two-generation reproduction study in the rat. The developmental toxicity studies are designed to evaluate adverse effects on the developing organism resulting from pesticide exposure during prenatal development to one or both parents. Reproduction studies provide information relating to effects from exposure to the pesticide on the reproductive capability of mating animals and data on systemic toxicity.

FFDCA section 408 provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for pre-and post-natal toxicity and the completeness of the database unless EPA determines that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a MOE analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans. EPA believes that reliable data support using the standard MOE and uncertainty factor (usually 100 for combined inter- and intra-species variability)) and not the additional tenfold MOE/uncertainty factor when EPA has a complete data base under existing guidelines and when the

severity of the effect in infants or children or the potency or unusual toxic properties of a compound do not raise concerns regarding the adequacy of the standard MOE/safety factor.

b. *Developmental toxicity studies.*— i. *Rats.* In the developmental study in rats, both the maternal (systemic) NOEL and the developmental (fetal) NOEL were ≥ 200 mg/kg/day at the highest dose tested.

ii. *Rabbits.* In the developmental toxicity study in rabbits, both the maternal (systemic) NOEL and the developmental (fetal) NOEL were ≥ 50 mg/kg/day at the highest dose tested. The Agency concluded that spinosad is not a developmental toxicant.

c. *Reproductive toxicity study. Rats.* In the 2-generation reproductive toxicity study in rats, the parental (systemic) NOEL was 10 mg/kg/day. The parental (systemic) LOEL of 100 mg/kg/day was based on increases in heart, kidney, liver, spleen, and thyroid weights (both sexes). In addition, histopathological lesions were found in the lungs and mesenteric lymph nodes (both sexes), stomach (females), and prostate, and increased incidence of dystocia and/or vaginal bleeding after parturition with associated increases in mortality in the dams. The NOEL for reproductive toxicity was 10 mg/kg/day. The LOEL for reproductive toxicity of 100 mg/kg/day was based on decreases in litter size, survival (F_2 litters), and body weights in the offspring.

d. *Pre- and post-natal sensitivity.* The toxicological data base for evaluating pre- and post-natal toxicity for spinosad is complete with respect to current data requirements. There are no pre- or post-natal toxicity concerns for infants and children, based on the results of the rat and rabbit developmental toxicity studies and the 2-generation rat reproductive toxicity study.

e. *Conclusion.* Based on the data examined above, the Agency concludes that reliable data support use of the standard 100-fold uncertainty factor and that an additional uncertainty factor is not needed to protect infants and children.

2. *Acute risk.* No endpoint of concern was identified by the Agency, so this risk assessment is not required.

3. *Chronic risk.* Using the conservative exposure assumptions described above, EPA has concluded that percentage of the RfD that will be utilized by dietary exposure to residues of spinosad from food ranges from 2 percent for nursing infants less than 1 year old, up to 23% for children 7-12 years old. EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Despite the potential for exposure to spinosad in drinking water, EPA does not expect the aggregate exposure to exceed 100% of the RfD. Under current Agency guidelines, the registered residential non-dietary uses do not fall under a chronic scenario. EPA concludes that there is a reasonable certainty that no harm will result to infants and children from chronic aggregate (food plus water) exposure to spinosad residues.

4. *Short- or intermediate-term risk.* Short- and intermediate-term aggregate exposure takes into account chronic dietary food and water (considered to be a background exposure level) plus indoor and outdoor residential uses.

Under current Agency guidelines, the registered residential non-dietary uses do not fall under a chronic scenario, but may constitute a short- and/or intermediate-term exposure scenario. However, no short- or intermediate-term toxicological endpoints have been identified. Therefore, a short- or intermediate-term aggregate risk assessment is not required.

F. Endocrine Disrupter Effects

EPA is required to develop a screening program to determine whether certain substances (including all pesticides and inerts) ''may have an effect in humans that is similar to an effect produced by a naturally occurring estrogen, or such other endocrine effect...'' The Agency is currently working with interested stakeholders, including other government agencies, public interest groups, industry and research scientists in developing a screening and testing program and a priority setting scheme to implement this program. Congress has allowed 3 years from the passage of FQPA (August 3, 1999) to implement this program. At that time, EPA may require further testing of this active ingredient and end use products for endocrine disrupter effects.

V. Other Considerations

A. Metabolism In Plants and Animals

The nature of the residue in plants is adequately understood based on acceptable metabolism studies on cotton, apples, cabbage, tomatoes, and turnips. The results of the metabolism studies have not yet been reviewed by the Agency's Metabolism Committee but, for the purposes of these section 18s only, the residues of concern are the parent compounds (Factors A and D) only, as specified in 40 CFR 180.495.

B. Analytical Enforcement Methodology

For the purposes of these section 18 requests, DowElanco method GRM 95.04 high pressure liquid chromatography/ultraviolet (HPLC/UV) should be adequate to enforce the tolerance expression for the fruiting vegetable (except cucurbits) crop group, and method GRM 94.22 (HPLC/UV) should be adequate to enforce the tolerance expression for the leafy vegetables (except Brassica vegetables) crop group and Brassica (cole) leafy vegetables crop subgroup.

C. Magnitude of Residues

Residues of spinosad (Factors A and D) are not expected to exceed 0.25 ppm in/on the fruiting vegetable (except cucurbits) crop grouping and 0.50 ppm in/on tomato paste as a result of this section 18 use. Residues are not expected to concentrate in/on tomato puree. Residues of spinosad (Factors A and D) are not expected to exceed 10 ppm in/on the leafy vegetables (except Brassica vegetables) crop group and 10 ppm in/on the Brassica (cole) leafy vegetables crop group as a result of this section 18 use. Secondary residues are not expected in animal commodities as no feed items are associated with these section 18 uses.

D. International Residue Limits

No Codex, Canadian, and/or Mexican MRLs tolerances have been established for spinosad.

E. Rotational Crop Restrictions

The results of a confined rotational crop study indicate that the parent compound does not appear to be taken up and/or be translocated within the plants tested (wheat, lettuce, and radish). Pending review of the plant metabolism and confined rotational crop studies by the Agency's Metabolism Committee, rotational crop field studies and rotational crop tolerances will not need to be established to support future section 3 permanent tolerance requests. For the purposes of these section 18 requests, the residues of concern in plants are the parent compounds (Factors A and D) only, and rotational crop restrictions and/or tolerances will not be needed.

VI. Conclusion

Therefore, tolerances are established for residues of spinosad (Factors A and D) in or on fruiting vegetables (except cucurbits) crop group (8), tomato paste, leafy vegetables (except Brassica vegetables) crop group (4), and Brassica (cole) leafy vegetables crop group (5) at 0.25, 0.50, 10.0 and 10.0 ppm respectively.

VII. Objections and Hearing Requests

The new FFDCA section 408(g) provides essentially the same process for persons to ''object'' to a tolerance regulation issued by EPA under new section 408(e) and (l)(6) as was provided in the old section 408 and in section 409. However, the period for filing objections is 60 days, rather than 30 days. EPA currently has procedural regulations which govern the submission of objections and hearing requests. These regulations will require some modification to reflect the new law. However, until those modifications can be made, EPA will continue to use those procedural regulations with appropriate adjustments to reflect the new law.

Any person may, by December 22, 1997, file written objections to any aspect of this regulation and may also request a hearing on those objections. Objections and hearing requests must be filed with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issues on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the requestor (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as Confidential Business Information (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

VIII. Public Record and Electronic Submissions

EPA has established a record for this rulemaking under docket control number [OPP–300560] (including any comments and data submitted electronically). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The public record is located in Rm. 1132 of the Public Information and Records Integrity Branch, Information Resources and Services Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA.

Electronic comments may be sent directly to EPA at:

opp-docket@epamail.epa.gov.

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption.

The official record for this rulemaking, as well as the public version, as described above will be kept in paper form. Accordingly, EPA will transfer any copies of objections and hearing requests received electronically into printed, paper form as they are received and will place the paper copies in the official rulemaking record which will also include all comments submitted directly in writing. The official rulemaking record is the paper record maintained at the Virginia address in ''ADDRESSES'' at the beginning of this document.

IX. Regulatory Assessment Requirements

This final rule establishes a time-limited tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled Regulatory Planning and Review (58 FR 51735, October 4, 1993). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4). Nor does it require any prior consultation as specified by Executive Order 12875, entitled Enhancing the Intergovernmental Partnership (58 FR 58093, October 28, 1993), or special considerations as required by Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994), or require OMB review in accordance with Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997).

In addition, since these tolerances and exemptions that are established on the basis of a petition under FFDCA section 408 (d), such as the time-limited tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. Nevertheless, the Agency has previously assessed whether establishing tolerances, exemptions from tolerances, raising tolerance levels or expanding exemptions might adversely impact small entities and concluded, as a generic matter, that there is no adverse economic impact. The factual basis for the Agency's generic certification for tolerance actions published on May 4, 1981 (46 FR 24950), and was provided to the Chief Counsel for Advocacy of the Small Business Administration.

X. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, the Agency has submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office prior to publication of this rule in today's **Federal Register**. This is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: October 1, 1997.

James Jones,

Acting Director, Office of Pesticide Programs.

Therefore, 40 CFR Chapter I is amended as follows:

PART 180—[AMENDED]

1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 346a and 371.

2. Section 180.495 is amended as follows:

a. By adding a heading to paragraph (a).

b. In paragraph (b) by adding a heading and alphabetically adding the following commodities.

c. Paragraphs (c) and (d) are added and reserved with headings.

§ 180.495 Spinosad; tolerances for residues.

(a) *General.* [Reserved]

(b) *Section 18 emergency exemptions.*

* * *

Commodity	Parts per million	Expiration/Revocation Date
Brassica (Cole) Leafy Vegetables Crop Group (5)	10.0	9/30/98
* * *	* * * *	
Fruiting Vegetables (except Cucurbits) Crop Group (8)	0.25	9/30/98
Leafy Vegetables (except Brassica vegetables) Crop Group (4)	10.0	9/30/98
Tomato paste	0.50	9/30/98

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect or inadvertent residues.* [Reserved]

[FR Doc. 97–27727 Filed 10–21–97; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–300548; FRL–5742–5]

RIN 2070–AB78

Pyrithiobac Sodium Salt; Time-Limited Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation extends the time-limited tolerance for residues of the herbicide pyrithiobac sodium salt (sodium 2-chloro-6-[(4,6-dimethoxypyrimidin-2-yl)thio]benzoate) in or on cottonseed at 0.02 parts per million (ppm). E.I. du Pont de Nemours & Co., Inc., requested this tolerance under the Federal Food, Drug and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1966 (Pub. L. 104–170). The tolerance will expire on September 30, 1999.

DATES: This regulation is effective October 22, 1997. Objections and requests for hearings must be received by EPA on or before December 22, 1997.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, [OPP–300548], must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled ''Tolerance Petition Fees'' and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk identified by the docket control number, [OPP–300548], must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring a copy of objections and hearing requests to Rm. 1132, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA.

A copy of objections and hearing requests filed with the Hearing Clerk may also be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov. Copies of objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Copies of objections and hearing requests will also be accepted on disks in WordPerfect 5.1 file format or ASCII file format. All copies of objections and hearing requests in electronic form must be identified by the docket control number [OPP–300548]. No Confidential Business Information (CBI) should be submitted through e-mail. Electronic copies of objections and hearing requests on this rule may be filed online at many Federal Depository Libraries.

FOR FURTHER INFORMATION CONTACT: By mail: James A. Tompkins, Registration Division 7505C, Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 305–5697, e-mail: tompkins.james@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of July 11, 1997 (62 FR 37241)(FRL–5728–7), EPA, issued a notice pursuant to section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(e) announcing the filing of a pesticide petition (PP 4F4391) for tolerance by E.I. du Pont de Nemours & Co., Inc., Barley Mill Plaza, P.O. Box 80038, Wilmington, DE 19880–0038. This notice included a summary of the petition prepared by du Pont. There were two comments received in response to the notice of filing from cotton growers urging the extension of the time limited tolerance.

The petition requested that 40 CFR 180.487 be amended by extending the time-limited tolerance for residues of the herbicide pyrithiobac sodium salt (sodium 2-chloro-6-[(4,6-dimethoxypyrimidin-2-yl)thio]benzoate) in or on cottonseed at 0.02 ppm. This tolerance will expire on September 30, 1999.

In the **Federal Register** of October 25, 1995 (60 FR 54607)(FRL–4982–8), EPA established a time limited tolerance for residues of the herbicide pyrithiobac sodium in or on cottonseed at 0.02 ppm. The time limited tolerance will expire on September 30, 1997.

I. Risk Assessment and Statutory Findings

New section 408(b)(2)(A)(i) of the FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) requires EPA to give special

consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue....''

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides based primarily on toxicological studies using laboratory animals. These studies address many adverse health effects, including (but not limited to) reproductive effects, developmental toxicity, toxicity to the nervous system, and carcinogenicity. Second, EPA examines exposure to the pesticide through the diet (e.g., food and drinking water) and through exposures that occur as a result of pesticide use in residential settings.

A. Toxicity

1. *Threshold and non-threshold effects.* For many animal studies, a dose response relationship can be determined, which provides a dose that causes adverse effects (threshold effects) and doses causing no observed effects (the ''no-observed effect level'' or ''NOEL'').

Once a study has been evaluated and the observed effects have been determined to be threshold effects, EPA generally divides the NOEL from the study with the lowest NOEL by an uncertainty factor (usually 100 or more) to determine the Reference Dose (RfD). The RfD is a level at or below which daily aggregate exposure over a lifetime will not pose appreciable risks to human health. An uncertainty factor (sometimes called a ''safety factor'') of 100 is commonly used since it is assumed that people may be up to 10 times more sensitive to pesticides than the test animals, and that one person or subgroup of the population (such as infants and children) could be up to 10 times more sensitive to a pesticide than another. In addition, EPA assesses the potential risks to infants and children based on the weight of the evidence of the toxicology studies and determines whether an additional uncertainty factor is warranted. Thus, an aggregate daily exposure to a pesticide residue at or below the RfD (expressed as 100 percent or less of the RfD) is generally considered acceptable by EPA. EPA generally uses the RfD to evaluate the chronic risks posed by pesticide exposure. For shorter term risks, EPA calculates a margin of exposure (MOE) by dividing the estimated human exposure into the NOEL from the appropriate animal study. Commonly, EPA finds MOEs lower than 100 to be unacceptable. This 100-fold MOE is based on the same rationale as the 100-fold uncertainty factor.

Lifetime feeding studies in two species of laboratory animals are conducted to screen pesticides for cancer effects. When evidence of increased cancer is noted in these studies, the Agency conducts a weight of the evidence review of all relevant toxicological data including short-term and mutagenicity studies and structure activity relationship. Once a pesticide has been classified as a potential human carcinogen, different types of risk assessments (e.g., linear low dose extrapolations or MOE calculation based on the appropriate NOEL) will be carried out based on the nature of the carcinogenic response and the Agency's knowledge of its mode of action.

2. *Differences in toxic effect due to exposure duration.* The toxicological effects of a pesticide can vary with different exposure durations. EPA considers the entire toxicity data base, and based on the effects seen for different durations and routes of exposure, determines which risk assessments should be done to assure that the public is adequately protected from any pesticide exposure scenario. Both short and long durations of exposure are always considered. Typically, risk assessments include ''acute'', ''short-term'', ''intermediate term'', and ''chronic'' risks. These assessments are defined by the Agency as follows.

Acute risk, by the Agency's definition, results from 1–day consumption of food and water, and reflects toxicity which could be expressed following a single oral exposure to the pesticide residues. High end exposure to food and water residues are typically assumed.

Short-term risk results from exposure to the pesticide for a period of 1-7 days, and therefore overlaps with the acute risk assessment. Historically, this risk assessment was intended to address primarily dermal and inhalation exposure which could result, for example, from residential pesticide applications. However, since enaction of FQPA, this assessment has been expanded to include both dietary and non-dietary sources of exposure, and will typically consider exposure from food, water, and residential uses when reliable data are available. In this assessment, risks from average food and water exposure, and high-end residential exposure, are aggregated. High-end exposures from all three sources are not typically added because of the very low probability of this occurring in most cases, and because the other conservative assumptions built into the assessment assure adequate protection of public health. However, for cases in which high-end exposure can reasonably be expected from multiple sources (e.g. frequent and widespread homeowner use in a specific geographical area), multiple high-end risks will be aggregated and presented as part of the comprehensive risk assessment/characterization. Since the toxicological endpoint considered in this assessment reflects exposure over a period of at least 7 days, an additional degree of conservatism is built into the assessment; i.e., the risk assessment nominally covers 1–7 days exposure, and the toxicological endpoint/NOEL is selected to be adequate for at least 7 days of exposure. (Toxicity results at lower levels when the dosing duration is increased.)

Intermediate-term risk results from exposure for 7 days to several months. This assessment is handled in a manner similar to the short-term risk assessment.

Chronic risk assessment describes risk which could result from several months to a lifetime of exposure. For this assessment, risks are aggregated considering average exposure from all sources for representative population subgroups including infants and children.

B. Aggregate Exposure

In examining aggregate exposure, FFDCA section 408 requires that EPA take into account available and reliable information concerning exposure from the pesticide residue in the food in question, residues in other foods for which there are tolerances, residues in groundwater or surface water that is consumed as drinking water, and other non-occupational exposures through pesticide use in gardens, lawns, or buildings (residential and other indoor uses). Dietary exposure to residues of a pesticide in a food commodity are estimated by multiplying the average daily consumption of the food forms of that commodity by the tolerance level or the anticipated pesticide residue level. The Theoretical Maximum Residue Contribution (TMRC) is an estimate of the level of residues consumed daily if each food item contained pesticide residues equal to the tolerance. In evaluating food exposures, EPA takes into account varying consumption patterns of major identifiable subgroups of consumers, including infants and children. The TMRC is a ''worst case'' estimate since it is based on the assumptions that food contains pesticide residues at the tolerance level

and that 100% of the crop is treated by pesticides that have established tolerances. If the TMRC exceeds the RfD or poses a lifetime cancer risk that is greater than approximately one in a million, EPA attempts to derive a more accurate exposure estimate for the pesticide by evaluating additional types of information (anticipated residue data and/or percent of crop treated data) which show, generally, that pesticide residues in most foods when they are eaten are well below established tolerances.

Percent of crop treated estimates are derived from Federal and private market survey data. Typically, a range of estimates are supplied and the upper end of this range is assumed for the exposure assessment. By using this upper end estimate of percent of crop treated, the Agency is reasonably certain that exposure is not understated for any significant subpopulation group. Further, regional consumption information is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups, to pesticide residues. For this pesticide, the most highly exposed population subgroup (children 1 to 6) was not regionally based.

II. Aggregate Risk Assessment and Determination of Safety

Consistent with section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action, EPA has sufficient data to assess the hazards of pyrithiobac sodium and to make a determination on aggregate exposure, consistent with section 408(b)(2), for a time-limited tolerance for residues of pyrithiobac sodium on cottonseed at 0.02 ppm. EPA's assessment of the dietary exposures and risks associated with establishing the tolerance follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects caused by pyrithiobac sodium salt are discussed below.

1. A rat acute oral study with a LD_{50} of 3,300 milligrams (mg)/kilogram (kg) for males and a LD_{50} 3,200 mg/kg for females.

2. A 90–day rat feeding study with a No Observed Effect Level (NOEL) of 50 ppm (3.25 mg/kg/day for males and 4.14 mg/kg/day for females) and a Lowest Observed Effect Level (LOEL) of 500 ppm (31.8 mg/kg/day for males and 40.5 mg/kg/day for females), based on decrease body weight gains and increased rate of hepatic B-oxidation in males.

3. A 90–day mouse feeding study with a NOEL of 500 ppm (83.1 mg/kg/day for males and 112 mg/kg/day for females) and a LOEL of 1,500 ppm (263 mg/kg/day for males and 384 mg/kg/day for females) based on increased liver weight and an increased incidence of hepatocellular hypertrophy in males and decreased neutrophil count in females.

4. A 3–month dog feeding study with a NOEL of 5,000 ppm (165 mg/kg/day) and a LOEL of 20,000 ppm (626 mg/kg/day), based on decrease red blood cell count, hemoglobin, and hematocrit in females and increased liver weight in both sexes.

5. A 21–day rat dermal study with a Dermal Irritation NOEL of 50 mg/kg/day and a dermal irritation LOEL of 500 mg/kg/day based on increased incidence of erythema and edema, and with a systemic dermal NOEL of 500 mg/kg/day and a Systemic Dermal LOEL of 1,200 mg/kg/day based on body weight gain inhibition.

6. A 90–day rat neurotoxicity screening battery with a systemic NOEL of 7,000 ppm (466 mg/kg/day for males and 588 mg/kg/day for females) and a systemic LOEL of 20,000 ppm (1376 mg/kg/day for males and 1,609 mg/kg/day for females), based on decreased hind grip strength and increased foot spay in males, and a neurotoxicity NOEL of 20,000 ppm [Highest Dose Tested (HDT)].

7. A 78–week dietary carcinogenicity study in mice with a NOEL of 1,500 ppm 217 mg/kg/day (males) and 319 mg/kg/day (females) and a LOEL of 5,000 ppm 745 mg/kg/day (males) and 1,101 mg/kg/day (females) based on decreased body weight/gain in both sexes, treatment related increase in the incidence of foci/focus of hepatocellular alternation in males, and increased incidence of glomerulonephropathy murine in both sexes, and an increased incidence of infarct in the kidney and keratopathy of the eyes. There was evidence of carcinogenicity based on significant differences in the pair-wise comparisons of hepatocellular adenomas and combined adenoma/carcinoma in the 150 and 1,500 dose groups (but not at the high dose of 5,000 ppm) with the controls. The carcinogenic effects observed are discussed below.

8. A 24–month rat chronic feeding/carcinogenicity study with a systemic NOEL of 1,500 ppm (58.7 mg/kg/day for males and 278 mg/kg/day for females) and a systemic LOEL of 5,000 ppm (200 mg/kg/day for males and 918 mg/kg/day for females) based on decreases in body weight, body weight gains and food efficiency in females, increased incidence of eye lesions in males and females, mild changes in hematology and urinalysis in both sexes, clinical signs suggestive of urinary tract dysfunction in males and females, increased incidence of focal cystic degeneration in the liver in males, increased rate of hepatic peroxisomal B-oxidation in males and an increased incidence of inflammatory and degenerative lesions in the kidney in females. There was evidence of carcinogenicity based on a significant dose-related increasing trend in kidney tubular combined adenoma/carcinoma in male rats and a significant dose related increasing trend in kidney tubular bilateral and/or unilateral adenomas in females. The carcinogenic effects observed are discussed further below.

9. A 1–year dog chronic feeding study with a NOEL of 5,000 ppm (143 mg/kg/day for males and 166 mg/kg/day for females) and a LOEL of 20,000 ppm (580 mg/kg/day for males and 647 mg/kg/day for females) based on decreases in body weight gain and increased liver weight.

10. A two generation reproduction study in rats with a maternal NOEL of 1,500 ppm (103 mg/kg/day) and a maternal LOEL of 7,500 ppm (508 mg/kg/day ppm), based on decreased body weight/gain and food efficacy. The Reproductive and Offspring NOEL is 7,500 ppm (508 mg/kg/day) and the reproductive and offspring LOEL is 20,000 ppm (1,551 mg/kg/day), based on decreased pup body weight.

11. A developmental toxicity study in rabbits with a maternal and developmental NOEL of 300 mg/kg and a Maternal LOEL of 1,000 mg/kg based on deaths, decreased body weight gain and feed consumption, increased incidence of clinical signs, and an increase in abortions and a developmental LOEL of 1,000 mg/kg, based on decreased fetal body weight gain.

12. A developmental toxicity study in rats with a maternal NOEL 200 mg/kg and a maternal LOEL of 600 mg/kg due to increased incidence of peritoneal staining. The developmental NOEL is 600 mg/kg and the developmental LOEL is 1,800 mg/kg based on the increased incidence of skeletal variations.

13. No evidence of gene mutation was observed in a test for induction of forward mutations at the HGPRT locus in Chinese hamster ovary cells. No evidence was observed for inducing reverse gene mutation in two independent assays with *Salmonella typhimurium* with and without mammalian metabolic activation. Pyrithiobac sodium was negative for the induction of micronuclei in the bone marrow cells of mice, and negative for induction of unscheduled DNA synthesis in rat primary hepatocytes. Pyrithiobac sodium was positive for inducing chromosome aberrations assay in human lymphocytes.

14. A rat metabolism study showed that radio labeled pyrithiobac sodium is excreted in urine and feces with > 90% being eliminated within 48 hours. A sex difference was observed in the excretion and biotransformation. Females excreted a greater amount of the radiolabel in the urine than males following all doing regimens, with a corresponding lower amount being eliminated in the feces compared to the males.

B. Toxicological Endpoints

1. *Acute toxicity*. EPA has concluded that no endpoint exists to suggest any evidence of significant toxicity from 1–day or single-event exposure.

2. *Short - and intermediate - term toxicity*. EPA has concluded that available evidence does not indicate any evidence of significant toxicity from short and intermediate term exposure.

3. *Chronic toxicity*. EPA has established the RfD for pyrithiobac sodium at 0.587 milligrams/kilogram/day (mg/kg/day). This RfD is based on the systemic NOEL of 58.7 mg/kg/day for males in the rat chronic feeding study with a 100-fold safety factor to account for interspecies extrapolation and intraspecies variability.

4. *Carcinogenicity*. The Health Effects Division Carcinogenicity Peer Review Committee has concluded that the available data provide limited evidence of the carcinogenicity of pyrithiobac sodium in mice and rats and has classified pyrithiobac sodium as a Group C (possible human carcinogen with limited evidence of carcinogenicity in animals) in accordance with Agency guidelines, published in the **Federal Register** in 1986 (51 FR 33992, September 24, 1986) and recommended that for the purpose of risk characterization, a low dose extrapolation model should be applied to the experimental animal tumor data for quantification for human risk (Q_1*). This decision was based on liver adenomas, carcinomas and combined adenoma/carcinomas in the male mouse and rare kidney tubular adenomas, carcinomas and combined adenoma/carcinomas in male rats. The unit risk, Q_1* $(mg/kg/day)^{-1}$, of pyrithiobac sodium is 1.05×10^{-3} $(mg/kg/day)^{-1}$ in human equivalents based on male kidney tumors.

B. Exposures and Risks

1. *From food and feed uses.* Time limited tolerances have been established (40 CFR 180.487) for the residues of pyrithiobac sodium in or on the raw agricultural commodity cottonseed at 0.02 ppm until September 30, 1997. Processing studies for cotton have shown that pyrithiobac sodium does not concentrate in cottonseed processed commodities. Risk assessments were conducted by EPA to assess dietary exposures and risks from herbicide pyrithiobac sodium salt (sodium 2-chloro-6-[(4,6-dimethoxypyrimidin-2-yl)thio]benzoate) as follows:

Based on the assumption that 100% of the crop is treated with pyrithiobac sodium, the upper bound limit of the dietary carcinogenic risk is calculated in the range of one incidence in a billion (1.0×10^{-9}).

Using the NOEL of 58.7 mg/kg/day from the most sensitive species in the rat chronic feeding study with a 100-fold safety factor, the Reference Dose (RfD) for systemic effects is 0.58 mg/kg/day. The theoretical maximum residue contribution (TMRC) from the established and proposed tolerances is 0.000001 mg/kg/day and utilizes less than 1 percent of the RfD for the overall U.S. population. For exposure of the most highly exposed subgroup in the population, children 1 through 6 years old, the TMRC is 0.000001 mg/kg/day which is still less than 1 percent of the RfD.

2. *From drinking water.* Pyrithiobac sodium concentration in surface water has been estimated by using the Generic Expected Environmental Concentrations (GENEEC) model. The worst case exposure estimate for surface water is 7.76 parts per billion (ppb) and for ground water is 0.778 ppb. Based on the estimated exposures to pyrithiobac sodium from drinking water, the percentage of the RfD utilized for children (1 through 6 years old) would be 0.1% of the RfD. The exposure for the general U.S. population would be less than 0.1% of the RfD.

The worst case estimate for cancer risk from the estimated residues of pyrithiobac sodium in drinking water is 2.3×10^{-7} .

3. *From non-dietary exposure.* There are no non-food uses of pyrithiobac sodium currently registered under the FIFRA, as amended. No non-dietary exposures are expected for the general population.

4. *Cumulative exposure to substances with common mechanism of toxicity.* Section 408(b)(2)(D)(v) requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.'' The Agency believes that ''available information'' in this context might include not only toxicity, chemistry, and exposure data, but also scientific policies and methodologies for understanding common mechanisms of toxicity and conducting cumulative risk assessments. For most pesticides, although the Agency has some information in its files that may turn out to be helpful in eventually determining whether a pesticide shares a common mechanism of toxicity with any other substances, EPA does not at this time have the methodologies to resolve the complex scientific issues concerning common mechanism of toxicity in a meaningful way. EPA has begun a pilot process to study this issue further through the examination of particular classes of pesticides. The Agency hopes that the results of this pilot process will increase the Agency's scientific understanding of this question such that EPA will be able to develop and apply scientific principles for better determining which chemicals have a common mechanism of toxicity and evaluating the cumulative effects of such chemicals. The Agency anticipates, however, that even as its understanding of the science of common mechanisms increases, decisions on specific classes of chemicals will be heavily dependent on chemical specific data, much of which may not be presently available.

Although at present the Agency does not know how to apply the information in its files concerning common mechanism issues to most risk assessments, there are pesticides as to which the common mechanism issues can be resolved. These pesticides include pesticides that are toxicologically dissimilar to existing chemical substances (in which case the Agency can conclude that it is unlikely that a pesticide shares a common mechanism of activity with other substances) and pesticides that produce a common toxic metabolite (in which case common mechanism of activity will be assumed).

EPA does not have, at this time, available data to determine whether pyrithiobac sodium salt has a common

mechanism of toxicity with other substances or how to include this pesticide in a cumulative risk assessment. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, pyrithiobac sodium does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that pyrithiobac sodium has a common mechanism of toxicity with other substances.

C. Aggregate Risks and Determination of Safety for U.S. Population

1. *Acute, short-term, and intermediate term risk.* EPA has concluded that no endpoint exists to suggest any evidence of significant toxicity from acute, short-term or intermediate-term exposures from the use of pyrithiobac sodium on cotton.

2. *Chronic risk.* Using the exposure assumptions described above, EPA has concluded that aggregate exposure to pyrithiobac sodium from food and drinking water will utilize less than 0.1% of the RfD for the U.S. population. For the major identifiable subgroup with the highest aggregate exposure, children (1 through 6 years old), the aggregate exposure to pyrithiobac sodium from food and drinking water will utilize less than 0.2% of the RfD. EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health.

D. Aggregate Cancer Risk for U.S. Population

Based on the upper bound potency factor (Q_1*) of 1.05×10^{-3} $(mg/kg/day)^{-1}$, the aggregate upper bound lifetime cancer risk from the use of pyrithiobac sodium on cotton from worst case estimates of residues in food and drinking water is 2.3×10^{-7}.

E. Aggregate Risks and Determination of Safety for Infants and Children

1. *Safety factor for infants and children*—a. *In general.* In assessing the potential for additional sensitivity of infants and children to residues of pyrithiobac sodium, EPA considered data from developmental toxicity studies in the rat and rabbit and a two-generation reproduction study in the rat. The developmental toxicity studies are designed to evaluate adverse effects on the developing organism resulting from pesticide exposure during prenatal development to one or both parents. Reproduction studies provide information relating to effects from exposure to the pesticide on the reproductive capability of mating animals and data on systemic toxicity.

FFDCA section 408 provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for pre- and post-natal toxicity and the completeness of the database unless EPA determines that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a MOE analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans. EPA believes that reliable data support using the standard MOE and uncertainty factor (usually 100 for combined inter- and intra-species variability)) and not the additional tenfold MOE/uncertainty factor when EPA has a complete data base under existing guidelines and when the severity of the effect in infants or children or the potency or unusual toxic properties of a compound do not raise concerns regarding the adequacy of the standard MOE/safety factor.

b. *Developmental and Reproductive toxicity studies.* The pre- and post-natal toxicology data base for pyrithiobac sodium is complete with respect to current toxicological data requirements. The results of these studies indicate that infants and children are not more sensitive to exposure, based on the results of the oral rat and rabbit developmental toxicity studies and the two-generation reproductive toxicity study in rats. Therefore, EPA concludes an additional tenfold safety factor is not necessary.

2. *Chronic risk.* Using the conservative exposure assumptions described above, EPA has concluded that aggregate exposure to pyrithiobac sodium from food and drinking water will utilize less than 0.2% of the RfD for infants and children. EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. EPA concludes that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to pyrithiobac sodium residues.

III. Other Considerations

A. Metabolism In Plants and Animals

The metabolism of pyrithiobac sodium in plants and animals is adequately understood for purposes of this tolerance.

B. Analytical Enforcement Methodology

An adequate analytical method, High Pressure Liquid Chromatography - Ultra Violet (HPLC-UV) with column switching, is available for enforcement purposes. Because of the long lead time from establishing these tolerances to publication of the enforcement methodology in the Pesticide Analytical Manual, Vol. II, the analytical methodology is being made available in the interim to anyone interested in pesticide enforcement when requested from: Calvin Furlow, Public Information and Records Integrity Branch, Information Resources and Records Service (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Room 1130A, CM#2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703–305–5937).

C. Magnitude of Residues

The nature of the residue in plants is adequately understood for the purposes of this time-limited tolerance.

D. International Residue Limits

There are no Codex Alimentarius Commission (Codex) Maximum Residue Levels (MRLs) for pyrithiobac sodium.

IV. Conclusion

The analysis for pyrithiobac sodium using tolerance level residues for all population subgroups examined by EPA shows the use on cotton will not cause exposure at which the Agency believes there is an appreciable risk. Based on the information cited above, EPA has determined that the extension of the time limited tolerance for residues of pyrithiobac sodium in cottonseed at 0.02 ppm until September 30, 1999 by amending 40 CFR 180.487 will be safe; therefore, the tolerances are extended as set forth below.

V. Objections and Hearing Requests

The new FFDCA section 408(g) provides essentially the same process for persons to ''object'' to a tolerance regulation issued by EPA under new section 408(e) and (l)(6) as was provided in the old section 408 and in section 409. However, the period for filing objections is 60 days, rather than 30 days. EPA currently has procedural regulations which govern the submission of objections and hearing requests. These regulations will require some modification to reflect the new law. However, until those modifications can be made, EPA will continue to use

those procedural regulations with appropriate adjustments to reflect the new law.

Any person may, by December 22, 1997, file written objections to any aspect of this regulation and may also request a hearing on those objections. Objections and hearing requests must be filed with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issues on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the requestor (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as Confidential Business Information (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

VI. Public Docket

EPA has established a record for this rulemaking under docket control number [OPP–300548] (including any comments and data submitted electronically). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The public record is located in Room 1132 of the Public Information and Records Integrity Branch, Information Resources and Services Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA.

Electronic comments may be sent directly to EPA at:

opp-docket@epamail.epa.gov.

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption.

The official record for this rulemaking, as well as the public version, as described above will be kept in paper form. Accordingly, EPA will transfer any copies of objections and hearing requests received electronically into printed, paper form as they are received and will place the paper copies in the official rulemaking record which will also include all comments submitted directly in writing. The official rulemaking record is the paper record maintained at the Virginia address in ''ADDRESSES'' at the beginning of this document.

VII. Regulatory Assessment Requirements

This final rule establishes a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled Regulatory Planning and Review (58 FR 51735, October 4, 1993). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4). Nor does it require any prior consultation as specified by Executive Order 12875, entitled Enhancing the Intergovernmental Partnership (58 FR 58093, October 28, 1993), or special considerations as required by Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994), or require OMB review in accordance with Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997).

In addition, since these tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. Nevertheless, the Agency has previously assessed whether establishing tolerances, exemptions from tolerances, raising tolerance levels or expanding exemptions might adversely impact small entities and concluded, as a generic matter, that there is no adverse economic impact. The factual basis for the Agency's generic certification for tolerance actions published on May 4, 1981 (46 FR 24950) and was provided to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, the Agency has submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office prior to publication of this rule in today's **Federal Register**. This is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: October 1, 1997.

Daniel M. Barolo,

Director, Office of Pesticide Programs.

Therefore, 40 CFR Chapter I is amended as follows:

PART 180—[AMENDED]

1. The authority citation for part 180 continues to read as follows:

Authority : 21 U.S.C. 346a and 371.

2. By revising § 180.487 to read as follows:

§ 180.487 Pyrithiobac sodium; tolerances for residues.

(a) *General.* (1) Time-limited tolerances are established for residues of the herbicide, pyrithiobac-sodium, sodium 2-chloro-6-[(4,6-dimethoxypyrimidin-2-yl)thio]benzoate, in or on the food commodities in the table in paragraph (a)(2). The tolerance will expire on the date specified in the table.

(2) Residues in these commodities not in excess of the established tolerance resulting from the use described in the following table remaining after expiration of the time-limited tolerance

will not be considered to be actionable if the herbicide is applied during the term of and in accordance with the provisions of paragraph (a) of this section.

Commodity	Parts per million	Expiration/ revocation date
Cottonseed	0.02	Sept. 30, 1999

(b) *Section 18 emergency exemptions.* [Reserved]

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect or inadvertent residues.* [Reserved]

[FR Doc. 97–27843 Filed 10–21–97; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 180 and 186

[OPP–300563; FRL–5748–9]

RIN 2070–AB78

Cyromazine; Pesticide Tolerances for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes time-limited tolerances for the combined residues of cyromazine and its metabolite melamine in or on the meat, fat, and meat byproducts of turkeys. This action is in response to EPA's granting of an emergency exemption under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act authorizing use of the pesticide on turkeys. This regulation establishes a maximum permissible level for residues of cyromazine and its metabolite melamine in this food commodity pursuant to section 408(l)(6) of the Federal Food, Drug, and Cosmetic Act, as amended by the Food Quality Protection Act of 1996. These tolerances will expire and are revoked on October 1, 1998.

DATES: This regulation is effective October 22, 1997. Objections and requests for hearings must be received by EPA on or before December 22, 1997.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, [OPP–300563], must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled ''Tolerance Petition Fees'' and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk identified by the docket control number, [OPP–300563], must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring a copy of objections and hearing requests to Rm. 1132, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA.

A copy of objections and hearing requests filed with the Hearing Clerk may also be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov. Copies of objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Copies of objections and hearing requests will also be accepted on disks in WordPerfect 5.1 file format or ASCII file format. All copies of objections and hearing requests in electronic form must be identified by the docket control number [OPP–300563]. No Confidential Business Information (CBI) should be submitted through e-mail. Electronic copies of objections and hearing requests on this rule may be filed online at many Federal Depository Libraries.

FOR FURTHER INFORMATION CONTACT: By mail: Andrew Ertman, Registration Division 7505C, Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 308-9367, e-mail: ertman.andrew@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: EPA, on its own initiative, pursuant to section 408(e) and (l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(e) and (l)(6), is establishing tolerances for combined residues of the insecticide (larvicide) cyromazine and its metabolite melamine, in or on meat, fat, and meat byproducts of turkeys at 0.05 part per million (ppm). These tolerances will expire and are revoked on October 1, 1998. EPA will publish a document in the **Federal Register** to remove the revoked tolerances from the Code of Federal Regulations.

I. Background and Statutory Authority

The Food Quality Protection Act of 1996 (FQPA) (Pub. L. 104–170) was signed into law August 3, 1996. FQPA amends both the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 301 *et seq*., and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq* . The FQPA amendments went into effect immediately. Among other things, FQPA amends FFDCA to bring all EPA pesticide tolerance-setting activities under a new section 408 with a new safety standard and new procedures. These activities are described below and discussed in greater detail in the final rule establishing the time-limited tolerance associated with the emergency exemption for use of propiconazole on sorghum (61 FR 58135, November 13, 1996)(FRL–5572–9).

New section 408(b)(2)(A)(i) of the FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

Section 18 of FIFRA authorizes EPA to exempt any Federal or State agency from any provision of FIFRA, if EPA determines that ''emergency conditions exist which require such exemption.'' This provision was not amended by FQPA. EPA has established regulations governing such emergency exemptions in 40 CFR part 166.

Section 408(l)(6) of the FFDCA requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under section 18 of FIFRA. Such tolerances can be established without providing notice or period for public comment.

Because decisions on section 18-related tolerances must proceed before EPA reaches closure on several policy issues relating to interpretation and implementation of the FQPA, EPA does not intend for its actions on such tolerance to set binding precedents for the application of section 408 and the new safety standard to other tolerances and exemptions.

II. Emergency Exemption for Cyromazine on Turkeys and FFDCA Tolerances

The applicant has requested an emergency exemption for the use of cyromazine on turkeys to control flies. The applicant states that the flies are thought to carry spiking mortality, an acute form of Poult Enteritis Mortality Syndrome (PEMS). PEMS first appeared in Union County, North Carolina in 1991. Initially, the disease affected turkey flocks only in western North Carolina until it spread to eastern North Carolina and neighboring states in 1994. Since that time, it has devastated the relatively small turkey industry in Georgia, and has had significant impact on turkey production in North Carolina. Estimates are that the disease was responsible for about $55 million in losses to the turkey industry in 1996. Most of these losses were incurred by North Carolina.

Evidence suggests that house fly (*Musca domestica*) can transmit the PEMS disease agent(s). The applicant states that the alternative products available for use on house flies in poultry houses, tetrachlorvinphos, dichlorvos, and dimethoate, are applied as larvicides to the manure accumulated beneath cages or slatted floors. These products were developed for use under caged layers or in chicken houses with slatted floors; however, market turkeys are grown in open-floor environments, and the birds cannot be easily moved from areas needing treatment. One problem with this type of treatment of turkey houses is that rates for larvicidal use of these chemicals are generally the highest rates permitted by the label, creating a concern for the exposed birds. A second problem with these alternatives is that the residual control is 10 to 14 days at best, thus requiring at least two treatments over the course of a brooder house flock cycle. Additionally, it may not be possible to penetrate the breeding substrate with a low pressure sprayer as recommended, due to compaction of the litter. Finally, these alternatives are labeled as adulticides, leaving a question of possible resistance development by house flies to these chemicals. EPA has authorized under FIFRA section 18 the use of cyromazine on turkeys for control of flies in North Carolina. After having reviewed the submission, EPA concurs that emergency conditions exist for this state.

As part of its assessment of this emergency exemption, EPA assessed the potential risks presented by residues of cyromazine in or on the meat, fat, and meat byproducts of turkeys. In doing so, EPA considered the new safety standard in FFDCA section 408(b)(2), and EPA decided that the necessary tolerances under FFDCA section 408(l)(6) would be consistent with the new safety standard and with FIFRA section 18. Consistent with the need to move quickly on the emergency exemption in order to address an urgent non-routine situation and to ensure that the resulting food is safe and lawful, EPA is issuing these tolerances without notice and opportunity for public comment under section 408(e), as provided in section 408(l)(6). Although these tolerances will expire and are revoked on October 1, 1998, under FFDCA section 408(l)(5), residues of the pesticide not in excess of the amounts specified in the tolerances remaining in or on meat, fat, and meat byproducts of turkeys after that date will not be unlawful, provided the pesticide is applied in a manner that was lawful under FIFRA. EPA will take action to revoke these tolerances earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

Because these tolerances are being approved under emergency conditions EPA has not made any decisions about whether cyromazine meets EPA's registration requirements for use on turkeys or whether permanent tolerances for this use would be appropriate. Under these circumstances, EPA does not believe that these tolerances serve as a basis for registration of cyromazine by a State for special local needs under FIFRA section 24(c). Nor do these tolerances serve as the basis for any State other than North Carolina to use this pesticide on this crop under section 18 of FIFRA without following all provisions of section 18 as identified in 40 CFR part 166. For additional information regarding the emergency exemption for cyromazine, contact the Agency's Registration Division at the address provided above.

III. Risk Assessment and Statutory Findings

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides based primarily on toxicological studies using laboratory animals. These studies address many adverse health effects, including (but not limited to) reproductive effects, developmental toxicity, toxicity to the nervous system, and carcinogenicity. Second, EPA examines exposure to the pesticide through the diet (e.g., food and drinking water) and through exposures that occur as a result of pesticide use in residential settings.

A. Toxicity

1. *Threshold and non-threshold effects.* For many animal studies, a dose response relationship can be determined, which provides a dose that causes adverse effects (threshold effects) and doses causing no observed effects (the ''no-observed effect level'' or ''NOEL'').

Once a study has been evaluated and the observed effects have been determined to be threshold effects, EPA generally divides the NOEL from the study with the lowest NOEL by an uncertainty factor (usually 100 or more) to determine the Reference Dose (RfD). The RfD is a level at or below which daily aggregate exposure over a lifetime will not pose appreciable risks to human health. An uncertainty factor (sometimes called a ''safety factor'') of 100 is commonly used since it is assumed that people may be up to 10 times more sensitive to pesticides than the test animals, and that one person or subgroup of the population (such as infants and children) could be up to 10 times more sensitive to a pesticide than another. In addition, EPA assesses the potential risks to infants and children based on the weight of the evidence of the toxicology studies and determines whether an additional uncertainty factor is warranted. Thus, an aggregate daily exposure to a pesticide residue at or below the RfD (expressed as 100% or less of the RfD) is generally considered acceptable by EPA. EPA generally uses the RfD to evaluate the chronic risks posed by pesticide exposure. For shorter term risks, EPA calculates a margin of exposure (MOE) by dividing the estimated human exposure into the NOEL from the appropriate animal study. Commonly, EPA finds MOEs lower than 100 to be unacceptable. This 100-fold MOE is based on the same rationale as the 100-fold uncertainty factor.

Lifetime feeding studies in two species of laboratory animals are conducted to screen pesticides for cancer effects. When evidence of increased cancer is noted in these studies, the Agency conducts a weight of the evidence review of all relevant toxicological data including short-term

and mutagenicity studies and structure activity relationship. Once a pesticide has been classified as a potential human carcinogen, different types of risk assessments (e.g., linear low dose extrapolations or MOE calculation based on the appropriate NOEL) will be carried out based on the nature of the carcinogenic response and the Agency's knowledge of its mode of action.

2. *Differences in toxic effect due to exposure duration.* The toxicological effects of a pesticide can vary with different exposure durations. EPA considers the entire toxicity data base, and based on the effects seen for different durations and routes of exposure, determines which risk assessments should be done to assure that the public is adequately protected from any pesticide exposure scenario. Both short and long durations of exposure are always considered. Typically, risk assessments include ''acute,'' ''short-term,'' ''intermediate term,'' and ''chronic'' risks. These assessments are defined by the Agency as follows.

Acute risk, by the Agency's definition, results from 1-day consumption of food and water, and reflects toxicity which could be expressed following a single oral exposure to the pesticide residues. High end exposure to food and water residues are typically assumed.

Short-term risk results from exposure to the pesticide for a period of 1-7 days, and therefore overlaps with the acute risk assessment. Historically, this risk assessment was intended to address primarily dermal and inhalation exposure which could result, for example, from residential pesticide applications. However, since enaction of FQPA, this assessment has been expanded to include both dietary and non-dietary sources of exposure, and will typically consider exposure from food, water, and residential uses when reliable data are available. In this assessment, risks from average food and water exposure, and high-end residential exposure, are aggregated. High-end exposures from all 3 sources are not typically added because of the very low probability of this occurring in most cases, and because the other conservative assumptions built into the assessment assure adequate protection of public health. However, for cases in which high-end exposure can reasonably be expected from multiple sources (e.g. frequent and widespread homeowner use in a specific geographical area), multiple high-end risks will be aggregated and presented as part of the comprehensive risk assessment/characterization. Since the toxicological endpoint considered in this assessment reflects exposure over a period of at least 7 days, an additional degree of conservatism is built into the assessment; i.e., the risk assessment nominally covers 1-7 days exposure, and the toxicological endpoint/NOEL is selected to be adequate for at least 7 days of exposure. (Toxicity results at lower levels when the dosing duration is increased.)

Intermediate-term risk results from exposure for 7 days to several months. This assessment is handled in a manner similar to the short-term risk assessment.

Chronic risk assessment describes risk which could result from several months to a lifetime of exposure. For this assessment, risks are aggregated considering average exposure from all sources for representative population subgroups including infants and children.

B. Aggregate Exposure

In examining aggregate exposure, FFDCA section 408 requires that EPA take into account available and reliable information concerning exposure from the pesticide residue in the food in question, residues in other foods for which there are tolerances, residues in groundwater or surface water that is consumed as drinking water, and other non-occupational exposures through pesticide use in gardens, lawns, or buildings (residential and other indoor uses). Dietary exposure to residues of a pesticide in a food commodity are estimated by multiplying the average daily consumption of the food forms of that commodity by the tolerance level or the anticipated pesticide residue level. The Theoretical Maximum Residue Contribution (TMRC) is an estimate of the level of residues consumed daily if each food item contained pesticide residues equal to the tolerance. In evaluating food exposures, EPA takes into account varying consumption patterns of major identifiable subgroups of consumers, including infants and children. The TMRC is a ''worst case'' estimate since it is based on the assumptions that food contains pesticide residues at the tolerance level and that 100% of the crop is treated by pesticides that have established tolerances. If the TMRC exceeds the RfD or poses a lifetime cancer risk that is greater than approximately one in a million, EPA attempts to derive a more accurate exposure estimate for the pesticide by evaluating additional types of information (anticipated residue data and/or percent of crop treated data) which show, generally, that pesticide residues in most foods when they are eaten are well below established tolerances.

Percent of crop treated estimates are derived from federal and private market survey data. Typically, a range of estimates are supplied and the upper end of this range is assumed for the exposure assessment. By using this upper end estimate of percent of crop treated, the Agency is reasonably certain that exposure is not understated for any significant subpopulation group. Further, regional consumption information is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups, to pesticide residues. For this pesticide, the most highly exposed population subgroups (non-nursing infants <1 year old and children 1-6 years old) was not regionally based.

IV. Aggregate Risk Assessment and Determination of Safety

Consistent with section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action, EPA has sufficient data to assess the hazards of cyromazine and to make a determination on aggregate exposure, consistent with section 408(b)(2), for time-limited tolerances for the combined residues of cyromazine and its metabolite melamine in or on meat, fat, and meat byproducts of turkeys at 0.05 ppm. EPA's assessment of the dietary exposures and risks associated with establishing these tolerances follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects caused by cyromazine are discussed below.

1. *Acute toxicity.* An acute dietary risk endpoint was not identified and an acute dietary risk assessment is not required.

2. *Short - and intermediate - term toxicity.* For short-term Margin of Exposure (MOE) calculations, the Agency is using a systemic NOEL of 0.75 mg/kg/day from a 6-month dog feeding study. At the lowest effect level (LEL) of 7.5 mg/kg/day, there were changes in hematological parameters.

3. *Chronic toxicity*. EPA has established the RfD for cyromazine at 0.0075 milligrams/kilogram/day (mg/kg/day). This RfD is based on a 6 month feeding study in the dog with a NOEL of 0.75 mg/kg/day and a LEL of 7.5 mg/kg/day based on pronounced effects on hematological parameters and an uncertainty factor of 100.

4. *Carcinogenicity*. Cyromazine has been classified as a Group E (evidence of non-carcinogenicity for humans) chemical by the Agency.

B. Exposures and Risks

1. *From food and feed uses.* Tolerances have been established (40 CFR 180.414) for the combined residues of cyromazine and its metabolite melamine, in or on a variety of raw agricultural commodities at levels ranging from 1.0 ppm in tomatoes to 10 ppm in leafy vegetables. Currently there are tolerances for residues of cyromazine and its metabolite melamine on the meat fat and meat by-products of chickens from the use of cyromazine as a feed-through. Risk assessments were conducted by EPA to assess dietary exposures and risks from cyromazine as follows:

Chronic exposure and risk. In conducting this chronic dietary risk assessment, the Agency has made very conservative assumptions which result in an overestimate of human dietary exposure:

(1) 100% crop treated is assumed for all commodities with the exception of tomatoes, sweet peppers, celery, and lettuce, where percent crop treated is used.

(2) All commodities having cyromazine tolerances are assumed to contain cyromazine residues and those residues will be at the level of the established tolerance.

Thus, in making a safety determination for this tolerance, EPA is taking into account this conservative exposure assessment. The existing cyromazine tolerances (published, pending, and including the necessary Section 18 tolerance(s)) result in an Anticipated Residue Contribution (ARC) that is equivalent to the following percentages of the RfD:

Subgroup	Percent
U.S. Population	32
Nursing Infants	12
Non-Nursing Infants (<1 year old)	50
Children (1-6 years old)	50
Children (7-12 years old)	41

The subgroups listed above are: (1) the U.S. population (48 states); (2) those for infants and children; and, (3) the other subgroups for which the percentage of the RfD occupied is greater than that occupied by the subgroup U.S. population (48 states).

2. *From drinking water.* Based on information available to the Agency, cyromazine is persistent and relatively mobile. There are no established Maximum Contaminant Level for residues of Cyromazine in drinking water. No health advisory levels for Cyromazine in drinking water have been established.

Chronic exposure and risk. Because the Agency lacks sufficient water-related exposure data to complete a comprehensive drinking water risk assessment for many pesticides, EPA has commenced and nearly completed a process to identify a reasonable yet conservative bounding figure for the potential contribution of water-related exposure to the aggregate risk posed by a pesticide. In developing the bounding figure, EPA estimated residue levels in water for a number of specific pesticides using various data sources. The Agency then applied the estimated residue levels, in conjunction with appropriate toxicological endpoints (RfD's or acute dietary NOEL's) and assumptions about body weight and consumption, to calculate, for each pesticide, the increment of aggregate risk contributed by consumption of contaminated water. While EPA has not yet pinpointed the appropriate bounding figure for exposure from contaminated water, the ranges the Agency is continuing to examine are all below the level that would cause cyromazine to exceed the RfD if the tolerances being considered in this document were granted. The Agency has therefore concluded that the potential exposures associated with cyromazine in water, even at the higher levels the Agency is considering as a conservative upper bound, would not prevent the Agency from determining that there is a reasonable certainty of no harm if the tolerances are granted.

3. *From non-dietary exposure.* Cyromazine is not currently registered for use on residential non-food sites.

4. *Cumulative exposure to substances with common mechanism of toxicity.* Section 408(b)(2)(D)(v) requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.'' The Agency believes that ''available information'' in this context might include not only toxicity, chemistry, and exposure data, but also scientific policies and methodologies for understanding common mechanisms of toxicity and conducting cumulative risk assessments. For most pesticides, although the Agency has some information in its files that may turn out to be helpful in eventually determining whether a pesticide shares a common mechanism of toxicity with any other substances, EPA does not at this time have the methodologies to resolve the complex scientific issues concerning common mechanism of toxicity in a meaningful way. EPA has begun a pilot process to study this issue further through the examination of particular classes of pesticides. The Agency hopes that the results of this pilot process will increase the Agency's scientific understanding of this question such that EPA will be able to develop and apply scientific principles for better determining which chemicals have a common mechanism of toxicity and evaluating the cumulative effects of such chemicals. The Agency anticipates, however, that even as its understanding of the science of common mechanisms increases, decisions on specific classes of chemicals will be heavily dependent on chemical specific data, much of which may not be presently available.

Although at present the Agency does not know how to apply the information in its files concerning common mechanism issues to most risk assessments, there are pesticides as to which the common mechanism issues can be resolved. These pesticides include pesticides that are toxicologically dissimilar to existing chemical substances (in which case the Agency can conclude that it is unlikely that a pesticide shares a common mechanism of activity with other substances) and pesticides that produce a common toxic metabolite (in which case common mechanism of activity will be assumed).

EPA does not have, at this time, available data to determine whether cyromazine has a common mechanism of toxicity with other substances or how to include this pesticide in a cumulative risk assessment. For the purposes of these tolerance actions, therefore, EPA has not assumed that cyromazine or its metabolite melamine have common mechanisms of toxicity with other substances.

C. Aggregate Risks and Determination of Safety for U.S. Population

Chronic risk. Using the conservative ARC exposure assumptions described above, and taking into account the completeness and reliability of the

toxicity data, EPA has concluded that aggregate exposure to cyromazine from food will utilize 32% of the RfD for the U.S. population. The Agency generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Despite the potential for exposure to Cyromazine in drinking water, EPA does not expect the aggregate exposure to exceed 100% of the RfD. Since there are no residential uses, EPA concludes that there is a reasonable certainty that no harm will result from chronic aggregate exposure to cyromazine residues.

D. Aggregate Cancer Risk for U.S. Population

Cyromazine has been classified as a Group E (evidence of non-carcinogenicity for humans) chemical by the Agency.

E. Aggregate Risks and Determination of Safety for Infants and Children

1. *Safety factor for infants and children*— i. *In general.* In assessing the potential for additional sensitivity of infants and children to residues of cyromazine, EPA considered data from developmental toxicity studies in the rat and rabbit and a two-generation reproduction study in the rat. The developmental toxicity studies are designed to evaluate adverse effects on the developing organism resulting from pesticide exposure during prenatal development to one or both parents. Reproduction studies provide information relating to effects from exposure to the pesticide on the reproductive capability of mating animals and data on systemic toxicity.

FFDCA section 408 provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for pre-and post-natal toxicity and the completeness of the database unless EPA determines that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a MOE analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans. EPA believes that reliable data support using the standard MOE and uncertainty factor (usually 100 for combined inter- and intra-species variability) and not the additional tenfold MOE/uncertainty factor when EPA has a complete data base under existing guidelines and when the severity of the effect in infants or children or the potency or unusual toxic properties of a compound do not raise concerns regarding the adequacy of the standard MOE/safety factor.

ii. *Developmental toxicity studies.* From the rat developmental study, the maternal (systemic) NOEL was 100 mg/kg/day, based on increased incidence of clinical signs and decreased body weight at the LOEL of 300 mg/kg/day. The developmental (pup) NOEL was 300 mg/kg/day, based on increased incidence of skeletal variations at the LOEL of 600 mg/kg/day.

From the rabbit developmental study, the maternal (systemic) NOEL was 10 mg/kg/day, based on decreased weight gain and food consumption at the LOEL of 30 mg/kg/day. The developmental (pup) NOEL was 60 mg/kg/day, the highest dose tested (HDT).

iii. *Reproductive toxicity study.* From the rat reproduction study, the maternal (systemic) NOEL was 50 mg/kg/day, based on body weight loss at the LOEL of 150 mg/kg/day. The reproductive/developmental (pup) NOEL was 50 mg/kg/day, based on decreased pup growth, decreased number of pups per litter, and increased fetotoxicity at the LEL of 150 mg/kg/day.

iv. *Pre- and post-natal sensitivity.* The toxicological data base for evaluating pre- and post-natal toxicity for Cyromazine is complete with respect to current data requirements. There are no pre- or post-natal toxicity concerns for infants and children, based on the results of the rat and rabbit developmental toxicity studies and the 2-generation rat reproductive toxicity study. Based on the above, EPA concludes that reliable data support use of the standard 100-fold margin of exposure/uncertainty factor and that an additional margin/factor is not needed to protect infants and children.

v. *Conclusion.* Aggregate exposure to cyromazine does not pose a risk to infants and children that exceeds the Agency's level of concern.

2. *Chronic risk.* Using the conservative exposure assumptions described above, EPA has concluded that aggregate exposure to cyromazine from food ranges from 12% for non-nursing infants less than one year old, up to 50% for children 1-6 years old. EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Despite the potential for exposure to cyromazine in drinking water and from non-dietary, non-occupational exposure, EPA does not expect the aggregate exposure to exceed 100% of the RfD. EPA concludes that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to cyromazine residues.

V. Other Considerations

A. Metabolism In Plants and Animals

The nature of the residue in plants and animals is adequately understood. The residue of concern is parent cyromazine and the metabolite melamine as specified in 40 CFR 180.414.

B. Analytical Enforcement Methodology

Adequate enforcement methodology for the published tolerance for chickens (HPLC with UV detector) is available in PAM II to enforce the tolerance expression. This method is adequate for turkeys.

C. Magnitude of Residues

Residues of Cyromazine and melamine are not expected to exceed 0.05 ppm in/on turkey meat, fat and meat byproducts as a result of this Section 18 use.

D. International Residue Limits

There is a CODEX MRL for residues of cyromazine *per se* on poultry meat at 0.05 ppm.

E. Rotational Crop Restrictions

While there are no crop rotation restrictions on the label of this feed through product, manure from treated animals may be used as a soil fertilizer supplement. There are restrictions on the amount of manure that may be used per acre and manure is not to be used on small grains.

VI. Conclusion

Therefore, tolerances are established for combined residues of cyromazine and its metabolite melamine in or on meat, fat and meat byproducts of turkeys at 0.05 ppm.

VII. Objections and Hearing Requests

The new FFDCA section 408(g) provides essentially the same process for persons to ''object'' to a tolerance regulation issued by EPA under new section 408(e) and (l)(6) as was provided in the old section 408 and in section 409. However, the period for filing objections is 60 days, rather than 30 days. EPA currently has procedural regulations which govern the submission of objections and hearing requests. These regulations will require some modification to reflect the new law. However, until those modifications can be made, EPA will continue to use those procedural regulations with

appropriate adjustments to reflect the new law.

Any person may, by December 22, 1997, file written objections to any aspect of this regulation and may also request a hearing on those objections. Objections and hearing requests must be filed with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issues on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the requestor (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

VIII. Public Docket

EPA has established a record for this rulemaking under docket control number [OPP–300563] (including any comments and data submitted electronically). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The public record is located in Room 1132 of the Public Information and Records Integrity Branch, Information Resources and Services Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA.

Electronic comments may be sent directly to EPA at:

opp-docket@epamail.epa.gov.

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption.

The official record for this rulemaking, as well as the public version, as described above will be kept in paper form. Accordingly, EPA will transfer any copies of objections and hearing requests received electronically into printed, paper form as they are received and will place the paper copies in the official rulemaking record which will also include all comments submitted directly in writing. The official rulemaking record is the paper record maintained at the Virginia address in ''ADDRESSES'' at the beginning of this document.

IX. Regulatory Assessment Requirements

This final rule establishes tolerances under FFDCA section 408(l)(6). The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled Regulatory Planning and Review (58 FR 51735, October 4, 1993). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4). Nor does it require any prior consultation as specified by Executive Order 12875, entitled Enhancing the Intergovernmental Partnership (58 FR 58093, October 28, 1993), or special considerations as required by Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994), or require OMB review in accordance with Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997).

In addition, since the tolerances and exemptions that are established under FFDCA section 408 (l)(6), such as the tolerances in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. Nevertheless, the Agency has previously assessed whether establishing tolerances, exemptions from tolerances, raising tolerance levels or expanding exemptions might adversely impact small entities and concluded, as a generic matter, that there is no adverse economic impact. The factual basis for the Agency's generic certification for tolerance actions published on May 4, 1981 (46 FR 24950), and was provided to the Chief Counsel for Advocacy of the Small Business Administration.

X. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, the Agency has submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office prior to publication of this rule in today's **Federal Register**. This is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects

40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

40 CFR Part 186

Environmental protection, Animal feeds, Pesticides and pests.

Dated: October 6, 1997.

James Jones,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

1. In part 180:

a. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 346a and 371.

b. In § 180.414:

i. By adding paragraph (a)(4).

ii. In paragraph (b), by alphabetically adding the following commodities to the table.

The addition and amendment to § 180.414 read as follows:

§ 180.414 Cyromazine; tolerances for residues.

(a) * * *

(4) The additive cyromazine (*N*-cyclopropyl-1,3,5-triazine-2,4,6-triamine) may be safely used in

accordance with the following prescribed conditions:

(i) It is used as a feed additive only in the feed for chicken layer hens and chicken breeder hens at the rate of not more than 0.01 pound of cyromazine per ton of poultry feed.

(ii) It is used for control of flies in manure of treated chicken layer hens and chicken breeder hens.

(iii) Feeding of cyromazine-treated feed must stop at least 3 days (72 hours) before slaughter. If the feed is formulated by any person other than the end user, the formulator must inform the end user, in writing, of the 3-day (72 hours) preslaughter interval.

(iv) To ensure safe use of the additive, the labeling of the pesticide formulation containing the feed additive shall conform to the labeling which is registered by the U.S. Environmental Protection Agency, and the additive shall be used in accordance with this registered labeling.

(v) Residues of cyromazine are not to exceed 5.0 parts per million (ppm) in poultry feed.

(b) * * *

Commodity	Parts per million	Expiration/revocation date
* * *	* *	* *
Turkey, fat	0.05	10/1/98
Turkey, mbyp	0.05	10/1/98
Turkey, meat	0.05	10/1/98

* * * * *

PART 186—[AMENDED]

2. In part 186:

a. The authority citation for part 186 continues to read as follows:

Authority: 21 U.S.C. 342, 348, and 701.

§ 186.1400 [Removed]

b. Section 186.1400 is removed.

[FR Doc. 97–27844 Filed 10–21–97; 8:45 am]

BILLING CODE 6560–50–F

FEDERAL COMMUNICATIONS COMMISSION

47 CFR PART 68

[CC Docket Nos. 96–128 and 91–35; DA 97–1793]

Pay Telephone Equipment Grandfathering

AGENCY: Federal Communications Commission.

ACTION: Final rules; correction.

SUMMARY: The Federal Communications Commission issues a correction to the previously published final rule in 62 FR 47371, September 9, 1997, concerning the connection of terminal equipment to the telephone network. The rule allows certain terminal equipment presently connected to central-office-implemented payphones to remain connected without registration. This correction is issued to clarify that the rule applies to the ''central-office-implemented telephone line'' rather than the ''central-office-implemented telephone.'' The correction is intended clarify the distinction between terminal equipment and a central-office-implemented telephone line.

EFFECTIVE DATE: October 5, 1997.

FOR FURTHER INFORMATION CONTACT:

Technical Information: William Von Alven, 202–418–2342.

Legal Information: Alan Thomas, 202–418–2338.

SUPPLEMENTARY INFORMATION: Section 68.2(l) (1) and (2) are corrected. 68.2(1) is corrected by inserting the word ''line'' after the phrase ''central-office-implemented telephone'' in the first sentence. Section 68.2(l)(2) is corrected by inserting the word ''line'' after the phrase ''central-office-implemented telephone'' in the first and second sentences.

List of Subjects in 47 CFR Part 68

Communications common carriers, Communications equipment, Reporting and recordkeeping requirements.

Federal Communications Commission.

LaVera F. Marshall,

Acting Secretary.

Correction

For the reasons discussed in Supplementary Information make the following corrections.

§ 68.2 [Corrected]

1. On page 47371, in the third column, in § 68.2, in paragraph (l)(1), in lines 3 and 4, the phrase ''central-office-implemented telephone'' is corrected to read ''central-office-implemented telephone line.''

2. On page 47371, in the third column, in § 68.2, in paragraph (l)(2), in lines 4 and 5 and lines 8 and 9, the phrase ''central-office-implemented telephone'' is corrected to read ''central-office-implemented telephone line.''

[FR Doc. 97–27635 Filed 10–17–97; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 97–148; RM–9088]

Radio Broadcasting Services; New London, IA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Sound In Spirit Broadcasting, Inc., allots Channel 247A at New London, Iowa, as the community's first local aural transmission service. Channel 247A can be allotted to New London in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.7 kilometers (1.7 miles) west in order to avoid a short-spacing conflict with the licensed operation of Station WFYR-FM, Channel 247B1, Elmwood, Illinois. The coordinates for Channel 247A at New London are 40–55–30 NL and 91–25–40 WL. With this action, this proceeding is terminated.

DATES: Effective: November 24, 1997. The window period for filing applications for Channel 247A at New London, Iowa, will open on November 24, 1997, and close on December 26, 1997.

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

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 97–148, adopted September 24, 1997, and released October 10, 1997. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC

Reference Center (Room 239), 1919 M Street, NW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, ITS, Inc., (202) 857–3800, 1231 20th Street, NW, Washington, DC 20036.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

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

PART 73—[AMENDED]

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

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Iowa, is amended by adding New London, Channel 247A.

Federal Communications Commission.

John A. Karousos,

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

[FR Doc. 97–27943 Filed 10–21–97; 8:45 am]

BILLING CODE 6712–01–F

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 96–124; RM–8813, RM–8864]

Radio Broadcasting Services; Winner and Wessington Springs, SD

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Midwest Radio Corporation, substitutes Channel 252C1 for Channel 253C1 at Winner, reallots Channel 252C1 from Winner to Wessington Springs, South Dakota, and modifies Station KGGK(FM)'s construction permit accordingly (RM–8813). *See* 61 FR 31489, June 20, 1996. At the request of Dakota Communications, Inc., we also allot Channel 227C1 at Wessington Springs, South Dakota, as the community's second local FM transmission service (RM–8864). Channels 227C1 and 252C1 can be allotted to Wessington Springs in compliance with the Commission's minimum distance separation requirements at city reference coordinates. The coordinates for Channels 227C1 and 252C1 at Wessington Springs are North Latitude 44–05–12 and West Longitude 98–34–24. With this action, this proceeding is terminated.

DATES: Effective November 24, 1997. The window period for filing applications for Channel 227C1 at Wessington Springs, South Dakota, will open on November 24, 1997, and close on December 26, 1997.

FOR FURTHER INFORMATION CONTACT: Sharon P. McDonald, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 96–124, adopted October 1, 1997, and released October 10, 1997. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., (202) 857–3800, 1231 20th Street, NW., Washington, DC 20036.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

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

PART 73—[AMENDED]

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

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under South Dakota, is amended by removing Channel 253C1 from Winner, and adding Wessington Springs, Channels 227C1 and 252C1.

Federal Communications Commission.

John A. Karousos,

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

[FR Doc. 97–27942 Filed 10–21–97; 8:45 am]

BILLING CODE 6712–01–F

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AD36

Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for Nine Plants From the Grasslands or Mesic Areas of the Central Coast of California

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service) determines endangered status pursuant to the Endangered Species Act of 1973, as amended (Act) for nine plants: *Alopecurus aequalis* var. *sonomensis* (Sonoma alopecurus), *Astragalus clarianus* (Clara Hunt's milk-vetch), *Carex albida* (white sedge), *Clarkia imbricata* (Vine Hill clarkia), *Lilium pardalinum* ssp. *pitkinense* (Pitkin Marsh lily), *Plagiobothrys strictus* (Calistoga allocarya), *Poa napensis* (Napa bluegrass), *Sidalcea oregana* ssp. *valida* (Kenwood Marsh checker-mallow), and *Trifolium amoenum* (showy Indian clover). These nine species grow in a variety of habitats including valley grasslands, meadows, freshwater marshes, seeps, and blue oak woodlands in Marin, Napa, and Sonoma Counties on the central coast of California. Habitat loss and degradation, competition from invasive plant species, elimination through plant community succession, trampling and herbivory by livestock and wildlife, collection for horticultural use, and hydrological alterations to wetland areas threaten the continued existence of these plants. This rule implements Federal protection and recovery provisions afforded by the Act for these nine species.

DATES: Effective November 21, 1997.

ADDRESSES: The complete file for this rule is available for public inspection, by appointment, during normal business hours at the Sacramento Field Office, U.S. Fish and Wildlife Service, 3310 El Camino Avenue, Suite 130, Sacramento, California 95821–6340.

FOR FURTHER INFORMATION CONTACT: Diane Elam or David Wright, Sacramento Field Office (see **ADDRESSES** section) (telephone 916/979–2120; facsimile 916/979–2128).

SUPPLEMENTARY INFORMATION:

Background

Populations of the nine plant species in this rule are found in Sonoma, Marin, and Napa Counties, California. *Astragalus clarianus* (Clara Hunt's milk-vetch), *Plagiobothrys strictus* (Calistoga allocarya), and *Poa napensis* (Napa bluegrass) are found up to 70 kilometers (km) (32 miles (mi)) inland in a variety of habitats near the City of Calistoga in the Napa Valley, California. *Alopecurus aequalis* var. *sonomensis* (Sonoma alopecurus), *Carex albida* (white sedge), *Clarkia imbricata* (Vine Hill clarkia), *Lilium pardalinum* ssp. *pitkinense* (Pitkin Marsh lily), *Sidalcea oregana* ssp. *valida* (Kenwood Marsh checker-mallow), and *Trifolium amoenum*

(showy Indian clover) are found in mesic areas mostly within 33 km (15 mi) of the central coast of California. Urbanization, road construction, airport construction, development of hot springs into commercial resorts, agricultural land conversion, hydrological alteration of wetlands, waste disposal, competition with invasive plant species, collection for horticultural use, or livestock grazing have eliminated or adversely impacted much of the habitat and have extirpated numerous populations of these plant species. Historically, these species have not been known to occur outside of Alameda, Marin, Mendocino, Napa, Santa Clara, Solano, and Sonoma Counties.

Willis Jepson (1925a) first described *Astragalus clarianus* in 1909 from specimens collected by Clara Hunt in the Conn Valley near St. Helena, Napa County, California. Axel Rydberg (1929) and Jepson (1936) later treated this taxon as *Hamosa clariana* and *Astragalus rattani* var. *clarianus*, respectively. Rupert Barneby (1950) reestablished *Astragalus clarianus* as a full species, a treatment retained by Spellenberg (1993). *Astragalus clarianus* is a low-growing annual herb in the pea family (Fabaceae). It is a slender, sparsely leafed plant, sparingly covered with sharp, stiff, appressed hairs. The simple single or few basally branching, stems ascend 7 to 20 centimeters (cm) (3 to 8 inches (in)) in height. The leaves are alternate, 1.5 to 6.0 cm (0.5 to 2.5 in) long, with 5 to 9 uncrowded leaflets 2 to 10 millimeters (mm) (0.1 to 0.4 in) long. The leaflets are oblong to obovate, narrow at the base, and notched at the tip. Small flowers appear from March through April. The petals are bicolored, with the wings whitish and the banner and keel purple in the upper third. The keel is longer and wider than the wings. The horizontal to declining seed pods are narrow, linear, slightly curved, pointed at both ends, and are borne on a 1.5 to 2.5 mm (0.06 to 0.10 in) long slender stalk. *Astragalus rattanii* var. *jepsonianus* resembles *A. clarianus*, but grows 10 to 36 cm (4 to 14 in) tall, has larger flowers, and has seed pods that are not elevated on a stalk.

Astragalus clarianus is found on thin, rocky clay soils derived from volcanic or serpentine substrates (Joe Callizo, California Native Plant Society (CNPS), *in litt.* 1996; Jake Ruygt, CNPS, Napa Valley Chapter, pers. comm. 1996, public hearing transcript) in grasslands and openings in whiteleaf manzanita (*Arctostaphylos manzanita*)-blue oak (*Quercus douglasii*) woodlands (Liston 1990) over an elevation range of 75 to 225 meters (m) (240 to 840 feet (ft)). Six historical occurrences were known from Napa and Sonoma counties. Two of these occurrences were extirpated by urbanization and viticulture (California Natural Diversity Data Base (CNDDB) 1996). Of the remaining four occurrences, three are found in northwestern Napa County and one occurs in adjacent Sonoma County. These four disjunct occurrences are restricted to about 28 hectares (ha) (70 acres (ac)) (CNDDB 1996). The trend for Clara Hunt's milk-vetch is one of decline as a result of habitat destruction and modification (California Department of Fish and Game (CDFG) 1991). Extant populations of *A. clarianus* are variously threatened by urbanization, recreational activities, airport maintenance, elimination due to plant community succession, competition from invasive weeds, a proposed water storage project, and random events. Populations occur on private, State, and municipal land.

Edward Greene (1892) and Jepson (Abrams ex Jepson 1951) treated *Plagiobothrys strictus* as *Allocarya stricta* and *Allocarya californica* var. *stricta*, respectively, before Ivan Johnston (1923) assigned the name, *Plagiobothrys strictus*, to specimens collected on alkaline flats near sulphur springs at Calistoga, Napa County, California. This treatment was retained by Messick (1993). *Plagiobothrys strictus* is a small, erect, annual herb belonging to the borage family (Boraginaceae). It grows 1 to 4 decimeters (dm) (4 to 15 in) in height. The nearly hairless plant has either a single stem or branches from near the base. The linear lower leaves are 4 to 9 cm (1.5 to 4 in) long. Small, usually paired, white flowers appear in March to April in a slender, unbranched inflorescence. The fruit is an egg-shaped nutlet about 1.5 mm (0.6 in) long, keeled on the back, with wart-like projections without any prickles. *Plagiobothrys greenei, P. lithocaryus, P. mollis var. vestitus, P. stipitatus,* and *P. tener* have ranges that overlap with that of *Plagiobothrys strictus* and occur in similar habitats, but they do not resemble *P. strictus* and have not been found at the known *P. strictus* sites (J. Callizo, *in litt.* 1996).

Plagiobothrys strictus is found in pools and swales adjacent to and fed by hot springs and small geysers in grasslands within an elevation range of 90 to 160 m (300 to 500 ft). Three historical populations occurred within a 3 km (2 mi) radius of Calistoga, Napa County, California. One population was extirpated by urbanization and agricultural land conversion. Of the two remaining populations of P. strictus, one occurs near a geyser and some undeveloped thermal hot springs while the other occurs at the airport in the city of Calistoga. The combined area of the two remaining populations is less than 80 square meters (m^2) (900 square feet (ft^2)) (CNPS 1990). The overall trend for Calistoga allocarya (*Plagiobothrys strictus*) is one of decline (CDFG 1991). The species is threatened by recreational activities, airport maintenance, urbanization, and random events. Both populations are on private land and neither is protected.

Alan Beetle first described *Poa napensis* in 1946 from specimens that he collected in a meadow moistened by seepage from hot springs, 3 km (2 mi) north of Calistoga at Myrtledale Hot Springs, Napa County, California. This treatment was retained by Soreng (1993). *Poa napensis* is an erect, tufted perennial bunchgrass in the grass family (Poaceae) that grows to 1 dm (4 in) in height. Leaves are folded, stiffly erect, 1 mm (0.04 in) wide, with the basal leaves 20 cm (8 in) long and upper stem leaves to 15 cm (6 in) in length. A few stiff, erect flowering stems appear in May and grow 7 dm (27 in) in height. Flower clusters occur as a pale green to purple, condensed, oblong-oval panicle 10 to 15 cm (4 to 6 in) long and 2 to 5 cm (0.8 to 2.0 in) wide. *Poa napensis* most closely resembles *P. unilateralis* (ocean bluff bluegrass), but differs in leaf and panicle form and habitat.

Poa napensis is found in grasslands and moist, alkaline meadows fed by hot springs. The elevation range of this plant is 100 to 120 m (340 to 400 ft) within a radius of 6 km (4 mi) of Calistoga. Historically, the range of this plant has been diminished by the development of recreational hot springs and the growth of the town of Calistoga. Only two populations of the species are known to exist, one near Myrtledale Hot Springs which is restricted to a 100 m^2 (1,100 ft^2) area, and a second smaller population of 100 plants nearby (CDFG 1979). Both populations of *P. napensis* depend on moisture from adjacent hot springs or surface runoff. Any action that would alter the hydrology or flow from these hot springs would be detrimental to these populations (CDFG 1979). The trend for Napa bluegrass is one of decline (CDFG 1991). *Poa napensis* is threatened by recreational activities, airport maintenance, urbanization, and random events (CNPS 1987, 1990; J. Ruygt, *in litt.* 1993; J. Ruygt, pers. comm. 1996). Both extant populations are located on private land and are not protected.

Peter Rubtzoff (1961) described *Alopecurus aequalis* var. *sonomensis* based on a specimen collected in 1955

in Guerneville Marsh, Sonoma County, California. Specimens assignable to this taxon were collected as early as 1880 in Sonoma and Marin counties, but had been identified as *Alopecurus aequalis* Sobol., a circumboreal foxtail grass found as far south as adjacent Mendocino County. These specimens, however, deviated considerably from typical *A. aequalis* and were identified by Rubtzoff as *A. aequalis* var. *sonomensis.* Although William Crins (1993) only referred to this variety in passing in a discussion of the species, its varietal status adequately reflects its morphological and ecological attributes and it is considered to be a distinct variety (William Crins, Ontario Ministry of Natural Resources, *in litt.* 1993).

Alopecurus aequalis var. *sonomensis* is a tufted perennial in the grass family (Poaceae) that reaches 30 to 75 cm (12 to 30 in) in height. The stems are mostly erect and either straight or weakly bent near the base. The leaf blades are up to 7.5 mm (0.3 in) wide. The panicle is 2.5 to 9.0 cm (1.0 to 3.5 in) long and 4 to 8 mm (0.1 to 0.3 in) wide. The spikelets are usually tinged violet-gray near the tip. The awn (bristlelike part) is straight, and exceeds the lemma body by 1.0 to 2.5 mm (0.04 to 0.1 in). This variety is distinguished from *A. aequalis* var. *aequalis* by its more robust, upright appearance, generally wider panicle, violet-gray tinged spikelets, and longer awn (Rubtzoff 1961; William Crins, Ontario Ministry of Natural Resources, *in litt.* 1993).

When the proposed rule was written, *Alopecurus aequalis* var. *sonomensis* was known from five natural populations. Three of the sites, in Sonoma County, were privately owned, and two sites were on Federal land within Point Reyes National Seashore (PRNS) in Marin County (CNDDB 1993; Virginia Norris, CNPS, Marin Chapter, *in litt.* 1993). Three more natural sites in Marin County have since been identified. Two are on Federal land within PRNS, and the third is a private inholding within the PRNS (CNDDB 1996; V. Norris, *in litt.* 1995; Robert Soost, CNPS, Marin Chapter, *in litt.* 1996). One of the newly discovered populations was initially thought to be the result of seeds washed down from a reintroduced population, but it is now considered a natural population (V. Norris, *in litt.* 1995). All populations occur in moist soils in permanent freshwater marshes between 6 and 210 m (20 and 680 ft) in elevation.

Alopecurus aequalis var. *sonomensis* was known historically from 16 populations. The historical range of the taxon was approximately 48 km (30 mi), extending north from Point Reyes Peninsula to Guerneville and east to Cunningham. Although fewer sites are now present, the range of the species has changed little. The numbers of populations of this species are declining due to competition from invasive plant species, trampling and grazing by cattle, and low reproductive success. Three attempts to reintroduce the species in the PRNS have failed (CNDDB 1996; V. Norris, *in litt.* 1995). The proposed rule, published August 2, 1995 (60 FR 39314), stated that one attempt was destroyed by a flash flood in 1993. It is now thought that the affected population was a natural population and not a reintroduction. This population reestablished and contained 15 plants in 1994 and 13 in 1995 (V. Norris, *in litt.* 1995).

The number of individuals in populations of *Alopecurus aequalis* var. *sonomensis* may fluctuate markedly between years. The largest population recorded in recent years was about 600 plants in 1995; this population dropped to about 100 plants in 1996 (V. Norris, *in litt.* 1995; R. Soost, *in litt.* 1996). A population in Sonoma County reported to have 150 individuals in 1987 had dropped to only 4 plants by 1994 (V. Norris, *in litt.* 1995). Most often, populations of *A. aequalis* ssp. *sonomensis* have about 100 or fewer individuals (CNDDB 1996).

Liberty Bailey (1889) described *Carex albida* based on a specimen collected by John Bigelow in 1854 on Santa Rosa Creek, Sonoma County, California. Specimens of the plant collected by John T. Howell and John W. Stacey in 1937 were described as *C. sonomensis* (Stacey 1937), but Howell (1957) later stated that the type specimen of *C. albida* had been misinterpreted by Stacey and others and that *C. sonomensis* is a synonym of *C. albida.* Howell's interpretation continues to be accepted (Mastrogiuseppe 1993).

Carex albida is a loosely tufted perennial herb in the sedge family (Cyperaceae). The stems are triangular, 4 to 6 dm (1.3 to 2.0 ft) tall, erect, and longer than the leaves. The leaves are flat and 3 to 5 cm (1 to 2 in) wide with closed sheaths. The inflorescence consists of 4 to 7 ovoid or obovoid to oblong spikelets 8 to 18 mm (0.3 to 0.7 in) long. The achenes (fruits) are three-sided when mature. The sacs (perigynia) surrounding the achenes are light green to yellow-green when mature and 3.0 to 4.5 mm (0.1 to 0.2 in) long. Several traits distinguish *C. albida* from other closely related sedges. *Carex albida* has inflorescences with staminate flowers above the pistillate flowers, especially on the terminal inflorescence, lateral spikelets, and leaves that are shorter than the stems and 3 to 5 mm (0.1 to 0.2 in) wide. Some individuals of *Carex lemmonii* resemble *C. albida,* but differ in perigynia and fruit size, or in other respects.

Carex albida was thought to be extinct but is now known from a single population discovered in 1987. *Carex albida* was known historically from four other locations including the type locality on Santa Rosa Creek and three additional populations in two marshes, all in Sonoma County. The marsh containing *C. albida* at the Santa Rosa Creek site was destroyed in the 1960's by channelization and other alterations to Santa Rosa Creek (Betty Guggolz, CNPS, Milo Baker Chapter, *in litt.* 1993). A second marsh has been used for cannery waste disposal since 1971, causing the probable loss of the population (CNDDB 1996). At the third marsh, one of the two historical populations has not been seen since 1951. Access to the other population has been denied by the landowner, and the presence of the plant has not been confirmed since 1976. This marsh has become drier in recent years because the addition of wells and other construction has altered the marsh hydrology, and it likely no longer supports the species (B. Guggolz, *in litt.* 1993).

The only extant population of *C. albida* is found in a sphagnum bog, between 45 and 60 m (150 and 200 ft) in elevation. The population contains about 1,000 plants and occurs on private property in Sonoma County (CDFG 1993a, CNDDB 1996). *Carex albida* is threatened by potential alteration of hydrology from changes in land use or potential disturbance from a proposed wastewater treatment project, competition from invasive species, potential disturbance from repair or alteration of a nearby state highway, and random events.

F. Harlan Lewis and Margaret Lewis (1953) described *Clarkia imbricata* from specimens they collected on July 10, 1951, along Vine Hill Road, Sonoma County. This treatment continues to be accepted (Lewis 1993). *Clarkia imbricata* is an erect, annual herb in the evening-primrose family (Onagraceae). The stems grow to 6 dm (2.5 ft) tall, unbranched or with numerous short branches in the upper parts. This plant is densely leafy, with entire, lanceolate leaves 2.0 to 2.5 cm (0.8 to 1.0 in) long and 4 to 7 mm (0.2 to 0.3 in) broad that are ascending and overlapping. The showy inflorescences appear from June through July. The flowers are grouped closely together and each flower has a conspicuous funnel-shaped tube at its base. Each flower has four fan-shaped, lavender petals 2.0 to 2.5 cm (0.8 to 1.0

in) long with a V-shaped purple spot extending from the middle to the upper margin of the petal. *Clarkia purpurea* ssp. *viminea* is the only other *Clarkia* taxon with which *C. imbricata* can be confused. *Clarkia purpurea* ssp. *viminea* has a much shorter, funnel-shaped tube and does not have the relatively broad, ascending, overlapping leaves of *C. imbricata.*

Clarkia imbricata has never been known to be common. Unsuccessful searches for this plant at its type locality have been made since 1974 (B. Guggolz, *in litt.* 1993). This taxon is only known from two populations, one natural and one planted in a preserve, found in sandy grasslands in Sonoma County. The natural population was the source for cuttings that were transplanted into the 0.6 ha (1.5 ac) preserve in 1974. The two populations are 1.2 km (0.75 mi) apart, have an elevation range of 60 to 75 m (200 to 250 ft), and occur on private land. The natural population contains 2,000 to 5,000 plants and occurs on an open, flat grassland surrounded by a variety of introduced trees and shrubs. The planted population, located in a preserve owned and managed by the CNPS, has fluctuated between 200 and 300 plants. Plants have recently expanded onto an adjacent parcel of private land to the east, where 70 to 100 plants were found in 1993. The planted population is threatened by damage associated with trespassers collecting other rare plants found in the preserve, while the natural population is at risk due to proposed land use conversion (B. Guggolz, *in litt.* 1993). Both populations are also susceptible to adverse impacts from random events.

Lawrence Beane and Albert M. Vollmer first collected *Lilium pardalinum* ssp. *pitkinense* on July 20, 1954, in Sonoma County, California. Beane (1955) described the plant as *Lilium pitkinense.* Mark Skinner (1993) subsequently treated the plant as a subspecies of *L. pardalinum*.

Lilium pardalinum ssp. *pitkinense* is an herbaceous, rhizomatous (underground stem) perennial in the lily family (Liliaceae). The slender, erect stems reach 1 to 2 m (3 to 6 ft) in height. Leaves are yellow-green, up to 14 cm (5.5 in) long, and 1 to 2 cm (0.4 to 0.8 in) wide. The leaves are generally scattered along the stem, but in some plants occur in 2 or 3 whorls of 3 to 6 leaves near the middle of the stem. The inflorescence is a terminal raceme. The flowers are large, showy, and nodding. The petals, which are reflexed from the middle, are red at the outer edge changing to yellow at the center with small, deep maroon dots mostly within the yellow zone. Anthers (pollen-bearing part of the stamen) are purple-brown. The fruit is an elliptical capsule containing many rounded seeds (CDFG 1993b). The species flowers from June to July. *Lilium pardalinum* ssp. *pitkinense* is distinguished from *L. pardalinum* ssp. *pardalinum* by generally shorter petals and anthers.

Lilium pardalinum ssp. *pitkinense* grows only in permanently saturated, sandy soils in freshwater marshes and wet meadows that are 35 to 60 m (115 to 200 ft) in elevation. Only three populations of *L. pardalinum* ssp. *pitkinense* at two sites were recorded historically. All three populations are on private land within a distance of 13 km (8 mi) in Sonoma County. Access to one of the sites has been denied by the landowner since 1975 (CNPS 1988a). As a result, the status of this population has not been confirmed, but it is presumed to be extant. Two populations occur at a second site. The size of these populations has declined due to loss of habitat from urbanization and competition with blackberries (*Rubus* spp.) (CDFG 1993b). About 300 individual plants remain on these two sites (B. Guggolz, pers. comm. 1996). Collection of plants, seeds, and bulbs for horticultural use, competition from invasive plant species, potential disturbance from a proposed subdivision, trampling and herbivory by livestock and wildlife and random events threaten this species (Lynn Lozier, The Nature Conservancy (TNC), *in litt.* 1990; CDFG 1993b; B. Guggolz, pers. comm. 1993, 1996).

Edward L. Greene (1897) first described *Sidalcea oregana* ssp. *valida* in June, 1894, based on material he collected from Knight's Valley, Sonoma County, California. Since then, this taxon has been known as *S. maxima* (Baker), *S. oregana* var. *spicata* (Jepson), *S. eximia* (Baker) and *S. spicata* ssp. *valida* (Wiggins) (CNPS 1988b). C. L. Hitchcock (1957) studied the genus *Sidalcea* and recognized four subspecies, including *S. oregana* ssp. *valida,* a treatment accepted by Steven Hill (1993).

Sidalcea oregana ssp. *valida* is a perennial herb in the mallow family (Malvaceae). The plants are 1 to 2 m (3 to 6 ft) tall. The leaves are rounded. Lower leaves have 5 to 7 shallow lobes; upper leaves are generally smaller and divided into 3 to 5 entire, lanceolate segments. The compound inflorescence consists of densely flowered, spike-like racemes 2 to 5 cm (0.8 to 2.0 in) long. Petals are 1.0 to 1.5 cm (0.4 to 0.6 in) long, notched at the apex, and deep pink-mauve. The flowers appear from late June to September. *Sidalcea oregana* ssp. *valida* differs from *S. oregana* ssp. *eximia* in having a hairless calyx.

Sidalcea oregana ssp. *valida* has never been recorded as abundant and only two occurrences are known. These occurrences are about 29 km (18 mi) apart in Sonoma County, California. Both are on private land. *Sidalcea oregana* ssp. *valida* inhabits freshwater marshes approximately 150 m (490 ft) in elevation. One population covers less than 0.1 ha (0.25 ac), and was reported to have fewer than 100 plants in 1979 (CDFG 1987) and approximately 60 plants in 1993 (Nick Wilcox, State Water Resources Control Board, pers. comm. 1993). The other population contained approximately 70 individuals in 1993 (Ann Howald, CDFG, pers. comm. 1993). Both populations are adversely affected by trampling and reduced seed set resulting from cattle grazing (CNPS 1988b). The potential alteration of the hydrology of one site due to urbanization and water withdrawal poses a threat to the species (A. Howald, pers. comm. 1993). The plants may also suffer from competition by common tule (*Scirpus acutus*) and yellow star-thistle (*Centaurea solstitialis*), and from periodic maintenance of a local aqueduct located in the marsh (A. Howald, pers. comm. 1993). This species is also susceptible to adverse impacts from random events.

Edward L. Greene (1891) described *Trifolium amoenum* from specimens that he collected near Vanden, Solano County, California, in 1890. This treatment was retained by Duane Isely (1993). Historically, this species has been found in a variety of habitats including low, wet swales, grasslands, and grassy hillsides up to 310 m (1,020 ft) in elevation. This annual plant, which is a member of the pea family (Fabaceae), is hairy, erect, and grows to 1 to 6 dm (4 to 27 in) in height. The leaves are pinnately compound, widely obovate, and 2 to 3 cm (0.8 to 1.2 in) long. The flowers, which are purple with white tips, are 12 to 16 mm (0.5 to 0.6 in) long and occur in dense, round or ovoid heads, 2 to 3 cm (0.8 to 1.2 in) long. Flowers appear from April to June. *Trifolium amoenum* is similar in appearance to *T. macraei,* but is generally larger and the flowers lack subtending bracts.

The historical range of *Trifolium amoenum* was from the western edge of the Sacramento Valley in Solano County, west and north to Marin and Sonoma counties, where many sites were presumed extirpated by urban and agricultural development (CNPS 1977). Until 1993, *Trifolium amoenum* was considered extinct. However, one

locality was discovered in 1993 and a second in 1996. In 1993, Peter Connors, Bodega Marine Laboratory, discovered a single *Trifolium amoenum* plant in Sonoma County. The land on which this plant was found is private (CNDDB 1996), and at the time of writing of the proposed rule the land was for sale (Peter Connors, Bodega Marine Laboratory, pers. comm. 1994). No plants were found at the site in 1994 or 1995, and the site has now been developed (P. Connors, pers. comm. 1996). The only known extant population of *T. amoenum* is that found in 1996. This population consists of about 200 plants growing on two residential lots in Marin County. One lot has a house on it, and a house is being built on the other; both landowners are currently cooperating in the conservation of the species on their property (P. Connors, pers. comm. 1996).

In 1994, Dr. Connors grew 18 plants in cultivation from seed produced by the single plant found in 1993 (Connors 1994). These plants were grown to produce seed for later reintroduction efforts (P. Connors, pers. comm. 1994); the seed is expected to be viable for decades (P. Connors, pers. comm. 1996). Should additional *T. amoenum* be found, these populations would likely be threatened by urbanization, competition with invasive plants, land conversion to agriculture, livestock grazing, and random events.

Previous Federal Action

Federal government actions on these nine species began as a result of section 12 of the Act which directed the Secretary of the Smithsonian Institution to prepare a report on those plants considered to be endangered, threatened, or extinct in the United States. This report, designated as House Document No. 94–51, was presented to Congress on January 9, 1975, and included *Astragalus clarianus, Carex albida, Clarkia imbricata, Lilium pardalinum* ssp. *pitkinense* (as *L. pitkinense*), *Plagiobothrys strictus, Poa napensis,* and *Trifolium amoenum* as endangered and *Sidalcea oregana* ssp. *valida* as threatened. The Service published a notice in the July 1, 1975, **Federal Register** (40 FR 27823) of its acceptance of the report of the Smithsonian Institution as a petition within the context of section 4(c)(2) (petition provisions are now found in section 4(b)(3) of the Act) and of its intent to review the status of the plant taxa named therein. The above eight taxa were included in the July 1, 1975, notice. On June 16, 1976, the Service published a proposal in the **Federal Register** (41 FR 24523) to determine approximately 1,700 vascular plant species to be endangered species pursuant to section 4 of the Act. The list of 1,700 plant taxa was assembled on the basis of comments and data received by the Smithsonian Institution and the Service in response to House Document No. 94–51 and the July 1, 1975, **Federal Register** publication. *Astragalus clarianus, Carex albida, Clarkia imbricata, Lilium pardalinum* ssp. *pitkinense, Poa napensis,* and *Trifolium amoenum* were included in the June 16, 1976, **Federal Register** document.

General comments received in relation to the 1976 proposal were summarized in an April 26, 1978, **Federal Register** publication (43 FR 17909). The Endangered Species Act Amendments of 1978 required that all proposals over 2 years old be withdrawn. A 1-year grace period was given to those proposals already more than 2 years old. In the December 10, 1979, **Federal Register** (44 FR 70796), the Service published a notice of withdrawal of the June 16, 1976, proposal, along with four other proposals that had expired.

The Service published a Notice of Review for plants in the **Federal Register** on December 15, 1980 (45 FR 82480). This notice included *Alopecurus aequalis* var. *sonomensis, Astragalus clarianus, Carex albida, Clarkia imbricata, Lilium pardalinum* ssp. *pitkinense, Plagiobothrys strictus, Poa napensis, Sidalcea oregana* ssp. *valida,* and *Trifolium amoenum* as a Candidate species. On November 28, 1983, the Service published a supplement to the Notice of Review (48 FR 53640). This supplement changed *Alopecurus aequalis* var. *sonomensis, Astragalus clarianus, Plagiobothrys strictus, Poa napensis, Sidalcea oregana* ssp. *valida,* and *Trifolium amoenum* to category 2. At that time, category 2 taxa were those being considered for possible addition to the Federal List of Endangered and Threatened Wildlife. Designation of category 2 species was discontinued in the February 28, 1996, **Federal Register** notice (61 FR 7596).

The plant notice was revised again on September 27, 1985 (50 FR 39526). The candidate status of eight of the plant species remained unchanged in this notice. *Trifolium amoenum* was indicated as being possibly extinct. Another revision of the plant notice was published on February 21, 1990 (55 FR 6184). In this revision, *Astragalus clarianus, Plagiobothrys strictus, Poa napensis,* and *Sidalcea oregana* ssp. *valida* were designated as Candidates. The Service made no changes to the status of any of the nine species in the plant notice published on September 30, 1993 (58 FR 51144). The Service approved Candidate status for *Alopecurus aequalis* var. *sonomensis* on August 26, 1993. However, the status change was inadvertently not published in the plant notice published on September 30, 1993. After the publication of that notice, the Service received information that *Trifolium amoenum* had been rediscovered (Connors 1994).

In the August 2, 1995, **Federal Register**, the Service published a proposed rule to list the nine plant species as endangered, and invited public comment (60 FR 39314). Processing of the proposed rule was delayed by a congressional moratorium on activities associated with final listings from April 10, 1995, through April 26, 1996. After the moratorium was lifted, the Service reopened the comment period and scheduled a public hearing on September 11, 1996 (61 FR 47856).

Section 4(b)(3)(B) of the Act requires the Secretary to make 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. This was the case for *Astragalus clarianus, Carex albida, Clarkia imbricata, Lilium pardalinum* ssp. *pitkinense, Plagiobothrys strictus, Poa napensis, Sidalcea oregana* ssp. *valida,* and *Trifolium amoenum* because the 1975 Smithsonian report had been accepted as a petition. The Service found that the petitioned listing of those eight species was warranted but precluded by other higher priority listing actions. This finding was reviewed annually in October from 1983 through 1994. Publication of the proposed rule on August 2, 1995 (60 FR 39314), constituted the final finding for the petitioned action for these species.

The processing of this final listing rule conforms with the Service's final listing priority guidance made final on December 5, 1996 (61 FR 64475). The guidance clarifies the order in which the Service will process rulemakings following two related events, the lifting, on April 26, 1996, of the moratorium on final listings imposed on April 10, 1995 (Pub. L. 104–6) and the restoration of significant funding for listing through passage of the omnibus budget reconciliation law on April 26, 1996, following severe funding constraints imposed by a number of continuing resolutions between November 1995 and April 1996. The guidance calls for giving highest priority to handling

emergency situations (Tier 1) and second highest priority (Tier 2) to resolving the status of proposed listings. A lower priority is assigned to resolving the conservation status of candidate species and processing administrative findings on petitions to add species to the lists or reclassify species from threatened to endangered status (Tier 3). The lowest priority actions are in Tier 4, a category which includes processing critical habitat determinations, delistings, or other types of reclassifications. Processing of this final rule is Tier 2 action.

Summary of Comments and Recommendations

In the August 2, 1995, proposed rule and associated notifications, all interested parties were requested to submit factual reports or information that would contribute to the development of a final determination on the proposed listing. A 65-day comment period closed on October 9, 1995. Appropriate Federal and State agencies, county and city governments, scientists, and interested parties were contacted and requested to comment. The Service published notices in the *Marin Independent Journal, Mill Valley Pacific Sun, Santa Rosa Press Democrat, Ross Valley Reporter, San Francisco Chronicle* and *San Francisco Examiner* on August 9, 1995, in the *Napa Register* on August 10, 1995, and in the *Napa County Record* and *Petaluma Argus-Courier* on August 11, 1995, inviting general public comment. In response to the publication of the proposed rule, the Sonoma County Farm Bureau, Santa Rosa, California, requested a public hearing in one of 2 letters each dated August 28, 1995.

Following the lifting of the listing moratorium, the comment period was reopened on September 11, 1996, for 35 days, closing on October 15, 1996. Upon the reopening of the comment period, the Service again contacted interested parties, and published notices—in the *Petaluma Argus-Courier* on September 17, 1996, in the *Marin Scope* and *Mill Valley Pacific Sun* on September 18, 1996, and in the *Marin Independent Journal, Napa Register,* and *Santa Rosa Press Democrat* on September 19, 1996—inviting general public comment and announcing the scheduling of a public hearing. A public hearing was held at the Best Western Novato Oaks Inn in Novato, California, on October 3, 1996. The hearing was attended by approximately 20 people, of whom nine presented oral or written testimony.

In accordance with Service peer review policy published on July 1, 1994, (59 FR 34270), the Service sent copies of the proposed rule to one ecologist who works for a university, two plant ecologists who work for State agencies, eight university professors who are species experts, and six other species experts. The Service received one response, from a species expert. The comments received in this response did not contain any new information substantive to the listing determination. The remaining reviewers did not respond to the Service.

In total, 24 individuals, groups, or agencies submitted comments, including the California Department of Parks and Recreation, the California Native Plant Society (CNPS), the Marin and the Sonoma County Farm Bureaus, the California Cattlemen's Association, and the Washington Legal Foundation. Several individuals commented more than once. Nine commenters supported the proposed action, eight opposed it or expressed reservations, and seven did not state a position. Several commenters provided corrections or updated information regarding one or more of the species proposed for listing. The Service has incorporated into the final rule any verifiable new information that is substantive to the listing decision.

Written comments and oral statements presented at the public hearing and received during the comment periods are addressed in the following summary. Comments of a similar nature are grouped together into general issues. These issues and the Service's responses are presented below.

Issue 1: Several commenters expressed concern that listing the plants would adversely affect the economies of Marin, Sonoma, and Napa counties, or requested the Service to consider possible economic impacts.

Service Response: Under section 4(b)(1)(A), a listing determination must be based solely on the best scientific and commercial data available. The legislative history of this provision clearly states the intent of Congress to ''ensure'' that listing decisions are ''based solely on biological criteria and to prevent non-biological considerations from affecting such decisions,'' H. R. Rep. No. 97–835, 97th Cong. 2d Sess. 19 (1982). As further stated in the legislative history, ''Applying economic criteria * * * to any phase of the species listing process is applying economics to the determinations made under section 4 of the Act and is specifically rejected by the inclusion of the word 'solely' in this legislation,'' H.R. Rep. No. 97–835, 97th Cong. 2d Sess. 19 (1982). Because the Service is precluded from considering economic impacts in a final decision on a proposed listing, the Service has not examined such impacts.

Issue 2: One commenter stated that the Service must complete a Taking Implications Assessment, as directed by Presidential Executive Order 12630, before issuing a final rule.

Service Response: The Attorney General has issued guidelines to the Department of the Interior (Department) on implementing Executive Order 12630: Governmental Actions and Interference with Constitutionally Protected Property Rights. Under these guidelines, a special rule applies when an agency within the Department is required by law to act without exercising its usual discretion, that is, to act solely upon specified criteria that leave the agency no choice. In the present context, the Service's action might be subject to legal challenge if it considered or acted upon economic information in reaching a listing decision.

In such cases, the Attorney General's guidelines state that Taking Implications Assessments (TIAs) shall be prepared after, rather than before, the agency makes the decision in which its discretion is restricted. The purpose of the TIAs in these special circumstances is to inform policy makers of areas where unavoidable taking exposures exist. Such TIAs must not be considered in the making of administrative decisions that must, by law, be made without regard to their economic impact. In enacting the Act, Congress required that listings be based solely on scientific and commercial data showing whether or not the species are in danger of extinction. Thus, by law and by U.S. Attorney General guidelines, the Service is forbidden to conduct TIAs prior to listing.

Issue 3: Several commenters expressed concern that farmers and ranchers would be restricted in their everyday operations by listing of the nine plant species. One worried that farmers and ranchers would be subject to criminal prosecution for the accidental taking of these plants. Another suggested that compensation should be provided for land taken out of range production.

Service Response: The Act does not restrict the taking of listed plants due to otherwise lawful private activities on private land. Listing the nine plants as endangered will not regulate farming or ranching operations, including cattle grazing, on private land. Other activities that do not violate the taking prohibitions of section 9(a)(2) of the Act are discussed further under ''Conservation Measures.''

Issue 4: Several commenters, including representatives of the California Cattlemen's Association, Sonoma-Marin Cattlemen's Association, and the Marin County Farm Bureau, stated that grazing is likely to be beneficial to the nine plant species, both as a land use alternative to urbanization and other land uses, and in reducing competition from other plant species, notably nonnative grasses. One commenter stated that there is no verifiable evidence of a relationship between grazing and these plants. Another said that because there is public debate about the effects of grazing on land and vegetation, little scientific basis exists for claims that grazing is a threat. One commenter asserted that the Service has a strong bias against all grazing.

Service Response: Some degree of grazing by cattle and other animals is likely to be beneficial to some or all of the nine plant species addressed in this rule. Evidence that heavy grazing is a threat to some of the species, however, is discussed under Factor C. The Service is not opposed to grazing, and maintains that best grazing management practices are compatible with many natural resource objectives.

Issue 5: Two commenters believed that listing would allow the Service or the California Department of Fish and Game to intrude upon private property to search for the listed plants.

Service Response: Listing will have no such effect. The Act does not give any person or government agency the right to trespass.

Issue 6: Several commenters requested an extension of the comment period beyond the second deadline of October 15, 1996. One member of the Marin County Farm Bureau stated that their organization had not had adequate time to notify their membership of the public hearing regarding the proposed rule. Other commenters requested additional hearings at more convenient places and times.

Service Response: The Service believes that the comment period provided was adequate. The beginning of this section reviews the Service's efforts to notify the public of the proposed rule regarding these nine plants. In addition to publication in the **Federal Register** and public notices appearing in several local and regional newspapers, the Service mailed separate notifications of the public hearing to species experts, other individuals, and Federal, State, and county entities, including the Marin County Farm Bureau, on September 17, 1996. The location and time of the public hearing was selected to be convenient to most citizens living around populations of the proposed plant species.

Issue 7: One commenter, noting certain errors in the proposed rule and in a Service press release on the proposed listing, requested an additional public hearing after corrections had been made.

Service Response: One purpose of the public comment period is to seek feedback on the accuracy of the information in the proposed rule; correction of errors in the rule does not mandate the re-opening of public comment. The inaccurate information in the Service's press release dealt only with consequences of any listing, not with information or procedures relevant to this listing determination.

Issue 8: One commenter questioned whether all appropriate public land has been surveyed for the nine plant species, and whether the species can truly be listed as threatened by extinction without such surveys. She requested that the listing decision be postponed and the comment period be extended until such surveys have been conducted. Another commenter asserted that the Service lacks data supporting the likelihood of the purported threats to the species, and that the Service has discussed threats that do not exist. As examples, the commenter stated that the water level of Lake Hennessey has not been raised such that it completely inundates a population of *Astragalus clarianus* and that *Carex albida* is not grazed, yet the Service considers these threats.

Service Response: The Act requires the Service to reach its decision based on the best scientific and commercial information available. The Service believes that botanical study of the appropriate habitats on public and private lands in Marin, Napa, Sonoma, and nearby counties has been adequate to show that the nine plants are indeed extremely rare. The threats to the species discussed under Summary of Factors Affecting the Species are also based on the best information available, and are well documented or reasonably foreseeable. With respect to the assertion that the Service has identified threats that do not exist, threats, by general definition, are descriptions of events that have not yet taken place but that are likely to occur in the foreseeable future.

Issue 9: One commenter argued it would be safer to engage in conservation actions without listing the nine plants, since listing could provoke malicious damage.

Service Response: Factor D presents information about the inadequacy of existing protections for the nine plant species. Additional protections that they will receive as a result of listing are discussed under Available Conservation Measures. The Service believes that listing these nine species as endangered under the Act will significantly reduce the threats to their continued existence. Although real, the Service considers the risk of malicious damage to most of these plants to be relatively small, especially for the species that are inconspicuous. The degree of risk, however, will increase significantly if precise maps of the locations of these species were published. This aspect is discussed further in the Critical Habitat section.

Issue 10: One commenter asserted that the Service has not given proper consideration to data provided by ranchers and other landowners, and that the Service gives much more weight to the information provided by California Native Plant Society volunteers. He further stated that references to grazing impacts in reports to the Natural Diversity Database maintained by the California Department of Fish and Game are inaccurate and biased and that the volunteers who submit these reports lack experience in range management or livestock behavior.

Service Response: The Service considers all information received from all sources. No group's or individual's information receives ''more weight'' than others. Information received from all sources was carefully evaluated in accordance with Service policy on information standards under the Act, published on July 1, 1994 (59 FR 34271). Criteria for what information may be considered are discussed in the Summary of Factors Affecting the Species, and in the response to Issue 1. The Service has checked all substantive information for accuracy, and believes that the information included in this rule is reliable and credible and represents the best scientific and commercial information available.

Issue 11: One commenter, representing the California Cattlemen's Association, commented that it is very unlikely that grazing is a threat to *Lilium pardalinum* ssp. *pitkinense*, in part because livestock prefer dry areas to the bogs and marshes in which this plant grows.

Service Response: Although cattle prefer dryer areas, they will enter and graze such wet areas, especially if forage in the surrounding dry areas is less attractive. Evidence of cattle and other herbivores grazing on *Lilium pardalinum* ssp. *pitkinense*, is discussed under Factor C.

Issue 12: One commenter suggested that the nine plants may be naturally rare, and may nevertheless be thriving.

Service Response: Decisions on listing plants and animals are based on the threats facing the species. A species may be determined to be endangered or threatened due to one or more of the five factors described in section 4(a)(1) of the Act. Evidence that the nine plants are in danger of extinction in all or significant portions of their ranges is discussed under Summary of Factors Affecting the Species.

Issue 13: One commenter noted that the proposed rule claimed that habitat for *Trifolium amoenum* has been lost due to livestock grazing and called for the Service to recognize that livestock grazing does not permanently alter the landscape.

Service Response: The final rule has been changed to clarify that proper grazing generally does not cause permanent habitat loss.

Issue 14: Two commenters suggested that the observation in the proposed rule that a fenced population of *Lilium pardalinum* ssp. *pitkinense* continued to suffer from herbivory demonstrating that something other than domestic livestock is causing the damage.

Service Response: The Service maintains that domestic livestock as well as other vertebrate and invertebrate herbivores are capable of damaging these plants (see Factor C and response to Issue 11).

Issue 15: One commenter said that *Alopecurus aequalis* var. *sonomensis* and *Trifolium amoenum* might prove to have agricultural value, since both are palatable to cattle. *Alopecurus aequalis* var. *sonomensis* appears tolerant of some grazing, and *T. amoenum* might renew soil fertility and provide valuable forage if it could be grown in sufficient quantity. The commenter speculated that these species could be seeded to improve pastures.

Service Response: The Service will evaluate these points as it plans and implements the recovery of these species.

Issue 16: One commenter argued that passive preservation of individual species is ecologically unsound and will not ultimately protect biodiversity.

Service Response: The Service notes that habitat protection helps conserve other species with similar habitat needs contributing to the biodiversity of the ecosystem. Some species require active management and the Service will address this in the recovery plan.

Issue 17: One commenter asserted that policies calling for the removal of nonnative species are based on outdated science, that nonnative plants have increased the biodiversity of California's annual grasslands and that these alien species do not threaten the ecological community of grasslands.

Service Response: The Service has extensive information and has received a large number of comments from farmers, ranchers, and scientists, indicating that competition from invasive plants, mostly of nonnative origin, has played a major role in the decline of several of the nine plant species and is a continuing and serious threat to most of them. This information is summarized under Factor E.

Issue 18: One commenter stated that, under the National Environmental Policy Act (NEPA), the Service must prepare an Environmental Impact Statement (EIS) for this rule.

Service Response: For the reasons set out in the NEPA section of this document, the Service has determined that the rules issued under section 4(a) of the Act do not require the preparation of an EIS. Courts in Pacific Legal Foundation v. Andrus, 657 F.2d 829 (6th Circuit 1981), held that an EIS is not required for listing under the Act. The Sixth Circuit decision noted that preparing an EIS on listing actions does not further the goals of NEPA or the Act.

Issue 19: One commenter urged the Service, in the event of listing, to designate critical habitat for the nine plant species with a consideration of economic impacts of such designation required by law.

Service Response: The Service has determined that the designation of critical habitat for these nine plant species is not prudent. Please refer to the ''Critical Habitat'' section of this rule for a detailed discussion of the critical habitat determination.

Summary of Factors Affecting the Species

After a thorough review and consideration of all information available, the Service has determined that *Alopecurus aequalis* Sobol. var. *sonomensis* Rubtzoff (Sonoma alopecurus), *Astragalus clarianus* Jepson (Clara Hunt's milk-vetch), *Carex albida* Bailey (white sedge), *Clarkia imbricata* Lewis and Lewis (Vine Hill clarkia), *Lilium pardalinum* Kellogg. ssp. *pitkinense* (Beane and Vollmer) M. Skinner (Pitkin Marsh lily), *Plagiobothrys strictus* (Greene) I.M. Johnston (Calistoga allocarya), *Poa napensis* Beetle (Napa bluegrass), *Sidalcea oregana* (Nutt.) Gray ssp. *valida* (Greene) C.L. Hitchcock (Kenwood Marsh checker-mallow), and *Trifolium amoenum* Greene (showy Indian clover) should be classified as endangered species. The Service followed procedures found at section 4(a)(1) of the Act and regulations implementing the listing provisions of the Act (50 CFR part 424) in reaching this determination. A species may be determined to be endangered or threatened due to one or more of the five factors described in section 4(a)(1). These factors and their application to the nine species are as follows:

A. *The present or threatened destruction, modification, or curtailment of their habitat or range.* Habitat destruction and modification due to urbanization, land use changes, or alterations in hydrology pose the most serious threats to the survival of these nine plant species.

Astragalus clarianus is known currently from three populations in Napa County and one population in Sonoma County (CNPS 1989, CNDDB 1996). The four populations face a variety of threats to their continued existence. One population in Napa County was reduced in size when the creation of Lake Hennessey in the 1950's inundated much of the site (L. Lozier, pers. comm. 1993). The City of Napa owns the lake and uses Lake Hennessey as a water source. Recently, the City of Napa conducted a feasibility study on the raising in elevation of the dam as part of a project to increase water storage for the city. This would have raised the lake level and submerged the remnant population of *A. clarianus* (J. Ruygt, CNPS, *in litt.* 1993). This increased water-storage project at Lake Hennessey is currently considered too costly (Don Ridenhour, Public Works Dept., City of Napa, pers. comm. 1993). However, any future water storage project that would involve increasing the height of the dam and raising the level of Lake Hennessey would constitute a threat to the population of *A. clarianus* that lies along the lakeshore. In December 1990, this remnant population was nearly destroyed when dredge spoils from the lake were placed on top of it (A. Howald, pers. comm. 1993). The City of Napa, in cooperation with CDFG, removed most of the dredge spoils and fenced the 1 ha (2 ac) area, placing a gate in the fence for fishing access to the lake. Ground disturbance caused by dredge spoil removal resulted in proliferation of invasive weeds that further threaten the site, as discussed below under Factor E. The population has not recovered well (J. Ruygt, pers. comm. 1996). Eight plants of *A. clarianus* were counted at this site in 1991, 325 plants in 1992, 156 plants in 1993 (CDFG 1989; J. Ruygt, *in litt.* 1993), 9 plants in 1994 (CNDDB 1996), and 15 plants in 1996 (J. Ruygt, pers. comm.

1996, public hearing transcript). The area remains a favorite fishing access to the lake and receives significant use by the public (CDFG 1989). The City of Napa has repaired damage to the fence several times (A. Howald, pers. comm. 1993).

Another population of *Astragalus clarianus* occurs in Bothe Napa Valley State Park. Plant numbers have been reported as 8 plants in 1988, 220 plants in 1992, 101 plants in 1993, and 39 plants in 1996 on a 1 ha (2 ac) monitoring site (J. Ruygt, *in litt.* 1993, pers. comm. 1996, public hearing transcript). The larger portion of the population of *A. clarianus* outside of the monitoring zone occurs sparsely on a 6 ha (15 ac) area. This area has been partially protected by placing brush piles next to a foot trail to divert people away from the population (William Grummer, Bothe Napa Valley State Park, California Dept. of Parks and Recreation, pers. comm. 1993). The general plan for the park indicates a campground to be placed over the larger portion of *A. clarianus*, but the Service does not consider the proposed action in this plan as an imminent threat because of lack of funding and possible revisions to the park plan (W. Grummer, pers. comm. 1993). At present, no specific plans to develop a campground have been made (W. Grummer, pers. comm. 1996). Although the campground development may be relocated away from the population of *A. clarianus*, the Service considers that increased recreational use from an additional campground in this park constitutes a potential threat.

The third population of *Astragalus clarianus* occurs near the City of Santa Rosa in eastern Sonoma County. This population was estimated at 2,100 plants in 1996 scattered over 6 ha (15 ac) and appears stable at the present time (Saxon Holt, CNPS, Milo Baker Chapter, pers. comm. 1996). It is on private land under a voluntary protection agreement with TNC. Upslope and adjacent to this population is the 454 ha (1,350 ac) approved Saddle Mountain subdivision (J. Ruygt, *in litt.* 1993, S. Holt, pers. comm. 1996). Soil erosion from proposed road and pad construction for house lots potentially threatens this population of *A. clarianus* (J. Ruygt, *in litt.* 1993). Construction of this development has not yet begun (S. Holt, pers. comm. 1996).

The fourth population of *Astragalus clarianus* consisted of 2,238 plants in 1993 scattered over less than 2 ha (5 ac) of private land (J. Ruygt, *in litt.* 1993). Feral pigs uprooted a substantial number of plants during 1994; the number of plants at this site has declined in 1995 and 1996, although this decline may be attributable to factors other than damage by pigs (J. Ruygt, pers. comm. 1996, public hearing transcript).

One historical occurrence and over 70 percent of the original habitat of *Plagiobothrys strictus* have been extirpated by urbanization and conversion of land to vineyards (CNPS 1990). The two remaining populations of *P. strictus* are threatened by urbanization (CNDDB 1996, CNPS 1990). One of these populations occurs at the Calistoga Airport, where about 5,000 plants were counted in an area of about 180 m^2 (2,000 ft^2) in 1994 (J. Ruygt, pers. comm. 1996, public hearing transcript). The number of individuals in this population fluctuates considerably, perhaps due to variations in spring rainfall between years (CDFG 1988). Future development at this site could threaten this population (J. Ruygt, *in litt.* 1993), as could airport maintenance activities (J. Ruygt, pers. comm. 1996). The other population of *P. strictus* is scattered over a 4 ha (10 ac) area bisected by an asphalt road on private land near Myrtledale Hot Springs in the City of Calistoga. The number of individuals in this population was estimated to be in the hundreds (J. Ruygt, *in litt.* 1993). In recent years, the landowner has denied access to the site. The landowner has proposed to build a hospital on this site, but has been unsuccessful due to current zoning status (CDFG 1988; J. Ruygt, *in litt.* 1993; J. Ruygt, pers. comm. 1996).

Historically, the habitat of the two remaining populations of *Poa napensis* has been reduced by the development of health spas and resorts in the City of Calistoga and other construction activities at the Calistoga Airport (CNPS 1989). The remnant population of *P. napensis* at the Calistoga Airport was thought to be extirpated as a result of construction activities in 1981 because no plants were found that year. By 1987, however, 500 plants were counted at the airport location (CDFG 1989; J. Ruygt, *in litt.* 1993). In 1994 and 1996, about 150 plants were counted at the airport site (J. Ruygt, pers. comm. 1996). The only other population is near Myrtledale Hot Springs in the City of Calistoga, where several thousand plants were reported in a 100 m^2 (1,100 ft^2) area in the early 1980's. The landowner has denied access to the property in recent years. Because *Poa napensis* and *Plagiobothrys strictus* occur at both the Calistoga Airport site and the other site near Myrtledale Hot Springs, the threats from urbanization, including construction of a hospital, are the same for both species (CNPS 1987, 1990; J. Ruygt, *in litt.* 1993; J. Ruygt, pers. comm. 1996).

The single known population of *Carex albida* is located approximately 46 m (150 ft) from a State highway in a sphagnum bog. Any direct impact or change in the hydrology of the area resulting from highway widening or maintenance, or a change in land use would adversely affect the population. Draining the wetland would not only directly impact the species but would encourage the spread of blackberries (*Rubus* spp.), which have become dominant in other parts of the marsh that have been drained (CDFG 1993a; CNDDB 1996; B. Guggolz, *in litt.* 1993).

When the proposed rule was written, a wastewater treatment project was proposed to be built 300 m (328 yards) from the Carex albida population. Potential impacts from this project, as originally proposed, included adverse effects from the application of recycled wastewater and the temporary or permanent removal of wetlands, riparian vegetation, and special status plants and their habitats (Environmental Science Associates 1993). The treatment plant has now been constructed, but the use of recycled wastewater has not been implemented (B. Guggolz, pers. comm. 1996). If implemented, from 1,200 to 4,900 cubic m (1 to 4 ac-ft) of wastewater per year would be applied on approximately 14 to 27 ha (35 to 60 ac) of land. Although the population of *C. albida* would not be directly impacted, the application of this volume of wastewater could result in the alteration of remaining habitat within the historical range of *C. albida* through modification of surface hydrology (Environmental Science Associates 1993). The historical ranges of *Lilium pardalinum* ssp. *pitkinense* and *Alopecurus aequalis* var. *sonomensis* also occur within the project boundaries.

The type locality of *Clarkia imbricata* along the roadside at Pitkin Ranch was extirpated prior to 1974, as a probable result of changes in land use or roadside maintenance (B. Guggolz, *in litt.* 1993). Another population of *C. imbricata* in Sonoma County was extirpated as a result of tree farming and weed control activities (B. Guggolz, *in litt.* 1993). The sole remaining natural population of C. imbricata is threatened by changing land use, such as conversion to agriculture, and inadvertent mowing of its habitat (B. Guggolz, *in litt.* 1993; B. Guggolz, pers. comm. 1996).

One site with two populations of *Lilium pardalinum* ssp. *pitkinense* was largely destroyed by urbanization in 1961; however, approximately 300 plants remain at this site (CDFG 1993b;

B. Guggolz, pers. comm. 1996). Although a subdivision is planned for the area surrounding a portion of this site, the landowner agreed to protect a portion of the habitat of *L. pardalinum* ssp. *pitkinense* (Allan Buckmann, CDFG, *in litt.* 1993; B. Guggolz, pers. comm. 1996). This agreement, if implemented, would place all sensitive natural resource areas in a conservation easement for long-term management, with CDFG as easement holder (A. Buckmann, *in litt.* 1993). Neither this easement, however, nor another easement that would protect the other population of *L. pardalinum* ssp. *pitkinense* at this site, has been executed and recorded (B. Guggolz, pers. comm. 1996). At the second site, wetland fills in the marsh have lowered the water table and resulted in drier soil conditions, which have negatively affected *L. pardalinum* ssp. *pitkinense*. This change in habitat quality is considered a significant threat to the population (CDFG 1993b), since only about 10 plants remain at this site (CNDDB 1996; B. Guggolz, pers. comm. 1996).

One of the two remaining sites of *Sidalcea oregana* ssp. *valida* is threatened by permitted and unauthorized water diversions from a stream that flows into the marsh where two subpopulations of the species occur. In the past, these diversions have removed all water from the stream channel, eliminating a source of surface water to the marsh (A. Howald, pers. comm. 1993). Plant census data from 1991 indicate that the eastern and western subpopulations in the marsh declined by approximately 40 and 30 percent, respectively, compared to 1989 and 1990 data. These figures suggest that this population may have been experiencing a delayed response to a drought period that began in the late 1980's. The adverse effects of future droughts may be exacerbated by increased surface water diversions and result in a further decline, or extinction of the species (John Turner, CDFG, *in litt.* 1993).

Trifolium amoenum was known from about 20 historical occurrences in 7 counties (Skinner and Pavlik 1994; CNDDB 1996). Loss of this habitat resulted primarily from urbanization and land conversion to agriculture (CNPS, 1977; Corelli and Chandik 1995). Two occurrences of *T. amoenum* have been recently discovered. The occurrence found in 1993 in Sonoma County consisted of a single plant located on private property that has subsequently been developed. The second, a population of about 200 plants, is found on two residential lots in Marin County (P. Connors, pers. comm 1996). If this property is further developed or altered, it may no longer contain suitable habitat for *T. amoenum*. Widespread urbanization has occurred, and continues to occur, throughout the historic range of the species. The populations of Sonoma and Marin counties are expected to grow by 11.1 and 10.4 percent, respectively, by the year 2000 (California Department of Finance 1993, 1996).

B. *Overutilization for commercial, recreational, scientific, or educational purposes.* One of the remaining populations of *Lilium pardalinum* ssp. *pitkinense* has been nearly extirpated by uncontrolled collection of plants, seeds, and bulbs for horticultural use. This species was abundant historically at this site, but the removal of plants and bulbs for horticultural use reduced this population to two plants by 1993 (CDFG 1993b). This population of *L. pardalinum* ssp. *pitkinense* has since expanded slightly to approximately 10 plants (B. Guggolz, pers. comm. 1996). Similar activities at the remaining site, which contains only 300 individuals in two populations, would likely result in the extinction of the species (B. Guggolz, pers. comm. 1993, 1996). Of the two remaining populations of *Clarkia imbricata*, one population is found in a preserve owned by the CNPS. Although CNPS has attempted to discourage unauthorized collection by fencing the preserve and by not publicizing the exact location of the site, trespassers have damaged the fence, trampled the vegetation, and collected seed of *C. imbricata* on several occasions (B. Guggolz, *in litt.* 1993).

No evidence of over-collection of *Sidalcea oregana* ssp. *valida* by botanists and/or horticulturists for scientific and commercial purposes is known at this time, although the species is considered to have horticultural potential (Hill 1993). Both populations are small enough, however, that even limited collecting pressure would have adverse impacts. *Sidalcea oregana* ssp. *valida* is an attractive plant, and may be sought for collection once the rarity of this species becomes known and if current site locations become known. Wild collected seed of the species, *S. oregana* (no variety given), are available through a seed exchange program offered by an international gardening society (North American Rock Garden Society (NARGS) 1996).

Any occurrences of *Trifolium amoenum* that may be discovered in the future also may attract collectors of plants or seed because the species was previously considered to be extinct. Overutilization is currently not known to be a factor for the remaining five species, but unrestricted collecting for scientific or horticultural purposes or excessive visits by individuals interested in seeing rare plants could result from increased publicity as a result of this proposal.

C. *Disease or predation.* Little is known about any diseases that may affect the nine plant species considered here. None of the species is currently known to be threatened by disease.

Seven of the 8 known sites of *Alopecurus aequalis* var. *sonomensis* are currently grazed or have been grazed in recent years by cattle (CNDDB 1996; V. Norris, *in litt.* 1995; R. Soost, *in litt.* 1996). All three populations in Sonoma County are currently threatened by cattle grazing (CNDDB 1996), as is a portion of one population outside of a fenced area on the PRNS where three small patches disappeared from a gathering place for cattle over a one week period of observation (V. Norris, *in litt.* 1995). The portion of the population inside of the fenced area decreased from 603 flowering culms (stems) in 1995 to 195 flowering culms in 1996, possibly due to annual fluctuation or competition from other vegetation (R. Soost, *in litt.* 1996). Another population on the PRNS was fenced from cattle in 1987. The number of individuals of *A. aequalis* var. *sonomensis* was 0 in 1990, 14 in 1991, and 0 in 1993, possibly due to competition from a dense growth of other marsh plants (V. Norris, *in litt.* 1993). Since then, experiments have been conducted with partial opening and closing of the entry gate, but few cattle found their way in and no plants have been seen at this site since 1991 (V. Norris, *in litt.* 1995; R. Soost, , *in litt.* 1996). These results suggest that some grazing may be necessary to maintain populations of *A. aequalis* var. *sonomensis* in the face of competition from other plants, but that excessive grazing by cattle can adversely impact the species.

Sidalcea oregana ssp. *valida* is adversely affected at both of its locations by reduced seed set resulting from cattle grazing (CNPS 1988b). Populations of *Lilium pardalinum* ssp. *pitkinense* have been enclosed with various types of wire fencing in an attempt to prevent grazing or browsing by cattle, horses, and deer, but most of the fences have failed to prevent grazing completely. The plants continue to suffer from herbivory by cattle, deer, and perhaps gophers and other herbivores, resulting in loss of flowers and seeds (L. Lozier, *in litt.* 1990).

Trifolium amoenum may have disappeared from some of its former

locations due to grazing (Connors 1994). This species is a large clover that blooms when many grassland plants have already turned brown, likely making it more attractive to grazing herbivores. Most recent sightings of the plant were located outside of fences along roadsides, suggesting that the species survived for a period where it was protected from grazing (Connors 1994). Threats due to herbivory on the one natural population of this species, which occurs on portions of two residential lots, are unknown, but livestock grazing is unlikely. Grazing may, however, pose a threat to any undiscovered sites for the species.

D. *The inadequacy of existing regulatory mechanisms.* The California Fish and Game Commission has listed *Carex albida, Clarkia imbricata, Lilium pardalinum* ssp. *pitkinense, Poa napensis,* and *Sidalcea oregana* ssp. *valida* as endangered species under the California Endangered Species Act (Division 3, Chapter 1.5 section 2050 et seq. of the California Fish and Game Code and Title 14 California Code of Regulations 670.2). The California Fish and Game Commission has also listed *Astragalus clarianus* and *Plagiobothrys strictus* as threatened species. Listing by the State of California requires individuals to obtain authorization from CDFG to possess or ''take'' a listed species. Although the ''take'' of State-listed plants is prohibited (California Native Plant Protection Act, Division 2, Chapter 10, section 1908 and California Endangered Species Act, Division 3, Chapter 1.5, section 2080), State law exempts the taking of such plants via habitat modification or land use changes by the owner. After CDFG notifies a landowner that a State-listed plant grows on his or her property, the California Native Plant Protection Act only requires that the landowner notify the agency ''at least 10 days in advance of changing the land use to allow salvage of such a plant'' (Division 2, Chapter 10, section 1913 of the California Fish and Game Code).

The California Environmental Quality Act (CEQA) requires a full disclosure of the potential environmental impacts of proposed projects. The public agency with primary authority or jurisdiction over the project is designated as the lead agency and is responsible for conducting a review of the project and consulting with the other agencies concerned with the resources affected by the project. Section 15065 of the CEQA Guidelines requires a finding of significance if a project has the potential to ''reduce the number or restrict the range of a rare or endangered plant or animal.'' Species that are eligible for State listing as rare, threatened, or endangered, but are not so listed, are given the same protection as those species that are officially listed with the State or Federal governments. Once significant effects are identified, the lead agency has the option to require mitigation for effects through changes in the project or to decide that overriding considerations make mitigation infeasible. In the latter case, projects may be approved that cause significant environmental damage, such as destruction of endangered species. Protection of listed species through CEQA is, therefore, dependent upon the discretion of the agency involved. In addition, CEQA guidelines recently have been revised in ways which, if made final, may weaken protections for threatened, endangered, and other sensitive species.

Hot spring areas and perennial freshwater emergent marshes are generally small and scattered, and treated as isolated wetlands or waters of the United States for regulatory purposes by the U.S. Army Corps of Engineers (Corps) under section 404 of the Clean Water Act. However, the Clean Water Act, alone, does not provide adequate protection for *Alopecurus aequalis* var. *sonomensis, Carex albida, Lilium pardalinum* ssp. *pitkinense, Poa napensis, Plagiobothrys strictus, Sidalcea oregana* ssp. *valida,* and *Trifolium amoenum*. For example, Nationwide Permit (NWP) No. 26 (33 CFR part 330 Appendix B (26)) was established by the Corps to facilitate issuance of permits for discharge of fill into wetlands. Under current regulations, NWPs may be issued for fills up to 1.2 ha (3.0 ac); fills greater than 1.2 ha require an individual permit. For project proposals falling under NWP 26, the Corps seldom withholds authorization unless a listed threatened or endangered species' continued existence would be jeopardized by the proposed action, regardless of the significance of other wetland resources. Moreover, for fills less than 0.13 ha (⅓ ac) only an after-the-fact report is required by the Corps. This report must be submitted within 30 days of completion of the work and include only the name, address, and telephone number of the permittee; location and description of the work; and the type and acreage of the loss. All of the populations of the seven species in this rule that occur in wetlands are significantly smaller than 0.13 ha (⅓ ac). Although General Condition 11 of the NWP states that ''no activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or which is likely to destroy or modify the critical habitat of such species,'' the after-the-fact nature of the reporting requirement is inadequate to ensure the protection of populations that occur in areas smaller than the 0.13 ha (⅓ ac) threshold. Four of the seven plant species in this rule that occur in wetlands are known from only two populations, and two of the seven species are known only from a single population. Thus, for six of the seven species, the *post facto* reporting requirement may be inadequate to prevent their extinction.

Additionally and equally important, the upland watersheds that contribute significantly to the hydrology of marshes are not provided any direct protection under section 404. Disturbance to, or loss of, seep or marsh habitat and alteration of hydrology have damaged populations and habitat, as discussed previously under Factor A. Reductions in water volume or inundation of the sites have the potential to adversely affect the seven plant taxa listed above. Thus, as a consequence of the small size of these marsh, meadow, and hot spring areas and lack of protection of associated uplands, these types of habitats receive insufficient protection under section 404 of the Clean Water Act.

The Sonoma County Department of Planning has designated several marshes where some of these plants occur as ''critical habitat'' (Sonoma County 1989). The streams within these marshes are designated as ''riparian corridors.'' It is not likely that these designations will adequately protect the species involved. County policies for ''critical habitat'' include 15 m (50 ft) setbacks of construction from wetland boundaries and preparation of biotic resource assessments for development of mitigation measures, if the planning director determines that a ''critical habitat'' area will be impacted (Sonoma County 1989). A setback may be waived, however, if the setback is determined to make the parcel unsuitable for construction. The single population of *Carex albida* and the larger population of *Lilium pardalinum* ssp. *pitkinense* occur within 15 m (50 ft) of streams in Sonoma County (CNDDB 1996). The Sonoma County policy for ''riparian corridors'' allows the removal of riparian vegetation as part of a pest management program administered by the County Agricultural Commissioner, as well as construction of roads and summer dams (Sonoma County 1989). In addition, agricultural projects that may involve removal of native vegetation, including the species in this

rule and their habitats, are considered in Sonoma County to be ''ministerial'' (Ken Ellison, Sonoma County Department of Planning, pers. comm. 1993). Ministerial projects are those projects that the public agency must approve after the applicant shows compliance with certain legal requirements. They may be approved or carried out without undertaking CEQA review.

Only a few measures have been taken to protect some of the species in this rule. In 1989, the landowners of the two confirmed populations of *Lilium pardalinum* ssp. *pitkinense* entered into voluntary protection agreements with TNC (CDFG 1993b). Since that time, TNC and the California Conservation Corps have jointly built and maintained cattle exclosures in an attempt to protect the plants at both sites. Some plants, however, continue to suffer herbivory from livestock and wildlife, resulting in loss of flowers and seeds (L. Lozier, *in litt.* 1990). A memorandum of understanding is currently in effect between CDFG and the Berry Botanic Garden, Portland, Oregon, for research on germination and recovery of this species (CDFG 1993b). TNC also obtained a voluntary agreement with private landowners in 1990 to protect one population of *Astragalus clarianus.*

CDFG has proposed to purchase approximately 37 ha (90 ac) of the marsh where *Sidalcea oregana* ssp. *valida* occurs to create an ecological preserve (A. Howald, pers. comm. 1993). Acquisition of the preserve, however, is dependent on the cooperation of the current landowners. The owner of one parcel with about half of the population has declined to sell her property to the State (N. Wilcox, pers. comm. 1994). Purchase of the land as a preserve would ensure appropriate grazing practices on the site and would allow direct management of the plant population with possible opportunities to expand the population (A. Howald, pers. comm. 1993). The preserve would include only a small portion of the watershed, however, limiting the protection that the preserve would afford to the hydrology of the marsh (N. Wilcox, pers. comm. 1994).

TNC also has entered into a verbal conservation agreement with a landowner for the protection of the one natural population of *Clarkia imbricata.* However, this population of *C. imbricata* was inadvertently mowed before seed set in 1989 and 1991, reducing the seed production and number of plants in the years following mowing (B. Guggolz, *in litt.* 1993).

Seed from cultivated *Trifolium amoenum* plants is currently being collected for future reintroduction efforts (P. Connors, pers. comm. 1994, 1996). In addition, half of the seed that was recovered from the single plant in 1993 was deposited for long-term storage at the U.S. Department of Agriculture National Seed Storage Laboratory in Fort Collins, Colorado (Connors 1994).

Although the PRNS is part of the National Park system, 17 cattle and dairy ranches are contained within its boundaries. Grazing and ranching, which have occurred on the peninsula for more than a century, have been determined to be ''consistent with the purpose for which the Seashore was authorized'' (Clark and Fellers 1987). Clark and Fellers (1986) state that grazing has been a serious threat to *Alopecurus aequalis* var. *sonomensis* occurrences located on the Seashore, but more recent reports indicate concerns about both too much and too little grazing (CNDDB 1996; V. Norris, in litt. 1995; R. Soost, *in litt.* 1996).

E. *Other natural or manmade factors affecting their continued existence.* *Alopecurus aequalis* var. *sonomensis* suffers from competition from invasive emergent wetland species, including rushes (*Juncus* spp.) and nutsedges (*Cyperus* spp.) at one location. These wetland plants have nearly extirpated *A. aequalis* var. *sonomensis* from that site (V. Norris, *in litt.* 1993; CNDDB 1996). Additionally, *A. aequalis* var. *sonomensis* is not readily propagated. Three attempts to reintroduce the species from seed to suitable habitat within its range have failed, as has an attempt to start a population in the East Bay Botanic Garden in Tilden Park. Naturally occurring floods also may be an ongoing threat. One population was damaged by a flash flood in 1993 (V. Norris, *in litt.* 1995; R. Soost, *in litt.* 1996).

The population of *Astragalus clarianus* located along the north shore of Lake Hennessey has an infestation of the invasive and dominating alien weed, yellow star-thistle (*Centaurea solstitialis*) (A. Howald, pers. comm. 1993; J. Ruygt, hearing transcript). This infestation was a direct result of ground disturbance associated with the removal of dredge spoils that were placed on top of this population as discussed under Factor A (A. Howald, pers. comm. 1993). Competition from this alien annual weed is also considered a threat to the population of *A. clarianus* at the Bothe Napa Valley State Park (J. Ruygt, *in litt.* 1993). A proposed application to build two small agricultural water storage reservoirs along a creek in Napa County would avoid direct impacts to another population of *A. clarianus*, but ground disturbance would most likely introduce this same alien invasive weed (A. Howald, pers. comm. 1993).

Plant succession may be excluding or reducing the population of *Astragalus clarianus* at one site (J. Ruygt, *in litt.* 1993) where *A. clarianus* grows sparingly in the gaps between manzanita plants. As established plants continue to grow, and new manzanita seedlings become established, less space is available for *A. clarianus*. Fire suppression has reduced fire frequency in the manzanita community. Periodic fire reduces manzanita cover and creates space for other plants, including *A. clarianus*. This species, therefore, is vulnerable to habitat loss from plant succession. Another population of *A. clarianus* is threatened by competition from French broom (*Genista monospessulana*), an invasive alien shrub, and the rooting behavior of wild pigs (CNDDB 1996; J. Ruygt, pers. comm. 1996).

The potential for loss of the only population of *Sidalcea oregana* ssp. *valida* from naturally occurring events, because of the small population size, is exacerbated by drought and water diversions. In addition, this population is being encroached upon by invasive weeds, including yellow star-thistle and blackberry (A. Howald, pers. comm. 1993). One of the subpopulations was damaged by an off-road vehicle during maintenance of a local aqueduct, which passes through the marsh. The maintenance activity occurred late in the season when the soil was relatively dry, resulting in minimal damage to the plants. If such maintenance activities occur during a time when the soil is saturated, they pose a threat to the plants (A. Howald, pers. comm. 1993).

Because *Lilium pardalinum* ssp. *pitkinense* is unlikely to be self-pollinating, single plants or widely separated plants in sparse populations may not set viable seed (Mark Skinner, CNPS, pers. comm. 1994). The remaining plants at one site are monitored closely by CNPS volunteers and, at the time the proposed rule was written, had not been observed to have set seed for several years (M. Skinner, pers. comm. 1994). Much of the habitat for *L. pardalinum* ssp. *pitkinense* has been invaded by blackberry vines that compete for space, light, and nutrients (CDFG 1993b).

Grass mowing, vehicle traffic, and parking have impacted and continue to threaten one population of *Poa napensis* at the Calistoga airport (CNPS 1990; Robert Soreng, Cornell Univ., *in litt.* 1993). Grass mowing is done at regular intervals through the spring and summer to reduce fire and aircraft safety hazards. Mowing for fire control during

the reproductive cycle of *Clarkia imbricata* has reduced the size of one of its populations by a third (B. Guggolz, *in litt.* 1996). Airport users include a spray plane service, recreational gliders, and associated tow planes. Service vehicles for the planes and the private vehicles of the customers impact this population of *P. napensis*, especially during the spring and summer when airport use increases.

The extirpation of historical populations of *Trifolium amoenum* may have partially been a result of competition with weedy, alien plant species. A recent germination study of other *Trifolium* species from historical *T. amoenum* habitat in Sonoma County suggested that some annual *Trifolium* species germinate in late November, well after many introduced species, including redstem storkbill (*Erodium cicutarium*), ripgut brome (*Bromus diandrus*), and California burclover (*Medicago polymorpha*) (Connors 1994). By germinating and growing earlier, it is likely that alien species have reduced the numbers of *T. amoenum* plants by occupying available space (Connors 1994).

The small population size of most of these nine plant species increases the susceptibility to extirpation from random events. Population sizes of 100 or fewer are known for one or more populations of *Alopecurus aequalis* var. *sonomensis, Astragalus clarianus, Lilium pardalinum* ssp. *pitkinense, Plagiobothrys strictus, Poa napensis,* and *Sidalcea oregana* ssp. *valida*. The single extant population of Trifolium amoenum contains about 200 individuals. These species may also be subject to increased genetic drift and inbreeding as a consequence of their small population sizes (Menges 1991, Ellstrand and Elam 1993). Increased homozygosity resulting from genetic drift and inbreeding may lead to a loss of fitness (ability of individuals to survive and reproduce) in small populations. In addition, reduced genetic variation in small populations may make any species less able to successfully adapt to future environmental changes (Ellstrand and Elam 1993). Thus, seven of the nine species are threatened by potential loss of fitness and/or genetic variability associated with small population sizes.

Each of the species addressed in this rule is known from few populations. *Carex albida* and *Trifolium amoenum* each have only one population. *Clarkia imbricata, Lilium pardalinum* ssp. *pitkinense, Plagiobothrys strictus, Poa napensis,* and *Sidalcea oregana* ssp. *valida* each have only two confirmed populations. *Astragalus clarianus* is known from four populations. *Alopecurus aequalis* var. *sonomensis* has eight populations. The combination of few populations, small range, and restricted habitat makes the nine species highly susceptible to extinction or extirpation from a significant portion of their ranges due to random events, such as flood, drought, disease, or other occurrences (Shaffer 1981, Primack 1993). Such events are not usually a concern until the number of populations or geographic distribution become severely limited, as is the case with all of the species discussed here. Once the number of populations, or the plant population size, is reduced due to habitat destruction or fragmentation, the remnant populations, or portions of populations, have a higher probability of extinction from random events.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by these species in determining to make this rule final. Based on this evaluation, the preferred action is to list *Alopecurus aequalis* var. *sonomensis* (Sonoma alopecurus), *Astragalus clarianus* (Clara Hunt's milkvetch), *Carex albida* (white sedge), *Clarkia* imbricata (Vine Hill clarkia), *Lilium pardalinum* ssp. *pitkinense* (Pitkin Marsh lily), *Plagiobothrys strictus* (Calistoga allocarya), *Poa napensis* (Napa bluegrass), *Sidalcea oregana* ssp. *valida* (Kenwood marsh checker-mallow), and *Trifolium amoenum* (showy Indian clover) as endangered. Competition with invasive plant species or excessive cattle grazing threatens five of the eight remaining populations of *Alopecurus aequalis* var. *sonomensis.* Efforts to reintroduce this species to sites within its range have failed. If combined, all four populations of *Astragalus clarianus* would occupy only a 0.5 ha (1 ac) area, and are threatened variously by a potential water storage project, an approved subdivision, competition from invasive plant species, recreational activities, airport maintenance, and elimination through plant community succession. The single *Carex albida* population, totaling approximately 1,000 plants, is located 46 m (150 ft) from the State highway and is threatened by potential changes in the site's hydrology resulting from wetland drainage or fill, competition from invasive plant species, changes in land management by the owner, highway widening or maintenance, and potential disturbance from a proposed wastewater treatment. The two remaining populations of *Clarkia imbricata* are threatened by changing land use, mowing for fire control, and unauthorized collection. The three remaining populations of *Lilium pardalinum* ssp. *pitkinense,* totaling approximately 300 plants, suffer from uncontrolled collection of plants, seeds, and bulbs for horticultural use, and from herbivory by livestock and wildlife. One site is potentially threatened by a proposed wastewater treatment project; the other site is potentially threatened by a proposed subdivision. Competition from invasive plants such as blackberry also adversely impacts this species. If combined, the remaining populations of *Plagiobothrys strictus* and *Poa napensis* would occupy an area of less than 0.5 ha (1 ac) each. These populations are surrounded by hot springs resorts or housing. *Plagiobothrys strictus* and *Poa napensis* both occur at the same two sites where they are threatened by airport activities, including traffic and vehicle parking on the plants, grass mowing, and land use changes, including the construction of a hospital at one site. Both populations of the two species are also threatened by potential alteration of hot springs hydrology. The only population of *Sidalcea oregana* ssp. *valida* is threatened by trampling and reduced seed set resulting from cattle grazing, aqueduct maintenance, competition from invasive plant species, and the potential alteration of hydrology from urbanization. *Trifolium amoenum* has been extirpated from all 24 historical occurrences in seven counties; the species currently is known from one natural population. This species is threatened by competition with invasive plant species, loss of habitat from urbanization and other land use changes. All nine species, because of their few, small populations and very narrow ranges are also highly susceptible to genetic complications and at increased risk of local extirpation or extinction from random events.

These nine species are imminently threatened by extinction throughout all or a significant portion of their range by the factors summarized above, and the final action, therefore, is to list them as endangered.

Critical Habitat

Critical habitat is defined in section 3 of the Act as: (i) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management consideration or protection and; (ii) specific areas outside the geographical area occupied

by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. ''Conservation'' means the use of all methods and procedures needed to bring the species to the point at which listing under the Act is no longer necessary.

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time the species is determined to be endangered or threatened. Critical habitat is not determinable when one or both of the following situations exist—(1) Information sufficient to perform required analyses of the impacts of the designation is lacking, or (2) the biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat (50 CFR 424.12(a)(2)). Service regulations (50 CFR 424.12(a)(1)) state that designation of critical habitat is not prudent when one or both of the following situations exist—(1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or (2) such designation of critical habitat would not be beneficial to the species.

The Service finds that designation of critical habitat is not prudent for any of these nine plant taxa. Designation of critical habitat is not prudent for *Astragalus clarianus, Clarkia imbricata, Lilium pardalinum, Carex albida, Plagiobothrys strictus, Poa napensis, Sidalcea oregana* ssp. *valida, Trifolium amoenum,* and *Alopecurus aequalis* var. *sonomensis* because of lack of benefit. Moreover, designation of critical habitat for *Clarkia imbricata, Lilium pardalinum* ssp. *pitkinense, Carex albida, Sidalcea oregana* ssp. *valida,* and some populations of *Alopecurus aequalis* var. *sonomensis* is not prudent because doing so would increase the degree of threat to these species, or another species in this rule with which it occurs. The basis for these conclusions, including the factors considered in weighing the benefits against the risks of designation, are provided by species below.

Astragalus clarianus

None of the four known occurrences of *Astragalus clarianus,* which total about 28 ha (70 ac), are on Federal land (CNDDB 1996). This species does not occur in wetlands and no Federal actions are likely to occur in its habitat. Critical habitat designation outside of the areas where *A. clarianus* occurs also would serve no purpose because all other historical sites have been destroyed by urban development and viticulture (CNDDB 1996) and have no practical value for the survival and recovery of the species. Designation of critical habitat for *A. clarianus,* therefore, is not prudent because it provides no additional benefit to the species beyond that conferred by listing.

Clarkia Imbricata and *Lilium Pardalinum* ssp. *Pitkinense*

Clarkia imbricata and *Lilium pardalinum* ssp. *pitkinense* are attractive to plant collectors and incidents of overutilization and illegal collection of both species have occurred in the past. Both taxa are known only from private land. One of the two remaining populations of *C. imbricata* occurs on a CNPS preserve where, despite attempts to not publicize the preserve location and to discourage unauthorized collection, trespassers have damaged the fencing, trampled vegetation, and collected seeds of *C. imbricata* on several occasions (B. Guggolz, *in litt.* 1993). Critical habitat designation outside of the areas where *C. imbricata* occurs would serve no purpose because no other sites are known to be essential to the conservation of this species. At one of the two remaining sites for *L. pardalinum* ssp. *pitkinense,* the species was once abundant, but it has now been nearly extirpated by the uncontrolled collection of plants, seeds, and bulbs for horticultural use (CDFG 1993b). No historical sites for this taxon other than the two where it now occurs have ever been reported.

Lilium pardalinum ssp. *pitkinense* is a wetland species and alteration of its habitat may be regulated by the Army Corps of Engineers under section 404 of the Clean Water Act. The Service believes that activities regulated under section 404 that could impact the habitat of *L. pardalinum* ssp. *pitkinense* are unlikely to occur in the foreseeable future, and that this species is primarily threatened by overcollection, unregulated hydrological alterations, competition from alien plants, and trampling and herbivory by livestock and wildlife. Moreover, the inadequacies of the section 404 permitting process for protecting very small plant populations, discussed in detail under factor D of the ''Summary of the Factors'' section, apply to this species. In addition to these inadequacies, due to the small size of the only two populations of this species and the lack of historical habitat elsewhere, any adverse modification of its habitat would also likely jeopardize its continued existence. This would also hold true as the species recovers and its numbers increase. Any benefits that might result from the designation of critical habitat for *L. pardalinum* ssp. *pitkinense* would be outweighed by the likely increased threat of uncontrolled collection to this species.

Designation of critical habitat for *Clarkia imbricata* and *Lilium pardalinum* ssp. *pitkinense,* therefore, is not prudent because doing so would increase the degree of threat to these species. Although there may be a Federal nexus for *L. pardalinum* ssp. *pitkinense* through the Clean Water Act, the designation of critical habitat for this species would provide little or no benefit to the protection of this species beyond that provided by listing. The publication of maps and precise locations of populations that is required for designation of critical habitat would contribute to the further decline of this species by facilitating trespassing, uncontrolled collecting, and hindering recovery efforts. Any benefit from designation of critical habitat for these species, therefore, would be outweighed by the increased degree of risk to these species due to the publication of precise maps of their populations.

Carex Albida

The only known population of *Carex albida* occupies less than 300 m^2 of private land in Sonoma County (CDFG 1993a). Critical habitat designation outside of the areas where *C. imbricata* occurs would serve no purpose. The other four historical localities for the species, due to hydrological alteration and the long-term effects of effluent discharge from a cannery (CDFG 1993a), serve no practical value for the survival and recovery of the species. The Service believes that activities regulated under section 404 that could impact the habitat of *C. albida* are unlikely to occur in the foreseeable future, and that this species is primarily threatened by unregulated hydrological alterations and competition from native and alien plant species favored by drier conditions. Moreover, the inadequacies of the section 404 permitting process for protecting very small plant populations, discussed in detail under factor D of the ''Summary of the Factors'' section above, apply to this species. Even if a proposed fill was larger than the regulatory threshold and a pre-construction permit was required, any activity that would destroy or adversely modify the habitat of the sole remaining population of this species would also likely jeopardize its continued existence. This would also hold true as

the species recovers and its numbers increase. Because the site occurs within 45 m (150 ft) of a State highway, a potential Federal nexus also exists through activities of the Federal Highway Administration. In such a situation, however, any action that would adversely modify the habitat of the only known population of the species would also likely jeopardize the continued existence of the species. This would also hold true as the species recovers and its numbers increase. Designation of critical habitat for *C. albida*, therefore, is not prudent because it provides no additional benefit to the species beyond that conferred by listing. In addition, *C. albida* occurs at the same site as *Lilium pardalinum* ssp. *parkinense* (see previous paragraph) and the designation of critical habitat and publication of detailed maps of this site would contribute to the further decline of the latter species by facilitating trespassing, uncontrolled collecting, and hindering recovery efforts for the latter species. The plants at this site are particularly vunerable since they are close to a State highway and more easily accessible to collectors.

Alopecurus Aequalis var. Sonomensis

Alopecurus aequalis var. *sonomensis* is the only species in this rule that occurs on Federal land. Four of the eight known populations occur on Federal land within the PRNS (CNDDB 1996). The plant appears to have very strict habitat requirements and suitable habitats occur in only a few places within the PRNS (V. Norris, *in litt.* 1995). Several attempts at establishing new populations in seemingly suitable habitat on the PRNS have been unsuccessful. The locations of these four populations are known to the managers of the PRNS and each population is closely monitored by CNPS members, acting in an official capacity as National Park Service (NPS) volunteers (V. Norris, *in litt.* 1995; R. Soost, *in litt.* 1996). This monitoring includes annual surveys for new populations of the species. The NPS has also fenced a portion of one population. The species within the exclosure declined despite this effort. Because the presence of this plant, and its specific locations, are well known to the managers of the PRNS, no modification of its habitat is likely to occur without consultation under section 7 of the Act. Any action which would destroy or adversely modify the habitat of the few remaining populations of this species would also likely jeopardize its continued existence. This would also hold true as the species recovers and its numbers increase. Designation of critical habitat for any of the four populations of *Alopecurus aequalis* var. *sonomensis* on Federal land with the PRNS, therefore is not prudent because it provides no additional benefit to the species beyond that conferred by listing.

The other four populations occur on private land and may have a Federal nexus through the Clean Water Act. However, the inadequacies of the section 404 permitting process for protecting very small plant populations, discussed in detail under Factor D of the ''Summary of the Factors'' section, apply to this species. In addition to these inadequacies, due to the small size of the only known populations of this species any adverse modification of its habitat would also likely jeopardize its continued existence. This would also hold true as the species recovers and its numbers increase.

Moreover, two of the four populations of *Alopecurus aequalis* var. *sonomensis* on private land are found in proximity to *L. pardalinum* ssp. *pitkinense* (see previous discussion of this species). Although *A. aequalis* var. *sonomensis* is not collected for horticultural use, mapping specific localities of *A. aequalis var. sonomensis* could lead to increased collection of *L. pardalinum* ssp. *pitkinense*. The horticultural value of the latter species makes it highly attractive and one of its two populations has been nearly extirpated by the uncontrolled collection of plants, seeds, and bulbs for horticultural use (CDFG 1993b). Designation of critical habitat for these two populations of *Alopecurus sonomensis*, therefore, would increase the degree of threat to *Lilium pardalinum* ssp. *pitkinense* by facilitating trespassing and uncontrolled collecting, and hindering recovery efforts.

Designation of critical habitat for any of the four populations of *Alopecurus aequalis* var. *sonomensis* on Federal land with the PRNS, therefore, is not prudent because it provides no additional benefit to the species beyond that conferred by listing. Critical habitat designation for known populations on private land would also confer no benefit beyond that provided by listing. Because of the few small occurrences of this species, any adverse modification of its habitat would likely jeopardize its continued existence. The publication of maps and precise locations of the two private populations at which *A. aequalis* var. *sonomensis* occurs with *Lilium pardalinum* ssp. *pitkinense* would also contribute to the further decline of the latter species by facilitating trespassing and uncontrolled collecting, and hindering recovery efforts.

Plagiobothrys strictus

Plagiobothrys strictus is known only from two populations on private land. The total area of these populations is less than 80 m^2 (900 ft^2). The only other historical locality has been rendered unsuitable by urbanization and agricultural land conversion (CNPS 1990) and has no practical value for the survival and recovery of the species. Thus, the establishment of critical habitat in this unoccupied area would serve no purpose. As with *Carex albida*, the habitat for *P. strictus* will likely be regulated under section 404 of the Federal Clean Water Act, but the total area of the population is significantly smaller than the minimum regulatory threshold of 0.13 ha (⅓ ac) for pre-construction notification. Even if a pre-construction permit was required, any activity that would destroy or adversely modify the habitat of the sole remaining population of this species would also likely jeopardize its continued existence. This would also hold true as the species recovers and its numbers increase. The designation of critical habitat for *Plagiobothrys strictus*, therefore, is not prudent because it provides no additional benefit to the species beyond that conferred by listing.

Poa Napensis

Both extant populations of *Poa napensis* occur on private land, where they occupy slightly more than 100 m^2 (1,100 ft^2). Urban growth and recreational development of hot springs in the Calistoga area has rendered all other historical localities unsuitable for this species (CDFG 1979). Thus, the establishment of critical habitat in these unoccupied areas would serve no purpose since these areas have no practical value for the survival and recovery of the species. At least some of the suitable wetland habitat for *P. napensis* may be regulated under section 404 of the Clean Water Act. As with *Carex albida* and *Plagiobothrys strictus*, the total population area is significantly smaller than the 0.13 ha (⅓ ac) minimum regulatory threshold for pre-construction notification. As is also the case with these species, even if a pre-construction permit was required, any activity that would destroy or adversely modify the habitat of the *Poa napensis* would also likely jeopardize its continued existence. This would also hold true as the species recovers and its numbers increase. Designation of critical habitat for *P. napensis*, therefore, is not prudent because doing so provides no additional benefit to the species beyond that conferred by listing.

Sidalcea Oregana ssp. Valida

Both populations of *Sidalcea oregana* ssp. *valida* occur only on private land. There is no evidence that the species was ever present at any other localities (CNPS 1988b, CDFG 1987). It grows in a habitat which is likely to be regulated under the Clean Water Act but, as with the other wetland species discussed above, the small populations occupy less than the 0.13 ha (1/3 ac) minimum regulatory threshold for pre-construction notification. Moreover, due to the small size of the only two extant populations, any activity that would destroy or adversely modify the habitat of either of the two remaining populations of this species would also likely jeopardize its continued existence. This would also hold true as the species recovers and its numbers increase. The species is also of recognized horticultural value (Hill 1993), and wild-collected seeds of this species (no variety given) are available through a seed exchange program offered by a international gardening society (NARGS 1996). Both populations are small enough that even limited collecting pressure would have adverse impacts. Designation of critical habitat for *S. oregana* ssp. *valida*, therefore, is not prudent because it provides no additional benefit to the species beyond that conferred by listing and because doing so would increase the degree of threat to this species. The publication of maps and precise locations of the populations that is required for designation of critical habitat, therefore, would contribute to the further decline of this species by facilitating trespassing and uncontrolled collecting, and hindering recovery efforts.

Trifolium Amoenum

Only a single population of *Trifolium amoenum* is known to be extant. Although the species was widespread north and east of San Francisco Bay historically, it had last been seen in 1969 and presumed extinct until its rediscovery in 1992 after years of searching (Connors 1994). Because it is a large, attractive plant, it is highly likely that it has been extirpated from its historical localities (Connors 1994). The sole population is on private land with little probability of any Federal activity. No other suitable habitat on Federal land, or where any Federal action is likely to occur, is known to exist. The species has probably been eliminated at its other historical localities by competition with alien species of annual plants and because of the prevalance of alien species throughout the historical range of *T. amoenum*, (Connors 1994). Although historically the plant was known from ''wet swales,'' the current site is not a regulated wetland. Even if a Federal nexus were identified, any activity that would destroy or adversely modify the habitat of the sole remaining population of this species would also likely jeopardize its continued existence. This would also hold true as the species recovers and its numbers increase. Designation of critical habitat for *Trifolium amoenum* at this site, therefore, is not prudent because it provides no additional benefit to the species beyond that conferred by listing. Although collection is not currently thought to be a threat to the species, the plant is large with showy flowers and its populations are small enough that even limited collecting pressure would have adverse impacts. Designation of critical habitat for *T. amoenum* anywhere within its historical range, therefore, is not prudent because doing so would increase the degree of threat to this species. The publication of maps and precise locations of involved plant populations that is required for designation of critical habitat would contribute to the further decline of this species by facilitating trespassing and uncontrolled collecting, and hindering recovery efforts.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness and conservation actions by Federal, State, and local agencies, private organizations, and individuals. The Act provides for possible land acquisition and cooperation with the State, and requires that recovery plans be developed for all listed species. 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. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402.

Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, 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 the species or 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.

To the extent that six of the nine taxa proposed herein are currently known to inhabit marshes, wet meadows, perennial streams, or thermal hot springs, the Service anticipates that the Corps will enter into section 7 consultations regarding these species if it regulates fill of these wetlands under section 404 of the Clean Water Act. Because of the small area covered by these populations, however, actions which could impact their habitats may not be subject to pre-construction notification. The inadequacies of current regulations for NWP 26 processing under the Clean Water Act are discussed in detail under factor D in the ''Summary of Factors'' section above. The National Park Service may participate in section 7 consultation because of potential grazing effects on *Alopecurus aequalis* var. *sonomensis* at the PRNS, and concerning park management plans that directly or indirectly affect this species.

Listing *Alopecurus aequalis* var. *sonomensis*, *Astragalus clarianus*, *Carex albida*, *Clarkia imbricata*, *Lilium pardalinum* ssp. *pitkinense*, *Plagiobothrys strictus*, *Poa napensis*, *Sidalcea oregana* ssp. *valida*, and *Trifolium amoenum* would provide for development of a recovery plan (or plans) for them. Such plan(s) would bring together both State and Federal efforts for conservation of the plants. The plan(s) would establish a framework for agencies to coordinate activities and cooperate with each other in conservation efforts, set recovery priorities, and estimate costs of various tasks necessary to accomplish them. The plan(s) also would describe site-specific management actions necessary to achieve conservation and survival of the nine plant species. Additionally, pursuant to section 6 of the Act, the Service would be more likely to grant funds to affected states for management actions promoting the protection and recovery of these species.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered plants. All 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 any of the plants, transport them in interstate or foreign commerce in the course of a commercial activity, sell or offer them for sale in interstate or foreign commerce, or remove and reduce any of the plants to possession from areas under Federal jurisdiction. In addition, the Act prohibits the malicious damage or destruction of endangered plants on areas under Federal jurisdiction, as well as the removal, cutting, digging up, or damaging or destroying of such plant species in knowing violation of any State law or regulation, including State criminal trespass law. Certain exceptions to the prohibitions 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 plant species under certain circumstances. Such permits are available for scientific purposes and to enhance the propagation or survival of the species. The Service anticipates that few permits would ever be sought or issued for most of the species because they are typically not sought for cultivation and are uncommon in the wild. *Lilium pardalinum* ssp. *pitkinense* and *Clarkia imbricata*, however, are collected for horticultural use.

It is the policy of the Service, published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of the listing of the nine plant species on proposed and ongoing activities within the species' range. Collection, damage or destruction of these species on Federal lands is prohibited, although in appropriate cases a Federal permit may be issued to allow collection for scientific or recovery purposes. Such activities on non-Federal (private) lands would constitute a violation of section 9 when conducted in knowing violation of California State law or regulations or in violation of State criminal trespass law. See Factor D. for a discussion of California's law protecting plants.

As noted above, Federal listing of plant species protects plants occurring on Federal lands and when Federal activities may affect the species. Thus, activities on private lands such as landscape maintenance, clearing vegetation for firebreaks, and livestock grazing, are not prohibited or regulated unless they are conducted in knowing violation of State law or are federally funded or authorized. Questions regarding whether specific activities would constitute a violation of section 9 should be directed to the Field Supervisor of the Service's Sacramento Field Office (see **ADDRESSES** section). Requests for copies of the regulations regarding listed plants and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Ecological Services, Endangered Species Permits, 911 NE 11th Ave., Portland, Oregon 97232–4181 (phone 503/231–2063, facsimile 503/231–6243).

National Environmental Policy Act

The Fish and Wildlife Service has determined that Environmental Assessments and Environmental Impact Statements, 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 Act. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

Required Determinations

The Service has examined this regulation under the Paperwork Reduction Act of 1995 and found it to contain no information collection requirements.

References Cited

A complete list of all references cited herein is available upon request from the Field Supervisor, Sacramento Field Office (see **ADDRESSES** section).

Author

The primary authors of this final rule are Diane Elam and David Wright, Sacramento Field Office (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

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

Regulation Promulgation

Accordingly, part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, the Service amends as follows:

PART 17—[AMENDED]

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

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

2. Amend Section 17.12(h) by adding the following, in alphabetical order under FLOWERING PLANTS, to the List of Endangered and Threatened Plants to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic Range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common Name						
FLOWERING PLANTS							
*	*	*	*	*	*	*	
Alopecurus aequalis var. *sonomensis*.	Sonoma alopecurus	U.S.A. (CA)	Poaceae	E	625	NA	NA
*	*	*	*	*	*	*	
Astragalus clarianus	Clara Hunt's milk-vetch.	U.S.A. (CA)	Fabaceae	E	625	NA	NA
*	*	*	*	*	*	*	
Carex albida	white sedge	U.S.A. (CA)	Cyperaceae	E	625	NA	NA
*	*	*	*	*	*	*	
Clarkia imbricata	Vine Hill clarkia	U.S.A. (CA)	Onagraceae	E	625	NA	NA

Species		Historic Range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common Name						
*	*	*	*	*	*	*	
Lilium pardalinum ssp. *pitkinense*.	Pitkin Marsh lily	U.S.A. (CA)	Liliaceae	E	625	NA	NA
*	*	*	*	*	*	*	
Plagiobothrys strictus	Calistoga allocarya	U.S.A. (CA)	Boraginaceae	E	625	NA	NA
*	*	*	*	*	*	*	
Poa napensis	Napa bluegrass	U.S.A. (CA)	Poaceae	E	625	NA	NA
*	*	*	*	*	*	*	
Sidalcea oregana ssp. *valida*.	Kenwood Marsh checker-mallow.	U.S.A. (CA)	Malvaceae	E	625	NA	NA
*	*	*	*	*	*	*	
Trifolium amoenum ..	showy Indian clover	U.S.A. (CA)	Fabaceae	E	625	NA	NA
*	*	*	*	*	*	*	

Dated: September 29, 1997.

Jamie Rappaport Clark,

Director, Fish and Wildlife Service.

[FR Doc. 97–27924 Filed 10–21–97; 8:45 am]

BILLING CODE 4310–55–P

Proposed Rules

Federal Register
Vol. 62, No. 204
Wednesday, October 22, 1997

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 Parts 966 and 980

[Docket No. FV97–966–1 PR]

Tomatoes Grown in Florida and Imported Tomatoes; Reopening of Comment Period on Changing Minimum Size and Size Designation Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Reopening of the comment period.

SUMMARY: Notice is hereby given that the comment period on proposed changes in the minimum size and size designation requirements for Florida and imported tomatoes is reopened until November 5, 1997.

DATES: Comments must be received by November 5, 1997.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Programs, AMS, USDA, room 2525–S, P.O. Box 96456, Washington, DC 20090–6456, Fax: (202) 720–5698. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: George Kelhart, Marketing Order Administration Branch, F&V, AMS, USDA, room 2525–S, P.O. Box 96456, Washington, DC 20090–6456; Telephone: (202) 720–2491, Fax: (202) 720–5698. Small businesses may request information on compliance with this proposed regulation by contacting: Jay Guerber, Marketing Order Information Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 96456, room 2525–S, Washington, DC 20090–6456; Telephone: (202) 720–2491, Fax: (202) 720–5698.

SUPPLEMENTARY INFORMATION: A proposed rule was issued on October 2, 1997, and published in the **Federal Register** (62 FR 52047; October 6, 1997). The proposed rule would increase the minimum diameter size requirement for Florida and imported tomatoes from 2$^{8}/_{32}$ inches to 2$^{9}/_{32}$ inches. For Florida tomatoes alone, the rule would change the size designations from Medium, Large, Extra Large to numeric size designations of 6×7, 6×6, and 5×6. The proposal also would slightly increase the diameter size ranges for the designated sizes. The comment period ended October 16, 1997.

The Secretaria de Comericio Y Fomento Industrial (SECOFI) of Mexico requested that additional time be provided for interested persons to comment on the proposed rule. SECOFI stated that U.S. tomato imports from Mexico have accounted for over 30 percent of U.S. consumption during the marketing order season, on average, over the past 10 years, and that the proposed measures would have a direct and important impact on Mexican producers and exporters. SECOFI further stated that it first became aware of the proposal only after it was published in the **Federal Register**, and that Mexican producers were not given advance notice and allowed to prepare for the possible change. The request indicated that immediate implementation of the proposal could seriously disrupt Mexican exports.

SECOFI also pointed out that Article 1802 of the North American Free Trade Agreement (NAFTA) requires that proposed regulatory measures affecting trade be published in advance, and that interested persons and the NAFTA country governments be provided a ''reasonable opportunity'' to comment on those proposed measures. SECOFI indicated that the 10-day time limit did not give a ''reasonable opportunity'' for comments, and requested that the comment period be extended for 60 additional days.

Providing an additional 60 days for comments would delay the final decision on these proposed measures until January of 1998. This is not acceptable because these measures, if adopted, should apply to as much of the 1997–98 domestic and import shipping seasons as possible. The Florida tomato industry has just begun harvesting, packing, and shipping 1997–98 season tomatoes, while Mexico exports to the U.S. each month of the year, with the most significant shipping period starting in mid-December.

Article 909.1(a) of NAFTA generally requires at least a 60-day notice period prior to the adoption or modification of a technical regulation, but, for a technical regulation relating to perishable goods, a 30-day notice prior to adoption of a regulation can be used.

After reviewing the situation, and in accordance with NAFTA, the Department is reopening the comment period for 20 additional days or until November 5, 1997. This will provide interested persons a total of 30 days to review the proposed rule, perform a more complete analysis, and submit any written comments.

This delay should not substantially add to the time required to complete this rulemaking action. Accordingly, the period in which to file written comments is reopened until November 5, 1997. This notice is issued pursuant to the Agricultural Marketing Agreement Act of 1937.

Authority: 7 U.S.C. 601–674.

Dated: October 17, 1997.

Robert C. Keeney,

Deputy Administrator, Fruit and Vegetable Programs.

[FR Doc. 97–28020 Filed 10–20–97; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

10 CFR Part 430

[Docket No. EE–DET–97–550]

RIN 1904–AA85

Energy Conservation Program for Consumer Products: Determination Concerning the Potential for Energy Conservation Standards for Electric Distribution Transformers

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy (DOE).

ACTION: Notice of Determination.

SUMMARY: The Department of Energy (DOE or the Department) has

determined, based on the best information currently available, that energy conservation standards for electric distribution transformers are technologically feasible, economically justified and would result in significant energy savings. This determination initiates the process of establishing, by notice and comment rulemaking, test procedures and energy conservation standards for this product.

ADDRESSES: Copies of ''Guide for Determining Energy Efficiency for Distribution Transformers'' (NEMA Standards Publication TP 1–1996), ''Determination Analysis of Energy Conservation Standards for Distribution Transformers, ORNL–6847,'' and ''Supplement to the Determination Analysis (ORNL–6847) and Analysis of the NEMA Efficiency Standard for Distribution Transformers, ORNL–6925,'' are available in the DOE Freedom of Information Reading Room, U.S. Department of Energy, Forrestal Building, Room 1E–190, 1000 Independence Avenue, SW, Washington, DC, 20585, (202) 586–6020, between the hours of 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Kathi Epping, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Mail Station EE–43, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585–0121, (202) 586–7425, FAX: (202) 586–4617, email: kathi.epping@hq.doe.gov.

Edward Levy, Esq., U.S. Department of Energy, Office of General Counsel, Mail Station GC–72, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585–3410, (202) 586–9507, email: edward.levy@hq.doe.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

A. Authority

The National Energy Conservation Policy Act of 1978, Pub. L. 95–619, amended the Energy Policy and Conservation Act (EPCA) to add a Part C to Title III, which established an energy conservation program for certain industrial equipment. The most recent amendments to EPCA, in the Energy Policy Act of 1992, Pub. L. 102–486, (EPACT) included amendments that expanded Title III of EPCA to include certain commercial water heaters and heating and air-conditioning equipment, incandescent and fluorescent lamps, electric motors and electric distribution transformers.

Among these amendments is section 124(a) of EPACT, which amended section 346 of EPCA, 42 U.S.C. 6317, to provide that the Secretary of Energy must prescribe testing requirements and energy conservation standards for those distribution transformers for which the Secretary determines that standards ''would be technologically feasible and economically justified, and would result in significant energy savings.'' 42 U.S.C. 6317(a). Section 346 was also amended to require the Secretary, within six months after prescribing energy conservation standards for distribution transformers, to prescribe labeling requirements for such transformers.

Section 346 requires the Department to make a determination that standards for transformers are technologically feasible and economically justified, and would save significant amounts of energy, *before* the Department initiates the process for promulgating test procedures and specific standards. The section could be read as providing that once this initial determination is made, there is no further consideration of technological feasibility, economic justification, or energy savings, and that the Department must proceed to adopt standards. Such an interpretation, however, would be inconsistent with the approach in other provisions of EPCA, and would be impractical. It is inconsistent, for example, with section 325(o) of EPCA, under which economic justification is addressed *after* specific standards have been proposed, based on a detailed evaluation with respect to one or more specific standards. It is impractical because, even if one or more design options has the potential for achieving energy savings, a determination that such savings could in fact be achieved cannot be made without first having developed test procedures to measure the energy efficiency of transformer designs, and then conducting an in-depth analysis of each design option. Such analysis might show that no standard meets all three of the prescribed criteria: i.e., technologically feasible, economically justified and significant energy savings.

For these reasons, the Department construes section 346 as requiring it to: (1) Determine based upon the best information available whether standards for transformers would be ''technologically feasible and economically justified, and would result in significant energy savings,'' and (2) if energy conservation standards appear to be warranted under these criteria, to prescribe test procedures and conduct a rulemaking concerning such standards. During the standards rulemaking, the Department would describe whether and at what level(s) to promulgate standards. This decision would be based on in-depth consideration, with public participation, of the technological feasibility, economic justification, and energy savings of potential standard levels. Thus, the initial determination made today that standards are warranted under the criteria specified in section 346(a) would in effect be reviewed during the rulemaking process, based on more complete information than is currently available as to whether those criteria are met.

B. Rulemaking Procedures

EPCA, which provides rulemaking procedures for the promulgation of test procedures and standards for appliances and commercial equipment, is ambiguous as to whether these procedures apply to rulemakings on test procedures and standards for transformers. For the reasons discussed below, the Department will nonetheless use these procedures in conducting the test procedure and standards rulemakings for transformers.

In conducting rulemakings on all subjects, the Department must, at a minimum, adhere to the procedures required by the Administrative Procedure Act and section 501 of the Department of Energy Organization Act (DOE Organization Act), 42 U.S.C. 7191. Section 501 in essence requires the following: (1) Issuance of a notice of proposed rulemaking (NOPR), (2) an opportunity for comment, (3) an opportunity for presentation of oral comments, if there exists ''a substantial issue of fact or law'' or if the rule will have a ''substantial impact,'' and (4) publication of the final rule accompanied by appropriate explanation. Pursuant to E.O. 12662, the comment period must be at least 75 days.

With respect to test procedures for transformers, the Department has

decided to use the same rulemaking procedures it uses under Part B of EPCA, and for other equipment covered under Part C. Thus, in addition to the generic procedural requirements described above, the Department will provide an opportunity for oral comment (i.e., hold a hearing) on all proposed test procedures, regardless of the ''substantial issue'' or ''substantial impact'' criteria, as is done in other EPCA test procedure rulemakings. See, e.g., EPCA section 323(b)(2), 42 U.S.C. 6293(b)(2). Hearings have been useful in promulgating test procedures in the appliance program, and a hearing can help to identify issues that should be addressed and points that should be amplified in the written comments. In addition, permitting oral as well as written comments will maximize the opportunity for interested parties to express their views on the proposed rule. This should give greater assurance of the validity and feasibility of the final test procedure that the Department adopts.

As to energy conservation standards, for most other products covered by EPCA, EPCA requires the Department to take supplemental steps in promulgating standards, including the following, that are not required by the Administrative Procedural Act or the DOE Organization Act:

1. An advance notice of proposed rulemaking (ANOPR) must be issued, followed by a 60-day comment period;
2. The notice of proposed rulemaking (NOPR) must set forth the maximum efficiency improvement that is technologically feasible and, if the proposed standard does not achieve this level, an explanation of why; and
3. A hearing must be held following issuance of the NOPR, regardless of the ''substantial issue'' or ''substantial impact'' criteria.

EPCA sections 325(p), 336(a), and 345(a), 42 U.S.C. 6295(p), 6306(a), and 6317(a). The Department also has a policy, in conducting rulemakings on appliance standards, to allow 75 days for comment on the ANOPR (rather than the 60 days required by EPCA), with at least one public hearing or workshop during this period. Procedures for Consideration of New or Revised Energy Conservation Standards for Consumer Products, 61 FR 36974, (July 15, 1996) (the ''Interpretive Rule'').

The first sentence of section 345(a) could be interpreted as requiring the Department to employ these EPCA procedures in developing standards on transformers. In any case, the Department has decided it will employ the foregoing procedures set forth in EPCA and the Interpretive Rule. It will do so in part for the same reasons it will use EPCA procedures to promulgate transformer test procedures. These reasons include: (1) EPCA procedures have worked well in the appliance program, and (2) they will provide enhanced the opportunity for public comment, thereby helping to improve the quality of the final rules. In addition, the Department has never developed efficiency standards for a product such as distribution transformers. Therefore, the Department believes that the development of transformer standards will benefit from enhanced opportunities for public participation during the standards development process. Such participation can best be achieved if the Department employs the full range of procedures used in its program to set efficiency standards.

C. Background

After the passage of EPACT, the Department contracted with the Oak Ridge National Laboratory (ORNL) to conduct a study to obtain data and assist the Department in making a determination as to whether standards for distribution transformers are warranted. ORNL developed and published a report, entitled ''Determination Analysis of Energy Conservation Standards for Distribution Transformer, ORNL–6847'' which was based on information from annual sales data, average load data, and surveys of existing and potential transformer efficiencies that were obtained from several organizations.

In the ORNL analysis, transformers with a primary voltage of 480 V to 35 kV and a secondary voltage of 120 to 480 V are defined as distribution transformers. This definition is consistent with ANSI/IEEE C57.12.80–1978 (subsection 2.3.1.1), which defines a distribution transformer as ''a transformer for transferring electrical energy from a primary distribution circuit to a secondary distribution circuit or consumer's service circuit.'' Typical utility primary distribution voltages in the U.S. range from 5 kV to 35 kV medium-voltage classes, and typical primary consumers' services are 480 V or higher; thus the total primary voltage range is 480 V to 35 kV. Typical secondary voltages in the U.S. range from 120 to 480 V. ANSI/IEEE C57.12.80–1978 indicates that distribution transformers usually have a rated capacity in the order of 5 –500 kVA. However, ANSI/IEEE C57.12.26–1993 defines pad-mounted distribution transformers as transformers with a rated capacity 2500 kVA or lower, with primary voltages of 34,500 V (35 kV class) or lower and secondary voltages of 480 V or lower. The ORNL analysis considered rated capacities ranging from of 10 to 2500 kVA for liquid-immersed transformers, because most manufacturers no longer produce units smaller than 10 kVA. For dry-type transformers a rated capacity range of 0.25 to 2500 kVA was considered; comments from manufacturers indicate that this range covers nearly all the U.S. dry-type transformer market, although the bulk of that market is in the range of 10 to 2500 kVA. The ORNL analysis did not consider transformers which are not continuously connected to a power distribution system as a distribution transformer. For example, transformers that are part of machinery which are switched off from electrical power were considered by the study as a component of the machinery's circuit and not part of the power distribution circuit. Also, special-purpose control and signal transformers, as well as bulk power transformers, were excluded from consideration because they are not classified as distribution transformers.

In the Department's view, the term ''distribution transformer'' in section 346 of EPCA means all transformers with a primary voltage of 480 V to 35 kV, a secondary voltage of 120 V to 480 V, and a capacity of either 10 to 2500 kVA for liquid-immersed transformers or 0.25 kVA to 2500 kVA for dry-type transformers, except for transformers described in the foregoing three sentences. This definition encompasses the transformers considered in the ORNL analysis.

ORNL collected data from the following organizations and sources: The American National Standards Institute (ANSI), Department of Commerce (DOC), Department of Energy (DOE), Edison Electric Institute (EEI), Institute of Electrical and Electronics Engineers (IEEE), National Electrical Manufacturers Association (NEMA), North American Electric Reliability Council (NAERC), Office of Management and Budget (OMB), various books and phone conversations with interested parties. In addition, the ORNL report used data from a survey developed by ORNL and circulated by NEMA to NEMA and non-NEMA manufacturers, to obtain no-load losses, load losses and selling prices of various sizes and types of distribution transformers. Data from these surveys and other relevant information were used in the report to show the potential energy savings of various conservation case studies such as: (1) Lowest Total

Owning Cost (TOC)[1] Case, (2) Median TOC Case, (3) Average Losses Case, (4) High-Efficiency Case, and (5) Two-Year Payback Case. The last of these, the Two-Year Payback Case, was not derived from the survey. Rather, a manufacturer developed this case during peer review of the report by using a combination of price and design losses, with the objective of achieving a two-year payback based on typical transformer operation and electricity rates. The efficiency levels used to define the conservation cases are based on responses from surveys completed by manufacturers.

Two peer reviews of the drafts of the report were performed by ORNL. The ORNL peer review consisted of 22 reviewers, including representatives of distribution transformer manufacturers, metal manufacturers, research institutions/laboratories, private as well as municipal electric utilities, manufacturer associations, metal associations, and energy conservation groups. After the comments from stakeholders were incorporated into the draft, the report (ORNL–6847) was published in July 1996. The information contained in this report assisted the Department in making this determination on the feasibility and significance of energy savings for distribution transformers.

In September 1996, shortly after publication of the ORNL report, the National Electrical Manufacturers Association (NEMA) developed and published a voluntary guide entitled ''Guide for Determining Energy Efficiency for Distribution Transformers'' (NEMA Standards Publication TP 1–1996, referred to ''NEMA TP–1'') to help purchasers choose more efficient distribution transformers. The NEMA TP–1 is intended to give manufacturers a vehicle to promote the use of high efficiency transformers and to assist purchasers/users in the selection of energy efficient transformers. NEMA TP–1 offers a simplified methodology to help users of utility (liquid-immersed) and commercial/industrial (dry-type) transformers to understand and calculate the equivalent first cost of core and load losses. It also offers an alternative method to users who would rather use tables of minimum efficiencies based on transformer kVA size, voltage considerations, and type (liquid-immersed or dry-type).

Subsequently, the Department determined that the initial estimate, reflected in the initial ORNL report, of the market size for dry-type transformers was too high. In addition, it was determined that the effective annual loads for liquid-immersed transformers were also too high. Consequently, ORNL re-analyzed the energy savings using a more accurate disaggregated model including data for all types and sizes of transformers. This data had not been available for the original ORNL study. Furthermore, the manufacturer that developed the two-year payback case advised ORNL that the actual payback will likely be substantially longer than 2 years due to higher than anticipated manufacturing costs. The two-year payback case was eliminated from the analysis because of this misestimation of cost and because this case is no longer necessary due to the addition of the TP–1 case. A description of the new data and model, ORNL's re-analysis, and an analysis of NEMA TP–1 are set forth in a second report, entitled ''Supplement to the 'Determination Analysis' (ORNL–6847) and Analysis of the NEMA Efficiency Standard for Distribution Transformers, ORNL–6925''. The purpose of this report is to assess NEMA TP–1 along with the options considered in the determination study, using the more accurate analysis model and transformer market and loading data developed subsequent to the publication of the original ORNL report.

Data and comments received from stakeholders during the peer review of the initial ORNL report have been considered in preparing this determination and will be more fully considered during all actions taken by the Department when proceeding with the rulemaking process to consider conservation standards for distribution transformers. Results of the energy savings analyses of the ORNL reports will be discussed in detail in the following sections of this determination notice.

II. Discussion of ORNL Reports

A. Purpose and Content

ORNL assisted the Department by studying the feasibility of achieving potential energy savings that could result from energy conservation standards for distribution transformers. The potential energy savings presented in the ORNL reports are preliminary estimates. Subsequent analyses will be performed after test procedures are established. These analyses will involve more exact, detailed information which will be developed during the standards rulemaking process, and will cover the effects of energy conservation standards for distribution transformers.

B. Methodology

The study methodology consisted of four major elements: (1) Development of a database, (2) development of conservation options, (3) assessments of the energy conservation options, and (4) incorporation of feedback from stakeholders. The following is a brief description of each element:

- *Database development.* Collecting and processing data was a major part of the study. Data on transformer designs, losses, and sales were provided by NEMA and individual manufacturers. The Edison Electric Institute (EEI), the American Public Power Association (APPA), and selected utilities provided utility user information. The database includes the results of a survey circulated by EEI and APPA to their member utilities. User information on dry-type transformers was provided by the American Institute of Plant Engineers. In addition, the Federal Energy Regulatory Commission's Form 1, Energy Information Administration data and trade journals were used. The basic information included historical information on user purchases, and costs and losses of new transformers for the various options considered in the study. Information on transformer loading factors was obtained from discussions with transformer manufacturers, utilities, and surveys of commercial and industrial users.
- *Development of energy conservation options.* Technically feasible energy conservation cases for distribution transformers were based on results of a survey circulated by NEMA, and other information provided by non-NEMA transformer manufacturers.
- *Assessments.* The technical analysis provided estimates of appropriate transformer loading factors, losses, and energy savings for the energy conservation cases.
- *Stakeholders input.* A distribution transformer review group consisting of manufacturers, users, material suppliers, and public interest groups was formed to provide data, and to review the study (see Appendix A of the initial ORNL report). Input from these stakeholders was incorporated in the report.

Much of the data on losses associated with cost-effective transformer designs used in this study are from a survey of

[1] Total Owning Cost is a capitalized value that permits the first cost of the transformer to be compared to the lifetime cost. The capitalized values can be converted to the equivalent discounted present values of the life-cycle costs by multiplying by the ratio of the fixed charge rate over the capital recovery factor. This information can be used to more accurately assess the tradeoffs between transformer first costs and operating costs, and allow the purchaser to compare the total costs of transformers with different energy efficiency levels.

transformers, called the NEMA-ORNL survey, developed by ORNL and circulated by NEMA to its members and several non-NEMA manufacturers. Utilities usually request that manufacturers submit bids for the lowest TOC transformer that they can design by specifying the transformer features and their A and B factors. The NEMA-ORNL survey took this approach. It included what were believed to be the most common features that would be requested for each size and price for the lowest TOC transformer they could design. The survey requested that manufacturers reveal the transformer design that had the lowest TOC in terms of core losses or no load losses (A factor), coil losses or load losses (B factor), and transformer price. While both A and B factors reflect the capitalized cost of losses, they differ in their cost per watt rates for two reasons. First, a watt of core loss represents a continuous loss that occurs whenever a transformer is energized, which is normally 100 percent of the time for most distribution transformers. This continuous loss of energy increases the cost per rated watt of core loss compared with the rated watt of coil loss, which occurs only while power is drawn through the transformer. The second reason for the difference in rate for A and B factors is the cost of energy associated with the losses. Load losses are proportionally higher during peak periods when the per unit cost of producing electricity is relatively high.

Three combinations of A and B factors were requested in the survey. The combinations of A/B factors requested were as follows:

1. A/B=$0/$0, which represents non-evaluated transformers. In the $0/$0 design, only the first cost is considered, and the price of the transformer is used as the TOC value (i.e., the value of losses is not included in the purchase decision). This design was requested in the survey to establish a baseline efficiency for non-evaluated distribution transformers.

2. A/B=$3.50/$2.25, with the B factor of $2.25 per watt representing a transformer with a relatively high average load.

3. A/B=$3.50/$0.75, with the B factor of $0.75 per watt representing a transformer with a normal to low average load while the A factor remains fixed at $3.50 per watt.

Twelve transformer sizes—six liquid-immersed and six dry-type—were surveyed:

Liquid-immersed transformers

1. Single-phase 25-kVA pole-mounted
2. Single-phase 50-kVA pole-mounted
3. Single-phase 50-kVA pad-mounted
4. Three-phase 150-kVA pad-mounted
5. Three-phase 750-kVA pad-mounted
6. Three-phase 2000-kVA pad-mounted

Dry-type transformers

7. Single-phase 1-kVA
8. Single-phase 10-kVA
9. Three-phase 45-kVA
10. Three-phase 1500-kVA
11. Three-phase 2000-kVA
12. Three-phase 2500-kVA

There were 216 transformer designs submitted for the 12 different types of transformers. Each type had at least three designs for each of the three A and B combinations. Eight designs for each of the three A and B combinations were submitted for the liquid-immersed 25-kVA pole, 50-kVA pole, and 50-kVA pad-mounted transformers.

Conservation cases were developed to determine if efficiency standards are warranted for distribution transformers. These cases were based on an economic methodology that is widely used by electric utilities in their purchase of distribution transformers: the TOC (total owning cost) methodology which considers the life cycle cost of owning a transformer. It finds the economically optimal tradeoff between the transformer's capital cost and its operating cost. The TOC methodology is neutral with respect to the technology and materials utilized in the transformer. It is a different approach from conservation based standards that are developed through explicitly considering energy efficient technologies.

For transformers, the technologies applied to alter the losses, and hence efficiencies, are very interactive and involve multiple variables, such as operating current density, flux density, geometric ratios and electrical insulation. For example, reducing no-load losses by using lower loss core materials generally requires an alteration of flux density and core/coil dimensions, which may or may not lower load losses. Hence, the ORNL reports used the TOC approach to allow for this interaction of design parameters in an optimal manner.

The TOC approach allows a utility to purchase the optimum distribution transformer for the particular set of energy costs and operating characteristics that are anticipated over the transformer's life. The TOC approach has led to significant increases in utility transformer efficiencies since it became widespread in the mid-1970's. Because the methodology is neutral with respect to transformer technologies and materials, it leads to choosing transformers that take advantage of any opportunities to economically improve transformer efficiencies.

The TOC approach was used in developing the conservation cases discussed in the ORNL reports. The first step in developing these conservation cases was selection of parameters that define the value of energy losses over a transformer's life. As previously explained, the TOC methodology hinges on the development of the A and B factors which represent the expected lifetime value per watt of a transformer's rated full load losses using the following formula:

$$TOC = price + (\text{no-load losses} \times A) + (\text{load losses} \times B)$$

A second key for developing these cases was selection of the low-TOC designs for the selected A and B values. During a typical transformer bid process, a buyer submits its required technical specifications and A and B values to a manufacturer. The manufacturer considers many transformer designs that meet the buyer's technical specifications with various load losses, no-load losses, and prices. From this large number of designs and costs, the manufacturer submits a selection of very low TOC designs for the buyer's consideration. The survey of manufacturers requested information on their lowest TOC designs for the selected A and B factors.

The losses and prices for each transformer manufacturer's lowest TOC design were used along with the utility surveys to develop the database. The database was used to develop the conservation cases for the determination study: The base case, the lowest TOC case, the median TOC case, the average losses case, and the high-efficiency case. The base case consisted of data on non-evaluated dry-type transformers and recent utility purchases of liquid-immersed transformers. The average losses case was developed by averaging losses from the three lowest TOC designs for each transformer size and type. A description of the conservation cases and their weighted efficiencies are presented in Table 1.

Amorphous-core transformer designs were excluded from two of the conservation cases, the lowest TOC case and the median TOC case. This exclusion does not imply that amorphous-core transformers are not economical for the A and B factors used in the study. Rather the rationale for excluding the amorphous-core transformers was to develop moderately high-efficiency cases that do not depend on a particular technology.

TABLE 1.—THE CONSERVATION CASES, PLUS THE NEMA TP–1 CASE, LISTED IN ORDER OF WEIGHTED EFFICIENCIES

Case	Description	Case efficiency weighted by sales [a] (%)
Base	Existing mix of transformers	98.40
NEMA TP–1	A voluntary efficiency guide	98.59
Median TOC	Efficiency of the transformer with the median TOC design according to a survey of manufacturers [b]	98.68
Average losses	Efficiency corresponding to the average full-load and no-load losses for the three most cost-effective transformers according to a survey of manufacturers [b].	98.81
Lowest TOC	Efficiency of the most cost-effective transformer according to a survey of manufacturers [b]	98.88
High-efficiency	Efficiency corresponding to highest efficiency according to a survey of manufacturers [b]	99.21

[a] The case efficiencies were recalculated by ORNL for this notice and are also set forth in the supplemental ORNL report.
[b] Distribution transformer manufacturers were asked to submit their lowest TOC designs corresponding to economic parameters developed to represent the nation.

Three of the conservation cases were based on the transformer manufacturers' minimum TOC designs. Use of different criteria to select from among the submitted designs provides a range of cost-effective transformer designs with different efficiencies. Estimates of the potential energy that could be saved if distribution transformers were more energy-efficient were developed for the conservation cases. Each conservation case is based on maximum load and no-load losses for the 12 sizes and types that were used to represent all new transformers by allocating each design to a range of transformer sizes. This approach was used because NEMA reports transformer sales in categories that include a range of transformer sizes. To estimate total annual losses for each conservation case, the average transformer losses per kilovolt-ampere were multiplied by the projected kilovolt-amperage of transformer sales. The energy losses (i.e., energy consumed by the transformer) for each conservation case were subtracted from the energy losses for the base case to provide an estimate of annual savings. The base case defines energy use for existing transformer purchasing practices. Table 2 represents the possible energy savings results based on the surveys circulated by NEMA to several NEMA and non-NEMA transformer manufacturers.

TABLE 2.—CUMULATIVE ENERGY SAVINGS FOR CONSERVATION CASES AND NEMA TP–1 a

Conservation case by transformer type	Cumulative savings, 2004–2034 (quads)
NEMA TP–1:	
Liquid	0.39
Dry	2.12
Total	2.51
Median total owning cost (TOC):	
Liquid	0.95
Dry	2.75
Total	3.70
Average losses:	
Liquid	1.84
Dry	3.58
Total	5.42
Lowest TOC:	
Liquid	1.26
Dry	5.04
Total	6.30
High-efficiency:	
Liquid	5.52
Dry	5.18
Total	10.70

[a] The energy savings were re-calculated by ORNL for this notice and are also set forth in the supplemental ORNL report; these savings have been revised downward from those estimated in the initial ORNL report.

The savings per kilovolt-ampere and the projections of estimated megavolt-amperage of transformer sales have been used to estimate the rate of savings in the first year and cumulative savings over 30 years if a conservation standard were enacted. Table 2 assumes that both utility and non-utility purchases of transformer capacity will grow by 1.2 percent annually, which is consistent with low-to-moderate growth energy scenarios. Sales of liquid-immersed utility distribution transformers depend primarily on new housing starts, while gross private domestic investments provide a good indicator for the growth rate of the non-utility (dry-type) transformer market. Several comments during the peer review of the initial ORNL report indicated that higher growth rates used in the report, such as 2.5% for the dry-type transformer market, were not realistic for the distribution transformer industry. The re-analysis on which Tables 1 and 2 are based essentially accepts these comments.

C. Conservation Cases

1. Base Case

Losses for the base case were estimated from the survey of electric utilities for evaluated liquid-immersed transformers (i.e., A and B factors = $0), and from the survey of manufacturers for the non-evaluated liquid-immersed and dry-type transformers (i.e., A factor = $3.50, and B factor = $2.75 or $0.75). The percentage of evaluated transformers was developed from information provided by transformer manufacturers. The base case non-evaluated transformers were assumed to have the average losses that were reported for the three lowest-priced transformers for the $0/$0 evaluation in the NEMA–ORNL survey. It was assumed that the evaluated transformers for the base case have the same losses as transformers that have been recently purchased by utilities. These losses were calculated from the average no-load and load loss ratings reported in the EEI–ORNL survey. The weighted average transformer efficiency for the base case was calculated at 98.40 percent.

2. Lowest Total Owning Cost (TOC) Case

The lowest TOC case measures savings resulting from the use of the lowest TOC non-amorphous transformer design for each of the 12 types of transformers surveyed in the NEMA–ORNL survey. The potential energy savings for this conservation case is 6.30 quads over a period of 30 years. Liquid-immersed transformers have a potential to achieve 1.26 quads in energy savings and dry-type transformers 5.04 quads. The weighted average transformer efficiency for this case was calculated to be 98.88 percent. The annual energy savings of this case is equivalent to

constructing a large coal-fired power plant every four years. Although the technology required to meet this conservation case is feasible, some retooling might be required for manufacturers of dry-type transformers to achieve 5.05 quads of savings over a 30 year period. The actual amount and expenses required of retooling, if any, will be determined by performing a manufacturer impact analysis during the standards rulemaking process.

3. Median Total Owning Cost (TOC) Case

The median TOC case measures savings from the design that represents the median TOC of all submitted designs for each of the 12 types of transformers surveyed. The potential energy savings of this conservation case is 3.7 quads over a 30 year period. Liquid-immersed transformers have a potential to achieve 0.95 quads in energy savings and dry-type 2.75 quads. The weighted average transformer efficiency estimated for this case is 98.68 percent. The technology required to achieve savings at this level is feasible and is currently utilized by manufacturers of liquid and dry-type transformers. Some retooling might be required of dry-type manufacturers to meet this particular conservation case. Further analysis will examine this issue.

4. Average Losses Case

The average losses case measures the average losses for the designs with the three lowest TOC's for each of the 12 types of transformers that were evaluated. If high-efficiency amorphous-core designs qualified as one of the three lowest TOC's, they were included in these averages. Because this case incorporates the losses from several designs that were averaged, it better represents the diversity in cost-effective designs than the other cases. It is more representative of the transformer market than the cases that are based on selecting a single design. It should be reiterated that the transformer losses used to represent the average losses case do not represent the losses of a specific transformer design. Rather, this case represents an average of the losses of the three lowest TOC's for transformers submitted for each category in the survey.

The potential energy savings for this conservation case is 5.42 quads over a 30 year period. Liquid-immersed transformers have a potential energy savings of 1.84 quads and dry-type transformers 3.58 quads. The weighted average efficiency level of this conservation case is 98.81 percent. Although the technology required to meet this conservation case is feasible, retooling might be required for manufacturers of dry-type transformers to meet 3.58 quads of energy savings over a 30 year period. The actual amount and expense required of retooling, if any, will be determined by performing a manufacturer impact analysis during the standards rulemaking process.

5. High-Efficiency Case

This case included both amorphous and non-amorphous core transformer designs and is represented by the highest-efficiency design that was submitted for each of the 12 transformer types surveyed, regardless of the technology used to achieve that efficiency and independent of any economic evaluation criteria such as TOC. The weighted average transformer efficiency for this case is 99.21 percent. For transformer categories where no amorphous-core designs were submitted, the most efficient of the non-amorphous designs was selected.

Although production of amorphous-core transformers may be less process-intensive (i.e., manufacturing involves a smaller number of steps) than that of oriented silicon steel transformers, it is very labor-and materials-intensive. The lack of cost-effective access to this technology by all manufacturers may present an economic hardship to both the transformer manufacturers and end users.

Electric Power Research Institute (EPRI), General Electric (GE), and Allied Signal Amorphous Metals hold most of the U.S. patents for amorphous metal and amorphous technology. The EPRI patents are available under licensing terms and conditions to U.S. manufacturers. An important patent on amorphous ribbon manufacturing held solely by Allied Signal Amorphous Metals will expire this year. However, a critical patent on magnetic field annealing used during transformer core manufacturing is held by GE and will not expire until early in the next century. At present, GE has licensed Allied Signal Amorphous Metals to sublicense transformer manufacturers to use this patent.

If a standard were set at this conservation case level, the impacts on existing liquid-immersed transformer manufacturers that do not produce amorphous core transformers would depend on (1) the ease of access to the technology, (2) the availability of amorphous core material, (3) the level of necessary investments, and (4) the higher transformer selling price. Because the quantity as well as the cost of raw materials in this case is higher than that of oriented silicon steel, the price of these transformers is typically 20 to 40 percent higher than the price of silicon steel transformers. The cost of raw material for amorphous core transformers is twice that of oriented silicon steel. These higher costs are due to the use of ferro-boron, most of which is imported from Japan, China, and the United Kingdom. The cost of this material has decreased during the past two decades from $140 per pound in 1978 to about $1.50 per pound now. By comparison, however, the cost of materials for a non-amorphous core transformer is considerably lower, ranging from $0.70 to $1.15 per pound, depending on the grade of the silicon steel. Although this conservation case is technologically feasible, the increased costs of retooling and of purchasing amorphous core material as opposed to less expensive silicon steel appear to be a potential burden to most manufacturers. Further analysis during the rulemaking process will be performed to determine the potential costs for manufacturers to meet this energy conservation level.

This conservation case includes proprietary amorphous-core technology. Some comments received during the peer review expressed concern regarding the limited access to amorphous core technology. The Department recognizes that standards which effectively limit transformer designs to a particular technology, especially if that particular technology is proprietary, may have adverse competitive and consumer impacts, and that such impacts must be carefully considered in assessing economic justification.

D. Voluntary Programs

1. NEMA TP–1 Guide

In September 1996, NEMA published voluntary guidelines, ''Guide for Determining Energy Efficiency for Distribution Transformers'' (NEMA TP–1), to help purchasers choose energy efficient distribution transformers. Developed by NEMA's Transformer Committee and approved by participating manufacturers as a means to promote the purchase of high efficiency transformers, the guide recommends the use of the TOC methodology to select the most desirable transformer designs and provides a table of recommended efficiency levels for buyers that do not wish to use the TOC methodology.

NEMA TP–1 is a significant purchase decision tool. It offers utility transformer and commercial/industrial transformer users a simplified method

for determining the equivalent first cost of transformers with different efficiency characteristics. This information can be used by prospective purchasers to more accurately assess the tradeoffs between transformer first costs and operating costs. For those who choose not to use this method for analyzing the total operating costs of transformers, NEMA TP–1 also provides tables of minimum efficiencies based on transformer kVA size and voltage.

NEMA TP–1's impact on energy savings will depend largely on two variables: (1) Manufacturer participation and (2) actual buyer/user purchase decisions. In the supplemental ORNL report, the possible energy impacts of NEMA TP–1 program were analyzed. ORNL has advised the Department that the upper bound of energy savings, with full manufacturer participation and universal acceptance by transformer purchasers of the minimum efficiency levels recommended in the NEMA TP–1 tables, would approach 2.51 quads over a 30-year period.

The ORNL analysis concluded that the efficiency levels recommended in the NEMA TP–1 tables would produce roughly a three year payback. The Department believes that such efficiency levels would capture the most cost-effective energy savings, but may not capture substantial energy savings that appear to be economically justified and technologically feasible.

2. National Business Awareness Campaign

The National Business Awareness Campaign was developed by NEMA to increase awareness of the benefits of more energy efficient electrical products, and to promote purchases of such products. This $1.5 million campaign, which has been under development for three years, will be directed at chief executive officers and chief financial officers of companies that purchase or make electrical products. NEMA is seeking support for the campaign from energy interest groups, distributors, energy service companies, and utilities. NEMA is also seeking partnerships with governmental agencies, such as the Environmental Protection Agency and the Department of Energy. NEMA plans to launch its campaign in the June/July time frame of 1997.

The Department seeks to support NEMA's campaign and intends to monitor its effectiveness in increasing the manufacture and purchase of more energy efficient electrical products.

III. Conclusion

A. Determination

Based on its analysis of the information now available, the Department has determined that energy efficiency standards for transformers appear to be technologically feasible and economically justified, and are likely to result in significant savings. Consequently, the Department will initiate the development of energy efficiency test procedures and standards for electric distribution transformers.

All energy conservation cases discussed in today's determination notice are technologically feasible. Data from the ORNL reports clearly show that current technologies used in the transformer market are available to all manufacturers. These technologies include increased use of higher grade silicon steels, copper, aluminum, and amorphous core materials. The machinery and tools used to produce more energy efficient transformers also appear to be generally available to manufacturers.

The cases analyzed in the determination report show that there is a large potential for energy savings, especially over a 30-year period: the Lowest TOC case has the potential to save 6.30 quads over a 30-year period; the Median TOC case could save 3.70 quads; and the High-Efficiency case could save 10.70 quads. The Lowest and Median TOC cases also demonstrate that increased efficiency could reduce significantly the total operating costs incurred by users of transformers, which is a strong indication that such efficiency levels would be economically justified. It also appears that these efficiency levels can be achieved without imposing substantial costs on manufacturers, thus providing further indication that they are economically justified.

Although all of the cases analyzed are technologically feasible and have significant energy savings, and at least two of these cases appear to be economically justified, it is still uncertain whether further analyses will reconfirm these findings. For example, the Department has not assessed the potential adverse impacts of a national standard on manufacturers or individual categories of users. During the course of the standards rulemaking process, the Department will perform an analysis of the impact of possible standards on manufacturers, as well as a more disaggregated assessment of their possible impacts on users.

The Department supports and commends NEMA's initiative to develop voluntary programs that will promote the manufacture and purchase of energy efficient distribution transformers. Industry-wide support for voluntary programs, such as NEMA's TP–1 guide and the National Business Awareness Campaign, could result in significant energy savings that might obviate the need for Federal regulatory intervention.

Based on the results of the analyses that have been completed, however, the Department believes it would be inappropriate to conclude now that either NEMA TP–1 or the National Business Awareness Campaign are likely to result in savings sufficient to eliminate the potential of technologically-feasible and economically-justified national standards to achieve significant additional energy savings. At this time, the Department does not share NEMA's view that the NEMA TP–1 program will result in efficiency levels that approach the maximum technologically feasible and economically justified levels. The supplemental ORNL report indicated that the potential energy savings of NEMA's TP–1 program is 2.51 quads over a 30-year period, while the potential savings from a higher efficiency level that appears to be both technologically feasible and economically justified exceeds 6 quads over 30 years. Furthermore, based on ORNL's analysis of NEMA TP–1, it appears that many buyers of electric distribution transformers, especially in the commercial market (dry-type transformers), are not likely to participate in NEMA's voluntary TP–1 program, so the actual savings are likely to be below the 2.51 quads estimated. The Department will reassess the impact of these voluntary programs during the rulemaking on standards.

B. Future Proceedings

The Department will begin, therefore, the process of establishing testing requirements for distribution transformers, which it expects will result in the publication of a Notice of Proposed Rulemaking in 1998. During this rulemaking process, the Department will consider the draft test procedure currently being developed through a joint effort of NEMA and the National Institute of Standards and Technology (NIST). The Department will schedule a public hearing and may also hold workshops to receive comments in reference to the test procedures. Publication of a Final Rule containing test procedures is anticipated during 1999.

The Department will also begin a proceeding to consider establishment of conservation standards for distribution transformers. Throughout the

rulemaking process, the Department intends to adhere to the provisions of the Interpretive Rule, where applicable. The Department will continue its review and analysis of the likely effects of NEMA TP–1 and National Business Awareness Campaign programs during the standards rulemaking. There will be workshops early in the standards development process to obtain the views of interested parties on design options, the conduct of the engineering and life-cycle cost analyses, and the expertise needed by the Department to perform such analyses. During the rulemaking process, the Department also intends to reevaluate its determination that mandatory standards are technologically feasible and economically justified, and are likely to result in significant energy savings. For example, the Department anticipates that NEMA will strengthen its efforts to promote voluntary standards for distribution transformers and will submit additional data for the Department's review and analysis. The Department welcomes data demonstrating the successful market penetration of NEMA TP–1 and/or the National Business Campaign. If further analyses reveal that standards are not warranted, DOE will revise this determination and will not proceed to promulgate standards.

Issued in Washington, D.C., on September 5, 1997.

Joseph J. Romm,

Acting Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. 97–27948 Filed 10–21–97; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 52 and 64

[CC Docket No. 92–237; FCC 97–364]

Administration of the North American Numbering Plan, Carrier Identification Codes (CICs)

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: On October 9, 1997, the Commission released a Further Notice of Proposed Rulemaking (FNPRM) addressing carrier identification codes (CICs). The FNPRM is intended to obtain comment on issues related to CIC use and assignment. This FNPRM contains proposed information collections subject to the Paperwork Reduction Act of 1995 (PRA). It has been submitted to the Office of Management and Budget (OMB) for review under the PRA. OMB, the general public, and other Federal agencies are invited to comment on the proposed information collections contained in this proceeding. The Commission concurrently released a Order in the same docket.

DATES: Comments must be filed on or before November 24, 1997, and reply comments must be filed on or before December 22, 1997. Written comments by the public on the proposed information collections are due on November 24, 1997. Written comments must be submitted by OMB on the proposed information collections on or before December 22, 1997.

ADDRESSES: Federal Communications Commission, Secretary, Room 222, 1919 M Street, N.W., Washington, DC 20554. In addition to filing comments with the Secretary, a copy of any comments on the proposed information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725—17th Street, N.W., Washington, DC 20503 or via the Internet to fain—t@al.eop.gov.

FOR FURTHER INFORMATION CONTACT: Elizabeth Nightingale, Attorney, Network Services Division, Common Carrier Bureau, (202) 418–2352. For additional information concerning the information collections contained in this FNPRM contact Judy Boley at 202–418–0214, or via the Internet at dconway@fcc.gov.

SUPPLEMENTARY INFORMATION: This summarizes the Commission's Further Notice of Proposed Rulemaking in the matter of Administration of the North American Numbering Plan, Carrier Identification Codes (CICs), CC Docket 92–237, adopted October 8, 1997, and released October 9, 1997. The file is available for inspection and copying during the weekday hours of 9 a.m. to 4:30 p.m. in the Commission's Reference Center, Room 239, 1919 M St., N.W., Washington D.C., or copies may be purchased from the Commission's duplicating contractor, ITS, Inc., 1231 20th Street, N.W., Washington, D.C. 20036, phone (202) 857–3800.

Paperwork Reduction Act

This FNPRM contains a proposed information collection. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the OMB to comment on the information collections contained in this FNPRM, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due at the same time as other comments on this FNPRM; OMB notification of action is due 60 days from date of publication of this FNPRM in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

Title: Administration of the North American Numbering Plan, Carrier Identification Codes (CICs), CC Docket 92–237 (Semi-Annual Access and Usage Reporting Requirements), adopted October 8, 1997, and released October 9, 1997.

Form No.: N/A.

Type of Review: New collection.

Respondents: Business or other for-profit.

Title	No. of respondents	Est. time per response	Total annual burden
1. Incumbent LEC and CIC Assignees Semi-Annual Access and Usage Reporting	2600	4x2	20,800
2. NANP Administrator Semi-Annual Access and Usage Reporting	1	16x2	32

Total Annual Burden: 20,832 hours.

Frequency of Response: Semi-annual.

Estimated costs per respondent: $0.

Needs and Uses: Proposal 1: that semi-annual access and usage reporting requirements for Feature Group D CICs be imposed on all incumbent local exchange carriers (LECs) and CIC assignees and that this information be

filed with the North American Numbering Plan (NANP) administrator. Proposal 2: that the NANP administrator file, on a semi-annual basis, a report with the Commission based on the information received from the incumbent LECs and CIC assignees in their semi-annual reports, and that the NANP administrator include any information obtained as a result of its monitoring CIC usage. The proposed collection of information will significantly aid the industry's and this Commission's joint effort to conserve CICs.

Initial Regulatory Flexibility Act Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected economic impact on small entities by the policies and proposals in this FNPRM. The Commission solicited written public comments on the IRFA, which must be filed by the deadlines for the submission of comments in this proceeding.

Need for and Objectives of Proposed Rules

The FNPRM continues the Commission's analysis of issues related to carrier identification code (CIC) use and assignment. The FNPRM seeks comment on the use and application of Feature Group D CICs, the CICs that are used to provide equal access. The Commission's actions here are part of an effort to ensure fair and efficient overall administration of numbering resources.

Legal Basis

Authority for actions proposed in this FNPRM may be found in: Sections 1, 4(i) and (j), 201–205, 218 and 251(e)(1) of the Communications Act as amended, 47 U.S.C. Sections 151, 154(i), 154(j), 201–205, 218 and 251(e)(1).

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

The proposals made by the Commission in this FNPRM may apply to a variety of entities listed below.

Local Exchange Carriers

We estimate that there are fewer than 1,347 small incumbent LECs that may be affected by the proposals in this FNPRM.

Interexchange Carriers

We estimate that there are fewer than 130 small entity IXCs and 30 ''other'' toll carriers that may be affected by the proposals in this FNPRM.

Wireless Service Providers

The 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, shows that only 12 radiotelephone firms out of a total of 1,176 such firms that operated during 1992 had 1,000 or more employees.[1] Therefore, even if all 12 of these large firms were radiotelephone companies, all of the remainder were small businesses under the SBA's definition. We assume that all of the current radiotelephone licensees are small entities, as that term is defined by the SBA.

Cellular and Mobile Radio Telephone Service

We estimate that there are fewer than 792 small entity Cellular Service Carriers and fewer than 138 small entity Mobile Service Carriers that might be affected by the proposals in this FNPRM. We assume that all of the current rural cellular and mobile licensees are small businesses.

Personal Communications Service

We conclude that the number of small broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small PCS providers as defined by the SBA [2] and the Commission's auction rules.

Paging and Radiotelephone Service, and Private Land Mobile Radio Services, Paging Operations

We believe that it is possible that a significant number of the estimated 48,393 licensees or potential licensees who could take the opportunity to partition or disaggregate a license or who could obtain a license through partitioning or disaggregation will be a small business.

Competitive Access Providers

We estimate that there are fewer than 57 small entity CAPS that may be affected by the proposals in this *FNPRM.*

Operator Service Providers

We estimate that there are fewer than 25 small entity operator service providers that may be affected by the proposals in this *FNPRM.*

Pay Telephone Operators

We estimate that there are fewer than 271 pay telephone operators that may be affected by the proposals in this *FNPRM.*

Resellers

We estimate that there are fewer than 260 small entity resellers that may be affected by the proposals in this *FNPRM.*

Telecommunications Equipment Manufacturers

We estimate that there are fewer than 436 small manufacturers of wireline telecommunications equipment.

Wireless Telecommunications Equipment Manufacturers

We estimate that there are fewer than 778 small manufacturers of wireless telecommunications equipment.

Fire and Burglar Equipment Manufacturers

We estimate that there are fewer than 469 small manufacturers of alarm equipment that may be affected by the proposals in this *FNPRM.*

Alarm Service Providers

We tentatively conclude that there are approximately 2,190 small security system service providers that may be affected by the proposals in this *FNPRM.*

Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

The FNPRM proposes that semi-annual access and usage reporting requirements for Feature Group D CICs be imposed on all incumbent LECs and CIC assignees and that this information be filed with the North American Numbering Plan (NANP) administrator. The FNPRM also proposes that the NANP administrator file, on a semi-annual basis, a report with the Commission based on the information received from the incumbent LECs and CIC assignees in their semi-annual reports, and that the NANP administrator include any information obtained as a result of its monitoring CIC usage. The *FNPRM* tentatively concludes that the proposed reporting requirements will: (1) impose minimum burdens on businesses, including small businesses; and (2) ensure CIC availability to current and new small business competitors, thereby serving the goals of section 257 of the Act, as amended, and offsetting any burdens of the reporting requirements. The *FNPRM* seeks comment on this tentative conclusion. The IRFA seeks further

[1] U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92–S–1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC 4812 (issued May 1995).

[2] *See* para. 9, *supra.*

comment on whether small entities will have additional burdens imposed as a result of these proposed requirements. We believe that monitoring and reporting on CIC usage will significantly aid the industry's and this Commission's joint effort to conserve CICs.

Steps Taken to Minimize Economic Impact on Small Entities and Significant Alternatives Considered

To gather relevant information from all interested parties, including small business entities, about allocation of this scarce numbering resource, we seek comment on a wide array of issues and ask that commenters suggest alternatives to our proposals. The IRFA tentatively concludes that our proposals in the *FNPRM* would impose minimum burdens on small entities. The IRFA seeks comment on these proposals and the impact they may have on small entities.

Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

None.

Analysis of Proceeding

The FNPRM asks for comment on the use and application of Feature Group D CICs, the CICs that are used to provide equal access. The FNPRM also seeks comment on the definition of ''entity'' used to determine who may receive a CIC and on CIC conservation issues, such as: (1) The limit on CIC assignments per entity; (2) the limit on assignable four-digit CICs; (3) CIC reclamation; and (4) usage reporting requirements. For some of these issues, the FNPRM proposes rules. Many of these issues are already addressed in the *CIC Assignment Guidelines*, developed by the industry for the NANP administrator. The intention of the FNPRM is not to propose modifications to the existing guidelines, but rather to propose new Commission rules to govern CIC use and assignment. The Commission's proposals are intended to ensure fair and efficient overall administration of numbering resources; to foster an integrated approach to numbering administration across NANP member countries; and to enable the Commission and regulatory bodies of other nations to ensure that domestic numbering administration is effective through reliance upon the expertise and innovative efforts of industry.

Ordering Clauses

Accordingly, *it is ordered*, pursuant to Sections 1, 4(i) and (j), 201–205, 218 and 251(e)(1) of the Communications Act as amended, 47 U.S.C. Sections 151, 154(i), 154(j), 201–205, 218 and 251(e)(1), that the Further Notice of Proposed Rulemaking is hereby *adopted*.

It is further ordered that the Commission's Office of Managing Director *shall send* a copy of the Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 52

Local exchange carrier, Numbering, Telecommunications.

47 CFR Part 64

Communications common carriers, Telephone.

Federal Communications Commission.

LaVera F. Marshall,

Acting Secretary.

[FR Doc. 97–27998 Filed 10–21–97; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No.97–215, RM–9168]

Radio Broadcasting Services; Wilson and Turrell, AR

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rule making filed on behalf of Pollack Broadcasting Company, permittee of Station KAFW(FM), Channel 234A, Wilson, Arkansas, requesting the reallotment of Channel 234A to Turrell, Arkansas, as that community's first local aural transmission service, and modification of the authorization for Station KAFW(FM) accordingly, pursuant to the provisions of §420(i) of the Commission's rules. Coordinates used for Channel 234A at Turrell are 35–22–36 and 90–15–12.

DATES: Comments must be filed on or before December 1, 1997, and reply comments on or before December 16, 1997.

ADDRESSES: Secretary, Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner's counsel, as follows: Barry D. Wood and Paul H. Brown, Esqs., Wood & Brinton, Chartered, Suite 900, 2300 M Street, NW., Washington, DC 20037–1436.

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

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 97–215, adopted October 1, 1997, and released October 10, 1997. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, NW., Washington, DC 20036, (202) 857–3800.

Provisions of the Regulatory Flexibility Act of l980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

John A. Karousos,

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

[FR Doc. 97–27944 Filed 10–21–97; 8:45 am]

BILLING CODE 6712–01–F

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No.97–216, RM–9153]

Radio Broadcasting Services; Berlin and North Conway, NH

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Fuller-Jeffrey Broadcasting Corporation of Greater Des Moines, licensee of Station WPKQ, Berlin, NH, seeking the reallotment of Channel 279C from

Berlin to North Conway, NH, as the community's first local aural transmission service, and the modification of Station WPKQ's license accordingly. Channel 279C can be allotted to North Conway, at Station WPKQ's presently licensed transmitter site, at coordinates 44–16–14 North Latitude and 71–18–15 West Longitude, which will maintain the presently grandfathered short-spacings to Station WKNE-FM, Channel 279B, Keene, NH, as well as to both the allotment reference coordinates for Channel 279D and proposed new station on Channel 279A at Montreal, Quebec, Canada, and the station on Channel 279A at Kahnawake, Quebec, Canada. Canadian concurrence in this allotment is required since North Conway is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

DATES: Comments must be filed on or before December 1, 1997, and reply comments on or before December 16, 1997.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: John Griffith Johnson, Jr., Paul, Hastings, Janofsky & Walker LLP, 1299 Pennsylvania Avenue, NW, Tenth Floor, Washington, DC. 20004–2400 (Counsel to petitioner).

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No.97–216, adopted October 1, 1997, and released October 10, 1997. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services, Inc., (202) 857–3800, 1231 20th Street, NW, Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

John A. Karousos,

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

[FR Doc. 97–27945 Filed 10–21–97; 8:45 am]

BILLING CODE 6712–01–F

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Chapter X

[STB Ex Parte No. 564]

Service Obligations Over Excepted Track

AGENCY: Surface Transportation Board.

ACTION: Withdrawal of proposed rule and notice of availability of policy statement.

SUMMARY: In a notice of proposed rulemaking published at 62 FR 24896 (May 7, 1997), the Board sought comments on the circumstances under which it should require a railroad to operate over excepted track that does not meet Federal Railroad Administration (FRA) Class 1 track safety standards, and that the operating railroad deems to be unsafe. After reviewing the comments, the Board has decided not to issue rules, but instead to issue a policy statement declaring that the Board will continue the current practice of evaluating railroad service issues on a case-by-case basis. In evaluating carrier claims that track is embargoed for safety reasons, the Board will consult with the FRA.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 565–1600. (TDD for the hearing impaired: (202) 565–1695.)

SUPPLEMENTARY INFORMATION: The Board's policy statement may be reviewed at the Board's offices and is available to all persons for a charge by phoning D.C. NEWS & DATA, INC., at (202) 289–4357.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Decided: October 8, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams,

Secretary.

[FR Doc. 97–27971 Filed 10–21–97; 8:45 am]

BILLING CODE 4915–00–P

Notices

Federal Register

Vol. 62, No. 204

Wednesday, October 22, 1997

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

Grain Inspection, Packers and Stockyards Administration, USDA

Proposed Posting of Stockyard

The Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, has information that the livestock market named below is a stockyard as defined in Section 302 of the Packers and Stockyards Act (7 U.S.C. 202), and should be made subject to the provisions of the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*).

IL–175 Greenville Livestock, Inc., Centralia, Illinois

Pursuant to the authority under Section 302 of the Packers and Stockyards Act, notice is hereby given that it is proposed to designate the stockyard named above as a posted stockyard subject to the provisions of said Act.

Any person who wishes to submit written data, views or arguments concerning the proposed designation may do so by filing them with the Director, Livestock Marketing Division, Grain Inspection, Packers and Stockyards Administration, Room 3408-South Building, U. S. Department of Agriculture, Washington, D.C. 20250, by November 6, 1997.

All written submissions made pursuant to this notice will be made available for public inspection in the office of the Director of the Livestock Marketing Division during normal business hours.

Done at Washington, D.C. this 14th day of October 1997.

Daniel L. Van Ackeren,

Director, Livestock Marketing Division, Packers and Stockyards Programs.

[FR Doc. 97–27927 Filed 10–21–97; 8:45 am]

BILLING CODE 3410–EN–P

DEPARTMENT OF COMMERCE

Bureau of Export Administration

Transportation and Related Equipment Technical Advisory Committee; Notice of Open Meeting

A meeting of the Transportation and Related Equipment Technical Advisory Committee will be held November 7, 1997, 9:00 a.m., at the Herbert C. Hoover Building, Room 1617M–2, 14th Street between Pennsylvania & Constitution Avenues, N.W., Washington, D.C. The Committee advises the Office of the Assistant Secretary for Export Administration with respect to technical questions which affect the level of export controls applicable to transportation and related equipment or technology.

Agenda

1. Opening remarks by the Chairperson.
2. Navy presentation on Uninhabited Air Vehicle (UAV) development and export control implications.
3. Status of Missile Technology Control Regime.
4. Update on The Wassenaar Arrangement.
5. Update on Bureau of Export Administration initiatives.
6. Election of Chairperson.
7. Review of List Review proposals offered by members.
8. Review of action items.
9. Presentation of papers or comments by the public.

The meeting will be open to the public and a limited number of seats will be available. To the extent time permits, members of the public may present oral statements to the Committee. Written statements may be submitted at any time before or after the meeting. However, to facilitate distribution of public presentation materials to Committee members, the Committee suggests that you forward your public presentation materials two weeks prior to the meeting to the following address: Ms. Lee Ann Carpenter, OAS/EA/BXA MS: 3886C, U.S. Department of Commerce, 14th & Constitution Avenue, N.W., Washington, D.C. 20230.

For further information or copies of the minutes, please call (202) 482–2583.

Dated: October 16, 1997.

Lee Ann Carpenter,

Director, Technical Advisory Committee Unit.

[FR Doc. 97–27947 Filed 10–21–97; 8:45 am]

BILLING CODE 3510–DT–M

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 75–97]

Proposed Foreign-Trade Zone—Gregg County, Texas; Application and Public Hearing

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by Gregg County, Texas, to establish a general-purpose foreign-trade zone in Gregg County, Texas, adjacent to the Shreveport-Bossier Customs port of entry. The application was submitted pursuant to the provisions of the FTZ Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR Part 400). It was formally filed on October 14, 1997. The applicant is authorized to make the proposal under Senate Bill 691 of the 70th Legislature of the State of Texas (Regular Session, 1987), codified as Tex. Rev. Civ. Stat. Ann. art. 1446.01.

The proposed zone site (299 acres) is located at the Gregg County Airport, approximately 4 miles south of the City of Longview, Texas. It is owned by the applicant. The proposed FTZ project is designed to serve the entire East Texas Region consisting of fourteen counties. (This would be the second foreign-trade zone associated with the Shreveport-Bossier Customs port of entry. FTZ 145 in Shreveport was established in 1988.)

The application contains evidence of the need for foreign-trade zone services in the East Texas Region. Several firms have indicated an interest in using zone procedures for warehousing/distribution activity. Specific manufacturing approvals are not being sought at this time. Requests would be made to the Board on a case-by-case basis.

In accordance with the Board's regulations, a member of the FTZ Staff has been designated examiner to investigate the application and report to the Board.

As part of the investigation, the Commerce examiner will hold a public hearing on November 20, 1997, 2:00 p.m., Gregg County Courthouse, 101 E. Methvin Street, Longview, Texas 75601.

Public comment on the application is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is December 22, 1997. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to January 5, 1997).

A company of the application and accompanying exhibits will be available during this time for public inspection at the following locations:

Gregg County Courthouse 101 E. Methvin Street, Suite 300 Longview, Texas 75601

Office of the Executive Secretary Foreign-Trade Zones Board, Room 3716 U.S. Department of Commerce 14th & Pennsylvania Avenue, NW Washington, DC 20230

Dated: October 15, 1997.

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 97–27989 Filed 10–21–97; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–707]

Granular Polytetrafluoroethylene Resin From Japan; Notice of Rescission of Initiation of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of rescission of antidumping duty administrative review.

SUMMARY: On September 25, 1997, the Department of Commerce published in the **Federal Register** a notice announcing the initiation of an administrative review of the antidumping duty order on granular polytetrafluoroethylene from Japan, covering one manufacturer/exporter of the subject merchandise, Mitsui-DuPont Polychemical, for the period August 1, 1996 through July 31, 1997. On September 17, 1997, we received a request for withdrawal from this review from Mitsui. Because Mitsui submitted a timely request for withdrawal and because no other interested party requested a review, we are rescinding this review.

EFFECTIVE DATE: October 22, 1997.

FOR FURTHER INFORMATION CONTACT: Davina Hashmi or Gregory Thompson, AD/CVD Enforcement, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, DC 20230; telephone: (202) 482–5760 or (202) 482–0410, respectively.

SUPPLEMENTARY INFORMATION:

Applicable Regulations

Unless otherwise indicated, all citations to the Department of Commerce's (the Department) regulations are to the regulations published in the **Federal Register** on May 19, 1997 (62 FR 27296).

Background

On August 28, 1997, Mitsui-DuPont Polychemical (Mitsui) requested an administrative review with respect to its entries or sales of granular polytetrafluoroethylene (PTFE) resin. On September 25, 1997, in accordance with section 351.221(b) of our regulations, we initiated an administrative review of this order for the period August 1, 1997 through July 31, 1997 (62 FR 50292). On September 17 and 25, 1997, Mitsui withdrew of its request for review.

Pursuant to section 351.213(d)(1) of the Department's regulations, a party may withdraw its request for an administrative review not later than 90 days after the date of publication of the notice of initiation of the administrative review. The Department may extend this time limit if the Department decides it is reasonable to do so.

Because Mitsui submitted a timely withdrawal of its request for review and because no other party requested a review, the Department is rescinding this initiation.

This notice is published in accordance with 19 CFR 351.213(d)(1).

Dated: October 14, 1997.

Richard W. Moreland,

Acting Deputy Assistant Secretary, AD/CVD Enforcement.

[FR Doc. 97–27997 Filed 10–21–97; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–706]

Nitrile Rubber From Japan: Termination of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Termination of Antidumping Duty Administrative Review.

SUMMARY: On August 1, 1997, the Department of Commerce initiated an administrative review of the antidumping duty order on Nitrile Rubber from Japan for one manufacturer or producer of nitrile rubber from Japan, Japan Synthetic Rubber Co., Ltd., covering the period June 1, 1996 through May 31, 1997. The Department of Commerce is terminating the review after receiving a withdrawal of its request for a review from Japan Synthetic Rubber Co., Ltd.

EFFECTIVE DATE: October 22, 1997.

FOR FURTHER INFORMATION CONTACT: Sheila Forbes or Irene Darzenta, AD/CVD Enforcement Group II, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482–0065 and (202) 482–6320, respectively.

SUPPLEMENTARY INFORMATION:

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Tariff Act), are to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department of Commerce's (the Department's) regulations are to the regulations as codified at 19 CFR Part 353 (1997).

Background

On June 30, 1997, Japan Synthetic Rubber Co., Ltd., a manufacturer and exporter of merchandise subject to this order, requested that the Department conduct an administrative review of the antidumping duty order on nitrile rubber from Japan for the period June 1, 1996 through May 31, 1997.

On August 1, 1997, the Department published in the **Federal Register** (62 FR 41339) a notice of initiation of administrative review with respect to Japan Synthetic Rubber Co., Ltd. for the period June 1, 1996 through May 31, 1997. On August 13, 1997, Japan Synthetic Rubber Co., Ltd. requested that it be allowed to withdraw its request for a review and that the review be terminated.

Pursuant to 19 CFR 353.22(a)(5) of the Department's regulations, the Department may allow a party that requests an administrative review to withdraw such request not later than 90

days after the date of publication of the notice of initiation of the administrative review. In light of the fact that Japan Synthetic Rubber Co., Ltd.'s request for termination was submitted within the 90-day time limit and there were no requests for review from other interested parties, we are terminating this review for Japan Synthetic Rubber Co., Ltd. *See Certain Welded Stainless Steel Pipe from Korea, Termination of Antidumping Duty Administration Review*, 62 FR 47460, (September 9, 1997). We will issue appraisement instructions directly to the U.S. Customs Service.

This notice is in accordance with 19 CFR 353.22(a)(5).

Dated: October 15, 1997.

Richard W. Moreland,

Acting Deputy Assistant Secretary, Group II, Import Administration.

[FR Doc. 97–27993 Filed 10–21–97; 8:45 am]

BILLING CODE 3510–DS–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–824]

Notice of Termination of New Shipper Antidumping Duty Administrative Review: Polyvinyl Alcohol From Taiwan

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: October 22, 1997.

FOR FURTHER INFORMATION CONTACT: Everett Kelly or Brian Smith, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482–4194 or (202) 482–1766, respectively.

The Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Act), are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all references to the Department's regulations are to those codified at 19 CFR part 353, as they existed on April 1, 1996.

Background

On December 18, 1996, the Department published in the **Federal Register** notice the initiation of a new shipper administrative review of the antidumping duty order on polyvinyl alcohol from Taiwan covering the exporter Perry Chemical Corporation (''Perry'') and the period May 1, 1996, through October 31, 1996 (61 FR 68237, December 28, 1996).

Under Section 751(a)(2)(B)(i) of the Act, the Department will conduct an administrative review to establish an individual weighted average dumping margin if the Department receives a request from an exporter or producer that establishes (1) it did not export the merchandise that was the subject of the antidumping duty order to the United States during the period of investigation and (2) it is not affiliated within the meaning of section 771(33), any exporter or producer who exported the merchandise to the United States during that period of investigation.

In the less than fair value (LTFV) investigation, the Department investigated the sales of Chang Chun Petrochemicals, Ltd. (Chang Chun), the only exporter of PVA from Taiwan during the period of investigation, including sales to Perry, a U.S. importer. The record indicates that Perry has had a longstanding business relationship as an importer of PVA produced by Chang Chun and imported the subject merchandise produced and exported by Chang Chun during the period of the LTFV investigation. The Department found Chang Chun to be dumping at a rate of 19.21 percent during the LTFV investigation. In this review, the business relationship remains essentially unchanged. As shown by proprietary information on the record in this review, Perry continues to be the importer and Chang Chun continues to undertake the entire production of PVA.

For the sales in question in this review, Perry states that in addition to being the importer, it is now also the ''manufacturer/exporter'' of the subject merchandise, and that as a new exporter, it is entitled to a new shipper rate. Perry indicates that to produce the subject merchandise, Perry purchased the primary input of PVA, vinyl acetate monomer (VAM) from a Taiwan producer of VAM through an unaffiliated U.S. trading company. Perry contracted with Chang Chun to produce PVA utilizing Perry's VAM under a tolling arrangement. Perry then sold the PVA to unaffiliated customers in the United States and Canada during the period of review (POR).

In most past cases involving tolling arrangements the Department considered the manufacturer of the product exported to the United States to be the processor or toller, and not the party which controlled the production process, set the prices of the finished product in all markets, and held title to both the inputs and the subject merchandise (*see, e.g., Final Determination of Sales at Less Than Fair Value: Certain Small Diameter Welded Carbon Steel Pipes and Tubes from the Phillippines*, 51 FR 33099, September 18, 1986).

Within the last few years, the Department has reconsidered its position of deeming the toller the manufacturer. A toller has no control over the price charged to U.S. and domestic buyers of the finished product, nor does a toller set the price in either market. Moreover, because the Department only considered the price or cost of the tolling in making comparisons between U.S. prices and prices of sales of the foreign like product, the Department did not capture all of the costs of manufacturing the subject merchandise, *e.g.*, cost of inputs, as required by the statute section 773. Therefore, this approach did not allow for analysis of price comparisons between the finished products.

To resolve this situation, the Department revised its tolling practice. Rather than treat the toller as the producer, the Department now will treat the party who keeps title to the inputs and the finished product, controls the entire production process, and sets the price of the finished product in each market as the producer and, hence, the proper respondent (*see Discussion Memorandum: A Proposed Alternative to Current Tolling Methodology in the Current Antidumping (AD) Reviews of Carbon Steel Flat Products,* Memorandum from Joseph A. Spetrini, Deputy Assistant Secretary for Compliance, to Susan G. Esserman, Assistant Secretary for Import Administration, dated December 12, 1994).

This approach is also reflected in the Department's preamble to its new regulations (*Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27295 (May 19,1997). Under section 351.401(h) of the new regulations, which, although not legally in effect for this new shipper review, are, at the time of this request for review, an expression of the Department's practice, the Department will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership of the finished product and does not control the relevant sale of the subject merchandise and the foreign like product. *See also Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27411 (legally effective only for segments of the proceeding initiated based on requests filed after June 18,

1997, but nevertheless a restatement of the Department's practice).

Perry claims that under the tolling agreement between Perry and Chang Chun, Perry maintains control of the entire production process by (1) controlling the supply of the major input, VAM, used to produce tolled PVA by Chang Chun, (2) controlling Chang Chun's production of tolled PVA through the specifications (grades) and amounts to be produced, (3) retaining title to VAM and the finished product throughout the tolling process, and (4) establishing the prices, the quantities and specifications/grade at which the tolled PVA will be sold in the United States and other markets. Perry pays a fee to Chang Chun for these services.

Perry has stated the following on the record of this proceeding:

(1) Perry controlled the sales process of the tolled PVA.

As detailed in its questionnaire responses, Perry controlled all aspects of its tolled PVA sales. It identified customers and negotiated the terms of sale with them. Perry arranged the warehousing and palletization of the tolled PVA prior to delivery to its customers. Perry shipped the merchandise to its customers and carried the accounts receivables until payment was received.

(2) Perry controlled the production of the tolled merchandise.

As detailed in its questionnaire responses, Perry controlled Chang Chun's production of PVA according to the terms of the tolling agreement. Perry determined all specifications for production of the PVA. Chang Chun could not deviate from Perry's production specifications without Perry's written approval. (This is reflected in the warranty terms set out in the contract.) Chang Chun could not produce PVA from the VAM owned by Perry without Perry's written instructions.

(3) Perry held title to the input materials.

As detailed in Perry's questionnaire responses, Perry purchased VAM through an unaffiliated trading company. Perry retained title to the merchandise throughout the PVA production process while the material was in Chang Chun's possession. Title did not transfer until it passed to Perry's customers upon delivery to them.

Petitioner, Air Products and Chemicals, Inc., argues that Chang Chun, not Perry, is the producer of the subject merchandise because the processing performed by Chang Chun is not a minor finishing operation, but rather a substantial transformation which converts VAM into the subject merchandise. Petitioner further contends that the Department should terminate this review because, based on the facts presented in this proceeding, there is no material difference between the Chang Chun sales to Perry in the LTFV investigation, when Perry was merely an importer, and the alleged tolling relationship now in existence between Chang Chun and Perry. The only difference is the paperwork. Petitioner concluded that Perry is not entitled to a new shipper review because Chang Chun is the true manufacturer of the subject merchandise.

Petitioner also argues that Perry is not entitled to a new shipper review because Perry and Chang Chun are affiliated under the affiliated parties provision of section 771(33)(G) of the Act. Petitioner contends that although Perry is not affiliated with Chang Chun through stock ownership, it is affiliated with Chang Chun by its close supplier relationship and its debt financing.

Perry responds that it has fully satisfied the Department's revised interpretation of a manufacturer/exporter of tolled merchandise and, therefore, Chang Chun is not the manufacturer of the merchandise. Perry further states that petitioner's conclusion that Chang Chun is the manufacturer is inconsistent with the standard for manufacturer/producer status codified in the Department's new regulations at 19 CFR section 351.401(h) (1997). Finally, Perry responds that, as the proprietary information placed on the record shows, its accounts payable to Chang Chun is not debt financing and does not establish an affiliation under the Act. Moreover, Chang Chun made a submission asserting that it does not exercise control over Perry through the supplier relationship.

We have determined that Perry does not qualify as a new shipper regardless of whether we regard it as the producer of PVA tolled by Chang Chun. If we were to continue to regard Chang Chun as the producer, Chang Chun (not Perry) would be both the producer and the exporter, because Chang Chun has knowledge at the time it sells to Perry that the subject merchandise is for export to the United States. On the other hand, if Perry is the producer based on a tolling arrangement with Chang Chun, we find that Perry would be affiliated with Chang Chun, an exporter of subject merchandise during the investigation.

Perry claims that it controlled all aspects of the subcontractor's operations in the tolling transaction—*i.e.*, Chang Chun's processing of VAM. Perry's own questionnaire responses indicated that Perry exercised direction over Chang Chun in all facets of the processing of VAM. This direction purportedly also illustrated in the tolling agreement between Perry and Chang Chun, included as part of the February 26, 1997, questionnaire response.

Under section 771(33)(G) of the Act, the Department will consider parties to be ''affiliated'' if one person controls any other person. The statutory provision defines control as a situation in which one person is legally or operationally in a position to exercise restraint or direction over another person. Based on our analysis of the information on the record, we do not find that Chang Chun exercises control over Perry through debt financing or the supplier relationship. However, based on Perry's own statements on the record, Perry was legally and operationally in a position to exercise direction over Chang Chun's production of PVA under contract to Perry and exported by Perry to the United States during the POR. Accordingly, Perry's assertions indicate that Perry and Chang Chun are affiliated persons within the meaning of section 771(33)(G) of the Act with regard to Perry's sales of PVA tolled by Chang Chun.

Based on this determination of affiliation, this proceeding does not meet the requirements of section 751(a)(2)(B) of the Act for conducting a new shipper review with regard to Perry's sales of tolled PVA since Perry is affiliated with Chang Chun, which was a producer who exported and producer of the subject merchandise during the period of the LTFV. This determination of affiliation under section 771(33)(G) of the Act is based on the particular facts of this review, and is made only in the context of determining Perry's eligibility for a new shipper review under section 751(a)(2)(B). Alternatively, if Perry is not the manufacturer based on a tolling arrangement, there likewise is no basis for conducting a new shipper review. Therefore, the Department is terminating this review.

Dated: October 14, 1997.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 97–27991 Filed 10–21–97; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–506]

Porcelain-on-Steel Cooking Ware From the People's Republic of China; Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of final results of antidumping duty administrative review.

SUMMARY: On January 29, 1997, the Department of Commerce (the Department) published in the **Federal Register** the preliminary results of its administrative review of the antidumping duty order on porcelain-on-steel (POS) cooking ware from the People's Republic of China (PRC) (62 FR 4250). This review covers shipments by two manufacturers/exporters of this merchandise to the United States during the period December 1, 1993, through November 30, 1994. We gave interested parties an opportunity to comment on our preliminary results. Based upon our analysis of the comments received (*see Analysis of Comments Received* section below), these final results of review remain unchanged from the preliminary results of review.

EFFECTIVE DATE: October 22, 1997.

FOR FURTHER INFORMATION CONTACT: Lorenza Olivas or Kelly Parkhill, Office of CVD/AD Enforcement VI, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington D.C. 20230; telephone (202) 482–2786.

Applicable Statute and Regulations: Unless otherwise stated, all citations to the statute and to the Department's regulations are references to the provisions as they existed on December 31, 1994.

SUPPLEMENTARY INFORMATION:

Background

On December 2, 1986, the Department published, in the **Federal Register**, the antidumping duty order on POS cooking ware from the PRC (51 FR 43414). On December 6, 1994, the Department published, in the **Federal Register**, a notice of opportunity to request an administrative review of this antidumping duty order (59 FR 62710) covering the period December 1, 1993, through November 30, 1994.

On December 21, 1994, in accordance with 19 C.F.R. 353.22(a)(1), a U.S. importer, CGS International Inc. (CGS), requested that we conduct an administrative review of Clover Enamelware Enterprise Ltd. (Clover), a PRC manufacturer/exporter of the subject merchandise, and its third-country reseller in Hong Kong, Lucky Enamelware Factory Ltd. (Lucky). On December 29, 1994, in accordance with 19 C.F.R. 353.22(a), petitioner, General Housewares Corp. (GHC) requested that we conduct an administrative review of China National Light Import and Export Corporation (China Light), Shanghai Branch, through Amerport (H.K.), Ltd. We published the notice of initiation of this antidumping duty administrative review covering the period December 1, 1993 through November 30, 1994, on January 13, 1995 (60 FR 3192).

On February 29, 1997, the Department published in the **Federal Register** the preliminary results of this administrative review of the antidumping duty order on POS cooking ware from the PRC (62 FR 4250). There was no request for a hearing. The Department has now completed this review in accordance with section 751(a) of the Act.

Related Parties

Clover is two-thirds owned by Lucky and therefore Lucky holds controlling interest in Clover. Due to Lucky's ownership interest in Clover, and the fact that the same individual is the general manager at both companies, we consider Clover and Lucky (hereafter Clover/Lucky) to be related pursuant to section 771(13) of the Act. As such, and consistent with prior reviews of this order, we have calculated only one rate for both of these companies. For a further discussion of this issue, see Memorandum from Case Analyst to the File Regarding Status as Related Parties dated January 17, 1997, which is a public document on file in the Central Records Unit (room B–099 of the Department of Commerce).

Scope of Review

Imports covered by this review are shipments of POS cooking ware, including tea kettles, which do not have self-contained electric heating elements. All of the foregoing are constructed of steel and are enameled or glazed with vitreous glasses. The merchandise is currently classifiable under the HTS item 7323.94.00. HTS item numbers are provided for convenience and Custom purposes. The written description remains dispositive.

Best Information Available

In our preliminary results, we determined, in accordance with sections 776(b) and (c) of the Act, that the use of best information available (BIA) is appropriate for China Light and Clover/Lucky. (*See* ''Memorandum for Jeffrey P. Bialos from Barbara E. Tillman Regarding Use of Best Information Available'' dated January 16, 1997, which is a public document on file in the Central Records Unit (room B–099 of the Main Commerce Building).) We received written comments on the preliminary results of review. Our analysis of the comments submitted by interested parties has not led us to modify our findings from the preliminary results.

Section 776(b) of the Act states that the Department shall use BIA whenever it is unable to verify the information submitted. Section 776(c) of the Act states that the Department shall use BIA whenever a company refuses or is unable to produce information in a timely manner and in the form required, or significantly impedes an investigation or review.

In deciding what to use as BIA, section 353.37(b) of the Department's regulations provide that the Department may take into account whether a party refuses to provide requested information or impedes a proceeding. Thus, the Department determines on a case-by-case basis what is BIA. The Department uses a two-tiered approach in its choice of BIA. When a company refuses to provide the information requested in the form required or otherwise significantly impedes the Department's review (first tier), the Department will normally assign to that company the higher of (1) the highest rate found for any firm in the less-than-fair-value (LTFV) investigation or a prior administrative review; or (2) the highest rate found in the current review for any firm. When a company has cooperated with the Department's request for information but fails to provide information requested in a timely manner or in the form required such that margins for certain sales cannot be calculated (second tier), the Department will normally assign to those sales the higher of (1) the highest rate applicable to that company for the same class or kind of merchandise from any previous review or the original investigation; or (2) the highest calculated margin for any respondent in the current review. *See Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of An Antidumping Duty Order: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, et. al.*, 58 FR 39729 (July 26, 1993). This practice has been upheld in *Allied-Signal Aerospace Co.* v. *United States*, 996 F.2d 1185

(Fed. Cir. 1993), and *Krupp Stahl AG et al.* v. *United States,* 822 F. Supp. 789 (CIT 1993).

As mentioned above, China Light did not respond to our questionnaire. As non-cooperative, first-tier BIA, and in accordance with section 776(c) of the Act, we have applied the highest margin from the LTFV investigation, prior administrative reviews, or in this review, which is 66.65 percent. Further, China Light was not found eligible for a separate rate in this review. Consequently, China Light is part of the single NME entity in this review, which has been assigned the PRC country-wide rate (*see, e.g., Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China; Preliminary Results of Antidumping Duty Administrative Review;* 61 FR 15218, 15221 (April 5, 1996), and *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China; Final Results of Antidumping Duty Administrative Review;* 61 FR 15269 (October 1, 1996).

Clover/Lucky cooperated with our requests for information and agreed to undergo verification. From July 17 through July 29, 1995, the Department attempted verification of the company's questionnaire response at Lucky's sales offices in Hong Kong and Clover's factory in Shenzhen, PRC. As a result of these verification efforts with respect to Clover's questionnaire response, we discovered significant discrepancies and were unable to verify substantial sections of the questionnaire response, including statutorily required factors of production information, such as the number of labor hours worked and the per unit quantities consumed of primary material inputs. These discrepancies are detailed in the Department's verification report concerning Clover, dated January 13, 1997.

As a result, the Department has determined that the data the company submitted is unverifiable. Therefore, in accordance with section 776(b) of the Act, there is no basis to accept the integrity of the factors of production information submitted in the questionnaire response, constituting a verification failure. *See Notice of Final Determination of Sales at Less Than Fair Value: Melamine Institutional Dinnerware Products from the People's Republic of China,* 61 FR 1708 (January 13, 1997). Because the respondent failed verification, the Department must use BIA. Since Clover/Lucky was cooperative, we have applied second-tier BIA. The second-tier BIA rate is the highest rate applicable to the company from a previous review or the original LTFV investigation, which in this case is 66.65 percent, the rate Clover/Lucky received in the 1990/91 administrative review.

Analysis of Comments Received

We gave interested parties an opportunity to comment on the preliminary results. We received a case brief from Clover/Lucky (respondent) and a rebuttal brief from General Housewares (petitioner).

Comment 1: Clover/Lucky alleges that the Department's decision to consider verification a failure is unwarranted. According to respondent, the problems at verification were due to: (1) The brevity of the verification at Clover's factory in the PRC; and (2) the Department's failure to explore alternative methods of verification.[1] Clover/Lucky claims that had the Department spent more time at Clover, the Department would have been able to verify much of the allegedly unverified information. According to Clover/Lucky, it is the Department's obligation to allow itself the time necessary to verify the responses and find alternative methods of verification of information, if needed.

Petitioner argues that Clover/Lucky provided no evidence demonstrating that the Department's verification procedures to verify Clover/Lucky were unfair or unreasonable.

Department's Position: We disagree with respondent. The on-site verification at Clover's factory in the PRC was but one portion of the ten-day verification of Clover/Lucky's questionnaire response. Ten days to verify a questionnaire response is well within the normal time period allotted for such verifications. In addition, as Clover/Lucky noted in its case brief, the verification team was willing to, and did, work overtime to allow the company the opportunity to demonstrate the accuracy of the submitted information. Further, upon leaving Clover's factory in the PRC, the team gave Clover the opportunity to send any missing supporting documentation to Lucky's offices in Hong Kong, which the team would then verify at that location. Despite this opportunity, Clover sent no such information.

As we stated in *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, et. al.; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 61 FR 66481, 66482 (December 17,1996), ''It is incumbent on the respondent to establish the accuracy of the information it submits during the time period allotted for verification.'' This position is supported by the U.S. Court of International Trade (CIT) which stated, ''There is no statutory mandate as to how long the process of verification must last, ... [The Department] is afforded discretion when conducting a verification pursuant to 19 U.S.C. 1677e(b).'' *Persico Pizzamiglio, S.A.* v. *United States,* 18 CIT 229, 307 (1994) (holding that a three-day overseas verification was reasonable). *See also Ceramica Regiomontana, S.A.* v. *United States,* 10 CIT 399, 406, 636 F. Supp. 961, 967 (1986) (held that the Department has wide latitude in determining the time to be spent and the procedures to be used to conduct verification).

We also disagree with Clover/Lucky's contention that it is the Department's obligation to explore alternative approaches to verifying information. As petitioner points out in its rebuttal brief, it is the responsibility of the respondent, and not of the Department, to create a sufficient record in the administrative review. *Tatung Co.,* v. *United States,* 18 CIT 1137, 1140 (1994). The purpose of verification is to verify the accuracy of the response, not to collect information or recreate the response in order to address its errors or deficiencies. *See Belmont Industries* v. *United States,* 733 F. Supp. 1507, 1508 (CIT 1990) (''verification is like an audit, the purpose of which is to test information provided by a party for accuracy and completeness. Normally an audit entails selective examination rather than testing of an entire universe''); *see also Monsanto Co.* v. *United States,* 698 F. Supp. 275, 281 (CIT 1988) (''verification is a spot check and is not intended to be an exhaustive examination of the respondent's business''). To accomplish this, the Department uses standard verification methods, and among other things, examines the source documents that respondents claim were used to

[1] Clover/Lucky suggests the following alternative methods for some portions of the response that could not be verified: (1) The verifiers could have timed the products going through the production process in order to verify the piece rate tables used to calculate the workers' wages; (2) 1995 (post-POR) time cards could be examined to verify the 1993/94 labor hours and piece rates reported in the response; (3) uncoated semi-finished steel blanks, steel blanks with the initial ground coat, steel blanks with the cover coat, double-coated steel blanks and finished goods for selected products could have been shipped to the United States for further examination and weighing in order to verify the reported enamel consumption; and (4) loan documents identifying ownership of machinery between Lucky and Clover could be examined, in conjunction with on-site identification of molds and equipment by knowledgeable floor supervisors, in order to verify the depreciation information included in the response that could not be verified through the depreciation cards.

compile the information contained in their questionnaire response.

To assist respondents in preparing for verification, the Department issues an outline of the verification to respondents prior to the arrival of the verifiers. Prior to verification in this case, the Department sent an outline of the verification procedures to Clover/Lucky. The outline identified the information in the response that the Department intended to verify and the types of source documents that would be examined by the Department when conducting the verification. The outline also indicated that it was not exhaustive, and that the Department might request relevant additional material necessary for a complete verification.

As discussed above, the Department does not have an unlimited amount of time in which to conduct a verification. As characterized by the CIT itself, verification under these conditions is, by its very nature, a spot check rather than a complete audit. As such, it is crucial that the information reported in the questionnaire response can be readily verified if selected for examination. Given the time limits of verification, the Department is unable to await, let alone accept, numerous clarifications or corrections to responses at verification, nor can it explore all conceivable verification methods suggested by a respondent in the hope that one of them might conceivably result in the information being verified at some indefinite point in the future.

The alternative methods of verification suggested by Clover/Lucky would have required significant amounts of additional time to undertake. In this case, such time was no longer available because of the difficulties encountered in verifying the information in the response using standard verification procedures as set forth in the verification outline that was sent to Clover/Lucky. For example, with respect to timing the processing steps on the factory floor as an alternative method of verifying labor hours, respondent noted in its comments that Clover's POS cookware production process is a complicated one. According to Clover/Lucky, the simplest piece of enamelware, a plate, involves seven processes while a teakettle (a covered cookware item) involves 48 processes. Some of these processes (*e.g.*, enameling) involve considerable time between steps. Given the need to take several readings per processing step being examined in order to calculate a meaningful average, this method would require considerable time and effort to verify even one cookware item, much less a meaningful sample of the approximately 45 cookware items under review. Further, Clover manufactures over 450 different enamelware items, only a portion of which are cookware items sold in the United States. Therefore, it is highly unlikely that the Department would be able to randomly select a cookware item from the piece rate table (a table listing the standard amounts of time required to complete individual processing steps for each enamelware item produced by the company) and find that it is being produced that day on the shop floor.

In addition, two of the suggested alternatives, the use of 1995 (post-POR) source documents to verify 1993/94 data and the post-verification shipment of finished and semi-finished cookware products to the United States for examination by the Department are simply not reasonable verification alternatives. The Department cannot accept unrelated information from a future review period to substitute for source documents from the period under review. The comparison of 1995 time cards to 1993/94 labor records and piece rate tables will not result in any meaningful determination as to the accuracy of the submitted 1993/94 information. As to the submission of selected pieces of finished and semi-finished cookware to the Department for examination and weighing, the purpose of on-site verification is to enable the Department not only to check certain factual information but also to be able to further verify the accuracy of the submitted information through questions to, and clarifying statements from, those individuals that either prepared the response, are involved in the manufacture and exportation of the merchandise under review or are responsible for maintaining the company's books and records. This is not possible under Clover/Lucky's suggested alternative methods of verification.

Comment 2: Clover/Lucky alleges that it should not be penalized for failing to maintain the source documentation needed to support its reported labor hours/record retention. Neither the questionnaire nor the outline specifically stated that time cards needed to be retained for verification. Further, these records are not required to be kept by local tax authorities.

Department's Position: Contrary to respondent's characterization that its failure to maintain source documentation for reported labor hours was the cause of the failed verification, in this review, labor hours were among the many items that Clover/Lucky was unable to tie to or support with source documentation.

In addition, we disagree with respondent's claim that it should not be penalized for failing to maintain certain source documents because the Department did not specifically identify these source documents in its questionnaire or outline. Both the questionnaire and the verification outline make it clear that the information submitted in the response may be subject to verification. Because responses submitted in an administrative review may be subject to verification, it is incumbent upon a respondent to retain the source documentation which it used to prepare the questionnaire response. The verification outline further notes that we will be tying the information reported in the response to the company's source documents that support that information. The outline provides examples of the type of documents we examine and clearly states that we may require any additional documentation necessary for a complete verification. Time cards are among the documents that support a company's payroll. That the Department might request to examine these time cards can hardly be considered outside the realm of possibility in a verification of reported labor hours. Section 773(c)(3) of the Act, which enumerates the specific factors of production that the Department examines in NME cases, lists as the very first factor ''hours of labor required'' (section 773(c)(3)(A)).

The record keeping requirements of local tax authorities are not germane to the records that need to be maintained for verification of the questionnaire response in an antidumping administrative review. *See Krupp Stahl A.G.* v. *United States*, 17 CIT 450; 822 F. Supp. 789, 791–92 (1993) (holding that the fact that a foreign government did not require retention of business records did not absolve the respondent from its obligation or responsibility to respond to the Department's questionnaire response in an antidumping proceeding. The court upheld the Department's use of BIA.) *See also Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders*, 60 FR 10900, 10990 (February 28, 1995).

Comment 3: Clover/Lucky claims that the Department's conclusion that Clover was unable to document its per-unit enamel consumption figure is

unfounded. At verification, the company explained the sampling procedure it used to estimate the per-unit consumption. By weighing three to five samples of each model throughout the various coating and drying processes, it calculated a per-unit weighted-average of enamel consumption. Clover/Lucky contends that, based on this procedure, the company prepared the table used to report per-unit enamel consumption in its response. As respondent itself states, because enamel coating is a hand-dipped process, the difference between the actual weight of an individual item may be quite different from the consumption figure calculated in the sample. However, since the consumption figures were derived from actual figures, respondent claims it was not necessary for the company to maintain the underlying source documents.

Department's Position: We disagree with respondent. The verification report does not support Clover/Lucky's contention that it was able to document the per-unit enamel consumption. As stated by Clover/Lucky itself in its case brief, the company did not retain any of the original worksheets or underlying source documents of the per-unit enamel consumption after conducting its sample weighing.

As discussed previously, it is the responsibility of the respondent, and not of the Department, to create a sufficient record in the administrative review. *Tatung Co.*, v. *United States*, 18 CIT 1137, 1140 (1994). The purpose of verification is to verify the accuracy of the response through examination of source documentation, not to collect information or recreate supporting source documentation that respondent has failed to maintain. Further, as discussed previously, we reject Clover's suggestion that the Department allow it to ship, after verification, selected samples of finished and semi-finished cookware products to the Department in order that the Department could further test the accuracy of the reported figures. For further information regarding the Department's position on this, *see* Department's Position to Comment 1.

Comment 4: Clover/Lucky argues that it should not be penalized for failing to report the quantities of water, electricity and fuel consumed in the production process because the Department did not specifically ask the company to report quantities of indirect materials in its factors of production questionnaire. Rather, as stated in Clover/Lucky's case brief, the Department only requested factor inputs for the following: (A) Direct Materials; (B) Direct Labor; (C) Factory Overhead; (D) Selling, General and Administrative Expenses; (E) Other; and (F) Packing. Therefore, the Department cannot not fault Clover for failing to report information that was not fairly requested, citing *Koyo Seiko Company, Ltd. and Koyo Corporation of U.S.A.* v. *The United States*, 92 F.3rd 1162, 1168 (Fed. Cir. 1986). Clover/Lucky argues further that since the Department verified Clover's total value of electricity and fuel consumption against financial statements and vouchers which contained both quantities and values of electricity and fuel consumption, it could just as well have compiled the total quantities of energy used.

Department's Position: We disagree with respondent. Because the prices of materials and inputs in an NME are not considered valid for calculation purposes, the Department requires respondents to report the amount, rather than the value, of materials consumed in the production process. Although the questionnaire did not specifically include ''indirect materials'' or ''energy'' in the list of factor input categories, it is clear that such items are covered by the Department's questionnaire. The list of requested information, with respect to the factors of production, is broad and all-inclusive—it includes all the major categories involved in production as well as a catch-all category (*i.e.*, ''Other''). Indirect materials and energy consumed in the production process normally fall under Factory Overhead, the very category Clover/Lucky used when reporting its expenses for electricity, water and fuel (rather than the requested quantities for these same three items). However, these inputs could have just as easily been categorized as Other, or in certain cases, if applicable, Direct Materials. All three of these categories were listed by the Department in its questionnaire. Therefore, it cannot be construed that the information asked for at verification was unfairly requested.

As to whether the Department could have gathered the information at verification from financial documents or invoices, again, respondent is asking the Department to take on the responsibility of creating the company's response at verification. As discussed previously, it is the responsibility of the respondent, and not of the Department, to create a sufficient record in the administrative review. *Tianjin Machinery I/E Corp.* v. *United States*, 806 F. Supp. 1008, 1015 (CIT 1992). The Court has held that the Department ''is not required to . . . recalculate a respondent's submission to develop an accurate response.'' *Tatung Co.*, v. *United States*, 18 CIT at 1142 n.3, citing *Chinsung Indus. Co.* v. *United States*, 705 F. Supp. 598, 601–02 (1989).

Comment 5: Clover/Lucky contests the Department's statement in the verification report that there was an extremely large number of typographical errors in the reported quantities of steel purchases. Clover/Lucky also claims that the statements in the verification report that the company was unable to reconcile the quantity of steel requisitioned for production with inventory withdrawals, and that it was also unable to substantiate its reported per unit quantities of steel, are incorrect. The company claims that much of the steel information was verified and that those items that did not verify were not substantial and would not materially affect the company's response.

Department's Position: We disagree with respondent. At verification, we found a number of discrepancies with respect to both steel purchases and steel consumption. From a small sample of selected invoices, the Department discovered typographical errors resulting in the under reporting of individual steel purchases in two cases by 22 and 43 percent, the over reporting of individual steel purchases by 222 percent in another, and the misclassification of one purchase's steel thickness. Because at verification the Department is only able to verify information through spot-checking, where we find discrepancies in the subset that is actually tested, we must judge the effect of such discrepancies that are randomly revealed on the unexamined portion of the response. *See, e.g., Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et. al.; Final Results of Antidumping Duty Administrative Review*, 62 FR 2081 (January 15, 1997).

Further, Clover/Lucky incorrectly concludes that the reported net discrepancy is inconsequential because it is small when compared to total reported steel purchases. In fact, the figure in the verification report was based on an examination of only a small portion of the steel purchases (those with a thickness of 4 mm), not all steel purchases and includes errors in both directions. Because at verification we examined a subset of steel purchases and found discrepancies in the reporting with respect to this subset, the Department must attribute to all of the steel purchases these same discrepancies. *See Belmont Industries* v. *United States*, 733 F. Supp. 1507, 1508 (CIT 1990); *see also Monsanto Co.* v. *United States*, 698 F. Supp. 275, 281 (CIT 1988). Therefore, the figure understates the impact of the

discrepancies, even when properly compared to 4mm steel purchases.

Problems also arose with respect to the verification of steel consumption. The Department was unable to verify the reported ratio for steel scrap, which, because of its significance in the manufacture of POS cookware, is an important factor in determining total steel consumption. The spot check of departmental steel requisitions to inventory withdrawals showed a discrepancy of approximately seven percent that the company was unable to account for.

The Department faced similar problems in its verification of the per unit quantities of steel used in the production of cooking ware that were reported in the response. The company submitted theoretical quantities based on an equation it developed using the specific density of steel. As to the statement in the verification report which noted no discrepancies between the reported per unit steel amounts and the method used by the company to calculate these amounts (cited by respondent as support for their conclusion that the problems in this area were insignificant), the only conclusion that can be drawn from that statement is that the company did not make any mathematical errors in its calculations, nor any transcription errors when typing this figure in the response. As such, the Department's statement in its verification report that it found no discrepancies between the reported per unit steel amounts and the method respondent used to calculate these reported figures has no bearing on either the accuracy of the method the company chose to estimate its per unit steel consumption or the figures in its response. The fact remains that the company could not corroborate the calculated theoretical per unit figures with sampled actual weight readings or support the figures used in the per unit calculations with the measurements from the technical drawings that the company claimed as supporting documentation.

The discrepancies, the errors in reporting and the inability to reconcile the figures reported in the response with supporting documentation, demonstrate that the company's response with respect to, not only its purchases, but also its consumption of steel, the primary material input in the POS production process, cannot be relied upon.

Comment 6: With respect to depreciation expenses regarding certain fixed assets, Clover/Lucky argues it did not create ''fixed asset cards'' (instead of a fixed-asset ledger, Clover records all its asset-related information on fixed asset cards) for its equipment at the time they were installed because the cards are only required to be created during the first fiscal year period. Further, although Clover admits that it had no system in place to show ownership of the molds,[2] it contends that the Department could have examined loan documents to determine the identity of the fixed assets in question. Moreover, Clover/Lucky claims that its technicians know the identity of the asset by merely looking at it. According to respondent, the Department could have reviewed the loan documents and successfully verified this section of the response if it had allowed sufficient time for verification.

Department's Position: The Department examined depreciation expenses in this case because of Clover/Lucky's claim that the POS cooking ware industry constituted a market-oriented industry (MOI). Since the Department found that the POS cooking ware industry does not constitute an MOI (see Department's position to Comment 9), the issue raised by respondent is moot.

Comment 7: Clover/Lucky argues that even if the Department rejects Clover's factors of production information in this case, it should determine the foreign market value (FMV) based on Lucky's home market (Hong Kong) sales or third country sales.

Petitioner disputes Clover/Lucky's argument, claiming that Clover/Lucky is, in effect, challenging the Department's preliminary finding that the POS cooking ware industry does not constitute a market-oriented industry. Petitioner points out that Clover has provided no information that prices for significant inputs are not controlled by the PRC government. Petitioner argues that the Department must, therefore, calculate FMV using the factors of production methodology.

Department's Position: We disagree with respondent that FMV in this case can be determined on the basis of Lucky's home market or third country sales. In order for FMV to be based on Lucky's home market or third country prices (which respondent, in its case brief, now requests for the first time in this proceeding), Lucky would have had to allege and demonstrate that it had third-country reseller status. Further, it would have to meet the requirements of section 773(f) of the Act in order to have its sales, either home market or third country, used as the basis for FMV. Lucky made no such claim in this proceeding. Moreover, issues of relatedness aside, since Clover knows at the time of the sale the final destination of the merchandise, Lucky does not qualify as a reseller from an intermediate country in any event. (*See* Clover/Lucky's June 20, 1995 Questionnaire Response (Public Version) which, at page 20, states that ''Clover is aware of the ultimate destination of the POS cookware because the destination is indicated on the outer carton.'') Moreover, given the relationship between Lucky and Clover, we do not consider that there exists a ''purchase'' from the PRC production facility by Lucky within the meaning of section 773(f). (*See Preliminary Determination of Sales at Less than Fair Value: Disposable Pocket Lighters From the People's Republic of China,* 59 FR 64191, 64194 (December 13, 1994)). Thus, even had Lucky made a proper claim that it was a third country reseller within the meaning of section 773(f) of the Act, the record evidence of this case would not support such a determination. Therefore, Lucky's prices to customers in Hong Kong or third countries could not be used as the basis for FMV—only Clover's factors of production information could form the basis of FMV, the method selected by the Department in this case. Moreover, had we considered using Lucky's prices in Hong Kong or to third countries, we would normally compare those prices to the cost of the merchandise based on factors of production, because the merchandise was produced in an NME country. We could not have performed this test, because we could not verify the factors of production. As stated previously, as a result of the failure of verification with respect to Clover's factors of production information, the Department had to resort to the best information available in this case under section 776(b) of the Act.

With respect to petitioner's rebuttal to respondent's claim, petitioner mistakenly frames respondent's claim as one of advocating the use of PRC prices to determine FMV (*i.e.*, petitioner raises the market-oriented industry discussion). Respondent, however, is not arguing that the Department use Clover's price, but, instead, that the Department use Lucky's home market or third country prices to determine FMV. As respondent itself states on page 19 of its case brief, ''Lucky and Clover are not requesting that Commerce use Clover's prices.''

Comment 8: Clover/Lucky argues that the Department should conduct a supplemental verification and reexamine the information submitted in

[2] Certain molds were among the fixed assets which the Department selected for verification of depreciation expenses.

its questionnaire response. This would allow the Department sufficient time to explore the alternative verification methods enumerated by Clover/Lucky in its comments.

Petitioner, however, contends that there is no basis to conduct a re-verification, since Clover/Lucky provided no evidence that Department's verification was flawed. Petitioner points out that the CIT ruled that the Department ''is not required to re-verify information submitted after verification, or recalculate a submission to develop an accurate response.'' *Tatung Co.* v. *United States,* 18 CIT at 1142 n.3, citing *Chinsung Indus. Co.* v. *United States,* 705 F. Supp., at 601–02.

Department's Position: We disagree with respondent. Conducting a second verification, particularly after a company fails its first verification, would be an extraordinary action. To do so would signal to respondents that a failed verification can be overcome, which would undermine both our ability to obtain complete and accurate information from Clover/Lucky in time to conduct proper verifications and to complete reviews in a timely manner as required by the Act. As in the case cited by petitioner, the Department is not required to conduct a supplemental verification. The CIT has ruled that ''Due to stringent time deadlines and the significant limitations on Commerce's resources it is vital that accurate information be provided promptly to allow the agency sufficient time for review.'' *Ceramica Regiomontana, S.A.* v. *United States,* 10 CIT 399, 406, 636 F. Supp, 961, 967 (1986).

Although the Department has conducted supplemental verifications in the past (*See, e.g., Cyanuric Acid and its Chlorinated Derivatives from Japan; Final Results of Antidumping Duty Administrative Review,* 51 FR 45495, 45496 (December 19, 1986); *Cell Site Transceivers from Japan; Final Determination of Sales at Less Than Fair Value,* 49 FR 43080, 43084 (October 26, 1984); *High Power Microwave Amplifiers and Components Thereof from Japan,* 47 FR 22134 (May 21, 1982) (final determination of sales at less than fair value), and; *Fireplace Mesh Panels from Taiwan; Final Determination of Sales at Less Than Fair Value,* 47 FR 15393, 15395 (April 9, 1982)), in each of these cases, re-verification was conducted pursuant to requests for additional information requested by the Department, or due to a particular emergency that arose in the case. In contrast, Lucky/Clover's request is based primarily on general time constraints, constraints which must always be imposed on a verification. There is simply no reason for the Department to take the extraordinary measure in this case of conducting a supplemental verification.

Comment 9: Clover/Lucky also argues that the Department should conduct a supplemental verification to redetermine that the POS cookware industry constitutes a market-oriented industry. Respondent claims that, at verification, the Department could verify that the company pays market prices for both labor and the PRC-sourced direct and indirect materials it uses in the production of cooking ware.

Department's Position: We disagree with respondent. As discussed above, in determining whether an industry under examination constitutes a market-oriented industry, the Department examines the industry as a whole, not just the practices of the company or companies under investigation or review. (*See Notice of Final Determination of Less Than Fair Value; Furfuryl Alcohol from the People's Republic of China,* 60 FR 22544 (May 8, 1995).) Clover/Lucky has not demonstrated that the POS cooking ware industry constitutes a market-oriented industry in the PRC, and we have adopted our preliminary determination with respect to this issue for these final results. The examination of Clover's purchases from its non-market suppliers and the wages it pays its employees is insufficient to conclude that the POS cooking ware industry as a whole is a market-oriented industry.

For a more detailed discussion of the Department's preliminary determination that the POS cooking ware industry does not constitute a market-oriented industry, *see* Memorandum to Barbara E. Tillman, Director of the Office of CVD/AD Enforcement VI, dated January 17, 1997, ''Market-Oriented Industry Request in the 1993–1994 Administrative Review of POS Cooking Ware from the People's Republic of China,''which is a public document on file in the Central Records Unit (room B–099 of the Main Commerce Building).

Final Results of Review

Based on our analysis of comments from interested parties, we determine that no changes to the preliminary results are warranted for purposes of these final results. The dumping margins for each company under review are:

Manufacturer/Exporter	Rate(percent)
Clover/Lucky	66.65
PRC-Wide Rate (including China Light)	66.65

The Department shall determine, and the U.S. Customs Service shall assess, antidumping duties on all appropriate entries. Individual differences between United States price and FMV may vary from the percentages stated above. The Department will issue appraisement instructions directly to the U.S. Customs Service.

Since the final results for the more recent review period, December 1, 1994 through November 30, 1995 (1995 review period) were published on June 17, 1997 (62 FR 3275), the cash deposit instructions contained in that notice will apply to all shipments to the United States of subject merchandise entered, or withdrawn from warehouse, for consumption on or after June 17, 1997. The dumping margins established for the period December 1, 1993 through November 30, 1994 period will have no effect on the cash deposit rate for any firm except for the company China Light. For China Light, which did not respond to our questionnaire, and was not subject to the 1995 review, the cash deposit rate will be the PRC-wide rate for the 1993–1994 period.

These deposit rates shall remain in effect until publication of the final results of the next administrative review.

Notification to Interested Parties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective orders (APOs) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 353.34(d)(1). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This administrative review and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.22.

Dated: October 16, 1997.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 97–27990 Filed 10–21–97; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–806]

Steel Wire Rope From Mexico: Extension of Time Limits for Preliminary Results of Antidumping Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of extension of time limits for preliminary results of antidumping administrative review.

EFFECTIVE DATE: October 22, 1997.

FOR FURTHER INFORMATION CONTACT: Leah Schwartz or G. Leon McNeill, Office of AD/CVD Enforcement, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482–3782 or (202) 482–4236, respectively.

The Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (the Act) by the Uruguay Round Agreements Act.

Extension of Time Limits for Preliminary Results

The Department of Commerce has received a request to conduct an administrative review of the antidumping duty order on Steel Wire Rope from Mexico. On May 21, 1997, the Department initiated this administrative review covering the period March 1, 1996 through February 28, 1997.

Because of the complexity of certain issues in this case, it is not practicable to complete this review within the time limits mandated by section 751(a)(3)(A) of the Act. *See* Memorandum from Joseph A. Spetrini to Robert S. LaRussa, Extension of Time Limit for the Administrative Review of Steel Wire Rope from Mexico, dated October 16, 1997. Therefore, in accordance with that section, the Department is extending the time limits for the preliminary results to March 1, 1998, and for the final results to 120 days after the publication of the preliminary results. These extensions of time limits are in accordance with section 751(a)(3)(A) of the Act.

Dated: October 16, 1997.

Joseph A. Spetrini,

Deputy Assistant Secretary for AD/CVD Enforcement III.

[FR Doc. 97–27992 Filed 10–21–97; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

University of Virginia, et al.; Notice of Consolidated Decision on Applications for Duty-Free Entry of Scientific Instruments

This is a decision consolidated pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 A.M. and 5:00 P.M. in Room 4211, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, D.C.

Comments: None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instruments described below, for such purposes as each is intended to be used, is being manufactured in the United States.

Docket Number: 97–034. *Applicant:* University of Virginia, Charlottesville, VA 22908. *Instrument:* Ultrascope, Model MKII. *Manufacturer:* Optech International Ltd., New Zealand. *Intended Use:* See notice at 62 FR 40334, July 28, 1997. *Reasons:* The foreign instrument provides video-enhanced imaging for teaching gross anatomy and tissue dissection for medical students. Advice received from: National Institutes of Health, September 2, 1997.

Docket Number: 97–052. *Applicant:* Albert Einstein College of Medicine, Bronx, NY 10461–1602. *Instrument:* Ion Source Kit for Mass Spectrometer, Model ES002. *Manufacturer:* The Protein Analysis Company, Denmark. *Intended Use:* See notice at 62 FR 40334, July 28, 1997. *Reasons:* The foreign instrument provides low flow (nanoliters per minute) electrospray ionization for analysis of biopolymeric samples. Advice received from: National Institutes of Health, September 2, 1997.

Docket Number: 97–056. *Applicant:* University of Vermont, Burlington, VT 05405–0084. *Instrument:* Roentgen Stereophotogrammetric Analysis System. *Manufacturer:* RSA BioMedical Innovations AB, Sweden. *Intended Use:* See notice at 62 FR 41361, August 1, 1997. *Reasons:* The foreign instrument provides three-dimensional measurements of the kinematics of skeletal or implant movements using radiographs of small implanted tantalum beads as markers during repeated examinations of body joints. Advice received from: National Institutes of Health, September 2, 1997.

Docket Number: 97–059. *Applicant:* University of Connecticut, Storrs, CT 06269–2092. *Instrument:* Interfacial Rheometer, Model CIR–100. *Manufacturer:* Camtel, Ltd., United Kingdom. *Intended Use:* See notice at 62 FR 42236, August 6, 1997. *Reasons:* The foreign instrument provides information on interfacial film strength, concentration and interactions, molecular unfolding and competition between molecules for interfacial space. Advice received from: National Institutes of Health, September 2, 1997.

Docket Number: 97–060. *Applicant:* The Pennsylvania State University, University Park, PA 16802. *Instrument:* NMR Spectrometer, Model Avance DRX–600. *Manufacturer:* Bruker Instruments, Inc., Switzerland. *Intended Use:* See notice at 62 FR 43710, August 15, 1997. *Reasons:* The foreign instrument provides a 600-MHz magnet with sample temperature stability to 0.01°C for study of solvation of macromolecules. Advice received from: National Institutes of Health, September 2, 1997.

Docket Number: 97–061. *Applicant:* Woods Hole Oceanographic Institution, Woods Hole, MA 02543. *Instrument:* IR Mass Spectrometer, Model DELTA^{plus}. *Manufacturer:* Finnigan, Germany. *Intended Use:* See notice at 62 FR 42237, August 6, 1997. *Reasons:* The foreign instrument provides a magnetic sector mass analyzer with a precision of 1 ppt. Advice received from: National Institutes of Health, September 2, 1997.

Docket Number: 97–062. *Applicant:* Clemson University, Clemson, SC 29634–0905. *Instrument:* Knee Joint Simulator. *Manufacturer:* UCL Ltd., United Kingdom. *Intended Use:* See notice at 62 FR 43710, August 15, 1997. *Reasons:* The foreign instrument provides pneumatic control of simulator and meniscal knee design testing. Advice received from: National Institutes of Health, September 2, 1997.

Docket Number: 97–067. *Applicant:* Princeton University, Princeton, NJ 08544–0033. *Instrument:* EPR Spectrometer, Model E580 FT/CW. *Manufacturer:* Bruker Instruments, Germany. *Intended Use:* See notice at 62 FR 43710, August 15, 1997. *Reasons:* The foreign instrument provides

operation of a frequency of 94 GHz for highest sensitivity. Advice received from: National Institutes of Health, September 2, 1997.

Docket Number: 97–069. *Applicant:* University of California, Los Angeles, Los Angeles, CA 90095–1569. *Instrument:* Stopped-Flow Reaction Analyzer, Model SX.18MV. *Manufacturer:* Applied Photophysics Ltd., United Kingdom. *Intended Use:* See notice at 62 FR 45397, August 27, 1997. *Reasons:* The foreign instrument provides sequential mixing (multi-mixing) capability. Advice received from: National Institutes of Health, September 2, 1997.

Docket Number: 97–070. *Applicant:* Yale University, New Haven, CT 06520–8202. *Instrument:* Signal Conditioner Processor, Model SIGMA–5–DF. *Manufacturer:* CardioDynamics BV, The Netherlands. *Intended Use:* See notice at 62 FR 45397, August 27, 1997. *Reasons:* The foreign instrument provides conductance catheter measurement of right and left ventricular volumes. Advice received from: National Institutes of Health, September 3, 1997.

Docket Number: 97–071. *Applicant:* Colorado School of Mines, Golden, CO 80401. *Instrument:* Mass Spectrometer, Model JMS–700T. *Manufacturer:* JEOL, Ltd., Japan. *Intended Use:* See notice at 62 FR 45397, August 27, 1997. *Reasons:* The foreign instrument provides high resolution tandem mass spectrometry for study of pyrolysis products from bacteria. Advice received from: National Institutes of Health, September 3, 1997.

The National Institutes of Health advises in its memoranda that (1) the capabilities of each of the foreign instruments described above are pertinent to each applicant's intended purpose and (2) it knows of no domestic instrument or apparatus of equivalent scientific value for the intended use of each instrument.

We know of no other instrument or apparatus being manufactured in the United States which is of equivalent scientific value to any of the foreign instruments.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 97–27994 Filed 10–21–97; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

University of California, San Diego; Notice of Decision on Application for Duty-Free Entry of Scientific Instrument

This decision is made pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 A.M. and 5:00 P.M. in Room 4211, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, D.C.

Docket Number: 97–066. *Applicant:* University of California, San Diego, San Diego, CA 92121. *Instrument:* Wave Measurement Equipment. *Manufacturer:* Datawell bv, The Netherlands. *Intended Use:* See notice at 62 FR 43710, August 15, 1997.

Comments: None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States. *Reasons:* The foreign instrument provides: (1) More reliable wave direction estimates at frequencies under 1.0 Hz and over 3.0 Hz with less variability within the range and (2) better wave spread estimates than comparable domestic equipment. Two domestic manufacturers of similar equipment advised on April 23, 1997 that (1) these capabilities are pertinent to the applicant's intended purpose and (2) they know of no domestic instrument or apparatus of equivalent scientific value to the foreign instrument for the applicant's intended use (comparable case).

We know of no other instrument or apparatus of equivalent scientific value to the foreign instrument which is being manufactured in the United States.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 97–27995 Filed 10–21–97; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

University of Florida; Notice of Decision on Application for Duty-Free Entry of Scientific Instrument

This decision is made pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 A.M. and 5:00 P.M. in Room 4211, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, D.C.

Docket Number: 97–068. *Applicant:* University of Florida, Gainesville, FL 32611. *Instrument:* IR Mass Spectrometer, Model DELTA^{plus}. *Manufacturer:* Finnigan MAT, Germany. Intended Use: See notice at 62 FR 44949, August 25, 1997.

Comments: None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States. *Reasons:* The foreign instrument provides: (1) A magnetic sector analyzer with double direction (stigmatic) focusing and (2) a universal triple collector suitable for N_2, O_2, CO_2 and SO_2 measurements. These capabilities are pertinent to the applicant's intended purposes and we know of no other instrument or apparatus of equivalent scientific value to the foreign instrument which is being manufactured in the United States.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 97–27996 Filed 10–21–97; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration, Commerce

Export Trade Certificate of Review

ACTION: Notice of Issuance of an Amended Export Trade Certificate Review, Application No. 88–4A013.

SUMMARY: The Department of Commerce has issued an amendment to the Export Trade Certificate of Review granted to CISA Export Trade Group, Inc. (''CISA ETG'') on October 19, 1988. Notice of issuance of the Certificate was published in the **Federal Register** on October 26, 1988 (53 FR 43253).

FOR FURTHER INFORMATION CONTACT: Morton Schnabel, Acting Director, Office of Export Trading Company Affairs, International Trade Administration, (202) 482–5131. 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 (1997).

The Office of Export Trading Company Affairs (''OETCA'') 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

Export Trade Certificate of Review No. 88–00013 was issued to CISA ETG on October 19, 1988 (53 FR 43253, October 26, 1988) and previously amended on May 31, 1990 (55 FR 23123, June 6, 1990); and December 16, 1991 (57 FR 883, January 9, 1992).

CISA ETG's Export Trade Certificate of Review has been amended. The only change in the CISA ETG Certificate was in its membership. The members of the CISA ETG Certificate are as follows:

(a) Ajax Magnethermic Corporation of Warren, OH;

(b) Allied Minerals Products, Inc. of Columbus, OH;

(c) American Colloid Company of Arlington Heights, IL;

(d) Ashland Chemical Company of Columbus, OH, and its controlling entity Ashland Oil, Inc. of Ashland, KY;

(e) Borden Chemical, Inc. for the activities of its Foundry and Industrial Products Divisions of Westchester, IL;

(f) Centrifugal Casting Machine Company, Inc. of Tulsa, OK;

(g) Delta Resins & Refractories, Inc. of Milwaukee, WI;

(h) Didion Manufacturing Company of St. Peters, MO;

(i) Eirich Machines, Inc. of Gurnee, IL;

(j) Equipment Merchants Int'l, Inc. of Cleveland, OH;

(k) Fargo Wear, Inc. of Detroit, MI;

(l) General Kinematics Corporation of Barrington, IL;

(m) George Fischer Disa, Inc. of Holly, MI;

(n) Hartley Controls Corporation of Neenah, WI, and its controlling entity the Neenah Corporation of Neenah, WI;

(o) Hickman, Williams & Company of Livonia, MI;

(p) Hunter Automated Machinery Corporation of Schaumburg, IL;

(q) Palmer Manufacturing Company of Springfield, OH;

(r) Roberts Sinto Corporation of Lansing, MI;

(s) Sand Mold Systems, Inc. of Newaygo, MI;

(t) Simpson Technologies Corp. of Aurora, IL;

(u) Superior Graphite Company of Chicago, IL;

(v) Thermtronix Corporation of Adelanto, CA;

(w) Vulcan Engineering Company of Helena, AL; and

(x) U.S. Filter/Wheelabrator Corp. of LaGrange, GA;

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: October 16, 1997.

Morton Schnabel,

Acting Director, Office of Export Trading Company Affairs.

[FR Doc. 97–27925 Filed 10–21–97; 8:45 am]

BILLING CODE 3510–DR–M

DEPARTMENT OF COMMERCE

International Trade Administration

North American Free-Trade Agreement (NAFTA), Article 1904 Binational Panel Reviews

AGENCY: NAFTA Secretariat, United States Section, International Trade Administration, Department of Commerce.

ACTION: Notice of Binational Panel decision.

SUMMARY: On September 15, 1997 the Binational Panel issued its second decision in the review of the final antidumping duty administrative review made by the Secretaria de Comercio y Fomento Industrial de Mexico (SECOFI) respecting Flat Coated Sheet Products from the United States, Secretariat File No. MEX–94–1904–01. The Binational Panel unanimously affirmed in part and remanded in part the agency's remand determination. A copy of the complete Panel decision in Spanish or English is available from the NAFTA Secretariat.

FOR FURTHER INFORMATION CONTACT: James R. Holbein, United States Secretary, NAFTA Secretariat, Suite 2061, 14th and Constitution Avenue, Washington, D.C. 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: Chapter 19 of the North American Free-Trade Agreement (''Agreement'') establishes a mechanism to replace domestic judicial review of final determinations in antidumping and countervailing duty cases involving imports from a NAFTA country with review by independent binational panels. When a Request for Panel Review is filed, a panel is established to act in place of national courts to review expeditiously the final determination to determine whether it conforms with the antidumping or countervailing duty law of the country that made the determination.

Under Article 1904 of the Agreement, which came into force on January 1, 1994, the Government of the United States, the Government of Canada and the Government of Mexico established *Rules of Procedure for Article 1904 Binational Panel Reviews* (''Rules''). These Rules were published in the **Federal Register** on February 23, 1994 (59 FR 8686). The Binational Panel review in this matter was conducted in accordance with these Rules.

BACKGROUND: On September 1, 1994 Inland Steel Company and USX Corporation filed a First Request for Panel Review with the Mexican Section of the NAFTA Secretariat pursuant to Article 1904 of the North American Free Trade Agreement. Panel review was requested of the final antidumping determination that was published in the *Diario Oficial* on August 2, 1994. Complaints were filed by Inland, USX, Bethlehem Steel Corporation, LTV Steel Company, New Process Steel Corporation and Industrias Monterrey, S.A. de C.V. (IMSA). Briefs were filed by all participants and oral argument was held in accordance with the Rules.

First Panel Decision

In its first decision, issued on September 27, 1996, the Binational Panel unanimously affirmed in part and remanded in part the final determination. In its Order the panel affirmed all aspects of the final determination except for several specific instructions to SECOFI to take further actions. The Panel Order then enumerated specific actions involving competence and formality requirements, dumping issues, and injury issues. The Panel directed SECOFI, on remand, to comply with the specific instructions within 120 days of the date of the Decision.

Second Panel Decision

On April 30, 1997, SECOFI filed its determination on remand. Challenges were timely filed by two interested parties, New Process Steel Corp. and Inland Steel. New Process challenged certain dumping findings and Inland sought to have its dumping margin conformed to any recalculation of New Process's dumping margin. After review of all relevant information and written arguments made by counsel for the participants, the Panel issued its second decision on September 15, 1997. The Panel remanded the determination on remand to SECOFI to do the following:

(1) Fully inform New Process of all missing information and of all needed clarifications regarding proposed calculations of hand labor cost, overhead expense, profit and credit expenses for New Process, and regarding product exclusions for New Process;

(2) Give New Process an opportunity to provide additional information and to make clarifications regarding proposed calculations of hand labor cost, overhead expense, profit and credit expense, and regarding product exclusions;

(3) Based on the above, make new dumping calculations for New Process and for Inland.

The panel affirmed SECOFI's Remand Results of April 30, 1997, with respect to the allocation of raw material costs of New Process and in all other respects not addressed above. The Panel ordered the second remand determination to be completed within 120 days of the date of the opinion (by not later than January 13, 1998).

Dated: October 14, 1997.

James R. Holbein,

United States Secretary, NAFTA Secretariat.

[FR Doc. 97–27721 Filed 10–21–97; 8:45 am]

BILLING CODE 3510–GT–P

DEPARTMENT OF COMMERCE

International Trade Administration

North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews; Request for Panel Review

AGENCY: NAFTA Secretariat, United States Section, International Trade Administration, Department of Commerce.

ACTION: Notice of First Request for Panel Review.

SUMMARY: On September 29, 1997 Electroquimica Mexicana S.A. de C.V. filed a First Request for Panel Review with the Mexican Section of the NAFTA Secretariat pursuant to Article 1904 of the North American Free Trade Agreement. Panel review was requested of the final countervailing determination made by the Secretaria de Comercio y Fomento Industrial, respecting Hydrogen Peroxide Originating in the United States of America. This determination was published in the *Diario Oficial de la Federacion* on September 2, 1997. The NAFTA Secretariat has assigned Case Number MEX–97–1904–01 to this request.

FOR FURTHER INFORMATION CONTACT: James R. Holbein, United States Secretary, NAFTA Secretariat, Suite 2061, 14th and Constitution Avenue, Washington, D.C. 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: Chapter 19 of the North American Free-Trade Agreement (''Agreement'') establishes a mechanism to replace domestic judicial review of final determinations in antidumping and countervailing duty cases involving imports from a NAFTA country with review by independent binational panels. When a Request for Panel Review is filed, a panel is established to act in place of national courts to review expeditiously the final determination to determine whether it conforms with the antidumping or countervailing duty law of the country that made the determination.

Under Article 1904 of the Agreement, which came into force on January 1, 1994, the Government of the United States, the Government of Canada and the Government of Mexico established *Rules of Procedure for Article 1904 Binational Panel Reviews* (''Rules''). These Rules were published in the **Federal Register** on February 23, 1994 (59 FR 8686).

A first Request for Panel Review was filed with the Mexican Section of the NAFTA Secretariat, pursuant to Article 1904 of the Agreement, on September 29, 1997, requesting panel review of the final antidumping duty investigation described above.

The Rules provide that:

(a) a Party or interested person may challenge the final determination in whole or in part by filing a Complaint in accordance with Rule 39 within 30 days after the filing of the first Request for Panel Review (the deadline for filing a Complaint is October 29, 1997);

(b) a Party, investigating authority or interested person that does not file a Complaint but that intends to appear in support of any reviewable portion of the final determination may participate in the panel review by filing a Notice of Appearance in accordance with Rule 40 within 45 days after the filing of the first Request for Panel Review (the deadline for filing a Notice of Appearance is November 13, 1997); and

(c) the panel review shall be limited to the allegations of error of fact or law, including the jurisdiction of the investigating authority, that are set out in the Complaints filed in the panel review and the procedural and substantive defenses raised in the panel review.

Dated: October 14, 1997.

James R. Holbein,

United States Secretary NAFTA Secretariat.

[FR Doc. 97–27722 Filed 10–21–97; 8:45 am]

BILLING CODE 3510–GT–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 101497B]

American Lobster; Intent to Prepare an Environmental Impact Statement

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

ACTION: Notice of intent (NOI) to prepare an environmental impact statement (EIS); request for written comments.

SUMMARY: NMFS announces its intent to prepare an EIS to assess the impact on the natural and human environment of possible measures to manage fishing for American lobster in the U.S. Exclusive Economic Zone (EEZ). This NOI requests public input in the form of written comments on issues that NMFS should consider in preparing the EIS. Specifically, the EIS will examine alternatives available to NMFS in addressing the overfishing of American lobsters in the EEZ as well as state waters, including specific recommendations to the Secretary of Commerce (Secretary) by the Atlantic States Marine Fisheries Commission (ASMFC) in its proposed Amendment 3 to the Interstate Fishery Management Plan for Lobster. Public hearings for the EIS will be scheduled at a later date.

DATES: Written comments on the intent to prepare the EIS must be received on or before November 20, 1997. Public hearings will be announced in the **Federal Register** at a later date.

ADDRESSES: Comments should be sent to: Andrew A. Rosenberg, Ph.D., Regional Administrator, Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930-3799.

FOR FURTHER INFORMATION CONTACT: Paul H. Jones, Fishery Policy Analyst, 978-281-9273.

SUPPLEMENTARY INFORMATION:

Background

On March 27, 1996 (61 FR 13478), NMFS published a proposed rule requesting comments on its initial determination to withdraw approval of the American Lobster Fishery Management Plan (FMP) under the Magnuson-Stevens Fishery

Conservation and Management Act (Magnuson-Stevens Act)(16 U.S.C. 1801 *et seq*.), and its implementing regulations (50 CFR part 649), and develop regulations under the Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA)(Pub. L. 103-206). The stated reason for the proposed withdrawal of this FMP, as more fully discussed in the proposed rule, was to transfer the lead for lobster management to the states and the ASMFC. In establishing the need for the transfer of management authority, NMFS pointed to the fact that most of the lobster resource resides within state waters and, therefore, without full state cooperation, NMFS could not ensure that it could address overfishing concerns as required under the Magnuson Act (now called the Magnuson-Stevens Act). At that time, NMFS determined that ACFCMA would be a better vehicle for addressing conservation needs in the American lobster fishery, particularly since ACFCMA provides a mechanism for state compliance with any coastal management plans adopted by ASMFC. Nevertheless, NMFS made the promulgation of a final rule to withdraw the FMP contingent upon appropriate action by the ASMFC and the states to address lobster conservation that would allow NMFS to issue effective compatible Federal regulations under ACFCMA, as necessary.

At the time, withdrawal of the American lobster FMP, subject to this contingency, was supported in formal comments submitted by the New England Fishery Management Council (Council), the ASMFC, and Maine's Department of Marine Resources.

Since the issuance of this proposed rule, the Magnuson Act was significantly amended (including a name change to the Magnuson-Stevens Act) by the Sustainable Fisheries Act (SFA)(Pub. L. 104–297) on October 11, 1996. Most notably for purposes of American lobster management, the SFA required that NMFS identify annually all overfished fisheries within the jurisdictions of fishery management councils, and that fishery management councils submit FMPs or amendments to FMPs to end overfishing and to rebuild overfished stocks by September 30, 1998. The SFA further required that, if a council does not submit a required FMP or amendment to end overfishing by the deadline, the Secretary shall prepare the FMP or amendment to stop the overfishing and to rebuild the overfished stocks 9 months after September 30, 1998. On September 30, 1997, NMFS issued its list of overfished fisheries, which includes the American lobster fishery.

The SFA also amended the ACFCMA by adding section 810 which provides that, if no regulations have been issued under section 804(b) of ACFCMA by December 31, 1997, to implement a coastal fishery management plan (CFMP) for American lobster, the Secretary shall issue interim regulations before March 1, 1998, that will prohibit any vessel that takes lobsters in the EEZ by a method other than pots or traps from landing lobsters (or any parts thereof) at any location within the United States in excess of:

(1) 100 lobsters (or parts thereof) for each fishing trip of a 24–hour or less duration (up to a maximum of 500 lobsters, or parts thereof, during any 5-day period); or

(2) 500 lobsters (or parts thereof) for a fishing trip of 5 days or longer.

Section 804(b) of the ACFCMA states that, in the absence of an approved and implemented FMP under the Magnuson-Stevens Act, and after consultation with the appropriate Councils, the Secretary may implement regulations to govern fishing in the EEZ that are—

1. Compatible with the effective implementation of an ASMFC CFMP; and

2. Consistent with the national standards set forth in section 301 of the Magnuson-Stevens Act.

Meanwhile, the lobster board of the ASMFC has developed the final draft of Amendment 3 to the ASMFC lobster FMP. The draft amendment includes the following specific recommendations for Secretarial action in the EEZ to support the Commission's FMP:

1. Keep the moratorium on new Federal permits;

2. Continue the Federal regulation currently in place;

3. Require that fishermen comply with the landing laws of the state in which they land lobsters, regardless of where they were caught; and

4. Implement any further measures that will be required on a coastwide basis in this plan including—

Specifications of the Management Unit; Definition of Overfishing; Stock Rebuilding Schedule; Implementation Schedule; Minimum Size; Possession of V-notched Female Lobsters; Permits and Licensing; Maximum Trap Size; Escape Vents on Traps; Area-specific Trap Proposals; Moratorium on Entry; License Limitations; Measures That May Be Optionally Implemented in Various Areas; Management Measures Applicable to Mobile Gear Fisheries; and Monitoring and Reporting.

ASMFC must decide whether to adopt the lobster board's draft Amendment 3 at its next meeting on October 21, 1997. If Amendment 3 is adopted by ASMFC with substantially the same measures as currently proposed, it is not certain whether overfishing will be adequately addressed, even if NMFS were to withdraw the Magnuson-Stevens Act lobster FMP and adopt compatible Federal regulations for the EEZ portion of the lobster fishery. If NMFS determines that overfishing will not be adequately addressed by the ASMFC amendment, the contingency for withdrawing the Magnuson-Stevens Act FMP will not have been met.

Therefore, NMFS is facing a difficult dilemma given the new requirements in the Magnuson-Stevens Act to address overfishing in the lobster fishery by a time certain as opposed to NMFS' stated intent to withdraw the lobster FMP and transfer the lead for lobster conservation management to the ASMFC and the states. Complicating this scenario is the new ACFCMA provision that mandates a possession limit on lobsters by non-trap vessels if the Magnuson-Stevens Act FMP is not withdrawn and replaced by Federal regulations under ACFCMA.

Although NMFS has not yet determined under which regulatory authority to proceed to implement conservation measures in the lobster fishery because ASMFC has not made a final determination on its Amendment 3, NMFS has decided that it must move forward with the process of implementing significant conservation measures to address overfishing in the lobster fishery. Accordingly, NMFS is issuing this NOI to prepare an EIS and soliciting public comments on the impacts of possible lobster conservation measures. This step is necessary to implement such measures, whether they are promulgated under the Magnuson-Stevens Act or ACFCMA. In addition to the possible measures recommended by ASMFC draft Amendment 3, described in this document, NMFS is also considering other measures, including, but not limited to the following: (1) Effort caps based on an historic number of traps or a flat cap of traps for all Federal limited access lobster permitted vessels that take lobsters in the EEZ by a method of traps, with possible consideration of the areas fished; (2) a trap reduction program to 1991 fishing levels; (3) a percent cap on landings based on the total reported catch of previous years allowable catch of lobster, or 100 lobsters (or parts thereof) for each fishing trip of a 24–hour or less duration (up to a maximum of 500 lobsters, or parts thereof, during any 5-day period), or 500 lobsters (or parts thereof) for a fishing trip of 5 days or longer, for all Federal limited access

lobster permitted vessels that take lobsters in the EEZ by a method other than traps, (4) a prohibition on the taking or possession of lobster in the EEZ; (5) the application of current Federal regulations (50 CFR part 649) to the EEZ under ACFCMA; and (6) status quo or no action taken. NMFS also requests comments on the appropriate regulatory authority under which it should proceed with lobster conservation measures.

NMFS has determined that the preparation of an EIS is appropriate, because of the potentially significant impact of EEZ regulations on the human environment. All of the Federal EEZ measures recommended in draft Amendment 3 to the ASMFC FMP will be assessed also during the EIS process. Participants in this fishery will be affected and may face more restricted harvests of lobster while the natural stocks of lobster are allowed to recover.

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

Dated: October 17, 1997.

Gary Matlock,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 97–27966 Filed 10–21–97; 8:45 am]

BILLING CODE 3510–22–F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 101597A]

Marine Mammals

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

ACTION: Issuance of photography permit no. 860–1374

SUMMARY: Notice is hereby given that Mr. Michael deGruy, The Film Crew, 629 State Street, Suite 222, Santa Barbara, California 93101, has been issued a permit to take by Level B harassment gray whales (*Eschrichtius robustus*) and northern elephant seals (*Mirounga angustirostris)* for purposes of commercial photography.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following offices:

Permits Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13130, Silver Spring, MD 20910 (301/713–2289); and

Regional Administrator, Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213 (562/980–4001).

FOR FURTHER INFORMATION CONTACT: Jeannie Drevenak, (301) 713-2289.

SUPPLEMENTARY INFORMATION: On September 3, 1997, notice was published in the **Federal Register** (62 FR 46484) that the above-named applicant had submitted a request for a permit to take gray whales and northern elephant seals by Level B harassment during the course of commercial photographic activities in California waters. The requested permit has been issued, under the authority of section 104(c)(6) of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*).

Dated: October 15, 1997.

Ann D. Terbush, Chief,

Permits and Documentation Division, Office of Protected Resources, National Marine Fisheries Service

[FR Doc. 97–27929 Filed 10–21–97; 8:45 am]

BILLING CODE 3510–22–F

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Request for Comments on Patent Formalities Treaty

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Notice of request for public comments.

SUMMARY: The Patent and Trademark Office is seeking comments to obtain views of the public on the international effort to simplify the formal requirements associated with patent applications and patents and the consequent changes to United States law and practice. Comments may be offered on any aspect of this effort.

DATES: All comments are due by December 1, 1997.

ADDRESSES: Persons wishing to offer written comments should address those comments to the Commissioner of Patents and Trademarks, Box 4, Patent and Trademark Office, Washington, DC 20231, marked to the attention of Mrs. Lois E. Boland.

Comments may also be submitted by facsimile transmission to (703) 305–8885 or by electronic mail through the Internet to plt.comments@uspto.gov. All comments will be maintained for public inspection in Room 902 of Crystal Park II, at 2121 Crystal Drive, Arlington, Virginia.

FOR FURTHER INFORMATION CONTACT: Mrs. Lois E. Boland by telephone at (703) 305–9300, by fax at (703) 305–8885 or by mail marked to her attention and addressed to Commissioner of Patents and Trademarks, Box 4, Washington, DC 20231.

SUPPLEMENTARY INFORMATION:

1. Background

The United States has been involved in an effort to reduce the formal requirements associated with patent applications and patents in the different countries of the world. A committee of experts, meeting under the auspices of the World Intellectual Property Organization (WIPO), continues to develop treaty articles and rules which attempt to minimize the formal requirements associated with patent applications and patents. Upon conclusion, these treaty articles and rules will simplify the formal obligations and reduce the associated costs for patent applicants and owners of patents in obtaining and preserving their rights for inventions in many countries of the world. The next (5th) committee of experts meeting will take place at WIPO in December of 1997. It is likely that two additional such meetings will take place in 1998. The issue of when a Diplomatic Conference will be convened to conclude these negotiations will be discussed in a March 1998 meeting at WIPO. WIPO has suggested that a 1999 Diplomatic Conference may be possible.

The United States Patent and Trademark Office (USPTO), leading the negotiations for the United States, is interested in obtaining comprehensive comments to assess continued support for the effort. Prior to each of the previous meetings of the committee of experts, the USPTO informally solicited and received comments on the then-current drafts of the treaty articles, rules and notes. In light of the impending conclusion of this effort, the USPTO desires to ensure that the text of the treaty is disseminated as widely as possible and the opportunity to provide comments is correspondingly comprehensive.

Written comments may be offered on any aspect of the draft treaty articles, rules or notes or expected implementation in the United States. Comments are also welcome on the following issues:

—The formalities/substantive distinction, discussed, specifically, with respect to Article 5, below;

—The subject matter appropriate for treaty articles versus that which should be relegated to rules; and

—Whether this effort should be concluded by a separate treaty or as

a protocol to the Patent Cooperation Treaty.

2. Brief Summary of the Draft Treaty

The current text of the draft treaty includes 16 articles, 17 rules and associated notes. A brief summary of selected articles and, where significant, associated rules follows. To the extent that a given article is not summarized, it is considered to be self-explanatory. Insofar as this effort is focused upon and limited to formal matters associated with patent applications and patents, the USPTO expects that, upon implementation, changes to our patent law would be minimal. However, to the extent the need for any such change has been identified for a given draft article or rule, it is noted below. This discussion is intended, only, to highlight various articles and rules; it is not intended as a comprehensive treatment of the draft texts. The draft texts, identified in Part 3, below, should be consulted for a complete understanding of the effort that is under way.

Article 1—Abbreviated Expressions—This article provides definitions for terms used throughout the text of the draft articles and rules. For the most part, this article is self-explanatory. The USPTO has supported a broadening of the definition for the term ''owner'' to include owners of both applications and patents.

Article 2—Applications and Patents to Which the Treaty Applies—This article defines the scope of the treaty by virtue of the types of applications and patents that are intended to be encompassed by its terms.

Article 3—National Security—This article preserves the right of Contracting Parties to apply measures deemed necessary for the preservation of national security.

Article 4—Filing Date—This article is viewed by the USPTO as one of the more important features of this effort. It mandates that a Contracting Party must provide a filing date for an application as the date that the following elements are filed with its Office:

(i) An indication that submitted elements are intended to be an application;

(ii) Indications allowing the identity of the applicant or person submitting the application to be established or contacted;

(iii) A description; and

(iv) If the description is not in an accepted language, an indication that the application contains a description.

This filing date requirement is fairly minimal and would greatly simplify the conditions imposed upon the grant of dates to patent applications throughout the world. Note that this article would mandate the acceptance, for filing date purposes, of patent applications in any language, subject to the furnishing of later translations. The USPTO has supported this article, with the knowledge that our claim requirement in section 111(a) of title 35, United States Code, would have to be deleted. Note that such a requirement is not included for provisional applications filed under section 111(b) of title 35, United States Code. The remainder of the article and Rule 2 provide additional details concerning the grant of filing dates.

Article 5—Application—This article is another of the more important features of this effort. It mandates that no Contracting Party may impose any requirement relating to the form or contents of an application which is different from or additional to any requirement applicable under the Patent Cooperation Treaty (PCT) to an international application. In essence, this article states that if an applicant submits an application to a national office that complies with the requirements of the PCT, that national office can impose no different or additional requirements on that national application. Of course, Contracting Parties would be free to impose requirements that are more liberal, from an applicant's perspective, than the PCT. Of note, the International Bureau of WIPO has expressed the view that the incorporation of the ''form or contents'' requirements from the PCT into this article would mandate the application of the PCT unity of invention standard for all national applications. The USPTO has taken exception to this view insofar as unity of invention is considered to be a substantive matter that is outside the scope of this effort. This article also provides that the Regulations shall include requirements regarding the filing of applications in paper and electronic form.

Article 6—Validity of Patent; Revocation—This article mandates that once a patent has been granted, it may be revoked or invalidated on the ground of non-compliance with certain formal requirements enunciated in Article 5.

Article 7—Representation; Address for Service—This article addresses requirements regarding representation, address for service and powers of attorney. Importantly, the article provides that Contracting Parties may not mandate representation for, among other things, the filing of a translation, the furnishing of drawings or the payment of any fee.

Article 8—Signature; Article 9—Request for Recordal of Change in Name and Address; Article 10—Request for Recordal of Change in Ownership; Article 11—Request for Recordal of Licensing Agreement or Security Interest; and Article 12—Request for Correction of a Mistake. These provisions, and associated rules, are considered to be self-explanatory. It has been the position of the USPTO that much of the detail in these articles would be more appropriate for a rule insofar as including such a level of detail in treaty articles may render the result unnecessarily inflexible. (While this issue is highlighted here with respect to these enumerated articles, it may apply to the level of detail associated with other articles.)

Article 13—Extension of a Time Limit Fixed by the Office—This article, with Rule 14, mandates that the Offices of all Contracting Parties must provide for, at the least, a first extension for any time limit set by the Office.

Article 14—Further Processing; Restoration of Rights—This article mandates that all Contracting Parties must provide for the further processing of applications and the restoration of rights related to applications/patents where compliance with a requirement takes place outside of a time limit originally established by an Office. The article also provides for intervening rights under certain circumstances.

Article 15—Addition and Restoration of Priority Claim—This article provides for the late claiming of priority of an earlier application where a subsequent application is timely filed and for the delayed filing of the subsequent application. The United States currently permits late claiming of priority and supports the concept of accepting the delayed filing of the subsequent application. With regard to accepting the delayed filing of a subsequent application, an amendment to section 119 of title 35, United States Code, would be warranted.

Article 16—Regulations—This provision provides the basis for the draft rules that follow. As noted above, there are, currently, 17 draft rules that accompany the text of the treaty.

3. Text of the Draft Treaty, Rules and Notes

The text of the current draft of the patent law treaty, with associated rules and notes, is available via the USPTO's World Wide Web site at http://www.uspto.gov via a link to WIPO's World Wide Web site. The documents are PLT/CE/V/2 and PLT/CE/V/3.

Requests for paper copies of the text may be made in writing to Mrs. Lois E.

Boland at the above address or by telephone at (703) 305–9300.

Dated: October 15, 1997.

Bruce A. Lehman,

Assistant Secretary of Commerce and Commissioner of Patents and Trademarks.

[FR Doc. 97–27973 Filed 10–21–97; 8:45 am]

BILLING CODE 3510–16–M

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

ACTION: Submission for OMB review; comment request.

SUMMARY: The Deputy Chief Information Officer, Office of the Chief Information Officer, invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before November 21, 1997.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Dan Chenok, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503. Requests for copies of the proposed information collection requests should be addressed to Patrick J. Sherrill, Department of Education, 600 Independence Avenue, SW, Room 5624, Regional Office Building 3, Washington, DC 20202–4651.

FOR FURTHER INFORMATION CONTACT: Patrick J. Sherrill (202) 708–8196. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U. S. C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Deputy Chief Information Officer, Office of the Chief Information Officer, publishes this notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment at the address specified above. Copies of the requests are available from Patrick J. Sherrill at the address specified above.

Dated: October 16, 1997.

Gloria Parker,

Deputy Chief Information Officer, Office of the Chief Information Officer.

Office of Educational Research and Improvement

Type of Review: Revision.
Title: Common Core of Data (CCD) Surveys.
Frequency: Annually.
Affected Public: State, local or Tribal Gov't, SEAs or LEAs.
Reporting Burden and Recordkeeping:
Responses: 57
Burden Hours: 9,635
Abstract: The CCD Survey collects data annually from state education agencies about student enrollments, graduation, dropout; education staff; school and agency characteristics; and revenues and expenditures for public elementary and secondary education. The Department will use this information to provide an official listing of public elementary and secondary schools and education agencies in the United States; and provide basic information and descriptive statistics on public elementary and secondary schools and schooling, including school finance.

Office of Postsecondary Education

Type of Review: Reinstatement.
Title: Applications for the Programs to Encourage Minority Students to Become Teachers.
Frequency: Annually.
Affected Public: Not-for-profit institutions; State, local or Tribal Gov't, SEAs or LEAs.
Annual Reporting and Recordkeeping Hour Burden:
Responses: 150
Burden Hours: 4,800
Abstract: This application is essential to conducting the competition for new awards in fiscal year 1998 for eligible institutions of higher education and state and local educational agencies for the Programs to Encourage Minority Students to Become Teachers.

Office of Postsecondary Education

Type of Review: Revision.
Title: Federal Direct Stafford/Ford Loan and Federal Direct Unsubsidized Stafford/Ford Loan Promissory Note and Disclosure.
Frequency: On occasion.
Affected Public: Individuals or households.
Annual Reporting and Recordkeeping Hour Burden:
Responses: 2,600,000
Burden Hours: 433,160
Abstract: This form is the means by which a Federal Direct Stafford/Ford and/or Federal Direct Unsubsidized Stafford/Ford Loan borrower promises to repay his or her loan.

Office of Postsecondary Education

Type of Review: Revision.
Title: Federal Direct PLUS Loan Application and Promissory Note.
Frequency: On occasion.
Affected Public: Individuals or households.
Annual Reporting and Recordkeeping Hour Burden:
Responses: 210,000
Burden Hours: 105,000
Abstract: This form is the means by which a Federal Direct PLUS Loan borrower promises to repay his or her loan.

Office of Postsecondary Education

Type of Review: Revision.
Title: Addendum to Federal Direct PLUS Loan Promissory Note Endorser.
Frequency: On occasion.
Affected Public: Individuals or households.
Annual Reporting and Recordkeeping Hour Burden:
Responses: 52,500
Burden Hours: 26,250
Abstract: This form is the means by which an endorser for a Federal Direct PLUS Loan borrower with an adverse credit history applies for and promises to repay the Federal Direct PLUS loan if the borrower does not pay it.

Office of Special Education and Rehabilitative Services

Type of Review: Reinstatement.
Title: Annual Client Assistance Program (CAP) Report.
Frequency: Annually.
Affected Public: State, local or Tribal Gov't, SEAs or LEAs.
Annual Reporting and Recordkeeping Hour Burden:
Responses: 57
Burden Hours: 342

Abstract: Form RSA–227 is used to analyze and evaluate the Client Assistance Program (CAP) administered by designated CAP agencies. These agencies provide services to clients and client applicants of programs, projects, and community rehabilitation programs authorized by the Rehabilitation Act of 1973, as amended. Data also are reported on information and referral services to any individual with a disability.

[FR Doc. 97–27889 Filed 10–21–97; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Educational Research Policy and Priorities Board; Meeting

AGENCY: National Educational Research Policy and Priorities Board; Education.

ACTION: Notice of committee teleconference.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming teleconference of the Executive Committee of the National Educational Research Policy and Priorities 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 general public of their opportunity to attend the meeting. The public is being given less than 15 days' notice because of the need to accommodate the schedules of the members.

DATE: October 29, 1997.

TIME: 4–6 p.m.

LOCATION: 80 F St., NW, Room 100, Washington, DC 20208–7564.

FOR FURTHER INFORMATION CONTACT: Thelma Leenhouts, Designated Federal Official, National Educational Research Policy and Priorities Board, Washington, DC 20208–7564. Tel.: (202) 219–2065; fax: (202) 219–1528; e-mail: Thelma__Leenhouts@ed.gov. The main telephone number for the Board is (202) 208–0692.

SUPPLEMENTARY INFORMATION: The National Educational Research Policy and Priorities Board is authorized by Section 921 of the Educational Research, Development, Dissemination, and Improvement Act of 1994. The Board works collaboratively with the Assistant Secretary for the Office of Educational Research and Improvement to forge a national consensus with respect to a long-term agenda for educational research, development, and dissemination, and to provide advice and assistance to the Assistant Secretary in administering the duties of the Office. The Executive Committee will approve for publication on behalf of the Board Standards for the Conduct and Evaluation of Research: Assessing Performance on Contracts, Grants, and Cooperative Agreements; and discuss possible research topics for FY 99. A final agenda will be available from the Board office on October 22. Records are kept of all Board proceedings and are available for public inspection at the office of the National Educational Research Policy and Priorities Board, Suite 100, 80 F St., NW, Washington, DC 20208–7564.

Dated: October 16, 1997.

Eve M. Bither,

Executive Director.

[FR Doc. 97–27934 Filed 10–21–97; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

[Docket Nos. EA–158 and EA–160]

Applications to Export Electric Energy; Williams Energy Services and Rochester Gas and Electric

AGENCY: Office of Fossil Energy, DOE.

AGENCY: Notice of applications.

SUMMARY: Williams Energy Services Company, a power marketer, and Rochester Gas and Electric, a public utility, have submitted applications to export electric energy to Canada pursuant to section 202(e) of the Federal Power Act.

DATES: Comments, protests or requests to intervene must be submitted on or before November 21, 1997.

ADDRESSES: Comments, protests or requests to intervene should be addressed as follows: Office of Coal & Power Im/Ex (FE–27), Office of Fossil Energy, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585–0350 (FAX 202–287–5736).

FOR FURTHER INFORMATION CONTACT: Ellen Russell (Program Office) 202–586–9624 or Michael Skinker (Program Attorney) 202–586–6667.

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated and require authorization under section 202(e) of the Federal Power Act (FPA) (16 U.S.C. § 824a(e)).

The Office of Fossil Energy (FE) of the Department of Energy (DOE) has received applications from the following companies for authorization to export electric energy to Canada, pursuant to section 202(e) of the FPA:

Applicant	Application date	Docket No.
Williams Energy Services Company (WESCO)	10/1/97	EA–158
Rochester Gas and Electric Corporation (RG&E)	10/10/97	EA–160

WESCO, a power marketing company, does not own or control any facilities for the generation or transmission of electricity, nor does it have a franchised service area. WESCO proposes to transmit to Canada electric energy purchased from electric utilities and other suppliers within the U.S. RG&E is a regulated public utility serving customers in and around Rochester, New York. RG&E proposes to transmit to Canada electric energy that is excess to its system or purchased from electric utilities or other suppliers within the U.S.

The applicants would arrange for the exported energy to be transmitted to Canada over the international facilities owned by Basin Electric Power Cooperative, Bonneville Power Administration, Citizens Utilities, Detroit Edison Company, Eastern Maine Electric Cooperative, Joint Owners of the Highgate Project, Maine Electric Power Company, Maine Public Service Company, Minnesota Power and Light Company, Minnkota Power Cooperative, New York Power Authority, Niagara Mohawk Power Corporation, Northern States Power, and Vermont Electric Transmission Company. Each of the transmission facilities, as more fully described in these applications, has previously been authorized by a Presidential permit issued pursuant to Executive Order 10485, as amended.

Procedural Matters.

Any persons desiring to become a party to these proceedings or to be heard by filing comments or protests to these applications should file a petition to intervene, comment or protest at the address provided above in accordance with §§ 385.211 or 385.214 of the

FERC's Rules of Practice and Procedures (18 CFR 385.211, 385.214). Fifteen copies of such petitions and protests should be filed with the DOE on or before the date listed above. Comments on WESCO's request to export to Canada should be clearly marked with Docket EA–158. Additional copies are to be filed directly with Michael E. Small and Davis S. Berman, Wright & Talisman, P.C., 1200 G Street, NW, Suite 600, Washington, DC 20005. Comments on RG&E's request to export to Canada should be clearly marked with Docket EA-160. Additional copies are to be filed directly with Elizabeth W. Whittle, Nixon, Hargrave, Devans & Doyle LLP, Suite 700, One Thomas Circle, Washington, DC 20005–5802 and Gerard C. Walter, Director of Generation Marketing, Rochester Gas and Electric Corporation, 89 East Avenue, Rochester, NY 14649.

A final decision will be made on these applications after the environmental impacts have been evaluated pursuant to the National Environmental Policy Act of 1969 (NEPA), and a determination is made by the DOE that the proposed actions will not adversely impact on the reliability of the U.S. electric power supply system.

Copies of these applications will be made available, upon request, for public inspection and copying at the address provided above.

Issued in Washington, DC on October 16, 1997.

Anthony J. Como,

Manager, Electric Power Regulation, Office of Coal & Power Im/Ex, Office of Coal & Power Systems, Office of Fossil Energy.

[FR Doc. 97–27950 Filed 10–21–97; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Solicitation for Financial Assistance for Cooperative Automotive Research for Advanced Technologies (CARAT) Program Solicitation No. DE–PS02–98EE50493

AGENCY: Chicago Operations Office, (DOE).

ACTION: Notice inviting financial assistance applications.

SUMMARY: The Department of Energy (DOE) invites applications for federal assistance for research on the Cooperative Automotive Research for Advanced Technologies (CARAT) Program. This program is a set aside for small businesses and higher eduction institutions. The CARAT Program is for research and development (R&D) in the following areas: vehicle systems, advanced gas turbines, fuel cells, batteries flywheel energy storage, compression ignition direct injection (CIDI), and alternative fuels.

DATES: Applications are to be received no later than February 24, 1998.

FOR FURTHER INFORMATION CONTACT: Ms. Tanga Baylor, Acquisition and Assistance Group, Chicago Operations Office, 9800 South Cass Avenue, Argonne, Illinois 60439, Telephone No. (630) 252–2214, FAX No. (630) 252–5045, Internet—Tanga.Baylor@CH.DOE.Gov

SUPPLEMENTARY INFORMATION: There are 18 topics for which the DOE invites Financial Assistance Applications: Reduction of Thermal Load in Passenger Compartments; Reduction of Energy Consumption of Power Accessories; Low Cost, Compact, High Efficiency, Traction Motor for Electric Vehicles/ Hybrid Electric Vehicles; Advanced Water-Gas Shift Catalysts; Fuel Processing for Fuel Cell Systems; Advanced Membranes and Membrane-Electrode Assemblies; Low Cost CO and Hydrogen Gas Sensors; Simulation of Fuel Cell Performance; Simple Particulate Emissions Measuring System; Variable Valve Timing Device for High Speed CIDI Engine; Measurement System for Mass Flow Rate of Oxygen and Hydrocarbons of an Engine Intake; Novel Fuel Injection System with Flexible Rate Control; Novel, Improved Desulfurization Process for Diesel Fuel; Device for Monitoring Natural Gas Vehicle (NGV) Storage Cylinders; Computer Model for Simulation of Battery Systems; Development of Novel Battery System(s); Light Weight, Low Cost, Flywheel Containment System; Improved or Alternative concept for Advanced Electrochemical Capacitor.

The solicitation will be available on the INTERNET to view and download at http://www.ch.doe.gov/business/ACQ.htm (It is critical that ACQ be in uppercase and all others are lower case). A limited number of printed copies will be available at the Customers' Coordination Meeting (CCM) the week of October 27, 1997 in Detroit, Michigan, otherwise printed copies will not be available from this office, copies must be downloaded from the INTERNET. For information on the CCM meeting contact: Conference Management Associates, Inc. 1401 Spring Lake Drive, Haymarket, VA 20169–1008, FAX (703) 754–4261.

Issued in Chicago, Illinois on September 26, 1997.

John D. Greenwood,

Manager, Acquisition and Assistance Group, Contracting Officer.

[FR Doc. 97–27949 Filed 10–21–97; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Secretary of Energy Advisory Board; Notice of Open Meeting

AGENCY: Department of Energy.

SUMMARY: Consistent with the provisions of the Federal Advisory Committee Act (Pub. L. No. 92–463, 86 Stat. 770), notice is hereby given of the following advisory committee meeting:

NAME: Secretary of Energy Advisory Board—Electric System Reliability Task Force.

DATES AND TIMES: Thursday, November 6, 1997, 8:30 a.m.–4:00 p.m.

ADDRESSES: ANA Hotel, Ballroom I, 2401 M Street, NW, Washington, D.C. 20037.

FOR FURTHER INFORMATION CONTACT: Richard C. Burrow, Secretary of Energy Advisory Board (AB–1), U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, D.C. 20585, (202) 586–1709 or (202) 586–6279 (fax).

SUPPLEMENTARY INFORMATION:

Background

The electric power industry is in the midst of a complex transition to competition, which will induce many far-reaching changes in the structure of the industry and the institutions which regulate it. This transition raises many reliability issues, as new entities emerge in the power markets and as generation becomes less integrated with transmission.

Purpose of the Task Force

The purpose of the Electric System Reliability Task Force is to provide advice and recommendations to the Secretary of Energy Advisory Board regarding the critical institutional, technical, and policy issues that need to be addressed in order to maintain the reliability of the nation's bulk electric system in the context of a more competitive industry.

Tentative Agenda

Thursday, November 6, 1997

8:30–8:45 AM Opening Remarks & Objectives—Philip Sharp, ESR Task Force Chairman.

8:45–9:45 AM Briefing: Reliability Council Progress in Addressing Key

Issues—David Nevius, Vice President, NERC.

9:45–10:00 AM Break.

10:00–11:30 AM Working Session: Discussion of a Draft Position Paper on a Self-Regulating Reliability Organization.

11:30–12:00 PM Public Comment Period.

12:00–1:15 PM Lunch.

1:15–2:30 PM Working Session: Discussion of Draft Outline of Technology Issues Affecting Reliability.

2:30–3:45 PM Panel Discussion: The Role of ISOs in Maintaining Reliability.

3:45–4:00 PM Public Comment Period.

4:00 PM Adjourn.

This tentative agenda is subject to change. The final agenda will be available at the meeting.

Public Participation

The Chairman of the Task Force is empowered to conduct the meeting in a fashion that will, in the Chairman's judgment, facilitate the orderly conduct of business. During its meeting in Washington, D.C., the Task Force welcomes public comment. Members of the public will be heard in the order in which they sign up at the beginning of the meeting. The Task Force will make every effort to hear the views of all interested parties. Written comments may be submitted to Skila Harris, Executive Director, Secretary of Energy Advisory Board, AB–1, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, D.C. 20585.

Minutes

Minutes and a transcript of the meeting will be available for public review and copying approximately 30 days following the meeting at the Freedom of Information Public Reading Room, 1E–190 Forrestal Building, 1000 Independence Avenue, SW, Washington, D.C., between 9:00 AM and 4:00 PM, Monday through Friday except Federal holidays. Information on the Electric System Reliability Task Force and the Task Force's interim report may be found at the Secretary of Energy Advisory Board's web site, located at http://www.hr.doe.gov/seab.

Issued at Washington, D.C., on October 17, 1997.

Rachel M. Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. 97–27959 Filed 10–21–97; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98–11–000]

Algonquin Gas Transmission Company; Notice of Request Under Blanket Authorization

October 16, 1997.

Take notice that on October 7, 1997, Algonquin Gas Transmission Company (Algonquin), 5400 Westheimer Court, Houston, Texas, 77056–5310, filed in the above docket, a request pursuant to Sections 157.205 and 157.211 of the Commission's Regulations, for authorization to construct a delivery point in Rochester, Plymouth County, Massachusetts, so that Algonquin may provide natural gas deliveries to Colonial Gas Company, (Colonial), a local distribution company and existing customer, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Specifically, Algonquin proposes to construct and install a 4-inch tap valve on Algonquin's G–8 Lateral at an existing 20-inch loop, at approximate mile Post 13.05 in Rochester, Plymouth County, Massachusetts. In addition to the facilities described above, Algonquin will install, or cause to be installed, a 4-inch turbine meter run and associated valving, approximately 100 feet of 4-inch pipeline which will extend from the Meter Station to the Tap and electronic gas measurement equipment.

Colonial will install or cause to be installed boilers, heat exchanger, 2-inch regulator runs, odorant injection equipment, and facilities to house and support Algonquin's meter and EGM equipment.

Algonquin states that the transportation service will be rendered within Colonial's existing maximum daily transportation quantities pursuant to Colonial's existing firm service agreements and Algonquin's FERC Gas Tariff, Fourth Revised Volume No. 1.

Colonial will reimburse Algonquin 100 percent of the costs and expenses that Algonquin will incur for installing the facilities. Such costs and expenses are estimated to be approximately $182,350 excluding an allowance for federal income taxes. Algonquin states that the installation of the delivery point will have no effect on Algonquin's peak day or annual deliveries. Algonquin submits that its proposal will be accomplished without detriment or disadvantage to Algonquin's other customers.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 97–27905 Filed 10–21–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OA96–178–001 Docket No. OA96–167–001]

Cambridge Electric Light Company; Commonwealth Electric Company; Notice of Filing

October 16, 1997.

Take notice that, on August 15, 1997, Cambridge Electric Light Company (Cambridge) and Commonwealth Electric Company (Commonwealth) submitted for filing revised tariff sheets and customer indices to implement changes to their respective open access transmission tariffs, as required by the Commission's order issued July 31, 1997 in Allegheny Power Systems, Inc., 80 FERC ¶ 61,143. The instant filings are requested to be effective as of July 9, 1996.

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, 888 First Street, N.E. 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 October 27, 1997. 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. 97–27918 Filed 10–21–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OA96–15–004]

Central Louisiana Electric Company, Inc.; Notice of Filing

October 16, 1997.

Take notice that on August 15, 1997, Central Louisiana Electric Company, Inc., tendered for filing its compliance filing in the above-referenced docket.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regualtory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before October 27, 1997. 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. 97–27917 Filed 10–21–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98–16–000]

Columbia Gas Transmission Corporation; Notice of Request Under Blanket Authorization

October 16, 1997.

Take notice that on October 9, 1997, Columbia Gas Transmission Corporation (Columbia), 1700 MacCorkle Avenue, S.E., Charleston, West Virginia 25314–1599, filed in Docket No. CP98–16–000, a request pursuant to Sections 157.205 and 157.216 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.216) for authorization to abandon by retirement approximately 15.6 miles of 6- and 8-inch pipeline located in McKean County, Pennsylvania, under its blanket certificate issued in Docket No. CP83–76–000, pursuant to Section 7(c) of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Columbia proposes to abandon its lateral transmission Line 10262 in its entirety (15.6 miles) in McKean County, Pennsylvania. Columbia explains the pipeline is in a deteriorating condition and the abandonment will avoid annual operation and maintenance expenses as well as the cost of pipeline replacement. Columbia states that it has no points of delivery from Line 10262. Columbia relates that its 8-inch Line 4226 shares a right-of-way with Line 10262, and therefore, Columbia asserts it will be able to continue to provide reliable service in that area.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 97–27908 Filed 10–21–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER97–4110–000]

The Detroit Edison Company; Notice of Filing

October 8, 1997.

Take notice that on September 24, 1997, The Detroit Edison Company filed an amendment to its filing in the above-referenced docket.

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, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before October 22, 1997. Protests will be considered by the Comission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 97–27915 Filed 10–21–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER97–4116–001]

Inventory Management and Distribution Company, Inc.; Notice of Filing

October 16, 1997.

Take notice that on October 7, 1997, Inventory Management and Distribution Company, Inc., tendered for filing its compliance filing in the above-referenced docket.

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, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before October 28, 1997. 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. 97–27913 Filed 10–21–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TM98–1–46–002]

Kentucky West Virginia Gas Company, L.L.C.; Notice of Proposed Changes in FERC Gas Tariff

October 16, 1997.

Take notice that on October 10, 1997, Kentucky West Virginia Gas Company, L.L.C. (Kentucky West), tendered for filing to its FERC Gas Tariff, Third Revised Volume No. 1, with the following tariff sheets to be effective October 1, 1997:

Second Substitute Fourth Revised Sheet No. 4
Second Substitute Fourth Revised Sheet No. 5

Kentucky West states that the proposed tariff sheets are submitted in compliance with the ''Order of the Director Accepting, Rejecting and Allowing Withdrawal of Tariff Sheets'' issued by the Federal Energy Regulatory Commission (''Commission'') on September 29, 1997 in Docket No. TM98–1–46–001. In the Order, the Commission accepted the tariff sheets effective October 1, 1997, subject to conditions.

Kentucky West states that the tariff sheets proposed herein remove the minor typographical changes which were not ACA related as required by the Commission.

Pursuant to Section 154.207 of the Commission's Regulations, Kentucky West requests that the Commission grant any waivers necessary to permit the tariff sheets contained herein to become effective October 1, 1997.

Kentucky West states that a copy of its filing has been served upon its customers and interested state commissions.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make Protestants parties to the proceeding. 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. 97–27923 Filed 10–21–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98–18–000]

Koch Gateway Pipeline Company, Notice of Request under Blanket Authorization

October 16, 1997.

Take notice that on October 9, 1997, Koch Gateway Pipeline Company (Koch Gateway), P.O. Box 1478, Houston, Texas 77251–1478, filed in Docket No. CP98–18–000 a request pursuant to Sections 157.205, 157.211, and 157.216 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.211, 157.216) for authorization to establish three new delivery taps and to abandon eight delivery taps, located in St. Tammany Parish, Louisiana, under Koch Gateway's blanket certificate issued in Docket No. CP82–430–000, pursuant to Section 7(c) of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Kock Gateway proposes to install three new delivery taps and minor piping, located in St. Tammany Parish, Louisiana, to tie over certain taps to its adjacent pipeline facilities, Index 300, or to the facilities of a local distribution company, Entex, Inc. (Entex). Koch Gateway also proposes to abandon eight farm taps by plugging and removing all valves and above-ground facilities on its Index 276 facilities, also in St. Tammany Parish, Louisiana. Koch Gateway states that these taps are used for delivery of natural gas to end-users on behalf of Entex. Koch Gateway asserts service will be continued to the affected end-users through new taps on an adjacent Koch Gateway pipeline. Koch Gateway declares that Entex concurs with the proposed abandonment and tie-over measures.

Kock Gateway states that the purchaser of Index 276, Koch Pipeline, Inc., a subsidiary of Koch Industries, will reimburse them for the cost of the proposed construction and abandonment activities, estimated to be $44,644.

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 Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 97–27909 Filed 10–21–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97–176–005]

MIGC, Inc.; Notice of Compliance Filing

October 16, 1997.

Take notice that on October 10, 1997 MIGC, Inc. (MIGC), tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the revised tariff sheets listed on Appendix A to the filing, to be effective November 1, 1997.

NIGC states that the purpose of the filing is to comply with the Commission's June 10 Letter Order (as modified by a June 20 Errata to the Letter Order) directing MIGC to file to reflect changes in its tariff to conform to the standards adopted by the Gas Industry Standards Board and incorporated into the Federal Energy Regulatory Commission's (Commission) Regulations by Order Nos. 587–C.

MIGC states that copies of its filing are being mailed to its jurisdictional customers, all parties on the official service list in Docket No. RP97–176–000, and interested state commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public

inspection in the Public Reference Room.

Liois D. Cashell,

Secretary.

[FR Doc. 97–27921 Filed 10–21–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. MT98–2–000]

National Fuel Gas Supply Corporation; Notice of Proposed Changes in FERC Gas Tariff

October 16, 1997.

Take notice that on October 10, 1997 National Fuel Gas Supply Corporation (National) tendered for filing to its FERC Gas Tariff, Fourth Revised Volume No. 1, First Revised Sheets Nos. 434 and 435, proposed to become effective November 14, 1997.

National's proposed tariff sheets are filed to comply with the requirement in Section 250.16 of the Commission's Regulations (18 CFR Section 250.16) that pipelines which conduct transportation transactions with affiliated marketing or brokering entities must update and refile, to reflect changes, the tariff provisions required by that regulation.

National states that copies of this filing were served upon the Company's jurisdictional customers and the Regulatory Commissions of the States of New York, Ohio, Pennsylvania, Delaware, Massachusetts and New Jersey.

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, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the 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. 97–27916 Filed 10–21–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98–14–000]

Northern Natural Gas Company; Notice of Application

October 16, 1997.

Take notice that on October 9, 1997, Northern Natural Gas Company (Northern), 1111 South 103rd Street, Omaha, Nebraska 68124, filed in Docket No. CP98–14–000 an application pursuant to Section 7(b) of the Natural Gas Act (NGA) for permission and approval to abandon, by sale to PG&E–TEX, L.P. (PG&E), certain compression, pipeline, treating, dehydration and delivery point facilities, with appurtenances, located in the State of Texas, and the services rendered thereby, all as more fully set forth in the application on file with the Commission and open to public inspection.

It is stated that Northern proposes to convey to PG&E, facilities located in the Permian Area of West Texas, which consist of 250 miles of pipeline ranging from 6-inch to 24-inch in diameter, nine compressor units located at two compressor stations, treating and dehydration facilities, all delivery points located along the length of the pipelines to be abandoned, and all appurtenant facilities. Northern states that it will continue to transport natural gas that is received at the interconnections between Northern's facilities and what are proposed to be PG&E's facilities pursuant to any valid transportation service agreements. In addition, Northern states that PG&E intends to file a petition for declaratory order seeking a determination that the subject facilities, once conveyed to PG&E, are intrastate pipeline facilities exempt from the Commission's jurisdiction under Section 2(16) of the Natural Gas Policy Act of 1978 and/or gathering facilities exempt from Commission jurisdiction under Section 1(b) of the NGA.

It is stated that Northern currently maintains rate schedules in its FERC Gas Tariff, Original Volume No. 2 for certain individually certificated service agreements with receipt or delivery points on the subject facilities. Northern states that it is not currently providing service under these agreements but has not previously abandoned such agreements. Therefore, Northern states that it is requesting permission and approval to abandon service under Rate Schedules ES–1, T–31, X–62 and X–89.

Any person desiring to be heard or to make any protest with reference to said application should on or before November 6, 1997, file with the Federal Energy Regulatory Commission, Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that permission and approval for the proposed abandonment are required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Northern to appear or be represented at the hearing.

Lois D. Cashell,

Secretary.

[FR Doc. 97–27907 Filed 10–21–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97–315–005]

Northwest Pipeline Corporation; Notice of Compliance Filing

October 16, 1997.

Take notice that on October 10, 1997, Northwest Pipeline Corporation (Northwest) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, the following tariff sheets, to become effective September 1, 1997:

First Revised Sheet No. 4
Substitute First Revised Sheet No. 232–H
Substitute First Revised Sheet No. 232–I
Substitute First Revised Sheet No. 232–J
Substitute Original Sheet No. 232–K

Northwest states that the purpose of this filing is to comply with the Commission's September 25, 1997 Order on Technical Conference and Accepting Compliance Filing Subject to Conditions in Docket Nos. RP97–315–000 and RP97–315–004 (80 FERC, Section 61,361) related to Northwest's proposed pooling service.

Northwest states that a copy of this filing has been served upon all intervenors in Docket No. RP97–315.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. 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. 97–27922 Filed 10–21–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OA97–591–000]

Oklahoma Gas and Electric Company; Notice of Filing

October 16, 1997.

Take notice that on July 30, 1997 and September 5, 1997, Oklahoma Gas and Electric Company, tendered for filing an amendment to its Open Access Transmission Tariff to conform the Tariff to the Offer of Settlement approved in Docket No. OA96–17–000.

Copies of this filing have been sent to the affected customers, the Oklahoma Corporation Commission, and the Arkansas Public Service Commission.

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, 888 First Street, N.E., 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 October 28, 1997. 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. 97–27920 Filed 10–21–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98–24–000]

Panhandle Eastern Pipe Line Company; Notice of Request Under Blanket Authorization

October 16, 1997.

Take notice that on October 14, 1997, Panhandle Eastern Pipe Line Company (Applicant), P.O. Box 1642, Houston, Texas 77251–1642, filed in Docket No. CP98–24–000 a request pursuant to Sections 157.205 and 157.211 of the Commission's Regulations under the Natural Gas Act for authorization to construct, own and operate seven new delivery points for the purpose of establishing interconnections with Panhandle Field Services Company (Field Services) in Hanford County, Texas and Texas County, Oklahoma, to provide start up gas for Field Services compression facilities, under blanket certificate issued in Docket No. CP83–83–000,[1] all as more fully set forth in the request for authorization on file with the Commission and open for public inspection.

At each delivery point, the proposed project will consist of (1) adding a side gate on Applicant's existing 4-inch, 6-inch, or 10-inch pipeline, (2) installing a 2-inch check valve and approximately 5 feet of 2-inch connecting pipeline, and (3) installing a 2-inch orifice meter run in order to provide start up gas for Field Services' compression facilities. Each new delivery tap will provide up to 20 Mcf per hour (0.48 Mcf per day) of natural gas at each of the seven locations.

The estimated cost to construct the proposed facilities is approximately $62,000 and will be 100% funded by Field Services. Applicant submits that the proposal herein will be accomplished without detriment or disadvantage to Applicant's other customers, that the total volumes delivered will not exceed the total volumes authorized prior to this request, and that the proposal is permitted by Applicant's tariff.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 97–27911 Filed 10–21–95; 8:45 am]

BILLING CODE 6717–01–M

[1] *See*, 22 FERC ¶ 62,043 (1983).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98–22–000]

Tennessee Gas Pipeline Company; Notice of Request Under Blanket Authorization

October 16, 1997.

Take notice that on October 14, 1997, Tennessee Gas Pipeline Company (Tennessee), P.O. Box 2511, Houston, Texas 77252, filed in Docket No. CP98–22–000 a request pursuant to Sections 157.205 and 157.212 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.212) for authorization to install a new delivery point for City of Florence Natural Gas Department (Florence) located in Lauderdale County, Alabama, under Tennessee's blanket certificate issued in Docket No. CP82–413–000, pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Tennessee proposes to construct a new delivery point located on its system by Milepost 554–1+5.6 and Milepost 554–3+5.6 in Lauderdale County, Alabama, to provide delivery of up to

20,000 Dekatherms per day of natural gas to Florence pursuant to an existing firm transportation agreement and Tennessee's Rate Schedule FT–A. Tennessee states that it will install two six-inch hot taps, electronic gas measurement (EGM) equipment and inspect Florence's installation of six-inch interconnecting pipe, dual orifice measurement, and flow control equipment. Tennessee states that Florence will provide the meter site, all weather access road, electrical service, telephone service, site preparations and site improvements. Tennessee states that the measurement facilities will be located on a site adjacent to and along Tennessee's existing right-of-way. Tennessee states that it will own, operate and maintain the hot tap and EGM and will operate the measurement facilities. Tennessee states that Florence will own, operate and maintain the interconnecting pipe and flow control equipment and will own and maintain the measurement facilities. Tennessee states that Florence will reimburse Tennessee for the cost of this project which is approximately $106.278.

Tennessee states that the total quantities to be delivered for Florence will not exceed the total quantities authorized. Tennessee asserts that its tariff does not prohibit the addition of new delivery points, and that it has sufficient capacity to accomplish the deliveries at the proposed new delivery meter without detriment or disadvantage to any of Tennessee's other customers.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 97–27910 Filed 10–21–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98–13–000]

Transwestern Pipeline Company; Notice of Application

October 16, 1997.

Take notice that on October 9, 1997, Transwestern Pipeline Company (Transwestern), having its main offices at 1400 Smith Street, Houston, TX 77002, filed in the above docket, an abbreviated application pursuant to Section 7(b) of the Natural Gas Act seeking permission to abandon by sale to PG&E–TEX, L.P. (PG&E), its Gomez Lateral located in Ward and Pecos Counties, TX. The Gomez Lateral, consisting of approximately 33 miles of 20-inch diameter pipeline and other appurtenances, is to be sold to PG&E for $2,500,000.

Transwestern asserts that these facilities are no longer necessary for it to transport gas for its merchant function and that PG&E will assume all future service obligations, and operational and economic responsibilities attached to these facilities. Transwestern avers that; (1) upon approval of the sale of these facilities, and (2) PG&E receiving a declaratory order from the Commission finding that the subject facilities, once conveyed, are intrastate pipeline facilities, exempt from jurisdiction under Section 2(16) of the Natural Gas Policy Act of 1978 (NGPA), PG&E will integrate the subject facilities into its intrastate pipeline system and be able to provide a similar transportation service to shippers requesting service on the Gomez Lateral.

Transwestern also states that the sale of the Gomez Lateral is contingent upon approval of Northern Natural Gas Company's request for abandonment by sale to PG&E, of certain facilities that are in close proximity to and interconnected with the Gomez Lateral, as filed in Docket No. CP98–14–000.

Any person desiring to be heard or to make any protest with reference to said application should on or before November 6, 1997, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceedings. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Transwestern to appear or be represented at the hearing.

Lois D. Cashell,

Secretary.

[FR Doc. 97–27906 Filed 10–21–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER97–3561–001]

Virginia Electric & Power Company; Notice of Filing

October 16, 1997.

Take notice that on September 23, 1997, Virginia Electric & Power Company tendered for filing its compliance filing in the above-referenced docket.

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, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before October 28, 1997. 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. 97–27912 Filed 10–21–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OA96–203–001]

Western Resources Inc.; Notice of Filing

October 16, 1997.

Take notice that on August 15, 1997, Western Resources Inc., tendered for filing its compliance filing in the above-referenced docket.

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, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before October 27, 1997. 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. 97–27919 Filed 10–21–97; 8:45 am]

BILLING CODE 6717–01–M

ENVIRONMENTAL PROTECTION AGENCY

[OPPTS–400117; FRL–5750–6]

Public Meetings on the Toxics Release Inventory Reporting Form

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public meetings.

SUMMARY: EPA will hold approximately nine public meetings over the next year to solicit comments relating to the Toxics Release Inventory (TRI) reporting form, Form R. The purpose of the meetings is to obtain comments from stakeholders on ways to improve the type of right-to-know information available to communities and to help streamline right-to-know reporting to ease the paperwork burden for businesses affected by the requirements. This notice announces three upcoming meetings. Additional meeting dates will be announced in future **Federal Register** notices.

DATES: The meetings will take place:

1. Thursday, November 13, 1997, 1 p.m. to 4 p.m., U.S. Environmental Protection Agency, East Tower, Rm. 542, 401 M St., SW., Washington, DC. Register to speak by 5 p.m., Friday, November 7, 1997.

2. Tuesday, November 18, 1997, 9 a.m. to 12 p.m., U.S. Environmental Protection Agency, Marianas Conference Room, 75 Hawthorne St., San Francisco, CA. Register to speak by 5 p.m., Thursday, November 13, 1997.

3. Thursday, November 20, 1997, 9 a.m. to 12 p.m., U.S. Environmental Protection Agency, Rm. 325 (3rd floor), 77 West Jackson Boulevard, Chicago, IL. Register to speak by 5 p.m., Friday, November 14, 1997.

ADDRESSES: All comments should be sent in triplicate to: OPPT Document Control Officer (7407), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Room G–099, East Tower, Washington, DC 20460. Each comment must bear the docket control number ''OPPTS–400117.''

Comments and data may also be submitted electronically to: oppt.ncic@epamail.epa.gov. Follow the instructions under Unit II. of this document. No Confidential Business Information (CBI) should be submitted through e-mail.

All comments which contain information claimed as CBI must be clearly marked as such. Three sanitized copies of any comments containing information claimed as CBI must also be submitted and will be placed in the public record. Persons submitting information on any portion of which they believe is entitled to treatment as CBI by EPA must assert a business confidentiality claim in accordance with 40 CFR 2.203(b) for each such portion. This claim must be made at the time that the information is submitted to EPA. If a submitter does not assert a confidentiality claim at the time of submission, EPA will consider this as a waiver of any confidentiality claim and the information may be made available to the public by EPA without further notice to the submitter.

FOR FURTHER INFORMATION CONTACT: Michelle Price, (Mail Stop 7408), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; Telephone: (202) 260–3372; Fax number: (202) 401–8142; e-mail: price.michelle@epamail.epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

EPA will hold approximately nine public meetings over the next year to solicit comments relating to the Toxics Release Inventory (TRI) reporting form, Form R. The purpose of the meetings is to obtain comments from stakeholders on ways to improve the type of right-to-know information available to communities and to help streamline right-to-know reporting to ease the paperwork burden for businesses affected by the requirements. Topics for comment include the following: format of the Form R; nomenclature used in the Form R; opportunities for burden reduction in both the Form R and the Form A; additional clarification of the elements in the Form R; and EPA's presentation of the data in public information documents.

The sections of the Form R that EPA would like specific comment on are sections 5, 6 and 8. In section 5, there have been a number of issues raised over the years with regard to the definition of ''release,'' particularly with respect to Class I underground injection wells and RCRA Subtitle C landfills. Several commenters believe that EPA's interpretation of the EPCRA definition of ''release'' will lead to the misperception that a reported EPCRA section 313 ''release'' necessarily results in an actual exposure of people or the environment to a toxic chemical. The Agency would like to hear suggestions on ways to collect and disseminate the data that are consistent with the Agency's interpretation of the EPCRA definition of ''release'' and would address the concerns raised regarding public misperception.

There have also been a number of issues raised with regard to the reporting of toxic chemicals in wastes in section 8 of the Form R. Section 8 collects information on waste managed at the facility whether or not the waste was generated at the reporting facility. Some individuals are concerned about public misperception of the data in section 8 because of the focus on the amount of waste managed at the facility, not waste generated. EPA would like comments on ways to change section 8 of the Form R which would continue to allow the user to assess wastes managed by the facility but would minimize the perception that the wastes reported in section 8 were generated by the reporting facility.

On any of the above issues, EPA would like to receive specific comments

from interested parties for changes, modifications, deletions, and/or additions of data elements to the Form R and the Form A.

Individuals wishing to attend these meetings must sign-up in advance in order to assure that all participants have an opportunity to speak. Depending on the number of individuals registered, oral presentations or statements will be limited to approximately 5 to 15 minutes. To register, contact Michelle Price at the number listed under ''FOR FURTHER INFORMATION CONTACT.'' When registering, give your name, organization, postal (and electronic, if any) mailing address, telephone and fax numbers. If there is insufficient interest in any of the meetings, that meeting may be canceled. Individuals registered will be notified in the event a meeting is canceled. The Agency bears no responsibility for attendees' decision to purchase nonrefundable transportation tickets or accommodation reservations.

II. Public Record and Electronic Submissions

The official record for this action, as well as the public version, has been established for this action under docket control number ''OPPTS–400117'' (including comments and data submitted electronically as described below). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from noon to 4 p.m., Monday through Friday, excluding legal holidays. The official record is located in the TSCA Nonconfidential Information Center, Rm. NE–B607, 401 M St., SW., Washington, DC.

Electronic comments can be sent directly to EPA at:

oppt.ncic@epamail.epa.gov

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on disks in WordPerfect 5.1/6.1 or ASCII file format. All comments and data in electronic form must be identified by the docket control number ''OPPTS–400117.'' Electronic comments on this action may be filed online at many Federal Depository Libraries.

List of Subjects

Environmental protection, Community right-to-know.

Dated: October 17, 1997.

Susan B. Hazen,

Director, Environmental Assistance Division, Office of Pollution Prevention and Toxics.

[FR Doc. 97–27976 Filed 10–21–97; 8:45 am]

BILLING CODE 6560–50–F

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority 5 CFR 1320, Comments Requested

October 16, 1997.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Pub. L. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Persons wishing to comment on this information collection should submit comments December 22, 1997.

ADDRESSES: Direct all comments to Jerry Cowden, Federal Communications Commission, Room 240–B, 2000 M St., N.W., Washington, DC 20554 or via internet to jcowden@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection contact Jerry Cowden at 202–418–0447 or via internet at jcowden@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Approval Number: 3060–0346.

Title: 47 CFR 78.27 License Conditions.

Type of Review: Extension of a currently approved collection.

Respondents: Businesses or other for-profit entities.

Number of Respondents: 340.

Estimated Time Per Response: 0.167 hours (10 minutes).

Total Annual Burden to Respondents: We estimate that Cable Television Relay Service (CARS) licensees will, on an annual basis, file approximately 285 notifications and 55 requests for additional time to construct. The average burden for each filing is estimated to be 10 minutes (0.167). 340 filings × 0.167 hours = 57 hours.

Total Annual Cost to Respondents: There are no capital or start-up costs. Total operation and maintenance costs: the cost associated with postage and stationery for complying with the filing requirements is estimated to be $1 per response. 340 × $1 = $340.

Needs and Uses: 47 CFR 78.27 requires licensees of CARS stations to notify the Commission in writing when the station commences operation. It also requires a CARS licensee needing additional time to complete construction of the station to request an extension of time 30 days before the expiration of the one-year construction period. The information is filed with Commission staff as a means to provide accurate records of actual CARS channel usage for frequency coordination purposes.

Federal Communications Commission.

Shirley Suggs,

Chief, Publications Branch.

[FR Doc. 97–27941 Filed 10–21–97; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Submitted to OMB for Review and Approval

October 16, 1997.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995, Pub. L. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number.

Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written comments should be submitted on or before November 21, 1997. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all comments to Judy Boley, Federal Communications Commission, Room 234, 1919 M St., N.W., Washington, DC 20554 or via internet to jboley@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s) contact Judy Boley at 202–418–0214 or via internet at jboley@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Approval Number: 3060–0626.

Title: Regulatory Treatment of Mobile Services.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents: 1,074.

Estimated Time Per Response: 1–10 hours.

Cost to Respondents: N/A.

Total Annual Burden: 6,673 hours.

Needs and Uses: The information requested provides the Commission with technical, operational and licensing data for private mobile radio service licensees that have been reclassified as commercial mobile radio service providers. This information is necessary to establish regulatory symmetry among similar mobile services.

OMB Approval Number: 3060–0761.

Title: Closed Captioning of Video Programming.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Individuals or households; business or other for-profit.

Number of Respondents: 4,300.

Estimated Time Per Response: .5–5 hours.

Cost to Respondents: $42,100.

Total Annual Burden: 5,750 hours.

Needs and Uses: In this proceeding, the Commission adopted a regulatory scheme that is intended to maximize the amount of programming containing closed captioning with appropriate exemptions and reasonable timetables to take into account the relevant technical and cost issues involved. This action is taken pursuant to Section 305 of the Telecommunications Act of 1996, which added a new Section 713, Video Programming Accessibility, to the Communications Act of 1934, as amended. The requirements set forth in Section 713 are intended to ensure that video programming is accessible to individuals with hearing disabilities through closed captioning, regardless of the delivery mechanism used to reach consumers.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 97–27940 Filed 10–21–97; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[Report No. 2235]

Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings

October 17, 1997.

Petitions for reconsideration and clarification have been filed in the Commission's rulemaking proceedings listed in this Public Notice and published pursuant to 47 CFR Section 1.429(e). The full text of these documents are available for viewing and copying in Room 239, 1919 M Street, N.W., Washington, D.C. or may be purchased from the Commission's copy contractor, ITS, Inc. (202) 857–3800. Oppositions to these petitions must be filed November 6, 1997. See Section 1.4(b)(1) of the Commission's rule (47 CFR 1.4(b)(1)). Replies to an opposition must be filed within 10 days after the time for filing oppositions has expired.

Subject: Amendment of the Commission's Rules Concerning Maritime Communications (PR Docket No. 92–257).

Number of Petitions Filed: 1.

Federal Communications Commission.

Shirley Suggs,

Chief, Publications Branch.

[FR Doc. 97–27900 Filed 10–21–97; 8:45 am]

BILLING CODE 6712–01–M

FEDERAL MARITIME COMMISSION

Notice of Agreement(s) Filed

The Commission hereby gives notice of the filing of the following agreement(s) under the Shipping Act of 1984.

Interested parties can review or obtain copies of agreements at the Washington, DC offices of the Commission, 800 North Capitol Street, N.W., Room 962. Interested parties may submit comments on an agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days of the date this notice appears in the **Federal Register**.

Agreement No.: 202–011375–033.

Title: Trans-Atlantic Conference Agreement.

Parties:

Atlantic Container Line AB
Cho Yang Shipping Co., Ltd.
Sea-Land Service, Inc.
A.P. Moller-Maersk Line
P&O Nedlloyd B.V.
Hapag-Lloyd Container Linie GmbH
Mediterranean Shipping Co., S.A.
DSR—Senator Lines
Pol-Atlantic
Orient Overseas Container Line (UK) Ltd.
Transportacion Maritima Mexicana, S.A. de C.V.
Neptune Orient Lines Ltd.
Hyundai Merchant Marine Co., Ltd.
P&O Nedlloyd Limited
Nippon Yusen Kaisha
Tecomar S.A. de C.V.
Hanjin Shipping Co., Ltd.

Synopsis: The proposed modification deletes Hanjin Shipping Co., Ltd. as a party at midnight, December 31, 1997; updates and revises the currency adjustment factor guidelines for service contracts; continues individual service contracts for 1998 on a calendar year basis, except for seasonal and non-containerizable cargo which may commence and terminate as agreed; and deletes all current restrictions applicable to the operations in the trade of companies related to Agreement parties.

Agreement No.: 203–011590.

Title: Grupo Libra-Nacional/TNX Vessel Sharing Agreement.

Parties:

Compania Maritima Nacional
Transroll Navieras Express, Inc.

Synopsis: The proposed Agreement would permit the parties to charter or exchange space with one another, to coordinate their vessel schedules, to interchange equipment, and, on a non-binding basis, to agree on rates in the trade United States Atlantic, Puerto Rican, and Virgin Islands ports

and ports in Brazil, Argentina, Uruguay, and Paraguay. The parties have requested a shortened review period.

By order of the Federal Maritime Commission.

Dated: October 17, 1997.

Joseph C. Polking,

Secretary.

[FR Doc. 97–27968 Filed 10–21–97; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL MARITIME COMMISSION

Ocean Freight Forwarder License; Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission applications for licenses as ocean freight forwarders pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718 and 46 CFR 510).

Persons knowing of any reason why any of the following applicants should not receive a license are requested to contact the Office of Freight Forwarders, Federal Maritime Commission, Washington, DC 20573.

Non-Stop Cargo, Inc., 8235 NW 56th Street, Miami, FL 33166, Officers: Michael A. Foreman, Jr., President, Marlene Castro, Vice President

Transports P. Fatton Inc., 149–23 182nd Street, Jamaica, NY 11413, Officer: Bruno Torre, Vice President

Scott Container Service, Inc., 9607 South Dearborn, Detroit, MI 48209, Officers: Charles H. Scott, President, Sheila Pullen, Vice President

Express International Incorporated, 2248 Cornell Drive, Flower Mound, TX 75028, Officers: Gary L. Elkins, President, Detra P. Elkins, Secretary

Arrisco International Inc., 1809 G Cross Beam Drive, Charlotte, NC 28217, Officers: Sam Arris, President, Sherry Jolley, Vice President

INBA International, Inc., 3600 S. State Road 7, Suite 347, Miramar, FL 33023, Officer: Erett B.P. Wallace, President

Dated: October 16, 1997.

Joseph C. Polking,

Secretary.

[FR Doc. 97–27886 Filed 10–21–97; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL MARITIME COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Federal Maritime Commission.

TIME AND DATE: 10:00 A.M., October 20, 1997.

PLACE: 800 North Capitol Street, N.W., Room 1000, Washington, D.C.

STATUS: Closed.

MATTER(S) TO BE CONSIDERED: 1. Docket No. 96–20—Port Restrictions and Requirements in the United States/Japan Trade.

CONTACT PERSON FOR MORE INFORMATION: Joseph C. Polking, Secretary, (202) 523–5725.

Joseph C. Polking,

Secretary.

[FR Doc. 97–28167 Filed 10–20–97; 2:38 pm]

BILLING CODE 6730–01–M

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act. Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than November 14, 1997.

A. Federal Reserve Bank of Boston (Richard Walker, Community Affairs Officer) 600 Atlantic Avenue, Boston, Massachusetts 02106-2204:

1. North Shore Bancorp, Peabody, Massachusetts; to become a bank holding company by acquiring 100 percent of the voting shares of North Shore Bank, Peabody, Massachusetts, (a Co-operative Bank).

B. Federal Reserve Bank of Atlanta (Lois Berthaume, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303-2713:

1. Citizens Effingham Bancshares, Inc., Springfield, Georgia; to become a bank holding company by acquiring 100 percent of the voting shares of Citizens Bank of Effingham, Springfield, Georgia (in organization).

2. Covenant Bancgroup, Inc., Leeds, Alabama; to become a bank holding company by acquiring 100 percent of the voting shares of Covenant Bank, Leeds, Alabama (in organization).

3. First State Financial Corporation, Sarasota, Florida; to become a bank holding company by acquiring 57.3 percent of the voting shares of First State Bank, Sarasota, Florida (formerly First State Bank of Sarasota).

C. Federal Reserve Bank of Chicago (Philip Jackson, Applications Officer) 230 South LaSalle Street, Chicago, Illinois 60690-1413:

1. States Financial Services Corporation, Hales Corners, Wisconsin; to acquire 100 percent of the voting shares of Richmond Bancorp, Inc., Gurnee, Illinois, and thereby indirectly acquire Richmond Bank, Richmond, Illinois.

In connection with this application, Applicant also has applied to acquire Richmond Financial Services, Inc., Richmond, Illinois, and thereby engage in discount brokerage, insurance agency activities in a town of less than 5,000, and management advisory services, pursuant to §§ 225.28(b)(7), (b)(11) and (b)(6)(iii) of the Board's Regulation Y, respectively.

Board of Governors of the Federal Reserve System, October 16, 1997.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 97–27899 Filed 10-21-97; 8:45 am]

BILLING CODE 6210-01-F

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company that engages either directly or through a subsidiary or other company, in a nonbanking activity that

is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than November 5, 1997.

A. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63102-2034:

1. Area Bancshares Corporation, Owensboro, Kentucky; to acquire Security First Network Bank, Atlanta, Georgia, and thereby indirectly acquire Solutions by Design, Inc. (''Solutions''), Atlanta, Georgia, and thereby engage in developing and providing data processing and data transmission services to financial institutions for use in providing products and services over the Internet, pursuant to § 225.28(b)(14) of the Board's Regulation Y. The acquisition will be accomplished through the merger of Solutions with and into Security First Technologies, Inc., Atlanta, Georgia, a wholly-owned subsidiary of Security First Network Bank.

Board of Governors of the Federal Reserve System, October 16, 1997.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 97–27898 Filed 10-21-97; 8:45 am]

BILLING CODE 6210-01-F

FEDERAL RESERVE SYSTEM

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 11:00 a.m., Monday, October 27, 1997.

PLACE: Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, NW, Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Federal Reserve Bank and Branch director appointments. (This item was originally announced for a closed meeting on October 6, 1997.)

2. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

3. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204. You may call (202) 452–3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: October 17, 1997.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 97–28072 Filed 10–17–97; 4:47 pm]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Notice of Interest Rate on Overdue Debts

Section 30.13 of the Department of Health and Human Services' claims collection regulations (45 CFR part 30) provides that the Secretary shall charge an annual rate of interest as fixed by the Secretary of the Treasury after taking into consideration private consumer rates of interest prevailing on the date that HHS becomes entitled to recovery. The rate generally cannot be lower than the Department of Treasury's current value of funds rate or the applicable rate determined from the ''Schedule of Certified Interest Rates with Range of Maturities.'' This rate may be revised quarterly by the Secretary of the Treasury and shall be published quarterly by the Department of Health and Human Services in the **Federal Register**.

The Secretary of the Treasury has certified a rate of 13⅞% for the quarter ended September 30, 1997. This interest rate will remain in effect until such time as the Secretary of the Treasury notifies HHS of any change.

Dated: October 16, 1997.

George Strader,

Deputy Assistant Secretary, Finance.

[FR Doc. 97–27887 Filed 10–21–97; 8:45 am]

BILLING CODE 4150–04–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Receipt of Applications(s) for Permit

The public is invited to comment on the following application for a permit to conduct certain activities with marine mammals. The application was submitted to satisfy requirements of the Marine Mammal Protection Act of 1972, *as amended* (16 U.S.C. 1361 *et seq.*) and the regulations governing marine mammals (50 CFR 18 and 50 FR 216).

Applicant: American Museum of Natural History, New York, NY, USFWS PRT–831724 and NMFS 876–1402.

Permit Type: Import, Re-import, Export, and Re-export for Scientific Research.

Name and Number of Animals: All Cetacea, Pinnipedia, Sirenia, marine and sea otters; unspecified amount.

Summary of Activity to be Authorized: The applicant has requested a permit for the import, re-import, export and re-export of salvaged material from all species of Cetacea, Pinnipedia, Sirenia, marine and sea otters collected worldwide as well as for samples of biopsy tissue collected from living specimens for the purpose of scientific research. Samples are intended for disposition in the museum collection and for exchange with other scientific institutions.

Source of Marine Mammals: Salvage and authorized research as described above.

Period of Activity: Up to five years from issuance date of the permit, if issued.

Concurrent with the publication of this notice in the **Federal Register**, the Office of Management Authority is forwarding copies of this application to the Marine Mammal Commission and the Committee of Scientific Advisors for their review.

Written data or comments, requests for copies of the complete application, or requests for a public hearing on this application should be sent to the U.S. Fish and Wildlife Service, Office of Management Authority, 4401 N. Fairfax Drive, Room 430, Arlington, Virginia 22203, telephone 703/358–2104 or fax 703/358–2281 and must be received within 30 days of the date of publication of this notice. Anyone requesting a hearing should give specific reasons why a hearing would be appropriate.

The holding of such a hearing is at the discretion of the Director.

Documents and other information submitted with the application are available for review, *subject to the requirements of the Privacy Act and Freedom of Information Act,* by any party who submits a written request for a copy of such documents to the above address within 30 days of the date of publication of this notice.

Dated: October 16, 1997.

Margaret Tieger,

Chief, Branch of Permits, Office of Management Authority, U.S. Fish and Wildlife Service.

Dated: October 3, 1997.

Ann D. Terbush,

Chief, Permits and Documentation Divison, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 97–27882 Filed 10–21–97; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Geological Survey

Request for Public Comments on Information Collection To Be Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

A request revising and extending the collection of information listed below will be 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's Clearance Officer at the phone number listed below. Comments and suggestions on the requirement should be made within 60 days directly to the Bureau Clearance Officer, U.S. Geological Survey, 807 National Center, Reston, VA 20192.

As required by OMB regulations at 5 CFR 1320.8(d)(1), the U.S. Geologial Survey solicits specific public comments regarding the proposed information collection as to:

1. Whether the collection of information is necessary for the proper performance of the functions of the bureau, including whether the information will have practical utility;

2. The accuracy of the bureau's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

3. The utility, quality, and clarity of the information to be collected; and,

4. How to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated electronic, mechanical, or other forms of information technology.

Title: Portland and Masonry Cement.

OMB approval number: 1028–NEW (Current number 1032–0038).

Abstract: Respondents supply the U.S. Geological Survey with data on cement production, shipments, and capacity, as well as consumption of raw materials. This information will be published as an annual report for use by Government agencies, industry, and the general public.

Bureau form number: 6–1214–A.

Frequency: Annual.

Description of respondents: Commercial producers and importers of portland and masonry cement.

Annual Responses: 130.

Annual Burden hours: 650.

Bureau clearance officer: John E. Cordyack, Jr., 703–648–7313.

John H. DeYoung, Jr.,

Chief Scientist, Minerals Information Team.

[FR Doc. 97–27891 Filed 10–21–97; 8:45 am]

BILLING CODE 4310–31–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AZ–930–5440–A015; AZAR 035683]

Public Land Order No. 7292; Revocation of Secretarial Order Dated March 8, 1938; Arizona

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order revokes a Secretarial order, in its entirety, as to the remaining 15 acres of public land withdrawn for use by the Federal Aviation Administration. The land is no longer needed for air navigation purposes. The revocation is needed to allow conveyance of the land to the city of Phoenix for airport purposes. The land is temporarily closed to surface entry and mining due to the pending conveyance. The land has been and will remain open to mineral leasing.

EFFECTIVE DATE: October 22, 1997.

FOR FURTHER INFORMATION CONTACT: Carol Kershaw, BLM Arizona State Office, 222 North Central Ave., Phoenix, Arizona 85004–2203, 602–417–9235.

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 (1994), it is ordered as follows:

1. The Secretarial Order dated March 8, 1938, which withdrew public land for Air Navigation Site No. 118, is hereby revoked in its entirety as to the following described land:

Gila and Salt River Meridian

T. 1 N., R. 4 E.,
Sec. 8, SW¼SW¼SW¼, and W½SE¼SW¼SW¼.

The area described contains 15 acres in Maricopa County.

2. The land described above is hereby made available for conveyance under Section 516 of the Airport and Airway Improvement Act of 1982, 49 U.S.C. 2215 (1994).

Dated: October 9, 1997.

Bob Armstrong,

Assistant Secretary of the Interior.

[FR Doc. 97–27892 Filed 10–21–97; 8:45 am]

BILLING CODE 4310–32–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before October 11, 1997. Pursuant to § 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, D.C. 20013–7127. Written comments should be submitted by November 6, 1997.

Paul Lusignan,

Acting Keeper of the National Register.

Florida

Dade County

Homestead Town Hall, (Homestead MPS), 43 N. Krome Ave., Homestead, 97001327.

Duval County

Atlantic National Bank Annex, (Downtown Jacksonville MPS), 118 W. Adams St., Jacksonville, 97001328.

Martin County

Martin County Court House, Old, 80 E. Ocean Blvd., Stuart, 97001329.

Georgia

Dodge County

Williamson Mausoleum at Orphans Cemetery, Orphans Cemetery Rd., jct. of US 23 and US 341, Eastman vicinity, 97001331.

Richmond County

Liberty Methodist Church, 2040 Liberty Church Rd., Hephzibah, 97001330.

Illinois

Champaign County

Bailey—Rugg Building, 219–225 N. Neil St., Champaign, 97001337.
Building at 201 North Market Street, 201 N. Market St., Champaign, 97001335.
Building at 203–205 North Market Street, 203–205 N. Market St., Champaign, 97001336.

Fulton County

Vermont Historic District, (Vermont, Illinois MPS), Roughly bounded by Second, Union, Fourth, and Liberty Sts., Vermont, 97001334.

Jo Daviess County

Apple River Fort Site, 0.25 mi. ESE of jct. of Mrytle and Illinois Sts., Elizabeth vicinity, 97001332.
White, W.E., Building, 100 N. Main St., Stockton, 97001339.

La Salle County

Armour's Warehouse, Jct. of William and Bridge Sts., Seneca, 97001333.

Livingston County

Standard Oil Gasoline Station, (Route 66 through Illinois MPS), 400 S. West St., Odell, 97001338.

KENTUCKY

Bourbon County

Snow Hill, 4100 Little Rock—Jackstown Rd., Little vicinity, 97001341.

Boyle County

Bower House, (Boyle MPS), KY 34, Parksville, 97001367.
Bright, T.B., House and Farmstead, (Boyle MPS), KY 34, 1 mi. E of Danville, Danville vicinity, 97001356.
Buster, Nimrod I., House and Farmstead, (Boyle MPS), 0.2 mi. E of Buster Rd., 0.1 mi. S of Mercer County Line, Danville vicinity, 97001359.
Caldwell, Charles W., House, (Boyle MPS), 0.2 mi N of KY 34, 0.6 mi. W of KY 127, Danville vicinity, 97001361.
Caldwell, W. Logan, Farmstead, (Boyle MPS), Irvine Rd., 0.4 mi. N of KY 34, Danville vicinity, 97001368.
Clifton Road Culvert, (Boyle MPS), Clifton Rd., 0.6 mi. N of KY 52, Clifton vicinity, 97001375.
Cutter, Henry, Houses, (Boyle MPS), 678 and 690 Shelby St., Junction City, 97001374.
Gentry House, (Boyle MPS), KY 150, 0.4 mi. S of KY 150 bypass, Danville, 97001370.
Granite Hill Farmstead, (Boyle MPS), 2570 Lancaster Rd., Danville vicinity, 97001355.
Grimes, Willis, House, (Boyle MPS), 8803 KY 34, Danville vicinity, 97001362.
Hutchings, A., House, (Boyle MPS), KY 52, 0.2 mi. W of jct. of KY 590 and KY 52, Danville vicinity, 97001353.
Isaacs House and Farmstead, (Boyle MPS), 1195 Rawlings Rd., Gravel Switch vicinity, 97001366.
Lazy Acres Farm, (Boyle MPS), 3910 Hustonville Rd., Danville vicinity, 97001372.
McFerran House, (Boyle MPS), US 127, 0.2 mi. S of KY 150, Danville, 97001360.
Mitchell, James P., House and Farmstead, (Boyle MPS), KY 34, 0.4 mi. E of jct. of KY 34 and KY 1856, Mitchellsburg vicinity, 97001349.
Moore, J.J., House, (Boyle MPS), Jct. of KY 34 and KY 1822, Parksville vicinity, 97001369.
Oldham, Mary Simpson, House, (Boyle MPS), 2907 Perryville Rd., Danville vicinity, 97001364.
Purdom—Lewis—Hutchison House, (Boyle MPS), Curtis Rd., jct of Curtis Rd. and N Rolling Fork R., Gravel Switch vicinity, 97001351.
Rosel Hotel, (Boyle MPS), Jct. of Shelby St. and White Oak Rd., Junction City vicinity, 97001371.
Salt River Road, (Boyle MPS), Along Salt River Rd., Danville vicinity, 97001350.
Spears—Craig House, (Boyle MPS), 0.1 mi. W. of KY 33, 0.6 mi. S of Spears Ln., Danville vicinity, 97001358.
Vanarsdale, J.S. and Nannie, House, (Boyle MPS), KY 52 in Atoka, Danville vicinity, 97001376.
Vermillion House and Farmstead, (Boyle MPS), 378 Salt River Rd., Danville vicinity, 97001373.
Wallace, J.S., House, (Boyle MPS), KY 34, 0.4 mi S of Mercer County Line, Danville vicinity, 97001357.
Wilson's Station, (Boyle MPS), 3750 Lebanon Rd., Danville vicinity, 97001363.
Worthington, Charles T., House, (Boyle MPS), 0.3 mi. W of Bluegrass Rd., 0.6 mi. N of Gentry Ln., Danville vicinity, 97001365.
Yeager, Samuel, House, (Boyle MPS), KY 590, 0.7 mi. S of jct. of KY 52 and KY 590, Danville vicinity, 97001352.

Breckinridge County

Irvington Historic District, Roughly bounded by CSX tracks, Third, Caroline and Walnut Sts., Irvington, 97001342.

Magoffin County

Salyersville Bank, Jct. of W. Maple and N. Church Sts., Salyersville, 97001340.

Nelson County

Mt. Broderick Pullman Lounge-Obs-Sleeping Car, 136 S. Main St., New Haven, 97001345.
Frankfort and Cincinnati Model 55 Rail Car, 136 S. Main St., New Haven, 97001344.
Louisville and Nashville Combine Car Number 665, 136 S. Main St., New Haven, 97001343.

Warren County

Horse Shoe Camp, (US 31W in Warren MPS), 8241 Louisville Rd., Bowling Green vicinity, 97001346.

MASSACHUSETTS

Suffolk County

Allston Congregational Church, 31–41 Quint Ave., Boston, 97001377.

MISSISSIPPI

Choctaw County

Weir, Col. John, House, 102 Ann St., Weir, 97001378.

Perry County

Mahned Bridge, Mahned Rd. over the Leaf R., New Augusta vicinity, 97001379.

MONTANA

Lewis and Clark County

Wolf Creek Hotel, Jct. of Main St. and Bissonnett St., Wolf Creek, 97001381.

Missoula County

Keith and Ross Block, (Missoula MPS), 403 N. Higgins Ave., Missoula, 97001382.

NEVADA

Churchill County

Fort Churchill and Sand Springs Toll Road, Address Restricted, Fallon vicinity, 97001383.

NEW MEXICO

Bernalillo County

Rte. 66, state maintained from Albuquerque to Rio Puerco, (Route 66 through New Mexico MPS), Rte. 66. West Central exit at I–40 to the Rio Puerco Bridge, Albuquerque vicinity, 97001396.

Cibola County

Rte 66, state maintained from McCartys to Grants, (Route 66 through New Mexico MPS), Rte 66, from E of McCartys to E of Grants, Grants vicinity, 97001398.
Rte. 66, state maintained from Milan to Continental Divide, (Route 66 through New Mexico MPS), Along Rte. 66, W of Milan to Continental Divide, Continental Divide, 97001394.

Mckinley County

Rte. 66, state maintained from Iyanbito to Rehobeth, (Route 66 through New Mexico MPS), Rte. 66, from Iyanbito Interchange at I–40 to State Police Stn. Rehobeth, Rehobeth, 97001397.
Quay County
Rte. 66, state maintained from Montoya to Cuervo, (Route 66 through New Mexico MPS), Along Rte. 66, from W of Montoya to Cuervo, Cuervo, 97001395.
Rte. 66, state maintained from San Jon to Tucumcari, (Route 66 through New Mexico MPS), Rte. 66, from E of San Jon to E of I–40 exit at Tucumcari, San Jon, 97001399.

NEW YORK

Genesee County

LeRoy House and Union Free School, 23 E. Main St., Leroy, 97001388.

Madison County

Smith, Gerrit, Estate, Jct. of Main and Nelson Sts., Peterboro, 97001386.

Onondaga County

Plymouth Congregational Church, 232 E. Onondaga St., Syracuse, 97001384.

Oswego County

Stillwater Bridge, Dam Rd. over Salmon R., Stillwater vicinity, 97001385.

Saratoga County

Saratoga Reformed Church, Old, Jct. of Burgoyne and Pearl Sts., Schuylerville, 97001387.

Tioga County

Wavely Junior and Senior High School, 443 Pennsylvania Ave., Waverly, 97001389.

SOUTH DAKOTA

Codington County

Citizens State Bank of Henry, Jct. of Main and 2nd Sts., Henry, 97001391.

Lawrence County

Toomey House, 1011 Main St., Spearfish, 97001390.

Roberts County

Stavig, Andrew and Mary, House, 112 First Ave. W, Sisseton, 97001392.

TEXAS

Dallas County

Highland Park Shopping Village, Jct. of Preston Rd. and Mockingbird Ln., Highland Park, 97001393.

VIRGINIA

Fauquier County

Burrland Farm Historic District, Burrland Ln., Middleburg vicinity, 97001406.
Number 18 School in Marshall, Jct. of VA 55 and VA 622, Marshall vicinity, 97001405.

Loudoun County

Red Fox Inn, 2 E. Washington St., Middleburg, 97001403.

Northumberland County

Academy, The, Jct. of Main St. and St. Stephen's Ln., Heathsville, 97001400.

Rockbridge County

Natural Bridge, Jct. of VA 11 and VA 130, Natural Bridge vicinity, 97001401.

Danville Independent City

Holbrook—Ross Street Historic District, Roughly bounded by Holbrook, Ross, Gay, and Maury Sts., Danville, 97001404.

Norfolk Independent City

Poplar Hall, 400 Stuart Cir., Norfolk, 97001402.

WASHINGTON

King County

Thornton, William Harper, House, (Bothel MPS), 17424 95th Ave, NE, Bothell, 97001408.

Lewis County

Chehalis Downtown Historic District, (Chehalis MPS), Roughly bounded by Park, and Front Sts., Washington and Cascade Aves., Chehalis, 97001407.

WEST VIRGINIA

Brooke County

Nicholls House and Woolen Mill Site, WV 67, Wellsburg-Bethany Pike, overlooking Buffalo Cr., Wellsburg, 97001416.

Cabell County

West Virginia Colored Children's Home, 3353 US 60, Huntington, 97001413.

Greenbrier County

Meadow River Lumber Building, US 219 S, State Fair of West Virginia, Fairlea, 97001411.

Kanawha County

Coal River Locks, Dams, and Log Booms Archeological District, Address Restricted, Alum Creek vicinity, 97001417.

Ohio County

La Bella Iron Works, Jct. of 31st and Wood Sts., Wheeling, 97001415.

Randolph County

Warfield—Dye House, 318 Bufalo St., Elkins, 97001412.

Upshur County

Fidler's Mill, Heaston Ridge Rd., Arlington, 97001414.

WISCONSIN

La Crosse County

Cass and King Street Residential Historic District, Roughly bounded by State, S. 21st, and Madison Sts., and West Ave. S, La Crosse, 97001410.

Waukesha County

Freewill Baptist Church, 19750 W. National Ave., New Berlin, 97001409.

[FR Doc. 97–27951 Filed 10–21–97; 8:45 am]
BILLING CODE 4310–70–P

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 731-TA–763–766 (Final)]

Certain Steel Wire Rod From Canada, Germany, Trinidad and Tobago, and Venezuela

AGENCY: United States International Trade Commission.

ACTION: Scheduling of the final phase of antidumping investigations.

SUMMARY: The Commission hereby gives notice of the scheduling of the final phase of antidumping investigations Nos. 731–TA–763–766 (Final) under section 735(b) of the Tariff Act of 1930 (19 U.S.C. § 1673d(b)) (the Act) to determine whether an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of less-than-fair-value imports from Canada, Germany, Trinidad and Tobago, and Venezuela of certain steel wire rod, provided for in subheadings 7213.91, 7213.99, 7227.20, and 7227.90 of the Harmonized Tariff Schedule of the United States.

For further information concerning the conduct of this phase of the investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207), as amended by 61 FR 37818, July 22, 1996.

EFFECTIVE DATE: September 29, 1997.

FOR FURTHER INFORMATION CONTACT: Larry Reavis (202–205–3185), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (http://www.usitc.gov or ftp://ftp.usitc.gov).

SUPPLEMENTARY INFORMATION:

Background.—The final phase of these investigations is being scheduled as a result of affirmative preliminary determinations by the Department of Commerce that imports of certain steel wire rod from Canada, Germany, Trinidad and Tobago, and Venezuela are being sold in the United States at less than fair value within the meaning of section 733 of the Act (19 U.S.C. § 1673b). The investigations were requested in petitions filed on February 26, 1997, by Connecticut Steel Corp., Wallingford, CT; Co-Steel Raritan, Perth Amboy, NJ; GS Industries, Inc., Georgetown, SC; Keystone Steel & Wire Co., Peoria, IL; North Star Steel Texas, Inc., Beaumont, TX; and Northwestern Steel & Wire, Sterling, IL.

Participation in the investigations and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the final phase of these investigations as parties should have filed an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, no later than 21 days prior to the October 16, 1997, hearing date applicable to these investigations and to the related countervailing duty investigations on certain steel wire rod from Canada, Germany, Trinidad and Tobago, and Venezuela (invs. Nos. 701–TA–368–371 (Final)). A party that filed a notice of appearance during the preliminary phase of the investigations need not have filed an additional notice of

appearance during this final phase. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in the final phase of these investigations available to authorized applicants under the APO issued in the investigations, provided that the application was made no later than 21 days prior to the October 16, 1997, hearing date. Authorized applicants must represent interested parties, as defined by 19 U.S.C. § 1677(9), who are parties to the investigations. A party granted access to BPI in the preliminary phase of the investigations need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Written submissions.—On February 24, 1998, the Commission will make available to parties any supplementary information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before March 3, 1998. Final comments must not contain new factual information and must otherwise comply with section 207.30 of the Commission's rules, except that the Commission has determined to waive the page limit and permit final comments not exceeding 25 pages. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.21 of the Commission's rules.

Issued: October 15, 1997.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 97–27937 Filed 10–21–97; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 701–TA–368–371 (Final)]

In the Matter of Certain Steel Wire Rod From Canada, Germany, Trinidad and Tobago, and Venezuela; Notice of Commission Determination to Conduct a Portion of the Hearing in Camera

AGENCY: U.S. International Trade Commission.

ACTION: Closure of a portion of a Commission hearing to the public.

SUMMARY: Upon request of a respondent in the above-captioned final investigation, the Commission has unanimously determined to conduct a portion of its hearing scheduled for October 16, 1997 *in camera. See* Commission rules 207.23(d), 201.13(m) and 201.35(b)(3) (19 CFR 207.23(d), 201.13(m) and 201.35(b)(3)). The remainder of the hearing will be open to the public. The Commission unanimously has determined that the seven-day advance notice of the change to a meeting was not possible. *See* Commission rule 201.35(a), (c)(1) (19 CFR § 201.35(a), (c)(1)).

FOR FURTHER INFORMATION CONTACT: Thomas H. Fine, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202–205–3092. Hearing-impaired individuals are advised that information on this matter may be obtained by contacting the Commission's TDD terminal on 202–205–1810.

SUPPLEMENTARY INFORMATION: The Commission believes that the respondents have justified the need for a closed session. A full discussion of information relating to the domestic industry's production levels and profitability, the occurrence of underselling and the effect and degree of domestic production outages can only occur if a portion of the hearing is held *in camera.* Because much of this information is not publicly available, any discussion of issues relating to this information will necessitate disclosure of business proprietary information (BPI). Thus, such discussions can only occur if a portion of the hearing is held *in camera.* In making this decision, the Commission nevertheless reaffirms its belief that whenever possible its business should be conducted in public.

The hearing will include the usual public presentations by petitioner and by respondents, with questions from the Commission. In addition, the hearing will include an *in camera* session for a presentation that discusses only the financial data submitted and information on bids for individual projects and for questions from the Commission relating to the BPI, followed by an *in camera* rebuttal presentation by petitioners. For any *in camera* session the room will be cleared of all persons except those who have been granted access to BPI under a Commission administrative protective order (APO) and are included on the Commission's APO service list in this investigation. *See* 19 CFR 201.35(b)(1), (2). The time for the parties' presentations and rebuttals in the *in camera* session will be taken from their respective overall allotments for the hearing. All persons planning to attend the *in camera* portions of the hearing should be prepared to present proper identification.

Authority: The General Counsel has certified, pursuant to Commission Rule 201.39 (19 CFR 201.39) that, in her opinion, a portion of the Commission's hearing in *Certain Steel Wire Rod from Canada, Germany, Trinidad and Tobago, and Venezuela,* Inv. Nos. 701–TA–368–371 (Final) may be closed to the public to prevent the disclosure of BPI.

By order of the Commission.

Issued: October 15, 1997.

Donna R. Koehnke,

Secretary.

[FR Doc. 97–27939 Filed 10–21–97; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–391]

In the Matter of Certain Toothbrushes and the Packaging Thereof; Notice of Issuance of Limited Exclusion Order

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has issued a limited exclusion order in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Tim Yaworski, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202–205–3096.

SUPPLEMENTARY INFORMATION: The authority for the Commission's

determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.50 of the Commission's Rules of Practice and Procedure (19 CFR 210.50).

The Commission instituted this investigation on November 22, 1996, based on a complaint filed by The Procter & Gamble Company (P&G) concerning allegations of unfair acts in violation of section 337 in the importation and sale of certain toothbrushes covered by U.S. Letters Patent Des. 328,392. The complaint, as amended, also alleged copyright infringement by certain respondents, but those allegations were subsequently withdrawn from the investigation.

The Commission found Shummi Enterprise Co., Ltd (Shummi) and Shumei Industrial Co., Ltd. (Shumei) in violation of section 337 and found Giftline International Corporation (Giftline) in default for failure to respond to the complaint and notice of investigation.

On July 2, 1997, the presiding administrative law judge (ALJ) issued a recommended determination (RD) on the issues of remedy and bonding for respondents Shummi and Shumei. The ALJ recommended a limited exclusion order and a bond in the amount of 100 percent of entered value during the 60-day Presidential review period.

On August 20, 1997, the Commission published a notice requesting written submissions on the issues of remedy, the public interest, and bonding. The Commission investigative attorney and complainant P&G filed submissions on these issues, essentially concurring with the ALJ's recommendations as to Shumei and Shummi and arguing for the same remedy and bond to apply to Giftline. No other submissions were filed.

Having reviewed the record in this investigation, including the parties' written submissions, the Commission determined that the appropriate form of relief is a limited exclusion order prohibiting the unlicensed entry of infringing toothbrushes that are manufactured abroad by or on behalf of Shummi, Shumei, or Giftline. The Commission further determined that the public interest factors enumerated in subsection 337(d) do not preclude issuance of the limited exclusion order, and that the bond during the Presidential review period shall be in the amount of one hundred (100) percent of the entered value of the articles in question.

Copies of the Commission's order, the public version of the Commission's opinion in support thereof, and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205–2000. Hearing impaired persons are advised that information on the matter can be obtained by contacting the Commission's TDD terminal at 202–205–1810.

Issued: October 15, 1997.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 97–27938 Filed 10–21–97; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importation of Controlled Substances; Notice of Application

Pursuant to Section 1008 of the Controlled Substances Import and Export Act (21 U.S.C. 958(i)), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in Schedule I or II and prior to issuing a regulation under Section 1002(a) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with Section 1301.34 of Title 21, Code of Federal Regulations (CFR), notice is hereby given that on June 6, 1997, Arenol Corporation, 189 Meister Avenue, Somerville, New Jersey 08876, made application by renewal to the Drug Enforcement Administration to be registered as an importer of the basic classes of controlled substances listed below:

Drug	Schedule
Methamphetamine (1105)	II
Phenylacetone (8501)	II

The firm plans to import the listed controlled substances to manufacture pharmaceutical products.

Any manufacturer holding, or applying for, registration as a bulk manufacturer of these basic classes of controlled substances may file written comments on or objections to the application described above and may, at the same time, file a written request for a hearing on such application in accordance with 21 CFR 1301.43 in such form as prescribed by 21 CFR 1316.47.

Any such comments, objections, or requests for a hearing may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, D.C. 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than November 21, 1997.

This procedure is to be conducted simultaneously with and independent of the procedures described in 21 CFR 1301.34 (b), (c), (d), (e), and (f). As noted in a previous notice at 40 FR 43745–46 (September 23, 1975), all applicants for registration to import basic classes of any controlled substances in Schedule I or II are and will continue to be required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration that the requirements for such registration pursuant to 21 U.S.C. 958(a), 21 U.S.C. 823(a), and 21 CFR 1301.34 (a), (b), (c), (d), (e), and (f) are satisfied.

Dated: October 7, 1997.

John H. King,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 97–27894 Filed 10–21–97; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to Section 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on September 10, 1997, Norac Company, Inc., 405 S. Motor Avenue, Azusa, California 91702, made application to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of tetrahydrocannabinols (7370) a basic class of controlled substance listed in Schedule I.

The firm plans to manufacture medication for the treatment of AIDS wasting syndrome and as an antiemetic.

Any other such applicant and any person who is presently registered with DEA to manufacture such substance may file comments or objections to the issuance of the proposed registration.

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug

Enforcement Administration, United States Department of Justice, Washington, D.C. 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than December 22, 1997.

Dated: October 3, 1997.

John H. King,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 97–27895 Filed 10–21–97; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacture of Controlled Substances; Notice of Application

Pursuant to Section 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on August 4, 1997, Novartis Pharmaceuticals Corp., Attn: Compliance, East Hanover, 556 Morris Avenue, Summit, New Jersey 07901, made application by renewal to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the Schedule II controlled substance methylphenidate (1724).

The firm plans to manufacture the finished product for distribution to its customers.

Any other such applicant and any person who is presently registered with DEA to manufacture such substances may file comments or objections to the issuance of the proposed registration.

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, D.C. 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than December 22, 1997.

Dated: October 6, 1997.

John H. King,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 97–27896 Filed 10–21–97; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to Section 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on September 10, 1997, Nycomed, Inc., 33 Riverside Avenue, Rensselaer, New York 12144, made application to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of meperidine (9230) a basic class of controlled substance listed in Schedule II.

The firm plans to manufacture bulk product for distribution to its customers.

Any other such applicant and any person who is presently registered with DEA to manufacture such substance may file comments or objections to the issuance of the proposed registration.

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, D.C. 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than December 22, 1997.

Dated: October 3, 1997.

John H. King,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 97–27897 Filed 10–21–97; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF LABOR

Office of the Secretary

Advisory Council on Employee Welfare and Pension Benefit Plans; Reopening and Extending the Time for Receipt of Nominations for Vacancies Until November 7, 1997

Section 512 of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 895, 29 U.S.C. 1142, provides for an ''Advisory Council on Employee Welfare and Pension Benefit Plans'' (the Council), to consist of 15 members to be appointed by the Secretary of Labor (the Secretary) as follows: Three representatives of employee organizations (at least one of whom shall be representative of an organization whose members are participants in a multiemployer plan); three representatives of employers (at least one of whom shall be representative of employers maintaining or contributing to multiemployer plans); one representative each from the fields of insurance, corporate trust, actuarial counseling, investment counseling, investment management and accounting; and three representatives from the general public (one of whom shall be a person representing those receiving benefits from a pension plan). No more than eight members of the Council shall be members of the same political party.

Members shall be qualified to appraise the programs instituted under ERISA. Appointments are for terms of three years. The prescribed duties of the Council are to advise the Secretary with respect to the carrying out of his or her functions under ERISA, and to submit to the Secretary, or his or her designee, recommendations with respect thereto. The Council will meet at least four times each year, and recommendations of the Council to the Secretary will be included in the Secretary's annual report to the Congress on ERISA.

The terms of five members of the Council expire Friday, November 14, 1997. The groups or fields represented are as follows: employee organizations (multiemployer plans), investment counseling, actuarial counseling, employers and the general public (pensioners). In addition, this year nominations also are being sought for individuals interested in an appointment to fill one year of an unexpired three-year term of a council member who died while serving on the Council. That unexpired term calls for naming an employee organization (multiemployer) representative.

Accordingly, notice is hereby given that any person or organization desiring to recommend one or more individuals for appointment to the Advisory Council on Employee Welfare and Pension Benefit Plans to represent any of the groups or fields specified in the preceding paragraph, may submit recommendations to Sharon Morrissey, Executive Secretary, ERISA Advisory Council, Frances Perkins Building, U.S. Department of Labor, 200 Constitution Avenue, NW, Suite N–5677, Washington, D.C. 20210. This notice is being issued to reopen and further extend the period in which recommendations can be delivered or mailed. The new date for receipt of recommendations is on or before November 7, 1997. Nominations for a particular category of membership should come from organizations or individuals within that category. A summary of the candidate's qualifications should be included with the nomination.

Signed at Washington, D.C., this 16 day of October, 1997.

Olena Berg,

Assistant Secretary of Labor, Pension and Welfare Benefits Administration.

[FR Doc. 97–27958 Filed 10–21–97; 8:45 am]

BILLING CODE 4510–29–M

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

Working Group on Studying the Merits of Defined Contribution vs. Defined Benefit Plans, Advisory Council on Employee Welfare and Pension Benefits Plans; Notice of Meeting

Pursuant to the authority contained in Section 512 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1142, the Advisory Council on Employee Welfare and Pension Benefit Plans Working Group established to Study the Merits of Defined Contribution vs. Defined Benefit Plans With an Emphasis on Small Business Concerns will hold a public meeting on November 12, 1997 in Conference Center C–5521, Seminar Room 4, U.S. Department of Labor Building, Second and Constitution Avenue, NW, Washington, D.C. 20210.

The purpose of the open meeting, which will run from 9:30 a.m. until approximately noon, is for Working Group members to finish its final report to the Council on the issue, particularly as to the formation of defined benefit plans for small businesses.

Members of the public are encouraged to file a written statement pertaining to the topic by submitting 20 copies on or before October 30, 1997, to Sharon Morrissey, Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, Room N–5677, 200 Constitution Avenue, NW, Washington, D.C. 20210. Individuals or representatives of organizations wishing to address the Working Group on Studying the Merits of Defined Contribution vs. Defined Contribution Plans With an Emphasis on Small Business Concerns should forward their request to the Executive Secretary or telephone (202) 219–8753. Oral presentations will be limited to 10 minutes, time permitting, but an extended written statement may be submitted for the record. Individuals with disabilities, who need special accommodations, should contact Sharon Morrissey by October 30, at the address indicated in this notice.

Organizations or individuals may also submit statements for the record without testifying. Twenty (20) copies of such statements should be sent to the Executive Secretary of the Advisory Council at the above address. Papers will be accepted and included in the record of the meeting if received on or before October 30.

Signed at Washington, D.C. this 15th day of October, 1997.

Olena Berg,

Assistant Secretary, Pension and Welfare Benefits Administration.

[FR Doc. 97–27954 Filed 10–21–97; 8:45 am]

BILLING CODE 4510–29–M

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

Working Group Studying Employer Assets In ERISA Employer-Sponsored Plans, Advisory Council on Employee Welfare and Pension Benefits Plans; Notice of Meeting

Pursuant to the authority contained in Section 512 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1142, a public meeting will be held on November 12, 1997 of the Advisory Council on Employee Welfare and Pension Benefit Plans Working Group studying Employer Assets in ERISA Employer-Sponsored Plans.

The purpose of the open meeting, which will run from 1:00 p.m. until approximately 3:30 p.m. in Conference Center C–5521, Seminar Room 4, U.S. Department of Labor Building, Second and Constitution Avenue NW, Washington, D.C. 20210, is for Working Group members to finish their report to the Council on employer assets in ERISA employer assets in ERISA employer-sponsored plans.

Members of the public are encouraged to file a written statement pertaining to the working group's topic by submitting 20 copies on or before October 30, 1997, to Sharon Morrissey, Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, Room N–5677, 200 Constitution Avenue, NW, Washington, D.C. 20210. Individuals or representatives of organizations wishing to address the Working Group on Employer Assets in ERISA Employer-Sponsored Plans should forward their request to the Executive Secretary or telephone (202) 219–8753. Oral presentations will be limited to 10 minutes, time permitting, but an extended written statement may be submitted for the record. Individuals with disabilities, who need special accommodations, should contact Sharon Morrissey by October 30, 1997, at the address indicated in this notice. Organizations or individuals may also submit statements for the record without testifying. Twenty (20) copies of such statements should be sent to the Executive Secretary of the Advisory Council at the above address. Papers will be accepted and included in the record of the meeting if received on or before October 30.

Signed at Washington, D.C. this 15 day of October, 1997.

Olena Berg,

Assistant Secretary, Pension and Welfare Benefits Administration.

[FR Doc. 97–27955 Filed 10–21–97; 8:45 am]

BILLING CODE 4510–29–M

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

Working Group Studying Soft Dollar Arrangements and Commission Recapture, Advisory Council on Employee Welfare and Pension Benefits Plans; Notice of Meeting

Pursuant to the authority contained in Section 512 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1142, a public meeting will be held November 13, 1997 of the Advisory Council on Employee Welfare and Pension Benefit Plans Working Group formed to study Soft Dollar Arrangements and Commission Recapture.

The session will take place in Conference Center C–5521, Seminar Room 4, U.S. Department of Labor Building, Second and Constitution Avenue, NW, Washington, D.C. 20210. The purpose of the open meeting, which will run from 9:30 a.m. to approximately noon, is for working group members to finish their final report to the Council.

Members of the public are encouraged to file a written statement pertaining to the specific topic by submitting 20 copies on or before October 30, 1997, to Sharon Morrissey, Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, Room N–5677, 200 Constitution Avenue, NW, Washington, D.C. 20210. Individuals or representatives of organizations wishing to address the Working Group on Soft Dollar Arrangements and Commission Recapture should forward their request to the Executive Secretary or telephone (202) 219–8753. Oral presentations will be limited to 10 minutes, time permitting, but an extended written statement may be submitted for the record. Individuals with disabilities, who need special accommodations, should contact Sharon Morrissey by October 30, at the address indicated in this notice.

Organizations or individuals may also submit statements for the record without testifying. Twenty (20) copies of

such statements should be sent to the Executive Secretary of the Advisory Council at the above address. Papers will be accepted and included in the record of the meeting if received on or before October 30.

Signed at Washington, D.C. this 15th day of October, 1997.

Olena Berg,

Assistant Secretary, Pension and Welfare Benefits Administration.

[FR Doc. 97–27956 Filed 10–2–97; 8:45 am]

BILLING CODE 4510–29–M

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

100th Full Meeting of the Advisory Council on Employee Welfare and Pension Benefits Plans; Notice of Meeting

Pursuant to the authority contained in Section 512 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1142, the 100th public meeting will be held November 13, 1997 of the Advisory Council on Employee Welfare and Pension Benefit Plans.

The session will take place in the Secretary's Conference Room S–2508, U.S. Department of Labor Building, Second and Constitution Avenue, NW, Washington, D.C. 20210. The purpose of the open meeting, which will run from 1:00 p.m. until approximately 2:30 p.m., is for working group chairs and vice chairs to present their groups' final reports and recommendations of the year to the full Council for its action on their findings and/or acceptance before the reports and recommendations are officially forwarded to the Secretary of Labor. The meeting also will provide the opportunity for an update on activities of the Pension and Welfare Benefits Administration by the Assistant Secretary of that organization and for a formal ceremony of appreciation for outgoing members of the Council.

Members of the public are encouraged to file a written statement pertaining to the Council's specific topics for the year by submitting 20 copies on or before October 30, 1997, to Sharon Morrissey, Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, Room N–5677, 200 Constitution Avenue, NW, Washington, D.C. 20210. Individuals or representatives of organizations wishing to address the Council should forward their request to the Executive Secretary or telephone (202) 219–8753. Oral presentations will be limited to 10 minutes, time permitting, but an extended written statement may be submitted for the record. Individuals with disabilities, who need special accommodations, should contact Sharon Morrissey by October 30, at the address indicated in this notice.

Organizations or individuals may also submit statements for the record without testifying. Twenty (20) copies of such statements should be sent to the Executive Secretary of the Advisory Council at the above address. Papers will be accepted and included in the record of the meeting if received on or before October 30.

Signed at Washington, D.C. this 15th day of October, 1997.

Olena Berg,

Assistant Secretary, Pension and Welfare Benefits Administration.

[FR Doc. 97–27957 Filed 10–21–97; 8:45 am]

BILLING CODE 4510–29–M

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–369 and 50–370]

Duke Energy Corporation; Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of amendments to Facility Operating License Nos. NPF–9 and NPF–17 issued to Duke Energy Corporation (the licensee) for operation of the McGuire Nuclear Station, Units 1 and 2, located in Mecklenburg County, North Carolina.

The proposed amendments would revise Technical Specification Table 3.3–4, ''Engineered Safety Features [ESF] Actuation System Instrument Trip Setpoints.'' Specifically, the amendments would support the replacement of the three safety-related wide range level instruments. The ESF trip setpoint for the refueling water automatic switch over to recirculation would be revised to account for the difference in instrument uncertainty associated with wide range level instruments and provide additional operator response time margin.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

First Standard

Operation of the facility in accordance with the proposed amendment will not involve a significant increase in the probability or consequences of an accident previously evaluated.

Probability

The FWST [Refueling Water Storage Tank] and its associated instrumentation are not considered accident initiators. The instrumentation change is from a narrow range type instrument to a wide range type instrument. A failure of either type of instrument could result in an undesired switch over or failure to switchover. However, the failure could not initiate any subsequent accident sequences.

Consequences

With the switchover to recirculation setpoint change, the system design will still provide enough injected water to ensure that the reactor remains shut down, as well as provide sufficient water depth within the containment sump to ensure adequate net positive suction head (NPSH) for the ECCS [emergency core cooling system] pumps and protect against vortexing. Also, adequate time is provided to ensure the completion of all operator actions necessary for switchover to cold leg recirculation prior to the loss of all usable FWST inventory and loss of suction to the ECCS pumps.

The change in the FWST LOW level setpoint reduces the FWST volume that is delivered to the primary system in the injection phase of a LOCA [loss-of-coolant accident]. Thus, this volume reduction affects the containment pressure response during a LOCA. A reanalysis of the containment pressure response using the NRC-approved methodology of DPC–NE–3004 demonstrates that the peak containment pressure remains below the design limit for the proposed FWST LOW level setpoint.

The LOCA blowdown, refill, and reflood phases of the analysis are not affected by the change in switchover setpoint. Therefore, the fuel clad integrity will not be impacted as a result of this change. The containment response was analyzed and found to be within acceptable limits. Therefore, the fission product barriers are unaffected by this change in setpoint.

The radiological calculations include assumptions regarding the start of ECCS recirculation which could be impacted by

this change. The impact of the setpoint changes is to shorten the time that is assumed for ECCS recirculation to begin. This would tend to increase the calculated dose from this potential leak path but the impact is so small that the currently reported results remained unchanged (calculation results are the same within roundoff, such that reported results do not change). The change does not significantly impact the radiological consequences of the design basis LOCA.

An analysis was performed at the FWST reduced borated water volume delivered to the primary system during a LOCA. The resulting primary system boron concentrations were compared to boron concentrations required to keep the core subcritical and found to be acceptable.

Therefore, there is no increase in the probability or consequences of an accident previously evaluated.

Second Standard

The amendment would not create the possibility of a new or different kind of accident from any kind of accident previously evaluated.

The failure modes of the new level transmitters remain the same. The instrumentation interacts with the same equipment and provides the same function. Therefore, failure of the new instrumentation [cannot] produce a new or different kind of accident previously evaluated. However, some failure modes will be more readily detectable because of the change to wide range instrumentation.

Third Standard

The amendment would not involve a significant reduction in a margin of safety.

The change to the FWST instrumentation does not involve a reduction in the margin of safety. Although increased instrument uncertainty is being introduced, the FWST low level setpoint is being adjusted to compensate for this change. The overall analysis results continue to be bounded such that there is no loss of suction from the FWST prior to ECCS pump switchover to the containment sump. There is adequate FWST inventory injected to maintain the reactor shutdown. There is sufficient water depth within the containment sump to satisfy NPSH and vortex concerns. In addition, the peak containment pressure remains below the design limit for the proposed FWST LOW level setpoint.

The rate of injection and back pressure of the FWST is not affected by the setpoint change. Analysis shows that the peak cladding temperature occurs prior to ECCS pump switchover to the containment sump, and thus is unaffected by this change.

Therefore, the new instrumentation and revised setpoints do not cause a reduction in the margin of safety associated with containment pressure or fuel cladding integrity.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish in the **Federal Register** a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D22, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

By November 21, 1997 the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the J. Murrey Atkins Library, University of North Carolina at Charlotte, 9201 University City Boulevard, North Carolina. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the

petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, by the above date. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and to Mr. Albert Carr, Duke Energy Corporation, 422 South Church Street, Charlotte, North Carolina 28242, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)-(v) and 2.714(d).

For further details with respect to this action, see the application for amendment dated October 13, 1997, which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the J. Murrey Atkins Library, University of North Carolina at Charlotte, 9201 University City Boulevard, North Carolina.

Dated at Rockville, Maryland, this 17th day of October 1997.

For the Nuclear Regulatory Commission.

Victor Nerses,

Senior Project Manager, Project Directorate II–2, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 97–28005 Filed 10–21–97; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–315 and 50–316]

Indiana Michigan Power Company; Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, And Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License Nos. DPR–58 and DPR–74, issued to Indiana Michigan Power Company (the licensee), for operation of the Donald C. Cook Nuclear Plant, Units 1 and 2 (D.C. Cook), located in Berrien County, Michigan.

The proposed amendment would change the D.C. Cook technical specifications (TS) to delete the interlock which would close the residual heat removal (RHR) suction valves if the reactor coolant system (RCS) pressure were to increase to 600 psig while retaining the interlock which would prevent the suction valves from opening while the RCS pressure is above the RHR system design pressure. This change would maintain the interlock against opening to protect against an intersystem loss of coolant accident but would allow continued deactivation of the isolation valves when the RHR system is operating to assure RHR availability and provide low temperature overpressure protection (LTOP).

The licensee has requested that the proposed amendment be reviewed on an emergency basis. Section 50.91(a)(5) of Title 10 of Code the Code of Federal Regulations requires the licensee to explain the emergency and why the licensee cannot avoid it. The licensee's explanation is provided below:

On September 18, 1997, a letter was sent to the USNRC providing a discussion of the actions we are taking to address technical issues identified by the recently complete [concluded September 12, 1997] architect engineering (AE) team inspection. We are currently anticipating the commencement of startup activities on September 29, 1997, and respectfully request NRC review and approval of this change by that date.

We understand the impact of such an emergency request, and recognizing that the conditions and status of the Cook Nuclear Plant restart may change in the future, we intend to keep the commission informed, through our daily contact with our NRR project manager, as to the status of our restart schedule.

The situation described above occurred because, until recently, the need to meet the RHR suction valve surveillance requirement, in mode 4, simultaneously with the reactivity control specification and the LTOP administrative requirements, was not recognized. Investigation into the root cause of this oversight is still in progress.

The AE inspection team identified issues related to our configuration management, design and procedure control, and our understanding of the plant's design and licensing bases. With the insight gained from the inspectors' conclusions, we identified this particular issue on September 11, 1997. The need for a T/S [technical specification] change prior to restarting either of the units, became evident as a result of our investigation of this matter.

The licensee was unable to make a more timely application because it was not determined until the recent inspection (September 11, 1997) that the RHR suction valve surveillance requirement in Mode 4 needed to be met, simultaneously with the reactivity control specification and the LTOP administrative requirements. Due to changes in the anticipated restart schedule, emergency circumstances no longer exist. However, the NRC has determined that the licensee used its best efforts to make a timely application for the proposed changes and that, pursuant to 10 CFR 50.91(a)(6), exigent circumstances do exist and were not the result of any intentional delay on the part of the licensee. The Donald C. Cook Nuclear Plant, Units 1 and 2, cannot restart until the proposed amendments have been approved by the NRC.

Pursuant to 10 CFR 50.91(a)(6), for amendments to be granted under exigent circumstances, the NRC staff must determine that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means

that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated, or (2) create the possibility of a new or different kind of accident from any accident previously evaluated, or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Criterion 1

This amendment request does not involve a significant increase in the probability or consequences of an accident previously evaluated. The change provides an alternative means of providing overpressurization protection for the RHR system, and thereby protection against potential intersystem LOCA. Operating procedure administrative requirements establish the necessary LTOP system configuration and ECCS equipment operability constraints for mode 4 operation. The LTOP system has been analyzed to show that, if operated per the existing operating procedure constraints, it will protect the RHR system during postulated overpressure conditions.

Criterion 2

The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated. The change involves a different response by the system to an overpressurization event, but we have shown by analysis that the alternative LTOP configuration is capable of providing equivalent protection to the original suction value auto-closure feature. The system remains protected from single failure to any of the available overpressure protection components. The change eliminates the potential for a single power supply or instrument failure isolating and damaging the RHR system while operating to remove decay heat in mode 4.

Criterion 3

This proposed change does not involve a significant reduction in a margin of safety. The change maintains an equivalent margin of safety against intersystem LOCA concerns. Operating with the suction valves blocked open and the overpressure protection of the LTOP system, the change also helps to ensure the availability of decay heat removal from the RCS during any potulated accident which would involve pressurization of the RCS. Operating with the original auto-closure isolation of the suction values would automatically cut off decay heat removal via the RHR system in any such postulated event if the RCS reached the auto-closure setpoint and the suction valves closed.

The change eliminates the potential for a power supply or instrument failure isolating and damaging the RHR system while in mode 4. The requested change maintains protection from inadvertently opening the RHR suction valves, thereby exposing the RHR system to high RCS system pressure, by maintaining the requirement for the open interlock in all modes.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 14 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 14-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 14-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish in the **Federal Register** a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D22, Two White Flint North, 11545 Rockville Pike, Rockville, MD, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the Commission's Public Document Room, located at the Gelman Building, 2120 L Street, NW., Washington, DC.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

By November 21, 1997, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.714, which is available at the Commission's Public Document Room, located at the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Maud Preston Palenske Memorial Library, 500 Market Street, St. Joseph, Michigan 49085. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) the nature of the petitioner's right under the Act to be made party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner

shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If the amendment is issued before the expiration of the 30-day hearing period, the Commission will make a final determination on the issue of no significant hazards consideration. If a hearing is requested, the final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, Attention: Rulemakings and Adjudications Staff, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, by the above date. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and to Gerald Charnoff, Esquire; Shaw, Pittman, Potts and Trowbridge; 2300 N Street, NW., Washington, DC 20037, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer, or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1) (i)–(v) and 2.714(d).

For further details with respect to this action, see the application for amendment dated October 8, 1997, which is available for public inspection at the Commission's Public Document Room, located at the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room, located at the Maud Preston Palenske Memorial Library, 500 Market Street, St. Joseph, Michigan 49085.

Dated at Rockville, Maryland, this 16th day of October 1997.

For The Nuclear Regulatory Commission.

John B. Hickman,

Project Manager, Project Directorate III–3, Division of Reactor Projects III/IV, Office of Nuclear Reactor Regulation.

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NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–315 and 50–316]

Indiana Michigan Power Company; Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License Nos. DPR–58 and DPR–74, issued to Indiana Michigan Power Company (the licensee), for operation of the Donald C. Cook Nuclear Plant, Units 1 and 2 (D.C. Cook), located in Berrien County, Michigan.

The proposed amendment would change the D.C. Cook technical specifications (TS) to increase both the minimum required ice mass per ice basket and the total minimum required ice mass, and to change the bases of the TS. The change in the bases is considered to be an unreviewed safety question.

The licensee has requested that the proposed amendment be reviewed on an exigent basis. Section 50.91(a)(6)(vi) of Title 10 of the *Code of Federal Regulations* requires the licensee to explain the exigency and why the licensee cannot avoid it. The licensee's explanation is provided below:

During the recent architect engineer inspection conducted at Cook Nuclear Plant [concluded September 12, 1997], it was determined that, because of instrument uncertainties, the switchover to the recirculation mode might occur before a sufficient volume of RWST [refueling water storage tank] water had been injected into the containment. This, when considered with our lower containment design that allows some containment spray flow to become trapped in the dead ended annulus region, raised a concern as to whether the limiting vortexing height requirements for the RHR [residual heat removal] and CTS [containment spray] pumps could be met throughout the transient. As a result, evaluations for transient sump level for small break loss-of-coolant accident (SBLOCA) and large break loss-of-coolant accident were performed. This limiting evaluation is the SBLOCA, due to its lower RCS and accumulator mass release. A calculation performed for SBLOCA indicates that it is necessary to credit more of the available ice condenser ice mass than currently listed in the T/S [technical specifications].

The amount of ice presently taken credit for (per basket and total) in our current T/S minimum ice weights is less than what is needed to maintain the sump level above 602′ 10″. Based on a model test in 1997, water level of 602′ 10″ is sufficient to prevent pump vortexing at maximum safeguards flow. The proposed changes to the T/S will take credit for more of the available ice to provide reasonable assurance that sufficient water to maintain 602′ 10″ elevation is achieved.

On September 18, 1997, our submittal AEP:NRS:1260G1 was sent to the NRC, providing a discussion of the actions we are taking to address technical issues identified by the recently completed architect engineer team inspections. We are anticipating the commencement of startup activities in several weeks, and respectfully request the NRC's review and approval on an exigent basis.

The licensee was unable to make a more timely application because it was not determined until the recent inspection (September 1997) that the amount of ice in the current TS minimum ice weights is less than what is needed to maintain the sump level above 602′ 10″. The NRC has determined that the licensee used its best efforts to make a timely application for the proposed changes and that exigent circumstances do exist and were not the result of any intentional delay on the part of the licensee. The Donald C. Cook Nuclear Plants, Units 1 and 2, cannot restart until the proposed amendments have been approved by the NRC.

Pursuant to 10 CFR 50.91(a)(6), for amendments to be granted under exigent circumstances, the NRC staff must determine that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated, or (2) create the possibility of a new or different kind of accident from any accident previously evaluated, or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Criterion 1

This amendment request does not involve a significant increase in the probability or consequences of an accident previously evaluated. The change increases the minimum ice weight requirements, ensuring that there will be sufficient water (i.e., a minimum sump level of 602′ 10″) in the recirculation sump from the time of switchover until an equilibrium level is reached. This will provide adequate sump level for the RHR [Residual Heat Removal] and CTS [Containment Spray] pumps to function properly, and provide sufficient flow to meet accident requirements.

Criterion 2

The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated. This change increases the required minimum amount of ice in the ice condenser. It does not alter any other physical characteristics of the ice baskets, nor does it change the ice condenser's function. No known failure mechanisms are introduced by this change.

Criterion 3

This proposed change does not involve a significant reduction in a margin of safety. The change increases the minimum heat absorbing capability of the ice condenser, and ensures that there will be sufficient quantity of melted ice to maintain the desired minimum sump level of 602′ 10″ from the time of switchover. This will provide an adequate sump level for the RHR and CTS pumps following switchover to the recirculation please.

The reduction in the allowance for ice sublimation does not significantly reduce the margin of safety. The original allowance was conservatively estimated to be ten times the design value. At the time this allowance was made, there was no data for determining the actual sublimation rate.

Data taken since 1984 has shown that the average measured sublimation rate is 2.31% per eighteen month cycle for unit 1, and 2.68% for unit 2. Both historic values are less than the 5% sublimation rate used in setting the T/S minimum ice weight. Based on this historical data, there is reasonable assurance that the analysis assumptions for available ice mass will be satisfied.

The revision to the T/S 3/4.5.5 basis provides clarification that water sources in addition to the water in the RWST are considered in determining the water inventory for the recirculation sump. This classification is consistent with FSAR appendix N, section 13.1 through section 13.25, question 23, and appendix Q, unit 2 question 212.29. The answers to these questions document that melted ice, RCS inventory, and RWST inventory were considered as contributing to the volume of water in the recirculation sump.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 14 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 14-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 14-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take action, it will publish in the **Federal Register** a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D22, Two White Flint North, 11545 Rockville Pike, Rockville, MD, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the Commission's Public Document Room, located at the Gelman Building, 2120 L Street, NW., Washington, DC.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

By November 21, 1997, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.714, which is available at the Commission's Public Document Room, located at the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Maud Preston Palenske Memorial Library, 500 Market Street, St. Joseph, Michigan 49085. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended

petition must satisfy the specificity requirements described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If the amendment is issued before the expiration of the 30-day hearing period, the Commission will make a final determination on the issue of no significant hazards consideration. If a hearing is requested, the final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, Attention: Rulemakings and Adjudications Staff, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, by the above date. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and to Gerald Charnoff, Esquire; Shaw, Pittman, Potts and Trowbridge; 2300 N Street, NW., Washington, DC 20037, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer, or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1) (i)–(v) and 2.714(d).

For further details with respect to this action, see the application for amendment dated October 8, 1997, which is available for public inspection at the Commission's Public Document Room, located at the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room, located at the Maud Preston Palenske Memorial Library, 500 Market Street, St. Joseph, Michigan 49085.

Dated at Rockville, Maryland, this 16th day of October 1997.

For the Nuclear Regulatory Commission.

John B. Hickman,

Project Manager, Project Directorate III–3, Division of Reactor Projects III/IV , Office of Nuclear Reactor Regulation.

[FR Doc. 97–28004 Filed 10–21–97; 8:45 am]

BILLING CODE 7590–01–U

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–483]

Union Electric Company Callaway Plant, Unit 1; Post Operating License Antitrust Review Finding Of No Significant Changes

By letter dated February 23, 1996, as supplemented by letters dated April 24, 1996 and November 15, 1996, Union Electric Company (UEC), holder of the Operating License for the Callaway Nuclear Plant, requested NRC approval regarding a merger agreement with Central Illinois Public Service Company (CIPSCO), under which UEC would become a wholly-owned subsidiary of the newly formed Ameren Corporation, a registered public utility holding company. Presently, 50 percent of Ameren is owned by UEC, and 50 percent is owned by CIPSCO.

The staff has examined, from a competitive standpoint, events which have occurred since issuance of the Callaway, Unit 1 construction permit to UEC and the operating license. In addition, the staff has considered the structure of the electric utility industry in the State of Missouri, and the record and testimony developed in related proceedings at the Federal Energy Regulatory Commission (FERC).

The staff's analysis is as follows:

After the merger, UEC will continue to own and operate the Callaway Nuclear Plant. UEC will continue to be engaged principally in the generation, transmission, distribution and retail and wholesale sale of electricity and in the distribution and retail sale of natural gas in Missouri.

Based upon the information provided by the licensee, the proposed merger and restructuring will not adversely affect the operation of the Callaway facility nor the bulk power services market served by the Callaway facility. For the most part, the transmission systems of UEC and CIPSCO do not overlap, so the merger for the most part would not eliminate one independent and potentially competing transmission alternative. Also, the licensee has filed consolidated (one system) open access transmission tariffs, which make available all of the direct interconnections of both companies as receipt and delivery points. This has the potential to expand wholesale bulk power trading opportunities in the region. The single-system open access transmission tariffs should make entry by new non-utility generators easier than before the merger, which should increase competition for long term generating capacity.

Market forces resulting from deregulation of the electric utility industry appear to be the driving force for the proposed merger. In testimony before FERC, licensee representatives stated that the rationale for the merger was to reduce the combined operating costs of UEC and CIPSCO. Both companies have been aggressively pursuing cost reductions to remain competitive, and have reached the practical limits of that strategy. Without a fundamental change in their way of doing business, it would become increasingly difficult to continue reducing costs. By combining utility operations, both companies have an opportunity to achieve more cost efficiency than either company could achieve independently.

The staff recommends that the Director of the Office of Nuclear Reactor Regulation issue a no significant antitrust change finding in connection with UEC's request dated February 23, 1996, as supplemented by letters dated April 23, 1996, and November 15, 1996.

Based on the staff's analysis, it is my finding that the proposed

implementation of the merger agreement between UEC and CIPSCO, which provides for UEC to become a wholly-owned subsidiary of the newly formed Ameren Corporation, does not represent a ''significant change.''

Dated at Rockville, Maryland, this 16th day of October 1997.

For the Nuclear Regulatory Commission.

Samuel J. Collins,

Director, Office of Nuclear Reactor Regulation.

[FR Doc. 97–28000 Filed 10–21–97; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–483]

In the Matter of Union Electric Company (Callaway Plant, Unit 1); Order Approving Application Regarding the Corporate Merger Agreement Between Union Electric Company and Cipsco Incorporated To Form a Holding Company

I

Union Electric Company (UEC) is sole owner of Callaway Plant, Unit 1. UEC holds Facility Operating License No. NPF–30 issued by the U.S. Nuclear Regulatory Commission (NRC) pursuant to Part 50 of Title 10 of the Code of Federal Regulations on October 18, 1984. Under this license, UEC has the authority to own and operate Callaway Plant, Unit 1. Callaway Plant is located in Callaway County, Missouri.

II

By letter dated February 23, 1996, as supplemented by letters dated April 24, 1996, and November 15, 1996, UEC informed the Commission that it had entered into a merger agreement with CIPSCO Incorporated (CIPSCO) which would provide for UEC to become a wholly-owned operating company of Ameren Corporation (Ameren). Ameren was formed to implement the merger agreement, and is presently owned equally by UEC and CIPSCO. Under the merger agreement, current holders of UEC common stock and holders of CIPSCO common stock will become holders of common stock in Ameren. UEC requested, to the extent necessary, the Commission's approval, pursuant to 10 CFR 50.80. Notice of this application for approval was published in the **Federal Register** on June 10, 1996 (61 FR 29434), and an Environmental Assessment and Finding of No Significant Impact was published in the **Federal Register** on November 22, 1996 (61 FR 59469).

Under 10 CFR 50.80, no license shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. Upon review of the information submitted in the letter of February 23, 1996, as supplemented by letters dated April 24, 1996, and November 15, 1996, and other information before the Commission, the NRC staff has determined that consummation of the merger agreement between UEC and CIPSCO, resulting in UEC becoming a wholly-owned subsidiary of a holding company, Ameren, will not affect the qualifications of UEC as holder of the license for Callaway Plant, and that the transfer of control of the license, to the extent effected by the consummation of the merger agreement between UEC and CIPSCO, is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission, subject to the conditions set forth herein. These findings are supported by the Safety Evaluation dated October 16, 1997.

III

Accordingly, pursuant to Section 161b, 161i, 161o, and 184 of the Atomic Energy Act of 1954, as amended, 42 USC 2201(b), 2201(i), 2201(o) and 2234, and 10 CFR 50.80, *It Is Hereby Ordered* that the Commission approves the application regarding the merger agreement between UEC and CIPSCO, under which Ameren will become the holding company of UEC, subject to the following: (1) UEC shall provide the Director of the Office of Nuclear Reactor Regulation a copy of any application, at the time it is filed, to transfer (excluding grants of security interests or liens) from UEC to its proposed parent or to any other affiliated company, facilities or other assets for the production, transmission, or distribution of electric energy having a depreciated book value exceeding ten percent (10%) of UEC's consolidated net utility plant, as recorded on UEC's books of account; and (2) should the merger agreement between UEC and CIPSCO not be implemented by September 30, 1998, this Order shall become null and void, provided, however, on application and for good cause shown, such date may be extended.

This Order is effective upon issuance.

IV

By November 21, 1997, any person adversely affected by this Order may file a request for a hearing with respect to issuance of the Order. Any person requesting a hearing shall set forth with particularity how that interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.714(d).

If a hearing is to be held, the Commission will issue an order designating the time and place of such hearing.

The issue to be considered at any such hearing shall be whether this Order should be sustained.

Any request for a hearing must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, or may be delivered to 11555 Rockville Pike, Rockville, Maryland between 7:45 am and 4:15 pm Federal workdays, by the above date. Copies should be also sent to the Office of the General Counsel, and to the Director, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Gerald Charnoff, Esquire/Thomas A. Baxter, Esquire, Shaw, Pittman, Potts & Trowbridge, 2300 N. Street, N.W., Washington, D.C. 20037, attorneys for UEC.

For further details with respect to this Order, see the application dated February 23, 1996, and supplemental letters dated April 24, 1996 and November 15, 1996, which are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Callaway County Public Library, 710 Court Street, Fulton, Missouri 65251.

Dated at Rockville, Maryland, this 16th day of October 1997.

For the Nuclear Regulatory Commission.

Samuel J. Collins,

Director, Office of Nuclear Reactor Regulation.

[FR Doc. 97–28001 Filed 10–21–97; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Biweekly Notice

Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

I. Background

Pursuant to Public Law 97-415, the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this regular biweekly notice. Public Law 97-415 revised section 189 of the Atomic Energy Act of 1954, as amended (the Act), to require the Commission to publish notice of any amendments issued, or proposed to be

issued, under a new provision of section 189 of the Act. This provision grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from September 29, 1997, through October 9, 1997. The last biweekly notice was published on October 8, 1997 (62 FR 52578).

Notice Of Consideration Of Issuance Of Amendments To Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, And Opportunity For A Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received before action is taken. Should the Commission take this action, it will publish in the **Federal Register** a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D22, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC. The filing of requests for a hearing and petitions for leave to intervene is discussed below.

By November 21, 1997, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC and at the local public document room for the particular facility involved. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) the nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the

Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemakings and Adjudications Staff, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington DC, by the above date. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, and to the attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for a hearing will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of factors specified in 10 CFR 2.714(a)(1)(i)-(v) and 2.714(d).

For further details with respect to this action, see the application for amendment which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room for the particular facility involved.

Commonwealth Edison Company, Docket Nos. STN 50-454 and STN 50-455, Byron Station, Unit Nos. 1 and 2, Ogle County, Illinois

Date of amendment request: April 7, 1997, as supplemented on August 7, 1997.

Description of amendment request: The proposed amendment would revise the plants' technical specifications to permit replacement of the 125 volt dc Gould batteries with new C&D Charter Power Systems, Inc., batteries.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

A. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The replacement C&D battery has been selected to meet or exceed the design, functional, and operational requirements of those of the present Gould battery, including crosstie load limitations. The C&D batteries are similar in design to the installed Gould batteries (e.g., electrolyte specific gravity and construction of the plates) except for capacity. The replacement C&D batteries have a significantly larger capacity than the Gould batteries, which can provide additional margin for future use. Also, the C&D batteries are qualified for a 20 year life and meet the latest applicable standards. The short circuit current provided by the C&D batteries is well within the interrupting capability of the existing DC system circuit breakers.

Additionally, the crosstie limit is increased to take advantage of the larger C&D battery capacity. The C&D batteries were sized based on having sufficient capacity to energize the design basis DC loads for an operating unit with the IEEE-485 design margin while maintaining the desired limited DC load of 200 amps for a shutdown unit. This proposed change allows use of the C&D batteries' larger capacity. The overall design, function, and operation of the DC system and equipment has not been altered by these changes. The proposed changes do not affect any accident initiators or precursors and do not alter the design assumptions for the systems or components used to mitigate the consequences of an accident as analyzed in UFSAR Chapter 15. Therefore, there is no increase in the probability or consequences of an accident previously evaluated.

B. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The replacement C&D batteries will provide the same functions as those of the installed Gould batteries and will be operated with the same types of operational controls. These limits include battery float terminal voltage, individual cell voltage and electrolyte specific gravity, and crosstie loading. Crosstie conditions are allowed under the present Technical Specifications. The crosstie limit is increased to take advantage of the larger C&D battery capacity. The remaining changes are administrative in nature or provide clarification to maintain consistency with other Technical Specifications.

The DC system and its equipment will continue to perform the same functions and be operated in the same fashion. The proposed change does not create any new or common failure modes. The proposed changes do not introduce any new accident initiators or precursors, or any new design assumptions for the systems or components used to mitigate the consequences of an accident. Therefore, the possibility of a new or different kind of accident from any accident previously evaluated has not been created.

C. The proposed change does not involve a significant reduction in a margin of safety.

The replacement C&D batteries will meet or exceed the design, functional, and qualification requirements [of] those of the installed Gould batteries. The proposed Technical Specification limitations for the C&D batteries are derived from the same methodology as the Gould batteries with applied margins in accordance with IEEE-485. Increasing the crosstie loading limit takes advantage of the larger C&D battery capacity with its increased design margin. The proposed change to the crosstie loading limit will continue to conservatively envelope the postulated design requirements. The remaining changes are administrative in nature or provide clarification to maintain consistency with other Technical Specifications.

The inherent design conservatism of the DC system and its equipment has not been altered. The DC system and its equipment will continue to be operated with the same degree of conservatism. Therefore, there is no reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the requested amendments involve no significant hazards consideration.

Local Public Document Room location: Byron Public Library District, 109 N. Franklin, P.O. Box 434, Byron, Illinois 61010

Attorney for licensee: Michael I. Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60603

NRC Project Director: Robert A. Capra

Commonwealth Edison Company, Docket Nos. STN 50-454 and STN 50-455, Byron Station, Unit Nos. 1 and 2, Ogle County, Illinois Docket Nos. STN 50-456 and STN 50-457, Braidwood Station, Unit Nos. 1 and 2, Will County, Illinois

Date of amendment request: June 30, 1997, as supplemented on September 25, 1997.

Description of amendment request: The proposed amendment would revise the plants' technical specifications to permit the licensee to take credit for soluble boron in spent fuel storage pool water to maintain an acceptable margin of subcriticality.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The following accidents have been specifically evaluated relative to the SFP [spent fuel pool]: fuel assembly drop, accidental misloading of spent fuel

assemblies into the SFP racks, and loss of normal cooling.

There is no increase in the probability of a fuel assembly drop accident in the SFP when considering the presence of soluble boron in the SFP water for criticality control. The handling of the fuel assemblies in the SFP has previously been performed in borated water. The criticality analysis shows the consequences of a fuel assembly drop accident in the SFP are not affected when considering the presence of soluble boron.

There is no increase in the probability of the accidental misloading of spent fuel assemblies into the SFP racks when considering the presence of soluble boron in the pool water for criticality control. Fuel assembly placement will continue to be controlled in accordance with approved fuel handling procedures and the spent fuel storage configuration limitations. Periodic surveillances of the SFP inventory (physical inventory and piece counts) are performed in accordance with station procedures. These surveillances ensure physical SFP inventory verification is performed at least once per year and in a timely manner upon completion of fuel movement in the SFP. The addition of credit for decay time in the spent fuel pool in determining allowable storage requirements is an extension of the reactivity equivalencing methodologies used for burnup credit in WCAP-14416-NP-A, ''Westinghouse Spent Fuel Rack Criticality Analysis Methodology,'' Revision 1, November 1996.

There is no increase in the consequences of the accidental misloading of spent fuel assemblies into the SFP racks because criticality analyses demonstrate that the pool will remain subcritical following an accidental misloading if the pool contains an adequate boron concentration. The proposed TS limitations and surveillance frequency will ensure that an adequate SFP boron concentration is maintained.

There is no increase in the probability of the loss of normal cooling to the SFP water when considering the presence of soluble boron in the pool water for subcriticality control since a high concentration of soluble boron has previously been maintained in the SFP water. A loss of normal cooling to the SFP water causes an increase in the temperature of the water passing through the stored fuel assemblies. This causes a decrease in water density which would result in a decrease in reactivity when Boraflex neutron absorber panels are present in the racks. However, since the proposed change does not consider Boraflex to be present in the racks, and the SFP water has a high concentration of boron, a density decrease causes a positive reactivity addition. [The] consequences of this accident are bounded by the misloaded assembly analysis. Because adequate soluble boron will be maintained in the SFP water, the consequences of a loss of normal cooling to the SFP will not be increased.

The proposed 48 hour surveillance frequency will be used to verify the boron concentration is within the initial assumptions of the criticality analysis. The current frequency of 24 hours was based on the sampling frequency for reactor coolant system (RCS) shutdown margin in Mode 5. A dilution of the SFP to a k_{eff} greater than 0.95 would take a much longer time than an RCS dilution resulting in loss of shutdown margin. This is due to the larger SFP volume compared to the RCS volume, and the turnover rate of water in the SFP is much less due to the lack of large dilution sources for the SFP. The 48 hour sampling frequency is sufficient based on operating experience, and based on the fact that significant changes in the boron concentration in the spent SFP are difficult to produce without detection, due to the large inventory of water. Soluble boron concentration reduction requires the inflow and outflow of large volumes of water which are readily detected by SFP and fuel handling building sump high level alarms, flooding in the fuel handling building or by normal operator rounds through the SFP area (once every eight hours), allowing adequate time for operator intervention prior to exceeding a k_{eff} of 0.95. Therefore, consequences of an accident previously evaluated are not increased by the change in surveillance frequency.

The format revisions to Specification 5.6.1.1 and reference to the report containing the specific NRC-approved criticality methodology in Specification 6.9.1.10 are administrative in nature and will not result in an increase in the probability or consequences of an accident previously evaluated.

Therefore, based on the above analysis, the proposed changes will not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The results of criticality accident analyses in the SFP are discussed in the UFSAR [Updated Final Safety Analysis Report] and in Criticality Analysis Reports associated with previous licensing activities. Specific accidents considered include fuel assembly drop, accidental misloading of spent fuel assemblies into the SFP racks, and loss of normal cooling.

LCO 3.9.1, ''BORON CONCENTRATION,'' contains limitations on the boron concentration in the filled portions of the reactor coolant system and the refueling canal during Mode 6. ComEd has maintained soluble boron in the SFP at all times and has imposed administrative limits on the SFP boron concentration, due in part to this requirement. LCO 3.9.11 establishes specific boron concentration requirements for the SFP water consistent with the results of the new criticality analysis based on the NRC-approved methodology of WCAP-14416-NP-A, ''Westinghouse Spent Fuel Rack Criticality Analysis Methodology,'' Revision 1, November 1996. Credit is also taken for radioactive decay time of the spent fuel.

Since soluble boron has always been maintained in the SFP water and is currently controlled administratively, the implementation of this requirement will have little effect on normal pool operations and maintenance. The implementation of the proposed limitations on the SFP boron concentration will only result in a requirement to verify boron concentration of the SFP water every 48 hours rather than every 24 hours. Sampling every 48 hours is sufficient to verify the SFP boron concentration meets the assumptions of the criticality analysis.

Because soluble boron has always been present in the SFP and has been administratively controlled, a dilution of the SFP soluble boron has always been a possibility. As shown in the SFP dilution evaluation performed for Byron and Braidwood, a dilution of the SFP which could increase the rack k_{eff} to greater than 0.95 (i.e., which could reduce the required margin to criticality) is not a credible event.

Therefore, the implementation of the proposed limitations on the SFP boron concentration and surveillance frequency will not result in the possibility of a new kind of accident.

The proposed change to Specification 5.6.1.1 identifies the requirements for the spent fuel rack storage configurations. The proposed changes relate to the criteria for determining the storage configuration. Since the proposed SFP storage configuration limitations will be similar to those currently in the Byron and Braidwood TS, these limitations will not have any significant effect on normal SFP operations and maintenance and will not create any possibility of a new or different kind of accident. Verifications will continue to be performed to ensure that the SFP loading configuration meets specified requirements.

The format revisions to Specification 5.6.1.1 and reference to the report containing the specific NRC-approved criticality methodology in Specification 6.9.1.10 are administrative in nature and will not create the possibility of a new [or] different kind of accident.

As discussed above, there is no significant change in plant configuration or equipment and the proposed changes will not create the possibility of a new or different kind of accident.

3. The proposed change does not involve a significant reduction in a margin of safety.

The proposed TS changes and the resulting spent fuel storage operating limits will provide adequate safety margin to ensure that the stored fuel assembly array will always remain subcritical. These limits are based on a plant specific criticality analysis performed in accordance with the NRC-approved Westinghouse spent fuel rack criticality analysis methodology (WCAP-14416-NP-A). Credit is also taken for radioactive decay time of the spent fuel.

Soluble boron credit provides significant negative reactivity in the SFP such that the k_{eff} is maintained less than or equal to 0.95. The proposed surveillance frequency will be used to verify the boron concentration is within the initial assumptions of the criticality analysis. A storage configuration has also been defined, with a 95-percent probability at a 95-percent confidence level, that ensures the spent fuel rack k_{eff} will be less than 1.0 with no credit for soluble boron or Boraflex panels in the racks. In addition to soluble boron credit, credit is taken for fuel assembly burnup, decay time, and IFBAs [Integral Fuel Burnable Absorber] when determining assembly storage requirements.

The loss of substantial amounts of soluble boron from the SFP which could lead to exceeding a k_{eff} of 0.95 has been evaluated and shown not to be credible. These evaluations show that the dilution of the SFP boron concentration from 2000 ppm to 550 ppm is not credible and that the spent fuel rack k_{eff} will remain less than 1.0 when flooded with unborated water.

The format revisions to Specification 5.6.1.1 and reference to the report containing the specific NRC-approved criticality methodology in Specification 6.9.1.10 are administrative in nature and will not result in a significant reduction in the plant's margin of safety.

Therefore, the proposed changes in this license amendment will not result in a significant reduction in the plant's margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the requested amendments involve no significant hazards consideration.

Local Public Document Room location: For Byron, the Byron Public Library District, 109 N. Franklin, P.O. Box 434, Byron, Illinois 61010; for Braidwood, the Wilmington Public Library, 201 S. Kankakee Street, Wilmington, Illinois 60481

Attorney for licensee: Michael I. Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60603

NRC Project Director: Robert A. Capra

Commonwealth Edison Company, Docket Nos. 50-373 and 50-374, LaSalle County Station, Units 1 and 2, LaSalle County, Illinois

Date of amendment request: August 12, 1997

Description of amendment request: The proposed amendments would remove a Technical Specification surveillance requirement to verify that sediment deposition within the lake screenhouse is not greater than one foot in thickness. Control of sediment accumulation in the lake screenhouse would be accomplished through the Service Water Performance Monitoring Program.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1) Involve a significant increase in the probability or consequences of an accident previously identified because:

Surveillance's [sic] to fully verify [that] the Ultimate Heat Sink contains enough water to perform its design function will continue. All cleanliness issues associated with ensuring operability of Core Standby Cooling System - Equipment Cooling Water System (CSCS-ECWS) equipment will be performed under the Service Water Performance Monitoring Program, which meets GL 89-13 [≥Service Water System Problems Affecting Safety-Related Equipment≥] recommended actions. By performing these inspections per GL 89-13, LaSalle will ensure that there is no build up of sediment, which could hinder or impede the design operation of any safety or non-safety related equipment which takes a suction from the service water tunnel. Based on the nature of sediment, where it collects, and system design, the CSCS-ECWS will be available if called upon or started to respond in case of an accident for equipment cooling and long term cooling.

At no time, during approximately fourteen years of LaSalle operation, has sediment built up or accumulated either in front of the inlet to the CSCS cooling water screen bypass supply line or the six 36-inch normal tunnel supply lines in such a manner that the flow of water through these lines could have been reduced or blocked. Instead, loose sediment collects in quiescent areas near the traveling screens, the north end of the Service Water Tunnel, under the outlets of the 36-inch normal tunnel supply lines in the service water tunnel, and downstream of the butterfly isolation valve in the 54 inch CSCS cooling water screen bypass supply line. The sediment that collects in the service water tunnel does not build up in a manner such that CSCS-ECWS, non-essential station service water, or fire pump suctions from the tunnel are affected, based on inspections since 1992.

The CSCS equipment cooling bypass valve, OE12-F300, is the manual butterfly valve in the CSCS cooling water screen bypass supply line. The bypass valve is being added to the ASME Section XI Inservice Testing Program to cycle the valve quarterly. This valve cycling will help maintain sediment level in the bypass line at a low level due to flow through the line while the valve is not fully closed and thus assure the bypass line remains available. The flow is created due to the differential pressure across the circulating water traveling screens with circulating water pumps in operation.

Therefore, neither essential nor non-essential service water will be lost due to sediment. Neither the probability nor the consequences of an accident are increased by the deletion of SR 4.7.1.3.c.

2) Create the possibility of a new or different kind of accident from any accident previously evaluated because:

Inspections for sedimentation will continue to be required by LaSalle's Service Water System Performance Monitoring Program per GL 89-13, to ensure continued operability of Core Standby Cooling System-Equipment Cooling Water System (CSCS-ECWS). The Ultimate Heat Sink operability requires assurance of a specific volume of water to provide cooling for at least 30 days for long term cooling following an accident. The public will be protected by the safety analysis in place by the fact that the safety and non-safety related equipment which take a suction from the service water tunnel will not be impaired by sediment. Therefore, there will be no possibility of a new or different kind of accident from any accident previously evaluated.

3) Involve a significant reduction in the margin of safety because:

The Ultimate Heat Sink continues to be demonstrated Operable by verifying a sufficient volume of water per TS SR 4.7.1.3.a and 4.7.1.3.b. Equipment operability will still be required per Technical Specifications 3/4.7.1.1 and 3/4.7.1.2 for the CSCS-ECWS systems. Sedimentation in the lake screenhouse is a maintenance/cleanliness issue addressed by the LaSalle Service Water Performance Monitoring Program. The program ensures equipment operability by both inspection for and removal of sedimentation and chemical control with a biocide to limit the growth of biological material and silt dispersant to help keep silt in the flow stream from coagulating. Therefore, there is minimal or no reduction in the margin of safety due to the deletion of this surveillance requirement.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the requested amendments involve no significant hazards consideration.

Local Public Document Room location: Jacobs Memorial Library, Illinois Valley Community College, Oglesby, Illinois 61348

Attorney for licensee: Michael I. Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60603

NRC Project Director: Robert A. Capra

Detroit Edison Company, Docket No. 50-341, Fermi 2, Monroe County, Michigan

Date of amendment request: September 29, 1997 (NRC-97-0089)

Description of amendment request: The proposed amendment would relocate the requirements for selected instrumentation and the associated Bases from the technical specifications (TS) to the updated final safety analysis report. The affected instrumentation is seismic monitoring (TS 3.7.2), meteorological monitoring (TS 3.7.3), the traversing in-core probe system (TS 3.7.7), the chlorine detection system (TS 3.7.8), and the loose parts detection system (TS 3.7.10). Changes to the TS index and list of tables were also requested to reflect the relocation of these TS and associated Bases. NRC Generic Letter 95-10, ''Relocation of Selected Technical Specification Requirements Related to Instrumentation,'' dated December 15, 1995, provided information concerning relocation of the requirements for these instruments.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed changes would relocate TS 3/4.3.7.2 - Seismic Monitoring Instrumentation, TS 3/4. 3.7.3 - Meteorological Monitoring Instrumentation, TS 3/4.3.7.7 - Traversing In-Core Probe System, TS 3/4.3.7.8 - Chlorine Detection System, and TS 3/4.3.7.10 - Loose-Part Detection System and their associated Bases to the Fermi 2 Updated Final Safety Analysis Report (UFSAR). They would also delete the special reporting requirements from the aforementioned TS which contain such requirements. The proposed changes would revise the TS Index and List of Tables to reflect the relocation of these TS and associated Bases. The relocated TS changes would be controlled in accordance with the requirements of 10 CFR 50.59.

The proposed changes affect TS that do not meet the NRC's ''Final Policy Statement on Technical Specification Improvements for Nuclear Power Reactors'' or 10 CFR 50.36(c)(2)(ii) criteria for inclusion in TS. These TS relocations are consistent with NUREG-1433, ''Standard Technical Specifications, General Electric Plants, BWR/4,'' Revision 1, April 1995. Furthermore, these five TS are specifically identified in NRC Generic Letter 95-10, ''Relocation of Selected Technical Specifications Requirements Related to Instrumentation,'' dated December 15, 1995, as suitable for relocation to licensee-controlled documents.

The Special Report requirements of TS 3/4.3.7.2, TS 3/4.3.7.3, and TS 3/4.3.7.10 would be deleted as part of their relocation to the UFSAR. The NRC reporting criteria of 10 CFR 50.72, ''Immediate Notification Requirements for Operating Nuclear Reactors,'' and 10 CFR 50.73, ''Licensee Event Report Systems'' provide appropriate requirements for reporting degraded and non-conforming conditions to the NRC.

These proposed TS changes do not involve a significant increase in the probability of an accident previously evaluated because no changes are being made to any accident initiator. No previously analyzed accident scenario is changed, and initiating conditions and assumptions remain as previously analyzed.

These proposed TS changes do not involve a significant increase in the consequences of an accident previously evaluated because the proposed changes do not affect accident sequences or assumptions used in evaluating the radiological consequences of an accident. The proposed changes do not alter the source term, containment isolation or allowable radiological releases.

2. The changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed changes do not change the way in which the plant is operated and no new or different failure modes have been defined for any plant system or component. No limiting single failure has been identified as a result of the proposed changes. No new or different types of failures or accident initiators are introduced by the proposed changes.

3. The changes do not involve a significant reduction in the margin of safety.

The proposed changes involve instrumentation and systems which are not inputs in the calculation of any safety margin with regard to Technical Specification Safety Limits, Limiting Safety System Settings, Limiting Control Settings or Limiting Conditions for Operation, or other previously defined margins for any structure, system, or component.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Monroe County Library System, 3700 South Custer Road, Monroe, Michigan 48161

Attorney for licensee: John Flynn, Esq., Detroit Edison Company, 2000 Second Avenue, Detroit, Michigan 48226

NRC Project Director: John N. Hannon

Duquesne Light Company, et al., Docket Nos. 50-334 and 50-412, Beaver Valley Power Station, Unit Nos. 1 and 2, Shippingport, Pennsylvania

Date of amendment request: September 11, 1997

Description of amendment request: The proposed amendments would relocate the reactor trip system and engineered safety feature actuation system response times from technical specification (TS) tables 3.3-2 and 3.3-5 to Section 3 of the licensee's Licensing Requirements Manual (LRM) in accordance with the guidance provided in NRC Generic Letter 93-08. Subsequent changes to the LRM would be controlled in accordance with the requirements of 10 CFR 50.59. The proposed amendments would also make several editorial changes in TSs 3.3.1.1 and 3.3.1.2, as well as making conforming changes to the Bases for these TSs.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the change involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed amendment relocates the instrument response time limits for the reactor trip system (RTS) and engineered safety feature actuation system (ESFAS) from the technical specifications to the Licensing Requirements Manual (LRM). The Core Operating Limits Report (COLR) and containment penetrations table (containment isolation valves) are controlled and maintained in the LRM. The LRM was developed to control and maintain those items removed from the technical specifications. The proposed amendment conforms to the guidance given in Enclosures 1 and 2 of Generic Letter 93-08. Neither the response time limits nor the surveillance requirements for performing response time testing will be altered by this submittal. The overall RTS and ESFAS functional capabilities will not be changed and assurance that action requirements of the protective and engineered safety features systems are completed within the time limits assumed in the accident analyses is unaffected by the proposed amendment. Therefore, operation of the facility in accordance with the proposed amendment will not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed amendment will not change the physical plant or the modes of plant operation defined in the operating license. The change does not involve the addition or modification of equipment nor does it alter the design or operation of plant systems. Therefore, operation of the facility in accordance with the proposed amendment will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the change involve a significant reduction in a margin of safety?

The measurement of instrumentation response times at the frequencies specified in the technical specification provides assurance that actions associated with the protective and engineered safety features systems are accomplished within the time limits assumed in the accident analyses. The response time limits, and the measurement frequencies remain unchanged by the proposed amendment. The proposed changes do not alter the basis for any other technical specification that is related to the establishment of or maintenance of a nuclear safety margin. Therefore, operation of the facility in accordance with the proposed amendment will not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: B. F. Jones Memorial Library, 663 Franklin Avenue, Aliquippa, PA 15001

Attorney for licensee: Jay E. Silberg, Esquire, Shaw, Pittman, Potts &

Trowbridge, 2300 N Street, NW., Washington, DC 20037

NRC Project Director: John F. Stolz

Entergy Operations, Inc., et al., Docket No. 50-416, Grand Gulf Nuclear Station, Unit 1, Claiborne County, Mississippi

Date of amendment request: September 18, 1997

Description of amendment request: The amendment would decrease the safety limit for the minimum critical power ratio (MCPR) from 1.12 to 1.11 for two recirculation loop operation and from 1.14 to 1.12 for single recirculation loop operation in Technical Specification (TS) 2.1.1.2. Because the proposed amendment is for Cycle 10 operation, the amendment would also revise the footnotes to TSs 2.1.1.2 and 5.6.5 to state that the MCPR values and the items 19 and 20 are ''applicable only for Cycle 10 operation.'' Cycle 10 operation is after the next (i.e., 9th) refueling outage.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

I. The proposed change does not significantly increase the probability or consequences of an accident previously evaluated.

The Minimum Critical Power Ratio (MCPR) safety limit is defined in the Bases to Technical Specification [TS] 2.1.1 as that limit which ''ensures that during normal operation and during Anticipated Operational Occurrences (AOOs), at least 99.9% of the fuel rods in the core do not experience transition boiling.'' The MCPR safety limit is re-evaluated for each reload and, for GGNS [Grand Gulf Nuclear Station, Unit 1] Cycle 10, the analyses have concluded that a two-loop MCPR safety limit of 1.11 based on the application of GE's [General Electric Company's] cycle-specific MCPR safety limit methodology is necessary to ensure that this acceptance criterion is satisfied. For single-loop operation, a MCPR safety limit of 1.12 based on GE's cycle-specific MCPR safety limit methodology was determined to be necessary. Core MCPR operating limits are developed to support the Technical Specification [TS] 3.2 requirements and ensure these safety limits are maintained in the event of the worst case transient. Since the MCPR safety limit will be maintained at all times, operation under the proposed changes will ensure [that] at least 99.9% of the fuel rods in the core do not experience transition boiling. Therefore, these changes to the [MCPR] safety limit do not affect the probability or consequences of an accident [previously evaluated].

GE's GESTAR-II approved methodology will continue to be implemented and has no effect on the probability or consequences of any accidents previously evaluated. One exception to GESTAR is that the mis-oriented and mis-located bundle events will continue to be analyzed as accidents subject to the acceptance criteria in the current licensing basis [for GGNS]. The design of the GE11 fuel bundles[, to be added to the core to replace Siemens fuel bundles,] is such that the bundles are not likely to be mis-oriented or mis-located and the normal administrative controls will be in effect for assuring proper orientation and location. Therefore, the probability of a fuel loading error is not increased. This analysis ensures that postulated dose releases will not exceed a small fraction (10 percent) of 10CFR100 [10 CFR Part 100] limits. Therefore, the probability or consequences of accidents previously evaluated are unchanged.

II. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The GE 11 fuel to be [added to the core and] used in Cycle 10 [operation] is of a design compatible with fuel present in the core and used in the [current 9th] cycle. [The current core is a mixture of GE11 and Siemens fuel bundles. The addition of GE11 to the core for the 9th cycle is addressed in Amendment 131 to the license dated November 21, 1996.] Therefore, the GE11 fuel will not create the possibility of a new or different kind of accident. The proposed changes do not involve any new modes of operation, any changes to setpoints, or any plant modifications.

They introduce revised MCPR safety limits that have been proven to be acceptable for Cycle 10 operation. Compliance with the applicable criterion for incipient boiling transition continues to be ensured. The proposed MCPR safety limits do not result in the creation of any new precursors to an accident.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

III. The proposed change does not involve a significant reduction in a margin of safety.

The MCPR safety limits have been evaluated in accordance with GE's current cycle-specific methodology to ensure that during normal operation and during AOOs, at least 99.9% of the fuel rods in the core are not expected to experience transition boiling. Unless otherwise approved, GGNS will implement only the NRC-approved revisions to GE's GESTAR methodology. This GE methodology is similar to those SPC [(Siemens Power Corporation)] reports current listed in TS 5.6.5 and it will be applied in a similar, conservative fashion. [TS 5.6.5, Core Operating Limits Report, lists the analytical methods which are approved by NRC and are used to determine the core operating limits for the GGNS core, including the MCPR.] One exception to GESTAR is that the mis-oriented and mis-located bundle events will continue to be analyzed as accidents subject to the acceptance criteria in the current [GGNS] licensing basis. This analysis ensures that postulated dose releases will not exceed a small fraction (10 percent) of 10CFR100 limits. [The proposed changes are to maintain the margin of safety for transition boiling in the core.] On this basis, the implementation of this GE methodology does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room Location: Judge George W. Armstrong Library, 220 S. Commerce Street, Natchez, MS 39120

Attorney for licensee: Nicholas S. Reynolds, Esquire, Winston and Strawn, 1400 L Street, N.W., 12th Floor, Washington, DC 20005-3502

NRC Project Director: James W. Clifford, Acting

Entergy Operations Inc., Docket No. 50-382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

Date of amendment request: September 25, 1997

Description of amendment request: The proposed change modifies Limiting Condition for Operation (LCO) 3.6.1.2 (Containment Leakage), the associated Action, and Surveillance Requirement (SR) 4.6.1.2 in Technical Specification (TS) for Waterford Steam Electric Station, Unit 3 (Waterford 3). The air lock door seal leakage rate acceptance criteria in TS 6.15 is being changed from 0.01La to 0.005La. TS 6.15 is also being modified to make the terms used in the Containment Leakage Rate Testing Program consistent with terms used in the TS. This change corrects an error that inadvertently decreased the allowed outage time from 24 hours to 1 hour when the containment purge valve or containment air lock leakage rates are not within limits. This error was made in the Waterford 3 TS change request that was approved in Amendment 124 for Waterford 3 on April 10, 1997.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Will operation of the facility in accordance with this proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No

The proposed change adds the specific type of containment leakage to the Limiting Condition for Operation (LCO), Action, and Surveillance Requirement (SR) in the Containment Leakage Technical Specification (TS) which results in increasing

the allowed outage time from 1 hour to 24 hours when the containment purge valve or containment air lock leakage rates are not within limits. The proposed change revises the air lock door seal leakage rate acceptance criteria. Also, the proposed change revises the Actions in the Containment Leakage TS to be consistent with the Applicability, and revises terms in the Containment Section and Administrative Controls Section of the TS to be consistent with the Containment Leakage Rate Testing Program. This change will not affect the probability of an accident. The containment purge valve and air lock leakage rates are not an initiator of any analyzed event. This change corrects two errors that were made in the Waterford 3 10CFR50 Appendix J, Option B, TS change request that was approved in TS Amendment 124. The first error inadvertently decreased the allowed outage time from 24 hours to 1 hour when either the containment purge valve or containment air lock leakage rate acceptance criteria is not met. The second error inadvertently increased the acceptance criteria for the air lock door seal leakage. The revised air lock door seal leakage rate acceptance criteria was never used at Waterford 3. This change also administratively changes the Containment Leakage TS Action and terms in the TS for consistency.

The proposed change will not affect the consequences of an accident. The amount of leakage from the containment purge valve and from the containment air lock will still be included in the overall combined containment leak rate. Neither the overall containment leakage rate limit nor the Action required to be taken if the overall containment leakage rate were exceeded is being changed. The Containment Leakage TS Action will be consistent with the Applicability and TS 3.0.4 will prohibit entry into Mode 4 (RCS [Reactor Coolant System] temperature ≤ 200°F), unless the overall containment leakage rate is within limit. The revised air lock acceptance criteria was never used. Waterford 3 will continue using the more restrictive acceptance criteria which is controlled administratively. This proposed change does not affect the mitigation capabilities of any component or system, nor does it affect the assumptions relative to the mitigation of accidents or transients.

Therefore, the proposed change will not involve a significant increase in the probability or consequences of any accident previously evaluated.

2. Will operation of the facility in accordance with this proposed change create the possibility of a new or different type of accident from any accident previously evaluated?

Response: No

The proposed change adds the specific type of containment leakage to the LCO, Action, and SR in the Containment Leakage TS. This results in increasing the allowed outage time from 1 hour to 24 hours when the containment purge valve or containment air lock leakage rates are not within limits. The proposed change revises the air lock door seal leakage rate acceptance criteria. Also, the proposed change revises the Actions in the Containment Leakage TS to be consistent with the Applicability, and revises terms in the Containment Section and Administrative Controls Section of the TS to be consistent with the Containment Leakage Rate Testing Program. Neither the design nor configuration of the plant, or how the plant is operated is being changed due to the addition of the specific types of leakage from the Containment Leakage Rate Testing Program, corrections made to the air lock door seal leakage rate acceptance criteria, or the changes made to make the TS consistent. There has been no physical change to plant systems, structures, or components nor will these changes reduce the ability of any of the safety-related equipment required to mitigate anticipated operational occurrences or accidents. Therefore, the proposed change will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Will operation of the facility in accordance with this proposed change involve a significant reduction in a margin of safety?

Response: No

The proposed change adds the specific type of containment leakage to the LCO, Action, and SR in the Containment Leakage TS. This results in increasing the allowed outage time from 1 hour to 24 hours when the containment purge valve or containment air lock leakage rates are not within limits. The proposed change revises the air lock door seal leakage rate acceptance criteria. Also, the proposed change revises the Actions in the Containment Leakage TS to be consistent with the Applicability, and revises terms in the Containment Section and Administrative Controls Section of the TS to be consistent with the Containment Leakage Rate Testing Program. The proposed revision to the Action and making the containment leakage rate terms consistent are administrative changes that have no technical impact on the TS.

The pre-amendment 124 Waterford 3 TS and NUREG-1432 allowed entry into specific Actions with allowed outage times greater than 1 hour (24 hours) when the air lock and purge valve leakage rate acceptance criteria could not be met. This change restores this allowed outage time which was inadvertently changed due to an error in the TS change request. The increased allowed outage time may prevent an unnecessary plant shutdown which is a plant transient. Plant shutdowns produce thermal stress on components in the Reactor Coolant System and the potential for a plant upset that could challenge safety systems. This change decreases the possibility of a plant shutdown by replacing the 1 hour allowed outage time with a 24 hour allowed outage time when the containment purge valve or containment air lock leakage is not within limits. Also, the overall containment leakage rate limits are not being changed and are required to be maintained.

The revision to the air lock door seal acceptance criteria is a more restrictive change to correct an error made by Waterford 3 in the TS change request approved in Amendment 124. The less restrictive acceptance criteria was never used; Waterford 3 continued testing to the more restrictive acceptance criteria.

Therefore, the proposed change will not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room Location: University of New Orleans Library, Louisiana Collection, Lakefront, New Orleans, LA 70122

Attorney for licensee: N.S. Reynolds, Esq., Winston & Strawn 1400 L Street N.W., Washington, D.C. 20005-3502

NRC Project Director: James W. Clifford, Acting

Florida Power Corporation, et al., Docket No. 50-302, Crystal River Nuclear Generating Plant, Unit No. 3, Citrus County, Florida

Date of amendment request: October 1, 1997

Description of amendment request: The proposed amendment would revise the technical specifications (TS) for the Crystal River Nuclear Electric Generating Plant Unit 3 (CR-3). The proposed TS change would add a new TS section, 5.6.2.10.4.c. The new section will provide growth monitoring criteria for the first span section of tubes in the ''B'' Once-Through Steam Generator (OTSG) with pit-like intergranular attack (IGA) indications.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Criterion 1

Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated.

The purpose of OTSG tube inspection is to identify tubes that have a higher potential for in service failure due to degradation that results in a reduced ability to withstand normal and upset operating conditions. The formal incorporation of specific indication growth monitoring and repair criteria is consistent with this purpose. Therefore, the probability of an accident previously evaluated has not been increased.

Chapter 14 of the CR-3 Final Safety Analysis Report (FSAR) provides an analysis to assess the consequences of a steam generator tube rupture event, including the complete severance of a steam generator tube. This analyses concluded that CR-3 was sufficiently designed to ensure that in the event of a steam generator tube rupture, the radiological doses would not exceed the allowable limits prescribed by 10 CFR 100. Neither would this result in additional tube failures and further degradation of the

integrity of the reactor coolant pressure boundary. The proposed changes do not alter this analysis in any fashion. Therefore, the consequences of an accident have not been increased.

Criterion 2

Does not Create the Possibility of a New or Different Kind of Accident from any Accident Previously Evaluated.

This change does not alter the design or operation of the OTSGs. The incorporation of the proposed requirements is more conservative than the existing ITS requirements. Neither the type of inspection of OTSG tubes nor the process for performing inspections will be changed by this amendment. Therefore, this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

Criterion 3

Does Not Involve a Significant Reduction in the Margin of Safety as defined in the Bases for any Technical Specifications.

The previously performed analyses on the effects of OTSG tube failures, as reported in the CR-3 FSAR, have demonstrated that onsite and offsite consequences are within allowable limits. The proposed change incorporates more conservative growth monitoring and operational assessment criteria for the ''B'' OTSG first-span pit-like IGA indications. This change does not result in a significant reduction in the margin of safety as defined in the Bases for any Technical Specifications.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Coastal Region Library, 8619 W. Crystal Street, Crystal River, Florida 34428

Attorney for licensee: R. Alexander Glenn, General Counsel, Florida Power Corporation, MAC - A5A, P. O. Box 14042, St. Petersburg, Florida 33733-4042

NRC Project Director: Frederick J. Hebdon

North Atlantic Energy Service Corporation, Docket No. 50-443, Seabrook Station, Unit No. 1, Rockingham County, New Hampshire

Date of amendment request: September 26, 1997

Description of amendment request: The proposed amendment would separate the requirements for Control Room Air Conditioning from Control Room Makeup Air and Filtration as presently contained in Technical Specification 3.7.6, ''Control Room Emergency Makeup Air and Filtration,'' and its associated BASES. Technical Specification 3.7.6 now requires that each subsystem of Control Room Emergency Makeup Air and Filtration include an OPERABLE emergency filtration unit and air conditioning unit. The proposed amendment would separate the requirements based on system function. The proposed amendment also would increase the allowed outage time for the air conditioning portion of the Control Room Air Conditioning Subsystem.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration. The NRC staff has reviewed the licensee's analysis against the standards of 10 CFR 50.92(c). The NRC staff's review is presented below.

A. The changes do not involve a significant increase in the probability or consequences of an accident previously evaluated (10 CFR 50.92(c)(1)). The proposed changes have no impact on the probability of an accident because the control room ventilation systems are support systems which have a role in the detection and mitigation of accidents but do not contribute to the initiation of any accident previously evaluated. Reorganizing the Technical Specifications by function is merely an administrative change and the change has no impact on the course of any accidents previously evaluated since there is no change in the functions provided by the subsystems.

Increasing the allowed outage time to 30 days from 7 days for the cooling of recirculated air while one train is inoperable does not affect the availability of the second train of air conditioning or the actions required if both trains of air conditioning become unavailable. Thus, the consequences accidents previously evaluated are not increased.

B. The changes do not create the possibility of a new or different kind of accident from any accident previously evaluated (10 CFR 50.92(c)(2)) because they do not affect the function of any facility structure, system or component, nor do they affect the manner by which the facility is operated. The proposed changes do not introduce any new failure modes.

C. The changes do not involve a significant reduction in a margin of safety (10 CFR 50.92(c)(3)) because the proposed changes do not affect the function of any facility structure, system or component, nor do they affect the manner by which the facility is operated. Increasing the allowed outage time for the cooling of recirculated air while one train is inoperable represents an increase in the probability that the air conditioning functions could be unavailable. However, the increase does not affect the availability of the second train of air conditioning or the actions required should both trains of air conditioning become unavailable.

Based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Exeter Public Library, Founders Park, Exeter, NH 03833

Attorney for licensee: Lillian M. Cuoco, Esquire, Northeast Utilities Service Company, Post Office Box 270, Hartford CT 06141-0270

NRC Project Director: Ronald B. Eaton, Acting

Northern States Power Company, Docket Nos. 50-282 and 50-306, Prairie Island Nuclear Generating Plant, Unit Nos. 1 and 2, Goodhue County, Minnesota

Date of amendment requests: September 26, 1997

Description of amendment requests: The proposed amendments would revise Technical Specification (TS) 3.4.B, ''Auxiliary Feedwater System,'' to provide specific guidance for conducting post-maintenance operational testing of the turbine-driven auxiliary feedwater (TDAFW) pump and associated system valves to meet operability and limiting conditions for operation during unit startup. An additional change is proposed to revise Table TS.3.5.2B to permit during Mode 2 the bypassing of the auto start feature of the auxiliary feedwater (AFW) pumps that results from the trip of both main feedwater pumps when the feedwater pumps are not required to be operated.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed amendment[s] will not involve a significant increase in the probability or consequences of an accident previously evaluated.

Since none of the proposed changes involve a physical change to the plant, the mechanisms that could cause a Loss of Normal Feedwater have not changed. The probability that a Loss of Normal Feedwater will occur is not altered.

This change still requires that the motor driven AFW Pump and associated system valves are operable during Startup Operations. Analysis of the Loss of Normal Feedwater transient shows that a single AFW Pump provides sufficient AFW flow to prevent any adverse conditions in the core. The condition of an inoperable TDAFW Pump is already permitted during power operations where the consequences of the event would be more severe than during startup. Since there are no consequences from the Loss of Normal Feedwater event at power, the consequences during startup would still be none, but the margins would be larger because; (1) the amount of residual heat generated is less because reactor power

at the start of the event is less and (2) the power history is lower resulting in less decay heat.

Thus, these changes do not involve an increase in the probability or consequences of an accident previously analyzed.

2. The proposed amendment[s] will not create the possibility of a new or different kind of accident from any accident previously analyzed.

The proposed changes do not create the possibility of a new or different kind of accident previously evaluated because the proposed changes do not introduce a new mode of operation or testing, or make physical changes to the plant.

The proposed changes do not alter the design, function, operation, or testing of any plant component, therefore the possibility of a new or different kind of accident from those previously analyzed would not be created by these changes to Technical Specifications.

3. The proposed amendment[s] will not involve a significant reduction in the margin of safety.

Margins previously established for the Loss of Normal Feedwater event, were analyzed for different initial conditions. The Loss of Normal Feedwater event was analyzed for Power Operations. This analysis determined that no adverse conditions would occur in the core. Since there are no consequences from the Loss of Normal Feedwater event at power, the consequences during startup would still be none but the margins would be greater because; (1) the amount of residual heat generated is less because reactor power at the start of the event is less and (2) the power history is lower causing less decay heat.

Therefore, the proposed change does not result in a significant reduction in the margin of safety currently established.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment requests involve no significant hazards consideration.

Local Public Document Room location: Minneapolis Public Library, Technology and Science Department, 300 Nicollet Mall, Minneapolis, Minnesota 55401

Attorney for licensee: Jay Silberg, Esq., Shaw, Pittman, Potts, and Trowbridge, 2300 N Street, NW, Washington, DC 20037

NRC Project Director: John N. Hannon

Power Authority of The State of New York, Docket No. 50-286, Indian Point Nuclear Generating Unit No. 3, Westchester County, New York

Date of amendment request: September 3, 1997

Description of amendment request: The proposed amendment would change the Technical Specifications (TSs) to revise the number of hours operating personnel can work in a normal shift. The proposed amendment also contains some administrative changes to the TSs.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed license amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

A. Establishing operating personnel work hours at, ''an 8 to 12 hour day, nominal 40 hour week,'' allows normal plant operations to be managed more effectively and does not adversely effect performance of operating personnel. Overtime remains controlled by site administrative procedures in accordance with NRC Policy Statement on working hours (Generic Letter 82-12). If 8 hour shifts are maintained in part or whole, then acceptable levels of performance from operating personnel is assured through effective control of shift turnovers and plant activities. No physical plant modifications are involved and none of the precursors of previously evaluated accidents are affected. Therefore, this change will not involve a significant increase in the probability or consequence of an accident previously evaluated.

B. Editorial changes clarify section 6.2.2.g without changing the intent or meaning. The proposed change meets the intent of the NRC Policy Statement on working hours (Generic Letter 82-12).

C. Changes to sections 3.10.6.1.a and 3.10.9 do not change the intent or meaning of the technical specification sections. Clarification to the table notation in section 4.1 related to the definition of shift checks to monitor plant conditions will continue as intended but are allowed to increase up to at least once per 12 hours. This increase is consistent with standard industry practice as represented by the Standard Technical Specifications (STS), Reference 1.

2. Does the proposed license amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

A. Establishing operating personnel work hours at, ''an 8 to 12 hour day, nominal 40 hour week,'' allows normal plant operations to be managed more effectively and does not adversely effect performance of operating personnel. If 8 hour shifts are maintained in part or whole, then acceptable levels of performance from operating personnel is assured through effective control of shift turnovers and plant activities. Overtime remains controlled by site administrative procedures in accordance with the NRC Policy Statement on working hours (Generic Letter 82-12). No physical modification of the plant is involved. As such, the change does not introduce any new failure modes or conditions that may create a new or different accident. Therefore, operation in accordance with the proposed amendment will not create the possibility of a new or different kind of accident from any previously evaluated.

B. Editorial changes clarify section 6.2.2.g without changing the intent or meaning. The proposed change meets the intent of the NRC Policy Statement on working hours (Generic Letter 82-12).

C. Changes to sections 3.10.6.1.a and 3.10.9 do not change the intent or meaning of the technical specification sections. Clarification to the table notation in section 4.1 related to the definition of shift checks to monitor plant conditions will continue as intended but are allowed to increase up to at least once per 12 hours. This increase is consistent with standard industry practice as represented by the Standard Technical Specifications (STS), Reference 1.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

A. Establishing operating personnel work hours at, ''an 8 to 12 hour day, nominal 40 hour week,'' allows normal plant operations to be managed more effectively and does not adversely effect performance of operating personnel. If 8 hour shifts are maintained in part or whole, then acceptable levels of performance from operating personnel is assured through effective control of shift turnovers and plant activities. Overtime remains controlled by site administrative procedures in accordance with the NRC Policy Statement on working hours (Generic Letter 82-12) and is consistent with the Standard Technical Specifications. The proposed change involves no physical modification of the plant, or alterations to any accident or transient analysis. There is no Basis to section 6 of the Technical Specifications, and the changes are administrative in nature. Therefore, the change does not involve any significant reduction in a margin of safety.

B. Editorial changes clarify section 6.2.2.g without changing the intent or meaning. The proposed change meets the intent of the NRC Policy Statement on working hours (Generic Letter 82-12).

C. Changes to sections 3.10.6.1.a and 3.10.9 do not change the intent or meaning of the technical specification sections. Clarification to the table notation in section 4.1 related to the definition of shift checks to monitor plant conditions will continue as intended but are allowed to increase up to at least once per 12 hours. This increase is consistent with standard industry practice as represented by the Standard Technical Specifications (STS), Reference 1.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: White Plains Public Library, 100 Martine Avenue, White Plains, New York 10601.

Attorney for licensee: Mr. David Blabey, 10 Columbus Circle, New York, New York 10019.

NRC Project Director: S. Singh Bajwa, Director

Power Authority of The State of New York, Docket No. 50-286, Indian Point Nuclear Generating Unit No. 3, Westchester County, New York

Date of amendment request: September 8, 1997

Description of amendment request: The proposed amendment would revise the f delta I function.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

(1) Does the proposed license amendment involve a significant increase in the probability or consequences of an accident previously analyzed?

Response:

No. The revision to the negative [f delta I] penalty does not significantly increase the probability or consequences of an accident previously evaluated in the FSAR [Final Safety Analysis Report]. This revision does not directly initiate an accident. The consequences of accidents previously evaluated in the FSAR are unaffected by this proposed change because no change to any equipment response or accident mitigation scenario has resulted. There are no additional challenges to fission product barrier integrity.

(2) Does the proposed license amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response:

No. The revision to the negative [f delta I] penalty does not create the possibility of a new or different kind of accident than any accident already evaluated in the FSAR. No new accident scenarios, failure mechanisms, or limiting single failures are introduced as a result of this proposed change. The proposed Technical Specification revision does not challenge the performance or integrity of any safety related systems. Therefore, the possibility of a new or different kind of accident is not created.

(3) Does the proposed amendment involve a significant reduction in a margin of safety?

Response:

No. The proposed change to the Technical Specification does not involve a significant reduction in a margin of safety. The margin of safety associated with the acceptance criteria for any accident is unchanged.

The revision to the negative [f delta I] penalty will have no affect on the availability, operability or performance of the safety related systems and components and does not affect the plant Technical Specification requirements. The revision to the negative [f delta I] penalty does require a change to the Technical Specifications but does not prevent inspections or surveillances required by the Technical Specifications.

In addition, the revision to the [f delta I] parameters is based upon the revised boron dilution rate used to analyze the boron dilution transient. Indian Point 3 procedures require the placement of one PW [primary water makeup] pump control switch in the pull-out position, thus ensuring that only one PW pump is operating.

The Bases of the Technical Specifications are founded in part on the ability of the regulatory criteria being satisfied assuming the limiting conditions for operation for various systems. Conformance to the regulatory criteria for operation with the revision to the negative [f delta I] penalty is demonstrated and the regulatory limits are not exceeded. Therefore, the margin of safety as defined in the Technical Specifications is not reduced.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: White Plains Public Library, 100 Martine Avenue, White Plains, New York 10601

Attorney for licensee: Mr. David Blabey, 10 Columbus Circle, New York, New York 10019

NRC Project Director: S. Singh Bajwa, Director

Rochester Gas and Electric Corporation, Docket No. 50-244, R. E. Ginna Nuclear Power Plant, Wayne County, New York

Date of amendment request: September 29, 1997

Description of amendment request: The proposed amendment would revise the Ginna Station Improved Technical Specifications (ITS) to change the Allowable Value for high steam flow input into limiting condition for operation (LCO) Table 3.3.2-1, Function 4.d.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Operation of Ginna Station in accordance with the proposed changes does not involve a significant increase in the probability or consequences of an accident previously evaluated. An increase in the high steam flow Allowable Value for LCO Table 3.3.2-1, Function 4.d does not increase the probability of any analyzed accident nor does it increase the likelihood of an inadvertent main steam isolation. This function is not explicitly credited in the accident analyses. Also, there are three coincident parameters which must be reached in order for this function to cause a main steam line isolation. It has been demonstrated that the change to the high steam flow parameter does not delay the time at which this isolation signal would be reached for any analyzed accident since the steam flow value is reached much earlier in the accident scenario than the other parameters. Therefore, these changes do not involve a significant increase in the probability or consequences of an accident previously analyzed.

2. Operation of Ginna Station in accordance with the proposed changes does not create the possibility of a new or different kind of accident from any accident previously evaluated. The proposed changes do not involve a physical alteration of the plant (i.e., no new or different type of equipment will be installed) or changes in the methods governing normal plant operation. Thus, this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Operation of Ginna Station in accordance with the proposed changes does not involve a significant reduction in a margin of safety. The proposed changes do not directly affect any analyzed accident analysis. The new isolation times will not be affected for analyzed accidents. As such, no question of safety is involved, and the change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room Location: Rochester Public Library, 115 South Avenue, Rochester, New York 14610

Attorney for licensee: Nicholas S. Reynolds, Winston & Strawn, 1400 L Street, NW., Washington, DC 20005

NRC Project Director: S. Singh Bajwa, Director

Toledo Edison Company, Centerior Service Company, and The Cleveland Electric Illuminating Company, Docket No. 50-346, Davis-Besse Nuclear Power Station, Unit No. 1, Ottawa County, Ohio

Date of amendment request: August 26, 1997

Description of amendment request: The proposed amendment would change Technical Specification (TS) 3/4.6.1.3, ''Containment Systems - Containment Air Locks,'' TS Bases 3/4.6.1.3, ''Containment Systems - Containment Air Locks,'' and TS Bases 3/4.9.4, ''Refueling Operations - Containment Penetrations.'' The containment air lock Limiting Condition for Operation and Surveillance Requirements would be modified, and the associated bases would be changed.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards

consideration, which is presented below:

The Davis-Besse Nuclear Power Station has reviewed the proposed changes and determined that a significant hazards consideration does not exist because operation of the Davis-Besse Nuclear Power Station, Unit No. 1, in accordance with these changes would:

1a. Not involve a significant increase in the probability of an accident previously evaluated because accident initiators, conditions, or assumptions are not affected by the proposed changes, which clarify the Technical Specification (TS) Limiting Condition for Operation (LCO) for the containment air locks, extend the test frequency for the containment air lock interlock mechanisms, and modify guidelines relative to the routing of hoses and cables through the containment air lock during core alterations or during movement of irradiated fuel within the containment.

1b. Not involve a significant increase in the consequences of an accident previously evaluated because the proposed changes do not change the source term, containment isolation, or allowable releases. The proposed changes do not affect the allowable containment leakage rates presently specified in the Technical Specifications.

The proposed change to Surveillance Requirement (SR) 4.6.1.3.c to increase the surveillance interval for the air lock interlock mechanism to ''at least once per REFUELING INTERVAL'' is justified due to the purely mechanical nature of the interlock mechanism, and given that the interlock mechanism is not normally challenged when the air lock door is used for entry and exit since administrative controls require strict adherence to single door opening. Operating experience shows that the interlock mechanisms are very reliable. Further, the proposed change will allow performance of the surveillance under the conditions that apply during a plant outage, which is preferable to performance, in part, with the plant at power, as is currently necessitated by the present six month interval surveillance requirement. Although an interlock mechanism failure would not affect air lock sealing capabilities and would therefore not directly affect containment integrity, performance of the surveillance with the plant at power, when containment integrity is required, carries with it the potential for loss of containment integrity, should the interlock fail during testing and allow both doors to be opened simultaneously. The proposed TS change may result in an increased probability that due to the increased [decreased] test frequency, an inoperable interlock mechanism could go undetected for a longer length of time. However, in the unlikely event that as a containment entry is being made, abnormal radiation levels inside containment occur, any increase in consequences due to a radioactive release as a result of an inadvertent opening of both air lock doors (as could be allowed by a failed interlock mechanism and assuming violation of administrative controls) is counter-balanced by the decreased likelihood of similar events occurring when the interlock mechanism is tested at power under the current, more frequent, test requirement.

The proposed change to TS Bases 3/4.9.4 to add flexibility in routing cable and hoses through the containment personnel air lock will not affect the requirement to maintain at least one containment personnel air lock door capable of being closed. The analysis results for a fuel handling accident inside containment, as presented in Section 15.4.7.3 of the DBNPS Updated Safety Analysis Report (USAR), are well within the 10 CFR 100 guideline values. Since the analysis does not take credit for containment isolation, the status of the personnel air lock has no impact on the acceptability of the results. Under the proposed change, in the event of a fuel handling accident, release of radioactive material will continue to be minimized since at least one personnel air lock door will remain capable of being closed.

2. Not create the possibility of a new or different kind of accident from any accident previously evaluated because no new accident initiators or assumptions are introduced by the proposed changes. The proposed changes do not involve a change to the plant design or operation and, therefore, will not introduce any new or different failure modes or initiators.

3. Not involve a significant reduction in a margin of safety.

The proposed TS change to SR 4.6.1.3.c to increase the surveillance interval for the air lock interlock mechanism will have no adverse effect on plant safety based on its good historical surveillance and maintenance data, and the reduction in testing at power which will occur.

The analysis results for a fuel handling accident inside containment, as presented in the D

Basis for proposed no significant hazards guideline values. Since the analysis does not take credit for containment isolation, the status of the personnel air lock has no impact on the acceptability of the results. Therefore, the proposed change to TS Bases 3/4.9.4 to add flexibility in routing cable and hoses through the containment personnel air lock will not reduce the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: University of Toledo, William Carlson Library, Government Documents Collection, 2801 West Bancroft Avenue, Toledo, OH 43606

Attorney for licensee: Jay E. Silberg, Esquire, Shaw, Pittman, Potts and Trowbridge, 2300 N Street, NW., Washington, DC 20037

NRC Project Director: Gail H. Marcus

Vermont Yankee Nuclear Power Corporation, Docket No. 50-271, Vermont Yankee Nuclear Power Station, Vernon, Vermont

Date of amendment request: October 11, 1996

Description of amendment request: The proposed ammendment would revise the Vermont Yankee Technical Specifications (TSs) regarding the amount of foam concentrate required to support operability of the Recirculation Motor Generator (M. G.) Set Foam System as stated in TS 3.13.G.1 and 3.13.G.2. In both instances, the required amount of foam concentrate would be increased from 100 to 150 gallons.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed amendment will not involve a significant increase in the probability or consequences of an accident previously evaluated:

The changes proposed herein affect only the amount of foam concentrate inventory required to support the operability of the Recirculation M. G. Set Foam System and therefore does not modify or add any initiating parameters that would significantly increase the probability or consequences of any previously analyzed accident.

2. The proposed amendment will not create the possibility of a new or different kind of accident from any previously evaluated:

These changes involve the upgrade of an existing system using standard fire protection components to provide the level of protection originally required. An evaluation has been completed to ensure that the enhanced spray pattern and increased volume of spray does not impact any equipment not previously evaluated and does not create any threat of flooding to equipment. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed amendment will not involve a significant reduction in a margin of safety:

These changes do not affect any equipment involved in potential initiating events or safety limits. Therefore, it is concluded that the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee—s analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Brooks Memorial Library, 224 Main Street, Brattleboro, VT 05301

Attorney for licensee: Mr. David R. Lewis, Shaw, Pittman, Potts & Trowbridge, 2300 N Street, N.W., Washington, DC 20037-1128

NRC Project Director: Ronald B. Eaton, Acting Director

Wolf Creek Nuclear Operating Corporation, Docket No. 50-482, Wolf Creek Generating Station, Coffey County, Kansas

Date of amendment request: September 2, 1997

Description of amendment request: This license amendment request proposes to revise Technical Specification 3.7.1.2, Auxiliary Feedwater System, and associated Bases, to add requirements for the essential service water (ESW) flowpaths to the turbine-driven auxiliary feedwater pump (TDAFWP) and other changes consistent with the technical specification conversion application previously submitted. The proposed revisions would (a) provide an action and allowed outage time (AOT) for inoperability of one of the redundant ESW flowpaths to the TDAFWP, and (b) incorporate an action and AOT for inoperability of one of the redundant steam flowpaths to the TDAFWP turbine and other changes to make the auxiliary feedwater system limiting condition for operation (LCO) and actions consistent with those previously submitted.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

ESW Flow Path Required Actions

This change would provide a 7-day AOT for the ESW supply flow paths to the TDAFWP. This would replace administrative controls that imposed a 72-hour AOT on ESW flow paths to the TDAFWP.

The proposed change does not result in any hardware changes or changes to operating methodologies. This revision does not affect an accident initiator of any analyzed accident since the TDAFWP ESW supply only provides flow to equipment required to mitigate the consequences of an accident. The revision recognizes that the TDAFWP would remain available in most cases for accident mitigation because of the low probability of an accident and subsequent equipment failure requiring the use of the inoperable ESW supply for the TDAFWP. Changing the AOT from 3 days to 7 days would have a negligible effect on this small probability. Loss of the AFW function would also require the failure of the MDAFWPs [motor-driven auxiliary feedwater pumps]. In addition, the CST [condensate storage tank] would be OPERABLE in accordance with LCO 3.7.1.3 and would be available for use by the TDAFWP for all events except those external hazards that represent a hazard to the integrity of the tank itself.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Steam Supply Flow Path Required Actions

This change would provide a 7-day AOT for the steam supply flow paths to the TDAFWP. This would replace an administrative control that required the TDAFWP to be declared inoperable without applying an AOT. The proposed change does not result in any hardware changes or changes to operating methodologies. This revision does not affect an accident initiator of any analyzed accident since the TDAFWP steam supply only provides power to equipment required to mitigate the consequences of an accident. The revision recognizes the low probability of an accident requiring the use of the inoperable steam supply for the TDAFWP coincident with the failure of the MDAFWPs.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

3. Use of ''Trains'' Instead of ''Pumps and Associated Flow Paths'' and Removal of Unnecessary Details

This change is partially administrative and partially a movement of provisions not required to be in the technical specifications to other controlled documents. The administrative change does not impact initiators of analyzed events or equipment assumed in the mitigation of accidents or transient events. The details moved from the technical specification would be located in the Bases of the technical specification. Since any changes to the Bases will be evaluated per the requirements of 10 CFR 50.59, proper controls are in place to adequately limit the probability or consequences of an accident previously evaluated. Therefore, this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

4. Twelve Hours to HOT SHUTDOWN

This change would allow an additional 6 hours to achieve HOT SHUTDOWN for the AFW System. The proposed change does not alter the plant configuration or operation or function of any safety system. Consequently, the change does not increase the probability of an accident as defined in accident analysis. The proposed change permits a longer time to cooldown to RHR [residual heat removal] entry conditions; however, this would not affect the consequences of any postulated accidents and is appropriate due to the need to avoid any transients while cooling down with a potentially degraded AFW System.

Therefore, the proposed change would have no significant effect on the probability or consequences of any previously analyzed accidents.

5. Additional AOT of 10 Days from Discovery of Failure to Meet the LCO

The proposed change imposes more stringent requirements than contained in current technical specification. The more stringent requirements are imposed to ensure that the OPERABILITY requirements for the AFW System are maintained consistent with the safety analysis and licensing basis. Therefore, this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

6. Suspension of LCO 3.0.3

The proposed change involves clarifying the technical specification. The proposed revision involves no technical changes to the current technical specification. As such, this change is administrative in nature and does not impact initiators of analyzed events or assumed mitigation of accidents or transient events. Therefore, this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

1.ESW Flow Path Required Actions

The proposed change to add a 7-day AOT for the ESW supply flow paths does not require physical alteration to any plant system or change the method by which any safety-related system performs its function.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

2. Steam Supply Flow Path Required Actions

The proposed change to add a 7-day AOT for the steam supply flow paths does not require physical alteration to any plant system or change the method by which any safety-related system performs it function.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Use of ''Trains'' Instead of ''Pumps and Associated Flow Paths'' and Moving of Unnecessary Details

The proposed change does not involve a physical alteration of the plant (no new or different type of equipment will be installed) or changes in controlling parameters. The proposed change will not impose any different requirements and adequate control of the information moved to the Bases will be maintained. The proposed change will not impose any different requirements. Thus, this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

4. Twelve Hours to HOT SHUTDOWN

The proposed change does not require physical alteration to any plant system or change the method by which any safety-related system performs its function. As discussed above, the change does allow additional time to complete transfer from the SG [steam generator] as the method for heat removal to the RHR System, but does not alter the basic methodology.

Therefore, the proposed change would not create the possibility of a new or different kind of accident.

5. Additional AOT of 10 Days from Discovery of Failure to Meet the LCO

The proposed change does not involve a physical alteration of the plant (no new or different type of equipment will be installed) or changes in controlling parameters. The proposed change does impose different (more restrictive) requirements. However, these changes remain consistent with assumptions made in the safety analysis regarding system OPERABILITY. Thus, this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

6. Suspension of LCO 3.0.3

The proposed change clarifies an implied requirement from current technical specifications and does not involve a physical alteration of the plant (no new or different type of equipment will be installed) or changes in controlling parameters. The proposed change will not impose any different requirements. Thus, this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

1. ESW Flow Path Required Actions

The proposed change to add a 7-day AOT for the ESW flow paths does not change any accident analysis assumptions, initial conditions or results. Consequently, it does not have an effect on margin of safety.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

2. Steam Supply Flow Path Required Actions

The proposed change to add a 7-day AOT for the steam supply flow paths does not change any accident analysis assumptions, initial conditions or results. Consequently, it does not have an effect on margin of safety.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

3. Use of ''Trains'' Instead of ''Pumps and Associated Flow Paths'' and Removal of Unnecessary Details

The proposed change will not reduce a margin of safety because it has no impact on the design basis or safety analysis. In addition, the requirements to be transposed from the technical specification to the Bases are the same as the current technical specification. Since any future changes to these requirements in the Bases will be evaluated per the requirements of 10 CFR 50.59, proper controls are in place to maintain an appropriate margin of safety. Therefore, the changes do not involve a significant reduction in a margin of safety.

4. Twelve Hours to HOT SHUTDOWN

The proposed change does not alter the basic regulatory requirements or change any accident analysis assumptions, initial conditions or results.

Therefore, the proposed change would have no significant adverse effect on margins of safety.

5. Additional AOT of 10 Days from Discovery of Failure to Meet the LCO

The imposition of more stringent requirements on AOT would increase the margin of plant safety by providing additional requirements to maintain AFW System OPERABILITY.

The change is consistent with the safety analysis and licensing basis. Therefore, this change does not involve a reduction in a margin of safety.

6. Suspension of LCO 3.0.3

The proposed change will not reduce a margin of safety because it has no impact on the design basis or safety analysis. This change is administrative in nature. As such, no question of safety is involved.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room locations: Emporia State University, William Allen White Library, 1200 Commercial Street, Emporia, Kansas 66801 and Washburn University School of Law Library, Topeka, Kansas 66621

Attorney for licensee: Jay Silberg, Esq., Shaw, Pittman, Potts and Trowbridge, 2300 N Street, N.W., Washington, D.C. 20037

NRC Project Director: William H. Bateman

Yankee Atomic Electric Company, Docket No. 50-029, Yankee Nuclear Power Station, Franklin County, Massachusetts

Date of amendment request: September 5, 1997 (Accession No. 9709100106)

Description of amendment request: The proposed technical specification (TS) changes are needed to permit removal of spent nuclear fuel from the Spent Fuel Pit storage racks into a combined storage/shipping cask and to enable handling of the cask components and other hardware by the Yard Area Crane. Specific TS changes are needed for minimum water coverage over spent fuel, shielding for personnel exposure, increased loads carried over the fuel, addition of restrictions for load paths over spent fuel and changes to the appropriate TS bases.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

The changes provide for an alternate method of providing protection of the spent fuel and spent fuel pit (SFP) from heavy loads that must be transported over the SFP. The method chosen, that is, providing a single-failure-proof overhead crane, is considered an acceptable method as stated in Regulatory Guide 1.13, ''Spent Fuel Storage Facility Design Basis,'' and NUREG-0612, ''Control of Heavy Loads at Nuclear Power Plants.'' The Defueled Technical Specification 3.1.2 requirement for five (5) feet of water above the top of the fuel assemblies for fuel traveling in the SFP is provided for personnel protection (ALARA). This protection is provided by the shielding afforded by the shipping and/or transfer cask system. The cask handling crane will comply with the single-failure-proof crane design requirements of NUREG-0554, ''Single Failure-Proof Cranes for Nuclear Power Plants,'' and meet the criteria specified in NUREG-0612. In addition, design controls and administrative controls will be maintained to prevent handling of the shipping and/or transfer cask over spent fuel in the SFP. As such, these changes will not:

1. Involve a significant increase in the probability or consequence of an accident previously evaluated. NUREG-0612, Section 5, provides direction for providing an adequate level of defense-in-depth for handling of heavy loads near spent fuel and safe shutdown systems. The single-failure-proof overhead crane design is presented as an acceptable method of providing the proper margin of safety for handling of heavy loads. By upgrading the cask handling crane to a single-failure-proof design and meeting the requirements presented in Sections 5.1.1 and 5.1.6 of NUREG-0612 (for safe load path, procedures, crane operator training and qualification, special lifting devices, lifting devices that are not specially designed, and crane inspection, testing, and maintenance) a sufficient level of defense-in-depth is provided to ensure that a load drop is not a credible event. As such, there is no increase in the probability or consequence of an accident previously evaluated as a result of the heavy load changes. A fuel handling incident is a currently analyzed event; dropping of a fuel assembly over the spent fuel within the transfer cask is similar to dropping of a fuel assembly over spent fuel in the SFP. The design basis fuel handling event analysis bounds these events, so there is no increase in the probability or consequences of an accident previously evaluated.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated. The defense-in-depth philosophy provided by the single-failure-proof crane load handling sysem design, and compliance with the requirements specified in Sections 5.1.1 and 5.1.6 of NUREG-0612 provide assurance that for a credible single failure of the crane load handling system, the system will still be able to perform its safety function. This provides assurance that a load drop accident is not a credible event. As such, no new or different kind of accident will be created from any accident previously evaluated.

3. Involve a significant reduction in a margin of safety. The proposed changes implement the guidelines of NUREG-0612 and Regulatory Guide 1.13. YAEC is implementing an acceptable alternate method of ensuring the safe handling of heavy loads

over the SFP. This method provides a defense-in-depth approach for handling of heavy loads over the SFP and maintains the margin of safety consistent with that of the current requirements. Further protection is provided by the prohibition of these additional heavy loads from travel over the spent fuel assemblies in the SFP racks. The use of a single-failure-proof crane and associaed lifting devices provide an increased margin of safety that ensure that a load drop event is not credible and is considered an adequate alternate for the additional area added to the safe load path. The use of a limit switch to prevent movement of the prohibited cask handling crane loads from movement beyond the safe load path, provides an additional margin of safety, that was previously provided by the steel framing at the southern edge of the SFP superstructure roof opening. The single-failure-proof crane and defense-in-depth design ensure that a load drop is not a credible event, assuring that the margin of safety is not reduced.

Based on the above considerations, it is concluded that there is reasonable assurance that the operation of Yankee Nuclear Power Station consisent with the proposed changes will not endanger the health and safety of the public.

The proposed change has been reviewed by the Plant Operations Review Committee and the Nuclear Safety Audit and Review Committee.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration. Local Public Document Room location: Greenfield Community College, 1 College Drive, Greenfield, Massachusetts 01301

Attorney for licensee: Thomas Dignan, Esquire, Ropes and Gray, One International Place, Boston, Massachusetts 02110-2624

NRC Project Director: Seymour H. Weiss

Previously Published Notices Of Consideration Of Issuance Of Amendments To Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, And Opportunity For A Hearing

The following notices were previously published as separate individual notices. The notice content was the same as above. They were published as individual notices either because time did not allow the Commission to wait for this biweekly notice or because the action involved exigent circumstances. They are repeated here because the biweekly notice lists all amendments issued or proposed to be issued involving no significant hazards consideration.

For details, see the individual notice in the **Federal Register** on the day and page cited. This notice does not extend the notice period of the original notice.

Florida Power Corporation, et al., Docket No. 50-302, Crystal River Unit No. 3 Nuclear Generating Plant, Citrus County, Florida

Date of application for amendment: September 12, 1997

Brief description of amendment: The proposed amendment involves a revision to the Emergency Diesel Generator protective relaying scheme at CR3, as described in the Final Safety Analysis Report Chapter 8.

Date of publication of individual notice in the **Federal Register:** September 30, 1997 (62 FR 51165).

Expiration date of individual notice: October 30, 1997

Local Public Document Room location: Coastal Region Library, 8619 W. Crystal River, Florida 34428

Notice Of Issuance Of Amendments To Facility Operating Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for A Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document rooms for the particular facilities involved.

Arizona Public Service Company, et al., Docket Nos. STN 50-528, STN 50-529, and STN 50-530, Palo Verde Nuclear Generating Station, Units Nos. 1, 2, and 3, Maricopa County, Arizona

Date of application for amendment: March 24, 1995, as supplemented by letters dated September 10, 1995, and March 22, 1996.

Brief description of amendment: The amendment would change the technical specifications (TS) to (1) reflect the applicable portions of NUREG-1432, ''Standard Technical Specifications Combustion Engineering Plants,'' (2) implement the recommendations of Generic Letter (GL) 93-05, ''Line Item Technical Specification Improvements to Reduce Surveillance Requirements for Testing During Plant Operation,'' and (3) implement the recommendations of GL 94-01, ''Removal of Accelerated Testing and Specific Reporting Requirements for Emergency Diesel Generators.'' The purpose of the proposed amendment is to increase emergency diesel generator (EDG) reliability by reducing stresses on EDG caused by unnecessary testing. The associated Bases are also updated.

Date of issuance: October 6, 1997

Effective date: October 6, 1997, to be implemented within 120 days of date of issuance.

Amendment Nos.: Unit 1 - 114; Unit 2 - 107; Unit 3 - 86

Facility Operating License Nos. NPF-41, NPF-51, and NPF-74: The amendments revised the Technical Specifications.

Date of initial notice in **Federal Register:** June 6, 1995 (60 FR 29870) The September 10, 1995, and March 22, 1996, supplemental letters provided additional clarifying information and did not change the original no significant hazards consideration. The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 6, 1997. No significant hazards consideration comments received: No.

Local Public Document Room location: Phoenix Public Library, 1221 N. Central Avenue, Phoenix, Arizona 85004

Baltimore Gas and Electric Company, Docket Nos. 50-317 and 50-318, Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2, Calvert County, Maryland

Date of application for amendments: March 28, 1996, as supplemented November 20, 1996, and July 31, 1997.

Brief description of amendments: The amendments reduce the moderator temperature coefficient limit shown on Technical Specification Figure 3.1.1-1. This proposed change is necessary to support changes in the safety analyses made to accommodate a larger number of plugged steam generator tubes for future operating cycles.

Date of issuance: October 2, 1997

Effective date: As of the date of issuance to be implemented within 30 days.

Amendment Nos.: 222 and 198

Facility Operating License Nos. DPR-53 and DPR-69: Amendments revised the Technical Specifications.

Date of initial notice in **Federal Registe for amendment: February 21, 1997**

Brief description of amendment: This amendment adds a specific time limit to Technical Specification Table 3.3-3 to place an inoperable refueling water storage tank level channel in a bypassed condition.

Date of issuance: September 30, 1997

Effective date: September 30, 1997

Amendment No.: 74

Facility Operating License No. NPF-63: Amendment revises the Technical Specifications.

Date of initial notice in **Federal Register:** April 9, 1997 (62 FR 17225) The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated September 30, 1997. No significant hazards consideration comments received: No.

Local Public Document Room location: Cameron Village Regional Library, 1930 Clark Avenue, Raleigh, North Carolina 27605

Commonwealth Edison Company, Docket Nos. 50-373 and 50-374, LaSalle County Station, Units 1 and 2, LaSalle County, Illinois

Date of application for amendments: July 1, 1997

Brief description of amendments: The amendments revise Technical Specification Table 3.3.7.1-1, ''Radiation Monitoring Instrumentation,'' to require two channels to be operable per trip system as opposed to two per intake. This change reflects a modification to the design of the instrumentation logic to satisfy single failure requirements. The amendments also revise the associated action statement to clarify system logic wording.

Date of issuance: October 9, 1997

Effective date: Immediately, to be implemented within 60 days.

Amendment Nos.: 121 and 106

Facility Operating License Nos. NPF-11 and NPF-18: The amendments revised the Technical Specifications.

Date of initial notice in **Federal Register:** August 27, 1997 (62 FR 45455). The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated October 9, 1997. No significant hazards consideration comments received: No.

Local Public Document Room location: Jacobs Memorial Library, Illinois Valley Community College, Oglesby, Illinois 61348

Commonwealth Edison Company, Docket Nos. 50-254 and 50-265, Quad Cities Nuclear Power Station, Units 1 and 2, Rock Island County, Illinois

Date of application for amendments: May 1, 1997

Brief description of amendments: The amendments clarify the load value for the emergency diesel generator to be equal to or greater than the largest single load and revise the frequency and voltage requirements during the performance of the test.

Date of issuance: October 7, 1997

Effective date: Immediately, to be implemented within 30 days.

Amendment Nos.: 178 and 176

Facility Operating License Nos. DPR-29 and DPR-30: The amendments revised the Technical Specifications.

Date of initial notice in **Federal Register:** June 18, 1997 (62 FR 33121). The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated October 7, 1997. No significant hazards consideration comments received: No.

Local Public Document Room location: Dixon Public Library, 221 Hennepin Avenue, Dixon, Illinois 61021

Consumers Energy Company, Docket No. 50-255, Palisades Plant, Van Buren County, Michigan

Date of application for amendment: January 10, 1996, as supplemented February 20, 1997

Brief description of amendment: The amendment revises the Technical Specifications for the containment emergency escape air lock test requirements. Concurrently, the Commission has also granted an exemption to certain requirements of 10 CFR Part 50, Appendix J, relating to the testing of the emergency escape air lock, to the extent that leakage rate testing is not necessary after opening the emergency escape air lock doors for post-test restoration or seal adjustment.

Date of issuance: September 30, 1997

Effective date: September 30, 1997

Amendment No.: 177

Facility Operating License No. DPR-20: Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** February 26, 1997 (62 FR 8795) The February 20, 1997, letter provided clarifying information within the scope of the original application and did not change the NRC staff's initial proposed no significant hazards considerations determination. The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated September 30, 1997. No significant hazards consideration comments received: No.

Local Public Document Room location: Van Wylen Library, Hope College, Holland, Michigan 49423 Consumers Energy Company, Docket No. 50-255, Palisades Plant, Van Buren County, Michigan

Date of application for amendment: December 6, 1995, as supplemented October 18 1996, January 10 and June 27, 1997

Brief description of amendment: The amendment deletes crane operation and movement of heavy loads requirements and their bases from the technical specifications. The requirements have been incorporated into the Palisades Operating Requirements Manual (ORM). The ORM has been incorporated by reference into the Palisades Final Safety Analysis Report, assuring that future changes to the crane and heavy loads requirements will be subject to the provisions of 10 CFR 50.59.

Date of issuance: October 2, 1997

Effective date: October 2, 1997

Amendment No.: 178

Facility Operating License No. DPR-20: Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** July 17, 1996 (61 FR 37298) The October 18, 1996, January 10 and June 27, 1997, letters provided clarifying information within the scope of the original application and did not change the staff's initial proposed no significant hazards consideration determination. The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 2, 1997. No significant hazards consideration comments received: No.

Local Public Document Room location: Van Wylen Library, Hope College, Holland, Michigan 49423

Detroit Edison Company, Docket No. 50-341, Fermi 2, Monroe County, Michigan

Date of amendment request: September 5, 1997 (NRC-97-0107)

Description of amendment request: The amendment revises the Technical Specifications by adding a special test exception to allow reactor coolant temperatures up to 212 degrees Fahrenheit during hydrostatic or inservice leak testing while in Operational Condition 4 without entering Operational Condition 3. The amendment also makes related changes to the Index, Table 1.2, ''Operational Conditions,'' and the Bases to incorporate the reference to the proposed special test exception. Date of issuance: September 30, 1997

Effective date: September 30, 1997, with full implementation within 45 days

Amendment No.: 114

Facility Operating License No. NPF-43: Amendment revises the Technical Specifications and Bases.

Date of initial notice in **Federal Register:** September 30, 1997 (62 FR The Commission's related evaluation of the amendment, finding of exigent circumstances, consultation with the State of Michigan, and final determination of no significant hazards considerations are contained in a Safety Evaluation dated September 30, 1997 No significant hazards consideration comments received: No.

Local Public Document Room location: Monroe County Library System, 3700 South Custer Road, Monroe, Michigan 48161

Duke Energy Corporation, et al., Docket No. 50-413, Catawba Nuclear Station, Unit 1, York County, South Carolina

Date of application for amendment: May 8, 1997, as supplemented by letter dated September 10, 1997

Brief description of amendment: The amendment revises Section 3/4.1.2 of the Technical Specifications to permit a one-time natural circulation test during Mode 3.

Date of issuance: October 9, 1997

Effective date: As of the date of issuance to be implemented within 30 days

Amendment No.: 162

Facility Operating License No. NPF-35: Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** June 4, 1997 (62 FR 30631) The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 9, 1997. No significant hazards consideration comments received: NoLocal Public Document Room location: York County Library, 138 East Black Street, Rock Hill, South Carolina 29730

Entergy Gulf States, Inc., Cajun Electric Power Cooperative, and Entergy Operations, Inc., Docket No. 50-458, River Bend Station, Unit 1, West Feliciana Parish, Louisiana

Date of amendment request: August 5, 1997, as supplemented August 15, 1997

Brief description of amendment: The amendment revises the Technical Specifications to increase the two recirculation loop Minimum Critical Power Ratio (MCPR) safety limit to 1.13 and the single recirculation loop MCPR safety limit to 1.14.

Date of issuance: October 8, 1997

Effective date: October 8, 1997

Amendment No.: 99

Facility Operating License No. NPF-47: The amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** August 27, 1997 (62 FR 45456) The August 15, 1997, submittal provided clarifying information that did not change the initial no significant hazards consideration determination. The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 8, 1997. No significant hazards consideration comments received: No.

Local Public Document Room location: Government Documents Department, Louisiana State University, Baton Rouge, LA 70803

Florida Power and Light Company, et al., Docket No. 50-389, St. Lucie Plant, Unit No. 2, St. Lucie County, Florida

Date of application for amendment: August 1, 1997

Brief description of amendment: Revises the Technical Specifications (TS) to extend the surveillance interval for the Engineered Safety Features Actuation System to a refueling interval on a staggered test basis.

Date of Issuance: October 2, 1997

Effective Date: October 2, 1997

Amendment No.: 90

Facility Operating License No. NPF-16: Amendment revised the TS.

Date of initial notice in **Federal Register:** August 27, 1997 (62 FR 45457) The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 2, 1997. No significant hazards consideration comments received: No.

Local Public Document Room location: Indian River Community College Library, 3209 Virginia Avenue, Fort Pierce, Florida 34981-5596

GPU Nuclear Corporation, et al., Docket No. 50-289, Three Mile Island Nuclear Station, Unit No. 1 (TMI-1), Dauphin County, Pennsylvania

Date of application for amendment: August 14, 1997, as supplemented September 9, 19, and 24, 1997

Brief description of amendment: The amendment revises the TMI-1 Technical Specifications which decreases the maximum allowable dose equivalent iodine-131 limit in the reactor primary coolant from 1.0 uCi/gm to 0.35 uCi/gm.

Date of Issuance: October 2, 1997

Effective Date: As of the date of issuance to be implemented within 30 days.

Amendment No.: 204

Facility Operating License No. NPF-50: Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** August 27, 1997 (62 FR 45459) The supplemental letters did not affect the initial no significant hazards consideration determination. The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 2, 1997. No significant hazards consideration comments received: No.

Local Public Document Room location: Law/Government Publications Section, State Library of Pennsylvania, (REGIONAL DEPOSITORY) Walnut Street and Commonwealth Avenue, Box 1601, Harrisburg, PA 17105

Northeast Nuclear Energy Company, et al., Docket No. 50-336, Millstone Nuclear Power Station, Unit No. 2, New London County, Connecticut

Date of application for amendment: April 10, 1997

Brief description of amendment: The amendment changes the Technical Specifications (TSs) by relocating the TS surveillance requirement for attaining a negative pressure in the enclosure building, addressing operability, deleting the definition for enclosure building integrity, modifying enclosure building access opening requirements, and making editorial changes for clarification and consistency. The TS Bases are also updated to reflect the proposed changes including the need to maintain the integrity of the enclosure building and to support previously approved laboratory testing requirements for charcoal filter sample testing.

Date of issuance: September 30, 1997

Effective date: As of the date of issuance to be implemented within 30 days.

Amendment No.: 208

Facility Operating License No. DPR-65: Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** May 7, 1997 (62 FR 24987) The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated September 30, 1997. No significant hazards consideration comments received: No

Local Public Document Room location: Learning Resources Center, Three Rivers Community-Technical College, 574 New London Turnpike, Norwich, CT 06360, and the Waterford Library, ATTN: Vince Juliano, 49 Rope Ferry Road, Waterford, CT 06385

Northeast Nuclear Energy Company, et al., Docket No. 50-423, Millstone Nuclear Power Station, Unit No. 3, New London County, Connecticut

Date of application for amendment: July 18, 1997

Brief description of amendment: The amendment adds a new Technical Specification and associated Bases to address the operability of the steam generator atmospheric relief bypass valves.

Date of issuance: October 2, 1997

Effective date: As of the date of issuance, to be implemented within 60 days.

Amendment No.: 151

Facility Operating License No. NPF-49: Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** August 13, 1997 (62 FR 43370) The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 2, 1997. No significant hazards consideration comments received: No.

Local Public Document Room location: Learning Resources Center, Three Rivers Community-Technical College, 574 New London Turnpike, Norwich, Connecticut 06360, and the Waterford Library, ATTN: Vince Juliano, 49 Rope Ferry Road, Waterford, Connecticut 06385

PECO Energy Company, Public Service Electric and Gas Company, Delmarva Power and Light Company, and Atlantic City Electric Company, Docket No. 50-278, Peach Bottom Atomic Power Station, Unit No. 3, York County, Pennsylvania

Date of application for amendment: January 17, 1995, as supplemented by letters dated March 30, 1995, July 2, 1996, February 28, 1997, and September 22, 1997

Brief description of amendment: The amendment revised the technical specifications to support the replacement of the Source Range and Intermediate Range Monitors with the Wide Range Neutron Monitoring System.

Date of issuance: September 30, 1997

Effective date: As of its date of issuance and is to be implemented upon completion of Unit 3 Modification P00271.

Amendment No.: 224

Facility Operating License No. DPR-56: Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** June 6, 1995 (62 FR 29885) The March 30, 1995, July 2, 1996, February 28, 1997, and September 22, 1997, supplemental letters did not change the initial proposed no significant hazards consideration determination. The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated September 30, 1997. No significant hazards consideration comments received: No.

Local Public Document Room location: Government Publications Section, State Library of Pennsylvania, (REGIONAL DEPOSITORY) Education Building, Walnut Street and Commonwealth Avenue, Box 1601, Harrisburg, PA 17105

Power Authority of the State of New York, Docket No. 50-333, James A. FitzPatrick Nuclear Power Plant, Oswego County, New York

Date of application for amendment: April 14, 1997

Brief description of amendment: The amendment revises Appendix A, Section 6 of the James A. FitzPatrick Technical Specifications. These changes will enable the Safety Review Committee to review rather than audit plant staff performance by deleting the plant staff performance audit requirements from Section 6.5.2.9.b and incorporating a plant staff performance review requirement in Section 6.5.2.8. Additionally, this amendment application replaces the position title of Vice President Regulatory Affairs and Special Projects with Director Regulatory Affairs and Special Projects.

Date of issuance: October 3, 1997

Effective date: As of the date of issuance to be implemented within 30 days.

Amendment No.: 240

Facility Operating License No. DPR-59: Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** August 13, 1997 (62 FR 43374) The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 3, 1997. No significant hazards consideration comments received: No.

Local Public Document Room location: Reference and Documents Department, Penfield Library, State University of New York, Oswego, New York 13126

Public Service Electric & Gas Company, Docket No. 50-354, Hope Creek Generating Station, Salem County, New Jersey

Date of application for amendment: June 19, 1997, as supplemented by letters dated July 30 and 31, 1997

Brief description of amendment: This amendment changes TS 4.1.3.1.2, ''Control Rod Operability;'' TS 3.1.3.6, ''Control Rod Drive Coupling;'' TS 3.1.3.7, ''Control Rod Position Indication;'' TS 3.1.4.1, ''Rod Worth Minimizer;'' TS 3/4.1.4.2, ''Rod Sequence Control System;'' TS 3/4.10.2, ''Special Test Exceptions - Rod Sequence Control System;'' the Bases for TS 2.2.1.2, ''Average Power Range Monitor;'' the Bases for TS 3/4.1.4, ''Control Rod Program Controls;'' and the Bases for TS 3/4.10.2, ''Rod Sequence Control System.'' The changes eliminate the Rod Sequence Control System (RSCS) Limiting Condition for Operation and Surveillance Requirements from the TSs and reduce the Rod Worth Minimizer low power setpoint to 10% from 20%. Changes to other sections of the TSs delete reference to the RSCS from the TSs and incorporate additional requirements necessary to support the elimination of the RSCS.

Date of issuance: September 30, 1997

Effective date: As of date of issuance, to be implemented within 60 days.

Amendment No.: 105

Facility Operating License No. NPF-57: This amendment revised the Technical Specifications and the License.

Date of initial notice in **Federal Register:** August 27, 1997 (62 FR 45462) The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated September 30, 1997. No significant hazards consideration comments received: No.

Local Public Document Room location: Pennsville Public Library, 190 S. Broadway, Pennsville, NJ 08070

Southern Nuclear Operating Company, Inc., Docket Nos. 50-348 and 50-364, Joseph M. Farley Nuclear Plant, Units 1 and 2, Houston County, Alabama

Date of amendments request: May 28, 1997

Brief description of amendments: The amendments revise the Technical Specifications to clarify that testing of

each shared emergency diesel generator (EDG), 1-2A and 1C, to comply with surveillance requirement 4.8.1.1.2.e is only required once per 5 years on a per EDG basis, not on a per unit basis.

Date of issuance: October 1, 1997

Effective date: As of the date of issuance to be implemented within 30 days

Amendment Nos.: 129, 122

Facility Operating License Nos. NPF-2 and NPF-8: Amendments revise the Technical Specifications.

Date of initial notice in **Federal Register:** June 18, 1997 (62 FR 33135) The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated October 1, 1997. No significant hazards consideration comments received: No.Local Public Document Room location: Houston-Love Memorial Library, 212 W. Burdeshaw Street, Post Office Box 1369, Dothan, Alabama 36302

Southern Nuclear Operating Company, Inc., Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia, Docket No. 50-321, Edwin I. Hatch Nuclear Plant, Unit 1, Appling County, Georgia

Date of application for amendment: May 9, 1997, as supplemented September 19, 1997

Brief description of amendment: The amendment revises the minimum critical power ratio safety limits for a mixed core of GE9B/GE12/GE13 fuel for Cycle 18 operation.

Date of issuance: October 8, 1997

Effective date: Prior to the restart from the Hatch Unit 1 outage currently scheduled to begin October 1997.

Amendment No.: 209

Facility Operating License No. DPR-57: Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** July 30, 1997 (62 FR 40857) The September 19, 1997, submittal provided clarifying information that did not change the initial proposed no significant hazards consideration determination. The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 8, 1997. No significant hazards consideration comments received: No.Local Public Document Room location: Appling County Public Library, 301 City Hall Drive, Baxley, Georgia 31513

Southern Nuclear Operating Company, Inc., Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia, Docket Nos. 50-321 and 50-366, Edwin I. Hatch Nuclear Plant, Units 1 and 2, Appling County, Georgia

Date of application for amendments: May 9, 1997, as supplemented September 3, 1997

Brief description of amendments: The amendments revise the applicability requirements for the Rod Block Monitor (RBM) to require that the RBM be operable whenever reactor thermal power is greater than or equal to 29 percent of rated thermal power.

Date of issuance: October 8, 1997

Effective date: As of the date of issuance to be implemented prior to Unit 1 startup from the fall 1997 refueling outage for Unit 1; and implemented within 30 days from issuance for Unit 2.

Amendment Nos.: 210, 151

Facility Operating License Nos. DPR-57 and NPF-5: Amendments revised the Technical Specifications.

Date of initial notice in **Federal Register:** July 30, 1997 (62 FR 40857) The September 3, 1997, submittal provided clarifying information that did not change the initial proposed no significant hazards consideration determination. The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated October 8, 1997. No significant hazards consideration comments received: No.

Local Public Document Room location: Appling County Public Library, 301 City Hall Drive, Baxley, Georgia 31513

Tennessee Valley Authority, Docket Nos. 50-327 and 50-328, Sequoyah Nuclear Plant, Units 1 and 2, Hamilton County, Tennessee

Date of application for amendments: August 21, 1996, as supplemented by letters dated March 17, March 27, April 3, and July 15, 1997 (TS 96-07)

Brief description of amendments: The amendments change the Technical Specifications (TS) by revising the as-found setpoint tolerance band for the pressurizer Code safety relief valves and the main steam Code safety relief valves from plus or minus one percent to plus or minus three percent.

Date of issuance: September 29, 1997

Effective date: September 29, 1997

Amendment Nos.: 229 (Unit 1), 220 (Unit 2)

Facility Operating License Nos. DPR-77 and DPR-79: Amendments revise TS.

Date of initial notice in **Federal Register:** October 9, 1996 (61 FR 52969) The March 17, March 27, April 3, and July 15, 1997, letters provided clarifying information that did not change the initial no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated September 29, 1997. No significant hazards consideration comments received: No.

Local Public Document Room location: Chattanooga-Hamilton County Library 1001 Broad Street, Chattanooga, Tennessee 37402

Wisconsin Electric Power Company, Docket Nos. 50-266 and 50-301, Point Beach Nuclear Plant, Unit Nos. 1 and 2, Town of Two Creeks, Manitowoc County, Wisconsin

Date of application for amendments: August 14, 1997 (TSCR 199)

Brief description of amendments: The amendments revise TS 15.4.2.B. ''In-Service Inspection and Testing of Safety Class Components Other than Steam Generator Tubes,'' to modify item 2 by deleting the reference to TS 15.4.4 and referencing the Containment Leakage Rate Testing Program; TS 15.6.12.A.1, ''Containment Leakage Rate Testing Program,'' to eliminate the one-time requirement for Unit 2 Type A testing since the testing has been completed; and TS Bases 15.4.4 to delete the specific bases for containment purge valve testing and to delete a reference that is no longer used. Date of issuance: September 29, 1997Effective date: September 29, 1997, with full implementation within 45 days

Amendment Nos.: 181 and 185

Facility Operating License Nos. DPR-24 and DPR-27: Amendments revised the Technical Specifications.

Date of initial notice in **Federal Register:** August 27, 1997 (62 FR 45466) The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated September 29, 1997. No significant hazards consideration comments received: No.

Local Public Document Room location: The Lester Public Library, 1001 Adams Street, Two Rivers, Wisconsin 54241

Wolf Creek Nuclear Operating Corporation, Docket No. 50-482, Wolf Creek Generating Station, Coffey County, Kansas

Date of amendment request: July 29, 1997

Brief description of amendment: The amendment changes the wording of Action Statement 5a to Technical Specification Table 3.3-1, ''Reactor Trip System Instrumentation.'' This action statement prescribes a set of actions to

be accomplished when a source range neutron detector is inoperable with the plant shutdown. The proposed wording change will clarify the times and order in which these actions are to be performed.

Date of issuance: September 29, 1997

Effective date: September 29, 1997, to be implemented within 30 days from the date of issuance.

Amendment No.: 111

Facility Operating License No. NPF-42: The amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** August 27, 1997 (62 FR 45467) The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated September 29, 1997. No significant hazards consideration comments received: No.

Local Public Document Room locations: Emporia State University, William Allen White Library, 1200 Commercial Street, Emporia, Kansas 66801 and Washburn University School of Law Library, Topeka, Kansas 66621

Wolf Creek Nuclear Operating Corporation, Docket No. 50-482, Wolf Creek Generating Station, Coffey County, Kansas

Date of amendment request: September 6, 1997

Brief description of amendment: This amendment allows the testing of certain contacts in the emergency diesel generator load sequencer to be done with the unit at power (Mode 1) and provides an additional 24 hours to the time allowed by TS 4.0.3 to complete the testing.

Date of issuance: October 7, 1997

Effective date: October 7, 1997

Amendment No.: 112

Facility Operating License No. NPF-42. The amendment revised the Technical Specifications. Public comments requested as to proposed no significant hazards consideration: Yes (62 FR 49261 dated September 19, 1997). The notice provided an opportunity to submit comments on the Commission's proposed no significant hazards consideration determination. No comments have been received. The notice also provided for an opportunity to request a hearing by October 20, 1997, but indicated that if the Commission makes a final no significant hazards consideration determination any such hearing would take place after issuance of the amendment. The Commission's related evaluation of the amendment, finding of exigent circumstances, and final determination of no significant hazards consideration are contained in a Safety Evaluation dated October 7, 1997.

Attorney for licensee: Jay Silberg, Esq., Shaw, Pittman, Potts and Trowbridge, 2300 N Street, N.W., Washington, D.C. 20037

Local Public Document Room locations: Emporia State University, William Allen White Library, 1200 Commercial Street, Emporia, Kansas 66801 and Washburn University School of Law Library, Topeka, Kansas 66621

Dated at Rockville, Maryland, this 15th day of October 1997.

For the Nuclear Regulatory Commission

Elinor G. Adensam,

Acting DirectorDivision of Reactor Projects - III/IV, Office of Nuclear Reactor Regulation

[Doc. 97-27877 Filed 10–21–97; 8:45 am]

BILLING CODE 7590-01-F

NUCLEAR REGULATORY COMMISSION

[NUREG–1569]

Draft Standard Review Plan For In Situ Uranium Extraction License Applications

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of availability; opportunity for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is soliciting comments on a Draft Standard Review Plan for *in Situ* Uranium Extraction License Applications (NUREG–1569) from interested parties. A NRC source and byproduct material license is required under the provisions of Title 10 of the Code of Federal Regulations, Part 40 (10 CFR Part 40), Domestic Licensing of Source Material, to recover uranium by *in situ* leach uranium extraction mining techniques (*in situ* leaching). An applicant for a new operating license, or for the renewal or amendment of an existing license, is required to provide detailed information on the facilities, equipment, and procedures to be used, and if appropriate, an environmental report that discusses the effect of proposed operations on public health and safety and on the environment. This information is used by Nuclear Regulatory Commission staff to determine whether the proposed activities will be protective of public health and safety and be environmentally acceptable. The purpose of this standard review plan is to provide NRC staff with specific guidance on the review of this information and will be used to ensure a consistent quality and uniformity of staff reviews. Each section in the review plan provides guidance on what is to be reviewed, the basis for the review, how the staff review is to be accomplished, what the staff will find acceptable in a demonstration of compliance with the regulations, and the conclusions that are sought regarding the applicable sections in 10 CFR. The review plan is also intended to improve the understanding of the staff review process by interested members of the public and the uranium recovery industry. The draft was developed using input from (1) staff review precedents; (2) staff inspection experiences; (3) public meetings with industry; and (4) experience from the State of Texas, which is an agreement state for uranium recovery and has 15 licensed *in situ* leach operations.

Opportunity to Comment: Interested parties are invited to comment on the review plan. Interested parties are also asked to comment on the level and extent that staff could rely on technical reviews performed by non-agreement states in areas where the NRC and the State have concurrent regulatory authority. These areas include land application, nonradiological soil cleanup, upper control limit, and groundwater restoration reviews. A final review plan will be prepared after the NRC staff has evaluated public comments received on the draft review plan.

DATES: Written comments must be received prior to December 8, 1997.

ADDRESSES: Comments on the draft review plan should be sent to the Chief, Rules and Directives, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

AVAILABILITY: A copy of the Draft Standard Review Plan (NUREG–1569) may be obtained by writing to the Printing and Graphics Branch, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555–0001.

Dated at Rockville, Maryland, this 14th day of October 1997.

For the Nuclear Regulatory Commission.

Joseph J. Holonich,

Chief, Uranium Recovery Projects Branch, Division of Waste Management, Office of Nuclear Material, Safety and Safeguards.

[FR Doc. 97–28002 Filed 10–21–97; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Applications, Hearings, Determinations, Etc. Tivoli Industries, Inc.

October 16, 1997.

Issuer Delisting; Notice of Application to Withdraw from Listing and

Registration; (Tivoli Industries, Inc., Common Stock, $.001 Par Value; Redeemable Class A Warrants to Purchase $.001 Par Value Common Stock, expiring Sept. 21, 1997; Redeemable Class B Warrants to Purchase $.001 Par Value Common Stock, expiring Sept. 21, 1997) File No. 1–13338.

Tivoli Industries, Inc. (''Company'') has filed an application with the Securities and Exchange Commission (''Commission''), pursuant to Section 12(d) of the Securities Exchange Act of 1934 (''Act'') and Rule 12d2–2(d) promulgated thereunder, to withdraw the above specified securities (''Securities'') from listing and registration on the Boston Stock Exchange, Inc. (''BSE'' or ''Exchange'').

The reasons cited in the application for withdrawing the Securities from listing and registration include the following:

The Company's Securities have been listed for trading on both the BSE and Nasdaq Small Cap Stock Market since September 21, 1994.

The Company has complied with the rules of BSE by setting forth in detail to such Exchange the reasons for such proposed withdrawal, and the facts in support thereof. In making the decision to withdraw its Securities from listing on the BSE, the Company considered the direct and indirect costs and expenses attendant on maintaining the dual listing of its Securities on the NASDAQ SmallCap Stock Market and the BSE. The Company does not see any particular advantage in the dual trading of its Securities and believes that dual listing would fragment the market for its securities.

By letter dated September 23, 1997, the BSE has informed the Company that it has no objection to the withdrawal of the Company's Securities from listing on the BSE.

Any interested person may, on or before November 6, 1997, submit by letter to the Secretary of the Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549, facts bearing upon whether the application has been made in accordance with the rules of the exchange and what terms, if any, should be imposed by the Commission for the protection of investors. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 97–27901 Filed 10–21–97; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 39235; File No. SR–CTA/CQ–97–2]

Consolidated Tape Association; Notice of Filing and Immediate Effectiveness of Second Charges Amendment to the Second Restatement of the Consolidated Tape Association Plan and First Charges Amendment to the Restated Consolidated Quotation Plan

October 14, 1997.

Pursuant to Rule 11Aa3–2 of the Securities Exchange Act of 1934 (''Act'')[1], notice is hereby given that on September 26, 1997, the Consolidated Tape Association (''CTA'') and the Consolidated Quotation (''CQ'') Plan Participants (''Participants'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') amendments to the Restated CTA Plan and CQ Plan. The amendments (a) establish a new Network A fee (*i.e.*, one cent per ''quote packet'') for interrogation services that vendors offer on a pay-for-use basis, (b) eliminate the Network A Class F and Class H program classification charges, (c) reclassify the Network A Class G program classification charge and (d) raise the monthly Network A fee applicable to nonprofessional subscribers from $4.25 to $5.25. In addition, the amendment to the CTA Plan raises the monthly connection fee for delivery of the ticker signal by means of AT&T from $200 to $250.

Pursuant to Rule 11Aa3–2(c)(3)(i), the CTA and CQ Participants have designated the amendments as establishing or changing fees and other charges collected on behalf of all of the sponsors and participants, which renders the amendments effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments from interested persons on the amendments.

I. Description and Purpose of the Amendments

A. Rule 11Aa3–2

The purpose of the amendments is to allow the Participants under the Plans that make Network A last sale information and quotation information available (''the Network A Participants'') to establish a new and additional pricing alternative for vendors of, and subscribers to, certain Network A market data interrogation services. That pricing alternative has proved popular and successful in the context of a pilot program. In addition, the amendments eliminate two categories of program classification fees, reclassify a third category of program classification fee and increase the monthly nonprofessional subscriber fee by $1. The amendment to the CTA Plan also increases the monthly connection fee that applies for delivery of the ticker signal by AT&T by $50.

1. Usage-Based Charge

a. *One Cent Per Quote.* The Network A Participants propose to establish a fee of one cent for each real-time ''quote packet'' that vendors disseminate to subscribers on a pay-for-use basis during the hours that the Network A Participants are open for trading (a ''per-quote charge''). For the purposes of this charge, a ''quote packet'' refers to a group of one or more data elements relating to the same issue. Last sale price, bid, offer, transaction size, quotation size, opening price, high price, low price, trading volume and net change in price are all examples of data elements that might be part of the same ''quote packet,'' either individually or in combination. An index value qualifies as a ''quote packet'' in and of itself.

In order to take advantage of the per-quote charge, a vendor must document in its Exhibit A that it has the ability to measure accurately the number of quote packets and must have the ability to report aggregate quote packet quantities to the Network A Participants on a monthly basis.

The Network A Participants will impose the per-quote charge only on the dissemination of the real-time market data. Vendors may provide delayed data services in the same manner as they do today.

The per-quote charge is payable on a monthly basis and is payable by the vendor providing the service, rather than the vendor's subscribers. It represents a new and additional alternative to existing rates. That is, vendors may elect to continue to offer monthly display device services subject to the current rates for per-device services (rather than the newly established per-quote charge) and also may elect, either in addition or as a substitute, to disseminate data pursuant to the per-quote charge.

[1] 15 U.S.C. § 78s(b)(1).

The Network A Participants anticipate that the nonprofessional subscriber community will be more likely to embrace the per-quote charge than the professional subscriber community. In fact, making market data more readily available to individual investors is one of the primary motivations for establishing the per-quote charge. However, the Network A Participants will not require vendors charging on a per-quote basis to differentiate between professional and nonprofessional subscribers.

Contractually, the Network A Participants intend to require vendors (A) to incorporate into their agreements with subscribers the form of addendum to vendor-subscriber agreements that the Participants have adopted or (B) to incorporate substantively similar provisions to those found in that addendum into the vendors' agreements with subscribers, rather than to have each subscriber sign the consolidated Network A subscriber agreement. (The Network A Participants will review and pass upon the adequacy of those ''incorporating agreements.'')

b. *The Pilot Programs.* Since 1991, the Network A Participants have conducted a pilot program pursuant to which they have allowed vendors of PC dial-up and paging services to pay for those services based on the quantity of quote packets disseminated. The pilot fee was one-half cent per quote packet and was assessed for quote packets disseminated during the period from market open to market open. Thirteen vendors participated in the pilot program. The terms of the program prohibited those vendors from providing delayed data services during the hours that the Participants were open for trading.

CTA's experience with the pilot demonstrated two things. First, it demonstrated that demand for usage-based pricing is considerable. (As noted above, the per-quote pilot program has grown to include thirteen vendor organizations. The aggregate number of quote packets disseminated has increased substantially each year.) The Participants welcome that demand because it suggests that usage-based services will promote an important goal of the Participants and of the national market system that Congress established when it passed the 1975 Amendments to the Act: the widespread dissemination of real-time market data.

Second, it made clear that vendors prefer to have the flexibility of providing delayed data services pursuant to the delayed data fee schedule at the same time as they are providing real-time usage-based services. (Approximately six vendors that elected not to participate in the pilot program have indicated that they have an interest in providing services pursuant to per-quote charges once the Network A Participants allow them to continue to provide their delayed data services.) Initially, it was hoped that the inexpensive rate for the receipt of real-time data pursuant to the pilot program would cause vendors to feel comfortable in substituting one-half cent per quote real-time services for delayed services, thereby allowing us to promote the use of real-time data instead of delayed data. However, the vendors expressed a different view. The inability to provide delayed data services alongside a usage-based service under the pilot program discouraged many potential pilot program participants, including all of the major traditional market data vendors, from taking part in the pilot program.

To accommodate the preference for providing real-time usage-based services and delayed data services at the same time, the Network A Participants propose to set the per-quote charge at one cent per quote packet (as opposed to one-half cent per-quote packet which has applied during the pilot program), to impose the per-quote charge only on real-time market data and to allow vendors to provide delayed data services in the same way as they do today.

Given the success of the pilot programs and the market demand for per-quote charges, the Network A Participants are hereby looking to accommodate the vendor community by making it possible for all vendors to meter market data on a per-quote basis. The Network A Participants note that the Commission has approved an identical one-cent-per-quote usage-based fee for the Nasdaq Stock Market, Inc.

2. Program Classification Charges

The amendments eliminate the Class F and Class H program classification charges and reclassify Class G as a component of display device charges.

a. *Class F.* The Class F charges of $250 per month for last sale price information and $250 per month for quotation information permit vendors of delayed market data services to provide a real-time price in order to allow their subscribers to verify the market price of a security before entering an automated order for that security through a personal computer. The introduction of usage-based services eliminates the need for that charge. At one cent per quote, a vendor's customers could check the market prior to entering orders 50,000 times per month before the vendor would reach the fee equivalent of the Class F charges.

b. *Class G.* Program classification G imposes display device fees on automated telephone voice response services, based upon the concept of device equivalents. That is, the charge is set at the device fee that would apply for a number of devices equal to the maximum number of inquiries to which the vendor's automated voice response service can respond simultaneously. The Network A Participants propose to recharacterize the Class G charge as a device fee, rather than a separate program classification charge. They will simply apply device fees to automated telephone voice response services based on device equivalents, just as today. The amount of the charge remains unchanged.

c. *Class H.* The Class H charge applies to automated printer report services. Historically, only one vendor has ever provided such a service and it ceased providing that service some years ago. The absence of demand for this type of service eliminates the need for the Class H computer program classification charge.

3. Nonprofessional Subscriber Charge

The Network A Participants established a separate category of fees (one fee for Network A last sale prices and a separate fee for Network A quotes) for nonprofessional subscribers in 1983. In October 1986, the Network A Participants consolidated fees for Network A last sale prices and quotes and reduced nonprofessional subscriber Network A fees from $7.50 per month for Network A last sale prices and $6.00 per month for Network A quotes to a consolidated rate of $4.00 per month for both Network A prices and quotes. In 1991, the Network A Participants increased the consolidated nonprofessional subscriber rate to $4.25 per month. Those rates have not increased since. The Network A Participants believe that the introduction of a per-quote charge to facilitate the provision of usage-based services presents a meaningful alternative pricing mechanism for nonprofessional subscribers and believes that the $1.00 increase is justified. Therefore, the Network A Participants propose to increase the consolidated Network A nonprofessional monthly rate from $4.25 to $5.25 per month.

4. Ticker Charge

Under the CTA Plan, the Network A Participants impose a charge that is designed to recover the ticker network expense that common carrier AT&T

imposes on the Network A Participants for the delivery of the ticker signal to ticker customers in the United States. The proposed increase is designed to offset increases in those expenses that AT&T has recently imposed on the Network A Participants.

The present per connection charge for AT&T's delivery of the ticker signal was set at $200 on July 1, 1996. Since then, Network A has absorbed increases in AT&T common carrier costs and the Network A Participants have determined to pass those increased costs along to customers. The increase applies only to leased line service in the continental United States (except downtown New York City). Rates for customers receiving service in New York City south of Chambers Street or by means of satellite remain unchanged, as common carrier rates for those services are not affected by the recent rate increases.

The number of Network A ticker connections has declined from a peak of 6,200 in 1982 to a current level of 1,076. Further declines are predicted and the long-term viability of this service is questionable. The Network A Participants have determined to continue to offer the low speed ticker service, but not to subsidize the product, and to periodically review market demand for the service.

* * * * *

This amendment furthers the national market system objectives regarding the dissemination of last sale information delineated in Sections 11A(a)(1)(C), 11A(a)(1)(D) and 11A(a)(3)(B) of the Act.

B. Governing or Constituent Documents

Not applicable.

C. Implementation of Amendment

The Network A Participants approved the per-quote service at their August 6, 1997 meeting and shortly thereafter, began the process of notifying those vendors that participate in the one-half-cent-per-quote pilot program that: (a) The Network A Participants have determined to terminate the one-half-cent-per-quote pilot program, and (b) those vendors may convert to the one-cent-per-quote model upon the satisfactory completion of the necessary contract work. That will allow the pilot program participants to continue to provide their services pursuant to usage-based fees in an uninterrupted manner or to elect to terminate the provision of services pursuant to usage-based fees. In addition, upon filing the amendments with the Commission, the Network A Participants will again notify those vendors, this time to require the pilot program participants to either convert to the cent-per-quote service within 30 days from the date of the filing or terminate the distribution of market data on a per-quote basis.

The Network A Participants have also begun the process of notifying those vendors that do not participate in the pilot program but that have expressed an interest in the proposed per-quote service that they may commence to provide the proposed service upon the completion of an appropriate contract. Hereafter, the Network A Participants will assist any additional vendors that express interest in the per-quote service. For the purpose of educating the investment community about the per-quote service, the Network A Participants have prepared a ''Fact Sheet,'' a copy of which is included for the Commission's information.

Upon filing the amendments with the Commission, the Network A Participants will notify organizations that are subject to the Class F program classification charges of the elimination of those charges, will notify distributors of services to nonprofessional subscribers of the increase in the non-professional subscriber fee, and will notify recipients of the ticker signal from AT&T of the increase in the ticker connection fee.

D. Development and Implementation Phases

See Item I(C).

E. Analysis of Impact on Competition

The Participants believe the proposed amendments will impose no burden on competition.

F. Written Understanding or Agreements Relating to Interpretation of, or Participation in, Plan

Not applicable.

G. Approval by Sponsors in Accordance With Plan

Under Section XII(b)(iii) of the CTA Plan and Section IX(b)(iii) of the CQ Plan, each of the Participants must execute a written amendment to the Plan before an amendment to that Plan can become effective.

H. Description of Operation of Facility Contemplated by the Proposed Amendment

Not applicable.

I. Terms and Conditions of Access

See Item I(A).

J. Method of Determination and Imposition, and Amount of, Fees and Charges

See Item I(A) and the text of the amendments.

K. Method and Frequency of Processor Evaluation

Not applicable.

L. Dispute Resolution

Not applicable.

II. Rule 11Aa3–1 (Solely in its Application to the Amendments to the CTA Plan)

A. Reporting Requirements

Not applicable.

B. Manner of Collecting, Processing, Sequencing, Making Available and Disseminating Last Sale Information

Not applicable.

C. Manner of Consolidation

Not applicable.

D. Standards and Methods Ensuring Promptness, Accuracy and Completeness of Transaction Reports

Not applicable.

E. Rules and Procedures Addressed to Fraudulent or Manipulative Dissemination

Not applicable.

F. Terms of Access to Transaction Reports

See Item I(A).

G. Identification of Marketplace of Execution

Not applicable.

III. Solicitation of Comments

The CTA has designated this proposal as establishing or changing fees and other charges collected on behalf of all of the sponsors and participants which under Section 11Aa3–2(c)(3)(i) of the Act renders the proposal effective upon receipt of this filing by the Commission.

The Commission may summarily abrogate the amendment within sixty days of its filing and require refiling and approval of the amendments by Commission order pursuant to Section 11Aa3–2(c)(3)(iii), if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors and maintenance of fair and orderly markets, to remove impediments to and perfect the mechanisms of a National Market System, or otherwise in furtherance of the purposes of the Act.

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, N.W., Washington, D.C. 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 such filing will also be available for inspection and copying at the principal office of the CTA. All submissions should refer to the file number in the caption above and should be submitted by November 12, 1997.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[2]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–27902 Filed 10–21–97; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following meeting during the week of October 20, 1997.

A closed meeting will be held on Tuesday, October 21, 1997, at 10:00 a.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designees, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c) (4), (8), (9)(A) and (10) and 17 CFR 200.402(a) (4), (8), (9)(i) and (10), permit consideration of the scheduled matters at the closed meeting.

Commissioner Hunt, as duty officer, voted to consider the items listed for the closed meeting in a closed session.

The subject matter of the closed meeting scheduled for Tuesday, October 21, 1997, at 10:00 a.m., will be:

Institution of injunctive actions.

Institution and settlement of administrative proceedings of an enforcement nature.

At time, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 942–7070.

Dated: October 15, 1997.

Jonathan G. Katz,

Secretary.

[FR Doc. 97–28129 Filed 10–20–97; 11:46 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–39211; File No. SR–Amex–97–27]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the American Stock Exchange, Inc., to Establish Hedge Exemptions From Narrow-Based and Broad-Based Index Options Position and Exercise Limits

October 7, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 4, 1997, the American Stock Exchange, Inc. (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. On August 18, 1997, the Amex submitted to the Commission an amendment to the proposal.[3] The Amex also submitted a letter regarding certain aspects of its proposal.[4] This order approves the Amex's proposal, as amended, and solicits comments from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend (1) Amex Rule 904C to establish hedge exemptions from narrow-based and broad-based index option position limits, and (2) Amex Rule 905C to establish corresponding exemptions from index option exercise limits.

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 Amex 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 Amex 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

1. Purpose

Currently, position and exercise limits for index options are the same for all investors, regardless of whether the investor holds a portfolio of stocks which could hedge an index options position. The Exchange now proposes to adopt a hedge exemption from narrow-based and broad-based index options position and exercise limits. The Exchange believes that such an exemption is necessary to meet the needs of investors who use index options for investment and hedging purposes.

According to the Exchange, on various occasions during the last few months, member firms have, on behalf of managers of large portfolios, such as pension and insurance funds, indicated that the current position limits for index options have restricted the use of such options in hedging stock portfolios. Many institutional investors and portfolio managers invest in portfolios of stocks which could be readily hedged with Exchange traded index options. Current position and exercise limits, however, hamper their ability to fully utilize index options to hedge their positions. According to the Exchange, the proposed hedge exemptions from index option position and exercise limits should increase the depth and liquidity of index options markets and allow more effective hedging by investors without increasing the potential for market disruption. The exemptions are similar to exemptions previously approved by the Commission for the Philadelphia Stock Exchange, Inc. (''Phlx'').[5]

[2] 17 CFR 200.30–3(a)(27).

[1] 15 U.S.C. § 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Claire McGrath, Vice President and Special Counsel, Derivative Securities, Amex, to Ivette Lopez, Assistant Director, Office of Market Supervision, Division of Market Regulation, Commission, dated August 18, 1997 (''Amendment No. 1'').

[4] *See* letter from Claire McGrath, Vice President and Special Counsel, Derivative Securities, Amex, to Sharon Lawson, Senior Special Counsel, Office of Market Supervision, Division of Market Regulation, Commission, dated September 18, 1997.

[5] *See* Securities Exchange Act Release Nos. 36858 (February 16, 1996), 61 FR 7295 (February 27, 1996)

Continued

Index option positions hedged in accordance with the proposal would be entitled to exceed existing position and exercise limits by up to two times above and in addition to the current limits.[6]

In order to qualify for an exemption, each option position must be hedged by a position in at least: (1) with respect to narrow-based index options, 75% of the number of component stocks or securities readily convertible into component stocks underlying the index; or (2) with respect to broad-based index options, 20 stocks or securities readily convertible into stocks in four industry groups represented in the index, of which no one component stock accounts for more than 15% of the value of the portfolio hedging the index option position.

In addition, the value of the option position may not exceed the value of the underlying portfolio employed as the hedge. The value of the underlying portfolio is determined as follows: (1) the total market value of the net stock position; less (2) the value of (a) any offsetting calls and puts in the respective index option; and (b) any offsetting positions in related stock index futures or options; and (c) any economically equivalent positions.

The stock portfolio employed as the hedge must be established prior to the index option positions and the options positions must be carried in an account with an Exchange member. Also, securities used to secure an index hedge exemption may not also be used to hedge other option positions.

Exercise limits under the proposal will continue to correspond to position limits, so that investors may exercise up to the number of contracts set forth as the position limit, as well as those contracts exempted by this proposal, during five consecutive business days.

The Amex proposes to exempt positions in index options in a manner which balances the hedging needs of index options investors with the Exchange's obligation to maintain a fair and orderly market. The Amex believes that a hedge exemption of up to two times above the current limit or index options would considerably enhance the attractiveness of these products for institutional investors, who would, in turn, trade more of the products in a hedged manner and thereby provide stabilizing liquidity in both the index options and the underlying securities.

The Exchange also believes that the proposed index option hedge exemptions should not increase the potential for disruption or manipulation in the markets for the stocks underlying each index. The proposal incorporates several safeguards the Amex will employ to monitor the use of the exemptions. Specifically, prior Exchange approval on the appropriate form designated by the Exchange is required, which should ensure that the hedges are appropriate for the position being taken and are in compliance with Amex rules, including those governing the composition and dollar value of the underlying stock portfolio. The Exchange may grant an exemption for less than the maximum of two times above the existing limit. The hedge exemption form must be kept current, with information updated as warranted. Any information concerning the dollar value and composition of the stock portfolio,[7] or its equivalent, the current hedged and aggregate options positions, and any stock index futures positions must be promptly provided to the Exchange.

In addition, the exemption requires that both the options and stock positions be initiated and liquidated in an orderly manner. An account in which the exempt option positions are held must liquidate any options prior to or contemporaneously with a decrease in the hedged value of the underlying portfolio to the extent the dollar value of such options would otherwise be excessive under the rule. Also, initiating or liquidating positions should not be conducted in a manner calculated to cause unreasonable price fluctuations or unwarranted price changes or with a view toward taking advantage of any differential price between a group of securities and an overlying stock position.

The Amex's surveillance procedures are designed to detect as well as to deter manipulation and market disruptions. In particular, the Exchange will monitor trading activity in Amex traded index options and the stocks underlying those indexes to detect potential frontrunning and manipulation, as well as review such trading to ensure that the closing of positions subject to the exemptions are conducted in a fair and orderly manner. This means that a reduction of the option positions must occur at or before the corresponding reduction in the stock portfolio positions, thereby helping to ensure that the stock transactions are not used to impact the market so as to benefit the option positions. Furthermore, the Exchange must be notified in writing for approval prior to liquidating or initiating any such position as well as of any material change in the portfolio or futures positions which materially effects the unhedged value of the qualified portfolio.[8] On a daily basis, the Exchange will also monitor each option contract to ensure that it is hedged by the equivalent dollar amount of component securities.

If any member or member organization that maintains an index option position in such member's or member organization's own account or in a customer account has reason to believe that such position is in excess of the applicable limit, then it must promptly take action necessary to bring the position into compliance pursuant to Amex Rule 904C, Commentary .01(f).[9]

Lastly, violation of any of the provisions of the index options hedge exemption, absent reasonable justification or excuse, will result in withdrawal of the hedge exemption and may form the basis for subsequent denial of an application for an index hedge exemption.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act in general and furthers the objectives of Section 6(b)(5) in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and is not designed to permit unfair discrimination between customers, issuers, brokers, and dealers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe the proposed rule change will impose any inappropriate burden on competition.

(approval order relating to industry index option hedge exemption) (File No. SR–Phlx–95–45); 37320 (June 18, 1996) 61 FR 32878 (June 25, 1996) (approval order relating to market index option hedge exemption) (File No. SR–Phlx–96–07).

[6] The Commission notes that the hedge exemptions are in addition to any other exemptions available under the Exchange's rules.

[7] The Exchange notes that as the dollar value of the hedging portfolio fluctuates, the number of exempt contracts may need to be adjusted.

[8] *See* Amendment No. 1, *supra* note 3.

[9] The Commission notes that under Exchange Rule 904(a), member organizations are prohibited from effecting opening transactions in option contracts on behalf of a customer where the transaction would cause the customer account to be in violation of the position limits set forth under Rule 904. Rule 904C incorporates Rule 904 by reference; therefore, the Commission believes that, under Exchange rules, failure to reduce a limit in a customer account in accordance with Amex Rule 904C, Commentary .01(f) would be considered a violation by the member firm carrying the customer account. *See* Amex Rules 904 and 904C.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; (3) was provided to the Commission for review at least five business days prior to the filing date; and (4) does not become operative for 30 days from August 18, 1997, [10] the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(e)(6) thereunder. In particular, the Commission believes that the proposal qualifies as a ''noncontroversial filing'' in that the proposal does not significantly affect the protection of investors or the public interest and does not impose any significant burden on competition. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate for 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 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 at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Amex.

All submissions should refer to File No. SR–Amex–97–27 and should be submitted by November 12, 1997.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–27903 Filed 10–21–97; 8:45 am]

BILLING CODE 8010–01–M

[10] Because the Exchange filed Amendment No. 1 subsequent to the original filing date, the 30-day period commences on the filing date of Amendment No. 1.

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–39240; File No. SR–CBOE–97–54]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Chicago Board Options Exchange, Incorporated Relating to Routing of Firm and Broker-Dealer Orders to the Par Workstations in the DJX Trading Crowd

October 14, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on October 3, 1997, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') 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 CBOE. 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 Chicago Board Options Exchange, Incorporated (''CBOE'' or the ''Exchange'') will enable its order routing system (''ORS'') to route broker-dealer and firm orders to the trading crowd for options based on the Dow Jones Industrial Average (''DIX'').[2]

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 CBOE 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 CBOE 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

On May 30, 1997, the Securities and Exchange Commission (''SEC'' or ''Commission'') approved a proposed rule change of the CBOE which sought permanent approval of a pilot program concerning certain enhancements to the Exchange's electronic order routing system.[3]

The changes instituted in the pilot program, now approved on a permanent basis, included the electronic routing and processing of contingency and discretionary orders,[4] the recognition by ORS of firm and broker-dealer orders, the routing of firm and broker-dealer orders to the Public Automated Routing (''PAR'') system workstations in the OEX crowd, and the execution of certain contingency orders on the Exchange's Retail Automatic Execution System. In addition, the Exchange enabled the system to route firm and broker-dealer orders electronically to the PAR workstations in the trading crowd for options on the Standard & Poor's 100 Index (''OEX''), but not to PAR stations in any other trading crowd. The Exchange has now enabled its systems to route firm and broker-dealer orders electronically to the PAR stations in the trading crowd for DJX, which is scheduled to commence trading on the Exchange on October 6, 1997. The Exchange intends to study further whether it should enable the system to route such orders to equity and SPX crowds at some future date. All other enhancements to the ORS which were recently approved by the Commission will apply equally to trading in DJX as

[1] 15 U.S.C. § 78s(b)(1).

[2] The text of the proposed rule change is available at the Office of the Secretary, CBOE and in the Public Reference Room at the Commission.

[3] SR–CBOE–97–22, approved in Securities Exchange Act Release No. 38702 (May 30, 1997), 62 FR 31184 (June 6, 1997).

[4] The systems enhancements specifically have allowed for the routing of the following types of contingency and discretionary orders: All or None orders (AON), Immediate or Cancel orders (IOC), Fill or Kill orders (FOK), Minimum Quantity orders (MIN), Stop orders (STP), Stop Loss orders (STP LOSS), Opening Only orders (OPG), Market on Close Orders (MOC), Closing Only orders (CLO), Market if Touched orders (MIT), Not held orders (NH), and With Discretion orders. Due to systems and administrative limitations, ORS has continued to be unavailable for stop limit orders as well as spreads, straddles, combos, and other multi-part orders.

they do at all other trading crowds on the floor.

The Exchange believes the proposed system change is consistent with and furthers the objectives of Section 6(b)(5)[5] of the Act in that it would foster cooperation and coordination with persons engaged in regulating, clearing, settling, and processing information with respect to, and facilitating transactions in securities, and would remove impediments to and perfect the mechanism of a free and open market in a manner consistent with the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The CBOE does not believe that the proposed rule change will impose any 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 solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change has been designated by the Exchange as a policy effecting a change in an existing order-entry system of the Exchange that (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not have the effect of limiting access to or availability of the system, it has become effective pursuant to Section 19(b)(3)(A)[6] of the Act and Rule 196–4(e)(2)[7] thereunder. At any time within 60 days of the filing of a rule change, the Commission may summarily abrogate the 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 proposes 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, N.W., Washington, D.C. 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 at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the CBOE. All submissions should refer to File No. SR–CBOE–97–54 and should be submitted by November 12, 1997.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–27904 Filed 10–21–97; 8:45 am]

BILLING CODE 8010–01–M

[5] 15 U.S.C. § 78f(b)(5).

[6] 15 U.S.C. § 78s(b)(3)(A)(ii).

[7] 17 CFR 240.19b–4(e)(2).

[8] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice No. 2622]

Advisory Committee on International Communications and Information Policy; Meeting Notice

The Department of State is holding the next meeting of its Advisory Committee on International Communications and Information Policy. The Committee provides a formal channel for regular consultation and coordination on major economic, social and legal issues and problems in international communications and information policy, especially as these issues and problems involve users of information and communication services, providers of such services, technology research and development, foreign industrial and regulatory policy, the activities of international organizations with regard to communications and information, and developing country interests.

The guest speaker at the meeting will be Ms. Nancy Wong, Commissioner of the President's Commission on Critical Infrastructure Protection (PCCIP). She will speak on the telecommunications aspects of the PCCIP's mission.

In addition, the purpose of this meeting will be to hear reports from the working groups on various issues that chart the future direction and work plan of the committee. The members will look at the substantive issues on which the committee should focus, as well as specific countries and regions of interest to the committee.

This meeting will be held on Thursday, November 13, 1997, from 9:30 a.m.–12:30 p.m. in Room 1105 of the Main Building of the U.S. Department of State, located at 2201 ''C'' Street, N.W., Washington, D.C. 20520. Members of the public may attend these meetings up to the seating capacity of the room. While the meeting is open to the public, admittance to the State Department Building is only by means of a pre-arranged clearance list. In order to be placed on the pre-clearance list, please provide your name, title, company, social security number, date of birth, and citizenship to Shirlett Brewer at (202) 647–8345 or by fax at (202) 647–0158. All attendees must use the ''C'' Street entrance. One of the following valid ID's will be required for admittance: any U.S. driver's license with photo, a passport, or a U.S. Government agency ID.

For further information, contact Timothy C. Finton, Executive Secretary of the Committee, at (202) 647–5385.

Dated: October 10, 1997.

Timothy C. Finton,

Executive Secretary.

[FR Doc. 97–27893 Filed 10–21–97; 8:45 am]

BILLING CODE 4710–45–M

DEPARTMENT OF TRANSPORTATION

Privacy Act of 1974: Notice To Add Two Systems of Records

AGENCY: Department of Transportation, Operating Administrations.

ACTION: Notice to add two systems of records.

SUMMARY: The Department of Transportation is proposing to add two systems of records notices to its inventory of Privacy Act systems of records notices subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

EFFECTIVE DATE: December 1, 1997.

FOR FURTHER INFORMATION CONTACT: Crystal Bush, Office of the Chief Information Officer, Department of Transportation, Washington, DC 20590, Telephone (202) 366–9713, Fax (202) 366–7066, Internet address crystal.bush@ost.dot.gov.

SUPPLEMENTARY INFORMATION: The Department of Transportation systems of records notices subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available through the Government Printing Office.

The proposed systems reports, as required by 5 U.S.C. 552a(r) of the

Privacy Act of 1974, as amended, were submitted on October 6, 1997, to the Committee on Government Reform and Oversight of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget.

DOT/SLS 152

SYSTEM NAME:

Data Automation Program Records.

SECURITY CLASSIFICATION:

Unclassified sensitive.

SYSTEM LOCATION:

Saint Lawrence Seaway Development Corporation, Office of Finance, PO Box 520, 180 Andrews Street, Massena, N.Y. 13662–0520.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Employees and consultants.

CATEGORIES OF RECORDS IN THE SYSTEM:

Payroll and leave records, work measurement records, and travel vouchers.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. Section 301, 44 U.S.C. Section. 3101, 33 U.S.C. Section 984(a)(4).

PURPOSE(S):

This system integrates leave, payroll, work measurement, and travel voucher records.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:

1. Payroll and voucher disbursement: GAO audits.

2. To the Office of Child Support Enforcement, Administration for Children and Families, Department of Health and Human Services Federal Parent Locator System (FPLS) and Federal Tax Offset System for use in locating individuals and identifying their income sources to establish paternity, establish and modify orders of support and for enforcement action.

3. To the Office of Child Support Enforcement for release to the Social Security Administration for verifying social security numbers in connection with the operation of the FPLS by the Office of Child Support Enforcement.

4. To Office of Child Support Enforcement for release to the Department of the Treasury for purposes of administering the Earned Income Tax Credit Program (Section 32, Internal Revenue Code of 1986) and verifying a claim with respect to employment in a tax return.

5. See Prefatory Statement of General Routine Uses.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

Disclosures pursuant to 5 U.S.C. 552a(b)(12). Disclosures may be made from this system to 'consumer reporting agencies' (collecting on behalf of the U.S. Government) as defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(f)) or the Federal Claims Collection Act of 1982 (31 U.S.C. 3701(a)(3)).

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Magnetic tape reels, diskettes, microfilm cassettes and supporting documents.

RETRIEVABILITY:

Records are retrieved by name and social security number.

SAFEGUARDS:

Records are kept in locked file cabinets or locked rooms accessible to appropriate supervisor, his/her immediate assistants and secretary.

RETENTION AND DISPOSAL:

Records are retained in accordance with General Accounting Office and National Archives and Records Administration requirements.

SYSTEM MANAGER(S) AND ADDRESS:

Director of Finance, Saint Lawrence Seaway Development Corporation, PO Box 520, 180 Andrews Street, Massena, N.Y. 13662–0520.

NOTIFICATION PROCEDURE:

Individuals may inquire, in writing, to the system manager.

RECORD ACCESS PROCEDURES:

Individuals may gain access to his/her records by submitting a written request to the system manager.

CONTESTING RECORD PROCEDURES:

Contest of these records should be directed to the system manager.

RECORD SOURCE CATEGORIES:

Information contained in this system would come from Saint Lawrence Seaway Development Corporation records.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

DOT/FAA 851

SYSTEM NAME:

Administration and Compliance Tracking in an Integrated Office Network.

SECURITY CLASSIFICATION:

Unclassified, sensitive.

SYSTEM LOCATION:

U.S. Department of Transportation, Federal Aviation Administration (FAA), Office of Aviation Medicine, Drug Abatement Division, 800 Independence Avenue, SW., Washington, DC 20591.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Medical review officers, company anti-drug program managers, other contact names, and individuals who call the FAA to self-disclose who are directly involved in the implementation and maintenance of drug and alcohol testing programs in conjunction with the aviation industry.

CATEGORIES OF RECORDS IN THE SYSTEM:

The name(s), company and office telephone numbers of program managers who are in charge of the everyday operation of drug and alcohol testing programs for aviation companies, other persons who are contacts for facilities directly involved in drug and alcohol testing for the aviation industry, medical review officers (physicians) who review test results for the aviation companies, and individuals with company name and telephone numbers who call the FAA to self-disclose non-compliance.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Omnibus Transportation Employee Testing Act of 1991 (Pub.L. 102–143, Title V); 49 CFR part 40; 14 CFR part 61, et al.

PURPOSE(S):

To support the information resource, reporting and archival needs of the Drug Abatement Division. An automated system is needed to provide the FAA with an information system that will operate with greater accuracy, efficiency and effectiveness. This system will:

1. Provide management with easy access to accurate information concerning status and contents of aviation industry drug and alcohol testing program plans;

2. Provide capability for trend analyses and predictions;

3. Provide readily accessible tracking information;

4. Establish data links among correspondence files, enforcement files and plan files to enable inspectors, managers and administrators to rapidly access accurate, timely information;

5. Support management's reporting and accountability requirements; and

6. Provide data and information for program planning and analysis.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

See Prefatory Statement of General Routine Uses.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

These records would be maintained in an automated information system.

RETRIEVABILITY:

These records would be retrieved by the name of an individual or by a unique case file identifier.

SAFEGUARDS:

Access to and use of these records would be limited to those persons whose official duties require such access. Computer processing of information would be conducted within established FAA computer security regulations. A risk assessment of the FAA computer facility used to process this system of records has been accomplished.

RETENTION AND DISPOSAL:

These records will be retained in accordance with the records retention established in the current version of FAA Order 1350.15, Records Organization, Transfer, and Destruction Standards.

SYSTEM MANAGER(S) AND ADDRESS:

Manager, Drug Abatement Division, AAM–800, Office of Aviation Medicine, Federal Aviation Administration, 800 Independence Avenue, SW, Washington, DC 20591.

NOTIFICATION PROCEDURE:

An individual may inquire as to whether the system of records contains a record pertaining to him or her by addressing a written request to the System Manager identified above. The request should include enough information to allow for accurate identification of the record. For example, full name, company and company address, and any available information regarding the type of record involved should be provided.

RECORD ACCESS PROCEDURES:

Individuals who would wish to gain access to such systems of records would contact the System Manager.

CONTESTING RECORD PROCEDURES:

Individuals who would desire to contest information about themselves contained in this system of records would contact or address their inquiries to the Administrator or his delegate at 800 Independence Avenue, SW., Washington, DC 20591.

RECORD SOURCE CATEGORIES:

Information contained in this system would come from FAA records.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Dated: October 15, 1997.

Michael P. Huerta,

Acting Chief Information Officer, Department of Transportation.

[FR Doc. 97–27964 Filed 10–21–97; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent to Rule on Application Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Fresno Yosemite International Airport, Fresno, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Intent to Rule on Application.

SUMMARY: The FAA to rule and invites public comment on the application to impose and use the revenue from a PFC at Fresno Yosemite International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Public Law 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

DATES: Comments must be received on or before November 21, 1997.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Federal Aviation Administration, Airports Division, 15000 Aviation Blvd., Lawndale, CA 90261, or San Francisco Airports District Office, 831 Mitten Road, Room 210, Burlingame, CA 94010–1303. In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Terry O. Cooper, Director of Transportation, city of Fresno, at the following address: 2401 N. Ashley Way, Fresno, CA 93727–1504. Air carriers and foreign air carriers may submit copies of written comments previously provided to the city of Fresno under section 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: Marlys Vandervelde, Airports Program Specialist, Airports District Office, 831 Mitten Road, Room 210, Burlingame, CA 94010–1303, Telephone: (650) 876–2806. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Fresno Yosemite International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

On October 3, 1997, the FAA determined that the application to impose and use the revenue from a PFC submitted by the city of Fresno was substantially complete within the requirements of section 158.25 of Part 158. The FAA will approve or disapprove the application, in whole or in part, no later than January 2, 1998. The following is a brief overview of the impose and use application number 97–02–C–00–FAT.

Level of proposed PFC: $3.00.

Proposed charge effective date: February 1, 1998.

Proposed charge expiration date: May 1, 2028.

Total estimated PFC revenue: $58,910,388.

Brief description of proposed impose and use projects: Baggage Claim Expansion, Terminal Lobby and Ticket Counter Areas, Exterior Improvements (Terminal Entryway Reconfiguration), Concourse Expansion, Building Utility Systems, Entrance Road Construction, Storm Water Retention Basin Expansion and Improvement, Ramp Reconstruction/Taxiway Relocation (Taxiway ''A''), Additional Portland Cement Concrete Parking Stands, Terminal Ramp Drainage and Oil-Water Separator Improvements, and Terminal Ramp Pavement Markings and Reconstruction of Concourse Ramp Sections.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: Air Taxi/Commercial Operators (ATCO) filing FAA Form 1800–31.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** and at the FAA Regional Airports Division located at: Federal Aviation Administration, Airports Division, 15000 Aviation Blvd., Lawndale, CA 90261. In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the city of Fresno.

Issued in Hawthrone, California, on October 9, 1997.

Herman C. Bliss,

Manager, Airports Division, Western-Pacific Region.

[FR Doc. 97–27963 Filed 10–21–97; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Application To Impose a Passenger Facility Charge (PFC) at Orlando International Airport, Orlando, Florida and Use the Revenue at Orlando International Airport, Orlando, Florida and Orlando Executive Airport, Orlando, Florida

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Intent to Rule on Application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose a PFC at Orlando International Airport and use the revenue at Orlando International Airport and Orlando Executive Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158.

DATES: Comments must be received on or before November 21, 1997.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Orlando Airports District Office, 5950 Hazeltine National Dr., Suite 400, Orlando, Florida 32822.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Robert B. Bullock, Executive Director of the Greater Orlando Aviation Authority at the following address: Greater Orlando Aviation Authority, Orlando International Airport, One Airport Boulevard, Orlando, Florida 32827–4399.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the Greater Orlando Aviation Authority under § 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: Mr. Vernon P. Rupinta, Project Manager, Orlando Airports District Office, 5950 Hazeltine National Dr., Suite 400, Orlando Florida 32822–5024, 407–812–6331, Extension 24. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose a PFC at Orlando International Airport and use the revenue at Orlando International Airport and Orlando Executive Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

On October 14, 1997, the FAA determined that the application to impose a PFC at Orlando International Airport and use the revenue at Orlando International Airport and Orlando Executive Airport submitted by Greater Orlando Aviation Authority was substantially complete within the requirements of § 158.25 of Part 158. The FAA will approve or disapprove the application, in whole or in part, no later than January 29, 1998.

The following is a brief overview of PFC Application No. 98–05–C–00–MCO.

Level of the proposed PFC: $3.00.

Proposed charge effective date: April 1, 1998.

Proposed charge expiration date: February 1, 2005.

Total estimated PFC revenue: $231,750,000.

Brief description of proposed project(s):

Projects at Orlando International Airport: Replace Four Additional High Mast Light Poles; North Cross Field Taxiway Construction; Upgrade Aircraft Rescue and Fire Fighting Vehicle CRASH–84 and Replace Aircraft Rescue and Fire Fighting Vehicle CRASH–82; Loop Road Taper Improvements; Air Aide 2—Final Design and Construction

Projects at Orlando Executive Airport: West Quadrant Improvements (Phase III C); Construct Taxiway C–2 and Fillet Joiner; Rehabilitate North West Quadrant Ramp; Parallel Taxiway West of Runway 13/31; Replace Direct Buried Airfield Lights; Rehabilitate Runway 13/31 and Pave Taxiways Shoulders

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: None

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT.**

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Greater Orlando Aviation Authority.

Issued in Orlando, Florida on October 14, 1997.

John W. Reynolds, Jr.,

Assistant Manager, Orlando Airports District Office Southern Region.

[FR Doc. 97–27962 Filed 10–21–97; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Intelligent Transportation Society of Amercia; Public Meeting

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of public meeting.

SUMMARY: The Intelligent Transportation Society of America (ITS AMERICA) will hold a meeting of its Coordinating Council on Wednesday, November 19, 1997. The following designations are made for each item: (A) Is an ''action'' item; (I) is an ''information item;'' and (D) is a ''discussion'' item. The agenda includes the following: (1) Call to Order and Introductions (I); (2) Statements of Antitrust Compliance and Conflict of Interest (A); (3) Approval of Last Meeting's Minutes (A); (4) Federal Report(I&D); (5) President's Report; (6) National ITS Research Agenda (I/A); (7) ATIS Business Models Workshop Report; (8) Professional Capacity Building Update (I); (9) FCC Frequency Petition Update (I); (10) ITS World Congress Report (I&D); (11) ITS America 8th Annual Meeting Update (I/D); (12) Roundtable Discussion of Committee and Task Force Activities (I&D); (13) Other Business.

ITS AMERICA provides a forum for national discussion and recommendations on ITS activities including programs, research needs, strategic planning, standards, international liaison, and priorities. The charter for the utilization of ITS AMERICA establishes this organization as an advisory committee under the Federal Advisory Committee Act (FACA), 5 USC app. 2, when it provides advice or recommendations to DOT officials on ITS policies and programs. (56 FR 9400, March 6, 1991).

DATES: The Coordinating Council of ITS AMERICA will meet on Wednesday, November 19, 1997, from 8:00 a.m. to noon.

ADDRESSES: Memorial Student Center, Building 65, Room 201, Texas A&M University, College Station, Texas.

FOR FURTHER INFORMATION CONTACT: Materials associated with this meeting may be examined at the offices of ITS AMERICA, 400 Virginia Avenue, SW.,

Suite 800, Washington, D.C. 20024. Persons needing further information or to request to speak at this meeting should contact Kenneth Faunteroy at ITS AMERICA by telephone at (202) 484–4130, or by FAX at (202) 484–3483. The DOT contact is Mary Pigott, FHWA, HVH–1, Washington, D.C. 20590, (202) 366–9536. Office hours are from 8:30 a.m. to 5:00 p.m., e.t., Monday through Friday, except for legal holidays. (23 U.S.C. 315; 49 CFR 1.48)

Issued on: October 17, 1997.

Jeff Paniati,

Deputy Director, ITS Joint Program Office.

[FR Doc. 97–28040 Filed 10–21–97; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA 3021]

Notice of Receipt of Petition for Decision That Nonconforming 1994–1997 BMW R1100 Motorcycles Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of receipt of petition for decision that nonconforming 1994–1997 BMW R1100 motorcycles are eligible for importation.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 1994–1997 BMW R1100 motorcycles that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because (1) they are substantially similar to vehicles that were originally manufactured for importation into and sale in the United States and that were certified by their manufacturer as complying with the safety standards, and (2) they are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is November 21, 1997.

ADDRESSES: Comments should refer to the docket number and notice number, and be submitted to: Docket Management, Room PL–401, 400 Seventh St., SW, Washington, DC 20590. (Docket hours are from 10 am to 5 pm)

FOR FURTHER INFORMATION CONTACT: George Entwistle, Office of Vehicle Safety Compliance, NHTSA (202–366–5306).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR Part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

Champagne Imports, Inc. of Lansdale, Pennsylvania (''Champagne'') (Registered Importer 90–009) has petitioned NHTSA to decide whether 1994–1997 BMW R1100 motorcycles are eligible for importation into the United States. The vehicles which Champagne believes are substantially similar are 1994–1997 BMW R1100 motorcycles that were manufactured for importation into, and sale in, the United States and certified by their manufacturer, Bayerische Motoren Werke, A.G., as conforming to all applicable Federal motor vehicle safety standards.

The petitioner claims that it carefully compared non-U.S. certified 1994–1997 BMW R1100 motorcycles to their U.S. certified counterparts, and found the vehicles to be substantially similar with respect to compliance with most Federal motor vehicle safety standards.

Champagne submitted information with its petition intended to demonstrate that non-U.S. certified 1994–1997 BMW R1100 motorcycles, as originally manufactured, conform to many Federal motor vehicle safety standards in the same manner as their U.S. certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that non-U.S. certified 1994–1997 BMW R1100 motorcycles are identical to their U.S. certified counterparts with respect to compliance with Standard Nos. 106 *Brake Hoses,* 111 *Rearview Mirrors,* 116 *Brake Fluid,* 119 *New Pneumatic Tires for Vehicles other than Passenger Cars,* and 122 *Motorcycle Brake Systems.*

Petitioner also contends that the vehicles are capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* installation of U.S.-model headlamp assemblies.

Standard No. 120 *Tire Selection and Rims for Vehicles other than Passenger Cars:* installation of a tire information placard.

Standard No. 123 *Motorcycle Controls and Displays:* installation of a U.S. model speedometer calibrated in miles per hour.

The petitioner also states that vehicle identification number plates meeting the requirements of 49 CFR part 565 will be affixed to non-U.S. certified 1994–1997 BMW R1100 motorcycles.

Comments should refer to the docket number and be submitted to: Docket Management, Room PL–401, 400 Seventh Street, S.W., Washington, DC 20590. It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141 (a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: October 16, 1997.

Marilynne Jacobs,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 97–27965 Filed 10–21–97; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 33480]

Charles Barenfanger—Continuance in Control Exemption—Effingham Railroad Company

Charles Barenfanger (applicant) has filed a verified notice of exemption to continue in control of Effingham

Railroad Company (ERRC), upon its becoming a Class III rail carrier.

Although applicant does not indicate an expected consummation date, it is noted that the transaction could not be consummated before October 7, 1997, the effective date of this exemption.

This transaction is related to STB Finance Docket No. 33468, *Effingham Railroad Company—Operation Exemption—Line Owned by Agracel Corporation,* wherein ERRC seeks to operate over a certain rail line owned by the Agracel Corporation, in Effingham, IL.

Applicant controls one existing Class III railroad, Illinois Western Railroad Company (IWRC), operating in Greenville, IL.

Applicant states that: (i) The rail line to be operated by ERRC does not connect with IWRC; (ii) the transaction is not part of a series of anticipated transactions that would connect ERRC with IWRC; and (iii) the transaction does not involve a Class I carrier. Therefore, the transaction is exempt from the prior approval requirements of 49 U.S.C. 11323. *See* 49 CFR 1180.2(d)(2).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under sections 11324 and 11325 that involve only Class III rail carriers. Because this transaction involves Class III rail carriers only, the Board, under the statute, may not impose labor protective conditions for this transaction.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33480, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on John M. Robinson, 9616 Old Spring Road, Kensington, MD 20895.

Decided: October 14, 1997.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 97–27969 Filed 10–21–97; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 33468]

Effingham Railroad Company—Operation Exemption—Line Owned by Agracel Corporation

Effingham Railroad Company (ERRC), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to operate over approximately 206.05 feet [1] of railroad line owned by the Agracel Corporation (Agracel), located in a new industrial park in Effingham, IL. ERRC states that it is a substitute operator for Consolidated Rail Corporation, the previous operator of the line, and that it will operate the line under lease or operating agreement with Agracel after the transaction is completed.

This transaction is related to STB Finance Docket No. 33480, *Charles Barenfanger—Continuance in Control Exemption—Effingham Railroad Company,* wherein Charles Barenfanger has filed a verified notice of exemption to continue in control of ERRC, upon its becoming a Class III rail carrier.

The exemption became effective on September 25, 1997, but, because the related notice in the control proceeding was not filed simultaneously, the earliest date the transaction could be lawfully consummated was October 7, 1997.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to reopen the proceeding to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time.[2] The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33468, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on John M. Robinson, 9616 Old Spring Road, Kensington, MD 20895.

Decided: October 14, 1997.

[1] In an attachment to the verified notice, the length of the line is stated as approximately 206.8 feet, but all other references in this and related proceedings consistently specify the length as approximately 206.05 feet.

[2] On September 22, 1997, Joseph C. Szabo, on behalf of United Transportation Union-Illinois Legislative Board, filed a petition to stay the operation of the notice of exemption, as well as to reject or revoke the notice. By decision served September 24, 1997, in this matter, the petition for stay was denied. A subsequent decision will be issued by the Board on the request to reject or to revoke the exemption.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 97–27970 Filed 10–21–97; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF TRANSPORTATION

Bureau of Transportation Statistics

Advisory Council on Transportation Statistics

AGENCY: Bureau of Transportation Statistics, (DOT).

ACTION: Notice of meeting.

SUMMARY: Pursuant to Section 10(A)(2) of the Federal Advisory Committee Act (Public Law 72–363; 5 U.S.C. App. 2), notice is hereby given of a meeting of the Bureau of Transportation Statistics (BTS) Advisory Council on Transportation Statistics (ACTS) to be held Wednesday, November 12, 1997, 10:00 a.m. to 4:00 p.m. The meeting will take place at the U.S. Department of Transportation, 400 7th Street, SW., Washington, DC, in conference room 10234–38 of the Nassif Building.

The Advisory Council, called for under Section 6007 of Public Law 102–240, Intermodal Surface Transportation Efficiency Act of 1991, December 18, 1991, and chartered on June 19, 1995, was created to advise the Director of BTS on transportation statistics and analyses, including whether or not the statistics and analysis disseminated by the Bureau are of high quality and are based upon the best available objective information.

The agenda for this meeting will include a review of the last meeting, identification of substantive issues, review of plans and schedule, other items of interest, discussion and agreement of date(s) for subsequent meetings, and comments from the floor.

Since access to the DOT building is controlled, all persons who plan to attend the meeting must notify Ms. Carolee Bush, Council Liaison, on (202) 366–6946 prior to November 10. Attendance is open to the interested public but limited to space available. With the approval of the Chair, members of the public may present oral statements at the meeting. Noncommittee members wishing to present oral statements, obtain information, or who plan to access the building to attend the meeting should also contact Ms. Bush.

Members of the public may present a written statement to the Council at any time.

Persons with a disability requiring special services, such as an interpreter for the hearing impaired, should contact Ms. Bush (202) 366–6946 at least seven days prior to the meeting.

Issued in Washington, DC, on October 16, 1997.

Robert A. Knisely,

Executive Director, Advisory Council on Transportation Statistics.

[FR Doc. 97–27961 Filed 10–21–97; 8:45 am]

BILLING CODE 4910–FE–P

UNITED STATES INFORMATION AGENCY

U.S. Advisory Commission on Public Diplomacy Meeting

AGENCY: United States Information Agency.

ACTION: Notice.

SUMMARY: A meeting of the U.S. Advisory Commission on Public Diplomacy will be held on October 22 in Room 600, 301 4th Street, SW., Washington, DC, from 8:30 a.m. to 10:30 a.m.

At 8:30 a.m. the Commission will hold a panel discussion on *Fulbright at 50.* The panelists are Ambassador Julia Chang Bloch, President, U.S.-Japan Foundation, Member, Steering Committee; and Mr. Michael Schneider, Executive Director, Steering Committee. At 9:30 a.m. the Commission will hold a panel discussion on international exchanges. The panelists are Dr. Dan E. Davidson, Chair, Alliance for International Educational and Cultural Exchanges, CEO, ACTR/ACCELS; Mr. William Reese, President, Partners of the Americas; and Mr. Michael McCarry, Executive Director, Alliance for International Educational and Cultural Exchanges.

FOR FURTHER INFORMATION CONTACT:

Please call Betty Hayes, (202) 619–4468, if you are interested in attending the meeting. Space is limited and entrance to the building is controlled.

Dated: October 15, 1997.

Rose Royal,

Management Analyst, Federal Register Laison.

[FR Doc. 97–27888 Filed 10–21–97; 8:45 am]

BILLING CODE 8230–01–M

Federal Register

Wednesday
October 22, 1997

Part II

Environmental Protection Agency

40 CFR Part 64, et al.

Compliance Assurance Monitoring; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 64, 70, and 71

[IL–64–2–5807; FRL–5908–6]

RIN 2060–AD18

Compliance Assurance Monitoring

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; Final rule revisions.

SUMMARY: Pursuant to requirements concerning enhanced monitoring and compliance certification under the Clean Air Act (the Act), EPA is promulgating new regulations and revised regulations to implement compliance assurance monitoring (CAM) for major stationary sources of air pollution that are required to obtain operating permits under title V of the Act. Subject to certain exemptions, the new regulations require owners or operators of such sources to conduct monitoring that satisfies particular criteria established in the rule to provide a reasonable assurance of compliance with applicable requirements under the Act. Monitoring will focus on emissions units that rely on pollution control device equipment to achieve compliance with applicable standards. The regulations also provide procedures for coordinating these new requirements with EPA's operating permits program regulations. Revisions to the operating permits program regulations clarify the relationship between the 64 requirements and periodic monitoring and compliance certification requirements. The rulemaking is estimated to improve compliance with existing regulations which will potentially reduce the need for further regulation to achieve clean air goals at a cost significantly less than that of the 1993 proposed rule.

DATES: The effective date of this rule is November 21, 1997.

ADDRESSES: *Docket.* Supporting information used in developing the regulations is contained in Docket No. A–91–52. This docket is available for public inspection and copying between 8:00 a.m. and 5:30 p.m. Monday through Friday, excluding government holidays, and is located at: EPA Air Docket (LE–131), Room M–1500, Waterside Mall, 401 M Street SW, Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Peter Westlin, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, at (919) 541–1058.

SUPPLEMENTARY INFORMATION: The contents of the preamble are listed in the following outline:

The first section of this preamble provides an introduction to the principles underlying EPA's CAM approach, the benefits of the part 64 rulemaking, and background on the statutory provisions and key issues involved with developing the rule. This section also summarizes the public's participation in the development of the rulemaking. The second section of the preamble presents a more detailed summary of the regulations. This section includes a description of the provisions and the basic purpose of each provision. This section also describes the Agency's response to the comments received on the original proposal, as supplemented by additional comments during subsequent periods in which public input was requested and obtained. The preamble describes how the final rule has been changed from the proposal in response to the input received. The final section of the preamble addresses administrative requirements for Federal regulatory actions.

The preamble includes many citations which refer the reader to more detailed discussions of a topic or to the origin of certain requirements. These citation sections generally will not be followed by their source, such as ''of this preamble'' or ''of the Act.'' Rather, the reader can recognize the origins of the sections by their nature: sections of the preamble begin with a Roman numeral; sections of the regulations in 40 CFR part 64 range from §§ 64.1 to 64.11; sections of the regulations in 40 CFR part 70 range from §§ 70.1 to 70.11; sections of other existing EPA regulations are preceded by 40 CFR; and sections of the Act are referenced by a three-digit number, such as 114 or 504.

This preamble often refers to ''State'' or ''permitting authority.'' The reader should assume that where the preamble refers to a ''State'', such term also includes local air pollution agencies, Indian tribes, and territories of the United States to the extent they are or will be the permitting authority for their area, or have been or will be delegated permitting responsibilities under the Act. In addition, the term ''permitting authority'' would also include EPA to the extent EPA is the permitting authority of record.

Finally, this preamble often refers to 40 CFR part 70, the regulations promulgated July 21, 1992, implementing the operating permits program under title V of the Act (57 FR 32250). The EPA has proposed revisions to those regulations on August 29, 1994 (59 FR 44460), and August 31, 1995 (60 FR 45530). Those regulations, including the proposed revisions, provide requirements applicable to federally-approved, State-administered operating permits programs. Where a State fails to submit an approvable program or to adequately administer and enforce an approved program, EPA will have to promulgate, administer and enforce a Federal program for title V permits in that State. The reader should assume that where the preamble refers to 40 CFR part 70, such term may also refer to an EPA-administered (Federal) operating permits program, which EPA has promulgated under 40 CFR part 71 (see July 1, 1996, 61 FR 34202).

I. Background and Summary of the Rulemaking

A. Statutory Authority

The part 64 regulations respond to the statutory mandate in the Clean Air Act Amendments of 1990. The 1990 Amendments contain several provisions directing the Agency to require owners or operators to conduct monitoring and to make compliance certifications. These provisions are set forth in both title V (operating permits provisions) and title VII (enforcement provisions) of the 1990 Amendments.

Title V directs the Agency to implement monitoring and compliance certification requirements through the

operating permits program. Section 503(b)(2) requires at least annual certifications of compliance with permit requirements and prompt reporting of deviations from permit requirements. Section 504(a) mandates that owners or operators submit to the permitting authority the results of any required monitoring at least every six months. This section also requires permits to include ''such other conditions as are necessary to assure compliance with applicable requirements'' of the Act. Section 504(b) of the Act also allows the Agency to prescribe, by rule, methods and procedures for determining compliance, and states that continuous emission monitoring systems need not be required if other methods or procedures provide sufficiently reliable and timely information for determining compliance. Under section 504(c), each operating permit must ''set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions.''

Title VII of the 1990 Amendments added a new section 114(a)(3) that requires EPA to promulgate rules on enhanced monitoring and compliance certifications. This paragraph provides, in part:

> The Administrator shall in the case of any person which is the owner or operator of a major stationary source, and may, in the case of any other person, require enhanced monitoring and submission of compliance certifications. Compliance certifications shall include (A) identification of the applicable requirement that is the basis of the certification, (B) the method used for determining the compliance status of the source, (C) the compliance status, (D) whether compliance is continuous or intermittent, (E) such other facts as the Administrator may require.

The 1990 Amendments also revised section 114(a)(1) of the Act to provide additional authority concerning monitoring, reporting, and recordkeeping requirements. As amended, that section provides the Administrator with the authority to require any owner or operator of a source:

> On a one-time, periodic or continuous basis to—
> (A) Establish and maintain such records;
> (B) Make such reports;
> (C) Install, use, and maintain such monitoring equipment;
> (D) Sample such emissions (in accordance with such procedures or methods, at such locations, at such intervals, during such periods and in such manner as the Administrator shall prescribe);
> (E) Keep records on control equipment parameters, production variables, or other indirect data when direct monitoring of emissions is impractical;
> (F) Submit compliance certifications in accordance with section 114(a)(3); and
> (G) Provide such other information as the Administrator may reasonably require.

B. Rulemaking History

The EPA has acted to implement the statutory provisions discussed above in two separate ways. First, the part 70 operating permits program includes basic monitoring and compliance certification requirements. Section 70.6(a)(3)(i) requires that permits include all existing monitoring and testing requirements set forth in applicable requirements. In many cases, the monitoring requirements in the underlying regulations will suffice for assessing compliance. However, if particular applicable requirements do not include periodic testing or monitoring, then § 70.6(a)(3)(i)(B) requires the permit to include ''periodic monitoring'' to fill that gap. Section 70.6(c)(5)(iii) requires the submittal of compliance certifications no less frequently than annually, and generally incorporates the language on compliance certifications included in section 114(a)(3) of the Act.

To implement the statutory requirement for enhanced monitoring, EPA has developed through this rulemaking a general monitoring rule in 40 CFR part 64 to be implemented through the part 70 operating permits program. The Agency first provided notice in the **Federal Register** of an opportunity for public review and comment on this concept in August 1991 (see 56 FR 37700). A public information document was made available, a public meeting was held, and written comments were received after the meeting. A subsequent public meeting was held in August 1993, and a proposed rule was published on October 22, 1993 (58 FR 54648). This proposed rule is referred to as the ''1993 EM proposal'' throughout the remainder of this preamble.

The Agency received approximately 2000 comment letters during the public comment period. These letters contained several thousand individual comments on more than 500 major and minor issue topics. Because of some of the complex and difficult issues raised, the Agency held a series of stakeholder meetings in the fall of 1994, released draft sections of a possible final rule, and then officially reopened the public comment period on specific issues on December 28, 1994 (59 FR 66844). An additional stakeholder meeting was held near the close of that reopened comment period, and more than 200 additional comment letters were received.

In April 1995, EPA decided to shift the emphasis of part 64. The Agency issued a press release in early April 1995 that indicated EPA's intent to hold a public meeting to discuss the potential changes to the proposed enhanced monitoring rule, and then contacted various stakeholder groups so that they would have the opportunity to participate. A formal notice of the meeting was also published in the **Federal Register** on May 26, 1995 (60 FR 27943). Approximately 200 people attended the meeting on May 31, 1995, and many additional people attended the follow-up meetings held in June 1995 in Washington, DC, Cincinnati, Austin, and Portland, Oregon. The Agency then drafted a preamble and rule for public discussion and comment, and held another public meeting in September 1995. (See 60 FR 48679, September 20, 1995, for the formal **Federal Register** notice of that meeting and request for comment.) Approximately 150 people attended that meeting, and EPA received more than 60 written comment letters on the draft rule package. The Agency subsequently issued a draft final part 64 and discussion document in August 1996 (see 61 FR 41991, August 13, 1996) and held another public meeting in September 1996. The 1995 and 1996 draft rules are referred to as the ''1995 part 64 Draft'' and ''1996 part 64 Draft,'' respectively, throughout the remainder of this preamble. Approximately 200 people attended and 120 written comment letters were submitted during the comment period. The Agency also has held numerous informal stakeholder discussions with interested parties to discuss the CAM approach, and received additional written comments during the period since April 1995. (See the items in sections II–D, II–E, IV–D, IV–E, IV–F, VI–D, VI–E, and VI–F of Docket A–91–52 for a complete record of written comments submitted by stakeholders, and discussions between EPA and interested parties concerning the rulemaking.)

This preamble addresses the changes to part 64 that have been made in response to the significant public comment received during the course of the rulemaking. The focus is on documenting the changes made in response to the comments received on the formal 1993 proposed rule, as well as specific changes made in response to comments received on the draft rule materials made available in 1995 and 1996. The Agency has also prepared a detailed, three–part Response to Comments Document which includes a response to all material comments on

the rule. See Docket Items A–91–52–VII–C–1 through VII–C–3.

C. Overview of the CAM Approach

1. General Approach

The CAM approach as defined in part 64 is intended to address the requirement in title VII of the 1990 Amendments that EPA promulgate enhanced monitoring and compliance certification requirements for major sources, and the related requirement in title V that operating permits include monitoring, compliance certification, reporting and recordkeeping provisions to assure compliance. The EPA has long recognized that obtaining ongoing compliance is a two-step process. First, the Agency must determine whether properly designed control measures—including, as applicable, control devices, process modifications, operating limitations or other control measures—are installed or otherwise employed, and that those control measures are proven to be capable of achieving applicable requirements. In the past, this step has been addressed through new source review permitting, initial stack testing, compliance inspections and similar mechanisms. The title V permit application and review process, including the applicant's initial compliance certification and compliance plan obligations, will add another tool for assuring that source owners or operators have adopted the proper control measures for achieving compliance. The second step is to monitor to determine that the source continues to meet applicable requirements. An important aspect of this second step is to assure that the control measures, once installed or otherwise employed, are properly operated and maintained so that they do not deteriorate to the point where the owner or operator fails to remain in compliance with applicable requirements. The Agency believes that monitoring, reporting, recordkeeping and ongoing or recurring compliance certification requirements under title VII should be designed so that owners or operators carry out this second step in assuring ongoing compliance.

There are two basic approaches to assuring that control measures taken by the owner or operator to achieve compliance are properly operated and maintained so that the owner or operator continues to achieve compliance with applicable requirements. One method is to establish monitoring as a method for directly determining continuous compliance with applicable requirements. The Agency has adopted this approach in some rulemakings and, as discussed below, is committed to following this approach whenever appropriate in future rulemakings. Another approach is to establish monitoring for the purpose of: (1) Documenting continued operation of the control measures within ranges of specified indicators of performance (such as emissions, control device parameters and process parameters) that are designed to provide a reasonable assurance of compliance with applicable requirements; (2) indicating any excursions from these ranges; and (3) responding to the data so that excursions are corrected. The part 64 published today adopts this second approach as an appropriate approach to enhancing monitoring in the context of title V permitting for significant emission units that use control devices to achieve compliance with emission limits. For units not covered by part 64, a similar but less detailed approach is provided for in the monitoring and related recordkeeping and reporting provisions of part 70 (see § 70.6(a)(3)).

The rule defines ''control devices'' to mean equipment that removes pollutants or transforms pollutants to passive emissions (see § 64.1), as opposed to other control measures, such as process modifications, material substitution, and other control options. For significant units that use control devices to achieve compliance, the owner or operator will have to develop and propose, through the part 70 permit process, monitoring that meets specified criteria for selecting appropriate indicators of control performance, establishing ranges for those indicators, and for responding to any excursions from those ranges. The final rule also includes performance and operating criteria that must be achieved, as well as documentation requirements for the monitoring proposed by the owner or operator.

The final element of part 64 is the concept of a quality improvement plan (QIP). Under the final rule, a QIP may be required where the owner or operator has failed to satisfy the general duty to properly operate and maintain an emissions unit (including the applicable control device) or the owner or operator has evidence of a failure to comply with an applicable requirement, as determined through part 64 monitoring data and/or other appropriate information (such as inspections). The rule allows for the permit to establish a ''bright line'' test for implementing a QIP, but does not require such a test.

The QIP would include both an initial ''problem investigation'' phase and a ''corrective action'' phase. The rule provides for the QIP mechanism so that permitting authorities have a specific regulatory tool to address situations in which an owner or operator operates in a manner that involves excursions followed by ineffective actions to bring the monitored indicators back into the acceptable ranges established in the permit. Thus, the QIP will help assure that the owner or operator pays attention to the data and, if necessary, improves performance to the point where ongoing compliance with applicable requirements is reasonably assured. See Section II.H. for further discussion of QIP issues.

2. Implementation through Permits

a. *Burdens to the Permitting Process.* Many commenters, including State and local agencies, industry, and environmental groups raised concerns in their comments that the part 64 process of selecting the appropriate monitoring for a particular source would overburden the permitting process and lead to poor implementation. The Agency is very sensitive to these concerns; however, the Agency continues to believe that, consistent with the preamble to the 1993 EM proposal, the permit implementation approach provides the greatest amount of flexibility to the regulated community and States while at the same time ensuring that enhanced monitoring will be implemented for all major sources in a reasonably expeditious time frame. In addition, the Agency has taken several significant steps in the final rule to reduce the potential burden to the permitting process, including the actions discussed below.

i. *Applicability.* The focus of applicability on those pollutant-specific emissions units that rely on control devices to achieve compliance has reduced the estimated number of units that will be subject to part 64 and also has reduced the variety of emissions unit types that will be affected by part 64. This reduction in the volume and breadth of units covered by part 64 will reduce the overall burdens on the permit process.

ii. *Extended Implementation Period.* As discussed in Section II.E., the final rule provides for a new extended implementation schedule. Only those units which are major units based on their potential to emit will be subject to part 64 requirements prior to the renewal of an initial part 64 permit. In addition, in many cases, implementation will not be required for these large units until permit renewal. For the smaller units covered by part 64, implementation will not occur until

permit renewal. This extended implementation schedule will relieve much of the burden on source owners or operators to develop and prepare proposed monitoring during the initial part 70 permitting process and will similarly relieve the burdens of the approval process on permitting authorities.

iii. *Guidance Development Process.* The Agency is committed to developing non-prescriptive examples of the types of monitoring that can be used to satisfy part 64 for various types of control devices and emissions units. The guidance development process will provide an opportunity for source owners or operators and other interested parties to submit suggestions, review drafts and generally clarify the part 64 requirements. The Agency emphasizes that the development of example monitoring approaches is intended to assist both regulated industry and permitting authorities to streamline permit review in those instances where a source owner or operator proposes monitoring based on one of the examples. These examples should not be considered as an implied limitation on the owner or operator's ability to propose a different approach that the owner or operator can demonstrate satisfies the part 64 requirements or on the permitting authority's authority to require additional monitoring.

iv. *General Clarifications.* Finally, the potential implementation burdens have been reduced by adopting many general clarifications in the final rule. For instance, the final rule clearly states that emissions units that are not subject to applicable requirements are not required to conduct part 64 monitoring. A second example is the streamlined performance and operating design criteria in the final rule, which are substantially less complex and burdensome than the comparable requirements in the appendices to the 1993 EM proposal.

b. *Creation of New Substantive Standards.* Many commenters argued that the requirements in part 64 were inconsistent with EPA's stated position that the part 70 operating permits program was intended solely to collect existing requirements in one document, without creating new substantive obligations for source owners or operators. The Agency disagrees with these arguments. As mentioned in section I.A., the part 64 regulations respond to the statutory mandate in the Clean Air Act Amendments of 1990 and the part 70 regulations implement title V of the Clean Air Act Amendments of 1990, which directs the Agency to implement monitoring and compliance certification requirements through the operating permits program. The part 64 requirements are independently applicable, substantive requirements that an owner or operator must achieve. The fundamental requirements of part 64 are to: (a) Monitor compliance in a manner that is sufficient to yield data that provide a reasonable assurance of compliance and allow an owner or operator to make an informed certification of compliance; (b) take necessary corrective actions in response to the monitoring data; (c) report on the results of such monitoring; and (d) maintain records of such monitoring. None of these fundamental obligations under part 64 will be added as part of a part 70 permit independently of part 64. What will be added as part of the permit process are the particulars as to how a specific source owner or operator will satisfy these general part 64 requirements. This type of regulatory structure is entirely consistent with the purpose of a permit process which is to specify how general obligations will be achieved in particular circumstances.

c. *Consistency of Implementation.* Implementation of part 64 through the part 70 permits program means that part 64 will be implemented on a case-by-case basis. Many industry and State and local agencies supported EPA's proposal to allow for a flexible implementation approach that allows for adopting monitoring that is most appropriate to a particular emission unit's circumstances. However, many industry, environmental and State and local agency commenters also raised concerns that the case-by-case implementation process in part 64 may not be implemented in a reasonably consistent manner by different permitting authorities.

The EPA acknowledges the potential significance of these concerns; however, EPA believes that they have been overstated by the commenters. As discussed in Section II. below, EPA has taken steps to minimize potential inconsistencies by simplifying and clarifying the final rule. Also, EPA must weigh these concerns against the significant policy concerns that would exist if the Agency attempted to develop specific enhanced monitoring requirements for each NSPS and NESHAP standard, as well as the burdens on States to revisit each SIP regulation, as well as individual State preconstruction and operating permits. The administrative burdens associated with that approach would severely hinder the effective and timely implementation of enhanced monitoring for most sources for many years. In addition, such an approach fails to acknowledge the new benefits of the operating permits program to tailor general requirements in a manner that is most appropriate to the circumstances at a particular source. For these reasons, EPA believes that the benefits of the permit implementation approach far outweigh the concerns over consistency in implementation.

d. *Programmatic Options.* Some stakeholders have suggested alternative means of implementing part 64 requirements. One alternative suggested was to allow a State the option of implementing part 64 monitoring requirements through programmatic rule changes instead of implementing CAM through source-specific part 64 requirements. One potential method for allowing this option is to exempt from part 64 monitoring any emissions units for which a State has developed requirements specifically designed to satisfy part 64 in a rule that has been submitted and approved as part of the SIP. Another would be to delay implementation of part 64 to provide an opportunity for a State to devise a competitive monitoring program for submittal to and approval by EPA.

The final rule will allow states to implement CAM through rulemaking pertaining to categories of sources. The EPA encourages States to consider adding monitoring requirements to existing and new rules that are consistent with part 64 requirements. In this manner, the burdens associated with source-specific monitoring development could be reduced. To provide an incentive for this type of rule, the final rule includes a provision (see § 64.4(b)) that allows the owner or operator to rely upon this type of programmatic rule as the primary documentation of the appropriateness of its monitoring. This approach would reduce the number of case-by-case reviews necessary to implement part 64.

On the other hand, EPA does not agree with commenters who suggest that states that choose to use programmatic rulemaking should be allowed to apply different criteria in determining monitoring and to have additional time to implement such an approach. The EPA believes monitoring decisions should be made on the same basis whether done on a programmatic or case-by-case basis. Second, EPA questions both the need for a substantial delay for programmatic rulemaking and whether the purported advantages of a programmatic approach justify any substantial delay. The final part 64 does not include an option for permitting authorities to delay implementation of part 64 through use of a programmatic approach.

Because of the implementation schedule for part 64 (see Section II.E.), owners or operators will not have to implement part 64 for many emissions units until renewal of initial part 70 permits. These include both large units that are at sources which have already received or are in the process of receiving part 70 permits, and smaller units for which the rule explicitly delays implementation until permit renewal. This schedule provides substantial time for States to adopt SIP regulations, as discussed above, that are consistent with part 64, especially for smaller units that could most benefit from generic monitoring requirements that could be developed through programmatic SIP rule changes.

3. Limited Purpose of Part 64

Part 64 is intended to provide a reasonable means of supplementing existing regulatory provisions that are not consistent with the statutory requirements of titles V and VII of the 1990 Amendments to the Act. The EPA believes that the CAM approach is a reasonable approach commensurate with this role. The Agency does not believe that existing monitoring requirements that are more rigorous than part 64 should be reduced or that monitoring imposed in future regulatory actions necessarily should be guided by part 64.

If existing requirements are more rigorous than part 64, those requirements should continue to exist unaffected by part 64. This point is made explicitly in several instances in the final rule. In addition, EPA is committed to developing new emission standards subsequent to the 1990 Amendments with methods specified for directly determining continuous compliance whenever possible, taking into account technical and economic feasibility, and other pertinent factors. In recognition of this EPA commitment, the rule exempts New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) rules that are proposed after the 1990 Amendments to the Act from part 64 requirements. The Agency believes that States should approach their regulatory actions from the same perspective and thus the Agency does not believe that part 64 will have a significant impact on requirements imposed subsequent to the 1990 Amendments.

Comments on the 1996 part 64 Draft received from environmental, public health and labor organizations emphasized the public's right to information about air pollution from major stationary sources. These commenters argued that the CAM approach provides insufficient information about actual emissions and thus will frustrate the public's right to know about actual emissions from a source. Their comments also asserted that source owners should not be allowed to use information gathered under the CAM approach, including information on pollution control operations and practices, to certify compliance with applicable standards.

The Agency responded to those comments (see letter from Mary Nichols to various environmental and other organizations dated December 19, 1996, docket item A–91–52–VI–C–18) and summarizes its response here. The Agency agrees with incorporating direct emissions and compliance monitoring where the technology is available and feasible, and promoting public disclosure of air pollution emissions information. On the other hand, the Agency does not believe that such a broad, expensive, and technically complex objective can be accomplished through a single rulemaking at this time. Not only would trying to impose such monitoring requirements across the board in the short term be technically unrealistic, doing so would put in jeopardy the possibility of advancing monitoring of existing emissions sources through part 70 operating permits program already in progress.

The Agency notes that current requirements for submission of emission statements prepared by owners of industrial air pollution sources continues independent of part 64 (such as statements required under section 182(a)(3) of the Act) and such statements will be based on the most currently available information, including new monitoring data produced under part 64.

As described above, the Agency firmly believes that continued proper operation and maintenance of process operations and air pollution controls demonstrated capable of achieving applicable standards is vital to ongoing compliance. By providing the necessary data and requiring appropriate corrective action, part 64 will result in owners and operators being more conscientious in the attention paid to the operation and maintenance of air pollution control equipment and practices than has been the case in the past. This approach has proven effective in reducing air pollution emissions and improving compliance performance in the implementation of many existing regulations with similar requirements. See further discussion on the use of part 64 data for purposes of part 70 compliance certifications in Section I.C.5., below.

4. Relationship to Part 70 Monitoring

Part 70 currently requires all title V operating permits to include monitoring to assure compliance with the permit. This includes all existing monitoring requirements as well as additional monitoring (generally referred to as ''periodic monitoring'') if current requirements fail to specify appropriate monitoring. As noted in the 1993 EM proposal, because part 64 contains applicable monitoring requirements sufficient to demonstrate compliance with applicable emission limitations or standards, the part 70 periodic monitoring requirements will not apply to the emissions units and applicable requirements covered by part 64. This conclusion is equally applicable under the final part 64 rule. However, during the course of the rulemaking, two other issues have been raised that concern the relationship of the final part 64 rule to the existing part 70 periodic monitoring requirements: (1) The extent to which periodic monitoring should be relied on as ''enhanced monitoring'' and (2) timing concerns where periodic monitoring may be required prior to implementation of part 64.

With respect to relying on part 70 periodic monitoring as ''enhanced monitoring'' for at least some units, EPA suggested this option in both the 1993 EM proposal and the December 1994 notice reopening the comment period on that proposal (see 58 FR 54648, 54653 and 59 FR 66844, 66849). Industry commenters generally supported this option; although, many suggested that EPA rely completely on periodic monitoring as ''enhanced monitoring.'' Some environmental groups, however, argued against this option. They asserted further that EPA's part 64 applicability provisions would not meet the statutory requirement that all major stationary sources conduct enhanced monitoring. The EPA considered including in part 64 requirements analogous to the existing part 70 provisions (see subpart C of part 64 in the 1996 part 64 Draft). This approach would clearly indicate EPA's position that the part 70 monitoring requirements including periodic monitoring if necessary, constitute the appropriate ''enhanced monitoring'' for units not covered by part 64. However, in the final rule, EPA has determined to rely on the position originally discussed in the 1993 EM proposal that existing monitoring when supplemented as necessary by periodic monitoring is sufficiently enhanced for emissions units not subject to part 64. The Agency

decided not to pursue the Subpart C option included in the 1996 part 64 Draft based on the comments received (see Section II.B., below) and also because of concerns about disrupting the ongoing implementation of part 70.

Because of the delays in finalizing part 64 and the delayed implementation schedule included in the final rule (see Section II.E., below), many part 70 permits will address periodic monitoring issues prior to implementation of part 64. To address concerns about the potential duplication and disruption that this situation could cause, EPA has taken certain steps. First, the ''Subpart C'' option has been rejected and the existing part 70 monitoring, including periodic monitoring, requirements will continue to apply. Because the majority of emissions units do not use control devices, this decision will result in part 64 creating no duplication or disruption for the majority of emissions units. As discussed in the Regulatory Impact Analysis (RIA) for this rulemaking, EPA estimates that the final part 64 rule will affect less than 27,000 emissions units, while an additional 54,000 units that could have been affected by subpart C will remain affected by part 70 monitoring requirements.

Second, for units with control devices, EPA has adopted a phased implementation schedule under which part 64 will apply only to the largest units prior to the first renewal of a part 70 permit. To the extent part 64 and periodic monitoring may have some overlap for these largest units, any overlap should be minimal because these units are most likely to have existing monitoring that would make the periodic monitoring provisions in part 70 unnecessary. For the smaller units that will not be required to implement part 64 until part 70 permit renewal, the periodic monitoring provisions of part 70 may apply. While there may be some concern that this will result in installation of monitoring that could later be found inappropriate for part 64, EPA does not believe this would generally be the case. In many instances, such periodic monitoring would likely serve as the basis, in whole or in part, for compliance with part 64. For instance, a source owner or operator may conduct intermittent monitoring of visible emissions or certain parameters to satisfy part 70 periodic monitoring. To the extent successful, the experience with that monitoring could be used to justify its use under part 64. At the least, the experience gained under periodic monitoring could be used to develop data to support proposed part 64 monitoring at permit renewal. Such data could be used, for example, to justify appropriate indicator ranges, quality assurance procedures, monitoring frequency and similar part 64 requirements. Just as importantly, the continued presence of part 70 monitoring requirements during the initial permit term is essential to provide the minimum level of assurance that a source remains in compliance with a part 70 permit as required under title V of the Act. Thus, EPA rejects the position suggested by some commenters that it should immediately suspend the part 70 periodic monitoring requirements pending implementation of part 64.

5. Relationship to part 70 Compliance Certifications

In developing an implementation approach in the 1993 EM proposal, EPA indicated that owners or operators must rely on methods for determining continuous compliance to submit a certification of whether compliance is continuous or intermittent. Many industry representatives and State and local agencies objected to the burdens associated with the 1993 proposal. A large part of those burdens would have occurred as a result of having to develop monitoring that could produce data of sufficient reliability to make determinations of continuous compliance with a degree of representativeness, accuracy, precision, and reliability equivalent to that provided by conducting the test method established for a particular requirement. In response to those concerns, the Agency opted to pursue the CAM approach which provides a reasonable assurance of compliance through monitoring of control operations. The EPA believes that the CAM approach does enhance existing monitoring requirements and provides sufficient information for an owner or operator to reach a conclusion about the compliance status of the owner or operator's source that is adequate to satisfy the compliance certification obligations in the Act. Such monitoring also provides data sufficient for EPA, permitting authorities, and the public to evaluate a source's compliance and to take appropriate action where potential compliance problems are discovered.

The part 64 rulemaking also clarifies the Agency's interpretation of the phrase ''continuous or intermittent'' as used in section 114(a)(3) of the Act. The 1993 EM proposal interpreted the requirement that source owners or operators certify ''whether compliance is continuous or intermittent'' to require monitoring sufficient to determine if compliance was continuous. (58 FR 54654, 54658) Thus the term ''continuous'' was read as meaning that compliance was achieved during all averaging periods for a standard and ''intermittent'' was read generally as meaning that one or more deviations occurred during the certification period. (58 FR 54665). This proposed interpretation was consistent with the Agency's position in the preamble to proposed part 70 as well (see 56 FR 21737, May 10, 1991 (''The compliance certification must document * * * whether compliance was continuous or intermittent (i.e., whether there were periods of noncompliance).'').

The Agency reconsidered this interpretation in reopening the public comment period on the 1993 EM proposal and noted that ''intermittent'' could mean either that noncompliance had occurred or that the owner or operator has data sufficient to certify compliance only on an intermittent basis. (See 59 FR 66848, col. 2 (''nothing in section 114(a)(3) dictates that all source owners or operators must certify to being in either continuous compliance or else be considered in noncompliance; source owners or operators may also certify to being in compliance as demonstrated on an intermittent basis.'')). The EPA believes that the statutory interpretation discussed in the preamble to the 1993 EM proposal and this alternative interpretation are both reasonable, and that EPA has discretion to clarify the meaning of this statutory provision given the ambiguity in the legislation. As outlined below, today's rulemaking (see the revisions to § 70.6(c)(5)) is derived from the interpretation contained in the December 1994 notice reopening the comment period on the 1993 EM proposal.

6. Consistency with Regulatory Reinvention Efforts

The approach in this rule lays out broad principles and performance criteria for appropriate monitoring, but does not mandate the use of a particular technology. The proposal is intended to reflect the principles articulated in President Clinton's and Vice President Gore's March 16, 1995 report, ''Reinventing Environmental Regulation.'' That report established as goals for environmental regulation building partnerships between EPA and State and local agencies, minimizing costs, providing flexibility in implementing programs, tailoring solutions to the problem, and shifting responsibilities to State and local agencies. The Agency believes that part 64 meets the goals of the report.

This approach also is consistent with President Clinton's regulatory reform initiatives and EPA's Common Sense Initiative in that it focuses on steps to prevent pollution rather than to impose unnecessary command and control regulations on regulated sources. The approach is based on the assumption that pollution control is an integral part of doing business and that owners or operators should pay attention to their pollution control operations with the same care they do their product operations. The CAM approach emphasizes the role of the owner or operator in developing a plan to achieve this goal for specific circumstances.

D. Benefits of a CAM Approach and Potential Control Costs

The EPA believes that monitoring under part 64 can in some situations, reduce operating costs. For example, monitoring data can be used to increase combustion efficiency in an industrial boiler or to increase capture and reuse of solvents at a coating plant. A 1990 study by the General Accounting Office entitled ''Air Pollution: Improvements Needed in Detecting and Preventing Violations'' (see docket item A–91–52–VI–I–12) noted several instances in which companies have achieved such operating cost reductions. The CAM approach also alerts owners or operators that potential control device problems may exist. The owner or operator can use this information to target control devices for routine maintenance and repair, and reduce the potential for costly breakdowns. While benefits may occur to some facilities as the result of better awareness of equipment operation, changes in equipment operation are not required by part 64.

Part 64 does not itself have emissions reductions benefits, EPA does expect, however, that some sources may have to reduce emissions in order to comply with their underlying emissions standards in response to monitoring under part 64. EPA expects that some emissions reductions may result from sources having to reduce emissions overall, and/or to respond to periods of excess emissions more quickly, thus reducing their frequency and duration. EPA has not estimated the emissions reductions that may result from this; EPA believes these reductions and any associated health and welfare benefits are not attributable to part 64—but to the underlying emissions standards.

The Agency believes that there is adequate evidence that monitoring control performance will assure continuing compliance with applicable requirements. Studies conducted by the Agency have shown that control device operation and maintenance problems are a significant factor in creating excess emissions (see docket items II–A–22 and VI–A–2). In addition, these studies have documented that assumptions about compliance status are often inaccurate when detailed inspections of control devices are conducted (see, for example, docket item VI–A–2). Moreover, information included in the Regulatory Impact Analyses (RIA) documents that, based on data sheets compiled for all major sources by State agency inspectors in fifteen States, approximately 20 percent of all major sources have significant compliance problems and there is a significant corollary between the adequacy of a source's operation and maintenance procedures and compliance risk.

There will be real costs associated with measures sources may take to reduce emissions in order to comply with their underlying emissions standards in response to monitoring under part 64. Costs as well as emissions reductions benefits will result from sources having to reduce emissions overall, and/or to respond to periods of excess emissions more quickly, thus reducing their frequency and duration. Such costs would be due to increase expenditures for operation and maintenance and capital equipment. The EPA has not estimated the cost associated with emissions reductions that may result; EPA believes such costs are not attributable to part 64—but to the underlying emissions standard.

E. The Relationship of Part 64 to Credible Evidence and Enforcement Issues

1. General CAM Enforcement Policy

As a general matter, the Agency expects that source owners or operators will be in compliance with all applicable emission requirements if they conform to the requirements of part 64. Further, the Agency expects that there will be relatively limited information available to override the information provided by the owner or operator on an emissions unit's compliance status beyond that provided through monitoring that satisfies part 64 or part 70. However, neither these expectations nor complete compliance with part 64 will prohibit the Agency from undertaking enforcement investigations when appropriate under the circumstances, such as when information indicates there are conditions that may threaten or result in harm to public health or the environment, indicates a pattern of noncompliance, indicates serious misconduct, or presents other circumstances warranting enforcement.

2. The Credible Evidence Revisions to 40 CFR parts 51, 52, 60, and 61 (''The CE Revisions'')

See the CE Revisions as published in the **Federal Register** on February 24, 1997 (62 FR 8314) for discussion of that rulemaking history. During the many public comment periods for the CE Revisions and the CAM proposal, the Agency received numerous comments stating that the two rules are inextricably connected, impact each other, and should be proposed together in order for meaningful public comment from interested stakeholders. The Agency reviewed these comments but decided to proceed with the CE rulemaking separately from this rulemaking for several reasons. First, the Agency believes that there was sufficient opportunity for all interested parties to comment on any perceived relationship or any substantive issues regarding the proposed credible evidence revisions and the CAM proposal before the promulgation of the CE Revisions in February, 1997. The Agency released a public draft of the CAM approach in September, 1995, and then conducted a public meeting in April, 1996, on the credible evidence revisions. The Agency also accepted public comments on the credible evidence rulemaking and the CAM proposals between September, 1995, and the promulgation of the CE Revisions. Thus, all interested parties had the opportunity to comment on the two rulemakings and the Agency received numerous comments on this topic before the CE Revisions were promulgated. In addition, there was also ample opportunity for public comment on any perceived relationship after promulgation of the CE Revisions and before the finalization of part 64. The Agency released a public draft of the CAM approach in August, 1996, and held a public meeting regarding the 1996 part 64 Draft. The Agency also reopened the comment period on part 64 on April 25, 1997, (62 FR 20147) to allow for comments on the relationship between part 64 and the CE Revisions. See the Response to Comments Document (Part III) at section 14 for the Agency's response to these comments. Thus, all interested parties had the opportunity to comment on the relationship between part 64 and the CE Revisions before each of these rulemakings was promulgated.

Second, the Agency decided to promulgate the CE Revisions separate from part 64 because the two programs are different in scope. The CE Revisions

are not limited to part 64 data or information collected pursuant to a part 70 permit generally. Other types of CE could include information from monitoring that is not required by regulation (such as monitoring conducted pursuant to a consent agreement or a specific section 114 request) or information from inspections by the permitting authority. In addition, the CE Revisions affect all sources regulated by 40 CFR parts 51, 52, 60, and 61, not just sources who will be covered by part 64. Thus, although sources covered by this rulemaking are regulated under the provisions amended by the CE Revisions, both the sources covered by this rulemaking and the data generated by this rulemaking are subsets of the sources and potential credible evidence addressed in the CE Revisions. Therefore, it was appropriate for the Agency to promulgate these two rulemakings separately. See 63 FR 8314 for a discussion of the scope of the CE Revisions.

Even though the CE Revisions and part 64 rulemakings are distinct regulatory actions, there are complementary aspects to the two rules. As noted above, consistent with the existing provisions of part 70, the CE revisions reiterate that data other than compliance test data can be used as a basis for title V compliance certifications. Most importantly, the CE rulemaking affects the potential consequences of identifying deviations, exceedances or excursions in a compliance certification based on data, such as part 64 data, that are from sources other than the compliance or reference test method. The CE revisions clarify the authority to rely on these data to prove that a source is in compliance or that a violation has occurred.

Finally, the CE Revisions and this rulemaking did not need to be promulgated together because these regulations have different statutory bases. The Agency promulgated the CE Revisions based primarily on section 113(a) of the Act, which authorizes the Agency to bring an administrative, civil or criminal action ''on the basis of any information available to the Administrator.'' See 62 FR at 8320–23. The part 64 regulations, however, respond to the statutory mandates of the CAA Amendments of 1990, including but not limited to section 114(a)(3).

3. Potential Enforcement Consequences Related to CAM and CE

As a general matter, the Agency notes that it intends to apply its current enforcement policies in instances where the Agency believes, based on a review of CAM data, that a source has violated underlying emission limits. During the public comment period, commenters raised several issues about the relationship between the proposed part 64 monitoring information, the CE Revisions, and enforcement of violations of the Act. The following discussion generally addresses those concerns. See section 14.2 (Part III) of the Response to Comments Document (A–91–53–VII–C–3) for responses to specific issues raised.

First, these commenters suggested that compliance with indicator ranges under part 64 should act as a shield to enforcement actions. The Agency disagrees. Complete compliance with an approved part 64 monitoring plan does not shield a source from enforcement actions for violations of applicable requirements of the Act if other credible evidence proves violations of applicable emission limitations or standards. The Agency expects that a unit that is operating within appropriately established indicator ranges as part of approved monitoring will, in fact, be in compliance with its applicable limits. Part 64 does not prohibit the Agency, however, from undertaking enforcement where appropriate (such as cases where the part 64 indicator ranges may have been set improperly and other data such as information collected during an inspection provides clear evidence that enforcement is warranted).

Similarly, several commenters stated that if a source owner or operator identified excursions or exceedances of the applicable indicator ranges and conducted a prompt correction, with or without a QIP, then there should be a shield from enforcement for any potential violation of an underlying emissions limitation. This is also incorrect. If a source owner or operator identifies one or more excursions or exceedances of its indicator ranges established under part 64, prompt correction of the condition does not establish a shield. At the same time, the CAM excursions do not necessarily give rise to liability under part 64 or the Act (unless an excursion is specifically made an enforceable permit term). The Agency understands that many sources operate well within permitted limits over a range of process and pollution control device operating parameters. Depending on the nature of pollution control devices installed and the specific compliance strategy adopted by the source or the permitting authority, part 64 indicator ranges may be established that generally represent emission levels significantly below the applicable underlying emission limit. For this reason, and because the Agency anticipates a wide variance in CAM indicator range setting practices, the Agency intends to draw no firm inferences as to whether excursions from CAM parameter levels warrant enforcement of underlying emission levels without further investigation into the particular circumstances at the source. Thus, although staying within appropriately established indicator ranges gives a reasonable assurance of compliance, excursions from indicator ranges do not necessarily indicate noncompliance. The Agency may investigate such excursions for possible violations based on the general enforcement criteria identified above. A proper and prompt correction of the problem causing the excursion or exceedance, with or without a QIP, will factor into the Agency's decision on whether to investigate a source for potential violations but does not shield the source from an enforcement action by the Agency.

Second, several comments have stated that the use of CAM monitoring data as credible evidence to demonstrate the existence of a violation would increase the stringency of many standards. Although it is correct that the Agency, as well as states, public citizens, and sources, could potentially use CAM monitoring data as credible evidence of either compliance or noncompliance with an emission standard, the evidence could only be used if, as stated in the CE Revisions, the information is relevant to whether the source would have been in compliance with applicable requirements if the appropriate performance or compliance test had been performed. The CE Revisions and the use of CAM data as potential credible evidence do not change the stringency of any emission standard for the reasons set forth in the preamble to the CE Revisions. See 63 FR 8314.

Finally, it has been suggested during the part 64 and credible evidence rulemakings that a Title V permit may be written to limit the types of evidence used to prove violations of emissions standards. As mentioned in the CE Revisions, even if a Title V permit specifies that certain monitoring, CAM or other monitoring, be performed and that this monitoring is the sole or exclusive means of establishing compliance or non-compliance, EPA views such provisions as null and void. Such an attempt to eliminate the possible use of credible evidence other than the monitoring specified in a Title V permit is antithetical to the credible evidence rule and to section 113(e)(1). If such a provision is nonetheless included in a permit, the permit should

be vetoed to avoid any ambiguity. If the provision is not vetoed, the provision is without meaning, as it is *ultra vires*, that is, beyond the authority of the permit writer to limit what evidence may be used to prove violations, just as if a permit writer were to attempt to write in a provision that a source may not be assessed a penalty of $25,000 per day of violation for each violation. Evidence that is permitted by statute to be used for enforcement purposes, fines that may be levied, and any other statutory provisions, may not be altered by a permit.

II. Detailed Discussion of Regulatory Provisions

A. Section 64.1—Definitions

Section 64.1 defines most of the key terms and phrases used in part 64. Certain definitions which were contained in § 64.2 of the 1993 EM proposal have been deleted from the final rule, while other definitions from the proposed rule have been considerably revised. In addition, a number of new definitions have been added to the final rule. The Agency believes these deletions, revisions, and additions accomplish the following goals: They reflect changes to the objectives and substantive provisions of part 64; they respond to concerns and comments made about the definitions in the 1993 EM proposal; and they bring part 64 more closely into accord with the regulatory language of part 70. The final definitions also reflect changes made in response to comments received on the 1995 and 1996 part 64 Drafts. These are discussed below.

1. Definitions Deleted from the Final Rule

The revisions to the substantive provisions of part 64 in the final rule have necessitated the deletion of certain definitions set forth in § 64.2 of the 1993 EM proposal. In some instances, these definitions have been superseded by new terminology relating to the same or similar concepts. In other cases, the deleted definitions related to matters which are inapplicable to the final rule. The eliminated definitions are as follows:

a. *Continuous Compliance and Intermittent Compliance.* The 1993 EM proposal would have required the use of data from an enhanced monitoring protocol to determine and certify whether an affected source or emissions unit complied with applicable emission limitations or standards and whether such compliance was ''continuous'' or ''intermittent.'' Section 64.2 of the 1993 EM proposal defined the term ''continuous compliance'' as requiring the attainment of quality-assured data from an enhanced monitoring protocol for all required periods, the demonstration by such data that an owner or operator has complied with the applicable emission limitation or standard during all monitored periods, and a demonstration of compliance by any other data collected for the purpose of determining compliance during the monitored periods if such other data were collected. The 1993 EM proposal stated that a source or emissions unit was in ''intermittent compliance'' if, during the reporting period, either the data availability requirement was not satisfied because insufficient data was obtained from the enhanced monitoring protocol, or the owner or operator violated the applicable emission limitation or standard because a deviation occurred during a period for which no federally-approved or federally-promulgated excused period applied.

Many commenters objected to these definitions for various reasons, including a contention that EPA had merged the concept of achieving continuous compliance with the concept of demonstrating compliance. The definitions of continuous compliance and intermittent compliance in the proposed rule were also closely tied to the Agency's interpretation of section 114(a)(3) of the Act under the 1993 EM proposal. Section 114(a)(3) directs the Administrator to require certification of ''whether compliance is continuous or intermittent.'' Under the 1993 EM proposal, this language was interpreted as requiring a certification that compliance was achieved during all averaging periods for a standard, and ''intermittent'' meant that one or more unexcused deviations occurred during the certification period. This interpretation was also the subject of much public comment. As described in greater detail above, the Agency has responded to these comments by adopting an alternative interpretation of section 114(a)(3). The Agency has therefore deleted the EM proposed definitions of continuous and intermittent compliance from the final rule. (See Section II.K.2. for additional discussion of the interpretation of compliance certifications.)

b. *Deviation.* The proposed rule stated that a ''deviation'' included any condition determined by enhanced monitoring or other collected data which identifies that an emissions unit has failed to meet an applicable emission limitation or standard. This definition included any conditions that either violated an applicable emission limitation or standard or would have violated such limitation or standard but for a federally-promulgated exemption.

A number of commenters raised concerns about the proposed definition of deviation. Some argued that the proposed definition was too closely tied to the violation of an emission limitation or standard. These commenters requested clarification that a deviation is not necessarily a violation of an emission limitation or standard. Other commenters objected to portions of the definition which would have allowed a deviation to be based on ''data collected that can be used to certify compliance,'' such as the data obtained through a voluntary audit. These commenters argued that such a definition created a disincentive for owners and operators to engage in certain types of self-monitoring.

The final rule does not refer to ''deviations'' in part 64 and thus does not include a definition of ''deviation.'' The 1996 part 64 Draft did contain a revised definition of ''deviation'' to be included in the part 71 provisions covering the federal operating permits program. This definition would have clarified that a deviation is not always a violation and that types of events that were to be considered deviations included ''exceedances'' and ''excursions'' as defined under part 64. The state operating permit programs authorized by part 70 of this chapter allow permitting authorities to define the term ''deviation'' in the context of their individual programs. The 1996 part 64 Draft did not include a definition of ''deviation'' to be included in part 70 because the Agency did not want to restrict the power of permitting authorities to define this term.

Public comments on the 1996 part 64 Draft pointed out that there are permitting authorities which define a ''deviation'' as a violation of the underlying emission limitation or standard. The provisions in the 1996 part 64 Draft which stated that exceedances and excursions are to be considered deviations without necessarily being violations arguably conflict with those definitions of ''deviation.'' In response to these concerns, the Agency has eliminated all references to ''deviations'' from part 64.

c. *Other Deleted Definitions.* The proposed rule contained a definition for ''established monitoring.'' This definition applied to certain types of monitoring methodologies which had been demonstrated to be a feasible means of assessing compliance with emissions limitations or standards. The concept of ''established monitoring''

was used in the monitoring selection process under the 1993 EM proposal. As discussed below in Section II.D., these provisions have been eliminated in part 64. Because the concept of ''established monitoring'' serves no function in the final rule, this definition has been deleted.

The proposed rule defined ''fugitive emissions'' as those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally-equivalent opening. This definition was necessary because § 64.4(d) of the proposed rule would have established separate monitoring protocol requirements for fugitive emissions monitoring. As discussed below in Section II.B., fugitive emissions are not subject to any specific part 64 monitoring requirements. The Agency has therefore deleted this definition from the final rule.

Section 64.4(c) of the 1993 EM proposal established certain requirements for owners or operators who sought to use the monitoring of process or control device parameters as part of an enhanced monitoring protocol. In certain instances, the proposed rule required the establishment of a ''demonstrated compliance parameter level'' (DCPL) to determine which levels of the parameter being monitored correlated with a demonstration of compliance with the applicable emission limitation or standard. Under the requirements in the final rule, the Agency has modified its approach to parameter monitoring (see Section II.C. for a more detailed discussion). Accordingly, the definition of ''demonstrated compliance parameter level'' or DCPL has been deleted from the final rule.

Both the terms ''enhanced monitoring'' and ''enhanced monitoring protocol'' have been eliminated in the final rule. The 1993 EM proposal defined ''enhanced monitoring'' as the methodology used by an owner or operator to detect deviations with sufficient representativeness, accuracy, precision, reliability, frequency, and timeliness in order to determine if compliance is continuous during a reporting period. An ''enhanced monitoring protocol'' was defined as the monitoring methodology and all installation, equipment, performance, operation, and quality assurance requirements applicable to that methodology. The final part 64 establishes monitoring performance criteria in the body of the rule rather than in a definition; thus, the definitions of ''enhanced monitoring'' and ''enhanced monitoring protocol'' have been deleted. The 1996 part 64 Draft included a related concept, the ''compliance assurance monitoring (CAM) plan,'' which distinguished monitoring for units with control devices subject to subpart B of that draft rule and monitoring for other units under subpart C of that draft rule. Because the final rule does not include subpart C, this term is not used in the final rule.

''Responsible official'' was defined under the 1993 EM proposal as having the same meaning as provided under § 70.2. This term was used in § 64.5(c) of the 1993 EM proposal, which required that the personal certification of a responsible official be included in each enhanced monitoring report. In response to a number of objections to this requirement, the Agency has not included a part 64 report signature requirement in the final part 64 rule but generally relies on part 70 reporting procedures. Thus, there is no need to define ''responsible official'' in part 64. It should be noted that § 70.5(d) outlines the responsible official's duties with respect to submitting reports, including part 64 reports.

2. Revised Definitions

There are a number of definitions that were in the 1993 EM proposal that have been revised in the final rule. Some of these revisions are relatively minor, such as technical revisions designed to reflect changes to the substantive provisions of part 64 or to more closely parallel the definitions found in part 70. Other revisions are intended to address more significant concerns with the proposed definitions. The revised definitions are as follows:

a. *Emission Limitation or Standard and Applicable Requirement.* The 1993 EM proposal defined an ''emission limitation or standard'' as any federally enforceable emission limitation, emission standard, standard of performance or means of emission limitation as defined under the Act. This term is actually a hybrid of several terms used under the Act. The proposed definition stated that an emission limitation or standard may be expressed as a specific quantity, rate or concentration of emissions; as the relationship of controlled to uncontrolled emissions (e.g., control efficiency); as a work practice; as a process or control device parameter; or as another form of design, equipment, operational, or operation and maintenance requirement.

Section 64.2 of the 1993 EM proposal also defined an ''applicable emission limitation or standard'' as any emission limitation or standard subject to the requirements of part 64 including: (1) An emission limitation or standard applicable to a regulated hazardous air pollutant under 40 CFR part 61; or (2) an emission limitation or standard applicable to a regulated air pollutant other than a hazardous air pollutant under section 112 of the Act, for which the source is classified as a major source.

The definition of ''applicable emission limitation or standard'' was closely tied to the applicability provisions of the 1993 EM proposal. For example, the separate treatment of hazardous air pollutant emissions limitations or standards in the definition followed the proposed rule's separate applicability provisions for hazardous air pollutants. Those applicability provisions have been significantly revised in part 64. Commenters raised concerns that the meaning of the term ''applicable emission limitation or standard'' was unclear. The Agency agrees that the proposed definitions of ''applicable emission limitation or standard'' and ''emission limitation or standard'' could be confusing, especially when interpreted in conjunction with the pre-existing definition of ''applicable requirement'' in part 70. The final rule replaces the term ''applicable emission limitation or standard'' with the term ''applicable requirement.'' Part 64 states that ''applicable requirement'' shall have the same meaning as provided under part 70. The Agency made this change in the final rule to avoid any potential confusion and to bring part 64 into closer agreement with the definitions of part 70.

Part 64 retains the basic definition of ''emission limitation or standard'' with several revisions. Several commenters requested clarification on the meaning of ''federally enforceable'' in this definition. The final rule eliminates the phrase ''federally enforceable'' in the definition and defines an emission limitation or standard as ''any applicable requirement that constitutes an emission limitation, emission standard, standard of performance or means of emission limitation * * *'' This adjustment reflects the addition of the term ''applicable requirement'' in the final rule. The term ''applicable requirement'' is used in part 70 permitting to refer to the standards, requirements, terms, and conditions that are contained in the part 70 permit as federally-enforceable requirements. Thus, the reference to ''federally enforceable'' was eliminated because, through the permitting process, all ''applicable requirements'' become federally enforceable.

Additional language in the part 64 definition of ''emission limitation or standard'' clarifies that, for purposes of part 64, the definition of ''emission limitation or standard'' does not include general operation requirements that an owner or operator may be required to meet, such as requirements to obtain a permit, to operate and maintain sources in accordance with good air pollution control practices, to develop and maintain a malfunction abatement plan, or to conduct monitoring, submit reports or keep records. As noted below (see detailed discussion of § 64.2), requirements of this type generally apply to an entire facility. The Agency has specifically excluded such requirements so that otherwise unregulated emissions units are not inappropriately subject to part 64 monitoring requirements.

A number of commenters requested that EPA further narrow the definition of emission limitation or standard so that it would not apply to work practice, design or similar types of requirements. The commenters argued that part 64 monitoring for these types of standards did not make sense and would be redundant. The Agency disagrees to the extent that a control device is used to achieve compliance with these types of standards. As discussed in Section II.B., the final rule applies only to pollutant-specific emissions units which achieve compliance by using a control device. The monitoring is designed to document that the control device is properly operated and maintained. Many work practice, design or similar standards will not apply to these types of units (i.e., with control devices), which addresses many of the commenters' concerns. For units that are subject to such requirements and that do use a control device (see, e.g., 40 CFR 60.692–5, which imposes a ''design'' standard that certain emissions be controlled by a control device with 95 percent design efficiency), the nature of the standard is immaterial to the assessment of whether the control device is properly operated and maintained. The Agency notes that in the example, the NSPS requires the owner or operator to monitor the control device to assure proper operation and maintenance (see § 60.695). Part 64 will act in a similar manner.

b. *Part 70/Part 71 Permit.* The term ''permit'' as defined in the 1993 EM proposal meant any applicable permit issued, renewed, amended, revised, or modified under part C or D of title I of the Act, or title V of the Act. Under the 1993 EM proposal, part 64 would have been implemented through both the part 70 operating permits program and the preconstruction permits programs developed under parts C and D of title I of the Act. Public commenters raised a variety of objections and concerns to this proposed implementation structure. The Agency has responded to these comments in part by limiting part 64 implementation under part 64 to permits covered by title V of the Act.

To reflect this change in the implementation approach, the Agency has replaced the proposed definition of ''permit'' with a definition for a ''part 70 or 71 permit.'' Section 64.1 of the final rule states that ''part 70 or 71 permit'' shall have the same meaning as provided under part 70 (or part 71) of this chapter. The Agency believes this definition is consistent with the goal of bringing part 64 definitions into closer agreement with their part 70 (or part 71) counterparts.

The Agency has also added a related definition in part 64. The definition of a ''part 70 or 71 permit application'' includes any application that is submitted by an owner or operator in order to obtain a part 70 or 71 permit, including any supplement to a previously submitted application. The Agency believes the addition of this definition is necessary because the implementation provisions set forth in § 64.3 of part 64 are connected to the submission of a part 70 or 71 permit application.

c. *Major Source.* The 1993 EM proposal defined the term ''major source'' as including any major source meeting the definition in § 70.2, excluding any hazardous air pollutant (HAP) source included in paragraph (1) of that definition. One commenter requested clarification of why this definition excluded major HAP sources included in the major source definition of part 70. The form of the proposed definition was necessary because the 1993 EM proposal treated HAP requirements separately from other requirements. For HAP requirements, the 1993 EM proposal would have applied to any source required to obtain a part 70 operating permit or a preconstruction permit under part C or D of title I of the Act and not just to ''major sources.'' As discussed below, the applicability provisions of part 64 have been substantially modified in the final rule such that there are no separate applicability provisions for HAP requirements (see Section II.B.). In the final rule, the definition of ''major source'' has been revised to reflect these changes. Part 64 simply states that ''major source'' shall have the same meaning as provided in part 70.

The U.S. Small Business Administration (SBA) submitted for discussion at the September 10, 1996 meeting a proposal to retain, in part 64, EPA's current practice of excluding from major source status those sources whose actual emissions are less than 50 percent of the major source threshold. SBA apparently was referring to EPA's policy issued in January 1995 to establish a two-year (extended until July 31, 1998) transition policy that guides EPA in applying the definition of ''major source'' in part 70. Because part 64 relies on part 70's definition of ''major source,'' SBA's concern is met. As long as that policy remains in effect, it will be relevant to determining applicability under part 64. *See also National Mining Association* versus *U.S. EPA*, 59 F.3d 1351 (D.C. Cir. 1995).

d. Other Part 70 Related Definitions. Section 64.2 of the proposed rule contained a definition for ''potential to emit'' which tracked the language of the part 70 definition of ''potential to emit'' with technical edits to reflect the 1993 EM proposal's focus on emissions units as opposed to the focus on major sources in part 70. The text of the proposed rule did not make it clear, however, that part 70 was the source for the proposed definition. Under part 64, ''potential to emit'' is explicitly defined as having ''the same meaning as provided under part 70 of this chapter, provided that it shall be applied with respect to an 'emissions unit' as defined under this part in addition to a 'stationary source' as provided under part 70 of this chapter.'' Although the text of the definition has been changed, the meaning of ''potential to emit'' in the final rule is effectively the same as in the proposed rule. The Agency made these revisions to clarify the connection of this term with the definitions of part 70.

The 1993 EM proposal defined ''emissions unit'' as any part or activity of a source that emits or has the potential to emit any regulated air pollutant for which an emission limitation or standard had been established. This definition was a modification of the definition of ''emissions unit'' set forth in part 70. The Agency received a variety of public comments on this definition. One commenter recommended using the part 70 definition of ''emissions unit'' in part 64. Several other commenters expressed concern over the use of the phrase ''any part or activity'' in the definition, stating that the definition was not clear as to whether an emissions unit is a single piece of equipment or a group of multiple units located together within a source. In response to these comments, the definition of ''emissions unit'' has been revised in the final rule to have the same meaning as provided under part

70. This approach clarifies potential ambiguity in the definition by relying on the established part 70 definition of the term and brings part 64 into closer agreement with the provisions of the operating permits program thorough which part 64 will be implemented.

The 1993 EM proposal contained a definition of ''permitting authority'' which tracked the language of the part 70 definition of ''permitting authority'' with technical edits to reflect the proposed EM rule's implementation through both title V permitting programs and title I preconstruction permit programs. The text of the proposed rule did not make it clear, however, that part 70 was the source for the proposed definition. In addition, the final rule is not implemented through title I preconstruction permits. The Agency has therefore revised the definition of ''permitting authority'' to have expressly the same meaning as provided under part 70.

3. Definitions Added in the Final Rule

Many of the definitions in § 64.1 of the final rule have been added to reflect changes in the substantive requirements of part 64 monitoring under part 64. These definitions are generally addressed in the detailed discussion of the appropriate substantive sections of the final rule. The following discussion provides a brief overview of some key terms added to the definitions section of the final rule.

The Agency has added definitions for the terms ''monitoring'' and ''data'' to the final rule. The rule defines ''monitoring'' as any form of collecting data on a routine basis to determine or otherwise assess compliance with emission limitations or standards. The rule also includes a non-exclusive list of data collection techniques which may be considered appropriate monitoring under part 64. This list is similar to the list included in § 64.6 of the 1993 EM proposal with minor changes in response to comments on that section. ''Data'' is defined as the results of any type of monitoring or compliance determination method. Some commenters had raised concerns that the use of the term ''data'' in the substantive provisions of proposed part 64 reflected a bias toward instrumental monitoring methods. The Agency believes that by adding these two definitions, the final rule reflects the Agency's intent that a wide variety of information and means of collecting information potentially can be used to satisfy the requirements of part 64.

Definitions for the terms ''exceedance'' and ''excursion'' have been added to the final rule. These terms are closely related. Section 64.1 defines an ''exceedance'' as a condition detected by monitoring which provides data in terms of an emission limitation or standard and which indicates that emissions or opacity are greater than that limitation or standard, consistent with the applicable averaging period. An ''excursion'' is defined as a departure from an indicator range established as part of part 64 monitoring, also as consistent with the applicable averaging period. As discussed above, the 1996 part 64 Draft would have stated that an exceedance or excursion would be considered a deviation in the part 70 compliance certification. This statement has been removed in response to comments that such conditions should not necessarily constitute deviations, especially since some permitting authorities equate a deviation with a violation. See Section II.K.2. of this preamble for additional discussion on the status of excursions for a part 70 compliance certification. The 1996 part 64 Draft also omitted reference to the applicable averaging period. That omission has been corrected in the final rule.

The final definition added to the final rule describes the meaning of a ''predictive emissions monitoring system (PEMS).'' Several commenters to the 1993 EM proposal suggested that a definition for this term should be added to part 64. The Agency agrees with this suggestion and has included an appropriate definition in § 64.1 of the final rule. This definition is included in the final part 64 rule because § 64.3(c) sets forth special criteria for the use of predictive monitoring systems when employed to fulfill part 64 monitoring requirements. The same section also provides special criteria for the use of continuous emission or opacity monitoring systems. Because these latter types of systems are well understood, no explicit definition was considered necessary for purposes of part 64.

B. Section 64.2—Applicability

1. Overview

The applicability provisions in § 64.2 reflect EPA's decision to focus part 64 requirements on units that use control devices to achieve compliance. The types of emission exceedance problems that can arise from poor operation and maintenance of a control device can be severe and represent a significant compliance concern. Moreover, although units with control devices represent a smaller percentage of the overall number of emissions units than other units, these controlled units represent a disproportionate share of the overall potential emissions from all emissions units. By concentrating the requirements of part 64 on these units with control devices, the Agency has focused the rule on units that represent a significant portion of the overall potential emissions regulated under the Act and that are generally most likely to raise compliance concerns.

The Agency notes that the term ''pollutant-specific emissions unit,'' defined in § 64.1, is used in part 64 to clarify that applicability is determined with respect to each pollutant at an emissions unit separately. For example, a coal-fired boiler emitting through a single stack could constitute several pollutant-specific emissions units, such as for particulate matter, SO_2, NO_X, and CO. This term is used throughout the remainder of this document where appropriate.

2. Significant Changes in the Applicability Threshold and Related Definitions

Section 64.2(a) of the final rule requires the owner or operator to apply part 64 to significant pollutant-specific emissions units that use control devices to achieve compliance at major sources subject to part 70 permit requirements. The issues raised with respect to applicability during the development of the rule are described below.

a. *Applicability Options Presented in the 1993 EM Proposal.* The preamble to the 1993 EM proposal solicited comments on five options for determining which emissions units would be subject to enhanced monitoring requirements under part 64. These options set the threshold for applicability based on each unit's potential to emit the regulated air pollutant(s) for which a stationary source is classified as a major source. Option 1 set no percentage threshold, making all units with applicable requirements for the pollutant for which a source is major subject to part 64 monitoring. Options 2, 3, 4, and 5 would have made part 64 applicable to all units that have the potential to emit pollutants in an amount equal to or greater than 10, 30, 50, and 100 percent of the applicable major source definition, respectively. The 1993 EM proposal incorporated Option 3, setting the threshold at 30 percent. Under the proposed rule, the source of an air pollutant which is defined as being major at 100 tons per year would be required to conduct enhanced monitoring at all emissions units within its facility that had the potential to emit 30 tons or more of the pollutant per year.

Applicability under the 1993 EM proposal was based on an emission unit's ''potential to emit.'' The proposal defined this term as an emission unit's maximum capacity to emit a regulated air pollutant under the unit's physical and operational design, taking into account such operating restrictions and control equipment as constitute federally-enforceable limitations. As noted above, the 1993 EM proposal also would have applied only to the pollutants for which a source is major. The 1993 EM proposal solicited comment on the applicability approach in the proposed rule, and specifically noted that one other option would be to use uncontrolled emissions rather than potential to emit to determine part 64 applicability. The Agency noted that such an approach arguably would better address the units with the greatest environmental risk. This request for comment was accompanied by an assertion that in a monitoring rule such as part 64, it may be appropriate to use a different definition of potential to emit than EPA has used for other purposes.

b. *Final Part 64 Applicability Provisions.* In response to the many comments received on the 1993 EM proposal, the Agency modified part 64 to bring about the CAM approach including a somewhat different approach to applicability. The Agency received numerous public comments on the applicability provisions of the 1993 EM proposal. Relatively few commenters supported the Option 3 (30 percent) threshold. Many of the comments critical of Option 3 argued that the benefits of increased pollutant monitoring obtained by covering additional emissions units at the 30 percent threshold was far outweighed by the additional costs and burdens of implementation at that threshold. Most industry and many State and local commenters supported Option 5 or a higher threshold. Many of the commenters also recommended that EPA exempt various types of units, especially uncontrolled units that are subject to design, work practice, or similar operational restrictions. In addition, a number of commenters suggested alternative approaches to determining the applicability threshold of part 64. Industry commenters generally favored the focus of the 1993 EM proposal on the pollutants for which a source is a major, while environmental groups opposed that approach.

The final part 64 retains the basic concept of an applicability threshold as contained in the 1993 EM proposal, but also narrows the focus so that part 64 applies only to those pollutant-specific emissions units that use a control device to achieve compliance with an applicable emission limitation or standard. In addition, units using control devices must have potential pre-control device emissions equal to or greater than 100 percent of the applicable major source definition to be subject to part 64. Since part 64 applies its size threshold only to the proportionally small number of emissions units that use control devices, the number of units required to meet part 64 monitoring requirements is lower than would have been subject to the 1993 EM proposal. The final RIA estimates that part 64 will affect fewer than 27,000 units as compared to the over 35,000 units which EPA had estimated would be affected under the 1993 EM proposal.

For part 64 to apply, § 64.2(a) specifies that a pollutant-specific emissions unit must meet the following three criteria: (1) The unit must be subject to an emission limitation or standard for the applicable regulated air pollutant (or a surrogate of that pollutant); (2) the unit must use a control device to achieve compliance with an emission limitation or standard; and (3) the unit must have ''potential pre-control device emissions'' in the amount, in tons per year, required to classify the unit as a major source under part 70.

i. *Emission Limitation or Standard Criterion.* For the first criterion, the Agency notes that part 64 applies only if an applicable emission limitation or standard applies because the purpose of part 64 is to provide a reasonable assurance of compliance with such requirements. Numerous comments on the 1993 EM proposal supported EPA's position that part 64 should apply only if an underlying applicable emission limitation or standard applies, but many commenters suggested that the final rule should contain explicit language concerning the necessity for an underlying standard to trigger part 64 applicability. The commenters believed inclusion of such language was critical because a part 70 operating permit will be required to include units without applicable requirements, and part 70 permits will be required for sources without any applicable requirements (so-called ''hollow permits''). Their concern was that part 64 could be interpreted as applying to units and sources of this type and that determining compliance with the rule under such an interpretation would be exceedingly difficult. The Agency agrees that the rule should clearly state that part 64 applies only where a federally enforceable emission limitation or standard applies and thus has added this first criterion to the applicability determination. The Agency also notes that the applicability provisions in part 64 include a ''surrogate'' of a regulated air pollutant to address situations in which the emission limitation or standard is expressed in terms of a pollutant (or other surrogate) that is different from the regulated air pollutant that is being controlled. A common example would be emission limits expressed in terms of particulate matter and opacity rather than PM–10. Another example would be an emission limit expressed as a control device operating requirement rather than in terms of the applicable regulated air pollutant.

ii. *Control Devices Criterion.* Second, the final rule applies only to pollutant-specific emissions units that rely on a control device to achieve compliance. The final rule provides a definition of ''control device'' that reflects the focus of part 64 on those types of control devices that are usually considered as ''add-on controls.'' This definition does not encompass all conceivable control approaches but rather those types of control devices that may be prone to upset and malfunction, and that are most likely to benefit from monitoring of critical parameters to assure that they continue to function properly. In addition, a regulatory obligation to monitor control devices is appropriate because these devices generally are not an inherent part of the source's process and may not be watched as closely as devices that have a direct bearing on the efficiency or productivity of the source.

The control device definition is based on similar definitions in State regulations (see, e.g., North Carolina Administrative Code, title 15A, chapter 2, subchapter 2D, section .0101 (definition of ''control device''); Texas Administrative Code, title 30, section 101.1 (definition of ''control device''). The definition is in contrast to broader definitions of ''control device,'' ''air cleaning equipment,'' ''control measure,'' or similar terms included in some States' regulations (see, e.g., Codes, Rules, and Regulations of the State of New York, title 6, chapter III, section 200.1 (definition of ''air cleaning device'' or ''control equipment'')). These broader definitions often include any method, process or equipment which removes, reduces or renders less noxious air contaminants released to the ambient air. Those types of controls could include material substitution, process modification, operating restrictions and similar types of controls. The definition in part 64 relies on the narrow interpretation of a control device that focuses on control

equipment that removes or destroys air pollutants.

Certain NSPS and NESHAP regulations also have targeted definitions of ''control device'' or ''add-on control device'' that apply to the specific type of affected facility covered by the applicable NSPS or NESHAP subpart (see, e.g., 40 CFR 60.581, 60.670, 60.691, 60.731, 61.171, 61.241, 63.161, 63.561, and 63.702). The part 64 control device definition generally is consistent with these prior Agency definitions, but without language targeted to a particular affected facility type.

The Agency notes that EPA's Aerometric Information Retrieval System (AIRS) contains a list of various air pollution control equipment codes that address a wide variety of possible control methods, processes and equipment; this list includes both active control devices and other types of controls. In conjunction with the release of the 1996 part 64 Draft, the Agency placed in the docket (item VI–I–3) a document that reflects EPA's position on which of those equipment codes refer to a ''control device'' as defined in the 1996 part 64 Draft and which refer to other types of controls. The Agency continues to believe that this document provides an appropriate list of the types of equipment which may constitute control devices.

For the final part 64 rule, the control device definition has been revised in response to public comments. In the discussion document accompanying the 1996 part 64 Draft, the Agency solicited comment on the appropriateness of the definition of control device and received numerous comments and requests for additional clarifications. Generally, commenters felt that the control device definition in the 1996 part 64 Draft was overly broad and that additional language was needed to clarify that EPA does not intend the rule to apply to inherent process equipment such as certain types of recovery devices.

The final rule defines a control device as ''equipment, other than inherent process equipment, that is used to destroy or remove air pollutant(s) prior to discharge to the atmosphere.'' Thus, the Agency has specifically excluded inherent process equipment from the control device definition in the final rule. The EPA suggested in the discussion document accompanying the 1996 part 64 Draft a list of three criteria that would be used to distinguish inherent process equipment from control devices:

(1) Is the primary purpose of the equipment to control air pollution?

(2) Where the equipment is recovering product, how do the cost savings from the product recovery compare to the cost of the equipment?

(3) Would the equipment be installed if no air quality regulations are in place? (See letter from David Solomon, EPA, to Timothy J. Mohin, Intel Government Affairs, dated November 27, 1995. Included in the docket as Item VI–C–14.)

The Agency received a number of comments on these criteria, some of which supported including the criteria in the rule and others of which suggested other approaches. Based on the comments received, the final rule defines ''inherent process equipment'' as ''equipment that is necessary for the proper or safe functioning of the process, or material recovery equipment that the owner or operator documents is installed and operated primarily for purposes other than compliance with air pollution regulations.'' If equipment must be operated at an efficiency higher than that achieved during normal process operations in order to comply with applicable requirements, that equipment will not qualify as inherent process equipment. In addition, the control device definition has been revised to include a list of several control techniques that do not constitute ''control devices'' as defined in part 64.

Finally, the definition also makes clear that part 64 does not override definitions in underlying requirements that may provide that certain equipment is not to be considered a control device for pollutant-specific emissions units affected by that regulation. Although not subject to part 64, an example of this type of provision is § 63.111 in subpart G to 40 CFR part 63 (NESHAP requirements for Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations, and Wastewater). The definition in that section states that recovery devices used in conjunction with process vents and primary condensers used in conjunction with a steam stripper do not constitute ''control devices.'' Certain commenters asserted that part 64 should not override these types of existing rules and EPA agrees. The Agency notes, however, that if an emissions unit is regulated for another pollutant, and the control device also is used to comply with a limit that applies to that second pollutant, the equipment will be considered a ''control device'' for the second pollutant unless the standards for the second pollutant also explicitly establish that the equipment is not a control device.

The final rule also includes a definition of a ''capture system'' because the rule requires, where applicable, monitoring of a capture system associated with a control device. The monitoring requirements for control devices extend to capture systems as well because they are essential to assuring that the overall emission reduction goals associated with the control device are achieved. See Section II.C., below. The Agency notes that duct work, ventilation fans and similar equipment are not considered to be a capture system if the equipment is used to vent emissions from a source to the atmosphere without being processed through a control device. For instance, roof vents that remove air pollutants from inside a building but do not transport the pollutants to a control device to reduce or destroy emissions would not be subject to the rule.

The Agency notes that some commenters, especially environmental and other public interest organizations, opposed limiting the applicability of part 64 to emissions units that rely on control devices. They argued that other significant emissions units with other types of control measures, such as low NO_X burners or similar combustion modification controls, should be subject to part 64 requirements.

Low NO_X burner technology and certain other types of combustion control measures are not included in the definition of ''control device'' in the final rule. For most large emissions units that employ such measures, such as utility boilers, separate applicable requirements already require the use of CEMS or similar monitoring for such units. Under part 70, that monitoring will have to be included in the permit and considered in certifying compliance with applicable requirements. Some types of combustion units (e.g., package boilers) that may use low NO_X burner technology do not use the same types of technology used by utility and large industrial boilers. The technology used for many units with automatic combustion control does not provide significant operational flexibility that could afford the owner or operator with an opportunity or incentive to manipulate NO_X control levels. (See docket item A–91–52–VI–A–9) For these types of units, the recordkeeping of regular inspection and maintenance of the low NO_X burners (e.g., annular flow ratio adjustment settings, burner replacement, portable instrument readings, etc.) in combination with periodic checks of emission levels with appropriate test methods, as necessary, are very likely sufficient to ensure that the unit is being operated in a manner

consistent with good air pollution control practices and that the low NO_X technology continues to reduce emissions at least to the level of the standard. The general monitoring requirements in part 70 are adequate to assure that this type of appropriate monitoring is employed.

For these reasons, EPA believes that monitoring for this control technology is best addressed through part 70 periodic monitoring requirements and not through expansion of part 64 to units with these types of control measures. Of course, if there are particular units which raise a significant continuous compliance concern, such as units with an historically poor compliance history, the permitting authority can require more detailed monitoring under the general part 70 monitoring provisions given that the permit must include appropriate monitoring for assuring compliance with the permit. In those cases, permitting authorities may want to consider elements of part 64 as potentially appropriate, but they would not be bound to satisfy each element of part 64.

iii. *Potential Pre-control Device Emissions Criterion.* Finally, for the third criterion for applicability, § 64.2(a) relies on the concept of ''potential pre-control device emissions.'' This term has the same meaning as ''potential to emit,'' except that any emission reductions achieved by the control device are not taken into account, even if the owner or operator generally is allowed to do so under the regulatory definition of ''potential to emit.''

The Agency first notes that numerous commenters expressed objections to the 1993 EM proposal's definition of potential to emit, believing the definition resulted in unrealistically high emissions numbers. The EPA notes that, contrary to beliefs expressed in many of those comments, that definition does take into account enforceable operating hour restrictions, throughput restrictions, control system efficiency factors, and similar enforceable restrictions. The Agency also points out that the same definition has been used in the part 70 operating permits program as well as the part 63 NESHAP general provisions.

The Agency also notes that the majority of commenters did favor the use of potential to emit over uncontrolled emissions because the latter approach would not take into account any emissions reductions achieved through any means. However, the 1993 EM proposal noted that EPA was considering basing applicability on uncontrolled emissions and the potential pre-control emissions approach was suggested subsequently by State and local agencies (see docket items VI–D–42 and 49) during further consideration of part 64 options. As noted in the discussion document accompanying the 1996 part 64 Draft, the Agency agrees with this approach and believes that excluding the assumed efficiency of the control device from the calculation of potential to emit for purposes of part 64 applicability provides an appropriate means of distinguishing between units based on environmental significance. It allows the Agency to distinguish between units based on their true size and based on the degree of control required to achieve compliance. The Agency notes that this approach does take into account all federally-enforceable emissions reductions except for those resulting from control devices (e.g., emission reductions that occur as a result of operating hour or throughput restrictions would be taken into account in determining potential pre-control device emissions).

Many commenters objected to the reliance on potential pre-control device emissions, primarily because the use of the potential pre-control device emissions threshold would result in too many units being subject to the rule. Some commenters noted that the 1993 EM proposal similarly had requested comment on the use of uncontrolled emissions, and that the comments strongly objected to that idea.

The Agency first notes that, contrary to some commenters' assertions, EPA estimates that the final rule will apply to fewer units than the 1993 EM proposal because the final rule only applies to the proportionally small number of emissions units that use equipment meeting the ''control device'' definition. The final RIA estimates that fewer than 27,000 pollutant-specific emissions units will be subject to part 64, whereas the 30 percent option in the 1993 EM proposal would have covered over 35,000 such units. The EPA has also delayed implementation for those units subject to the rule that have the ''potential to emit'' (post-control device) less than the major source threshold. This delayed implementation will reduce the burdens of part 64 on the initial round of part 70 permitting. The Agency feels that these changes should alleviate the commenters' concerns and that further reductions in the number of units to which the rule applies are not appropriate.

The CAM approach is necessarily concerned with significant, controlled units even if the potential to emit after the control device is low. The reason for covering these units is two-fold. First, part 64 monitoring will be designed to detect long-term under-performance of control devices that periodic evaluations such as stack tests may be unable to document. For example, a unit may have the potential to emit 20 tons per year after a control device which is required to operate with a 99 percent control efficiency. The pre-control device potential to emit for that unit is 2,000 tons per year; if the required control device efficiency is 99.9 percent, that figure increases to 20,000 tons per year. If the long-term actual control performance of that device decreases to 95 percent, the actual emissions could increase to 100 or 1000 tons per year, respectively. Part 64 is aimed first at addressing this type of long-term, significant loss of control efficiency that can occur without complete failure of a control device. The second type of problem is short-term complete loss of control. As indicated in some of the comments, for many types of control devices this type of problem could be detected after the fact with monitoring less detailed than part 64. However, the goal of air pollution control is to prevent these types of problems before they occur, if possible, at a reasonable cost. The EPA believes that part 64 in many instances can be designed to provide early indications of control equipment problems that could be addressed prior to such catastrophic failures. For these reasons, EPA believes that the use of pre-control device potential to emit is a rational basis on which to evaluate whether specific units should be subject to part 64.

Some comments on the 1996 part 64 Draft also objected to the potential pre-control device emissions threshold based on the argument that the creation of a new size calculation that source owners or operators must perform to determine applicability will cause confusion and result in additional burdens. The Agency disagrees since owners will simply need to remove the design efficiency of the control device from the calculation of the applicable unit's potential to emit. Potential pre-control emissions will otherwise be calculated in exactly the same way as potential to emit. The two figures will both factor in enforceable operational restrictions, so only the effect of the control device's efficiency, a factor which has to be quantified for determining the standard meaning of ''potential to emit,'' will be treated differently.

Commenters also noted that part 64 would expand the 1993 EM proposal by not limiting applicability to those pollutants for which the source is major. The final rule does limit applicability to

the pollutants for which a pollutant-specific emissions unit would be major except for the emissions reductions assumed to occur as a result of a control device. As explained above, EPA believes that the focus of the rule on the potential to emit of units prior to a control device is an appropriate screening tool to determine which units should be monitored under part 64. For that reason, the focus of the 1993 EM proposal on major pollutants only would be inappropriate. In addition, as some commenters pointed out in response to the proposed rule, the Agency typically does not focus on only the major pollutants even where applicability of a program is focused solely on whether a source is a major source.

Finally, EPA believes it would be irrational to continue to focus solely on the pollutants for which a source is major when the Agency is focusing on units that have installed control devices. For instance, a source could be ''major'' for NO_X with no NO_X control devices (and even no NO_X requirements in an attainment area) but have a unit with the potential to emit 20 tons of particulate matter after a control device that has a rated removal efficiency of 99.9 percent. The post-control particulate potential to emit from this particular emissions unit would be less than the major source threshold of 100 tons/year; however, the precontrol potential to emit of 20,000 tons/year of particulate matter emissions would be greater than the 100 tons/year major source threshold. As noted in the example discussed above, small decreases in efficiency of that control device could lead to actual emission increases significantly above the major source threshold. Thus, while the source in this example may not have the potential to emit particulate matter (taking into account the control device) in amounts sufficient for the source to be classified as a major source for particulate matter, the pollutant-specific emissions unit for particulate matter, not for NO_X, in this example is clearly one which the Agency believes should be subject to part 64.

Other commenters questioned whether the applicability provisions were self-implementing. They argued that unit-by-unit negative declarations would be highly burdensome. The Agency agrees and part 64 does not require that owners or operators justify in a permit application why part 64 is not applicable, or that owners or operators apply for exemptions. However, the Agency notes that the permitting authority can request further explanation as to how a source owner or operator determined that part 64 did or did not apply for any pollutant-specific emissions unit for which there may be an issue about applicability. In addition, an owner or operator that wishes to take advantage of the exemption for certain municipally-owned utility units will have to provide the documentation required to satisfy that exemption (see the following discussion of this exemption).

3. Development of the Exemption Provisions

Part 64 exempts owners or operators with respect to certain emission limitations or standards for which the underlying requirements already establish adequate monitoring for the emission limits being monitored, and with respect to certain municipally-owned utility units.

a. *Exemptions in the 1993 EM proposal.* The 1993 EM proposal established exemptions for the following types of emission limits:

—Emission limitations or standards under the NESHAP program (pursuant to section 112 of the Act), except for standards established in part 61. This exemption reflected the Agency's intent that the provisions of part 63, the MACT standards, will include appropriate enhanced monitoring provisions pursuant to the authority in section 114(a)(3) of the Act.

—Stratospheric ozone protection requirements under title VI of the Act. The type of requirements that apply under that program are significantly different than typical emission limitations or standards, and the appropriate monitoring for such requirements will be handled under regulations implementing those requirements. The exemption is unchanged from the proposed rule but for a technical correction (substituting title VI of the Act for the original reference to section 603).

—Acid Rain Program emission limits under title IV of the Act. The Acid Rain monitoring requirements under 40 CFR part 75 already establish all appropriate compliance assurance monitoring for such requirements. The exemption is unchanged from the proposed rule but for a technical correction (to include emission limits applicable to opt-in units under section 410 of the Act).

—NESHAP standards for asbestos demolition and renovation projects. These sources are exempt under part 70 and are not required to obtain operating permits.

—NSPS standards for residential wood heaters. These sources are also exempt under part 70 and are not required to obtain operating permits.

b. *Exemptions in the Final Rule.* Issues raised by comments on the 1993 EM proposal prompted EPA to include certain additional exemption provisions in the final part 64 rule. The exemptions that were changed or added are:

—Emission limitations or standards under the NSPS program that are proposed after November 15, 1990. This expands on the proposed rule, which provided for only the NESHAP exemption. Commenters suggested that EPA exempt all NSPS, arguing that existing NSPS contain enhanced monitoring requirements. The EPA disagrees that this is the case for all NSPS. Existing monitoring of covered units and sources under some NSPS may be sufficient to meet part 64 requirements; however, the question of sufficiency of any particular monitoring requirement from a non-exempt standard will have to be determined in accordance with the requirements of part 64. Future federal rulemakings, including NSPS rulemakings, will satisfy the monitoring requirements of titles V and VII of the 1990 Amendments (see preamble to 40 CFR part 70, 57 FR 32278, July 21, 1992). The EPA intends to focus on including methods for directly determining continuous compliance in these new federal rulemakings where such methods are feasible. Only where such approaches are not feasible would the Agency consider using an approach similar to the CAM approach in such requirements. Since there will be no gaps in their monitoring provisions, EPA exempts future NSPS as well as NESHAP standards. The Agency notes that this exemption does not apply to State emission limits or standards developed under section 111(d) of the Act.

—Emission limits that apply solely under an emissions trading program approved or promulgated by EPA and emission cap requirements that meet the requirements of § 70.4(b)(12) or § 71.6(a)(13)(iii) are exempt from part 64. This exemption was developed in response to comments received on a provision in the 1993 EM proposal which made certain ''group[s] of emissions units at a major source'' subject to enhanced monitoring requirements. The 1993 EM proposal's preamble suggested that this provision applied to emissions units involved in some form of ''bubbling'' or trading plan within a single facility as well as to fugitive emission points for which compliance is evaluated on a process-wide or facility-wide basis.

The EPA received many comments on the 1993 EM proposal that opposed applying enhanced monitoring to

groups of emissions units. Several industry commenters believed that applying part 64 to groups of emissions units would be too inclusive and would apply enhanced monitoring requirements to emissions units that otherwise would fall below the applicability threshold. Other commenters predicted that applying enhanced monitoring to groups of emissions units would discourage source owners or operators from participating in emissions trading, aggregating, or similar programs. Some industry representatives and State and local agencies also recommended providing an exemption in part 64 for source owners or operators who participate in programs such as RECLAIM in California's South Coast Air Quality Management District.

The final part 64 rule addresses these concerns in a number of ways. First, both emission limits that apply solely under an emissions trading program approved or promulgated by EPA and emission caps that meet the requirements of § 70.4(b)(12) or § 71.6(a)(13)(iii) are explicitly exempt from part 64 under § 64.2(b)(1)(iv) and (v). By their nature, these types of standards require methods to confirm trades or to calculate overall compliance with the cap, taking into account the contribution of emissions from all covered units. These types of emission limits also often cover all emissions units at a facility, including those with extremely low amounts of emissions, those without control devices, and those that are not subject to other applicable requirements. Because of the need to consider the interrelationships among units covered by this type of requirement, the type of monitoring in part 64 would not be appropriate. Instead, the Agency believes that the existing requirements for monitoring compliance with such standards should be followed.

For instance, the requirements for statutory economic incentive programs (40 CFR 51.490—.494) specify the quantification methods that must be included as part of any SIP economic incentive program developed pursuant to sections 182(g)(3), 182(g)(5), 187(d)(3), or 187(g) of the Act. In addition, EPA has proposed revisions to § 70.4(b)(12) to clarify that emission caps must include ''replicable procedures and permit terms that ensure the emissions cap is enforceable and trades pursuant to it are quantifiable and enforceable.'' (59 FR 44460, August 29, 1994). These provisions highlight the need to include as part of any emission trading or cap requirement the appropriate methods for quantifying emissions and assuring that the trade or cap limitation is enforceable. The Agency believes that the imposition of part 64 on these types of standards would not provide any additional benefit.

In addition, other groups of emissions units are generally not subject to monitoring requirements under part 64. Part 64 requirements apply only to individual pollutant-specific emissions units that use a control device to achieve compliance and whose pre-control device emissions of an applicable pollutant are equal to or greater than the amount needed for a unit to be classified as a major source. Groups of emissions units are not aggregated for this determination, so such groups would not be subject to part 64. In addition, fugitive emissions are generally not controlled through the use of control devices, so there is no need for special applicability or monitoring provisions for fugitive emission sources.

—Emission limitations or standards for which a part 70 permit already includes monitoring that is used as a continuous compliance determination method. In these instances, there generally is no need to require any additional compliance assurance monitoring for that emission limitation or standard. There is one exception to using this exemption. In some instances a continuous compliance determination method may be contingent upon an assumed control device efficiency factor. For example, a VOC coating source that includes add-on control equipment that destroys VOC emissions may use an assumed control device efficiency factor for the control equipment together with coating records to calculate compliance with an NSPS requirement. In this example, a monthly calculation generally is made using coating records and an assumed destruction efficiency factor that is based on the last control system performance test. In this example, § 64.2(b)(1)(vi) does not allow the exemption from part 64 because the owner or operator must assure proper operation and maintenance of the control device for the destruction efficiency factor to remain valid. The Agency notes that this position is consistent with the NSPS, which generally require monitoring of the control equipment in addition to the monthly compliance calculation in this type of example. The Agency notes that the monitoring under part 64 does not have to be included or otherwise affect the existing continuous compliance determination method. In the coating example, direct compliance will still be calculated based on the approved continuous compliance method. Part 64 monitoring will be used to document that the control device continues to operate properly and to indicate the need to reestablish the destruction efficiency factor through a control device performance test.

This exemption also raises a question about what constitutes a ''continuous compliance determination method.'' Section 64.1 defines this type of method as a means established in an applicable requirement or a part 70 permit for determining compliance on a continuous basis, consistent with the averaging period for the applicable requirement. The EPA has prepared initial guidance that includes some example of this type of monitoring. (See docket item A–91–52–VI–A–8 for a draft of this guidance.)

The Agency notes that if emission limitations or standards other than the exempt emission limits described above apply to the same pollutant-specific emissions unit, the owner or operator would still be subject to part 64 for that pollutant-specific emissions unit and may have to upgrade the existing monitoring or add other types of monitoring. The Agency believes that for many situations in which both exempt and non-exempt emission limits apply to a particular pollutant-specific emissions unit, the monitoring for the exempt limit may be adequate to satisfy part 64 for the other non-exempt emission limit(s). Section 64.4(b)(4) of the rule recognizes this possibility and allows the owner or operator to meet the obligation to explain the appropriateness of its proposed monitoring by stating that it is proposing monitoring for non-exempt limits that is based on the monitoring conducted for certain types of exempt emission limits.

Examples of situations that may involve both exempt and non-exempt limits for the same pollutant-specific emissions unit include the following. One example would be a pollutant-specific emissions unit that is subject to both a particulate matter limit and enforceable conditions to operate a control device within certain parameters. In this example, if compliance with the parameter conditions is determined by a continuous compliance determination method, that monitoring could be used to provide a reasonable assurance of compliance with the particulate matter limit, provided that the monitoring included all necessary parameters to satisfy § 64.3(a). In contrast, another example of multiple emission limitations or standards could be an emissions unit that is subject to a short

term emission rate limit and an annual throughput limit that has a means for determining compliance with total annual throughput. In this example, demonstrating compliance with the annual throughput limit is unlikely to assure that a control device used to comply with the short term limit continues to perform properly, and the owner or operator may have to use different or supplemental monitoring to satisfy part 64.

As noted above, emission limits established under the Acid Rain Program are exempt from part 64. The Agency expects that the part 75 monitoring required for Acid Rain sources likely will generate the data necessary to comply with part 64 as applied to other standards applicable to the same unit. However, because part 64 requires that CEMS data be reported in terms of the applicable emission limit, the owner or operator may face some additional requirements in order to generate the data in terms of the other non-Acid Rain emission limits that apply (such as a lb/mmBtu SO_2 standard).

—Two exemptions provided for in the 1993 EM proposal have been eliminated in part 64. The 1993 EM proposal included exemptions for NESHAP standards for asbestos demolition and renovation projects and NSPS standards for residential wood heaters. These source categories are exempt under part 70 and are not required to obtain operating permits. Since part 64 explicitly applies only to sources required to obtain a part 70 permit, separate exemptions for these source categories are unnecessary in the final rule.

—In addition to exempting certain emission limitations or standards, the 1996 part 64 Draft also introduced an exemption for small municipal utility emissions units in response to the large number of comments received on this issue during the extended comment period on the 1993 EM proposal (over 80 municipal power utilities submitted comments on this issue). The exemption applies to small (under 25 megawatts) existing municipal utility emissions units that are exempt from the Acid Rain Program and that supply power for sale only in peak demand or emergency situations. As commenters pointed out, these units have historically low usage rates, but, because of their nature, owners or operators cannot accept enforceable restrictions on the operation of these units for any particular year without violating their contractual obligations. Thus, these units usually have extremely high potential to emit values in comparison to actual emissions. In addition, the Agency notes that these units often are owned and operated by small municipal authorities and that the actual emissions from these units are minimal in many cases. The Agency therefore believes that a limited exemption for these units is appropriate.

To qualify for the exemption, the owners or operators of these units must include in their part 70 permit applications documentation showing that the unit is exempt from all of the monitoring requirements in 40 CFR part 75, and showing that the emissions unit is operated only to provide electricity during peaking hours or emergencies. This documentation should consist of historical operating data and contractual information.

The owner or operator must also demonstrate that the emissions unit has low annual average emissions. The rule requires the owner or operator to document that average annual emissions over the last 3 calendar years of operation are less than 50 percent of the amount required to classify the unit as a major source. If less than 3 years of historical data are available, the owner or operator can use such shorter time period that is available as the appropriate look back period.

The Agency chose the 3-year period to be consistent with the time frame used under the Acid Rain Program to define a peaking unit (see § 72.2). The 3-year period used under the CAM approach recognizes the similar circumstances presented by these small municipal power sources. The use of a 50 percent threshold is consistent with EPA's January 1995 potential to emit transition policy setting forth EPA guidance under which sources that have actual emissions well below title V applicability thresholds may avoid title V permitting by documenting those low actual emissions (see docket item A–91–52–VI–I–5 for a copy of this policy). If actual emissions exceed that 50 percent value, then the policy requires a source to obtain an enforceable restriction to reduce its potential to emit below the title V applicability threshold. The Agency believes that the principle behind that policy is equally applicable for purposes of this part 64 exemption. Based on the information supplied in comments submitted by the affected municipal utility companies, EPA believes that the vast majority of the emissions units under 25 megawatts operated at these sources will qualify for this exemption.

In response to the 1996 part 64 Draft, the Agency again received many comments that argued for expansion of the municipal utility exemption to other units which have low actual emissions. For example, the U.S. Small Business Administration submitted for discussion at the September 10, 1996, meeting a proposal (SBA proposal) to exclude entirely from part 64 any unit with emissions between 50 percent and 90 percent of the major source threshold so that the resources that would otherwise be spent on implementing part 64 for those sources could be saved; further, the SBA comments included a recommendation that EPA give partial credit for emission control measures rather than determining applicability based on total potential pre-control device emissions. The SBA proposal stated that this would eliminate possibly thousands of sources that do not need to be covered by part 64 since the reasonable assurance can be obtained through the facilities' own records. A number of commenters specifically expressed their support for the SBA proposal and others stated generally that they were in favor of such an exemption, arguing that any unit that can demonstrate a history of limited usage and an expectation of continued limited usage should be exempted.

The EPA disagrees with the concept of using actual emissions as the overall basis for part 64 applicability or as the basis for expanding significantly the municipal utility exemption. First, actual emissions can vary with changes in production. More importantly, for units with control devices, calculations of actual emissions necessarily rely on assumptions about on-going performance that part 64 is intended to verify. Further, to assure that units remain under the major source threshold is not the goal of part 64, but, instead, the goal of part 64 is to assure that sources meet all applicable requirements. Finally, because the types of sources to which commenters referred are unlikely to meet the control device applicability criterion of the final rule, the Agency feels even more strongly that the final rule will not subject small units to inappropriate monitoring. The Agency notes, however, that such units will remain subject to the monitoring requirements in part 70, and may have to adopt new or modified monitoring to comply with those requirements, even though part 64 does not apply.

4. Hazardous Air Pollutant Requirements

Under the 1993 EM proposal, part 64 would have applied to all emission limitations or standards established under 40 CFR part 61 at any source that is required to obtain an operating permit under part 70. The proposed rule contained an exemption, retained in

modified form in the final part 64 rule, for all hazardous air pollutant emissions standards promulgated pursuant to section 112 of the Clean Air Act except for those standards established in part 61 prior to the 1990 Amendments to the Act.

After receiving substantial public comment on the applicability of part 64 to hazardous air pollutants, the Agency has significantly modified its approach to HAPs under part 64. Hazardous air pollutant sources are no longer a separate category subject to a different applicability test. Instead, hazardous air pollutant emissions limitations and standards are treated the same as those for criteria air pollutants. Thus, a hazardous air pollutant-specific emissions unit is subject to part 64 only if it meets the applicability criteria set forth in § 64.2(a).

This approach is consistent with the Agency's overall goal of streamlining part 64. The EPA believes the final part 64, in conjunction with other regulatory provisions, provides for sufficient monitoring of hazardous air pollutant sources to both satisfy the statutory enhanced monitoring mandate and to meet the special concerns associated with regulating pollutants of this type. In addition, units and sources which do not meet the part 64 applicability threshold will still be subject to part 61 compliance monitoring and, if applicable, part 70 monitoring. For those units, EPA considers such monitoring sufficient to address the special concerns of regulating hazardous air pollutants.

With respect to emissions units subject to new hazardous air pollutant standards under amended section 112 of the Act, EPA will include appropriate monitoring requirements as part of those new hazardous air pollutant standards. Since part 64 monitoring for these standards would be needlessly duplicative, such standards are covered by the exemption in § 64.2(b)(1)(i). This approach is consistent with EPA's statement in the July 21, 1992 preamble to 40 CFR part 70 that all future rulemakings will have no gap in their monitoring provisions (see 57 FR 32278).

C. Section 64.3—Monitoring Design Criteria

Section 64.3 contains the design criteria for satisfying part 64. The selection and design of monitoring have undergone revision in the final rule. Some of these revisions were necessary to conform these provisions to applicability and implementation requirements under the final rule. Others have been made in response to public comments on the monitoring design and selection requirements in the 1993 proposed EM rule and subsequent drafts of part 64. These revisions reflect both the objective of providing a reasonable assurance of compliance with applicable requirements at lower cost than the 1993 proposed EM rule and the Agency's goal of developing a more simplified structure for part 64. The following section describes the specific revisions to these provisions and the Agency's rationale for making these changes.

1. General Criteria

a. *Overview.* The general purpose of the monitoring required by part 64 is to assure compliance with emission standards through requiring monitoring of the operation and maintenance of the control equipment and, if applicable, operating conditions of the pollutant-specific emissions unit. A basic assumption of EPA air pollution control rulemaking, at least under technology-based programs such as the NSPS program, is that an emission limit should be established at a point where a well operated and maintained source can achieve the limit under all expected operating conditions using control equipment that has been shown through a performance test to be capable of achieving the emission limit. This demonstration through a performance test is conducted under conditions specified by the applicable rule or, if not specified, generally under conditions representative of maximum emission potential under anticipated operating conditions (generally, but not always, at full load). Logically, therefore, once an owner or operator has shown that the installed control equipment can comply with an emission limit, there will be a reasonable assurance of ongoing compliance with the emission limit as long as the emissions unit is operated under the conditions anticipated and the control equipment is operated and maintained properly. This logical assumption is the basis of EPA standard-setting under the NSPS program and serves as the model for the CAM approach as well.

For example, under 40 CFR part 60, subpart NN, Phosphate Rock Plants, the standard for particulate matter is determined through Method 5 testing. The final preamble noted that certain commenters believed that the particulate emission limits ''were too stringent to be achieved on a continuous basis.'' Upon review of the information, EPA revised the standard because its evaluation ''indicated that the proposed emission limits . . . could not be achieved continuously under all operating conditions which are likely to occur.'' 47 FR 16584 (April 16, 1982). EPA then stated that ''(a)s required by the Clean Air Act, the promulgated . . . emission limits are based on the performance of the best available control equipment on the worst case uncontrolled emission levels. The best control systems have been demonstrated to be continuously effective. Therefore, there should be no problems achieving the standards if the control equipment is properly maintained and operated.'' Id. at 16585. This example documents the close nexus of first demonstrating through a performance test that the installed control equipment is capable of achieving the standard on a continuous basis and then properly operating and maintaining that equipment so as to provide a reasonable assurance of continuous compliance with the standard.

In EPA's Response to Remand in *Portland Cement Association* v. *Ruckelshaus* (see docket item A–91–52–VI–I–11), EPA further emphasized, in its discussion on opacity, the important relationship between proper operation and maintenance and attainment of the standards. The Agency stated, ''[T]he opacity standards and maintenance requirements were both promulgated, and work in tandem to guarantee that proper maintenance and operation of pollution control equipment, the sine qua non of continuous compliance with emission limits, can in fact be required and monitored.'' (Response to Remand, p. 87.) EPA discussed the fact that opacity standards provide enforcement agencies with a convenient indicator of whether pollution control devices are being properly operated and maintained, and therefore whether the standards are being met. (Response to Remand, p. 27–28.)

These examples point to the underlying assumption that there is a reasonable assurance of compliance with emission limits so long as the emission unit is operated under the conditions anticipated and the control equipment that has been proven capable of complying continues to be operated and maintained properly. In most cases, this relationship can be shown to exist through the performance testing without additional site-specific correlation of operational indicators with actual emission values. The monitoring design criteria in § 64.3(a) build on this fundamental premise of the regulatory structure.

Thus, § 64.3(a) states that units with control devices must meet certain general monitoring design criteria in order to provide a reasonable assurance

of compliance with emission limitations or standards for the anticipated range of operations at a pollutant-specific emissions unit. These criteria mandate the monitoring of one or more indicators of the performance of the applicable control device, associated capture system, and/or any processes significant to achieving compliance. The owner or operator shall establish appropriate ranges or designated conditions for the selected indicators such that operating within the established ranges will provide a reasonable assurance of compliance for the anticipated range of operating conditions. The requirement to establish an indicator range provides the objective screening measure to indicate proper operation and maintenance of the emissions unit and the control technology, i.e., operation and maintenance such that there is a reasonable assurance of compliance with emission limitations or standards. Monitoring based on indicator ranges that establish expected operating conditions and the proper functioning of control technology should take into account reasonably anticipated operating conditions and the process and pollution control device parameters that significantly affect emission control performance. The Agency notes that monitoring which fails to take into account significant process or control device parameters is unlikely to provide the reasonable assurance of compliance with emissions limitations or standards. The Agency does not expect that such parameters would normally include records of regular maintenance practices (e.g., periodic inspection and replacement of parts); these records may or may not be addressed in separate permit conditions relative to part 70 requirements. The Agency also emphasizes that a failure to stay within the indicator range does not automatically indicate a failure to satisfy applicable requirements. The failure to stay within an indicator range (over the appropriate averaging period, as discussed below) does indicate the need for the owner or operator to evaluate and determine whether corrective action is necessary to return operations within design parameters, and to act upon that determination as appropriate.

The use of operational data collected during performance testing is a key element in establishing indicator ranges; however, other relevant information in establishing indicator ranges would be engineering assessments, historical data, and vendor data. Indicator ranges do not need to be correlated across the whole range of potential emissions. Criteria developed in the design of the control equipment for the emissions unit may be used in establishing operating indicator ranges. For example, the engineering specifications for a venturi scrubber installed to control particulate emissions from an affected unit may include design operational ranges for liquid flow rate and pressure drop across the venturi. Assume for this simplified example that the scrubber design conditions are intended to achieve the desired emission reduction for uncontrolled pollutant rates that correspond to 120 percent of the affected unit's process design rate. The results of a performance test during which the scrubber is operated within these design conditions and the process is operated at conditions representative of high load (near 100 percent of process design rate) would be used to confirm that operating within the design conditions, the design ranges for the liquid flow rate in conjunction with the pressure drop across the venturi, achieves the emission reduction desired and provides a reasonable assurance of compliance across the anticipated range of process conditions for ongoing operation.

Review of historical monitoring data may also be used in defining an indicator range that provides a reasonable assurance of compliance with emission limits. Consider the example of a process dryer equipped with a low-energy wet scrubber for particulate matter control. The scrubber exhaust gas temperature is indicative of adequate water flow (as a result of the heat exchange between the dryer effluent stream and the scrubber water). However, since the inlet scrubber water temperature is affected by ambient temperature, the resulting scrubber outlet temperature will be affected by ambient conditions. Since the scrubber outlet temperature will vary somewhat as a result of ambient temperature, it makes sense to consider historical data from different seasons of the year when establishing the indicator range (maximum allowable exhaust temperature). In other words, if the performance test were conducted in the spring, one should also consider the historical data from the summer months (when the exhaust temperature would be expected to be slightly higher) when establishing the indicator range.

b. *Possible Monitoring Methods.* Section 64.4(a)(2) of the 1993 proposed EM rule stated that an enhanced monitoring protocol could include existing, modified, or new monitoring systems. It also contained a list of possible monitoring methods which could satisfy the rule. The basic elements of this subsection have been moved in the final rule to the definition of ''monitoring'' in § 64.1. The Agency has made several technical changes to the list of monitoring methodologies in response to comments received. See Section II.A. and the Response to Comments Document for further discussion.

c. *Indicator Ranges or Designated Conditions.* Sections 64.3(a)(2) and (3) of the final rule require the owner or operator of an affected pollutant-specific emissions unit to establish ranges or designated conditions of the indicators to be monitored. These ranges (e.g., minimum to maximum parameter value) or conditions (e.g., specific fuel or raw material type or control device adjustment) must be established at a level where the monitoring can assess whether there is a reasonable assurance of compliance with applicable requirements.

The addition of indicator range requirements to the general monitoring design criteria serves the objectives of part 64 and provides the permitting authority and the owner or operator of an affected source with information about the operation and maintenance of control measures in order to address any problems with that operation and maintenance before an emissions unit fails to comply with applicable requirements. An excursion from an indicator range or designated condition indicates a potential problem in the operation and maintenance of the control device and a possible exception to compliance with applicable requirements. The excursion signals, at a minimum, that the owner or operator should take appropriate corrective action to return operations within the established ranges. However, an excursion from an indicator range does not necessarily constitute a failure to comply with the underlying emissions limitation or standard. See Section II.D. below for further discussion on the degree of documentation required to establish indicator ranges under the final rule.

Sections 64.3(a)(3)(i)-(iv) state that ranges may be set as follows: established as a single maximum or minimum value if appropriate or at different levels that vary depending on alternative operating conditions; expressed as a function of process variables; expressed as maintaining the applicable parameter in a particular operational status; or expressed as interdependent between more than one indicator. These sections also provide examples of how such different forms of ranges might be employed. The description of what type of indicators and indicator ranges may

be employed under part 64 is designed to have a great deal of flexibility. This allows owners or operators to develop indicators and ranges that are most appropriate for their affected emissions units, so long as the basic design criteria of part 64 are met. The Agency is also developing guidance materials that will provide more specific examples of the various forms indicator ranges may take.

d. *Control Device Bypass.* Another monitor design requirement in the final rule addresses the possibility of control device bypass. Section 64.3(a)(2) requires that the monitoring be designed to detect any bypass of a control device or capture system, if such bypass can occur based on the design of the pollutant-specific emissions unit. The Agency believes this requirement is necessary under the CAM approach. Only pollutant-specific emissions units which use control devices to achieve regulatory compliance are subject to part 64. Part 64 monitoring generally will consist of monitoring parameters critical to the operation of those control devices. The monitoring will not be able to provide a reasonable assurance of compliance with applicable requirements if air pollutant emissions are potentially circumventing the control devices and/or capture systems being monitored. The Agency has therefore added this requirement to ensure that no emissions are bypassing the control device or capture system.

The Agency notes that certain comments on the 1996 part 64 Draft objected to this requirement. One objection was that it could be read to require monitoring of ''bypass'' that involves routine recycling of vent streams to a process where the control device is used as a backup in case such process recycling cannot occur. The final rule adds the phrase ''to the atmosphere'' to clarify that only bypasses which result in discharge to the atmosphere require monitoring. Another concern was that whether bypass monitoring should be required is often negotiated as part of underlying rulemakings and this requirement could undo agreements reached on those underlying rules. The Agency has added a provision to clarify that bypass monitoring is not required if an underlying rule specifically provides that it is not required for certain operations or units. Finally, a concern was raised that certain underlying rules provide for design features that obviate the need for monitoring (such as the use of locking car seals). The final rule requires bypass monitoring only if the bypass can occur based on the unit's design. Where features such as locking car seals are used, the design of the unit effectively prevents bypass and thus monitoring would not be required.

e. *Process and Capture System Monitoring.* Commenters on the 1996 part 64 Draft also objected to the requirement that the monitoring include process monitoring if necessary to assure proper operation and maintenance of the control device. The final rule retains this requirement, but the language has been rephrased to clarify that process monitoring must be conducted only as necessary to document that the control equipment is being operated properly. The simplest example would be throughput monitoring to assure that the design capacity of the control equipment is not exceeded. The Agency believes that this type of monitoring is essential to assuring that the control equipment is used in accordance with its design and in a manner that will provide a reasonable assurance of compliance.

Similarly, some commenters objected to the monitoring of capture systems. The Agency believes that this monitoring is essential for the same reasons as bypass and process monitoring may be critical to assuring proper operation and maintenance of control equipment and providing a reasonable assurance of compliance with emission limits. If emissions are not properly captured, those emissions will be released uncontrolled. That result likely would constitute a significant compliance problem even if the control equipment itself was being operated and maintained properly. It is essential that the emissions which a control device is supposed to be controlling are in fact sent to the device for control. Thus the Agency believes that assuring that the capture system is properly operated and maintained is also essential.

f. *Fugitive Emissions Monitoring.* Under the 1993 EM proposal, fugitive emission points for which compliance is evaluated on a process-wide or facility-wide basis were potentially subject to part 64 enhanced monitoring requirements. Section 64.4(d) of the proposed rule would have established enhanced monitoring protocol requirements for such fugitive emissions points. Many commenters raised objections to these provisions, arguing that § 64.4(d) required either burdensome monitoring of emissions from each fugitive emissions point or the use of costly monitoring devices to monitor fugitive emissions. The Agency does not necessarily agree with these comments, noting that proposed § 64.4(d) was intended to allow for cost-effective multi-point monitoring at affected fugitive emissions sources. The final rule, however, applies only to those emissions units for which emissions are vented to a control device. By definition, fugitive emissions are those emissions which cannot reasonably be vented through a stack, chimney, vent, or similar opening and thus will not be subject to part 64. Since there is no need for detailed fugitive emissions monitoring requirements under the final rule, the provisions in proposed § 64.4(d) have been eliminated.

2. Performance and Operating Criteria

The final part 64, like the 1993 EM proposal, requires that part 64 monitoring be subject to minimum performance specifications, quality assurance and control requirements, monitoring frequency requirements, and data availability requirements. These requirements assure that the data generated by the monitoring under part 64 present valid and sufficient information on the actual conditions being monitored. The final rule includes a series of performance and operating design criteria in §§ 64.3(b) through (d). The Agency received substantial public comment on the performance and operating criteria of the 1993 EM proposal, which were contained in a series of four appendices. Many commenters raised concerns that the organization of the appendices was confusing. A number of commenters suggested that the appendices required certain monitoring options to achieve inapplicable specifications or did not provide adequate guidance on the requirements for non-instrumental monitoring options. Commenters also raised a number of concerns specific to individual requirements. Finally, a great many commenters argued that the reliance on detailed specifications in the appendices which focused on the use of certain monitoring methodologies, such as CEMS, precluded the use of more cost-effective alternative methodologies, creating a strong bias for the use of continuous emission monitoring methodologies.

The Agency agrees with a number of those comments and has substantially revised the performance and operating criteria in the final rule to address the concerns they raised. Overall, these requirements have been greatly streamlined and simplified. There are no appendices to the final rule delineating more detailed performance and operating criteria. To assure consistency with existing monitoring programs, the performance criteria in the final rule also reflect other federal monitoring requirements, such as the NSPS general provisions in 40 CFR part

60 and the NESHAP general provisions in 40 CFR part 63. The following discussion addresses each of the key performance and operating criteria in the final rule.

a. *Data Representativeness.* Section 64.3(b)(1) of the final rule requires that the monitoring proposed by the owner or operator include location and installation specifications (if applicable) that allow for the obtaining of data which are representative of the emissions or parameters being monitored. Although this provision describes no specific tests for monitoring plan acceptability, it does establish an objective duty to insure that the data collected are representative of the operations being monitored. This provision is similar to the analogous requirements included in appendix B of the 1993 EM proposal. It is also analogous to the general monitoring provisions applicable to all monitoring under the NSPS program in § 60.13. The Agency has added the phrase ''if applicable'' to clarify that noninstrumental monitoring approaches may not require location or installation specifications.

The 1993 EM proposal would have required owners or operators to ''[s]atisfy applicable performance, equipment, installation and calibration gas specifications in accordance with the specifications and procedures provided in appendices A and B of this part.'' The appendices then required all enhanced monitoring protocols to satisfy generally applicable performance specifications including relative accuracy requirements; maximum levels of calibration error; measurement span requirements; response time requirements; measurement technique procedures; and requirements for equipment design, installation, and location. Many commenters observed that the high level of specificity required in the proposed appendices would limit the types of monitoring protocols that could be approved, while many other commenters argued that the performance and operating requirements were too subjective when applied in the context of demonstrating compliance with the 1993 EM proposed rule's general monitoring requirements. The Agency believes that such detailed requirements are unnecessary for the type of monitoring that is required to satisfy the final rule, but does believe that the general obligation to assure that representative data are obtained is necessary in part 64 just as it is in other programs such as NSPS.

b. *Verification of Operational Status.* Section 64.3(b)(2) requires verification procedures to confirm the initial operational status of new or modified monitoring equipment. These requirements specify that the owner or operator must consider manufacturer requirements or recommendations for installation, calibration and start-up operation. Owners or operators must provide documentation where the manufacturer's procedures are not followed. The Agency notes that under the NSPS program such manufacturer requirements and recommendations must be followed. However, because of the breadth of part 64 applicability, the Agency believes that the more flexible language in § 64.3(b)(2) is appropriate, especially given that the submittal requirements in § 64.4 will require that the owner or operator document the changes it proposes.

Some comments on the 1996 part 64 Draft stated that the requirements to verify operational status were overly burdensome given that many units will rely on existing monitoring to satisfy part 64. The final rule clarifies that verification of operational status is required only for units with new or modified monitoring.

c. *Quality Assurance and Control.* Section 64.3(b)(3) of the final rule requires quality assurance and control practices which are ''adequate to ensure the continuing validity of the data.'' This language ensures that monitoring under part 64 will have to include adequate procedures to document that the monitoring remains operational and can provide suitable readings for the purpose of measuring changes in control performance. Satisfying this general design criterion should not be confused with the detailed quality assurance provisions required for monitors that are used to determine direct emission limit compliance, such as appendix F to part 60. The 1993 EM proposal generally would have required compliance with appendix F for CEMS or comparable quality assurance requirements for other monitoring approaches. Numerous commenters expressed concerns about the burdens of quality assurance under the proposed EM rule. They pointed out several instances in the proposed appendices that appeared to establish presumptions of daily calibrations for all types of enhanced monitoring protocols or appeared to require overly frequent reverification of parametric correlations.

In contrast, the focus of the final rule's quality assurance requirements is on the minimum degree of ongoing quality checks that are necessary to rely on the data for purposes of indicating whether the unit remains in compliance and whether corrective action is necessary. The Agency recognizes that many types of monitoring which satisfy the final rule will not be based on the type of sophisticated equipment that is prone to calibration drift and loss of data quality over time, and the revised quality assurance provisions of the final rule reflect this understanding. The required level of quality assurance differs from certain existing quality assurance procedures such as appendix F of 40 CFR part 60 for a CEMS. With respect to a CEMS, the general requirements for assuring ongoing data quality that are contained in 40 CFR 60.13 and the performance specifications in appendix B of part 60 (such as zero and span checks) provide adequate quality control checks for the purpose of using the CEMS to indicate control performance for providing assurance of compliance. This approach of requiring only limited quality assurance is followed under the NSPS where a CEMS is not used as the compliance test method for direct continuous compliance monitoring. For types of monitoring other than CEMS, ongoing quality control measures must be adequate to ensure that the monitoring remains operational and can provide readings suitable for the purpose of measuring changes in control performance that indicate possible exceptions to compliance. An example of this type of requirement is the quarterly recalibration requirement in § 60.683(c) for wet scrubber parameter monitoring at wool fiberglass insulation manufacturing plants.

Again, the final § 64.3(b) directs owners or operators to consider manufacturer requirements or recommendations in developing quality assurance practices, and § 64.4 requires the owner or operator to document any changes in recommended quality assurance practices. The permitting authority and others can then evaluate the proposed procedures during the permitting process.

d. *Frequency of Monitoring.* Section 64.3(b)(4) of the final rule establishes the general criteria for monitoring frequency, data collection procedures (such as manual log entry, strip chart, or computerized collection procedures), and data averaging periods, if applicable to the proposed monitoring. The final rule requires that the monitoring frequency (including associated averaging periods) be designed to obtain data at such intervals that are, at a minimum, commensurate with the time period over which an excursion from an indicator range is likely to be observed based on the characteristics and typical variability of the pollutant-specific emissions unit (including the control device and associated capture system).

In addition, the final rule specifies minimum data collection frequency for pollutant-specific emissions units in accordance with their potential to emit. For ''large'' pollutant-specific emissions units (i.e., those units with the potential to emit the applicable pollutant emitted in an amount equivalent to or in excess of the amount established for classification as a major source), the monitoring frequency generally must satisfy a design criterion of four or more data values equally spaced over each hour of operation. This minimum data collection frequency is consistent with the frequency established by the Agency for continuous monitoring systems. Note that a permitting authority may reduce this minimum data collection frequency upon submission and approval of a request prepared by the owner or operator, and the rule provides a non-exclusive list of situations in which less frequent monitoring of certain parameters may be warranted. Other pollutant-specific emissions units are subject to a less frequent data collection requirement but some data must be collected for every unit subject to this rule at least once per day. The final rule thus sets a monitoring frequency standard appropriate to the focus on detecting changes in control device performance which could indicate possible noncompliance and for which corrective action is appropriate.

For example, many types of control devices are subject to rapid changes in performance and thus the frequency design criterion could result in frequent, near continuous collection of parametric data that are subsequently averaged over an appropriate period of time. Many NSPS subparts require continuous parametric control device data, which are then averaged over an appropriate interval (often consistent with the required minimum time for conducting a compliance test). Recent NESHAP have required control device parameter monitoring for direct compliance purposes. In these instances, a daily average of continuous data (i.e., data recorded at least every 15 minutes) is often used (see, e.g., § 63.152(b)(2)). For some control devices, the intervals between data collection points may be increased. The Agency is in the process of developing guidance for part 64 implementation, including example monitoring approaches. The guidance will indicate how the frequency of monitoring, data collection procedures, and averaging of data points can vary based on the type of emissions unit and the control device involved.

e. *Data Availability.* The 1996 part 64 Draft rule included a presumptive minimum data availability of 90 percent for the averaging periods in a reporting period. The final rule does not include such a presumptive requirement opting instead for affording the source owner or operator and the permitting authority flexibility in establishing appropriate site-specific conditions. Further, the final rule maintains the general duty requirement in § 64.7 that the owner or operator shall maintain and operate the monitoring at all times the pollutant-specific emissions unit is operating except for periods of monitoring malfunctions, associated repairs, and required quality assurance or control activities (such as calibration checks and (if applicable) required zero and span adjustments). This section of the final rule also requires that the owner or operator shall use all the data collected during all other periods in assessing the operation of the control device and associated control system. Under the savings provisions of § 64.10 of the final rule, source owners or operators must satisfy any existing data availability requirement established for monitoring associated with a particular emission limitation or standard.

The 1993 EM proposal would have required that an enhanced monitoring protocol satisfy any minimum data availability requirement that is applicable to the monitoring under a separate applicable emission limitation or standard pursuant to part 60 or 61 of this chapter. Where no existing data availability requirement would have applied, the proposed rule would have required the enhanced monitoring protocol to satisfy a data availability requirement that reflected obtaining quality-assured data for all emissions unit operating time periods excluding a fixed percentage of operating time that the owner or operator justified to the permitting authority as necessary to conduct quality assurance procedures. The preamble to the proposed rule stated that the only acceptable downtime under this requirement would be the time necessary to perform quality assurance testing and routine maintenance. The primary concern expressed in public comments on the data availability requirement was that the default requirement failed to take into account the likelihood that some repairs of instrumental components would be necessary even if the owner or operator performed all routine maintenance as appropriate. The Agency believes that the general duty requirement in the final rule effectively addresses the commenters' concerns, while still assuring that the owner or operator is responsible for collecting data at all required intervals, except where downtime is necessary to conduct required quality assurance or to respond to malfunctions that could not reasonably have been prevented.

A number of comments on the 1996 part 64 Draft objected to the 90 percent data availability presumption. Many pointed to a number of applicable requirements in which EPA has used 75 percent as the required minimum data availability. Others argued that EPA failed to present any data to document the reasonableness of the presumption. The Agency agrees with some of the commenters that a presumptive minimum data availability requirement may not be not generally applicable; although, the general obligations to operate the monitoring at all times with only specific exception periods and to collect and use all the data for reporting purposes are universal. The final rule reflects this position and allows the source owner or operator and the permitting authority the flexibility to specify a separate minimum data availability if justified or required under a separate rule.

3. Special Considerations for CEMS, COMS and PEMS

One method of assessing control performance is to calculate emission (or opacity) rates directly in order to track trends in emissions (or opacity) that document decreased control effectiveness. This type of monitoring could include a continuous emission or opacity monitoring system (CEMS or COMS) or a predictive emission monitoring system (PEMS) in which various process and control parameters are evaluated to predict emissions. (Where this type of monitoring is specified by the applicable standard to be used to determine compliance with an emission standard or limitation on a continuous basis, the requirements of part 64 do not apply to that emission standard or limitation. *See* § 64.2(b)(1)(vi).)

The EPA believes that these types of monitoring are preferable from a technical and policy perspective as a means of assuring compliance with applicable requirements because they can provide data directly in terms of the applicable emission limitation or standard. Therefore, where such systems are already required, § 64.3(d)(1) mandates that the design of the monitoring under part 64 incorporate such systems. This means that source owners and or operators whose emission units have had CEMS, COMS, and/or PEMS imposed by underlying regulations, emissions trading programs, judicial settlements,

or through other circumstances must use those CEMS, COMS, and/or PEMS when complying with part 64 for those emissions units. Even where the use of such monitoring is not mandated, the use of any of these types of systems in accordance with general monitoring requirements and performance specifications (or comparable permitting authority requirements if there are no requirements specified for a particular system) will be sufficient for a CEMS, COMS or PEMS to satisfy generally the design criteria in § 64.3(a) and (b).

One exception to this general rule is that if a COMS is used as a control performance indicator, and both a particulate matter and opacity standard apply, the monitoring will have to include an indicator range satisfying § 64.3(a)(2) and (3). Comments received in response to the 1996 part 64 Draft included the suggestion that COMS not be subject to the requirement to establish indicator ranges. The Agency has decided to retain this requirement. A CEMS or PEMS will provide data in terms of the applicable pollutant and therefore the process of identifying and reporting exceedances serves the same purpose as an indicator range. For assuring compliance with an opacity standard, a COMS also achieves this objective. However, depending on the type of control equipment being used and the design of an emissions unit (especially stack diameter), opacity standards are often established at a level which represents a likely significant exceedance of the particulate matter standard. In those circumstances, an opacity level below a required opacity standard would be more appropriate as a CAM indicator. Therefore, the use of a COMS may require an appropriate indicator range to be established that is different than the applicable opacity standard. The Agency notes that the averaging period for such an indicator range would not necessarily have to be consistent with the typical averaging time of an opacity standard (i.e., six minutes).

The final special design criterion for a CEMS, COMS or PEMS is to design the system to allow for reporting of exceedances. Again, in many cases, the reporting requirements for exceedances (or excess emissions) will already be established in existing requirements. However, in some cases the owner or operator, prior to implementing part 64, will not have continuous monitoring associated with an applicable emission limit, and the underlying regulation may not specify an appropriate time period for averaging data to report excess emissions. For example, this situation could arise in the example provided above for a part 75 Acid Rain CEMS being used to monitor compliance with a SIP limit. In this circumstance, the owner or operator will have to design the system to include an appropriate period for defining exceedances consistent with the emission limitation or standard. If the underlying applicable requirement does not require use of a specific averaging period, the averaging period should be designed using the same criteria as used for other part 64 monitoring under § 64.3(b)(4).

There was a concern about a perceived bias towards continuous emission monitoring methodologies in many public comments on the monitoring design and selection provisions of the 1993 EM proposal. In addition, many comments supported the notion that existing monitoring should be used wherever possible to reduce the burdens of part 64. Section 64.3(d) addresses both of these comment areas. It emphasizes the use of existing monitoring where that monitoring on its face is able to meet the part 64 design criteria, but it clarifies that the rule does not mandate the use of CEMS in situations where such monitoring is not already required. See also Section II.D. below which discusses in further detail the potential use of existing monitoring to satisfy part 64.

Stakeholders commented that the 1996 part 64 Draft rule did not address procedures for approving alternatives to CEMS or COMS as per the procedures specified in the general provisions of 40 CFR parts 60, 61, and 63. The Agency already has procedures for documenting, reviewing, and approving alternatives to performance test methods and monitoring procedures. Part 64 need not address these procedures. The Agency recommends that source owners or operators wishing to pursue alternatives to CEMS or COMS follow existing alternative methods processes.

4. Monitor Failures

Section 64.4(g) of the 1993 EM proposal would have provided a defense to violations of the data availability requirement where an interruption of the normal operation of an enhanced monitoring protocol was the result of a monitor failure or malfunction. This section would have operated in conjunction with proposed § 64.5(e) to establish general notification and corrective action requirements in response to monitor failures and malfunctions. The proposed rule would have provided a defense to data availability violations where the following criteria were met: The monitoring failure was the result of a sudden and unforeseeable malfunction; the monitoring systems and procedures had been properly operated and maintained prior to and up to the time of the malfunction; and the owner or operator took all reasonable steps to minimize the period the monitoring system was inoperative.

This section has been eliminated in the final rule. The Agency does not believe that there is a need for a data availability violation defense in part 64. The final rule does not require that the permit establish a specific data availability requirement. Rather, the owner or operator is under a general duty to operate the monitoring at all required intervals whenever the emissions unit is operating. The only exception to this duty is if the inoperation of the monitoring is caused by a monitor malfunction, associated repairs or required quality assurance or control activities. Monitor malfunctions are limited to those breakdowns which occur as a result of a sudden, infrequent, and not reasonably preventable failure of the monitoring to provide valid data. Monitoring failures that are caused in part by poor maintenance or careless operation are not considered malfunctions. This approach is similar to the malfunction defense included in the proposed rule, but does not entail the elaborate procedural elements of the proposed rule. To the extent a particular data availability requirement cannot be achieved for reasons that are no fault of the owner or operator, EPA believes that the proper use of oversight discretion can account for those situations.

D. Section 64.4—Submittal Requirements

Section 64.4 of the final rule outlines what information the owner or operator must submit with a part 70 permit application to propose the monitoring approach selected by the owner or operator. The required information has two basic components: general information necessary to justify the appropriateness of the proposed monitoring; and information to justify the appropriateness of the indicator ranges to be used for reporting exceedances or excursions.

1. General Information on the Proposed Monitoring

Section 64.4(a) first requires that the owner or operator identify the basic monitoring approach and indicator ranges that will form the primary elements of the monitoring, as well as the key performance and operating specifications needed to meet the design criteria in § 64.3. In submitting proposed indicator ranges, the owner or

operator can either submit the actual proposed ranges or the methodology that will be followed to establish the indicator ranges.

Section 64.4(b) then requires that the owner or operator submit relevant information to justify the proposed monitoring approach. The justification can rely on any available information, including appropriate reference materials and guidance documents. If an existing requirement already establishes monitoring for the pollutant-specific emissions unit, the justification can rely in part on that existing requirement. For certain types of monitoring, no extensive justification should be necessary because the final rule creates a rebuttable presumption that the monitoring satisfies part 64. When an owner or operator relies on one of these monitoring approaches, all that initially should be necessary is an explanation of why the monitoring is applicable to the unit in question. These types of monitoring include CEMS, COMS, or PEMS; excepted or alternative monitoring approaches allowed under part 75; and continuous compliance determination monitoring or monitoring for post-11/90 NSPS and NESHAP requirements that are exempt under § 64.2(b) but that may be applicable to the control equipment for other non-exempt emissions limitations at the same emissions unit. The reason for this presumption is similar to the reason for excepting from part 64 units that have such monitoring as their compliance determination method. The rule also notes that presumptively acceptable or required monitoring approaches established by rule by a State to achieve compliance with part 64 are deemed presumptively acceptable. This last option is included to promote the adoption of State programmatic rules designed to detail presumptively appropriate part 64 monitoring.

Finally, consistent with *Panhandle Producers & Royalty Owners Ass'n* v. *Economic Regulatory Administration,* 822 F.2d 1105 (D.C. Cir. 1987), the rule includes as presumptively acceptable monitoring, monitoring that is so designated by EPA through guidance documents. Such presumptively acceptable monitoring identified by EPA in guidance may also serve as models for permitting authorities to consider in programmatic rulemaking. Generally, EPA intends to issue such guidance only after providing notice and seeking comment on such monitoring. After considering comments received on the monitoring requirements for flares in 40 CFR 60.18, EPA is designating, at this time, that monitoring as presumptively acceptable. This designation is being made in recognition that some published monitoring practices or protocols provide sufficient design and monitoring performance specifications to satisfy CAM requirements while not fully satisfying the part 64 definition for a continuous compliance determination method. Some presumptively monitoring protocols may include procedures for calculating compliance with applicable emission limitations or standards but have some portions subject to CAM requirements (e.g., monitoring to indicate a reasonable assurance that control device efficiency is maintained at an assumed level) as indicated in § 64.2(b)(1)(vi) of the rule.

Reliance on presumptively acceptable monitoring will relieve owners and operators of the initial burden of justifying that the monitoring selected satisfies part 64. However, this presumption of acceptability is rebuttable, and, if information or evidence rebutting the presumption is brought forward, the owner or operator must bear the burden of justifying that the proposed monitoring complies with part 64. Final decisions as to the acceptability of monitoring rest with the informed discretion of the permitting authority, subject to permit review by EPA under 40 CFR 70.8, taking into account any appropriate presumption and all other relevant information and data.

Finally, § 64.4(b) requires the owner or operator to identify and explain any changes in manufacturer recommendations or requirements applicable to installation, verification and quality assurance of the monitoring. As explained above, the § 64.3(b) design criteria allow for these differences even though EPA generally requires the owner or operator to comply with such provisions. This documentation requirement is important to allow an appropriate evaluation of the reasons for changing these manufacturer specifications.

These submittal requirements streamline the similar requirements in the 1993 EM proposal. First, § 64.7 of the proposed rule would have required that a permit application incorporate a proposed enhanced monitoring protocol for every applicable emission limitation or standard at each emissions unit subject to the proposed rule. This protocol would have had to contain information about and supporting documentation for a number of elements, including proposed performance specifications, quality assurance procedures, test plans for conducting performance verification tests, and a list of all technologically feasible monitoring methodologies which could have been employed in the proposed protocol. Owners or operators of affected emissions units would have also been required to identify new technologically feasible monitoring methodologies when submitting a permit renewal application. Second, § 64.4(e)(3) of the proposed rule also covered permit application submittal requirements. That section would have required the owner or operator of an affected emissions unit to submit as part of a permit application all of the descriptions, explanations, justifications, and supporting data necessary to justify that a proposed enhanced monitoring protocol could satisfy the requirements of the proposed rule. This section explicitly placed the burden of proof on the owner or operator proposing an enhanced monitoring protocol to show that the protocol met the rule's requirements.

A number of commenters raised concerns about these permit application requirements. Some argued that the specific information requested, such as information pertaining to a parametric relationship, may not be available prior to installation of control technology and permit issuance. Others contended that the requirements to include information on all technologically feasible monitoring methodologies was an illustration of a perceived bias towards the use of costly continuous emission monitoring methods under the 1993 EM proposal. In response to some of these concerns and in furtherance of the goal of providing a reasonable assurance of compliance with applicable requirements, the Agency has replaced these detailed permit application requirements with the provisions described above in the final rule.

Third, many industry commenters opposed the enhanced monitoring protocol selection and proposal requirements in § 64.4(f) of the 1993 EM proposal. The proposal would have established a procedure for the selection of enhanced monitoring protocols that required owners or operators to justify the use of a proposed enhanced monitoring protocol over other available monitoring methodologies. Under this proposed procedure, owners or operators were first directed to consider ''established monitoring,'' defined as monitoring that had been previously demonstrated as a feasible means of assessing compliance at a specific emissions unit. An owner or operator could propose to use the ''best established monitoring.'' The determination of which established monitoring methodology was ''best'' was intended to be an evaluation of what type of monitoring was most

appropriate to determine continuous compliance at a specific emissions unit. If no ''established'' monitoring methodology could satisfy the performance and operating requirements of the proposed rule, owners or operators could propose additions or modifications to an established form of monitoring. If no established monitoring methodology applied, or if the owner or operator considered the established monitoring inappropriate, then an alternative monitoring could be proposed. In these circumstances, the proposed rule required the owner or operator to identify all monitoring methodologies that were technologically feasible for the particular emissions unit, selecting from that list the ''best'' methodology for that unit based on a site-specific assessment.

Commenters argued that the requirement to select ''best monitoring'' would impose a ''top-down'' selection process with a bias towards selection of a CEMS or similar monitoring system. Several commenters contended that the legislative history of section 114(a)(3) did not support a requirement that the approved enhanced monitoring protocol be the ''best'' available. Industry commenters also stated that requiring an owner or operator who proposed alternative monitoring to list all technologically feasible monitoring methodologies would impose unnecessary costs and burdens. Most of those opposing the selection provisions suggested that the rule should allow the owner or operator to propose any monitoring that met the basic requirements of the rule. In the alternative, many commenters suggested making cost an explicit criterion in the monitoring selection process.

Under the CAM approach, the owner or operator may propose any monitoring that can meet the design criteria in § 64.3 of the final rule. Thus, the comments regarding whether 1993 EM proposal imposed a top-down selection hierarchy are no longer relevant.

In response to the 1996 draft part 64, some commenters objected to the need to submit a rationale or justification for the proposed monitoring. The Agency disagrees. This information will be necessary for the permitting authority, the public, and EPA to judge the appropriateness of the proposed monitoring for satisfying the design criteria in § 64.3. In addition, this requirement builds on similar regulatory precedents in the NSPS and NESHAP programs. Under those programs, EPA has routinely required the owner or operator to submit a proposed monitoring approach and supporting rationale where the owner or operator intends to use a control device for which the underlying standard does not contain specific monitoring procedures. (See, e.g., 40 CFR 60.473(c), 60.544(b), 60.563(e), 60.613(e) and 60.663(e).)

Commenters on the 1996 part 64 Draft also raised concerns that the rule did not contain any provisions promoting the use of existing monitoring to satisfy part 64. Clearly, many existing monitoring requirements include some degree of monitoring that is used to indicate compliance through documenting important operating variables. As such, these requirements are generally consistent with the CAM approach. Thus, §§ 64.3(b) and 64.4(b) specifically allow for the owner or operator to design and justify proposed part 64 monitoring applying or building on existing applicable requirements. The rule uses the phrase ''in part'' because there is no assurance that the existing monitoring necessarily satisfies all of the part 64 design criteria. As described above, for certain monitoring that the Agency believes already meets the part 64 design criteria categorically, the owner or operator is likely to be able to rely completely on those regulatory precedents to justify the monitoring proposed to satisfy part 64. The Agency believes these provisions adequately provide for the consideration of existing monitoring and build upon the ''established monitoring'' concept in the 1993 EM proposal without the cumbersome selection process hurdles included in that proposal.

Industry commenters on the 1996 part 64 Draft proposed that the cost of monitoring that will provide a reasonable assurance of compliance be considered in light of the reliability of the pollution control technology, the margin of compliance demonstrated for the emissions unit, the emissions variability, and the reliability of the monitoring. State and local agency commenters noted that a demonstration of a credible relationship between parameter monitoring and actual emissions was primary in determining a reasonable assurance of compliance. These agency commenters also listed reliability of monitoring, margin of compliance, and potential emissions variability as elements to consider in such a demonstration. The Agency agrees that part 64 should enable the owner or operator and the permitting authority to consider these factors in developing and approving monitoring in a manner that both allows flexibility in design and provides a reasonable assurance of compliance. As noted above, the rule specifically allows for the use and augmentation of existing monitoring in lieu of developing and installing completely new monitoring approaches. Further, §§ 64.3(c) and 64.6(a) of the final rule reference the evaluation factors mentioned by both groups of commenters to apply in developing and reviewing monitoring to meet part 64 requirements. The Agency believes that in this manner, the owner or operator and the permitting authority can agree on cost-effective monitoring that results in the reasonable assurance of compliance required by part 64.

2. Documentation and Justification for Indicator Ranges

Section 64.4(c) of the final rule requires that an owner or operator propose indicator ranges supported by data obtained during the conduct of the applicable compliance or performance testing at the pollutant-specific emissions unit and supplemented, as necessary, by engineering assessments and manufacturer's recommendations. An owner or operator can satisfy this requirement with existing compliance test method data, if applicable. The use of existing data is limited to circumstances in which no changes have occurred since the data were obtained that could significantly affect the conditions for which the indicator ranges were established since the performance testing was conducted. Such significant changes include, but are not limited to, an increase in process capacity, a modification to the control system operating conditions, or a change in fuel or raw material type or chemical content. Because of the assurances provided through representative performance testing in conjunction with documentation provided by the use of engineering and other information, the final rule also explicitly states that testing over the entire indicator range or range of potential emissions is not required.

If site-specific compliance testing method data are unavailable, § 64.4(c) gives an owner or operator two options. Indicator ranges can be based on testing to be conducted pursuant to a test plan and schedule for obtaining the necessary data. An owner or operator may also choose to rely on other forms of data to establish the proper indicator ranges. However, if the owner or operator proposes to rely on engineering assessments and other data without conducting site-specific compliance method testing, § 64.4(c)(2) requires submission of documentation to demonstrate that factors applicable to the owner or operator's specific circumstances make compliance method testing unnecessary. Section 64.6(b) gives the permitting authority the discretion to require compliance

method testing where necessary to confirm the ability of the monitoring to provide data that are sufficient to satisfy part 64.

These provisions are similar to but are less prescriptive than the comparable provisions in the 1993 EM proposal as well as less contingent upon a statistical correlation between operational parameters and emission levels. Section 64.4(f) of the 1993 EM proposal would have operated with proposed § 64.4(b)(2) and appendix C to describe all requirements related to performance verification testing under the 1993 EM proposal. Section 64.4(b)(2) of the EM proposal established a duty under the proposed rule's general performance and operating criteria to conduct applicable performance verification test procedures in accordance with appendix C. Appendix C of the proposal contained specifications on the procedures to be used by an owner or operator for validating the representativeness of a monitoring protocol and the performance verification procedures for continuous monitoring systems. Section 64.4(f) would have required owners to submit with a permit application a test schedule and test plan that described the procedures, reference methods, test preparations, locations and other pertinent information for all required performance verification tests.

Section 64.4(b)(2) would have required an owner or operator who sought to include process or control device parameter monitoring in an enhanced monitoring protocol to conduct verification testing in accordance with appendix C. Section 7 of proposed appendix C described the required procedures for testing the correlation between the parameter(s) to be monitored and the applicable emission limitations or standards. Section 64.4(f)(1) of the proposed EM rule stated that a test plan for parameter monitoring correlation tests must describe any significant process or control device parameters not included in the proposed enhanced monitoring protocol and must demonstrate that excluding such parameters will not adversely affect the validity of the correlation. This section also would have required the owner or operator proposing the use of parameter monitoring to demonstrate the validity of the parameter correlation over the potential range of facility operations.

Industry commenters had a number of objections to and suggestions for improvement of the proposed rule's performance verification testing requirements and related permit application requirements. To reduce costs, some commenters suggested that performance verification tests should not need to be conducted under part 64 where adequate prior tests have been conducted pursuant to another applicable requirement. The Agency agrees and has adopted this approach in the final rule. A number of commenters expressed concerns about the level of detail which had to be included in the monitoring verification test plan. The EPA believes that the documentation provisions of the final rule will generally not require the same level of detail that would have been required under the proposed rule. Several commenters objected to the requirement to account in detail for all potentially significant parameters when documenting parameter range correlation testing. The Agency has not included a similar explicit requirement in the final rule's documentation and testing requirements for the establishment of indicator ranges. The Agency does note that an indicator range which fails to take into account significant control device parameters is unlikely to provide the reasonable assurance of compliance with emission limitations or standards required by § 64.3(a).

Finally, a number of commenters who supported the availability of parameter monitoring under the proposed rule stated that the correlation testing requirements would be difficult and expensive to meet and would discourage source owners or operators from using parameter monitoring. In addition, in response to the 1996 part 64 Draft, a number of commenters opposed the requirement to establish indicator ranges by conducting performance or compliance testing. They asserted that this either was an improper attempt to revive the correlation requirements in the 1993 EM proposal, or unnecessary to establish the appropriate range for most parameters.

As discussed above in Section II.C., the CAM approach builds on the premise that if an emissions unit is proven to be capable of achieving compliance as documented by a compliance or performance test and is thereafter operated under the conditions anticipated and if the control equipment is properly operated and maintained, then there will be a reasonable assurance that the emissions unit will remain in compliance. In most cases, this relationship can be shown to exist through results from the performance testing without additional site-specific correlation of operational indicators with actual emission values. The CAM approach builds on this fundamental premise of the regulatory structure.

However, as raised in the *Portland Cement* Response to Remand discussed in Section II.C., one difficult element of using ''proper operation and maintenance'' as a regulatory tool is the potential difficulty in determining whether proper operation and maintenance has in fact occurred. Thus, a critical issue that the CAM approach must address is establishing appropriate objective indicators of whether a source is ''properly operated and maintained.'' In developing the final rule, EPA looked to past regulatory experience in developing a balanced approach to establishing indicator ranges and using the monitoring to assure compliance performance.

In proposing the operation and maintenance requirements in 40 CFR 60.11(d), EPA required that owners or operators maintain and operate their facilities ''in a manner consistent with operations during the most recent performance test indicating compliance.'' 38 FR 10821, May 2, 1973. The obvious rationale behind this original language was that if the source was in compliance during the test, and it continued to operate its equipment as it was operated during the test, there was a reasonable assurance that the source would remain in compliance. This language, however, was revised when the rule was promulgated on October 15, 1973. In the preamble to the promulgated rule, EPA explained that the language was changed because of comments which questioned ''whether it would be possible or wise to require that all of the operating conditions that happened to exist during the most recent performance test be continually maintained.'' 38 FR 28565. The EPA therefore revised § 60.11(d) to require that source owners or operators operate and maintain their pollution control devices ''in a manner consistent with good air pollution control practices for minimizing emissions.'' Id.

This regulatory history argues against a strict requirement that part 64 require indicator ranges to be related exactly to the operating conditions that existed during a performance test. However, in many NSPS subparts, and more recently in MACT standards, EPA generally has required that operation and maintenance indicators be established during an initial performance test, with some allowance for adjusting the indicator values observed during the test. For instance, where a thermal incinerator is used to comply with a VOC emission limit, the NSPS subparts usually require the owner or operator to establish a baseline temperature value as an indication of whether the incinerator is properly operated and

maintained. The baseline temperature value is established at a value 50 degrees Fahrenheit below the average temperature recorded during the most recent performance test (see, e.g., 40 CFR 60.615(c)(1).) In recent MACT examples, EPA has required the indicator ranges to be established during performance testing, but with an allowance to supplement the performance test data with engineering assessments; in addition, the MACT requirements often state that testing across the full range of operating conditions is not required where the indicator range is subject to review and approval. (See, e.g., 40 CFR 63.654(f)(3)(ii)(A) and 63.1334(c).)

Based on these NSPS and MACT examples, the presumptive approach for establishing indicator ranges in part 64 is to establish the ranges in the context of performance testing. To assure that conditions represented by performance testing are also generally representative of anticipated operating conditions, a performance test should be conducted under conditions specified by the applicable rule or, if not specified, generally under conditions representative of maximum emission potential under anticipated operating conditions. In addition, the rule allows for adjusting the baseline values recorded during a performance test to account for the inappropriateness of requiring that indicator conditions stay exactly the same as during a test. The use of operational data collected during performance testing is a key element in establishing indicator ranges; however, other relevant information in establishing indicator ranges would be engineering assessments, historical data, and vendor data. Indicator ranges do not need to be correlated across the whole range of potential emissions.

Finally, because the emissions units subject to part 64 will not necessarily be undergoing performance testing absent part 64 (unlike the comparable units subject to initial compliance testing under the NSPS and MACT programs), the rule does not require establishment of indicator ranges during compliance or performance testing but rather presumes the appropriateness of doing so. The Agency believes that this approach makes part 64 consistent with underlying regulations but with appropriate alternatives that reflect the different universe of emissions units subject to part 64.

E. Section 64.5—Deadlines for Submittal

The final rule establishes two alternative schedules for implementing part 64 depending on the size of the pollutant-specific emissions unit involved. Under § 64.5(a), ''large'' pollutant-specific emissions units are subject to the shortest implementation timetable. ''Large'' units are those that have the potential to emit (after controls) the applicable pollutant at or above the major source threshold. If the owner or operator has not submitted the permit application for the applicable source prior to April 20, 1998, the owner or operator must submit proposed part 64 monitoring in the next part 70 permit application. If a permit application has been submitted by the rule's effective date, but the permitting authority has not yet determined by that date that the application is complete, the owner or operator will have to supplement the application with the relevant information required under part 64. If the application has already been found complete, then the part 64 information will generally not have to be submitted until the next permit renewal application. In the interim, the monitoring requirements adopted by permitting authorities in response to the requirements in part 70 will continue to apply.

There are two circumstances where information must be submitted prior to the next permit renewal application. First, if the owner or operator submits an application for a significant permit modification after April 20, 1998, the owner or operator must submit the appropriate part 64 information for any pollutant-specific emissions unit(s) covered by the modification. This requirement will assure that significant permit revisions affecting particular emissions units are not considered in a piecemeal fashion and that part 64 is implemented as quickly as reasonably practicable. In response to comments on the 1996 part 64 Draft, the Agency has limited this provision to only significant permit revisions so that part 64 requirements will not impede permit revisions made under expedited permit revision processes, such as administrative amendments, notice only changes, or de minimis permit revision procedures that are under consideration by the Agency. Second, if the permit application has been found complete but the permit has not issued, and the owner or operator proposes to revise the application to include a change of a type that would have been subject to the significant permit revision process, had the permit been issued, then the owner or operator must include part 64 required information for the pollutant-specific emissions unit(s) identified in the application revision. This circumstance triggers part 64 implementation because this type of permit application revision would require a second completeness determination by the permitting authority, and the implementation provision of § 64.5(a)(1)(ii) would be applicable.

Also in response to comments, the final rule does not include a provision in the 1996 part 64 Draft that would have required implementation prior to permit renewal for certain permit applications being processed under a part 70 transition plan for initial permit issuance. The Agency believes that this provision unnecessarily complicates the part 64 implementation process. The Agency also notes that the current part 70 monitoring provisions will continue to apply in the interim if part 64 is not implemented until permit renewal.

For the remaining smaller pollutant-specific emissions units, part 64 implementation is delayed until permit renewal. This approach was suggested in many comments as one way to reduce the implementation burdens of the rule. Such an approach will also allow permitting authorities and owners or operators to gain experience with implementing part 64 for the largest emissions units before having to address the more numerous, but in terms of overall site emissions, less significant, smaller units. As noted above, permitting authorities can use the delay in implementation to develop programmatic requirements that can be relied on in proposing and approving part 64 monitoring; this approach will be of the most benefit for the smaller emissions units that can use these generic requirements to reduce the burdens of part 64.

The phased-in implementation approach embodied in the final part 64 rule is a departure from the implementation schedule in the 1993 EM proposal. The effective date of the proposed rule was to be 30 days after publication of the final rule in the **Federal Register**. The proposed rule did not specify how operating permits issued prior to the rule's effective date would be treated. The preamble to the proposed rule suggested that these situations would be covered by 40 CFR 70.7(f)(1)(i). Section 70.7(f)(1)(i) requires that an operating permit be reopened to address an applicable requirement which becomes applicable during the permit term if the permit has a remaining term of three or more years. Thus, under the proposed rule, the owner or operator of any facility with an operating permit that had a remaining term of three or more years after the effective date of part 64 would have been required to reopen the permit and

provide the required part 64 information.

The Agency considered relying on this part 70 provision to set the implementation schedule for the rule, but chose to adopt the phased-in approach described above. Thus, the provisions in § 64.5(a) supersede the language of § 70.7(f)(1)(i). The part 70 approach would have required that a great many operating permits be reopened as soon as the rule became effective, while the phased-in approach initially focuses on new permit applications. The former is therefore more likely to cause initial burdens and delays in the permitting program. The Agency believes that the extended implementation timetable resulting from the phased-in approach is better suited to facilitating implementation through the operating permits program. In the December 1994 notice reopening the 1993 EM proposal for comment, EPA discussed the possibility of using a phased-in implementation approach as well as a ''hammer'' provision, which would have required enhanced monitoring to be implemented by all affected sources by January 1, 2000. Multiple commenters expressed concerns that an absolute deadline of this type would cause systemic logjams and delays in the operating permits program because it could require numerous permit revisions or reopenings outside of the normal permit renewal process.

In lieu of a ''hammer'' provision and to clarify that the monitoring requirements of part 70 apply irrespective of the part 64 requirements, the Agency has added explicit language to the rule stating that prior to approval and operation of part 64 monitoring, part 70 monitoring requirements apply. These part 70 monitoring requirements continue to apply even after approval and operation of part 64 monitoring; however, because part 64 contains applicable monitoring requirements sufficient to demonstrate compliance with applicable emission limitations or standards, the part 64 monitoring requirements can serve in the place of part 70 monitoring requirements.

F. Section 64.6—Approval of Monitoring

Consistent with the part 64 implementation approach, § 64.6 requires the permitting authority to approve or disapprove the monitoring proposed by the owner or operator. The following discussion highlights the key elements of this section and the key issues raised during development of the rule.

1. Approval and Permit Incorporation

If the monitoring is approved, the permitting authority must act in accordance with § 70.6(a)(3) to include appropriate permit terms that reflect the part 64 monitoring requirements. The requirements that must be reflected in the permit are: the monitoring approach (including the basic method, appropriate performance specifications, and required quality assurance checks), any specific data availability requirements, the indicator range(s), and a general statement that the owner or operator will conduct the monitoring, submit reports, maintain records, and, if applicable, identify any QIP obligations, all as required by §§ 64.7 through 64.9.

It is important to note that the rule provides for two different options for incorporating indicator range(s) in the permit. First, the actual range can be included (such as maintaining temperature of an incinerator at or above a specific number). Second, the permit can include a statement that describes how the indicator range will be established (such as ''The incinerator will be maintained at a temperature at or above a temperature which is 50 degrees Fahrenheit lower than the baseline temperature recorded during the most recent performance test.''). This latter type of condition would allow for reestablishment of the indicator range without the need for a permit modification. Several commenters raised concerns that there would be a need for changes to indicator ranges, especially near the beginning of the program, and that requiring permit modifications for all such changes would be burdensome and unwieldy. The Agency agrees and believes this latter option addresses the commenters' concerns while still providing adequate public comment and review on the establishment of indicator ranges at specific sources. If this type of approach is used, the permit would also need to specify how the permitting authority will be notified of the currently applicable indicator range(s).

These provisions are generally the same as required in § 64.8 of the 1993 EM proposal, although the requirements have been modified to reflect the changes in the design criteria for the monitoring required by part 64. The 1995 and 1996 part 64 Drafts included more elaborate conditions than are included in the final rule, including certain enforceability components that the Agency does not believe are necessary for effective implementation of part 64. These deleted components include provisions in the 1996 part 64 Draft that would have enabled a permitting authority to establish an indicator range as an enforceable condition and that would have established a second QIP during a permit term as a permit violation.

Whether the failure to meet an indicator range is an enforceable violation will be a matter of examining the relevant underlying applicable requirements, as well as the ability of the permitting authority to establish that type of requirement as a federally-enforceable element of a permit pursuant to approved SIP authority or as a State-only requirement pursuant to State law. As described above, for purposes of part 64, § 64.6 clarifies that the indicator ranges or the means by which they are to be established are to be included in the permit to indicate when an owner or operator is required to report excursions or exceedances. In addition, it should be noted that § 64.7 establishes the independent obligation for the owner or operator to take appropriate corrective action in response to excursions or exceedances that occur.

The Agency also decided to delete the draft requirement that a second QIP during a permit term constitutes a violation. This provision was widely criticized by both industry and State commenters. The Agency had specifically noted in the discussion accompanying the 1996 part 64 Draft that it was concerned that this approach may not be appropriate. As discussed in Sections II.G. and H., the final rule, consistent with the precedent of 40 CFR 60.11(d), provides for the general use of part 64 data and other information to document that the owner or operator has failed to operate and maintain an emission unit properly and provides for the QIP mechanism as one option for addressing situations in which such a failure has occurred. In that respect, any time a QIP is required there will be an underlying finding that the owner or operator has failed to take appropriate action and may be subject to enforcement for that violation. Thus, there is no need for the final rule to include separate enforcement consequences related to multiple QIPs.

The Agency notes that many commenters on the 1996 part 64 Draft suggested that the rule would impose too many permit requirements and that the permit should merely state that compliance with part 64 is required and that the owner or operator will take appropriate action in response to the data. Commenters pointed to the requirements for startup, shutdown, malfunction plans (SSMPs) under part 63 and section 112(r) risk management plans (RMPs) required under part 68 as examples of this approach to referencing

applicable requirements in a part 70 permit.

The Agency disagrees with the approach suggested and the use of the SSMP and RMP examples cited in the comments. The two examples both involve plans which an owner or operator is required to develop in accordance with general criteria but which are not subject to approval, although there are provisions which allow EPA or the permitting authority to require changes in the plans under certain conditions. (See 40 CFR 63.6(e)(3) and 68.220.) The Agency notes that it proposed this concept to implementing part 64 in the 1995 part 64 Draft but that numerous commenters opposed this approach because there would be no final approval process for the monitoring. (See § 64.3(c) of the 1995 part 64 Draft and the comments in, for example, VI√D–38 and 45). Many commenters then seemed to request that EPA use the SSMP or RMP approach after reviewing the 1996 part 64 Draft.

After evaluating all of the comments, the Agency believes that part 64 monitoring should be incorporated into permits in the same fashion as all other required monitoring. The following discussion provides a list of the various components of the basic monitoring approach that need to be incorporated in the permit. To provide a practical example of what the ''basic monitoring approach'' entails, the following example is based on the use of incineration to control TRS emissions from certain affected facilities at kraft pulp mills (see 40 CFR 60.280 et seq.); the example is intended to indicate the level of detail required, and not necessarily the appropriateness of the example monitoring for satisfying part 64: ''Company A will monitor the combustion temperature in the incinerator at the point of incineration of the effluent gases. Combustion temperature will be recorded continuously during all periods of incinerator operation using a strip chart recorder. Company A will use a 5-minute rolling average of combustion temperatures to determine whether an excursion from (combustion temperature limit or range) has occurred. The thermocouple used to determine the temperature will be accurate to within 1 percent of the temperature being measured. Company A will conduct daily operational checks of the thermocouple, strip chart recorder, and the temperature recording process system. Company A will conduct an annual accuracy check of the temperature measurement and recording system.'' This example mirrors the basic monitoring information required under the relevant portions of subpart BB. Another example that might apply in other cases could include a permit condition which: (1) Identifies the pollutant-specific emissions unit, (2) states that the owner or operator will install, operate, maintain and reduce data from a CEMS for that pollutant in accordance with both the general provisions in 40 CFR 60.13 and the applicable performance specifications in appendix B to 40 CFR part 60; and (3) specifies the appropriate period for averaging data to determine if an exceedance occurs. That type of permit condition would address the components of the basic monitoring approach identified above.

As noted in the above examples, there is no substantive difference for how an owner or operator will be required to address existing monitoring in a permit versus part 64 monitoring. For the one element of the monitoring (indicator ranges) which the owner or operator is most likely to need to adjust, especially at the beginning of the program, the final rule includes the option discussed earlier that can provide the necessary flexibility to adjust indicator ranges without the need for a permit revision. Thus, EPA believes that the level of detail required in the permit is appropriate and consistent with the level of detail originally included in the 1993 EM proposal and required for existing monitoring.

2. Approval Prior to Installation and/or Verification

A number of those commenting on the 1993 EM proposal expressed concerns about the costs of installing equipment and performing testing for proposed monitoring prior to approval in the permit. The Agency understands that an owner or operator may be unwilling to proceed with such installation, testing, or other monitor verification activities until after the proposed approach to complying with part 64 is approved. Under the final rule, these activities may be completed after approval of the monitoring. The owner or operator must propose a schedule for making the monitoring operational as expeditiously as practicable after approval (see § 64.4(e)) and then the permit must include an enforceable schedule with milestones that reflect the approved schedule. The schedule must provide for the monitoring being fully operational as expeditiously as practicable, but in no event more than 180 days from the date of issuance of the final permit. The general requirements in § 64.7 to operate the monitoring in accordance with part 64 will not apply until the final verification is complete.

3. Conditional Approval of the Monitoring

Under § 64.6(b), the permitting authority may condition the approval on the owner or operator collecting additional data on the indicators to be monitored for a pollutant-specific emissions unit, including required compliance or performance testing, to confirm the ability of the monitoring to provide data that are sufficient to satisfy the requirements of this part, and to confirm the appropriateness of an indicator range(s) or designated condition(s) proposed to satisfy the design criteria in the rule. Such conditional approval should also be consistent with the requirement in the rule that monitoring be designed, installed, and begin operation within 180 days of permit approval.

4. Disapproval of the Monitoring

If a permitting authority determines that the monitoring proposed by an owner or operator fails to satisfy part 64, the permit must include monitoring that at a minimum meets the monitoring provisions in part 70. Moreover, § 64.6(e)(2) requires the permitting authority to impose a compliance plan requirement in the permit which directs the owner or operator to repropose monitoring in accordance with §§ 64.3 and 64.4 within no more than 180 days after disapproval. Under § 64.6(e)(3), the owner or operator will be in noncompliance with part 64 if: (1) The owner or operator fails to submit monitoring within the required compliance schedule; or (2) the permitting authority disapproves the monitoring submitted, subject to the owner or operator's right to appeal any such disapproval. Note that the decision to disapprove the initially proposed monitoring would also constitute final agency action for purposes of appeal.

This disapproval process was implied but not explicitly addressed in the 1993 EM proposal or the subsequent drafts of part 64. However, comments on these earlier versions of the rule did raise concerns about when an owner or operator could appeal a decision as to the monitoring and whether a permitting authority could insert in the permit the monitoring which the permitting authority believes should be used. The Agency believes that in most cases, the permit process provides ample opportunity for the permitting authority and the owner or operator to confer about the appropriate monitoring to satisfy part 64 and agree upon an approach, with public and EPA review,

without having to reach the point of disapproving the monitoring in the final permit action. Nevertheless, the Agency also believes that the final rule should clarify how a monitoring disapproval will be handled.

The Agency notes further that, unlike the procedures for most applicable requirements, the part 70 permit process will be used as the process for approving the specific monitoring that is used to satisfy part 64. In that respect, the part 70 process will be essential to assuring adequate public, permitting authority, and, as necessary, EPA input on part 64 monitoring. The Agency believes that the approval/disapproval procedures in the final rule highlight this important aspect of part 64 and will provide for adequate public and EPA review of the monitoring used to satisfy part 64.

5. Permit Shield

The Agency notes that, after approval of the part 64 monitoring in a permit, the permit shield provisions in part 70 may extend to the part 64 monitoring approved in the permit. A significant area of comment on the 1993 proposed EM rule was the effect of implementing part 64 on these permit shield provisions. Some commenters were concerned that the linking of part 64 and the permitting process would hamper the timely processing of permits, and in some cases, result in the loss of the permit application shield. The Agency has addressed these concerns in the changes to the implementation schedule of the final rule. Other commenters suggested that the non-specific nature of part 64 monitoring requirements could lead to a situation where the permit shield could be lost even if the monitoring was originally developed in good faith and was approved by the permitting authority. These commenters argued that if such monitoring is later determined to be inadequate by the permitting authority or the owner or operator, there should be a process for correcting the monitoring without finding the owner or operator in violation of the general part 64 substantive requirements.

EPA believes that, if a permitting authority extends the permit shield to the monitoring requirements included in an operating permit, the owner or operator will be shielded from any retrospective action based on a claim that the monitoring approved in the permit fails to satisfy part 64 requirements. This protection is only available so long as the owner or operator conducts the monitoring in accordance with the permit. Also, the shield will not prevent the permitting authority or the EPA from reopening the permit if, after approval, the permitting authority or the Agency finds cause to reopen the permit based on a deficiency in the approved monitoring.

Where an owner or operator discovers that the originally approved monitoring is inadequate, the final rule does require the owner or operator to correct the defect in the monitoring expeditiously. Section 64.7(e) requires an owner or operator to promptly notify the permitting authority and submit a proposed modification to the source's part 70 permit under at least two circumstances. First, if the owner or operator documents that a violation of an emission limitation or standard occurs but the part 64 monitoring failed to indicate an excursion or exceedance for the same period, there will be a need to address that type of deficiency. Second, if the results of performance or compliance testing document a need to modify the approved indicator ranges, that type of correction will also be required. The appropriate permit modifications may include monitoring additional parameters, increasing monitoring frequency, reestablishing indicator ranges, or other changes appropriate for the circumstances.

G. Section 64.7—Operation of Approved Monitoring

1. General Conduct of Monitoring

As soon as the permitting authority has approved the operating permit, § 64.7(a) requires the owner or operator of an affected source to begin conducting monitoring of the source in accordance with the permit. If the permit includes a scheduled date for the completion of testing, installation, and final verification of the approved monitoring pursuant to § 64.6(d), then the owner or operator is not required to begin conducting monitoring until that completion date. This provision does not excuse the owner or operator from complying with monitoring required under separate authority if the monitoring being used to comply with part 64 is also required under that separate authority.

Section 64.7(b) requires an owner or operator to properly maintain the approved monitoring. The provision states that the maintenance and operation obligations include an obligation to maintain necessary parts for routine repairs of the monitoring equipment.

Under § 64.7(c), the monitoring must be conducted continuously or shall collect data at all required intervals during emissions unit operating periods unless the monitoring cannot be conducted because of monitor malfunctions, associated repairs or required quality assurance or control activities (including, as applicable, calibration checks and zero and span adjustments). Data collected during such periods is not to be used for purposes of part 64, including data averages and calculations, or fulfilling a data availability requirement. Data recorded during all other periods is to be used in assessing the operation of the control device and associated capture system.

The Agency notes that the requirements in §§ 64.7(b) and (c) are generally consistent with monitoring requirements promulgated under the NSPS program (see 40 CFR 60.13(e)) and the new NESHAP program (see 40 CFR 63.8(c)(1) and (4)). The obligation to keep parts necessary for routine repairs is based on a similar requirement in § 63.8(c)(1). The requirement that part 64 monitoring be operational during emissions unit operation except during monitor malfunctions and similar events is consistent with § 60.13(e) and § 63.8(c)(4). It is important to note that this provision does not excuse a failure to comply with a data availability requirement. Even if a data availability requirement is met, this provision requires an owner or operator to continue operating the monitoring unless it is technically infeasible to do so.

The Agency believes that these general operating requirements were implicit in the 1993 EM proposal, including proposed § 64.4(b)(4) which required the owner or operator to obtain quality-assured data from the monitoring sufficient to satisfy minimum data availability requirements. However, EPA notes that in comments on the subsequent drafts of part 64, certain commenters objected to these types of provisions, and specifically requested that the rule exempt the source owner or operator from having to conduct monitoring during periods when the source is not required to comply with the underlying standard (such as startup and shutdown conditions). The Agency disagrees with these comments, and notes that existing general monitoring requirements under NSPS and NESHAP do not provide for that type of exception to monitoring. In fact, EPA has previously rejected the idea of exempting sources from monitoring during startup and shutdown conditions in other rulemakings. (See, e.g., *Air Oxidation Processes in Synthetic Organic Chemical Manufacturing Industry—Background Information for*

Promulgated Standards, EPA–450/3–82–001b, June 1990, pp. 2–37 and 2–38. For a copy of this document, see EPA Air Docket A–81–22–V–B–1.) Although compliance with emission limitations may be exempted in some circumstances during conditions such as startup and shutdown, an owner or operator still is required to operate and maintain a source in accordance with good air pollution control practices for minimizing emissions during such periods. The monitoring under part 64 is essential to evaluate the extent to which this duty is fulfilled. Therefore, to clarify the intent of part 64 and assure that it is implemented consistently with other EPA monitoring programs, the final rule includes these general operating requirements in §§ 64.7(b) and (c).

2. Corrective Action Obligations

Section 64.7(d) of the final rule requires that, upon detecting an excursion or exceedance, the owner or operator will restore the pollutant-specific emissions unit to its normal or usual manner of operation as expeditiously as practicable in accordance with good air pollution control practices for minimizing emissions. This requires minimizing periods of startup, shutdown or malfunction, and taking corrective action to restore normal operation and prevent recurrence of the problem that led to the excursion or exceedance except where the excursion or exceedance was related to an excused startup or shutdown condition. Corrective action may include inspection and evaluation where operations returned to normal without operator action, or any appropriate follow up activities, including shutting down a pollutant-specific emissions unit until necessary repairs are completed, to return the operation to within the indicator range or below the applicable emission limitation or standard, as applicable. Consistent with existing general duty provisions such as § 60.11(d), determination of whether the owner or operator has used acceptable procedures in response to an excursion or exceedance will be based on available information, including monitoring data. A related provision found at § 64.8(a) of the final rule provides that a source owner or operator can be required to implement a quality improvement plan (QIP) after a determination by the permitting authority or the Administrator that the source owner has failed to conduct proper operation and maintenance as documented through part 64 monitoring and other available information (see Section II.H.).

Because the Agency's emphasis for part 64 monitoring shifted away from the direct compliance determination requirements of the 1993 EM proposal to the CAM approach, the Agency believes it is critical to underscore the need to maintain operation within the established indicator ranges. Therefore, the rule includes the requirement to take prompt and effective corrective action when the monitored indicators of compliance show that there may be a problem. Requiring that owners and operators are attentive and respond to the data gathered by part 64 monitoring has always been central to the CAM approach. Certain comments received on the 1996 part 64 Draft questioned the appropriateness of the corrective action provisions with some commenters finding the requirements unnecessary and others alleging that they were inadequate. The Agency reiterates its belief that part 64 monitoring can provide a reasonable assurance of compliance with applicable requirements. This is consistent with the approach suggested by many commenters throughout the development of part 64; however, because the data will not necessarily allow a direct determination of compliance, the Agency believes that it is essential to the CAM goal of ongoing compliance operation that part 64 require that owners or operators respond to the data so that any problems indicated by the monitoring are corrected as soon as possible. Without this corrective action obligation, owners or operators might tend to ignore excursions because such excursions may not necessarily allow a determination of a violation. Thus, EPA believes that the corrective action component of part 64 is critical to assuring that the information from the enhanced monitoring required by part 64 is heeded by owners or operators.

As described in the discussion accompanying the 1996 part 64 Draft, the Agency did consider requiring owners or operators to specify maximum periods for conducting various types of corrective action, but stakeholders raised concerns that it would be extremely difficult to establish the appropriate time frames for every possible contingency (see, e.g., docket items VI–D–45, p. 12; VI–E–9, p. 5–6). The Agency continues to agree that it would be difficult to establish appropriate time frames for all corrective action scenarios and therefore has adopted the general obligation requirement in the final rule. The Agency also believes, however, that as situations develop at a particular facility it may be possible in subsequent rounds of permitting to provide specific timetables for certain high priority concerns if a permitting authority desires to make this requirement more specific. In addition, if an existing site-specific plan, such as a malfunction abatement plan, already establishes required time frames for certain types of excursions, the owner or operator or the permitting authority could incorporate those specific time frames into the permit.

The obligation to correct excursions as expeditiously as practicable is the enforceable component associated with establishing an indicator range under part 64. Part 64 does not establish that an excursion from an indicator range constitutes an independent violation by itself. The 1996 part 64 Draft did provide that the permit may specify that an excursion could be considered a failure to satisfy an applicable permit term or condition in various situations. First, if existing requirements already require the owner or operator to comply with the indicator ranges, the 1996 Draft indicated that the ranges would be enforceable requirements. Second, the 1996 Draft indicated that an owner or operator could propose this approach. Finally, the 1996 Draft stated that, if consistent with existing authority, the permitting authority could specify in the permit that excursions from the indicator ranges will be considered enforceable permit deviations. In comments submitted during the development of the rule, State and local agency organizations stated their support for including control device performance indicator ranges as enforceable permit requirements even if such indicator ranges are not used directly to determine compliance or noncompliance with applicable emission limitations or standards. (See, for example, docket item VI–D–49 and IV–D–274). However, numerous industry commenters opposed the provisions in the 1996 part 64 Draft which addressed this issue.

The Agency has considered all of the relevant comments and has determined that part 64 need not address this issue. First, if an underlying requirement makes an indicator range enforceable, then that will have to be addressed in the permit under the existing requirements in part 70. Second, a source owner can always propose to make the indicator range enforceable and part 64 need not address this possibility. Third, if a State agency has independent authority to make indicator ranges enforceable, that can be done irrespective of the authority provided in part 64. Finally, as discussed in Section

I.E., the CE revisions clarify that an excursion from an indicator range in some circumstances may be sufficiently probative of compliance that it could be used to document a violation of an underlying requirement. Based on these considerations, the final rule simply requires the permit to establish an indicator range, and then imposes the obligation to take appropriate corrective action in response to an excursion and to report the excursion in applicable periodic reports and compliance certifications.

3. Monitoring Revisions

Section 64.3(d) of the 1993 EM proposal would have required a significant permit modification pursuant to § 70.7 whenever a change was made to an enhanced monitoring protocol or whenever a pollutant-specific emissions unit was modified in such a way as to make an existing protocol no longer appropriate. A great number of industry commenters objected to the permit modification provisions in the proposed rule. The vast majority objected to the scope of this provision, under which any change to an enhanced monitoring protocol triggered a requirement to obtain a significant permit modification. A number of commenters noted that the proposed rule would require significant permit modifications for changes that would not have triggered such a requirement under part 70 itself.

The Agency agrees with those commenters that believe the part 70 procedures generally should be relied on for determining when and what type of a permit change is required for different types of monitoring modifications. In keeping with this approach, EPA has removed the permit modification provisions from the final rule. Instead, the Agency intends that permit revisions involving part 64 requirements be made pursuant to part 70 permit revision procedures. The EPA has proposed revisions to part 70 in order to streamline the existing permit modification procedures (see 59 FR 44460, August 29, 1994, and 60 FR 45530, August 23, 1995). The preamble to those proposed revisions discusses what types of permit revisions would be appropriate for different types of monitoring changes. The EPA intends to promulgate permit revision procedures based on the proposed part 70 revisions that will clarify when and how a change in monitoring will trigger the need to modify the underlying operating permit.

As noted in the discussion of the permit shield above, § 64.7(e) does require an owner or operator to follow permit modification procedures upon discovery of deficiencies in approved part 64 monitoring. In addition, the part 70 procedures will apply if the owner or operator wants to change certain aspects of its approved monitoring, or if the owner or operator intends to make certain types of emissions unit modifications that could trigger the need for a permit revision to address part 64 requirements. For instance, if an owner or operator switched from a pollution prevention method of controlling emissions to a control device within the definition of part 64, that change could impose the part 64 monitoring requirements for a unit which had been subject only to part 70 monitoring before the change. In such a case, the revised part 70 procedures would require the owner or operator to submit a request for a part 70 permit modification which includes proposed part 64 monitoring and required supporting documentation.

H. Section 64.8—Quality Improvement Plans (QIPs)

Requirements for responding to the monitoring data if potential control problems are detected have been included in the final rule. Requiring that owners or operators are attentive to the data obtained by part 64 monitoring and take corrective action when problems are detected has always been part of the CAM approach. The discussions accompanying the 1995 and 1996 part 64 Drafts describe the CAM approach as promoting compliance by making the owner or operator pay attention and respond to the monitoring data. Because the approach of establishing indicator ranges and then imposing an obligation to respond to excursions could potentially allow owners or operators to comply with part 64 even though they may be in a near constant state of correcting excursions, the related concept of quality improvement plans (QIPs) was developed. This concept was designed to avoid perpetual corrective action which would frustrate the compliance promotion and compliance assurance goals of part 64.

1. QIPs in the 1995 Part 64 Draft

In the discussion accompanying the 1995 part 64 Draft, the requirements for responding to monitoring data were described as including: operating ranges for monitored parameters, time periods for corrective action in the event discrepancies from the established operating ranges occur, and a maximum number of discrepancies from the established operating ranges to occur in a reporting period. The 1995 part 64 Draft provided that source owners could establish this maximum number of discrepancies as a not-to-exceed limit or as a requirement that, initially, triggers implementation of a QIP. The QIP option would require evaluation of why the maximum number of discrepancies was exceeded. Based on that evaluation, the QIP would require the owner or operator to take steps to improve control performance including improved preventive maintenance procedures, process operation changes, control system improvements or similar actions.

The QIP option was described as a means of allowing an owner or operator to establish site-specific maximum discrepancy numbers without facing automatic enforcement exposure for failure to comply with those numbers during the early stages of part 64 applicability/implementation, while at the same time assuring that a large number of discrepancies would trigger additional steps to decrease the incidence of reduced control performance. In addition, the 1995 part 64 Draft contained limits to guard against the use of an ineffective QIP. Owners or operators would be allowed to exceed the maximum number of corrective actions trigger twice during a permit term. A third or subsequent exceedance of the trigger would have been treated as a failure to comply with the requirements of part 64 as well as still requiring a QIP to improve control performance. These situations potentially would have also required the QIP to be revised to more adequately serve its purpose of improved control performance.

The discussion accompanying the 1995 part 64 Draft noted that the provisions on the length of corrective action periods and the maximum number of corrective action periods per reporting period provided significant flexibility and solicited comment on whether the final rule should establish additional objective criteria such as a maximum length for corrective actions or a limit on the number of corrective actions permitted.

The Agency received a number of comments on the QIP concept after releasing the 1995 part 64 Draft. A number of industry commenters supported the QIP concept but raised concerns about the provisions limiting the number of allowable QIPs and about the specificity of certain requirements.

2. QIPs in the 1996 Part 64 Draft

In the 1996 part 64 Draft the owner or operator was required to implement a QIP if the duration of excursions occurring in any reporting period exceeded a set percentage of the operating time for the pollutant-specific emissions unit over that reporting

period, or if the number of excursions exceeded a set percentage of the monitored averaging periods during the applicable reporting period. If the approved monitoring involved the use of a CEMS or PEMS, then the appropriate trigger for a QIP would be exceedances instead of excursions.

The appropriate percentage was to be set in the context of the permitting process. The permitting authority was to take into account all relevant factors, but the percentage of operating time was not to exceed 5 percent. The Agency solicited comment on whether that was an appropriate percentage and information that could support another percentage limit. An exception was provided in the 1996 part 64 Draft for circumstances in which specific applicable requirements established a higher percentage. Finally, the draft rule stated that the permit must include a condition that in the event that either percent trigger was exceeded, the owner or operator would develop and implement a QIP that met specific criteria.

Like the 1995 part 64 Draft, the 1996 part 64 Draft described two basic parts of a QIP. The first part would consist of evaluation procedures to determine the cause of the excessive number of excursions (or exceedances, if applicable). Based on that evaluation, the owner or operator would develop the second part of the QIP. The second part would detail the steps the owner or operator would take to improve the quality of control performance, and the schedule for taking those steps. Again, depending on the nature of the problem, the appropriate steps could include improved preventive maintenance procedures, process operation changes, control system improvements or similar types of steps. In conjunction with those procedures, the QIP also might include improved monitoring procedures.

The discussion accompanying the 1996 part 64 Draft described these requirements as assuring that the monitoring conducted under part 64 would result in owners or operators taking the necessary steps to prevent pollution through reasonable optimization of control performance. The Agency stated in that discussion and the draft itself that compliance with a QIP is not a substitute for compliance with underlying applicable requirements, including general duties to operate and maintain facilities in accordance with good air pollution control practices, and the 1996 part 64 Draft also required the owner or operator to report as a deviation any period during which a QIP is being implemented.

Again the Agency expressed concern about owners or operators performing repeated QIPs, and the 1996 part 64 Draft provided that the necessity to implement a second QIP for the same pollutant-specific emissions unit during the same permit term would constitute a specific permit term violation. The Agency acknowledged that an enforceable permit condition placing a limit on the number of QIPs might be perceived as an unnecessary restriction on the operation of highly efficient and well-operated control measures. The EPA noted that a high level of excursions could result from tightly set indicator ranges that are not at all indicative of potential excess emissions, and that the ''second QIP as a violation'' approach could inappropriately put an owner or operator in violation under such circumstances.

The Agency then noted that the second QIP as a deviation approach might encourage source owners to set unrepresentatively broad indicator ranges and thereby avoid excursions. The Agency sought comment on other means to encourage the setting of the indicator ranges in a manner consistent with the best level of emissions control that can be achieved. As one possible alternative, EPA suggested that instead of a permit violation associated with the need to implement a second QIP the final rule could instead require that the second QIP be implemented only through a permitting authority approval process. Such a plan could also include restricted process operations until completion of the approved QIP. The agency also suggested as a second possible alternative that the time period for limiting the owner or operator to one QIP could be reduced from the 5-year permit term to 3 years or other appropriate period.

In addition, the 1996 part 64 Draft contained a number of other QIP-related requirements. First, it required the owner or operator to notify the permitting authority within 2 days after determining that a QIP is necessary. Second, the QIP would not become part of the permit and would not require permitting authority approval. Third, the QIP was to be implemented as soon as practicable, and completed within 180 days from the date notice of the QIP was given to the permitting authority. Exceptions to the 180-day limit were to be granted only after the owner or operator obtained a site-specific resolution and affirmative approval from the permitting authority or, if necessary, the EPA of a plan to complete the improvement activities. An approved extension could include an enforceable, site-specific schedule with milestones and completion dates.

The 1996 part 64 Draft also required the owner or operator to report on the activities taken in conjunction with a QIP. QIP activities would be summarized in the semiannual report covering the period in which the QIP began, and in any subsequent semiannual reports covering periods during which the QIP continued. In addition, the owner or operator was required to maintain a copy of the QIP and records of QIP implementation activities for a period of five years in accordance with part 64 recordkeeping provisions.

Finally, a QIP could lead to changes in previously approved monitoring or other changes at the source that require a permit revision. Therefore, the 1996 part 64 Draft required the owner or operator to submit a proposed revision to the approved monitoring in these circumstances. Even if such changes did not require a permit revision, a source owner or operator who intended to retain the previously approved monitoring was required to reestablish the rationale that justified the monitoring.

3. QIPs in the Final Rule

In response to comments received on the 1995 and 1996 part 64 Drafts, § 64.8 of the final rule reflects a number of significant changes to the QIP requirements.

A number of commenters challenged the 5 percent QIP trigger in the 1996 part 64 Draft and some questioned whether a single percentage threshold was appropriate regardless of exactly where the threshold was set. Section 64.8(a) of the final rule provides that a QIP trigger may be set in the permit but does not require it. Where such a trigger is used, a level of 5 percent is suggested as a potentially appropriate threshold. The final rule also provides that a QIP can be required after a determination by the permitting authority or the Administrator that an owner or operator has failed to conduct proper operation and maintenance as documented through part 64 monitoring and other available information. In this respect, the QIP provisions are analogous to existing corrective action remedies available to address compliance problems.

Commenters also argued that the 180-day limit for completion of a QIP that was included in the 1996 draft part 64 was not reasonable, with various commenters arguing for more or less time. Some commenters also noted that QIPs that lead to the need for a permit modification would be particularly

problematic in terms of meeting a specific deadline. Section 64.8(c) of the final rule requires owners or operators to complete any QIP as expeditiously as practicable and to notify the permitting authority if they determine that a QIP will take longer than 180 days rather than establishing a specific amount of time within which the QIP must be completed.

Many commenters objected to the requirement that a second QIP within a permit term be treated as a violation. A number of commenters pointed out that a subsequent QIP might be completely unrelated to the first QIP, that more room for error should be allowed in the early stages of part 64 applicability/implementation, and that the existence of such penalties would frustrate the goals of part 64 by discouraging source owners from setting indicator ranges at levels that would provide early warning of problems. Commenters also noted generally in other comments on part 64 that the Agency should consider the part 63 startup, shutdown, malfunction plan (SSMP) requirements as an appropriate precedent for implementing part 64. Based on EPA's consideration of the comments, EPA has deleted the concept that a second QIP during a permit term is a violation. Instead, the final rule allows permitting authorities to use recurring problems as an indication that a QIP should be required in order to bring about improvements in control device operation and maintenance. In addition, the final rule provides that the permitting authority or the Administrator may follow up on QIPs and make changes to the plan if the QIP has not addressed the problem adequately. This latter requirement is analogous to the comparable procedures for requiring changes to SSMPs pursuant to § 63.6(e)(3).

Other changes made in response to comments received on the 1996 part 64 Draft include deleting the requirement that source owners notify the permitting authority within two days of the need to implement a QIP, the requirement that periods during which an owner or operator is implementing a QIP be reported as deviations in monitoring reports and compliance certifications, and the requirement to report test method results after QIP implementation. The Agency does not believe that these draft requirements are necessary, especially given that under the final rule, QIPs generally will be implemented only after a determination that an owner or operator has failed to meet a general duty to properly operate and maintain a source.

Some commenters objected to the requirement that owners or operators state that a QIP has reduced the likelihood of similar problems occurring in the future. The Agency believes that this type of information is appropriate, but has changed the final rule so that rather than a certification-style requirement, the owner or operator is required to submit documentation that the QIP has been completed and reduced the likelihood of similar levels of excursions or exceedances occurring. This provision will provide the permitting authority with the information necessary to gauge the completion of a QIP and whether follow-up is necessary.

Commenters on the 1996 part 64 Draft also requested that an owner or operator be allowed to implement a QIP that involves only monitoring changes. The Agency notes that the final rule, like the 1996 part 64 Draft, does not provide for QIPs that address monitoring only. This type of change should not be made through a QIP. By its nature, a QIP focuses on situations where the owner or operator has failed to meet its obligation to properly operate and maintain a source. The QIP requirements in the final rule clarify this approach and no longer mandate that a QIP be implemented solely because a set duration of excursions or exceedances occurs. A source owner who needs to change approved part 64 monitoring can address any monitoring problems directly through the appropriate permit modification process. For indicator range changes, the final rule allows owners or operators to avoid the need for a permit modification by specifying in the permit the method by which such ranges will be established rather than the actual ranges. See Section II.F. for further discussion of that issue.

I. Section 64.9—Reporting and Recordkeeping Provisions

Part 64 generally relies on the requirements for reporting, compliance certification, and recordkeeping already established in part 70. Beyond general compliance with the part 70 requirements, § 64.9(a)(2) clarifies that part 70 reports that involve part 64 monitoring data must identify summary data on the number, duration and cause of: excursions from indicator ranges; emission limit exceedances; any corrective actions taken; and monitor downtime incidents other than those associated with daily calibration checks. If applicable, the report must also document QIP implementation and completion activities. See Section II.H. for further discussion of this QIP reporting provision.

The Agency believes that the additional information that is required to be reported under part 64 is consistent with streamlined reporting requirements under other monitoring programs (such as NSPS reporting under 40 CFR 60.7(d)). The Agency also believes that this information is necessary to allow permitting authorities to use part 64 data to track overall control performance and assure that owners or operators are operating part 64 monitoring appropriately and responding appropriately to excursions from established indicator ranges.

The recordkeeping requirements similarly require the owner or operator to maintain records in conformance with part 70. The provisions clarify what part 64 records need to be maintained and the acceptable formats for recordkeeping.

The Agency solicited and received comments on several aspects of the reporting and recordkeeping requirements that were included in the 1993 EM proposal. Those requirements, comments and the changes made by EPA in response to the comments are described below.

1. Commencement of Reporting Duty

Under the 1993 EM proposal, affected owners or operators were required to submit ''enhanced monitoring reports.'' These enhanced monitoring reports would have fulfilled essentially the same function as the part 70 reports required by § 70.6(a)(3)(iii)(A), providing permitting authorities with more regular data on monitoring compliance than is required under other provisions. The 1993 EM proposal required submission of these reports ''[o]n and after the effective date of this part * * *.'' Commenters were concerned that this language could be interpreted to require reporting prior to approval of a monitoring plan. They contended that it would be difficult, if not impossible, to fulfill the reporting requirement without knowledge of what monitoring would ultimately be required. The Agency agrees with these concerns. The final part 64 rule clarifies that the obligation to begin reporting does not commence until the specified date by which the owner or operator must begin monitoring under part 64.

2. Reporting Frequency

The 1993 EM proposal also required quarterly submission of the above-mentioned enhanced monitoring report for each enhanced monitoring protocol. Many commenters argued that quarterly reporting would be too costly and/or burdensome. The quarterly reporting requirement is eliminated in the final

rule. By explicitly relying on part 70 reporting requirements, the Agency has adopted a requirement that reports be submitted at least semiannually. The EPA believes that the minimum part 70 reporting frequency is sufficient to meet the goals of compliance assurance monitoring without imposing undue costs or burdens on affected sources. The Agency also notes that the 1993 EM proposal justified quarterly reporting in part on the similar provision that existed at that time in part 60 for quarterly reporting of direct compliance data. The Agency has since modified part 60 reporting provisions and no longer requires quarterly reporting where the source remains in compliance. (See § 60.7(e) added at 59 FR 12417, March 16, 1994.) The Agency also notes that part 70 authorizes permitting authorities to require more frequent reporting of monitoring data, when appropriate.

A related provision in the 1993 EM proposal required that each enhanced monitoring report be postmarked no later than thirty days after the last day of the reporting period. A number of commenters objected to this due date provision, arguing that thirty days was insufficient time to analyze and verify the necessary data and to then assemble a report reflecting that data, especially where such data is received from independent laboratories. Although the Agency believes that thirty days is generally sufficient time to compile the reports required under the revised part 64, the due date provision has been eliminated. Instead, by relying on the reporting requirements of part 70, the Agency requires ''prompt'' submission of monitoring reports as defined by the permitting authority.

3. Report Signature Requirement

The 1993 EM proposal required that certification by a responsible official be included in each enhanced monitoring report. Under this requirement the official had to certify by his or her signature that he or she had personally examined the information contained in the report and its attachments, that the statements and information were true to the best of his or her knowledge and belief, and that he or she was aware of the penalties (including the possibility of fine or imprisonment) that could accrue for submitting false statements and information or omitting required statements and information. A number of commenters were concerned that the requirement that an official personally examine all information in the report and its attachments was impractical, given the amount of data that would have to be examined and the responsible official's probable lack of expertise in the specific areas of the documents. Commenters also expressed concerns that the penalty language of the proposed rule imposed liability on the responsible official instead of the persons who might be responsible for violations, or on the company itself.

The EPA has eliminated the proposed report signature requirement in the final rule. Instead, part 64 reporting will be subject to the same certification requirements as required for all reports submitted under § 70.5(d). The Agency believes the use of the part 70 signature requirements is appropriate given the general reliance on part 70 reporting requirements in part 64.

4. Confidentiality of Report Information

The 1993 EM proposal explicitly provided that an owner or operator could assert a confidentiality claim for information reported under part 64 to the extent such information was entitled to protection under section 114(c) of the Act. This provision received a generally favorable response from industry commenters, some of whom proposed that the confidentiality provisions be expanded. This provision is not included in § 64.9 of the final rule. As noted above, part 64 reporting is governed by part 70. Information submitted under part 70 reporting requirements is already subject to confidentiality protection pursuant to § 70.4(b)(3)(viii), as well as section 503(e) of the Act. Any such information accompanied by a claim of confidentiality will be treated in accordance with the regulations of 40 CFR part 2. The Agency believes that the inclusion of confidentiality provisions in part 64 is unnecessary due to the applicability of the protections contained in part 70.

5. Recordkeeping Requirements

Section 64.9(b)(1) requires owners and operators of affected sources to comply with the recordkeeping obligations set forth in § 70.6(a)(3)(ii). Part 70 requires that records of the required monitoring including the following information be maintained for a period of at least five years: The date, place, and time of sampling or measurements; the date(s) analyses were performed; the company or entity that performed the analyses; the analytical techniques or methods used; the results of such analyses; and the operating conditions as existing at the time of sampling or measurement. Section 64.9(b) clarifies that for purposes of part 64, the records to be maintained include: Monitoring data, monitor performance data, corrective actions taken, the written quality improvement plan and related implementation activities, and other supporting information required to be maintained under part 64. The Agency notes that the part 64 requirement to keep these records is not a separate recordkeeping requirement. The Agency believes all of these records are already required to be maintained under the general part 70 provisions, but includes these specific types of records in the final rule to clarify the general part 70 language.

Recordkeeping requirements under the final rule are not significantly different from those in the 1993 EM proposal. Although the 1993 EM proposal did not explicitly refer to part 70 recordkeeping provisions, its requirements were essentially a restatement of part 70 requirements in an enhanced monitoring context. Owners or operators would have been required to maintain the same general information required by part 70 for the same minimum period of five years. The preamble to the 1993 EM proposal did state that the requirements were ''consistent with the minimum recordkeeping provisions in 40 CFR 70.6(a)(3).''

Both the requirements of the 1993 EM proposal and the currently applicable part 70 provisions require the maintenance of records for a period of at least five years from the date of the monitoring sample, measurement, report or application. A number of commenters expressed objections to the five year data retention period, arguing that the burden of retaining records for such an extended period was excessive. Among the proposed alternatives were a 3-year data retention period, consistent with the Acid Rain Program, or a shorter period for records covering periods for which there were no deviations. The EPA had included the 5-year period in the 1993 EM proposal to be consistent with the minimum requirements of § 70.6. The Agency continues to believe that this period is appropriate, as part 70 has established the 5-year retention period as the standard even where less than five years is required in underlying rules. For example, part 70 has changed the record retention time for NSPS and similar provisions, establishing the 5-year period for such provisions. By explicitly relying on part 70 recordkeeping requirements, the Agency has further affirmed the appropriateness of employing the 5-year period for part 64 records.

Section 64.6(b) of the 1993 EM proposal stated that records had to be available for inspection at the site of an affected source or at a different site approved by the permitting authority. In

addition, the proposed rule required that such records be maintained so as to permit prompt submittal if requested by EPA or the permitting authority. A number of commenters on the 1993 EM proposal and the 1996 part 64 Draft recommended that owners or operators should be free to decide where facility records would be kept, arguing that permitting authority approval should not be required since most facilities cannot handle the storage of the data required by the rule. Because the final rule relies directly on the reporting and recordkeeping requirements of part 70, the requirement that source owners get permitting authority approval for off-site storage of part 64 records has been deleted.

The recordkeeping provisions of the 1993 EM proposal did not specifically address the form in which records must be maintained. Several commenters supported the idea of storing data in a non-paper media such as microfiche or a form of electronic data storage. They contended that such storage methods would reduce the costs and burdens associated with storing records for the minimum 5-year period. The Agency agrees with these comments and encourages the use of alternative recordkeeping, provided appropriate safeguards are adopted to insure the integrity and accessibility of the data over time. Section 64.9(b)(2) of the final rule therefore explicitly allows the maintenance of records on alternative media, such as microfilm, computer files, magnetic tape disks, or microfiche, so long as the data are readily available for inspection and review and the alternative format does not conflict with other applicable recordkeeping provisions. This approach is consistent with recent general recordkeeping provisions, such as the NESHAP general provisions in 40 CFR 63.10(b).

J. Section 64.10—Savings Provisions

Because part 64 requirements may overlap with many other applicable requirements, § 64.10 of the final rule clarifies that nothing in part 64 is intended to excuse the owner or operator from applicable requirements under the Act (including emission limitations or standards as well as other monitoring requirements) or to restrict the authority of the EPA or the permitting authority to impose additional monitoring under the Act or State law, as applicable. For example, it would be possible for a source to be in compliance with its QIP, but out of compliance with an applicable emission limitation or standard. The owner of such a source could expect enforcement action for violation of the applicable emission limitation or standard, even though there may not be a violation of part 64. Simply put, adherence to a QIP does not insulate an owner or operator against enforcement action for violations of an underlying emission limitation or standard. This section also clarifies that the requirements may not be used to justify the imposition of less stringent monitoring under other programs than would otherwise be required under those programs. For instance, in acting on a new source review permit under title I of the Act, the part 64 requirements may not be used to judge the adequacy of the monitoring in that permit; instead, the general procedures and practices under the title I permit program will be used.

The 1993 EM proposal contained specific savings provisions in the applicability section (then § 64.1) and the permit application section (then § 64.7). The applicability savings provision in proposed § 64.1(d) clarified that nothing in part 64 was intended to excuse owners or operators from other monitoring, recordkeeping and reporting requirements that apply pursuant to other provisions of the Act, or to restrict the authority of the Administrator or permitting authority to impose additional or more restrictive monitoring, recordkeeping or reporting requirements under other provisions of the Act. The permit application provision in proposed § 64.7(d) stated that owners or operators must still comply with all other permit application requirements and requirements established by federal regulations or by permitting authorities under federally-approved permit programs. These savings provisions are brought together in a single section of the final rule without significant changes from the original proposal.

Section 64.10 of the final rule also states that nothing in part 64 will interfere with the permitting authority's or EPA's ability to enforce against violations of applicable requirements under the Act or the authority of a citizen to enforce against violations pursuant to section 304. This savings provision was added to the final rule to clarify the Agency's position on the relationship of part 64 to certain enforcement issues. A number of commenters requested that EPA include a provision that would shield owners or operators who comply with part 64 from enforcement for violations of their emission limits. As discussed in Section I.E.3., the Agency disagrees with this concept. In cases where the part 64 data indicate noncompliance with emission limits, including exceedances, permitting authorities and the Agency will be able to take enforcement action. In other cases, where the part 64 monitoring indicates, but does not directly establish, the compliance status of a source, the reasonable assurance of compliance based on part 64 data does not prohibit the Agency from taking appropriate investigatory or enforcement steps when noncompliance is shown by other means. This same point was clarified in the discussions accompanying both the 1995 and 1996 part 64 Drafts.

K. Revisions to 40 CFR Part 70 and Part 71

The final rule includes revisions to parts 70 and 71 to clarify the relationship between part 64 and the operating permits program. These revisions are outlined below.

1. Monitoring Requirements

The revisions to part 70 allow for streamlining multiple monitoring requirements if the streamlined monitoring is able to assure compliance at least to the same extent as the applicable requirements not included as a result of the streamlining. The Agency notes that the language in these revisions is designed to be consistent with a discussion in section A.5. of White Paper 2 (See docket item VI–I–2) concerning the possibility of streamlining applicable monitoring and testing requirements (''§ 70.6(a)(3) appears to restrict streamlining by requiring that all ''applicable'' monitoring . . . requirements be placed in the permit. . . . The EPA intends to revise part 70 to reflect this understanding in a future rulemaking.''). The Agency indicated in the 1996 part 64 Draft that it intended to fulfill its intent to modify part 70 as discussed in White Paper 2 by including the appropriate revisions to § 70.6(a)(3)(i) in conjunction with the part 64 rulemaking. Because the Agency received strong support for this proposed action and no negative comments, the Agency has proceeded to add this part 70 revision (and the corresponding revision to part 71) as part of this rulemaking.

2. Compliance Certification Requirements

To tailor compliance certification to the monitoring imposed by part 64, EPA has revised § 70.6(c)(5)(iii) (and § 71.6(c)(5)(iii)) so that a compliance certification includes the following elements.

First, the permit conditions being certified must be identified. Second, the method(s) and other information used to determine compliance status of each

term and condition must be identified. These method(s) will have to include at a minimum any testing and monitoring methods identified in § 70.6(a)(3) that were conducted during the relevant time period. In addition, if the owner or operator knows of other material information (i.e., information beyond required monitoring that has been specifically assessed in relation to how the information potentially affects compliance status), that information must be identified and addressed in the compliance certification. This requirement merely emphasizes the general prohibition in section 113(c)(2) of the Act on knowingly making a false certification or omitting material information and the general criminal section on submitting false information to the government codified at 18 USC 1001. The revised part 70 provision does not impose a duty on the owner or operator to assess every possible piece of information that may have some undetermined bearing on compliance. The description of the methods relied on by the source owner also will have to indicate whether the methods provide continuous or intermittent data. In accordance with section 114 of the Act that specifies that the certification include whether compliance is continuous or intermittent, the Agency will interpret the compliance certification that is based on monitoring that provides intermittent data as compliance on an intermittent basis.

Third, the responsible official will have to certify compliance based on the results of the identified methods. The certification must state the compliance status with the part 70 permit, taking into account any deviations and noting as possible exceptions to compliance any deviations or excursions/exceedances as defined in part 64 or other underlying applicable requirements. Because ''deviation'' was defined under part 71 as originally promulgated, the revisions to part 71 incorporate the concepts of excursion and exceedance into the § 71.6(a)(3) definition of ''deviation.'' Therefore, unlike the part 70 revisions, the revised compliance certification provision in part 71 refers only to ''deviations.''

The owner or operator may include information in the certification to document that compliance was achieved during any periods in which a possible exception is noted (such as information that an excursion or exceedance occurred during a period of startup or shutdown for which compliance with an emission limitation or standards was excused). The requirement to take into account deviations, excursions, and exceedances together with the requirement to identify whether the method used provides continuous or intermittent data ensures that the compliance certification will show whether compliance is continuous or intermittent. For example, a compliance certification based on a method providing intermittent data or that notes any deviations or certain possible exceptions to compliance as a result of exceedances or excursions based on monitoring required by this rule will be interpreted as showing intermittent compliance. The Agency does not interpret a certification of intermittent compliance to necessarily mean that the responsible official is certifying that there are periods of noncompliance. Such a certification can mean that there are periods of time in which the source's compliance status is unknown. When a responsible official certifies compliance based on a method providing continuous data and no deviations, excursions, or exceedances have occurred (or all such occurrences have been adequately addressed by other information, as explained above), this will be interpreted as a certification of continuous compliance. These provisions implement the requirements in section 114(a)(3)(B), (C), and (D) that the certification include the methods used to determine the compliance status and whether compliance is continuous or intermittent.

The certification also will have to include any other facts required by the permitting authority. This requirement is already included in parts 70 and 71 as promulgated. Finally, the Agency notes that the rule allows the owner or operator to cross-reference the permit or previous reports to identify the various information elements required in a certification. This provision allows the actual certification to be a short, concise compliance statement that is not burdened by restating detailed information that has already been provided.

The goal of part 64 is to provide improved compliance data for significant emissions units at title V major sources. This improvement will in turn provide additional data for the owner or operator to rely on in certifying compliance. As discussed in Section I.C. above, EPA believes that the part 64 data will provide a reliable means for owners or operators to reach a conclusion about their compliance status. However, since the part 64 data will not necessarily always provide unequivocal proof of compliance or noncompliance (as a performance or compliance test method would), there will be excursions or exceedances identified through part 64 which raise questions about compliance status but may not confirm conclusively that a source is in noncompliance. The existence of these occurrences only indicates the need to review the compliance information provided in order to determine what, if any, compliance or enforcement actions may be warranted.

These changes to parts 70 and 71 have been developed based on the provisions included in the 1993 EM proposal, as supplemented by the December 1994 reopened comment period, as well as based on the 1995 and 1996 part 64 Drafts. The reporting requirements of the 1993 EM proposal would have required that a responsible official for an affected source use enhanced monitoring data as the basis for the required title V compliance certification. The 1993 EM proposal also required the use of any other data collected for the purpose of determining compliance during the monitoring period. These provisions were the subject of significant public comment. Some of these comments seemed to be based on the belief that the proposed rule created a separate compliance certification requirement. The EPA always intended for these provisions to operate within the title V compliance certification process, establishing additional requirements that units subject to part 64 had to meet in order to satisfy title V compliance certification requirements. To clarify this approach, the compliance certification provisions in the final rule were removed from part 64. Instead, § 70.6(c)(5)(iii) of part 70 (and the corresponding section in part 71) has been amended to reflect the requirements of compliance certification for those units subject to part 64.

In addition, as discussed above in Section I.C., EPA reopened the public comment period on the 1993 EM proposal and stated EPA's intent that it may reconsider how to interpret the meaning of ''continuous or intermittent'' in the context of certifying compliance. The revisions to parts 70 and 71 in today's rulemaking reflect the position taken by EPA in that December 1994 notice. Finally, the revisions reflect the position taken in the final part 64 rule that monitoring data that do not constitute formal performance or compliance test method data may still be used by the owner or operator to determine compliance status and to note any possible exceptions to compliance that are indicated by the monitoring. This interpretation is consistent with the existing part 70 which specifically references the fact that a certification must consider all of the relevant data

under § 70.6(a)(3), which includes non-test method monitoring data. Because of the possible misinterpretations of the existing language, EPA believes that clarifying the compliance certification requirements in conjunction with promulgating part 64 is appropriate.

III. Administrative Requirements

A. Docket

The EPA is relying on the procedural requirements of section 307(d) of the Act for the regulations. In accordance with those requirements, EPA has established docket A–91–52 for the regulations. The docket is an organized and complete file of all the information submitted to, or otherwise considered by, EPA in the development of this rulemaking. The principal purposes of the docket are: (1) To allow interested parties a means to identify and locate documents so that they can effectively participate in the rulemaking process, and (2) to serve as the record in case of judicial review. The docket is available for public inspection at EPA's Air Docket, which is listed under the **ADDRESSES** section of this notice.

B. Executive Order 12866

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

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

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

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

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

EPA assumes as the baseline for its analysis of part 64 that affected emissions sources are currently in compliance with their underlying emission standards 100 percent of the time. Thus, there are no emissions reductions benefits (and health and welfare benefits), nor costs for additional control technology, operation and maintenance, associated with part 64. EPA believes that some sources, in response to monitoring data gathered under part 64, may indeed have to make investments in control equipment technology, operation and maintenance to reduce emissions to comply with their underlying emissions standards; however, EPA believes these emission reductions benefits and costs are not attributable to part 64—but to the underlying emissions standards. As such, EPA has not estimated the benefits or costs that may result from such actions to reduce emissions.

EPA has estimated the cost of part 64 to include the cost of development and implementation of CAM plans, $50 million per year. ($1995). This includes the cost of determining the monitoring approach and implementing the approved design, including reporting, recordkeeping, and certification activities.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a ''significant regulatory action'' due to its policy implications and was submitted to OMB for review. Any written comments from OMB to EPA and any written EPA response to those comments are included in the docket. The docket is available for public inspection at EPA's Air Docket Section, which is listed in the **ADDRESSES** section of this preamble. The Regulatory Impact Analysis (RIA) for this rulemaking is included in the docket.

C. Unfunded Mandates Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act'') (signed into law on March 22, 1995) requires that the Agency must prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. The budgetary impact statement must include: (i) Identification of the Federal law under which the rule is promulgated; (ii) a qualitative and quantitative assessment of anticipated costs and benefits of the Federal mandate and an analysis of the extent to which such costs to State, local, and tribal governments may be paid with Federal financial assistance; (iii) if feasible, estimates of the future compliance costs and any disproportionate budgetary effects of the mandate; (iv) if feasible, estimates of the effect on the national economy; and (v) a description of the Agency's prior consultation with elected representatives of State, local, and tribal governments and a summary and evaluation of the comments and concerns presented. Section 203 requires the Agency to establish a plan for obtaining input from and informing, educating, and advising any small governments that may be significantly or uniquely impacted by the rule.

Under section 205 of the Unfunded Mandates Act, EPA must identify and consider a reasonable number of regulatory alternatives before promulgating a rule for which a budgetary impact statement must be prepared. The Agency must select from those alternatives the most cost-effective and least burdensome alternative that achieves the objectives of the rule unless the Agency explains why this alternative is not selected or unless the selection of this alternative is inconsistent with law.

Because this rule is not estimated to result in the expenditure by State, local, and tribal governments and the private sector, in aggregate, of over $100 million per year, EPA is not required under UMRA to develop a budgetary impact statement or to undertake the analysis under section 205. However, because certain options considered by EPA would have resulted in a total cost in excess of $100 million, EPA did prepare such statement and analysis and they are included as part of the Regulatory Impact Analysis, which is included in the docket.

To the extent governmental entities are affected by the rule as permitting authorities, the costs of the rule are offset or mitigated by receipt of title V permit fees, since the rule affects only title V sources. Part 70 requires sources of pollution to pay permit fees sufficient to offset the costs incurred by the permitting authority in managing its operating permits program. Since part 64 introduces additional requirements for permitting authorities, these incremental costs must be incorporated into the operating permit fee. Because Permitting Authority costs may be transferred to sources of pollution through the permit fee, the administrative and recordkeeping cost of this rulemaking to State, local, and tribal governments is, for practical purposes, zero. EPA has also concluded that, to the extent small governments are impacted by this regulation because they are major stationary sources, the impact will not be significant. *See* Section III.E. As a result, UMRA requirements do not apply to this rulemaking.

D. Paperwork Reduction Act

The information collection requirements in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* An Information Collection Request (ICR) document has been prepared by EPA (ICR No. 1663.02) and a copy may be obtained from Sandy Farmer, OPPE Regulatory Information Division; U.S. Environmental Protection Agency (2137); 401 M St., SW.; Washington, DC 20460 or by calling (202) 260–2740. The information requirements are not effective until OMB approves them.

The information is planned to be collected to fulfill requirements in both the title V operating permit program and part 64 programs. The operating permit program requires owners or operators of units that emit air pollutants to submit annual compliance certifications, to submit monitoring results at least semiannually, and to report deviations promptly. Part 64 requires monitoring for certain emissions units at major sources subject to the title V operating permits program. Therefore, the collection of information is mandated by the Act. Generally, emissions data cannot be considered confidential under the Act. However, to the extent allowable under the Act, the collection of information will be entitled to confidential treatment in accordance with EPA's procedures established in 40 CFR part 2.

The part 64 rulemaking requires monitoring, compliance certification, periodic reporting, and recordkeeping information collections by owners and operators of title V sources with controlled pollutant-specific emissions units that have a pre-control potential to emit major amounts of regulated air pollutants. Owners or operators of affected emissions units will use the information as the basis for the compliance certification required by the operating permit program, and as the basis for compliance assurance monitoring reports. Sources may also use the information to determine and maintain the efficiency of process or emissions control devices. Permitting authorities will use the information to determining acceptability of proposed compliance assurance monitoring, to assess compliance, to input into reports to other agencies, and, when necessary, in enforcement proceedings and Quality Improvement Plans (QIPs). The information may be used by other entities, including federal entities and citizens. EPA will use the information to perform activities such as providing oversight and guidance to State and local agencies, and to assess requests for alternative monitoring.

The implementation schedule for part 64 will phase-in implementation over a number of years, so that not all sources will have reporting and recordkeeping impacts in the first three years of implementation. The estimated annualized cost of CAM on a national level for the first three years of implementation is $7,891,000 (in 1995 dollars). The annual average total capital and operation and maintenance costs are estimated at $1,230,000 (in 1995 dollars) for the first three years of implementation. The annual average burden hours for the first three years of implementation are estimated at 147,560. The Agency estimated the incremental reporting burden for this collection to average 1 hour annually per response, and to require between 26 and 390 hours annually for recordkeeping per response. This includes time for conducting activities over and above the requirements of part 70 such as an accounting of the number, duration and cause of monitor downtime incidents and exceedances, a reporting of corrective actions, and keeping records of data used to document the adequacy of monitoring. Note that the average burden hours and costs represent those estimated for the first three years of the rule's implementation during which a relatively small percentage of the affected pollutant-specific emission units will be subject to part 64 requirements. More units will be affected per year in the six to eight years following the rule's publication and the reporting and recordkeeping burden will also increase. See the RIA for more discussion of the costs associated with years beyond the first three years.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR Ch. 15.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques to the Director, OPPE Regulatory Information Division; U.S. Environmental Protection Agency (2137), 401 M St., SW., Washington DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., NW., Washington, DC 20503, marked ''Attention: Desk Officer for EPA.'' Comments are requested within November 21, 1997. Include the ICR number in any correspondence.

E. Regulatory Flexibility Act

The Agency has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this rule. A screening analysis was prepared to examine the potential for significant adverse impacts on small entities associated with specific monitoring and certification provisions. For small governmental entities that may own or operate affected sources, EPA determined that the most likely small government and organization sources affected by the rule are municipal power plants and hospitals. After analysis, EPA determined that, given the relatively low numbers of impacted sources(140 small government utilities and 70 small organizations (hospitals)), the low percentage of impacted sources out of the total number of similar sources (11—18 percent of small government utilities and 3 percent of hospitals), and the low cost impacts associated with CAM (assumed similar to the cost impact on small business as discussed below), there will not be a significant impact upon a substantial number of small governments and organizations. See Section V of the Regulatory Impact Analysis included in the docket. Nevertheless, in developing the rule, EPA did provide numerous opportunities for consultation with interested parties, including State, local, and tribal governments, at public conferences and meetings. The EPA evaluated the comments and concerns expressed, and the rule reflects, to the extent consistent with the Act, those comments and concerns. Most importantly, the Agency received comments from approximately 80 representatives of municipally-owned electric utilities that suggested exemptions for small municipal utility

units. In response, the rule includes an exemption for certain municipally-owned electric utility units that could be affected by the rule. These procedures ensured State and local governments an opportunity to give meaningful and timely input and obtain information, education and advice on compliance.

EPA estimates 4,957 small firms nationwide could be affected by CAM. A total of 40 affected small firms within this group could have a potential impact over one percent of average annual revenues. The ratio is 0.0087, or less than one percent, which represents the percent of small affected firms that may experience greater than a 1 percent (but less than a 3 percent) increase in costs due to CAM. EPA believes that these estimates of the number of firms affected and the level of cost impact are overstated due to several conservative assumptions in the analysis. These assumptions are described in Chapter 5 of the Regulatory Impact Analysis. Given the conservativeness of this assessment and the fact that 99 percent of the affected small businesses are expected to have impacts of less than 1 percent and no small business is likely to experience costs exceeding 3 percent, the EPA concludes that CAM will not have a significant economic impact on a substantial number of small businesses. In addition, EPA also notes that the use of general permits under title V and assistance through the small business assistance program provisions of title V will assist in reducing the impacts of the part 64 requirements on small businesses.

Accordingly, considering all of the above information, EPA concludes that this rule will not have a significant economic impact on a substantial number of small entities.

F. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office prior to publication of the rule in today's **Federal Register**. This rule is not a ''major rule'' as defined by U.S.C. 804(2).

List of Subjects

40 CFR Part 64

Environmental protection, Air pollution control, Monitoring, Operating permits, Reporting and recordkeeping requirements.

40 CFR Part 70

Air pollution control, Monitoring, Operating permits, Reporting and recordkeeping requirements.

40 CFR Part 71

Air pollution control, Monitoring, Operating permits, Reporting and recordkeeping requirements.

Dated: October 3, 1997.

Carol M. Browner,

Administrator.

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

1. Part 64 is added to read as follows:

PART 64—COMPLIANCE ASSURANCE MONITORING

Sec.

Authority: 42 U.S.C. 7414 and 7661–7661f.

§ 64.1 Definitions.

The following definitions apply to this part. Except as specifically provided in this section, terms used in this part retain the meaning accorded them under the applicable provisions of the Act.

Act means the Clean Air Act, as amended by Pub.L. 101–549, 42 U.S.C. 7401, *et seq.*

Applicable requirement shall have the same meaning as provided under part 70 of this chapter.

Capture system means the equipment (including but not limited to hoods, ducts, fans, and booths) used to contain, capture and transport a pollutant to a control device.

Continuous compliance determination method means a method, specified by the applicable standard or an applicable permit condition, which:

(1) Is used to determine compliance with an emission limitation or standard on a continuous basis, consistent with the averaging period established for the emission limitation or standard; and

(2) Provides data either in units of the standard or correlated directly with the compliance limit.

Control device means equipment, other than inherent process equipment, that is used to destroy or remove air pollutant(s) prior to discharge to the atmosphere. The types of equipment that may commonly be used as control devices include, but are not limited to, fabric filters, mechanical collectors, electrostatic precipitators, inertial separators, afterburners, thermal or catalytic incinerators, adsorption devices (such as carbon beds), condensers, scrubbers (such as wet collection and gas absorption devices), selective catalytic or non-catalytic reduction systems, flue gas recirculation systems, spray dryers, spray towers, mist eliminators, acid plants, sulfur recovery plants, injection systems (such as water, steam, ammonia, sorbent or limestone injection), and combustion devices independent of the particular process being conducted at an emissions unit (e.g., the destruction of emissions achieved by venting process emission streams to flares, boilers or process heaters). For purposes of this part, a control device does not include passive control measures that act to prevent pollutants from forming, such as the use of seals, lids, or roofs to prevent the release of pollutants, use of low-polluting fuel or feedstocks, or the use of combustion or other process design features or characteristics. If an applicable requirement establishes that particular equipment which otherwise meets this definition of a control device does not constitute a control device as applied to a particular pollutant-specific emissions unit, then that definition shall be binding for purposes of this part.

Data means the results of any type of monitoring or method, including the results of instrumental or non-instrumental monitoring, emission calculations, manual sampling procedures, recordkeeping procedures, or any other form of information collection procedure used in connection with any type of monitoring or method.

Emission limitation or standard means any applicable requirement that constitutes an emission limitation, emission standard, standard of performance or means of emission limitation as defined under the Act. An emission limitation or standard may be expressed in terms of the pollutant, expressed either as a specific quantity, rate or concentration of emissions (e.g., pounds of SO_2 per hour, pounds of SO_2 per million British thermal units of fuel input, kilograms of VOC per liter of applied coating solids, or parts per million by volume of SO_2) or as the relationship of uncontrolled to controlled emissions (e.g., percentage capture and destruction efficiency of VOC or percentage reduction of SO_2).

An emission limitation or standard may also be expressed either as a work practice, process or control device parameter, or other form of specific design, equipment, operational, or operation and maintenance requirement. For purposes of this part, an emission limitation or standard shall not include general operation requirements that an owner or operator may be required to meet, such as requirements to obtain a permit, to operate and maintain sources in accordance with good air pollution control practices, to develop and maintain a malfunction abatement plan, to keep records, submit reports, or conduct monitoring.

Emissions unit shall have the same meaning as provided under part 70 of this chapter.

Exceedance shall mean a condition that is detected by monitoring that provides data in terms of an emission limitation or standard and that indicates that emissions (or opacity) are greater than the applicable emission limitation or standard (or less than the applicable standard in the case of a percent reduction requirement) consistent with any averaging period specified for averaging the results of the monitoring.

Excursion shall mean a departure from an indicator range established for monitoring under this part, consistent with any averaging period specified for averaging the results of the monitoring.

Inherent process equipment means equipment that is necessary for the proper or safe functioning of the process, or material recovery equipment that the owner or operator documents is installed and operated primarily for purposes other than compliance with air pollution regulations. Equipment that must be operated at an efficiency higher than that achieved during normal process operations in order to comply with the applicable emission limitation or standard is not inherent process equipment. For the purposes of this part, inherent process equipment is not considered a control device.

Major source shall have the same meaning as provided under part 70 or 71 of this chapter.

Monitoring means any form of collecting data on a routine basis to determine or otherwise assess compliance with emission limitations or standards. Recordkeeping may be considered monitoring where such records are used to determine or assess compliance with an emission limitation or standard (such as records of raw material content and usage, or records documenting compliance with work practice requirements). The conduct of compliance method tests, such as the procedures in appendix A to part 60 of this chapter, on a routine periodic basis may be considered monitoring (or as a supplement to other monitoring), provided that requirements to conduct such tests on a one-time basis or at such times as a regulatory authority may require on a non-regular basis are not considered monitoring requirements for purposes of this paragraph. Monitoring may include one or more than one of the following data collection techniques, where appropriate for a particular circumstance:

(1) Continuous emission or opacity monitoring systems.

(2) Continuous process, capture system, control device or other relevant parameter monitoring systems or procedures, including a predictive emission monitoring system.

(3) Emission estimation and calculation procedures (e.g., mass balance or stoichiometric calculations).

(4) Maintenance and analysis of records of fuel or raw materials usage.

(5) Recording results of a program or protocol to conduct specific operation and maintenance procedures.

(6) Verification of emissions, process parameters, capture system parameters, or control device parameters using portable or in situ measurement devices.

(7) Visible emission observations.

(8) Any other form of measuring, recording, or verifying on a routine basis emissions, process parameters, capture system parameters, control device parameters or other factors relevant to assessing compliance with emission limitations or standards.

Owner or operator means any person who owns, leases, operates, controls or supervises a stationary source subject to this part.

Part 70 or 71 permit shall have the same meaning as provided under part 70 or 71 of this chapter, provided that it shall also refer to a permit issued, renewed, amended, revised, or modified under any federal permit program promulgated under title V of the Act.

Part 70 or 71 permit application shall mean an application (including any supplement to a previously submitted application) that is submitted by the owner or operator in order to obtain a part 70 or 71 permit.

Permitting authority shall have the same meaning as provided under part 70 or 71 of this chapter.

Pollutant-specific emissions unit means an emissions unit considered separately with respect to each regulated air pollutant.

Potential to emit shall have the same meaning as provided under part 70 or 71 of this chapter, provided that it shall be applied with respect to an ''emissions unit'' as defined under this part in addition to a ''stationary source'' as provided under part 70 or 71 of this chapter.

Predictive emission monitoring system (PEMS) means a system that uses process and other parameters as inputs to a computer program or other data reduction system to produce values in terms of the applicable emission limitation or standard.

Regulated air pollutant shall have the same meaning as provided under part 70 or 71 of this chapter.

§ 64.2 Applicability.

(a) *General applicability.* Except for backup utility units that are exempt under paragraph (b)(2) of this section, the requirements of this part shall apply to a pollutant-specific emissions unit at a major source that is required to obtain a part 70 or 71 permit if the unit satisfies all of the following criteria:

(1) The unit is subject to an emission limitation or standard for the applicable regulated air pollutant (or a surrogate thereof), other than an emission limitation or standard that is exempt under paragraph (b)(1) of this section;

(2) The unit uses a control device to achieve compliance with any such emission limitation or standard; and

(3) The unit has potential pre-control device emissions of the applicable regulated air pollutant that are equal to or greater than 100 percent of the amount, in tons per year, required for a source to be classified as a major source. For purposes of this paragraph, ''potential pre-control device emissions'' shall have the same meaning as ''potential to emit,'' as defined in § 64.1, except that emission reductions achieved by the applicable control device shall not be taken into account.

(b) *Exemptions—.* (1) *Exempt emission limitations or standards.* The requirements of this part shall not apply to any of the following emission limitations or standards:

(i) Emission limitations or standards proposed by the Administrator after November 15, 1990 pursuant to section 111 or 112 of the Act.

(ii) Stratospheric ozone protection requirements under title VI of the Act.

(iii) Acid Rain Program requirements pursuant to sections 404, 405, 406, 407(a), 407(b), or 410 of the Act.

(iv) Emission limitations or standards or other applicable requirements that apply solely under an emissions trading program approved or promulgated by the Administrator under the Act that allows for trading emissions within a source or between sources.

(v) An emissions cap that meets the requirements specified in § 70.4(b)(12) or § 71.6(a)(13)(iii) of this chapter.

(vi) Emission limitations or standards for which a part 70 or 71 permit specifies a continuous compliance determination method, as defined in § 64.1. The exemption provided in this paragraph (b)(1)(vi) shall not apply if the applicable compliance method includes an assumed control device emission reduction factor that could be affected by the actual operation and maintenance of the control device (such as a surface coating line controlled by an incinerator for which continuous compliance is determined by calculating emissions on the basis of coating records and an assumed control device efficiency factor based on an initial performance test; in this example, this part would apply to the control device and capture system, but not to the remaining elements of the coating line, such as raw material usage).

(2) *Exemption for backup utility power emissions units.* The requirements of this part shall not apply to a utility unit, as defined in § 72.2 of this chapter, that is municipally-owned if the owner or operator provides documentation in a part 70 or 71 permit application that:

(i) The utility unit is exempt from all monitoring requirements in part 75 (including the appendices thereto) of this chapter;

(ii) The utility unit is operated for the sole purpose of providing electricity during periods of peak electrical demand or emergency situations and will be operated consistent with that purpose throughout the part 70 or 71 permit term. The owner or operator shall provide historical operating data and relevant contractual obligations to document that this criterion is satisfied; and

(iii) The actual emissions from the utility unit, based on the average annual emissions over the last three calendar years of operation (or such shorter time period that is available for units with fewer than three years of operation) are less than 50 percent of the amount in tons per year required for a source to be classified as a major source and are expected to remain so.

§ 64.3 Monitoring design criteria.

(a) *General criteria.* To provide a reasonable assurance of compliance with emission limitations or standards for the anticipated range of operations at a pollutant-specific emissions unit, monitoring under this part shall meet the following general criteria:

(1) The owner or operator shall design the monitoring to obtain data for one or more indicators of emission control performance for the control device, any associated capture system and, if necessary to satisfy paragraph (a)(2) of this section, processes at a pollutant-specific emissions unit. Indicators of performance may include, but are not limited to, direct or predicted emissions (including visible emissions or opacity), process and control device parameters that affect control device (and capture system) efficiency or emission rates, or recorded findings of inspection and maintenance activities conducted by the owner or operator.

(2) The owner or operator shall establish an appropriate range(s) or designated condition(s) for the selected indicator(s) such that operation within the ranges provides a reasonable assurance of ongoing compliance with emission limitations or standards for the anticipated range of operating conditions. Such range(s) or condition(s) shall reflect the proper operation and maintenance of the control device (and associated capture system), in accordance with applicable design properties, for minimizing emissions over the anticipated range of operating conditions at least to the level required to achieve compliance with the applicable requirements. The reasonable assurance of compliance will be assessed by maintaining performance within the indicator range(s) or designated condition(s). The ranges shall be established in accordance with the design and performance requirements in this section and documented in accordance with the requirements in § 64.4. If necessary to assure that the control device and associated capture system can satisfy this criterion, the owner or operator shall monitor appropriate process operational parameters (such as total throughput where necessary to stay within the rated capacity for a control device). In addition, unless specifically stated otherwise by an applicable requirement, the owner or operator shall monitor indicators to detect any bypass of the control device (or capture system) to the atmosphere, if such bypass can occur based on the design of the pollutant-specific emissions unit.

(3) The design of indicator ranges or designated conditions may be:

(i) Based on a single maximum or minimum value if appropriate (e.g., maintaining condenser temperatures a certain number of degrees below the condensation temperature of the applicable compound(s) being processed) or at multiple levels that are relevant to distinctly different operating conditions (e.g., high versus low load levels).

(ii) Expressed as a function of process variables (e.g., an indicator range expressed as minimum to maximum pressure drop across a venturi throat in a particulate control scrubber).

(iii) Expressed as maintaining the applicable parameter in a particular operational status or designated condition (e.g., position of a damper controlling gas flow to the atmosphere through a by-pass duct).

(iv) Established as interdependent between more than one indicator.

(b) *Performance criteria.* The owner or operator shall design the monitoring to meet the following performance criteria:

(1) Specifications that provide for obtaining data that are representative of the emissions or parameters being monitored (such as detector location and installation specifications, if applicable).

(2) For new or modified monitoring equipment, verification procedures to confirm the operational status of the monitoring prior to the date by which the owner or operator must conduct monitoring under this part as specified in § 64.7(a). The owner or operator shall consider the monitoring equipment manufacturer's requirements or recommendations for installation, calibration, and start-up operation.

(3) Quality assurance and control practices that are adequate to ensure the continuing validity of the data. The owner or operator shall consider manufacturer recommendations or requirements applicable to the monitoring in developing appropriate quality assurance and control practices.

(4) Specifications for the frequency of conducting the monitoring, the data collection procedures that will be used (e.g., computerized data acquisition and handling, alarm sensor, or manual log entries based on gauge readings), and, if applicable, the period over which discrete data points will be averaged for the purpose of determining whether an excursion or exceedance has occurred.

(i) At a minimum, the owner or operator shall design the period over which data are obtained and, if applicable, averaged consistent with the characteristics and typical variability of the pollutant-specific emissions unit (including the control device and associated capture system). Such intervals shall be commensurate with the time period over which a change in control device performance that would require actions by owner or operator to return operations within normal ranges or designated conditions is likely to be observed.

(ii) For all pollutant-specific emissions units with the potential to emit, calculated *including* the effect of

control devices, the applicable regulated air pollutant in an amount equal to or greater than 100 percent of the amount, in tons per year, required for a source to be classified as a major source, for each parameter monitored, the owner or operator shall collect four or more data values equally spaced over each hour and average the values, as applicable, over the applicable averaging period as determined in accordance with paragraph (b)(4)(i) of this section. The permitting authority may approve a reduced data collection frequency, if appropriate, based on information presented by the owner or operator concerning the data collection mechanisms available for a particular parameter for the particular pollutant-specific emissions unit (e.g., integrated raw material or fuel analysis data, noninstrumental measurement of waste feed rate or visible emissions, use of a portable analyzer or an alarm sensor).

(iii) For other pollutant-specific emissions units, the frequency of data collection may be less than the frequency specified in paragraph (b)(4)(ii) of this section but the monitoring shall include some data collection at least once per 24-hour period (e.g., a daily inspection of a carbon adsorber operation in conjunction with a weekly or monthly check of emissions with a portable analyzer).

(c) *Evaluation factors.* In designing monitoring to meet the requirements in paragraphs (a) and (b) of this section, the owner or operator shall take into account site-specific factors including the applicability of existing monitoring equipment and procedures, the ability of the monitoring to account for process and control device operational variability, the reliability and latitude built into the control technology, and the level of actual emissions relative to the compliance limitation.

(d) *Special criteria for the use of continuous emission, opacity or predictive monitoring systems.* (1) If a continuous emission monitoring system (CEMS), continuous opacity monitoring system (COMS) or predictive emission monitoring system (PEMS) is required pursuant to other authority under the Act or state or local law, the owner or operator shall use such system to satisfy the requirements of this part.

(2) The use of a CEMS, COMS, or PEMS that satisfies any of the following monitoring requirements shall be deemed to satisfy the general design criteria in paragraphs (a) and (b) of this section, provided that a COMS may be subject to the criteria for establishing indicator ranges under paragraph (a) of this section:

(i) Section 51.214 and appendix P of part 51 of this chapter;

(ii) Section 60.13 and appendix B of part 60 of this chapter;

(iii) Section 63.8 and any applicable performance specifications required pursuant to the applicable subpart of part 63 of this chapter;

(iv) Part 75 of this chapter;

(v) Subpart H and appendix IX of part 266 of this chapter; or

(vi) If an applicable requirement does not otherwise require compliance with the requirements listed in the preceding paragraphs (d)(2)(i) through (v) of this section, comparable requirements and specifications established by the permitting authority.

(3) The owner or operator shall design the monitoring system subject to this paragraph (d) to:

(i) Allow for reporting of exceedances (or excursions if applicable to a COMS used to assure compliance with a particulate matter standard), consistent with any period for reporting of exceedances in an underlying requirement. If an underlying requirement does not contain a provision for establishing an averaging period for the reporting of exceedances or excursions, the criteria used to develop an averaging period in (b)(4) of this section shall apply; and

(ii) Provide an indicator range consistent with paragraph (a) of this section for a COMS used to assure compliance with a particulate matter standard. If an opacity standard applies to the pollutant-specific emissions unit, such limit may be used as the appropriate indicator range unless the opacity limit fails to meet the criteria in paragraph (a) of this section after considering the type of control device and other site-specific factors applicable to the pollutant-specific emissions unit.

§ 64.4 Submittal requirements.

(a) The owner or operator shall submit to the permitting authority monitoring that satisfies the design requirements in § 64.3. The submission shall include the following information:

(1) The indicators to be monitored to satisfy §§ 64.3(a)(1)–(2);

(2) The ranges or designated conditions for such indicators, or the process by which such indicator ranges or designated conditions shall be established;

(3) The performance criteria for the monitoring to satisfy § 64.3(b); and

(4) If applicable, the indicator ranges and performance criteria for a CEMS, COMS or PEMS pursuant to § 64.3(d).

(b) As part of the information submitted, the owner or operator shall submit a justification for the proposed elements of the monitoring. If the performance specifications proposed to satisfy § 64.3(b)(2) or (3) include differences from manufacturer recommendations, the owner or operator shall explain the reasons for the differences between the requirements proposed by the owner or operator and the manufacturer's recommendations or requirements. The owner or operator also shall submit any data supporting the justification, and may refer to generally available sources of information used to support the justification (such as generally available air pollution engineering manuals, or EPA or permitting authority publications on appropriate monitoring for various types of control devices or capture systems). To justify the appropriateness of the monitoring elements proposed, the owner or operator may rely in part on existing applicable requirements that establish the monitoring for the applicable pollutant-specific emissions unit or a similar unit. If an owner or operator relies on presumptively acceptable monitoring, no further justification for the appropriateness of that monitoring should be necessary other than an explanation of the applicability of such monitoring to the unit in question, unless data or information is brought forward to rebut the assumption. Presumptively acceptable monitoring includes:

(1) Presumptively acceptable or required monitoring approaches, established by the permitting authority in a rule that constitutes part of the applicable implementation plan required pursuant to title I of the Act, that are designed to achieve compliance with this part for particular pollutant-specific emissions units;

(2) Continuous emission, opacity or predictive emission monitoring systems that satisfy applicable monitoring requirements and performance specifications as specified in § 64.3(d);

(3) Excepted or alternative monitoring methods allowed or approved pursuant to part 75 of this chapter;

(4) Monitoring included for standards exempt from this part pursuant to § 64.2(b)(1)(i) or (vi) to the extent such monitoring is applicable to the performance of the control device (and associated capture system) for the pollutant-specific emissions unit; and

(5) Presumptively acceptable monitoring identified in guidance by EPA. Such guidance will address the requirements under §§ 64.4(a), (b), and (c) to the extent practicable.

(c)(1) Except as provided in paragraph (d) of this section, the owner or operator shall submit control device (and process

and capture system, if applicable) operating parameter data obtained during the conduct of the applicable compliance or performance test conducted under conditions specified by the applicable rule. If the applicable rule does not specify testing conditions or only partially specifies test conditions, the performance test generally shall be conducted under conditions representative of maximum emissions potential under anticipated operating conditions at the pollutant-specific emissions unit. Such data may be supplemented, if desired, by engineering assessments and manufacturer's recommendations to justify the indicator ranges (or, if applicable, the procedures for establishing such indicator ranges). Emission testing is not required to be conducted over the entire indicator range or range of potential emissions.

(2) The owner or operator must document that no changes to the pollutant-specific emissions unit, including the control device and capture system, have taken place that could result in a significant change in the control system performance or the selected ranges or designated conditions for the indicators to be monitored since the performance or compliance tests were conducted.

(d) If existing data from unit-specific compliance or performance testing specified in paragraph (c) of this section are not available, the owner or operator:

(1) Shall submit a test plan and schedule for obtaining such data in accordance with paragraph (e) of this section; or

(2) May submit indicator ranges (or procedures for establishing indicator ranges) that rely on engineering assessments and other data, provided that the owner or operator demonstrates that factors specific to the type of monitoring, control device, or pollutant-specific emissions unit make compliance or performance testing unnecessary to establish indicator ranges at levels that satisfy the criteria in § 64.3(a).

(e) If the monitoring submitted by the owner or operator requires installation, testing, or other necessary activities prior to use of the monitoring for purposes of this part, the owner or operator shall include an implementation plan and schedule for installing, testing and performing any other appropriate activities prior to use of the monitoring. The implementation plan and schedule shall provide for use of the monitoring as expeditiously as practicable after approval of the monitoring in the part 70 or 71 permit pursuant to § 64.6, but in no case shall the schedule for completing installation and beginning operation of the monitoring exceed 180 days after approval of the permit.

(f) If a control device is common to more than one pollutant-specific emissions unit, the owner or operator may submit monitoring for the control device and identify the pollutant-specific emissions units affected and any process or associated capture device conditions that must be maintained or monitored in accordance with § 64.3(a) rather than submit separate monitoring for each pollutant-specific emissions unit.

(g) If a single pollutant-specific emissions unit is controlled by more than one control device similar in design and operation, the owner or operator may submit monitoring that applies to all the control devices and identify the control devices affected and any process or associated capture device conditions that must be maintained or monitored in accordance with § 64.3(a) rather than submit a separate description of monitoring for each control device.

§ 64.5 Deadlines for submittals.

(a) *Large pollutant-specific emissions units.* For all pollutant-specific emissions units with the potential to emit (taking into account control devices to the extent appropriate under the definition of this term in § 64.1) the applicable regulated air pollutant in an amount equal to or greater than 100 percent of the amount, in tons per year, required for a source to be classified as a major source, the owner or operator shall submit the information required under § 64.4 at the following times:

(1) On or after April 20, 1998, the owner or operator shall submit information as part of an application for an initial part 70 or 71 permit if, by that date, the application either:

(i) Has not been filed; or

(ii) Has not yet been determined to be complete by the permitting authority.

(2) On or after April 20, 1998, the owner or operator shall submit information as part of an application for a significant permit revision under part 70 or 71 of this chapter, but only with respect to those pollutant-specific emissions units for which the proposed permit revision is applicable.

(3) The owner or operator shall submit any information not submitted under the deadlines set forth in paragraphs (a)(1) and (2) of this section as part of the application for the renewal of a part 70 or 71 permit.

(b) *Other pollutant-specific emissions units.* For all other pollutant-specific emissions units subject to this part and not subject to § 64.5(a), the owner or operator shall submit the information required under § 64.4 as part of an application for a renewal of a part 70 or 71 permit.

(c) The effective date for the requirement to submit information under § 64.4 shall be as specified pursuant to paragraphs (a)–(b) of this section and a permit reopening to require the submittal of information under this section shall not be required pursuant to § 70.7(f)(1)(i) of this chapter, provided, however, that, if a part 70 or 71 permit is reopened for cause by EPA or the permitting authority pursuant to § 70.7(f)(1)(iii) or (iv), or § 71.7(f) or (g), the applicable agency may require the submittal of information under this section for those pollutant-specific emissions units that are subject to this part and that are affected by the permit reopening.

(d) Prior to approval of monitoring that satisfies this part, the owner or operator is subject to the requirements of § 70.6(a)(3)(i)(B).

§ 64.6 Approval of monitoring.

(a) Based on an application that includes the information submitted in accordance with § 64.5, the permitting authority shall act to approve the monitoring submitted by the owner or operator by confirming that the monitoring satisfies the requirements in § 64.3.

(b) In approving monitoring under this section, the permitting authority may condition the approval on the owner or operator collecting additional data on the indicators to be monitored for a pollutant-specific emissions unit, including required compliance or performance testing, to confirm the ability of the monitoring to provide data that are sufficient to satisfy the requirements of this part and to confirm the appropriateness of an indicator range(s) or designated condition(s) proposed to satisfy § 64.3(a)(2) and (3) and consistent with the schedule in § 64.4(e).

(c) If the permitting authority approves the proposed monitoring, the permitting authority shall establish one or more permit terms or conditions that specify the required monitoring in accordance with § 70.6(a)(3)(i) of this chapter. At a minimum, the permit shall specify:

(1) The approved monitoring approach that includes all of the following:

(i) The indicator(s) to be monitored (such as temperature, pressure drop, emissions, or similar parameter);

(ii) The means or device to be used to measure the indicator(s) (such as

temperature measurement device, visual observation, or CEMS); and

(iii) The performance requirements established to satisfy § 64.3(b) or (d), as applicable.

(2) The means by which the owner or operator will define an exceedance or excursion for purposes of responding to and reporting exceedances or excursions under §§ 64.7 and 64.8 of this part. The permit shall specify the level at which an excursion or exceedance will be deemed to occur, including the appropriate averaging period associated with such exceedance or excursion. For defining an excursion from an indicator range or designated condition, the permit may either include the specific value(s) or condition(s) at which an excursion shall occur, or the specific procedures that will be used to establish that value or condition. If the latter, the permit shall specify appropriate notice procedures for the owner or operator to notify the permitting authority upon any establishment or reestablishment of the value.

(3) The obligation to conduct the monitoring and fulfill the other obligations specified in §§ 64.7 through 64.9 of this part.

(4) If appropriate, a minimum data availability requirement for valid data collection for each averaging period, and, if appropriate, a minimum data availability requirement for the averaging periods in a reporting period.

(d) If the monitoring proposed by the owner or operator requires installation, testing or final verification of operational status, the part 70 or 71 permit shall include an enforceable schedule with appropriate milestones for completing such installation, testing, or final verification consistent with the requirements in § 64.4(e).

(e) If the permitting authority disapproves the proposed monitoring, the following applies:

(1) The draft or final permit shall include, at a minimum, monitoring that satisfies the requirements of § 70.6(a)(3)(i)(B);

(2) The permitting authority shall include in the draft or final permit a compliance schedule for the source owner to submit monitoring that satisfies §§ 64.3 and 64.4, but in no case shall the owner or operator submit revised monitoring more than 180 days from the date of issuance of the draft or final permit; and

(3) If the source owner or operator does not submit the monitoring in accordance with the compliance schedule as required in paragraph (e)(2) of this section or if the permitting authority disapproves the monitoring submitted, the source owner or operator shall be deemed not in compliance with part 64, unless the source owner or operator successfully challenges the disapproval.

§ 64.7 Operation of approved monitoring.

(a) *Commencement of operation.* The owner or operator shall conduct the monitoring required under this part upon issuance of a part 70 or 71 permit that includes such monitoring, or by such later date specified in the permit pursuant to § 64.6(d).

(b) *Proper maintenance.* At all times, the owner or operator shall maintain the monitoring, including but not limited to, maintaining necessary parts for routine repairs of the monitoring equipment.

(c) *Continued operation.* Except for, as applicable, monitoring malfunctions, associated repairs, and required quality assurance or control activities (including, as applicable, calibration checks and required zero and span adjustments), the owner or operator shall conduct all monitoring in continuous operation (or shall collect data at all required intervals) at all times that the pollutant-specific emissions unit is operating. Data recorded during monitoring malfunctions, associated repairs, and required quality assurance or control activities shall not be used for purposes of this part, including data averages and calculations, or fulfilling a minimum data availability requirement, if applicable. The owner or operator shall use all the data collected during all other periods in assessing the operation of the control device and associated control system. A monitoring malfunction is any sudden, infrequent, not reasonably preventable failure of the monitoring to provide valid data. Monitoring failures that are caused in part by poor maintenance or careless operation are not malfunctions.

(d) *Response to excursions or exceedances.* (1) Upon detecting an excursion or exceedance, the owner or operator shall restore operation of the pollutant-specific emissions unit (including the control device and associated capture system) to its normal or usual manner of operation as expeditiously as practicable in accordance with good air pollution control practices for minimizing emissions. The response shall include minimizing the period of any startup, shutdown or malfunction and taking any necessary corrective actions to restore normal operation and prevent the likely recurrence of the cause of an excursion or exceedance (other than those caused by excused startup or shutdown conditions). Such actions may include initial inspection and evaluation, recording that operations returned to normal without operator action (such as through response by a computerized distribution control system), or any necessary follow-up actions to return operation to within the indicator range, designated condition, or below the applicable emission limitation or standard, as applicable.

(2) Determination of whether the owner or operator has used acceptable procedures in response to an excursion or exceedance will be based on information available, which may include but is not limited to, monitoring results, review of operation and maintenance procedures and records, and inspection of the control device, associated capture system, and the process.

(e) *Documentation of need for improved monitoring.* After approval of monitoring under this part, if the owner or operator identifies a failure to achieve compliance with an emission limitation or standard for which the approved monitoring did not provide an indication of an excursion or exceedance while providing valid data, or the results of compliance or performance testing document a need to modify the existing indicator ranges or designated conditions, the owner or operator shall promptly notify the permitting authority and, if necessary, submit a proposed modification to the part 70 or 71 permit to address the necessary monitoring changes. Such a modification may include, but is not limited to, reestablishing indicator ranges or designated conditions, modifying the frequency of conducting monitoring and collecting data, or the monitoring of additional parameters.

§ 64.8 Quality improvement plan (QIP) requirements.

(a) Based on the results of a determination made under § 64.7(d)(2), the Administrator or the permitting authority may require the owner or operator to develop and implement a QIP. Consistent with § 64.6(c)(3), the part 70 or 71 permit may specify an appropriate threshold, such as an accumulation of exceedances or excursions exceeding 5 percent duration of a pollutant-specific emissions unit's operating time for a reporting period, for requiring the implementation of a QIP. The threshold may be set at a higher or lower percent or may rely on other criteria for purposes of indicating whether a pollutant-specific emissions unit is being maintained and operated in a manner consistent with good air pollution control practices.

(b) Elements of a QIP:

(1) The owner or operator shall maintain a written QIP, if required, and have it available for inspection.

(2) The plan initially shall include procedures for evaluating the control performance problems and, based on the results of the evaluation procedures, the owner or operator shall modify the plan to include procedures for conducting one or more of the following actions, as appropriate:

(i) Improved preventive maintenance practices.

(ii) Process operation changes.

(iii) Appropriate improvements to control methods.

(iv) Other steps appropriate to correct control performance.

(v) More frequent or improved monitoring (only in conjunction with one or more steps under paragraphs (b)(2)(i) through (iv) of this section).

(c) If a QIP is required, the owner or operator shall develop and implement a QIP as expeditiously as practicable and shall notify the permitting authority if the period for completing the improvements contained in the QIP exceeds 180 days from the date on which the need to implement the QIP was determined.

(d) Following implementation of a QIP, upon any subsequent determination pursuant to § 64.7(d)(2) the Administrator or the permitting authority may require that an owner or operator make reasonable changes to the QIP if the QIP is found to have:

(1) Failed to address the cause of the control device performance problems; or

(2) Failed to provide adequate procedures for correcting control device performance problems as expeditiously as practicable in accordance with good air pollution control practices for minimizing emissions.

(e) Implementation of a QIP shall not excuse the owner or operator of a source from compliance with any existing emission limitation or standard, or any existing monitoring, testing, reporting or recordkeeping requirement that may apply under federal, state, or local law, or any other applicable requirements under the Act.

§ 64.9 Reporting and recordkeeping requirements.

(a) *General reporting requirements.* (1) On and after the date specified in § 64.7(a) by which the owner or operator must use monitoring that meets the requirements of this part, the owner or operator shall submit monitoring reports to the permitting authority in accordance with § 70.6(a)(3)(iii) of this chapter.

(2) A report for monitoring under this part shall include, at a minimum, the information required under § 70.6(a)(3)(iii) of this chapter and the following information, as applicable:

(i) Summary information on the number, duration and cause (including unknown cause, if applicable) of excursions or exceedances, as applicable, and the corrective actions taken;

(ii) Summary information on the number, duration and cause (including unknown cause, if applicable) for monitor downtime incidents (other than downtime associated with zero and span or other daily calibration checks, if applicable); and

(iii) A description of the actions taken to implement a QIP during the reporting period as specified in § 64.8. Upon completion of a QIP, the owner or operator shall include in the next summary report documentation that the implementation of the plan has been completed and reduced the likelihood of similar levels of excursions or exceedances occurring.

(b) *General recordkeeping requirements.* (1) The owner or operator shall comply with the recordkeeping requirements specified in § 70.6(a)(3)(ii) of this chapter. The owner or operator shall maintain records of monitoring data, monitor performance data, corrective actions taken, any written quality improvement plan required pursuant to § 64.8 and any activities undertaken to implement a quality improvement plan, and other supporting information required to be maintained under this part (such as data used to document the adequacy of monitoring, or records of monitoring maintenance or corrective actions).

(2) Instead of paper records, the owner or operator may maintain records on alternative media, such as microfilm, computer files, magnetic tape disks, or microfiche, provided that the use of such alternative media allows for expeditious inspection and review, and does not conflict with other applicable recordkeeping requirements.

§ 64.10 Savings provisions.

(a) Nothing in this part shall:

(1) Excuse the owner or operator of a source from compliance with any existing emission limitation or standard, or any existing monitoring, testing, reporting or recordkeeping requirement that may apply under federal, state, or local law, or any other applicable requirements under the Act. The requirements of this part shall not be used to justify the approval of monitoring less stringent than the monitoring which is required under separate legal authority and are not intended to establish minimum requirements for the purpose of determining the monitoring to be imposed under separate authority under the Act, including monitoring in permits issued pursuant to title I of the Act. The purpose of this part is to require, as part of the issuance of a permit under title V of the Act, improved or new monitoring at those emissions units where monitoring requirements do not exist or are inadequate to meet the requirements of this part.

(2) Restrict or abrogate the authority of the Administrator or the permitting authority to impose additional or more stringent monitoring, recordkeeping, testing, or reporting requirements on any owner or operator of a source under any provision of the Act, including but not limited to sections 114(a)(1) and 504(b), or state law, as applicable.

(3) Restrict or abrogate the authority of the Administrator or permitting authority to take any enforcement action under the Act for any violation of an applicable requirement or of any person to take action under section 304 of the Act.

PART 70—STATE OPERATING PERMIT PROGRAMS

1. The authority citation for part 70 continues to read as follows:

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

2. Section 70.6 is amended by revising paragraphs (a)(3)(i)(A) and (c)(5)(iii) and (c)(5)(iv), and by removing (c)(5)(v) to read as follows:

§ 70.6 Permit content.

* * * * *

(a) * * *

(3) * * *

(i) * * *

(A) All monitoring and analysis procedures or test methods required under applicable monitoring and testing requirements, including part 64 of this chapter and any other procedures and methods that may be promulgated pursuant to sections 114(a)(3) or 504(b) of the Act. If more than one monitoring or testing requirement applies, the permit may specify a streamlined set of monitoring or testing provisions provided the specified monitoring or testing is adequate to assure compliance at least to the same extent as the monitoring or testing applicable requirements that are not included in the permit as a result of such streamlining;

* * * * *

(c) * * *

(5) * * *

(iii) A requirement that the compliance certification include all of

the following (provided that the identification of applicable information may cross-reference the permit or previous reports, as applicable):

(A) The identification of each term or condition of the permit that is the basis of the certification;

(B) The identification of the method(s) or other means used by the owner or operator for determining the compliance status with each term and condition during the certification period, and whether such methods or other means provide continuous or intermittent data. Such methods and other means shall include, at a minimum, the methods and means required under paragraph (a)(3) of this section. If necessary, the owner or operator also shall identify any other material information that must be included in the certification to comply with section 113(c)(2) of the Act, which prohibits knowingly making a false certification or omitting material information;

(C) The status of compliance with the terms and conditions of the permit for the period covered by the certification, based on the method or means designated in paragraph (c)(5)(iii)(B) of this section. The certification shall identify each deviation and take it into account in the compliance certification. The certification shall also identify as possible exceptions to compliance any periods during which compliance is required and in which an excursion or exceedance as defined under part 64 of this chapter occurred; and

(D) Such other facts as the permitting authority may require to determine the compliance status of the source.

(iv) A requirement that all compliance certifications be submitted to the Administrator as well as to the permitting authority.

* * * * *

PART 71—FEDERAL OPERATING PERMITS PROGRAMS

1. The authority citation for part 71 continues to read as follows:

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

2. Section 71.6 is amended by revising paragraphs (a)(3)(i)(A), (a)(3)(iii)(C), (c)(5)(iii) and (c)(5)(iv), and by removing (c)(5)(v) to read as follows:

§ 71.6 Permit content.

* * * * *

(a) * * *

(3) * * *

(i) * * *

(A) All monitoring and analysis procedures or test methods required under applicable monitoring and testing requirements, including part 64 of this chapter and any other procedures and methods that may be promulgated pursuant to sections 114(a)(3) or 504(b) of the Act. If more than one monitoring or testing requirement applies, the permit may specify a streamlined set of monitoring or testing provisions provided the specified monitoring or testing is adequate to assure compliance at least to the same extent as the monitoring or testing applicable requirements that are not included in the permit as a result of such streamlining;

* * * * *

(iii) * * *

(C) For purposes of paragraph (a)(3)(iii)(B) of this section, deviation means any situation in which an emissions unit fails to meet a permit term or condition. A deviation is not always a violation. A deviation can be determined by observation or through review of data obtained from any testing, monitoring, or recordkeeping established in accordance with paragraphs (a)(3)(i) and (a)(3)(ii) of this section. For a situation lasting more than 24 hours which constitutes a deviation, each 24 hour period is considered a separate deviation. Included in the meaning of deviation are any of the following:

(*1*) A situation where emissions exceed an emission limitation or standard;

(*2*) A situation where process or emissions control device parameter values indicate that an emission limitation or standard has not been met;

(*3*) A situation in which observations or data collected demonstrates noncompliance with an emission limitation or standard or any work practice or operating condition required by the permit;

(*4*) A situation in which an exceedance or an excursion, as defined in part 64 of this chapter, occurs.

* * * * *

(c) * * *

(5) * * *

(iii) A requirement that the compliance certification include all of the following (provided that the identification of applicable information may cross-reference the permit or previous reports, as applicable):

(A) The identification of each term or condition of the permit that is the basis of the certification;

(B) The identification of the method(s) or other means used by the owner or operator for determining the compliance status with each term and condition during the certification period, and whether such methods or other means provide continuous or intermittent data. Such methods and other means shall include, at a minimum, the methods and means required under paragraph (a)(3) of this section. If necessary, the owner or operator also shall identify any other material information that must be included in the certification to comply with section 113(c)(2) of the Act, which prohibits knowingly making a false certification or omitting material information;

(C) The status of compliance with the terms and conditions of the permit for the period covered by the certification, based on the method or means designated in paragraph (c)(5)(iii)(B) of this section. The certification shall identify each deviation and take it into account in the compliance certification; and

(D) Such other facts as the permitting authority may require to determine the compliance status of the source.

(iv) A requirement that all compliance certifications be submitted to the Administrator as well as to the permitting authority.

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Part III

Environmental Protection Agency

Proposed Modification of National Pollutant Discharge Elimination System (NPDES) Storm Water Multi-Sector General Permit for Industrial Activities; Notice

ENVIRONMENTAL PROTECTION AGENCY

[WH–FRL–5912–3]

Proposed Modification of National Pollutant Discharge Elimination System (NPDES) Storm Water Multi-Sector General Permit for Industrial Activities

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed modification of NPDES general permits; notice of interpretation.

SUMMARY: Today's action proposes clarification of an interpretation of the technology-based effluent limitations applicable to point sources of ''mine drainage'' at ore mining and dressing operations, which was contained in a recently-issued NPDES general permit for storm water associated with industrial activity. With this notice, EPA intends to provide a more definitive interpretation of the applicability of those recently-issued general permits, specifically, as they apply to certain storm water discharges at ore mining and dressing operations. To incorporate today's proposed interpretation, EPA only proposes to modify the NPDES general permits issued by EPA Regions 1, 6, 9 and 10 because the Agency does not anticipate that the mining-related storm water discharges at issue occur in the other States where EPA is the NPDES permit issuance authority. The Agency, however, would take final action to modify the general permits applicable in the other States where EPA issues permits if public comments demonstrate the need to do so.

DATES: Comments on today's proposed interpretation and proposed modification must be received or post-marked by midnight no later than December 8, 1997.

ADDRESSES: Send written comments to: W–97–13, Comment Clerk, Water Docket (MC–4101), U.S. EPA, 401 M Street, SW, Washington, DC 20460. Please submit the original and three copies of your comments and enclosures (including references).

Commenters who want EPA to acknowledge receipt of their comments should enclose a self-addressed stamped envelope. No facsimiles (faxes) will be accepted. Comments may also be submitted electronically to: ow-docket@epamail.epa.gov. Electronic comments must be submitted as an ASCII file avoiding the use of special characters and forms of encryption. Electronic comments must be identified by the docket number W–97–13. Comments and data will also be accepted on disks in WordPerfect 5.1 format or ASCII file format. Electronic comments on this notice may be filed online at many Federal Depository Libraries.

The record for this action has been established under docket number W–97–13, and includes supporting documentation as well as printed paper versions of elctronic comments. The record is available for inspection from 9 a.m. to 4 p.m., Monday through Friday, excluding legal holidays at the Water Docket, Room M2616, U.S. EPA, 401 M Street SW, Washington, DC 20460. For access to docket materials, please call 202–260–3027 to schedule an appointment. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: For further information, contact Gary Hudiburgh, Office of Wastewater Management, Office of Water at (202) 260–4926 or the appropriate EPA Regional Office. For EPA Region 1, covering discharges in the State of Maine and Federal Indian reservations in Maine, in the Commonwealth of Massachusetts and Federal Indian reservations in Massachusetts, in the State of New Hampshire and Federal Indian reservations in New Hampshire, as well as Federal Indian reservations in the States of Vermont, Connecticut, and Rhode Island, and Federal facilities in Vermont, contact Thelma Hamilton at (617) 565–3569. For EPA Region 6, covering discharges in the State of Texas and Federal Indian reservations in Texas, in the State of New Mexico and Federal Indian reservations in New Mexico (except Navajo Reservation lands, which are covered by EPA Region 9 and Ute Reservation lands, which are covered by EPA Region 8 and were not covered by the Multi-Sector General Permit), as well as Federal Indian reservations in Oklahoma and Louisiana, contact Fred Humke at (214) 665–7503. For EPA Region 9, covering the State of Arizona and Federal Indian reservations in Arizona, and Federal Indian reservations in California and Nevada, as well as the Duck Valley, Fort McDermitt, Goshute Reservations and Navajo Reservations, each of which cross State boundaries, contact Eugene Bromley at (415) 744–1906. For EPA Region 10, covering the State of Alaska and Federal Indian reservations in Alaska, the State of Idaho and Federal Indian reservations in Idaho (except the Duck Valley Reservation, which is covered by EPA Region 9), Federal Indian reservations in Washington and Oregon (except the Fort McDermitt Reservation, which is covered by EPA Region 9), as well as Federal facilities in Washington, contact Steven Bubnick at (206) 553–5171.

SUPPLEMENTARY INFORMATION:

Authority

EPA issues NPDES permits under the authority of CWA section 402, 33 U.S.C. section 1342. Today's proposed modification would be based on an interpretation of rules published under the authority of CWA sections 301, 304, and 501(a), 33 U.S.C. sections 1311, 1314, and 1361(a). Today's action would modify a table that was initially published in conjunction with NPDES permits for storm water associated with industrial activity issued pursuant to CWA section 402, 33 U.S.C. section 1342.

In today's notice, EPA announces and invites public comment on its interpretation of the technology-based effluent limitations applicable to point sources of ''mine drainage'' at ore mining and dressing operations under the Clean Water Act (''CWA''). 33 U.S.C. 1251 *et seq.* This interpretation updates and replaces an earlier interpretation published in the fact sheet for the final National Pollutant Discharge Elimination System (''NPDES'') Storm Water Multi-Sector General Permit for Industrial Activities at 60 FR 50804 (Sept. 29, 1995)(''Multi-Sector Permit''). The interpretation in today's notice supplements EPA's interpretation in Table G–4 of the Multi-Sector Permit regarding the applicability of the ''mine drainage'' provisions of regulations found at 40 CFR part 440. 60 FR at 50897.

EPA has reviewed the administrative record supporting the Part 440 regulations, as well as Agency statements made during the course of litigation over those regulations, and is revising Table G–4 accordingly. In litigation challenging the Multi-Sector Permit, *National Mining Association* v. *EPA*, No. 95–3519 (8th Cir.), the National Mining Association (NMA) has argued that the regulatory interpretation contained in Table G–4 was overly expansive and not supported by appropriate economic and technological evaluation. To support its argument, NMA cited Agency statements made during the course of litigation approximately twenty years earlier. These statements were not raised and presented to the Agency during the public comment period of the permit. In response to NMA's arguments in the current litigation, EPA has re-evaluated the underlying record supporting the Part 440 regulations and is

supplementing its interpretation of the ''mine drainage'' provisions contained in Table G–4. Today's action supersedes the Agency interpretation contained in the Fact Sheet to the Multi-Sector Permit, as original issued.

Upon review of those documents, the Agency believes the documents (including judicial caselaw) speak for themselves. Therefore, the Agency is proposing to withdraw portions of the Table that discuss applicability of the part 440 regulations—i.e., those portions of the Table that do not specify applicability of the Multi-Sector permit. By today's action, EPA also proposes a slight expansion of the applicability of the Multi-Sector permit (consistent with the interpretation in today's notice) and, therefore, invites public comment.

The interpretation in today's notice provides clarification regarding the scope of the effluent guidelines initially promulgated in 1978. As explained more fully below, however, the Agency's communication of its 1978 intention was not fully clarified through publication in the **Federal Register** or other readily available documents. In addition to 1978 preamble statements in the **Federal Register** explaining the scope of the effluent guidelines, the Agency prepared other documents explaining the guideline's scope that were not published in the **Federal Register**. These other documents (including parts of the administrative record, the denial of an administrative petition for reconsideration, the Agency's litigation brief, and a guidance document for permit writers) contain statements about the applicability of the guidelines that NMA argued were inconsistent with Table G–4. Today's notice proposes to modify Table G–4 consistent with those statements and now would only address applicability of the Multi-Sector Permits.

I. Effluent Guidelines for Ore Dressing and Mining Point Source Category

A. Background

Congress enacted the Clean Water Act to establish a comprehensive program to ''restore and maintain the chemical, physical and biological integrity of the Nation's waters'' through the reduction, and eventual elimination, of the discharge of pollutants into those waters. CWA Section 101(a); 33 U.S.C. 1251(a). To achieve its objective, the CWA provides for a permit program to control ''point source'' pollution. The CWA point source permitting program is known as the National Pollutant Discharge Elimination System (''NPDES''), under which EPA or authorized States issue permits for point source discharges. Except in accordance with an NPDES permit, a point source discharge of a pollutant is unlawful. CWA Section 301(a); 33 U.S.C. 1311(a). All NPDES permits must, at a minimum, contain technology-based effluent limitations established in effluent guidelines or standards or, if no such guidelines have been established, limitations derived on the basis of best professional judgment.

Individual NPDES permits contain substantive restrictions, called ''effluent limitations,'' which are aimed at controlling the level of pollutants in point source discharges. CWA 402(a); 33 U.S.C. 1342(a). Effluent limitations may be ''technology-based'' or ''water quality-based.'' [1] For some industrial point source categories, EPA has published technology-based effluent limitations that apply on a nationwide basis, pursuant to CWA Sections 304(b) and 306(b)(1)(B); 33 U.S.C. 1314(b) and 1316(b)(1)(B). [2] These limitations are called national effluent limitations guidelines or standards. EPA has published best practicable control technology currently available (''BPT''), best conventional pollutant control technology (''BCT''), best available technology economically achievable (''BAT'') effluent guidelines, and new source performance standards (''NSPS'') for point sources in over fifty different industrial categories. Among the effluent guidelines and standards which EPA has established are those applicable to the ore mining and dressing industry. These guidelines are known as the ''Effluent Guidelines for the Ore Mining and Dressing Point Source Category'' (hereinafter referred to as the ''Guidelines''). The Guidelines are published at 40 CFR part 440.

EPA first published the Guidelines on an interim final basis on November 6, 1975. 40 FR 51722. On July 11, 1978, after substantially expanding the data base supporting the Guidelines, and after considering comments submitted since initial promulgation, EPA republished the Guidelines in modified form. 43 FR 29771 (July 11, 1978). Both the initial and republished Guidelines established BPT effluent limitations for discharges for ore mining and dressing operations.

B. Storm Water Regulation Under the Guidelines [3]

The Guidelines establish industry-wide effluent limitations for two types of mine discharges: (1) Mill discharges and (2) mine drainage. ''Mine drainage'' means ''any water drained, pumped, or siphoned from a mine.'' 40 CFR 440.132(h). A ''mine,'' in turn, is defined as:

> *an active mining area,* including all land and property placed under, or above the surface of such land, used in or resulting from the work of extracting metal ore or minerals from their natural deposits by any means or method, including secondary recovery of metal ore from refuse or other storage piles, wastes, or rock dumps and mine tailings derived from the mining, cleaning, or concentration of metal ores.

40 CFR 440.132(g) (emphasis added). An ''active mining area,'' in turn, is defined as:

> a place where work or other activity related to the extraction, removal, or recovery of metal ore is being conducted, except, with respect to surface mines, any area of land on or in which grading has been completed to return the earth to desired contour and reclamation work has begun.

40 CFR 440.132(a).

In statements in the administrative record supporting the Guidelines, EPA indicated an intent to include a broad range of discharges within the scope of the Guidelines. The 1975 Preamble to the Interim Final Guidelines expressly indicated that the Guidelines definition of the term ''mine'' was intended to be sufficiently broad ''to cover all point source pollution resulting from all the activities related to the operation of the mine including drainage tunnels, haul roads, storage piles, etc.'' 40 FR 51727. Consistent with this, in the 1978 Development Document (prepared by EPA before the Guidelines were republished in 1978), EPA stated that:

> A mine is an area of land upon which or under which minerals or metal ores are extracted from natural deposits in the earth by any means or methods. A mine includes the total area upon which such activities occur or where such activities disturb the natural land surface. A mine shall also include land affected by such ancillary operations which disturb the natural land surface, and any adjacent land the use of which is incidental to such activities; all lands affected by the construction of new roads or the improvements or use of existing roads to gain access to the site of such

[1] Water quality based effluent limitations are included in permits when necessary to assure compliance with water quality standards.

[2] If no such guidelines have been established, technology-based limits are developed on a case-by-case basis based on the best professional judgment of the permit writer.

[3] The definitions of and discussion of these terms in this notice are within the use of these terms under the NPDES program and the Clean Water Act. These definitions are not specifically applicable to the use of these terms under other federal environmental laws, including under the Resources Conservation and Recovery Act, 42 U.S.C. 6901, *et seq.* (RCRA) and its implementing regulations.

activities and for haulage and excavations, workings, impoundments, dams, ventilation shafts, drainage tunnels, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culmbanks, tailings, holes or depressions, repair areas, storage areas and other areas upon which are site structures, facilities, or other property or materials resulting from or incident to such activities.

1978 Development Document at 146.

1. Petition for Reconsideration

After EPA promulgated the Guidelines on July 11, 1978, a number of mining companies filed petitions for judicial review challenging the Guidelines. (The judicial challenges are discussed below.) During the pendency of its judicial challenge, one of those companies, Kennecott Copper Corporation (''Kennecott'') filed an administrative petition with EPA (dated September 26, 1978) requesting that the Agency reconsider and clarify the Guidelines. Kennecott amended its petition on November 9, 1978. Kennecott identified five areas of alleged deficiencies and concerns with the Guidelines. One of these issues related to the storm water runoff provisions of the Guidelines.

Kennecott objected to the storm water runoff provisions, which it argued were overly vague and capable of being interpreted in a manner that would violate applicable law. Among other things, Kennecott was particularly concerned about applicability of the Guidelines to what it referred to as ''non-process'' areas at mining operations. Kennecott further argued that the Guidelines, if applied in the manner suggested by Kennecott, would entail exorbitant costs not considered during the rulemaking. Kennecott presented EPA with cost estimates that Kennecott believed it would have to incur to comply with the Guidelines. Kennecott estimated costs to control storm water drainage flows from what Kennecott referred to as the ''process'' and ''non-process'' areas at two Kennecott mining operations, the Ray Mine and the Chino Mine. As discussed more fully below, the Agency's decision on Kennecott's petition is at the core of the NMA litigation over the Multi-Sector Permit.

In partial response to the Kennecott petition, EPA published a notice in the **Federal Register** that clarified the scope of the Guidelines' applicability to storm water runoff. 44 FR 7953–7954 (Feb. 8, 1979). That notice of clarification explained that the Guidelines applied only to point sources in the active mining area. The Notice clarified EPA's interpretation that the ''mine drainage'' provisions applied to ''water which contacts an active mining area and flows into a point source.'' *Id.* EPA further explained that mining operations are not required to ''collect and contain diffuse storm [water] runoff which would not otherwise be collected in or does not otherwise drain into a point source.'' *Id.* at 7954. In other words, diffuse storm water (from an active mining area) that was collected or contained in, or that naturally flowed into, a point source was subject to the Guidelines. Other storm water drainage flows were not subject to the Guidelines.

EPA denied Kennecott's petition on February 21, 1979. In doing so, EPA relied in part on the notice of clarification. The decision on the reconsideration petition discussed the applicability of the Guidelines to Kennecott's Ray Mine. For storm water drainage flows from what Kennecott called ''non-process'' areas at the Ray Mine, EPA concluded that Kennecott would incur no additional costs. Kennecott had, for the purposes of its petition, defined ''non-process'' area to mean ''overburden dumps, material too low in mineral content even to leach, and exposed benches at the mine.'' Citing to the notice of clarification, EPA concluded that the definition of ''mine drainage'' did not include diffuse storm water runoff from overburden dumps and material too low in mineral content to leach. As that notice of clarification explained, ''[a]ll water which contacts an 'active mining area * * *' and either does not flow, or is not channeled by the operator, to a point source, is considered runoff, and it is not the regulations' intent to require the mine operator to collect and treat such runoff.'' 44 FR at 7954. On the matter of storm water contacting the exposed benches, EPA could not determine whether such discharges would constitute point source discharges and thus, concluded that the issue would best be addressed by the permitting authority in the context of a permit proceeding.

After comprehensive review of these documents, there are several matters that are clear. EPA did not grant any portion of Kennecott's petition for reconsideration. In fact, EPA denied the petition and in so doing the Agency rejected Kennecott's cost estimates for what Kennecott called ''non-process'' areas because, based on the Ray Mine data submitted by Kennecott, EPA found that the Ray Mine would incur no costs with respect to runoff from those areas. Therefore, the Agency did not adopt or incorporate Kennecott's proposed distinction between ''process'' and ''non-process'' areas at mine sites. This conclusion alone, however, does not fully resolve all possible questions about applicability of the guidelines.

In responding to the portions of Kennecott's petition related to the Ray Mine, the Agency did not explain why the diffuse storm water runoff from ''overburden dumps and material which is too low [] to leach and other areas of the Ray Mine property where work or other activity related to the the [sic] extraction, removal or recovery of of [sic] metal ore is not being conducted'' was not subject to the Guidelines. These Agency statements merely repeated phraseology used in Kennecott's petition. Upon review of these statements, as well as re-review of Kennecott's original administrative petition, the Agency cannot determine with certainty, for example, whether the statement means that runoff was not subject to the Guidelines (1) because it was ''diffuse'' (i.e., nonpoint source), (2) because the drainage was already being contained at Ray Mine, (3) because the overburden at Ray Mine was outside of Ray Mine's active mining area, (4) because no activity related to the extraction, removal or recovery of metal ore was currently (or recently) being conducted at the Ray Mine site at that time as identified by Kennecott in its petition for reconsideration. The statements certainly, however, do not indicate that water which contacts overburden dumps in active mining areas is not subject to the Guidelines nor does any other subsequent Agency statement vacillate on this question. Runoff from overburden dumps within the active mining area is mine drainage subject to Guidelines.

2. Judicial Challenge

The Guidelines rule was ultimately upheld by the U.S. Court of Appeals for the Tenth Circuit. *Kennecott Copper Corp.* v. *EPA*, 612 F.2d 1232 (10th Cir. 1979). In affirming the Guidelines, the Tenth Circuit relied on the language of the Notice of Clarification and considered moot the Petitioner's challenges to storm water runoff provisions, which were based on the argument that the Guidelines were overbroad and included ''nonpoint'' as well as ''point sources.'' *Kennecott Copper Corp.*, 612 F.2d at 1242. The court further found that ''* * * EPA is entirely within its authority in regulating [discharges of] storm runoff that falls within [the definition of] a 'point source.''' *Id.* at 1243. Additionally, the court reasoned that the determination of whether a particular discharge constitutes a point source is best made in the context of permit proceedings, guided by the broad

definition of ''point source'' provided in the CWA.[4] The Court recognized that it is ''unrealistic, if not altogether impossible'' to provide an ''absolute and unequivocal'' definition of ''point source'' and rule of applicability, further supporting case-by-case or site-specific determinations on applicability of the Guidelines.

Congress has purposefully phrased this definition broadly. This is as it should be given its contemplated applicability to literally thousands of pollution sources. To cast such definitions in absolute, unequivocal terms would be unrealistic, if not altogether impossible. As we observed in *American Petroleum Institute,* 540 F.2d at 1032: ''On the road to attainment of the no discharge objective some flexibility is needed.''

612 F.2d at 1243.

The court did not say anything further in response to Kennecott's arguments complaining that the Guidelines would improperly regulate nonpoint source discharges at mine sites. The court did not rely on or cite to any other references in the administrative record before it. In response to any remaining arguments before it, the court simply noted that ''careful examination of petitioner's remaining arguments has persuaded us that they are without merit.'' *Id.* at 1243. Thus, the court either summarily rejected Kennecott's arguments that the guidelines were vague and overbroad, or affirmatively upheld the regulations against Kennecott's challenges based on reasons explained in the decision.[5]

While, over the course of the intervening years, the federal courts have refined their interpretations of ''point source,'' EPA's conclusions about point sources at mining operations has remained constant. In upholding the Guidelines in *Kennecott Copper Corp.,* the Tenth Circuit specifically cited to one of the seminal cases upon which courts rely for the proposition that the term ''point source'' should be interpreted broadly, *United States* v. *Earth Sciences, Inc.,* 599 F.2d 368 (10th Cir. 1979). 612 F.2d at 1241, 1243. In the *Earth Sciences* case, the Tenth Circuit concluded that uncollected surface runoff was a point source, specifically, groundwater seeps from under a combination of sumps, ditches, hoses, and pumps in a closed ''heap leach'' gold mining operation. *Earth Sciences,* 599 F.2d at 374. Therefore, the court recognized that even seemingly ''uncollected runoff'' from point sources were and could be regulated under the CWA and subject to the Guidelines limitations.

3. Subsequent Agency Action

Apart from the Agency statements made during the course of the *Kennecott Copper Corp.* litigation, EPA staff has not been able to locate evidence of subsequent Agency action referring to those statements. In an undated guidance package (circa early 1980's) prepared by EPA Headquarters for EPA and State NPDES permit writers, the Agency interpreted the term ''active mining area'' broadly to exclude only areas unaffected by mining or milling. The document also identified parts of the ''active mining area'' to include the excavations of deep mines and surface mines; leach areas; refuse, middling, and tailings areas; tailings ponds, holding and settling basins; and other ancillary areas to a mine or mill. Additionally, that document also explains that an ''active mining area'' can include mine areas where there is actually no extraction, removal, or recovery of metal ore, including where mine drainage is removed from a deep mine to protect present and future working areas, pumping out and rehabilitation of a closed mine prior to reentry, and pumping of an adjacent mine to protect present and future workings in an active mining area. This document suggests that contemporaneous Agency intent was to include certain areas, such as waste rock piles, within the scope of the active mining area.

Since that time, EPA and authorized NPDES States have issued permits to a significant number of ore mining and dressing operations. No party has ever identified or presented any of the Agency litigation statements from the *Kennecott Copper Corp.* case as evidence that the Agency does not interpret the term ''mine drainage'' very broadly.

A subsequent judicial case, which EPA cited in the 1990 storm water regulations, further clarifies that storm water associated with industrial activity at mining sites may result in point source discharges. See *Sierra Club* v. *Abston Construction Co., Inc.,* 620 F.2d 41 (5th Cir. 1980); 55 FR at 47997. In that case, the court determined that whether a point source discharge was present due to rainfall causing sediment basin overflow and erosion of piles of discarded material, even without direct action by coal miners, was a question of fact. 620 F.2d at 45. The ultimate question was whether the discharge is from a ''discernible, confined, discrete conveyance,'' whether by gravitational or non-gravitational means. *Id.* It was irrelevant that operators did not construct the conveyances, so long as those conveyances were reasonably likely to be the means by which pollutants were ultimately deposited into a navigable body of water. *Id.* Conveyances of pollution formed either as a result of natural erosion or by material means may fit the statutory definition of point source. *Id.*

II. NPDES Storm Water General Multi-Sector Permit for Industrial Activities

A. Background

In 1987, Congress amended the CWA by adding, among other things, several provisions concerning the control of point source discharges composed entirely of storm water. In the 1987 amendments, Congress directed EPA to publish permit application regulations for ''discharges of storm water associated with industrial activity.'' CWA section 402(p)(4)(A), 33 U.S.C. 1342(p)(4)(A). On November 16, 1990, EPA published those regulations. In doing so, EPA defined ''storm water'' as storm water runoff, snow melt runoff, and surface runoff and drainage. It also defined ''[s]torm water discharge associated with industrial activity'' to mean the discharge of pollutants from any conveyance which is used for collecting and conveying storm water and which is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant. See 40 CFR 122.26(b)(14). Included among these discharges were discharges from conveyances at mining facilities. 40 CFR 122.26(b)(14)(iii). Upon challenge, this part of the regulations was upheld by the U.S. Court of Appeals for the Ninth Circuit. *American Mining Congress* v. *EPA,* 965 F.2d 759 (9th Cir. 1992) (regulations upheld against industry challenge that the rules, among other things, imposed retroactive liability for storm water discharges from existing mine sites). The issues in that case are related to, but different from, the issues addressed in today's action. That case involved inactive mines; today's action involves active mining operations.

The NPDES regulations for storm water describe three mechanisms by which dischargers of storm water

[4] ''Point source'' is defined at Clean Water Act § 502(14) to mean ''any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. *See also* 40 CFR 122.2.

[5] In litigation over the Multi-Sector Permit, NMA now suggests that the 10th Circuit relied on the Agency statements concerning the status of storm water drainage flows at the Ray Mine to uphold the Guidelines and that the Agency cannot now conclude that the court independently found the storm water runoff provisions of the Guidelines acceptable. EPA disagrees. The court's decision never cites or discusses any of these statements.

associated with industrial activity could apply for permits. 40 CFR 122.26(c)(1). First, dischargers can apply for ''individual permits.'' Second (prior to 1992), dischargers could apply for permits through a ''group application.'' Third, dischargers can apply for coverage under an ''EPA promulgated storm water general permit.'' Dischargers from numerous industries applied for permits through the group application process. Among them were dischargers from the ore mining and dressing industry.

On March 10, 1993, EPA accepted group applications from ore mining and dressing industry applicants and began processing those group applications. On November 19, 1993, EPA proposed to issue a single ''general'' permit (for each State where EPA issues permits) based on all of the group applications accepted and received from group applicants in various covered industries. 58 FR 61146, 61236–61251 (November 19, 1993). EPA issued that set of general permits on September 29, 1995, and took subsequent action concerning these general permits on February 9, 1996, February 20, 1996 and September 24, 1996. These general permits are entitled the NPDES Storm Water Multi-Sector General Permits for Industrial Activities (hereinafter referred to in the singular as the ''Multi-Sector Permit''). The Multi-Sector Permit applies in most States, Territories, and Indian Country where EPA administers the NPDES permitting program.

The Multi-Sector Permit contains requirements that are specifically tailored to the types of industrial activity occurring at facilities represented by various industry groups applicants. Unlike much of the Ore Mining and Dressing Guidelines, the Multi-Sector Permit incorporates narrative effluent limitations for storm water discharges. These narrative effluent limitations are referred to as ''best management practices'' (''BMPs''). BMPs are designed to represent the pollution reductions achievable through application of BAT and BCT. Permits include BMPs to control or abate the discharge of pollutants when, for example, numeric effluent limitations are infeasible. 40 CFR 122.44(k).

B. Multi-Sector Permit Coverage of Mining Activity

By its terms, the Multi-Sector Permit provides authorization for some storm water discharges from ore (metal) mining and dressing facilities. Authorization is limited, however, to storm water discharges from or off of: topsoil piles; offsite haul/access roads outside the active mining area; onsite haul roads if not constructed of waste rock or spent ore (except if mine drainage is used for dust control); runoff from tailings dams/dikes when not constructed of waste rock/tailings and no process fluids are present; concentration buildings, if no contact with material piles; mill sites, if no contact with material piles; chemical storage areas; docking facilities, if no excessive contact with waste product; explosive storage areas; reclaimed areas released from reclamation bonds prior to December 17, 1990; and partially/inadequately reclaimed areas or areas not released from reclamation bonds.

The Multi-Sector Permit covers discharges composed of entirely storm water flows, as well as certain allowable non-storm water discharges. 60 FR at 51114; Part III.A. The Multi-Sector Permit does not authorize point source dry weather discharges, such as from mine adits, tunnels, or contaminated springs or seeps, which are not storm water. *Id*.; Part III.A.2.a.; 60 FR at 51155. Note that such dry weather discharges are not affected by today's clarification.

Under the Multi-Sector Permit at Part I.B.3.g., permit coverage is available for storm water discharges covered by some, but not all, of the various effluent guidelines that address storm water, including, for example, some of the storm water discharges under the Mineral Mining and Processing Guidelines at 40 CFR part 436. 60 FR at 51112. The Multi-Sector Permit does not, however, cover storm water discharges from point sources that are subject to the Ore Mining and Dressing Guidelines. 60 FR at 51155; Part XI.G.1.a.

Table G–4 of the Multi-Sector Permit, entitled ''Applicability of 40 CFR Part 440 Effluent Limitations Guidelines to Storm Water,'' identifies various discharge sources associated with ore mining and dressing operations. The Table then indicated EPA's view concerning standards of regulatory control for those discharges. The different standards of regulatory control include: ''mine drainage'' effluent limitations guidelines, found in the Guidelines; ''mill discharge process water'' effluent limitations guidelines, also found in the Guidelines; ''storm water,'' which could, for example, be found in the Multi-Sector Permit; and ''unclassified,'' indicating discharges not regulated under the Guidelines or the Multi-Sector Permit.

As EPA said in adopting the Multi-Sector Permit: ''Table G–4 clarifies the applicability of the Effluent Limitations Guidelines found in 40 CFR part 440. *This Table does not expand or redefine these Effluent Limitations Guidelines*.'' 60 FR at 50897 (emphasis added). EPAs intent in publishing Table G–4, therefore, was merely to reiterate the interpretation that EPA issued when it promulgated the Guidelines.

III. Legal Challenge Concerning Table G–4

On October 10, 1995, the National Mining Association (hereinafter referred to as ''NMA'' or the ''Petitioners'') petitioned the U.S. Court of Appeals for the Eighth Circuit for judicial review of the Multi-Sector Permit. Specifically, Petitioners challenged EPAs determination that storm water runoff from a number of ancillary mine sources identified in Table G–4 of the Multi-Sector Permit would constitute sources of ''mine drainage'' under the Guidelines. The particular mining activities of concern include overburden piles, haul roads made of overburden and other ancillary mine areas that fall within the Guidelines definition of ''mine drainage,'' or drainage from the active ''mining area.'' As noted above, EPA excluded storm water runoff from these sources from coverage under the Multi-Sector Permit. The Petitioners contended that this determination reflects a new, more expansive interpretation of the Guidelines.

NMA presented documents from the prior *Kennecott* litigation, namely: EPAs 1979 decision responding to Kennecott's petition for reconsideration of the Guidelines; a letter of EPA counsel which was attached to a decision responding to the Kennecott petition for reconsideration of the Guidelines; and a brief that EPA filed before the Tenth Circuit. NMA cited these documents to support its argument that EPA's interpretation prior to publishing the Multi-Sector Permit was that ''overburden'' (''waste rock/overburden piles'') would be outside the scope of the Guidelines. NMA asserted that certain entries in Table G–4 were incorrect to the extent that the table categorically identified discharges from overburden-related sources as covered by the Guidelines. NMA argued that, based on EPA statements made during the course of the *Kennecott* litigation, *no* overburden-related areas are covered by the Guidelines.

EPA has reviewed the Agency statements made during the 1979 litigation challenging the Guidelines rulemaking. While disagreeing with NMAs categorical conclusion that no overburden-related areas are covered by the Guidelines, EPA believes the earlier Agency statements reflect an EPA interpretation that storm water discharges from ''waste rock/overburden

piles'' would be subject to the Guidelines only if the ''waste rock/overburden piles'' are within the ''active mining area'' and the resulting storm water flows drain into a point source. This may include, but would not be limited to, such flows that combine with either process waters (i.e., mill drainage) or other mine drainage. This clarification was not obvious from the face of Table G–4 as presented in the Multi-Sector Permit.

NMAs challenge to the Multi-Sector Permit is currently under the advisement of the Eighth Circuit. Both parties have submitted briefs. A coalition of citizens interest groups, the Western Mining Action Project and Sierra Club Legal Defense Fund, also filed an *amicus curiae* brief with the Court. On March 10, 1997, the Eighth Circuit heard oral argument in *National Mining Association* v. *EPA*, No. 95–3519. At that time, counsel for EPA represented to the court that EPA intended to prepare a clarification of the Agencys interpretation of the technology-based effluent limitations applicable to point source discharges from various areas at ore mining and dressing operations. Todays notice provides that clarification and would revise the Table so that it reflects only sources to which the Permit would apply.

IV. Interpretation

Upon fuller review of the underlying record, EPA now believes that, in 1978–79, the Agency did not consider certain point source discharges of storm water associated with ''waste rock and overburden'' to be subject to the Ore Mining and Dressing Guidelines. Specifically, EPA did not conduct a complete economic and technological assessment of diverting drainage flows from ''waste rock or overburden'' outside the active mining area into the active mining area. Therefore, the Agency did not consider such discharges to be sources of mine drainage. First, discharges from ''waste rock/overburden piles'' would be outside the scope of the Guidelines if they consist ''entirely of diffuse runoff which contacts overburden piles, which did not either normally flow to, or by design drain to a point source.'' Such diffuse runoff would not even be subject to the NPDES permit program if it was not added to waters of the United States through a discrete, confined, discernable conveyance. *See* 44 FR 7953 (Feb. 8, 1979). Second, such discharges would be outside the scope of the Guidelines if storm water runoff from overburden-related sources was not within the ''active mine area.'' In light of the above, EPA believes that, to the extent that a reader could misinterpret the Table as categorically including all ''waste rock/overburden'' sources to be within the ''active mining area,'' Table G–4 did not accurately reflect the scope of the applicability of the Guidelines.

Todays action does not change in any way EPAs interpretation of the coverage of the Guidelines set forth in the 1979 Notice of Clarification, which provides that the Guidelines ''are not intended to require the operator to collect and contain diffuse storm water runoff which would not otherwise be collected in or does not otherwise drain into a point source.'' Todays notice articulates the 1979 interpretation to the fact situation contained in Table G–4 of the Multi-Sector Permit.

Discharges from overburden-related sources that are outside of the ''active mining area'' are not covered by the Guidelines. Like all ''point source'' discharges, however, these discharges require NPDES permit authorization to be in compliance with the CWA. If these discharges are entirely composed of storm water (and are not covered by the Guidelines), then they may be authorized under an EPA general permit for storm water (if it otherwise meets the eligibility provisions), or an individual permit with BPJ-based controls, which may include either numeric limitations and/or narrative limitations (in the form of BMPs).

Discharges from haul roads constructed of waste rock or spent ore are subject to the Guidelines only if the haul roads so constructed are within the ''active mining area'' and the resulting storm water flows drain into a point source. Such discharges would be outside the scope of the Guidelines if they are outside the ''active mining area.'' Point source discharges consisting entirely of storm water from haul road-related sources outside the active mining area would be addressed in the same manner as ''waste rock and overburden'' outside the active mining area (see above). As noted above, such discharges would be outside the scope of the NPDES program if they consist entirely of diffuse runoff which does not flow to a point source.

Though EPA notes that overburden piles (thus, runoff from overburden) are sometimes outside the ''active mining area,'' NPDES permit coverage is still required when such flows are channeled or drain to a point source. Under todays clarification, determinations about whether numeric effluent limitations similar to those in the Ore Mining and Dressing Guidelines should apply to discharges from overburden piles and haul roads outside the active mining area are ones to be made on a site-by-site basis based on the ''best professional judgment'' of the permit writer (according to regulations at 40 CFR § 125.3(d)). Such permits might include effluent limitations similar to the effluent limitations for ''mine drainage'' under the Guidelines. If determined feasible, EPA acknowledges that compliance with such limits may necessitate diversion of flows from such sources into the active mining area for treatment. EPA provides additional guidance below.

V. Guidance to Permit Applicants and Permit Writers

Based on the foregoing discussion, EPA is proposing Table G–4 in a revised form today. In its earlier form, Table G-4 could have been misinterpreted. Consistent with earlier EPA statements made in the preamble to the Guidelines, the Development Document, the Notice of Clarification and other documents discussed above, the Table G–4 references to discharges from ''waste rock/overburden'' and ''onsite haul roads constructed of waste rock or spent ore'' at active ore mining and dressing sites are hereby modified. The Agency does not consider those discharges to be subject to the Guidelines on a categorical basis unless they are within the ''active mining area'' and the resulting storm water flows drain into a point source. Although not compelled by the Guidelines, numeric effluent limitations may be appropriate for these discharges (i.e., point source drainage from outside the active mining area) if the permit writer so determines on a BPJ basis or if the discharge would cause or contribute to a violation of water quality standards.

The Agency still presumes that ''active mining area'' should be interpreted as broadly as the plain language of the regulations suggests; however, application of the definition may vary from mine to mine. As the Tenth Circuit recognized in the *Kennecott Corp.* case, ''to cast such definitions in absolute, unequivocal terms would be unrealistic, if not altogether impossible.'' 612 F.2d at 1243. The regulations define ''active mining area'' as ''a place where work or other activity related to the extraction, removal, or recovery of metal ore is being conducted, except, with respect to surface mines, any area of land on or in which grading has been completed to return the earth to desired contour and reclamation work has begun.'' 40 CFR 440.132(a). The Agency continues to reject any distinction between ''process'' and ''nonprocess'' areas at mining operations to determine the nature and

scope of the active mining area. Many areas that some might consider to be ''nonprocess'' areas do constitute part of the active mining area provided that work or other activity related to extraction, removal, or recovery of metal ore *is being* conducted (until the mining operation finishes recontouring and begins reclamation).

Today's proposed interpretation and guidance describe a distinct class of discharges that was not distinct from the face of Table G–4 when the Agency published the Multi-Sector Permit. Specifically, today's proposed interpretation identifies some discharges that could have been interpreted to be ''mine drainage'' under the plain language of the Guidelines and, therefore, within the applicability of the Guidelines and ineligible for coverage under the ore mining and dressing portion of the Multi-Sector General Permit (and under Table G–4) even though the Agency did not evaluate the technological feasibility and cost impacts of diverting drainage from those sources into the active mining area when it developed the Ore Mining and Dressing Guidelines. Based on today's proposed clarification, such an interpretation would be inaccurate because EPA did not require diversion of flows from outside the active mining area into the active mining area for treatment. For this distinct and limited class of discharges described by today's notice, i.e., those overburden/waste rock sources outside the active mining area, authorization under an EPA general permit for storm water may be available.

Note that the permit applicant bears the initial responsibility to determine whether its discharges are eligible for coverage under an EPA-issued general permit. Discharges of ''mine drainage'' from the ''active mining area'' are not eligible for authorization under either the NPDES Baseline General permit or the Multi-Sector Permit because such discharges are subject to the Guidelines. For this reason, EPA encourages permit applicants to contact the NPDES permit issuance authority if there is any doubt regarding the nature and scope of the ''active mining area'' at the site of their operations. In many cases, modifications to individual permits may be more appropriate for longer-term authorization of the storm discharges in question. Of course, as indicated in the Table, there may be other such point sources of drainage from within the active mining area that would not be ''mine drainage.'' Such discharges may be appropriately regulated under EPA general permits for storm water.

EPA also recommends that permit applicants contact the relevant NPDES authority for assistance in determining the appropriate permitting vehicle to address the class of discharges described in today's notice. Individual permits provide the opportunity to tailor controls appropriate for the discharge, for example, through the use of best professional judgment (BPJ) according to 40 CFR 125.3(d) or analogous State law, and where necessary to assure compliance with water quality standards. If the NPDES permitting authority has data, for example, which indicate that discharges outside the active mining area only present pollution concerns associated with solids (e.g., settleable solids or total suspended solids), the permit requirements for those discharges may be limited to controlling those solids. However, if discharges contain heavy metals, the permitting authority, using BPJ, should establish appropriate technology-based metals effluent limitations. Further, if the permitting authority has data to indicate a reasonable potential to cause or contribute to an excursion of water quality standards for other pollutants, including pH and/or heavy metals, then the permit must include those more stringent requirements to assure compliance with water quality standards. EPA recommends ongoing monitoring for both pH and metals because the complex geochemistry at many mine sites presents difficulty in predicting the quality of storm water into the future.

In cases where there is a dry weather discharge outside the scope of the Guidelines, EPA strongly recommends that the permitting authority issue an individual NPDES permit using BPJ to establish appropriate technology-based limits or more stringent limitations necessary to assure compliance with water quality standards. The permitting authority should consider the degree of pollutant discharges (especially, whether the discharge contains heavy metal pollutants) and must consider the impact on the receiving water when establishing appropriate water quality-based controls on the discharge.

Finally, the Agency cautions that today's interpretation should not be read as a license for mine operators to convert point source discharges into ''nonpoint'' sources in order to avoid regulation under the NPDES permit program. If a mining operation has a discernable, confined, discrete conveyance, any attempt to avoid regulation by intentional ''diffusion'' of that waste water stream, for example by spraying it over a hill side or inserting diffusing devices at the ends of drainage culverts, would still constitute a point source discharge if the waste water ultimately enters waters of the United States (as opposed to appropriate land application of such waste waters). While such diffusion may beneficially reduce the potential for erosion and instream sedimentation, it would not eliminate the need for treatment where necessary, for example, where the discharge contains metals contributing to a violation of State water quality standards.

VI. Regulation Assessment Requirements

A. Executive Order 12866

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

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

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

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

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

Because the Agency takes the position that NPDES general permits are not ''rules'' or ''regulations'' subject to the rulemaking requirements of Administrative Procedure Act section 553, it has been determined that this rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Regulatory Flexibility Act

The Agency has determined that the permit modification being published today is not subject to the Regulatory Flexibility Act (''RFA''), which generally requires an agency to conduct a regulatory flexibility analysis of any significant impact the rule will have on a substantial number of small entities. By its terms, the RFA only applies to rules subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act (''APA'')

or any other statute. Today's permit modification is not subject to notice and comment requirements under the APA or any other statute because the APA defines ''rules'' in a manner that excludes permits. See APA section 551 (4), (6), and (8).

APA section 553 does not require public notice and opportunity for comment for interpretative rules or general statements of policy. In addition to proposing modification of the general permit, today's action repeats an interpretation of existing regulations promulgated almost twenty years ago. The action would impose no new or additional requirements.

C. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year.

For reasons explained in the discussion regarding the Regulatory Flexibility Act, the UMRA only applies to rules subject to notice-and-comment rulemaking requirements under the APA or any other statute. Today's permit modification is not subject to notice and comment requirements under the APA or any other statute because the APA defines ''rules'' in a manner that excludes permits. See APA section 551 (4), (6), and (8).

Today's proposed permit modification contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector. Today's proposed modification merely announces an Agency interpretation of existing regulations. EPA has determined that this permit modification does not contain any Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Therefore, today's proposed permit modification is not subject to the requirements of section 202 of the UMRA.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements. Because today's proposed modification is based on an interpretation of existing regulations and because EPA anticipates that extremely few, if any, small governments operate mining operations, EPA has determined that this action contains no regulatory requirements that might significantly or uniquely affect small governments.

D. Paperwork Reduction Act

The proposed permit modification contains no requests for information and consequently is not subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

Signed this 26th day of September, 1997.

Patricia L. Meany,

Acting Regional Administrator, Region 1.

Signed this 26th day of September, 1997.

Jerry Clifford,

Acting Regional Administrator, Region 6.

Signed this 25th day of September, 1997.

Deborah Jordan,

Acting Regional Administrator, Region 9.

Signed this 25th day of September, 1997.

Philip S. Millam,

Acting Regional Administrator, Region 10.

1. For the reasons set forth in this preamble, the table published on September 29, 1995, at 60 FR 50897 would be modified to read as follows:

TABLE G–4.—APPLICABILITY OF THE MULTI-SECTOR GENERAL PERMIT TO STORM WATER RUNOFF FROM ACTIVE ORE (METAL) MINING AND DRESSING SITES

Discharge/source of discharge	Note/comment
Piles (seepage and/or runoff):	
Waste rock/overburden	If not in active mining area and composed entirely of storm water. See Note below.
Topsoil	
Roads constructed of waste rock or spent ore:	
Onsite haul roads	If not in active mining area and composed entirely of storm water. See Note below.
Offsite haul/access roads	If outside of the active mining area.
Roads not constructed of waste rock or spent ore:	
Onsite haul roads	Except if ''mine drainage'' is used for dust control.
Offsite haul/access roads	
Milling/concentrating:	
Runoff from tailings dams/dikes when constructed of waste rock/tailings.	Except if process fluids are present and only if not in active mining area and composed entirely of storm water. See Note below.
Runoff from tailings dams/dikes when not constructed of waste rock/tailings.	Except if process fluids are present.
Concentration building	If storm water only and no contact with piles.
Mill site	If storm water only and no contact with piles.
Ancillary areas:	
Office/administrative building and housing	If mixed with storm water from the industrial area.
Chemical storage area	
Docking facility	Except if excessive contact with waste product that would otherwise constitute ''mine drainage.''
Explosive storage	
Fuel storage (oil tanks/coal piles)	
Vehicle/equipment maintenance area/building	
Parking areas	But coverage unnecessary if only employee and visitor-type parking.

TABLE G–4.—APPLICABILITY OF THE MULTI-SECTOR GENERAL PERMIT TO STORM WATER RUNOFF FROM ACTIVE ORE (METAL) MINING AND DRESSING SITES—Continued

Discharge/source of discharge	Note/comment
Power plant	
Truck wash area	Except when excessive contact with waste product that would otherwise constitute ''mine drainage.''
Reclamation-related areas:	
Any disturbed area (unreclaimed)	Only if not in active mining area.
Reclaimed areas released from reclamation bonds prior to Dec. 17, 1990	
Partially/inadequately reclaimed areas or areas not released from reclamation bond	

Storm water runoff from these sources are subject to the NPDES program for storm water unless mixed with discharges subject to the 440 CFR Part 440 that are not regulated by another permit prior to mixing. Non-storm water discharges from these sources are subject to NPDES permitting and may be subject to the effluent limitation guidelines under 40 CFR Part 440.

Note: Discharges from overburden/waste rock and overburden/waste rock-related areas are subject to 40 CFR part 440 if the source of the drainage flows is within the ''active mining area'' and the resulting storm water flows drain to a point source. For such sources outside the active mining area, coverage under this permit would be available if the discharge is composed entirely of storm water and not subject to 40 CFR Part 440, as well as meeting other eligibility criteria contained in Part I.B. of the permit. Permit applicants bear the initial responsibility for determining the applicable technology-based standard for such discharges. EPA recommends that permit applicants contact the relevant NPDES permit issuance authority for assistance to determine the nature and scope of the ''active mining area'' on a mine-by-mine basis, as well as to determine the appropriate permitting mechanism for authorizing such discharges.

2. The third sentence in the first paragraph in permit eligibility provision for Storm Water Discharges Associated with Industrial Activity from Metal Mining (Ore Mining and Dressing), Section XI.G.1. (introductory language), previously published on September 29, 1995, at 60 FR 51155, would be modified and a fourth and fifth sentence would be added to read as follows:

1. Discharges Covered Under This Section

* * * All storm water discharges from inactive metal mining facilities and storm water discharges from the following areas of active, and temporarily inactive, metal mining facilities are the only discharges covered by this permit: waste rock/overburden piles outside the active mining area; topsoil piles; offsite haul/access roads if outside of the active mining area; haul/access roads constructed of waste rock/overburden if outside of the active mining area; onsite haul/access roads not constructed of waste rock/overburden/ spent ore except if mine water is used for dust control; runoff from tailings dams/dikes when not constructed of waste rock/tailings and no process fluids are present; runoff from tailings dams/dikes when constructed of waste rock/tailings and no process fluids are present if outside the active mining area; concentration building if no contact with material piles; mill site if no contact with material piles; office/administrative building and housing if mixed with storm water from industrial area; chemical storage area; docking facility except if excessive contact with waste product; explosive storage; fuel storage; vehicle/equipment maintenance area/building; parking areas (if necessary); power plant; truck wash areas except when excessive contact with waste product; unreclaimed, disturbed areas outside of active mining area; reclaimed areas released from reclamation bonds prior to December 17, 1990; and partially/inadequately reclaimed areas or areas not released from reclamation bond. Note: Discharges from overburden/waste rock and overburden/waste rock-related areas are subject to 40 CFR part 440 if the source of the drainage flows is within the ''active mining area'' and the resulting storm water flows drain to a point source. For such sources outside the active mining area, coverage under this permit would be available if the discharge is composed entirely of storm water and not subject to 40 CFR part 440, as well as meeting other eligibility criteria contained in Part I.B. of the permit.

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Federal Register

Wednesday
October 22, 1997

Part IV

Department of Commerce

International Trade Administration

Countervailing Duty Determinations; Trinidad and Tobago, et al.; Notices

DEPARTMENT OF COMMERCE

International Trade Administration

[C–274–803]

Suspension of Countervailing Duty Investigation: Steel Wire Rod From Trinidad and Tobago

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) has suspended the countervailing duty investigation involving steel wire rod from Trinidad and Tobago. The basis for the suspension is an agreement between the Department and the Government of Trinidad and Tobago (GOTT) wherein the GOTT has agreed not to provide any new or additional export or import substitution subsidies on the subject merchandise and has agreed to restrict the volume of direct or indirect exports to the United States of steel wire rod products from all Trinidad and Tobago producers/exporters in order to eliminate completely the injurious effects of exports of this merchandise to the United States.

EFFECTIVE DATE: October 22, 1997.

FOR FURTHER INFORMATION CONTACT: Jean Kemp or Donna Kinsella, Office of Antidumping/Countervailing Duty Enforcement, Group III, Import Administration, U.S. Department of Commerce, Room 1874, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482–1131 or 4093.

SUPPLEMENTARY INFORMATION:

Background

On March 24, 1997, the Department initiated a countervailing duty investigation under section 702 of the Tariff Act of 1930, (the Act), as amended, to determine whether manufacturers, producers, or exporters of steel wire rod from Trinidad and Tobago receive subsidies (62 FR 13866). On April 30, 1997, the United States International Trade Commission (ITC) notified the Department of its affirmative preliminary injury determination. On May 2, 1997, we postponed the preliminary determination until no later than July 28, 1997 (62 FR 25172, May 8, 1997).

On July 28, 1997, the Department preliminarily determined that countervailable subsidies are being provided to Caribbean Ispat Limited (CIL) (62 FR 41927, August 4, 1997). Between August 18 and 26, 1997, the Department verified the questionnaire responses of the GOTT and CIL in Trinidad and Tobago.

The Department and the GOTT initialed a proposed agreement suspending this investigation on September 16, 1997. Interested parties were informed that the Department intended to finalize the agreement on October 14, 1997, and were invited to provide written comments on the agreement. No comments were filed by interested parties.

The Department and the GOTT signed the final suspension agreement on October 14, 1997.

Scope of Suspension Agreement

The products covered by this suspension of investigation are set forth in section II of Appendix 1 to this notice.

Suspension of Investigation

The Department consulted with the parties to the proceeding and has considered their positions with respect to the proposed suspension agreement. In accordance with section 704(c) of the Act, we have determined that extraordinary circumstances are present in this case, as defined by section 704(c)(4) of the Act. (*See* October 14, 1997, Extraordinary Circumstances Memorandum to Robert S. LaRussa.)

The suspension agreement provides that: (1) The GOTT will not provide any new or additional export or import substitution subsidies on the subject merchandise; and (2) the GOTT will restrict the volume of direct or indirect exports to the United States of subject merchandise from all Trinidad and Tobago producers/exporters.

We have also determined that the suspension agreement can be monitored effectively and is in the public interest, pursuant to section 704(d) of the Act. (*See* October 14, 1997, Public Interest Memorandum to Robert S. LaRussa.) We find, therefore, that the criteria for suspension of the investigation pursuant to section 704(c) of the Act have been met. The terms and conditions of the suspension agreement, signed October 14, 1997, are set forth in Appendix I to this notice.

The suspension of liquidation ordered in the final affirmative determination in this case shall continue in effect, subject to section 704(h)(3) of the Act. Section 704(f)(2)(B) of the Act provides that the Department may adjust the security required to reflect the effect of the Agreement. Pursuant to this provision, the Department has found that the Agreement eliminates completely the injurious effects of these imports and, thus, the Department is adjusting the security required from producers and/or exporters to zero.

On October 14, 1997, we received a request from petitioners requesting that we continue the investigation. Pursuant to this request, we are continuing the investigation in accordance with section 704(g) of the Act. We will notify the International Trade Commission (ITC) of our determination. If the ITC's injury determination is negative, the agreement will have no force or effect, and the investigation will be terminated (*see* section 704(f)(3)(A) of the Act). If the ITC's determination is affirmative, the Department will not issue a countervailing duty order as long as the suspension agreement remains in force (*see* section 704(f)(3)(B) of the Act).

This notice is published pursuant to section 704(f)(1)(A) of the Act.

Dated: October 14, 1997.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

Agreement Suspending the Countervailing Duty Investigation on Steel Wire Rod From Trinidad and Tobago

For the purpose of encouraging free and fair trade in steel wire rod, establishing more normal market relations, and eliminating injury to the domestic industry, the United States Department of Commerce (''the Department'') and the Government of Trinidad and Tobago enter into this suspension agreement (''the Agreement'').

Pursuant to this Agreement, the Government of Trinidad and Tobago agrees not to provide any new or additional export subsidies on the subject merchandise. The Government of Trinidad and Tobago also will restrict the volume of direct or indirect exports to the United States of subject merchandise from all Trinidad and Tobago producers/exporters, subject to the terms and provisions set forth below.

On the basis of this Agreement, pursuant to the provisions of Sections 704 (b) and (c) of the Tariff Act of 1930, as amended (the ''Act'') (19 U.S.C. 1671c (b) and (c)), the Department shall suspend its countervailing duty investigation with respect to steel wire rod produced in Trinidad and Tobago, subject to the terms and provisions set forth below.

I. Definitions

For purposes of this Agreement, the following definitions apply:

A. ''Date of Export'' for imports of subject merchandise into the United

States shall be considered the date the Export License was issued.

B. ''Party to the Proceeding'' means any interested party, within the meaning of Section 355.2(l) of the Department's Regulations, which actively participates through written submissions of factual information or written argument.

C. ''Indirect Exports'' means arrangements as defined in Section IV.E of this Agreement and exports from Trinidad and Tobago through one or more third countries, whether or not such exports are further processed, whether or not such exports are sold in one or more third countries prior to importation into the United States and whether or not the Trinidad and Tobago producer knew the product was destined to enter the United States.

D. For purposes of this Agreement, ''United States'' shall comprise the customs territory of the United States of America (the 50 States, the District of Columbia and Puerto Rico) and foreign trade zones located in the territory of the United States of America.

E. ''Export License'' is the document which serves as both an export license and a certificate of origin. An Export License must accompany all shipments of subject merchandise from Trinidad and Tobago to the United States, and must contain all of the information enumerated in the Appendix (U.S. sales), except Date of Entry information and Final Destination.

F. ''Relevant Period'' for the export limit of this Agreement means the period October 1 through September 30.

G. ''For Consumption'' means all subject merchandise sold to customers, such as, trading companies, distributors, resellers, end-users, or service centers.

H. ''End-User'' means an entity, such as a steel service center, reseller, trading company, end-user, etc., which consumes the subject merchandise as defined in Section I.G.

II. Product Coverage

The products covered by this Agreement (''subject merchandise'') are certain hot-rolled carbon steel and alloy steel products, in coils, of approximately round cross section, between 5.00 mm (0.20 inch) and 19.0 mm (0.75 inch), inclusive, in solid cross-sectional diameter. Specifically excluded are steel products possessing the above noted physical characteristics and meeting the Harmonized Tariff Schedule of the United States (HTSUS) definitions for (a) stainless steel; (b) tool steel; (c) high nickel steel; (d) ball bearing steel; (e) free machining steel that contains by weight 0.03 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.4 percent of phosphorus, more than 0.05 percent of selenium, and/or more than 0.01 percent of tellurium; or (f) concrete reinforcing bars and rods.

The following products are also excluded from the scope of this Agreement:

Coiled products 5.50 mm or less in true diameter with an average partial decarburization per coil of no more than 70 microns in depth, no inclusions greater than 20 microns, containing by weight the following: carbon greater than or equal to 0.68 percent; aluminum less than or equal to 0.005 percent; phosphorous plus sulfur less than or equal to 0.040 percent; maximum combined copper, nickel and chromium content of 0.13 percent; and nitrogen less than or equal to 0.006 percent. This product is commonly referred to as ''Tire Cord Wire Rod.''

Coiled products 7.9 to 18 mm in diameter, with a partial decarburization of 75 microns or less in depth and seams no more than 75 microns in depth; containing 0.48 to 0.73 percent carbon by weight. This product is commonly referred to as ''Valve Spring Quality Wire Rod.''

The products subject to this Agreement are currently classifiable under subheadings 7213.91.3000, 7213.91.4500, 7213.91.6000, 7213.99.0030, 7213.99.0090, 7227.20.0000, and 7227.90.6050 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this Agreement is dispositive.

III. Non-Provision of Export Subsidies

A. The Government of Trinidad and Tobago certifies that all exports of the subject merchandise to the United States made on or after the effective date of this Agreement will not receive or benefit from any export or import substitution subsidies, other than export allowances under Act No. 14 of 1976, as codified in Section 8(1) of the Corporation Tax Act, whereby companies in Trinidad and Tobago with export sales may deduct an export allowance in calculating their corporate income tax.

B. The Government of Trinidad and Tobago recognizes that the provision of any export or import substitution subsidies on the production or shipment of the subject merchandise exported directly or indirectly from Trinidad and Tobago to the United States, other than that export subsidy specifically provided for in Section III.A., may result in termination of this Agreement and resumption of the investigation pursuant to the provisions of section 704(i) of the Act. Export or import substitution subsidies include those that have been determined to be export or import substitution subsidies in the preliminary determination in the countervailing duty investigation underlying this Agreement (unless the investigation is continued and a contrary decision is reached in the final determination), in any final U.S. countervailing duty investigation of a Trinidad and Tobago product, or in any final review of a Trinidad and Tobago product under section 751 of the Act, and include subsidies which may apply to other products or exports to other destinations to the extent that such subsidies cannot be segregated as applying solely to such other products or exports. For purposes of this Agreement, relief from corporation tax pursuant to the Fiscal Incentives Act, Chapter 85:01, shall not be considered an export or import substitution subsidy, so long as: (1) Such relief is in lieu of the tax benefit currently conferred by the export allowance under Act No. 14 of 1976, as codified in Section 8(1) of the Corporation Tax Act, as of August 1, 1997; (2) such relief does not exceed the amount of benefit that would have been received for the same year under the export allowance program provided for in Act No. 14 of 1976, as codified in Section 8(1) of the Corporation Tax Act, as of August 1, 1997; and (3) there is no determination by the World Trade Organization that either the Fiscal Incentives Act or, as appropriate, the Corporation Tax Act is inconsistent with the development needs of Trinidad and Tobago pursuant to Article 27 of the Agreement on Subsidies and Countervailing Measures (''the SCM'').

C. The Government of Trinidad and Tobago shall notify the Department in writing of any new benefit which is, or which the Government of Trinidad and Tobago has reason to know would be, an export or import substitution subsidy on shipments of the subject merchandise exported, directly or indirectly, from Trinidad and Tobago to the United States, including subsidies which may apply to both the subject merchandise and other products or exports to other destinations, to the extent such benefits cannot be segregated as applying solely to such other products or exports.

D. At such time as Trinidad and Tobago reaches export competitiveness with respect to products covered by this Agreement, as defined by Article 27.6 of the SCM, the export subsidy specifically provided for in Section III.A shall be

eliminated in accordance with Article 27.5 of the SCM.

IV. Export Limit

A. The export limit for subject merchandise in each Relevant Period shall be 148,000 short tons. The export limit for each Relevant Period shall be allocated in semi-annual quota allocation periods (October–March, April–September). No more than 60% of the export limit for any Relevant Period can be allocated in any given semi-annual quota allocation period. Deductions from the export limit shall be made based on the ''Date of Export,'' as defined in Section I.

B. On or after the effective date of this Agreement, the Government of Trinidad and Tobago will restrict the volume of direct or indirect exports of subject merchandise to the United States, and the transfer or withdrawal from inventory of subject merchandise (consistent with the provisions of Section IV.D), in accordance with the export limit then in effect.

C. An export shipment to the United States may not be made for more than the entire amount of quota allocated for that semi-annual quota allocation period. Any amount exported to the United States during a semi-annual quota allocation period shall not, however, when cumulated with all prior exports to the United States within the same Relevant Period, exceed the annual quota for that Relevant Period.

D. Any inventories of subject merchandise currently held in the United States by a Trinidad and Tobago entity and imported into the United States between May 6, 1997, and the effective date of this Agreement will be subject to the following conditions:

1. Such inventories will not be transferred or withdrawn from inventory for consumption in the United States without an Export License issued by the Government of Trinidad and Tobago. Any such transfers or withdrawals from inventory shall be deducted from the export limit in effect at the time the Export License is issued.

2. A request for an Export License under this provision shall be accompanied by a report specifying the original date of export, the date of entry into the United States, the identity of the original exporter and importer, the customer, a complete description of the product (including lot numbers and other available identifying documentation), and the quantity expressed in short tons.

3. In the event that there is a surge of sales of subject merchandise from such inventory, the Department will decrease the export limit to take into account such sales.

E. Any arrangement involving the exchange, sale, or delivery of steel wire rod products, as described in Section II, from Trinidad and Tobago, to the degree it results in the sale or delivery in the United States of steel wire rod products, as described in Section II, from a country other than Trinidad and Tobago, is subject to the requirements of Section V and will be counted toward the available quota. Any such transaction that does not comply with the requirements of Section V will be deducted from the available quota pursuant to Section VII.

F. Where subject merchandise is imported into the United States and is subsequently re-exported, or re-packaged and re-exported, the available quota shall be increased by the number of short tons re-exported. Such increase will be applicable to the Relevant Period corresponding to the time of such re-export. Such increase will be applied only after the Department receives, and has the opportunity to verify, evidence demonstrating original importation, any re-packaging, and subsequent exportation. The re-exported material must be identical to the imported material.

G. Export Licenses for a given Relevant Period may not be issued after September 30, except that Export Licenses not so issued may be issued during the first three months of the following Relevant Period, up to a maximum of 15 percent of the export limit for that following Relevant Period. Such ''carried-over'' quota shall be counted against the export limit applicable to the previous Relevant Period.

Export Licenses for up to 15 percent of the export limit for a subsequent Relevant Period may be issued as early as August 1 of the preceding Relevant Period. Such ''carried-back'' quota shall be counted against the export limit applicable to the following Relevant Period.

H. For the first 90 days after the effective date of this Agreement, subject merchandise shall be admitted into the United States with an ''Export License/ Certificate of Origin (Temporary Papers).''

The volume of any such imports will be deducted from the export limit applicable to the first Relevant Period. A full reporting of any such imports, which must correspond to the United States sales information detailed in the Appendix, must be submitted to the Department no later than 30 days after the conclusion of the 90 day period. This data must be sorted on the basis of date of export.

V. Export License

A. The Government of Trinidad and Tobago will restrict the volume of direct or indirect exports of subject merchandise to the United States by means of semi-annual quota allocations and Export Licenses. Export Licenses shall be issued by the Government of Trinidad and Tobago for all direct or indirect exports of subject merchandise to the United States in accordance with the export limit in Section IV.

B. Thirty days following the semi-annual allocation of quota rights for any Relevant Period, the Government of Trinidad and Tobago shall provide to the Department a report identifying each quota recipient and the volume of quota which each recipient has been accorded (''report of quota allocation results'').

C. Before it issues an Export License, the Government of Trinidad and Tobago will ensure that neither the annual quota for the Relevant Period nor the semi-annual quota allocation is exceeded.

D. The Government of Trinidad and Tobago shall take action, including the imposition of penalties, as may be necessary to make effective the obligations resulting from the export limit and Export Licenses. The Government of Trinidad and Tobago will inform the Department of any violations concerning the export limit and/or Export Licenses which come to its attention and the action taken with respect thereto.

The Department will inform the Government of Trinidad and Tobago of violations concerning the export limit and/or Export Licenses which come to its attention and the action taken with respect thereto.

E. Export Licenses will be issued sequentially, will be endorsed against the export limit for the Relevant Periods, and will reference the report of quota allocation results for the appropriate Relevant Period.

F. Export Licenses must be issued no earlier than one month before the day, month, and year on which the merchandise is accepted by a transportation company, as indicated in the bill-of-lading or a comparable transportation document, for export.

G. On or after the effective date of this Agreement, the United States shall require presentation of an Export License as a condition for entry of subject merchandise into the United States. The United States will prohibit the entry of any subject merchandise not accompanied by an Export License.

VI. Implementation

A. Export Subsidies

The Government of Trinidad and Tobago shall certify to the Department within 15 days after the first day of each three-month period, beginning on January 15, 1998, whether it continues to be in compliance with the agreement by providing that all exports of the subject merchandise to the United States will not receive or benefit from any export or import substitution subsidies, except that export subsidy which is specifically provided for in Section III.A. Failure to supply such information or certification in a timely fashion may result in the immediate resumption of the investigation or issuance of a countervailing duty order.

B. Export Limit

In order to effectively restrict the volume of exports of subject merchandise to the United States, the Government of Trinidad and Tobago agrees to implement the following procedures:

1. Establish an Export License program for all exports of subject merchandise to, or destined directly or indirectly for consumption in, the United States, no later than 90 days after the effective date of this Agreement.

2. Ensure compliance by any official Trinidad and Tobago institution, chamber, or other entities authorized by the Government of Trinidad and Tobago, all producers, exporters, brokers, and traders of the subject merchandise, and their affiliated parties, with all procedures established in order to effectuate this Agreement.

3. Collect information from all Trinidad and Tobago producers, exporters, brokers, and traders of the subject merchandise, and their affiliated parties, on the sale of the subject merchandise, and report such information pursuant to Section VIII of this Agreement.

4. Prohibit, by resolution, decree, legislation or equivalent Government action, direct and indirect exports to the United States of subject merchandise except with an Export License issued pursuant to Section V.A. and impose strict sanctions, such as penalties or prohibition from participation in the export limit allowed by the Agreement, in the event that any Trinidad and Tobago or Trinidad and Tobago-affiliated party does not comply in full with all the terms of the Agreement.

VII. Anticircumvention

A. The Government of Trinidad and Tobago will take all appropriate measures under Trinidad and Tobago law to prevent circumvention of this Agreement. It shall promptly conduct an inquiry into any and all allegations of circumvention, including allegations raised by the Department, and shall complete such inquiries in a timely manner (normally within 45 days). The Government of Trinidad and Tobago shall notify the Department of the results of its inquiries within ten days of the conclusion of such inquiries. Within 15 days of a request from the Department, the Government of Trinidad and Tobago shall share with the Department all facts known to the Government of Trinidad and Tobago regarding its inquiries, its analysis of such facts and the results of such inquiries. The Government of Trinidad and Tobago will require all Trinidad and Tobago exporters of steel wire rod products, as described in Section II, to include a provision in their contracts for sales to countries other than the United States that the steel wire rod sold through such contracts cannot be re-exported, transhipped or swapped to the United States, or otherwise used to circumvent the export limit of this Agreement. The Government of Trinidad and Tobago will also establish appropriate mechanisms to enforce this requirement.

B. If, in an inquiry pursuant to paragraph A, the Government of Trinidad and Tobago determines that a Trinidad and Tobago company has participated in a transaction that resulted in circumvention of the export limit of this Agreement, then the Government of Trinidad and Tobago shall impose penalties on such company including, but not limited to, denial of access to the steel wire rod quota. Additionally, the Government of Trinidad and Tobago shall deduct an amount of steel wire rod equivalent to the amount involved in such circumvention from the available quota and shall immediately notify the Department of the amount deducted. If sufficient quota is not available in the current Relevant Period, then the remaining amount necessary shall be deducted from the subsequent Relevant Period.

C. If the Government of Trinidad and Tobago determines that a company from a third country has circumvented the Agreement and the signatories agree that no Trinidad and Tobago entity participated in or had knowledge of such activities, then the signatories shall hold consultations for the purpose of sharing evidence regarding such circumvention and reaching mutual agreement on the appropriate steps to be taken to eliminate such circumvention, such as the Government of Trinidad and Tobago prohibiting sales of Trinidad and Tobago steel wire rod to the company responsible or reducing steel wire rod exports to the country in question. If the signatories are unable to reach mutual agreement within 45 days, then the Department may take appropriate action, such as deducting the amount of steel wire rod involved in such circumvention from the available quota, taking into account all relevant factors. Before taking such action, the Department will notify the Government of Trinidad and Tobago of the facts and reasons constituting the basis for the Department's intended action and will afford the Government of Trinidad and Tobago ten days in which to comment.

D. If the Department determines that a Trinidad and Tobago entity participated in circumvention, the signatories shall hold consultations for the purpose of sharing evidence regarding such circumvention and reaching mutual agreement on an appropriate resolution of the problem. If the signatories are unable to reach mutual agreement within 45 days, the Department may take appropriate action, such as deducting the amount of steel wire rod involved in such circumvention from the available quota or instructing the U.S. Customs Service to deny entry to any subject merchandise sold by the entity found to be circumventing the Agreement. Before taking such action, the Department will notify the Government of Trinidad and Tobago of the facts and reasons constituting the basis for the Department's intended action and will afford the Government of Trinidad and Tobago ten days in which to comment.

E. The Department shall direct the U.S. Customs Service to require all importers of steel wire rod, as described in Section II, into the United States, regardless of stated country of origin, to submit at the time of entry a written statement certifying that the steel wire rod being imported was not obtained under any arrangement, swap, or other exchange which would result in the circumvention of the export limit established by this Agreement. Where the Department has reason to believe that such a certification has been made falsely, the Department will refer the matter to the U.S. Customs Service or the Department of Justice for further action.

F. The Department will take the following factors into account in distinguishing normal steel wire rod market arrangements, swaps, or other exchanges from arrangements which would result in the circumvention of the export limit established by this Agreement:

1. Existence of any verbal or written arrangements which would result in the circumvention of the export limit established by this Agreement;
2. Existence of any arrangement as defined in Section IV.E that was not reported to the Department pursuant to Section VIII.A;
3. Existence and function of any subsidiaries or affiliates of the parties involved;
4. Existence and function of any historical and/or traditional trading patterns among the parties involved;
5. Deviations (and reasons for deviation) from the above patterns, including physical conditions of relevant steel wire rod facilities;
6. Existence of any payments unaccounted for by previous or subsequent deliveries, or any payments to one party for merchandise delivered or swapped by another party;
7. Sequence and timing of the arrangements; and
8. Any other information relevant to the transaction or circumstances.

G. ''Swaps'' include, but are not limited to:

Ownership swaps-involve the exchange of ownership of any type of steel wire rod product(s), without physical transfer. These may include exchange of ownership of steel wire rod products in different countries, so that the parties obtain ownership of products located in different countries; or exchange of ownership of steel wire rod products produced in different countries, so that the parties obtain ownership of products of different national origin.

Flag swaps-involve the exchange of indicia of national origin of steel wire rod products, without any exchange of ownership.

Displacement swaps-involve the sale or delivery of any type of steel wire rod product(s) from Trinidad and Tobago to an intermediary country (or countries) which can be shown to have resulted in the ultimate delivery or sale into the United States of displaced steel wire rod products of any type, regardless of the sequence of the transaction.

H. The Department will enter its determinations regarding circumvention into the record of the Agreement.

VIII. Monitoring

The Government of Trinidad and Tobago will provide to the Department such information as is necessary and appropriate to monitor the implementation of and compliance with the terms of this Agreement. The Department of Commerce shall provide semi-annual reports to the Government of Trinidad and Tobago indicating the volume of imports of the subject merchandise to the United States, together with such additional information as is necessary and appropriate to monitor the implementation of this Agreement.

A. The Government of Trinidad and Tobago shall immediately provide copies of any resolution, decree, legislation, or equivalent Government action governing any changes in the export allowance provisions of Act No. 14 of 1976, as codified in Section 8(1) of the Corporation Tax Act as soon as such changes occur. The Government of Trinidad and Tobago also shall immediately notify and provide copies to the Department of any resolution, decree, legislation or equivalent Government action governing any other export or import substitution subsidy which is issued, altered or amended in any way as to be applicable or available to producers/exporters of the subject merchandise to the United States.

B. The Government of Trinidad and Tobago shall notify the Department if any exporters of the subject merchandise transship the subject merchandise through third countries to the United States. The Government of Trinidad and Tobago also shall notify the Department if any exporter applies for or receives, directly or indirectly, the benefits of any export or import substitution subsidy program, other than that which is specifically excepted in Section III.A., regarding the export of the subject merchandise.

C. Beginning on the effective date of this Agreement, the Government of Trinidad and Tobago shall collect and provide to the Department the information set forth, in the agreed format, in the Appendix. All such information will be provided to the Department by May 1 of each year for exports during the period from October 1 of the previous year through March 31. In addition, such information will be provided to the Department by November 1 for exports from April 1 through September 30, or within 90 days of a request made by the Department. Such information will be subject to the verification provision identified in Section VIII.G of this Agreement. The Government of Trinidad and Tobago agrees to allow sales of subject merchandise only by those producers and through those brokers and trading companies which permit full reporting and verification of data. The Department may disregard any information submitted after the deadlines set forth in this Section or any information which it is unable to verify to its satisfaction.

Aggregate quantity and value of sales by HTS category to each third country will be provided to the Department by May 1 of each year for exports during the period from October 1 of the previous year through March 31. In addition, such quantity and value information will be provided to the Department by November 1 for exports from April 1 through September 30.

Transaction specific data for all third country sales will also be reported on the schedule provided above in the format provided in the Appendix. However, if the Department concludes that the transaction specific data is not necessary for a given period, it will notify the Government of Trinidad and Tobago at least 90 days before the reporting deadline that transaction specific sales data need not be reported. If the Department determines that such data is relevant in connection with Section VII and requests information on transactions for one or more third countries during a period for which the Department waived complete reporting, the Government of Trinidad and Tobago will provide the data listed in the Appendix for those specific transactions within 90 days of the request.

D. Both governments recognize that the effective monitoring of this Agreement may require that Trinidad and Tobago provide information additional to that which is identified above. Accordingly, the Department may establish additional reporting requirements, as appropriate, during the course of this Agreement.

E. The Department shall provide notice to the Government of Trinidad and Tobago of any additional reporting requirements no later than 45 days prior to the period covered by such reporting requirements unless a shorter notice period is mutually agreed.

F. Other sources for monitoring. The Department will review publicly-available data as well as Customs Form 7501 entry summaries and other official import data from the Bureau of the Census, on a monthly basis, to determine whether there have been imports that are inconsistent with the provisions of this Agreement.

The Department will monitor Bureau of the Census IM–115 computerized records, which include the quantity and value of each entry. Because these records do not provide other specific entry information, such as the identity of the producer/exporter which may be responsible for such sales, the Department may request the U.S. Customs Service to provide such information. The Department may request other additional documentation from the U.S. Customs Service.

The Department may also request the U.S. Customs Service to direct ports of entry to forward a Countervailing Duty Report of Importations for entries of the subject merchandise during the period this Agreement is in effect.

G. Verification. The Government of Trinidad and Tobago will permit full verification of all information related to the administration of this Agreement, including verification of Trinidad and Tobago producer and any brokers/trading companies utilized in making sales/shipments to the United States, on an annual basis or more frequently, as the Department deems necessary to ensure that Trinidad and Tobago is in full compliance with the terms of the Agreement. Such verifications may take place in association with scheduled consultations whenever possible.

IX. Disclosure and Comment

A. The Department shall make available to representatives of each party to the proceeding, under appropriately-drawn administrative protective orders consistent with the Department's Regulations, business proprietary information submitted to the Department semi-annually or upon request, and in any administrative review of this Agreement.

B. Not later than 30 days after the date of disclosure under Section VIII.A, the parties to the proceeding may submit written comments to the Department, not to exceed 30 pages.

C. During the anniversary month of this Agreement, each party to the proceeding may request a hearing on issues raised during the preceding Relevant Period. If such a hearing is requested, it will be conducted in accordance with Section 751 of the Act (19 U.S.C. 1675) and applicable regulations.

X. Consultations

The Government of Trinidad and Tobago and the Department shall hold consultations regarding matters concerning the implementation, operation and/or enforcement of this Agreement. Such consultations will be held each year during the anniversary month of this Agreement. Additional consultations may be held at any other time upon request of either the Government of Trinidad and Tobago or the Department.

XI. Violations of the Agreement

A. Violation

''Violation'' means noncompliance with the terms of this Agreement caused by an act or omission in accordance with Section 355.19 of the Department's Regulations.

The Government of Trinidad and Tobago and the Department will inform the other party of any violations of the Agreement which come to their attention and the action taken with respect thereto.

Imports in excess of the export limit set out in this Agreement shall not be considered a violation of this Agreement or an indication the Agreement no longer meets the requirements of Section 704 (b) or (c) of the Act where such imports are minimal in volume, are the result of technical shipping circumstances, and are applied against the export limit of the following year.

Prior to making a determination of an alleged violation, the Department will engage in emergency consultations. Such consultations shall begin no later than 14 days from the day of request and shall provide for full review, but in no event will exceed 30 days. After consultations, the Department will provide the Government of Trinidad and Tobago 20 days within which to provide comments. The Department will make a determination within 30 days.

B. Appropriate Action

If the Department determines that this Agreement is being or has been violated, the Department will take such action as it determines is appropriate under Section 704(i) of the Act and Section 355.19 of the Department's Regulations.

XII. Duration

Absent affirmative determinations under the five-year review provisions of sections 751 and 752 of the Act, the Department expects to terminate this Agreement and the underlying investigation no later than October 14, 2002.

The Government of Trinidad and Tobago may terminate this Agreement at any time upon notice to the Department. Termination shall be effective 60 days after such notice is given to the Department. Upon termination at the request of the Government of Trinidad and Tobago, the provisions of Section 704(i) of the Act shall apply.

XIII. Other Provisions

A. The Department finds that this Agreement is in the public interest; that effective monitoring of this Agreement by the United States is practicable; and that this Agreement will completely eliminate injury to the domestic industry producing the like product by imports of the merchandise subject to this Agreement.

B. In entering into this Agreement, the Government of Trinidad and Tobago does not admit that any programs alleged or investigated constitute countervailable benefits under the Act, or that sales of the subject merchandise have materially injured, or threatened material injury to, an industry or industries in the United States.

C. For all purposes hereunder, the Department and the signatory Government shall be represented by, and all communications and notices shall be given and addressed to:

Department of Commerce, U.S. Department of Commerce, Assistant Secretary for Import Administration, International Trade Administration, Washington, D.C. 20230

Government of Trinidad and Tobago, Ministry of Trade and Industry, Level 15, Riverside Plaza, No. 2 Besson Street, Port-of-Spain, Trinidad and Tobago, West Indies.

XIV. Effective Date

The effective date of this Agreement is the date of its publication in the **Federal Register**.

Dated: October 14, 1997.

For Government of Trinidad and Tobago.

Mervyn Assam,

Minister of Trade and Industry.

For U.S. Department of Commerce.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

Appendix

In accordance with the established format, the Government of Trinidad and Tobago shall collect and provide to the Department all information necessary to ensure compliance with this Agreement. This information will be provided to the Department on a semi-annual basis, or upon request.

The Government of Trinidad and Tobago will collect and maintain sales data to the United States, in the home market, and to countries other than the United States, on a continuous basis and provide the prescribed information to the Department.

The Government of Trinidad and Tobago will provide a narrative explanation to substantiate all data collected in accordance with the following formats.

Report of Inventories

Report, by location, the inventories held by Trinidad and Tobago producers/exporters in the United States and imported into the United States between the period beginning May 6, 1997, through the effective date of the Agreement.

1. Quantity: Indicate original units of measure and in short tons.

2. Location: Identify where the inventory is currently being held. Provide the name and address for the location.

3. Titled Party: Name and address of party who legally has title to the merchandise.

4. Export License Number: Indicate the number(s) relating to each entry now being held in inventory.

5. Certificate of Origin Number(s): Indicate the number(s) relating to each sale or entry.

6. Date of Original Export: Date the Export License/certificate of origin is issued.

7. Date of Entry: Date the merchandise entered the United States or the date book transfer took place.

8. Original Importer: Name and address.

9. Original Exporter: Name and address.

10. Complete Description of Merchandise: Include heat numbers, HTS number, physical description, ASTM specification, and other available information.

United States Sales

The Government of Trinidad and Tobago will provide all Export Licenses, which shall contain the following information with the exception of item #9, date of entry, and item #16, final destination.

1. Export License/Certificate of Origin Number(s): Indicate the number(s) relating to each sale and/or entry.

2. Complete Description of Merchandise: Include heat numbers, HTS number, physical description, ASTM specification, and other available information.

3. Quantity: Indicate in original units of measure and in short tons.

4. F.O.B. Sales Value: Indicate currency used.

5. Unit Price: Indicate currency used/per original unit of measure.

6. Date of Sale: The date all terms of order are confirmed.

7. Sales Order Number(s): Indicate the specification number/order number relating to each sale and/or shipment.

8. Date of Export: Date the Export License is issued.

9. Date of Entry: Date the merchandise entered the United States or the date book transfer took place.

10. Importer of Record: Name and address.

11. Trading Company/Broker: Name and address of any trading company involved in the sale.

12. Customer: Name and address of the first unaffiliated party purchasing from the Trinidad and Tobago producer/exporter.

13. Customer Affiliation: Indicate whether the customer is affiliated or unaffiliated to the Trinidad and Tobago exporter.

14. Quota Allocated to Exporter: Indicate the total amount of quota allocated to the individual exporter during the Relevant Period.

15. Quota Remaining: Indicate the remaining quota available to the individual exporter during the Relevant Period.

16. Final Destination: Name and address of the end-user for consumption in the United States.

17. Other: The identity of any party(ies) in the transaction chain between the customer and the final destination/end-user.

Mill Certification

The Government of Trinidad and Tobago shall ensure that all shipments of subject merchandise exported to the United States pursuant to this Agreement shall be accompanied by a copy of the original mill certification.

Sales Other Than United States

Pursuant to Section VIII, paragraph A, the Government of Trinidad and Tobago will provide country-specific sales volume and value information for all sales of steel wire rod products, as described in Section II, in the home market and to third countries.

1. Quantity: Indicate in original units of measure sold and/or entered and in metric tons.

2. F.O.B. Sales Value: Indicate currency used.

3. Date of Sale: The date all terms of order are confirmed.

4. Complete Description of Merchandise: Include heat numbers, HTS number, physical description, specification/grade under which sold, and other available information.

5. Sales Order Number(s): Indicate the specification number/order number relating to each sale and/or shipment.

6. Date of Export (if third country): Date of shipment from Trinidad and Tobago.

7. Date of Entry (if third country): Date the merchandise entered the third country or the date a book transfer took place.

8. Importer of Record (if third country): Name and address.

9. Customer: Name and address of the first party purchasing from the Trinidad and Tobago producer/exporter.

10. Customer Affiliation: Indicate whether the customer is affiliated or unaffiliated.

11. Final Destination: Name and address of the end-user for consumption in the United States.

12. Other: The identity of any party(ies) in the transaction chain between the customer and the final destination/end-user.

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–307–814]

Suspension of Countervailing Duty Investigation: Steel Wire Rod From Venezuela

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) has suspended the countervailing duty investigation involving steel wire rod from Venezuela. The basis for the suspension is an agreement between the Department and the Government of Venezuela (GOV) wherein the GOV has agreed not to provide any export subsidies or import substitution subsidies on the subject merchandise and has agreed to restrict the volume of direct or indirect exports to the United States of subject merchandise from all Venezuelan producers/exporters in order to eliminate completely the injurious effects of exports of this merchandise to the United States.

EFFECTIVE DATE: October 22, 1997.

FOR FURTHER INFORMATION CONTACT: Jean Kemp or Donna Kinsella, Office of Antidumping/Countervailing Duty Enforcement, Group III, Import Administration, U.S. Department of Commerce, Room 1874, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482–2104.

SUPPLEMENTARY INFORMATION:

Background

On March 24, 1997, the Department initiated a countervailing duty investigation under section 702 of the Tariff Act of 1930, (the Act), as amended, to determine whether manufacturers, producers, or exporters of steel wire rod from Venezuela receive subsidies (62 FR 13866). On April 30, 1997, the United States International Trade Commission (ITC) notified the Department of its affirmative preliminary injury determination. On May 2, 1997, we postponed the preliminary determination until no later than July 28, 1997 (62 FR 25172, May 8, 1997).

On July 28, 1997, the Department preliminarily determined that countervailable subsidies are being provided to CVG-Siderurgica del Orinoco (62 FR 41927, August 4, 1997). From August 27 through September 8, 1997, the Department verified the questionnaire responses of the GOV and SIDOR in Venezuela.

The Department and the GOV initialed a proposed agreement suspending this investigation on September 12, 1997. Interested parties were informed that the Department intended to finalize the agreement on October 14, 1997, and were invited to provide written comments on the agreement. Comments were timely filed by the GOV on October 3, 1997.

The Department and the GOV signed the final suspension agreement on October 14, 1997.

Scope of Suspension Agreement

The products covered by this suspension of investigation are set forth in section II of the Appendix to this notice.

Suspension of Investigation

The Department consulted with the parties to the proceeding and has considered the comments submitted with respect to the proposed suspension agreement. (*See* October 14, 1997, Memorandum to the File Re: Analysis of Comments Submitted by Interested Parties, which is a public document on file in the Central Records Unit in room B–099 of the main Commerce building.) In accordance with section 704(c) of the Act, we have determined that extraordinary circumstances are present

in this case, as defined by section 704(c)(4) of the Act. (*See* October 14, 1997, Extraordinary Circumstances Memorandum to Robert S. LaRussa, which is a public document on file in the Central Records Unit in room B–099 of the main Commerce building.)

The suspension agreement provides that: (1) The GOV will restrict the volume of direct or indirect exports to the United States of subject merchandise from all Venezuelan producers/exporters; and (2) the GOV will not provide any export subsidies or import substitution subsidies on the subject merchandise.

We have also determined that the suspension agreement can be monitored effectively and is in the public interest, pursuant to section 704(d) of the Act. (*See* October 14, 1997, Public Interest Memorandum to Robert S. LaRussa, which is a public document on file in the Central Records Unit in room B–099 of the main Commerce building.) We find, therefore, that the criteria for suspension of the investigation pursuant to section 704(c) of the Act have been met. The terms and conditions of the suspension agreement, signed October 14, 1997, are set forth in the Appendix to this notice.

The suspension of liquidation ordered in the final affirmative determination in this case shall continue in effect, subject to section 704(h)(3) of the Act. Section 704(f)(2)(B) of the Act provides that the Department may adjust the security required to reflect the effect of the Agreement. Pursuant to this provision, the Department has found that the Agreement eliminates completely the injurious effects of imports and, thus, the Department is adjusting the security required from producers and/or exporters to zero.

On October 14, 1997, we received a request from petitioners requesting that we continue the investigation. Pursuant to this request, we are continuing the investigation in accordance with section 704(g) of the Act. We will notify the International Trade Commission (ITC) of our determination. If the ITC's injury determination is negative, the agreement will have no force or effect, and the investigation will be terminated (*see* section 704(f)(3)(A) of the Act). If the ITC's determination is affirmative, the Department will not issue a countervailing duty order as long as the suspension agreement remains in force (*see* section 704(f)(3)(B) of the Act).

This notice is published pursuant to section 704(f)(1)(A) of the Act.

Dated: October 14, 1997.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

Agreement Suspending the Countervailing Duty Investigation on Steel Wire Rod From Venezuela

For the purpose of encouraging free and fair trade in steel wire rod, establishing more normal market relations, and eliminating injury to the domestic industry, the United States Department of Commerce (''the Department'') and the Government of Venezuela enter into this suspension agreement (''the Agreement'').

Pursuant to this Agreement, the Government of Venezuela agrees not to provide any export subsidies on the subject merchandise. The Government of Venezuela also will restrict the volume of direct or indirect exports to the United States of subject merchandise from all Venezuela producers/exporters, subject to the terms and provisions set forth below.

On the basis of this Agreement, pursuant to the provisions of Sections 704 (b) and (c) of the Tariff Act of 1930, as amended (the ''Act'') (19 U.S.C. 1671c (b) and (c)), the Department shall suspend its countervailing duty investigation with respect to steel wire rod produced in Venezuela, subject to the terms and provisions set forth below.

I. Definitions

For purposes of this Agreement, the following definitions apply:

A. ''Date of Export'' for imports of subject merchandise into the United States shall be considered the date the Export License was issued.

B. ''Party to the Proceeding'' means any interested party, within the meaning of Section 355.2(l) of the Department's Regulations, which actively participates through written submissions of factual information or written argument.

C. ''Indirect Exports'' means arrangements as defined in Section IV.E of this Agreement and exports from Venezuela through one or more third countries, whether or not such exports are further processed whether or not such exports are sold in one or more third countries prior to importation into the United States and whether or not the Venezuela producer knew the product was destined to enter the United States.

D. For purposes of this Agreement, ''United States'' shall comprise the customs territory of the United States of America (the 50 States, the District of Columbia and Puerto Rico) and foreign trade zones located in the territory of the United States of America.

E. ''Export License'' is the document which serves as both an export license and a certificate of origin. An Export License must accompany all shipments of subject merchandise from Venezuela to the United States, and must contain all of the information enumerated in the Appendix (U.S. sales), except Date of Entry information and Final Destination.

F. ''Relevant Period'' for the export limit of this Agreement means the period October 1 through September 30.

''For Consumption'' means all subject merchandise sold to customers, such as, trading companies, distributors, resellers, end-users, or service centers.

''End-User'' means an entity, such as a steel service center, reseller, trading company, end-user, etc., which consumes the subject merchandise as defined in I (G).

II. Product Coverage

The products covered by this Agreement (''subject merchandise'') are certain hot-rolled carbon steel and alloy steel products, in coils, of approximately round cross section, between 5.00 mm (0.20 inch) and 19.0 mm (0.75 inch), inclusive, in solid cross-sectional diameter. Specifically excluded are steel products possessing the above noted physical characteristics and meeting the Harmonized Tariff Schedule of the United States (HTSUS) definitions for (a) stainless steel; (b) tool steel; (c) high nickel steel; (d) ball bearing steel; (e) free machining steel that contains by weight 0.03 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.4 percent of phosphorus, more than 0.05 percent of selenium, and/or more than 0.01 percent of tellurium; or (f) concrete reinforcing bars and rods.

The following products are also excluded from the scope of this Agreement:

Coiled products 5.50 mm or less in true diameter with an average partial decarburization per coil of no more than 70 microns in depth, no inclusions greater than 20 microns, containing by weight the following: carbon greater than or equal to 0.68 percent; aluminum less than or equal to 0.005 percent; phosphorous plus sulfur less than or equal to 0.040 percent; maximum combined copper, nickel and chromium content of 0.13 percent; and nitrogen less than or equal to 0.006 percent. This product is commonly referred to as ''Tire Cord Wire Rod.''

Coiled products 7.9 to 18 mm in diameter, with a partial decarburization

of 75 microns or less in depth and seams no more than 75 microns in depth; containing 0.48 to 0.73 percent carbon by weight. This product is commonly referred to as ''Valve Spring Quality Wire Rod.''

The products subject to this Agreement are currently classifiable under subheadings 7213.91.3000, 7213.91.4500, 7213.91.6000, 7213.99.0030, 7213.99.0090, 7227.20.0000, and 7227.90.6050 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this Agreement is dispositive.

III. Non-Provision of Export Subsidies

A. The Government of Venezuela certifies that all exports of the subject merchandise to the United States made on or after the effective date of this Agreement are not and will not be eligible for any export or import substitution subsidies.

B. The Government of Venezuela recognizes that the provision of export or import substitution subsidies on the production or shipment of the subject merchandise exported directly or indirectly from Venezuela to the United States may result in termination of this Agreement and resumption of the investigation pursuant to the provisions of section 704(i) of the Act. Export and import substitution subsidies include those subsidies that have been determined to be export or import substitution subsidies in the preliminary determination in the countervailing duty investigation underlying this agreement (unless the investigation is continued and a contrary decision is reached in the final determination), in any final U.S. countervailing duty investigation of a Venezuela product, or in any final review of a Venezuela product under section 751 of the Act, and include subsidies which may apply to other products or exports to other destinations to the extent that such subsidies cannot be segregated as applying solely to such other products or exports.

C. The Government of Venezuela shall notify the Department in writing of any new benefit which is, or which Venezuela has reason to know would be, an export or import substitution subsidy on shipments of the subject merchandise exported, directly or indirectly, from Venezuela to the United States, including subsidies which may apply to both the subject merchandise and other products or exports to other destinations, to the extent such benefits cannot be segregated as applying solely to such other products or exports.

IV. Export Limit

A. The export limit for subject merchandise in each Relevant Period shall be 60,000 short tons. The export limit for each Relevant Period shall be allocated in semi-annual quota allocation periods (October–March, April–September). No more than 60% of the export limit for any Relevant Period can be allocated in any given semi-annual quota allocation period. Deductions from the export limit shall be made based on the ''Date of Export,'' as defined in Section I.

B. On or after the effective date of this Agreement, the Government of Venezuela will restrict the volume of direct or indirect exports of subject merchandise to the United States, and the transfer or withdrawal from inventory of subject merchandise (consistent with the provisions of Section IV.D), in accordance with the export limit then in effect.

C. An export shipment to the United States may not be made for more than the entire amount of quota allocated for that semi-annual quota allocation period. Any amount exported to the United States during a semi-annual quota allocation period shall not, however, when cumulated with all prior exports to the United States within the same Relevant Period, exceed the annual quota for that Relevant Period.

D. Any inventories of subject merchandise produced by a Venezuela entity, currently held in the United States by a Venezuela entity, and imported into the United States between May 6, 1997 and the effective date of this Agreement will be subject to the following conditions:

1. Such inventories will not be transferred or withdrawn from inventory for consumption in the United States without an Export License issued by the Government of Venezuela. Any such transfers or withdrawals from inventory shall be deducted from the export limit in effect at the time the Export License is issued.

2. A request for an Export License under this provision shall be accompanied by a report specifying the original date of export, the date of entry into the United States, the identity of the original exporter and importer, the customer, a complete description of the product (including lot numbers and other available identifying documentation), and the quantity expressed in pounds.

3. In the event that there is a surge of sales of subject merchandise from such inventory, the Department will decrease the export limit to take into account such sales.

E. Any arrangement involving the exchange, sale, or delivery of steel wire rod products, as described in Section II, from Venezuela, to the degree it results in the sale or delivery in the United States of steel wire rod products, as described in Section II, from a country other than Venezuela, is subject to the requirements of Section V and will be counted toward the available quota. Any such transaction that does not comply with the requirements of Section V will be deducted from the available quota pursuant to Section VII.

F. Where subject merchandise is imported into the United States and is subsequently re-exported, or re-packaged and re-exported, the available quota shall be increased by the amount of pounds re-exported. Such increase will be applicable to the Relevant Period corresponding to the time of such re-export. Such increase will be applied only after the Department receives, and has the opportunity to verify, evidence demonstrating original importation, any re-packaging, and subsequent exportation. The re-exported material must be identical to the imported material.

G. Export Licenses for a given Relevant Period may not be issued after September 30, except that Export Licenses not so issued may be issued during the first three months of the following Relevant Period, up to a maximum of 15 percent of the export limit for that following Relevant Period. Such ''carried-over'' quota shall be counted against the export limit applicable to the previous Relevant Period.

Export Licenses for up to 15 percent of the export limit for a subsequent Relevant Period may be issued as early as August 1 of the preceding Relevant Period. Such ''carried-back'' quota shall be counted against the export limit applicable to the following Relevant Period.

H. For the first 90 days after the effective date of this Agreement, subject merchandise shall be admitted into the United States with an ''Export License/ Certificate of Origin (Temporary Papers).''

The volume of any such imports will be deducted from the export limit applicable to the first Relevant Period. A full reporting of any such imports, which must correspond to the United States sales information detailed in the Appendix, must be submitted to the Department no later than 30 days after the conclusion of the 90 day period. This data must be sorted on the basis of date of export.

V. Export License

A. The Government of Venezuela will restrict the volume of direct or indirect exports of subject merchandise to the United States by means of semi-annual quota allocations and Export Licenses. Export Licenses shall be issued by the Government of Venezuela for all direct or indirect exports of subject merchandise to the United States in accordance with the export limit in Section IV.

B. Thirty days following the semi-annual allocation of quota rights for any Relevant Period, the Government of Venezuela shall provide to the Department a report identifying each quota recipient and the volume of quota which each recipient has been accorded (''report of quota allocation results'').

C. Before it issues an Export License, the Government of Venezuela will ensure that neither the annual quota for the Relevant Period nor the semi-annual quota allocation is exceeded.

D. The Government of Venezuela shall take action, including the imposition of penalties, as may be necessary to make effective the obligations resulting from the export limit and Export Licenses. The Government of Venezuela will inform the Department of any violations concerning the export limit and/or Export Licenses which come to its attention and the action taken with respect thereto.

The Department will inform the Government of Venezuela of violations concerning the export limit and/or Export Licenses which come to its attention and the action taken with respect thereto.

E. Export Licenses will be issued sequentially, will be endorsed against the export limit for the Relevant Periods, and will reference the report of quota allocation results for the appropriate Relevant Period.

F. Export Licenses must be issued no earlier than one month before the day, month, and year on which the merchandise is accepted by a transportation company, as indicated in the bill-of-lading or a comparable transportation document, for export. Export Licenses must contain an English language translation.

G. On or after the effective date of this Agreement, the United States shall require presentation of an Export License as a condition for entry of subject merchandise into the United States. The United States will prohibit the entry of any subject merchandise not accompanied by an Export License.

VI. Implementation

A. Export Subsidies

The Government of Venezuela shall certify to the Department, in accordance with the reporting schedule in Section VIII.C., whether it continues to be in compliance with the Agreement by providing that all exports of the subject merchandise to the United States are not and will not be eligible for any export subsidies, as provided in Section III.A. Failure to supply such information or certification in a timely fashion may result in the immediate resumption of the investigation or issuance of a countervailing duty order.

B. Export Limit

In order to effectively restrict the volume of exports of subject merchandise to the United States, the Government of Venezuela agrees to implement the following procedures:

1. Establish an Export License program for all exports of subject merchandise to, or destined directly or indirectly for consumption in, the United States, no later than 90 days after the effective date of this Agreement.

2. Ensure compliance by any official Venezuela institution, chamber, or other entities authorized by the Government of Venezuela, all producers, exporters, brokers, and traders of the subject merchandise, and their affiliated parties, with all procedures established in order to effectuate this Agreement.

3. Collect information from all Venezuela producers, exporters, brokers, and traders of the subject merchandise, and their affiliated parties, on the sale of the subject merchandise, and report such information pursuant to Section VIII of this Agreement.

4. Prohibit, by resolution, decree, legislation or equivalent Government action, direct and indirect exports to the United States of subject merchandise except with an Export License issued pursuant to Section V.A. and impose strict sanctions, such as penalties or prohibition from participation in the export limit allowed by the Agreement, in the event that any Venezuela or Venezuela-affiliated party does not comply in full with all the terms of the Agreement.

VII. Anticircumvention

A. The Government of Venezuela will take all appropriate measures under Venezuela law to prevent circumvention of this Agreement. It shall promptly conduct an inquiry into any and all allegations of circumvention, including allegations raised by the Department, and shall complete such inquiries in a timely manner (normally within 45 days). The Government of Venezuela shall notify the Department of the results of its inquiries within ten days of the conclusion of such inquiries. Within 15 days of a request from the Department, the Government of Venezuela shall share with the Department all facts known to the Government of Venezuela regarding its inquiries, its analysis of such facts and the results of such inquiries. The Government of Venezuela will require all Venezuela exporters of steel wire rod products, as described in Section II, to include a provision in their contracts for sales to countries other than the United States that the steel wire rod sold through such contracts cannot be re-exported, transhipped or swapped to the United States, or otherwise used to circumvent the export limit of this Agreement. The Government of Venezuela will also establish appropriate mechanisms to enforce this requirement.

B. If, in an inquiry pursuant to paragraph A, the Government of Venezuela determines that a Venezuela company has participated in a transaction that resulted in circumvention of the export limit of this Agreement, then the Government of Venezuela shall impose penalties on such company including, but not limited to, denial of access to the steel wire rod quota. Additionally, the Government of Venezuela shall deduct an amount of steel wire rod equivalent to the amount involved in such circumvention from the available quota and shall immediately notify the Department of the amount deducted. If sufficient quota is not available in the current Relevant Period, then the remaining amount necessary shall be deducted from the subsequent Relevant Period.

C. If the Government of Venezuela determines that a company from a third country has circumvented the Agreement and the signatories agree that no Venezuela entity participated in or had knowledge of such activities, then the signatories shall hold consultations for the purpose of sharing evidence regarding such circumvention and reaching mutual agreement on the appropriate steps to be taken to eliminate such circumvention, such as the Government of Venezuela prohibiting sales of Venezuela steel wire rod to the company responsible or reducing steel wire rod exports to the country in question. If the signatories are unable to reach mutual agreement within 45 days, then the Department may take appropriate action, such as deducting the amount of steel wire rod involved in such circumvention from

the available quota, taking into account all relevant factors. Before taking such action, the Department will notify the Government of Venezuela of the facts and reasons constituting the basis for the Department's intended action and will afford the Government of Venezuela ten days in which to comment.

D. If the Department determines that a Venezuela entity participated in circumvention, the signatories shall hold consultations for the purpose of sharing evidence regarding such circumvention and reaching mutual agreement on an appropriate resolution of the problem. If the signatories are unable to reach mutual agreement within 45 days, the Department may take appropriate action, such as deducting the amount of steel wire rod involved in such circumvention from the available quota or instructing the U.S. Customs Service to deny entry to any subject merchandise sold by the entity found to be circumventing the Agreement. Before taking such action, the Department will notify the Government of Venezuela of the facts and reasons constituting the basis for the Department's intended action and will afford the Government of Venezuela ten days in which to comment.

E. The Department shall direct the U.S. Customs Service to require all importers of steel wire rod, as described in Section II, into the United States, regardless of stated country of origin, to submit at the time of entry a written statement certifying that the steel wire rod being imported was not obtained under any arrangement, swap, or other exchange which would result in the circumvention of the export limit established by this Agreement. Where the Department has reason to believe that such a certification has been made falsely, the Department will refer the matter to the U.S. Customs Service or the Department of Justice for further action.

F. Given the fungibility of the world steel wire rod market, the Department will take the following factors into account in distinguishing normal steel wire rod market arrangements, swaps, or other exchanges from arrangements which would result in the circumvention of the export limit established by this Agreement:

1. Existence of any verbal or written arrangements which would result in the circumvention of the export limit established by this Agreement;

2. Existence of any arrangement as defined in Section IV.E that was not reported to the Department pursuant to Section VIII.A;

3. Existence and function of any subsidiaries or affiliates of the parties involved;

4. Existence and function of any historical and/or traditional trading patterns among the parties involved;

5. Deviations (and reasons for deviation) from the above patterns, including physical conditions of relevant steel wire rod facilities;

6. Existence of any payments unaccounted for by previous or subsequent deliveries, or any payments to one party for merchandise delivered or swapped by another party;

7. Sequence and timing of the arrangements; and

8. Any other information relevant to the transaction or circumstances.

G. ''Swaps'' include, but are not limited to:

Ownership swaps—involve the exchange of ownership of any type of steel wire rod product(s) without physical transfer. These may include exchange of ownership of steel wire rod products in different countries, so that the parties obtain ownership of products located in different countries; or exchange of ownership of steel wire rod products produced in different countries, so that the parties obtain ownership of products of different national origin.

Flag swaps—involve the exchange of indicia of national origin of steel wire rod products without any exchange of ownership.

Displacement swaps—involve the sale or delivery of any type of steel wire rod product(s) from Venezuela to an intermediary country (or countries) which can be shown to have resulted in the ultimate delivery or sale into the United States of displaced steel wire rod products of any type, regardless of the sequence of the transaction.

H. The Department will enter its determinations regarding circumvention into the record of the Agreement.

VIII. Monitoring

The Government of Venezuela will provide to the Department such information as is necessary and appropriate to monitor the implementation of and compliance with the terms of this Agreement. The Department of Commerce shall provide semi-annual reports to the Government of Venezuela indicating the volume of imports of the subject merchandise to the United States, together with such additional information as is necessary and appropriate to monitor the implementation of this Agreement.

A. The Government of Venezuela shall immediately notify and provide copies to the Department of any resolution, decree, legislation or equivalent Government action governing any export or import substitution subsidy which is issued, altered or amended in any way as to be applicable or available to producers/exporters of the subject merchandise to the United States.

B. The Government of Venezuela shall notify the Department if any exporters of the subject merchandise transship the subject merchandise through third countries. The Government of Venezuela also shall notify the Department if any exporter applies for or receives, directly or indirectly, the benefits of any export or import substitution subsidy.

C. Beginning on the effective date of this Agreement, the Government of Venezuela shall collect and provide to the Department the information set forth, in the agreed format, in the Appendix. All such information will be provided to the Department by May 1 of each year for exports during the period from October 1 of the previous year through March 31. In addition, such information will be provided to the Department by November 1 for exports from April 1 through September 30, or within 90 days of a request made by the Department. Such information will be subject to the verification provision identified in Section VIII.G of this Agreement. The Government of Venezuela agrees to allow sales of subject merchandise only by those producers and through those brokers and trading companies which permit full reporting and verification of data. The Department may disregard any information submitted after the deadlines set forth in this Section or any information which it is unable to verify to its satisfaction.

Aggregate quantity and value of sales by HTS category to each third country will be provided to the Department by May 1 of each year for exports during the period from October 1 of the previous year through March 31. In addition, such quantity and value information will be provided to the Department by November 1 for exports from April 1 through September 30.

Transaction specific data for all third country sales will also be reported on the schedule provided above in the format provided in the Appendix. However, if the Department concludes that the transaction specific data is not necessary for a given period, it will notify the Government of Venezuela at least 90 days before the reporting deadline that transaction specific sales data need not be reported. If the Department determines that such data is relevant in connection with Section VII

and requests information on transactions for one or more third countries during a period for which the Department waived complete reporting, the Government of Venezuela will provide the data listed in the Appendix for those specific transactions within 90 days of the request.

D. Both governments recognize that the effective monitoring of this Agreement may require that Venezuela provide information additional to that which is identified above. Accordingly, the Department may establish additional reporting requirements, as appropriate, during the course of this Agreement.

E. The Department shall provide notice to the Government of Venezuela of any additional reporting requirements no later than 45 days prior to the period covered by such reporting requirements unless a shorter notice period is mutually agreed.

F. Other sources for monitoring. The Department will review publicly-available data as well as Customs Form 7501 entry summaries and other official import data from the Bureau of the Census, on a monthly basis, to determine whether there have been imports that are inconsistent with the provisions of this Agreement.

The Department will monitor Bureau of the Census IM–115 computerized records, which include the quantity and value of each entry. Because these records do not provide other specific entry information, such as the identity of the producer/exporter which may be responsible for such sales, the Department may request the U.S. Customs Service to provide such information. The Department may request other additional documentation from the U.S. Customs Service.

The Department may also request the U.S. Customs Service to direct ports of entry to forward a Countervailing Duty Report of Importations for entries of the subject merchandise during the period this Agreement is in effect.

G. Verification. The Government of Venezuela will permit full verification of all information related to the administration of this Agreement, including verification of the Venezuela producer and any brokers/trading companies utilized in making sales/shipments to the United States, on an annual basis or more frequently, as the Department deems necessary to ensure that Venezuela is in full compliance with the terms of the Agreement. Such verifications may take place in association with scheduled consultations whenever possible.

IX. Disclosure and Comment

A. The Department shall make available to representatives of each party to the proceeding, under appropriately-drawn administrative protective orders consistent with the Department's Regulations, business proprietary information submitted to the Department semi-annually or upon request, and in any administrative review of this Agreement.

B. Not later than 30 days after the date of disclosure under Section VIII.A, the parties to the proceeding may submit written comments to the Department, not to exceed 30 pages.

C. During the anniversary month of this Agreement, each party to the proceeding may request a hearing on issues raised during the preceding Relevant Period. If such a hearing is requested, it will be conducted in accordance with Section 751 of the Act (19 U.S.C. 1675) and applicable regulations.

X. Consultations

The Government of Venezuela and the Department shall hold consultations regarding matters concerning the implementation, operation and/or enforcement of this Agreement. Such consultations will be held each year during the anniversary month of this Agreement. Additional consultations may be held at any other time upon request of either the Government of Venezuela or the Department.

XI. Violations of the Agreement

A. Violation

''Violation'' means noncompliance with the terms of this Agreement caused by an act or omission in accordance with Section 355.19 of the Department's Regulations.

The Government of Venezuela and the Department will inform the other party of any violations of the Agreement which come to their attention and the action taken with respect thereto.

Imports in excess of the export limit set out in this Agreement shall not be considered a violation of this Agreement or an indication the Agreement no longer meets the requirements of Section 704 (b) or (c) of the Act where such imports are minimal in volume, are the result of technical shipping circumstances, and are applied against the export limit of the following year.

Prior to making a determination of an alleged violation, the Department will engage in emergency consultations. Such consultations shall begin no later than 14 days from the day of request and shall provide for full review, but in no event will exceed 30 days. After consultations, the Department will provide the Government of Venezuela 20 days within which to provide comments. The Department will make a determination within 30 days.

B. Appropriate Action

If the Department determines that this Agreement is being or has been violated, the Department will take such action as it determines is appropriate under Section 704(i) of the Act and Section 355.19 of the Department's Regulations.

XII. Duration

Absent affirmative determinations under the five-year review provisions of sections 751 and 752 of the Act, the Department expects to terminate this Agreement and the underlying investigation no later than October 14, 2002.

The Government of Venezuela may terminate this Agreement at any time upon notice to the Department. Termination shall be effective 60 days after such notice is given to the Department. Upon termination at the request of the Government of Venezuela, the provisions of Section 704(i) of the Act shall apply.

XIII. Other Provisions

A. The Department finds that this Agreement is in the public interest; that effective monitoring of this Agreement by the United States is practicable; and that this Agreement will completely eliminate injury to the domestic industry producing the like product by imports of the merchandise subject to this Agreement.

B. The English language version of this Agreement shall be controlling.

C. For all purposes hereunder, the Department and the signatory Government shall be represented by, and all communications and notices shall be given and addressed to:

Department of Commerce, U.S. Department of Commerce, Assistant Secretary for Import Administration, International Trade Administration, Washington, D.C. 20230

Government of Venezuela, Ministerio de Industria y Comerio, Dirección General Sectorial de Comercio Exterior, Av. Libertador—Centro Comercial Los Cedros, Urbanización La Florida, Caracas, Venezuela

XIV. Effective Date

The effective date of this Agreement is the date of its publication in the **Federal Register**.

For Government of Venezuela.

Dated: October 14, 1997.

Alejandro J. Perera,

DCM & Charge D'Affairs of Venezuelan Embassy.

For U.S. Department of Commerce.

Dated: October 14, 1997.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

Appendix

In accordance with the established format, the Government of Venezuela shall collect and provide to the Department all information necessary to ensure compliance with this Agreement. This information will be provided to the Department on a semi-annual basis, or upon request.

The Government of Venezuela will collect and maintain sales data to the United States, in the home market, and to countries other than the United States, on a continuous basis and provide the prescribed information to the Department.

The Government of Venezuela will provide a narrative explanation to substantiate all data collected in accordance with the following formats.

Report of Inventories

Report, by location, the inventories held by Venezuela producers/exporters in the United States and imported into the United States between the period beginning May 6, 1997, through the effective date of the Agreement.

1. Quantity: Indicate original units of measure and in pounds.
2. Location: Identify where the inventory is currently being held. Provide the name and address for the location.
3. Titled Party: Name and address of party who legally has title to the merchandise.
4. Export License Number: Indicate the number(s) relating to each entry now being held in inventory.
5. Certificate of Origin Number(s): Indicate the number(s) relating to each sale or entry.
6. Date of Original Export: Date the Export License/certificate of origin is issued.
7. Date of Entry: Date the merchandise entered the United States or the date book transfer took place.
8. Original Importer: Name and address.
9. Original Exporter: Name and address.
10. Complete Description of Merchandise: Include heat numbers, HTS number, physical description, ASTM specification, and other available information.

United States Sales

The Government of Venezuela will provide all Export Licenses, which shall contain the following information with the exception of item #9, date of entry, and item #16, final destination.

1. Export License/Certificate of Origin Number(s): Indicate the number(s) relating to each sale and/or entry.
2. Complete Description of Merchandise: Include heat numbers, HTS number, physical description, ASTM specification, and other available information.
3. Quantity: Indicate in original units of measure and in pounds.
4. F.O.B. Sales Value: Indicate currency used.
5. Unit Price: Indicate currency used/per original unit of measure.
6. Date of Sale: The date all terms of order are confirmed.
7. Sales Order Number(s): Indicate the specification number/order number relating to each sale and/or shipment.
8. Date of Export: Date the Export License is issued.
9. Date of Entry: Date the merchandise entered the United States or the date book transfer took place.
10. Importer of Record: Name and address.
11. Trading Company/Broker: Name and address of any trading company involved in the sale.
12. Customer: Name and address of the first unaffiliated party purchasing from the Venezuela producer/exporter.
13. Customer Affiliation: Indicate whether the customer is affiliated or unaffiliated to the Venezuela exporter.
14. Quota Allocated to Exporter: Indicate the total amount of quota allocated to the individual exporter during the Relevant Period.
15. Quota Remaining: Indicate the remaining quota available to the individual exporter during the Relevant Period.
16. Final Destination: Name and address of the end-user for consumption in the United States.
17. Other: The identity of any party(ies) in the transaction chain between the customer and the final destination/end-user.

Mill Certification

The Government of Venezuela shall ensure that all shipments of subject merchandise exported to the United States pursuant to this Agreement shall be accompanied by a copy of the original mill certification.

Sales Other Than United States

Pursuant to Section VIII, paragraph C, the Government of Venezuela will provide country-specific sales volume and value information for all sales of steel wire rod products, as described in Section II, in the home market and to third countries.

1. Quantity: Indicate in original units of measure sold and/or entered and in metric tons.
2. F.O.B. Sales Value: Indicate currency used.
3. Date of Sale: The date all terms of order are confirmed.
4. Complete Description of Merchandise: Include heat numbers, HTS number, physical description, specification/grade under which sold, and other available information.
5. Sales Order Number(s): Indicate the specification number/order number relating to each sale and/or shipment.
6. Date of Export (if third country): Date of shipment from Venezuela.
7. Date of Entry (if third country): Date the merchandise entered the third country or the date a book transfer took place.
8. Importer of Record (if third country): Name and address.
9. Customer: Name and address of the first party purchasing from the Venezuela producer/exporter.
10. Customer Affiliation: Indicate whether the customer is affiliated or unaffiliated.
11. Final Destination: Name and address of the end-user for consumption.
12. Other: The identity of any party(ies) in the transaction chain between the customer and the final destination/end-user.

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–122–827]

Final Affirmative Countervailing Duty Determination: Steel Wire Rod From Canada

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: October 22, 1997.

FOR FURTHER INFORMATION CONTACT: Robert Bolling or Rick Johnson, Office of Antidumping/Countervailing Duty Enforcement, Group III, Office IX, Import Administration, U.S. Department of Commerce, Room 1874, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482–3434, or 482–0165, respectively.

Final Determination

The Department of Commerce (the ''Department'') determines that countervailable subsidies were provided to Sidbec-Dosco (Ispat) Inc., a producer and exporter of steel wire rod from Canada. For information on the estimated countervailing duty rates, please see the *Suspension of Liquidation* section of this notice.

Case History

Since our preliminary determination on July 28, 1997 (62 FR 41933–39, August 4, 1997) (''*Preliminary Determination*''), the following events have occurred:

Verification: In accordance with section 782(i) of the Act, we verified the information used in making our final determination. We followed standard verification procedures, including meeting with government and company officials, and examination of relevant accounting records and original source documents. Our verification results are outlined in detail in the public versions of the verification reports, which are on file in the Central Records Unit (Room B–099 of the Main Commerce Building).

We conducted verification in Canada of the questionnaire responses of the Government of Canada (''GOC''), the Government of Quebec (''GOQ''), the

Government of Ontario (''GOO''), Sidbec-Dosco (Ispat) Inc. (''SDI''), Sidbec (Sidbec was incorrectly referred to as ''Sidbec, Inc.'' in the preliminary determination), Ivaco, Inc. (Ivaco), Stelco, Inc. (Stelco), Bank of Canada, The Bank of Nova Scotia, and the Canadian Steel Trades and Employment Congress (CSTEC) from September 2 through September 11, 1997.

Argument: Petitioners and respondents filed case and rebuttal briefs on September 22 and September 25, 1997, respectively. A public hearing was held on September 29, 1997.

Scope of Investigation

The products covered by this investigation are certain hot-rolled carbon steel and alloy steel products, in coils, of approximately round cross section, between 5.00 mm (0.20 inch) and 19.0 mm (0.75 inch), inclusive, in solid cross-sectional diameter. Specifically excluded are steel products possessing the above-noted physical characteristics and meeting the Harmonized Tariff Schedule of the United States (HTSUS) definitions for (a) stainless steel; (b) tool steel; (c) high nickel steel; (d) ball bearing steel; (e) free machining steel that contains by weight 0.03 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.4 percent of phosphorus, more than 0.05 percent of selenium, and/or more than 0.01 percent of tellurium; or (f) concrete reinforcing bars and rods.

The following products are also excluded from the scope of this investigation:

Coiled products 5.50 mm or less in true diameter with an average partial decarburization per coil of no more than 70 microns in depth, no inclusions greater than 20 microns, containing by weight the following: carbon greater than or equal to 0.68 percent; aluminum less than or equal to 0.005 percent; phosphorous plus sulfur less than or equal to 0.040 percent; maximum combined copper, nickel and chromium content of 0.13 percent; and nitrogen less than or equal to 0.006 percent. These products are commonly referred to as ''Tire Cord Wire Rod.''

Coiled products 7.9 to 18 mm in diameter, with a partial decarburization of 75 microns or less in depth and seams no more than 75 microns in depth; containing 0.48 to 0.73 percent carbon by weight. These products are commonly referred to as ''Valve Spring Quality Wire Rod.''

The products under investigation are currently classifiable under subheadings 7213.91.3000, 7213.91.4500, 7213.91.6000, 7213.99.0030, 7213.99.0090, 7227.20.0000, and 7227.90.6050 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this investigation is dispositive.

The Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute are references to the provisions of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act effective January 1, 1995 (the ''Act'').

Injury Test

Because Canada is a ''Subsidies Agreement Country'' within the meaning of section 701(b) of the Act, the International Trade Commission (ITC) is required to determine whether imports of wire rod from Canada materially injure, or threaten material injury to, a U.S. industry. On April 30, 1997, the ITC published its preliminary determination finding that there is a reasonable indication that an industry in the United States is being materially injured or threatened with material injury by reason of imports from Canada of the subject merchandise (62 FR 23485).

Petitioners

The petition in this investigation was filed by Connecticut Steel Corp., Co-Steel Raritan, GS Industries, Inc., Keystone Steel & Wire Co., North Star Steel Texas, Inc. and Northwestern Steel and Wire (the ''petitioners''), six U.S. producers of wire rod.

Corporate History

Sidbec was established by the GOQ in 1964. In 1968, Sidbec acquired Dominion Steel and Coal Corporation Limited, a steel producer, and later changed the name to Sidbec-Dosco, Inc. The GOQ owned 100 percent of Sidbec's stock, and Sidbec owned 100 percent of Sidbec-Dosco, Inc.'s stock, until privatization in 1994.

In 1976, Sidbec, British Steel Corporation (International), and Quebec Cartier Mining Company entered into a joint venture to mine and produce iron ore concentrates and iron oxide pellets. The company they formed was Sidbec-Normines Inc. (Sidbec-Normines), of which Sidbec owned 50.1%. These mining activities were shut down in 1984.

Before its privatization, Sidbec-Dosco, Inc. operated steel making facilities in Contrecoeur, Montreal and Longueuil, Quebec. Until 1987, all of the facilities at Longueuil and a good portion of the facilities in Contrecoeur were owned by Sidbec and leased to Sidbec-Dosco, Inc. In 1987, Sidbec reorganized in order to consolidate all steel-related assets under its wholly-owned subsidiary, Sidbec-Dosco, Inc. Sidbec itself became a holding company.

On August 17, 1994, Sidbec-Dosco, Inc. was sold to Beheer-en Beleggingsmaatschappij Brohenco B.V. (Brohenco), which is wholly-owned by Ispat-Mexicana, S.A. de C.V. (Ispat Mexicana). It became known as Sidbec-Dosco (Ispat) Inc.

Sidbec, the holding company, continues to be 100% owned by the GOQ.

Subsidies Valuation Information

Period of Investigation: The period for which we are measuring subsidies (the ''POI'') is calendar year 1996.

Allocation Period: In the past, the Department has relied upon information from the U.S. Internal Revenue Service on the industry-specific average useful life of assets, in determining the allocation period for nonrecurring subsidies. *See* General Issues Appendix (''GIA'') appended to *Final Countervailing Duty Determination; Certain Steel Products from Austria* (58 FR 37217, 37226; July 9, 1993). However, in *British Steel plc.* v. *United States*, 879 F. Supp. 1254 (CIT 1995) (*British Steel*), the U.S. Court of International Trade (the ''Court'') ruled against the allocation methodology. In accordance with the Court's remand order, the Department calculated a company-specific allocation period for nonrecurring subsidies based on the average useful life (''AUL'') of non-renewable physical assets. This remand determination was affirmed by the Court on June 4, 1996. *See British Steel plc.* v. *United States*, 929 F. Supp. 426, 439 (CIT 1996).

In this investigation, the Department has followed the Court's decision in *British Steel.* Therefore, for the purposes of this final determination, the Department has calculated a company-specific AUL.

Based on information provided by Sidbec and SDI regarding depreciable assets, the Department has determined the appropriate company-specific allocation period. Due to the proprietary nature of data from SDI, we are unable to provide the specific AUL for Sidbec/SDI for the public file. The calculation of this AUL is on the official file in the Central Records Unit, Room B–099 of the Department of Commerce (*see Memorandum to the File: Calculation of AUL Period,* dated October 14, 1997).

Because we have determined that Ivaco and Stelco did not receive any non-recurring subsidies during the POI,

we have not calculated an AUL for either company.

Equityworthiness: In analyzing whether a company is equityworthy, the Department considers whether that company could have attracted investment capital from a reasonable, private investor in the year of the government equity infusion based on information available at that time. In this regard, the Department has consistently stated that a key factor for a company in attracting investment capital is its ability to generate a reasonable return on investment within a reasonable period of time.

In making an equityworthiness determination, the Department examines the following factors, among others:

1. Current and past indicators of a firm's financial condition calculated from that firm's financial statements and accounts;
2. Future financial prospects of the firm including market studies, economic forecasts, and project or loan appraisals;
3. Rates of return on equity in the three years prior to the government equity infusion;
4. Equity investment in the firm by private investors; and
5. Prospects in the world for the product under consideration.

For a more detailed discussion of the Department's equityworthiness methodology, *see* GIA (58 FR at 37239 and 37244).

Petitioners alleged that Sidbec and Sidbec-Dosco, Inc. (SDI's predecessor) were unequityworthy for the period 1982 through 1992. Petitioners alleged that any equity infusions received during those years would have been inconsistent with the usual investment practices of private investors and therefore conferred a countervailable benefit within the meaning of section 771(5)(E)(i) of the Act. In the preliminary determination, we determined Sidbec to be unequityworthy from 1982 to 1992 (*see Preliminary Determination* at 62 FR 41933).

In this investigation, both the GOQ and SDI have submitted arguments regarding Sidbec's equityworthyness at the time of the 1988 debt-to-equity conversion, and whether the Department considered the appropriate company (Sidbec versus Sidbec-Dosco, Inc.) when it made its preliminary equityworthiness determination.

Throughout the period 1982 to 1985, Sidbec reported substantial losses. Although Sidbec reported a profit in 1986 and 1987, the profits were not of such a magnitude to offset the substantial losses suffered from 1982 through 1985. Additionally, return on equity was either negative or not meaningful (due to a negative equity balance) in every year from 1984 through 1987. Moreover, for the years 1984 through 1987 Sidbec had a negative debt-to-equity ratio, which indicated that the company's liabilities exceeded the company's assets. Therefore, based on an analysis of Sidbec's data, we have determined that Sidbec was unequityworthy at the time of the 1988 debt-to-equity conversion (*see* Comments 8–10 below). The Department has not rendered a final determination on other years in the AUL period, because for this final determination we find only one potentially countervailable equity event, the 1988 debt-to-equity conversion.

Equity Methodology: In measuring the benefit from a government equity infusion to an unequityworthy company, the Department compares the price paid by the government for the equity to a market benchmark, if such a benchmark exists, *i.e.*, the price of publicly traded shares of the company's stock or an infusion by a private investor at the time of the government's infusion (the latter may not always constitute a proper benchmark based on the specific circumstances in a particular case).

Where a market benchmark does not exist, the Department has determined in this investigation to continue to follow the methodology described in the GIA 58 FR 37239–44. Following this methodology, equity infusions made into an unequityworthy firm are treated as grants. Using the grant methodology for equity infusions into an unequityworthy company is based on the premise that an unequityworthiness finding by the Department is tantamount to saying that the company could not have attracted investment capital from a reasonable investor in the infusion year based on the available information.

Creditworthiness: When the Department examines whether a company is creditworthy, it is essentially attempting to determine if the company in question could obtain commercial financing at commonly available interest rates. If a company receives comparable long-term financing from commercial sources, that company will normally be considered creditworthy. In the absence of comparable commercial borrowings, the Department normally evaluates financial data for three years prior to each year at issue to determine whether or not a firm is creditworthy. The Department considers the following factors, among others:

1. Current and past indicators of a firm's financial health calculated from that firm's financial statements and accounts;
2. The firm's recent past and present ability to meet its costs and fixed financial obligations with its cash flow; and
3. Future financial prospects of the firm including market studies, economic forecasts, and project or loan appraisals.

For a more detailed discussion of the Department's creditworhiness criteria, *see, e.g., Final Affirmative Countervailing Duty Determinations: Certain Steel Products from France,* 58 FR 37304 (July 9, 1993) (''*Certain Steel Products from France''*), and Final Affirmative Countervailing Duty Determination: Certain Steel Products from the United Kingdom, 58 FR 37393 (July 9, 1993).

Petitioners alleged that Sidbec and Sidbec-Dosco, Inc. were uncreditworthy from 1977 through 1993. We first initiated an investigation of Sidbec-Dosco, Inc.'s creditworthiness for the years 1982 and 1984 through 1988. Then, on July 1, 1997, we initiated an investigation of Sidbec's creditworthiness for the period 1984 through 1993. In the preliminary determination, we determined Sidbec to be uncreditworthy from 1982 to 1992 (*see Preliminary Determination,* 62 FR at 41935).

In its case brief, SDI submitted arguments regarding Sidbec's creditworthiness from 1982 to 1992, and whether the Department considered the appropriate company (Sidbec versus Sidbec-Dosco, Inc.) when it made its preliminary creditworthiness determination (*see* Comment 14 below).

To determine the creditworthiness of Sidbec during the years 1983 (the year of the first countervailable subsidy in the AUL period) through 1992 (the year of the last alleged subsidy in the AUL period), we have evaluated certain liquidity and debt ratios, *i.e.,* quick, current, times interest earned, and debt-to-equity, on a consolidated basis. For the period 1980 through 1985, the company consistently incurred substantial losses. Despite the fact that Sidbec reported a profit from 1986 through 1990, the company was still thinly capitalized and had a high debt-to-equity ratio during this time. Additionally, the interest coverage ratio was negative for the years 1991 and 1992 and the liquidity ratios (*i.e.,* quick and current ratio) indicated that the company may have had difficulty in meeting its short-term obligations. Consequently, based on our analysis of Sidbec's data, we have determined that

Sidbec was uncreditworthy for the years 1983 through 1992.

Discount Rates: Respondents did not provide company-specific information relevant to the appropriate discount rates to be used in calculating the countervailable benefit for non-recurring grants and equity infusions in this investigation. For the preliminary determination, we used the long-term government bond rate in Canada published in the *International Monetary Fund (IMF) International Financial Statistics Yearbook* as the discount rate, plus a risk premium (because we had determined Sidbec to be uncreditworthy), for each year in which there was a non-recurring countervailable subsidy. For the final determination, because we now have verified long-term corporate rates for the AUL period (*i.e.,* loans or bonds) from the Bank of Canada, we have used these rates as the discount rate, plus a risk premium (because we have continued to determine Sidbec to be uncreditworthy), for each year in which there was a non-recurring countervailable subsidy, *i.e.,* 1983 through 1992.

Privatization/Restructuring Methodology: In the GIA, we applied a new methodology with respect to the treatment of subsidies received prior to the sale of a government-owned company. Under this methodology, we calculate the amount of prior subsidies that passed through to the purchaser.

In the specific context of a restructuring, as here, where Sidbec sold Sidbec-Dosco, Inc. to Ispat Mexicana's subsidiary Brohenco, we performed the calculation for restructuring as set forth in the GIA, 58 FR at 37269, to derive the amount of prior subsidies that passed through to SDI.

In the current investigation, we have analyzed the privatization of Sidbec-Dosco, Inc. in the year 1994. We have followed the methodology in the GIA, described above, to calculate the amount of prior subsidies that passed through to SDI.

Based upon our analysis of the petition, the responses to our questionnaires, and verification, we determine the following:

I. Programs Determined To Be Countervailable

A. 1988 Debt-to-Equity Conversion

Petitioners alleged that Sidbec-Dosco, Inc. received a debt-to-equity conversion from either the GOC or the GOQ in 1988 based on Sidbec-Dosco, Inc.''s 1988 Annual Report. SDI reported that a portion of Sidbec's debt (owed to the GOQ) was converted into Sidbec capital stock in 1988. According to SDI, the debt consisted of four loans provided to Sidbec by the GOQ during the period 1982–1985, plus accrued interest. SDI explained that, every two years, the GOQ extended the maturity date for these loans for another two years. According to the GOQ, it converted four of Sidbec's debt instruments into equity in Sidbec in 1988 in order to improve Sidbec-Dosco, Inc.''s economic profile, for the purpose of making it more attractive for privatization, partnership, or investment. In the GOQ Act which authorized this debt conversion, Sidbec was authorized to acquire, as it later did, an equivalent amount in shares of Sidbec-Dosco, Inc.

We have concluded that, consistent with our equity methodology, benefits to Sidbec occurred at the point when the debt instruments (*i.e.,* loans) were converted to capital stock given that, as discussed above, we have determined that Sidbec was unequityworthy in 1988. *See, e.g., Certain Steel Products from France,* 58 FR at 37306–7, 37312. We consider the conversion of debt to capital stock in 1988 to constitute an equity infusion inconsistent with the usual investment practice of private investors within the meaning of section 771(5)(E)(i) of the Act.

When receipt of benefits under a program is not contingent upon exportation, the Department must determine whether the program is specific to an enterprise or industry, or group of enterprises or industries. Under the specificity analysis, the Department examines both whether a government program is limited by law to a specific enterprise or industry, or group thereof (*i.e., de jure* specificity), and whether the government program is in fact limited to a specific enterprise or industry, or group thereof (*i.e., de facto* specificity) (*see* Section 771(5A)(D) of the Act). We determine the 1988 debt-to-equity conversion to be specific, because it was provided only to one enterprise, Sidbec, and was not part of a broader program.

For these reasons, we determine that the 1988 debt-to-equity conversion constitutes a countervailable subsidy within the meaning of section 771(5) of the Act.

Consistent with the equity methodology, we followed our standard declining balance grant methodology for allocating the benefits from the equity infusion represented by the debt-to-equity conversion. We then reduced the benefit stream by applying the privatization calculation described in the Restructuring section of the GIA (58 FR at 37269). We divided the benefit by SDI total sales. On this basis, we calculated an estimated net subsidy for this program of 0.92 percent *ad valorem* for SDI.

B. 1983–1992 Grants

Sidbec received grants from the GOQ from 1983 to 1992 to compensate for expenses it incurred to finance Sidbec-Normines and its discontinued operations. Certain of these grants were provided by the GOQ to Sidbec with regard to the payment of interest on six different loans, the first of which was taken out in 1983. The GOQ was the guarantor of these loans. These grants were made in each year from 1983 to 1992. In addition, other grants were provided by the GOQ to Sidbec with regard to the payment of the principal on the same six loans during each year from 1984 to 1992. In the preliminary determination, the Department noted that these payments appeared in Sidbec's Consolidated Contributed Surplus and treated them as equity infusions from the GOQ. However, at verification the Department discovered that these payments were not equity but grants. The receipt of these grants occurred as follows: (1) Sidbec paid the interest and principal, as it came due, on loans that were taken out to finance Sidbec-Normines and its discontinued mining operations; (2) Sidbec then issued statements to the GOQ for these amounts; and (3) the GOQ, after obtaining the necessary budgetary authority, issued checks to Sidbec to cover these expenses. According to the GOQ, to process a request for these funds, approval was needed from four agencies (*i.e.*, the Quebec Ministry of Industry and Commerce, the Treasury Board, the National Assembly and the Executive Counsel). Once the approval process was completed, the GOQ issued a decree providing funding to Sidbec. *See* July 3, 1997 GOQ response, Exhibit H. In some years, the GOQ-approved grants did not cover all of the principal and interest due and paid by Sidbec (because of differing fiscal years for Sidbec and the GOQ), and Sidbec's financial statements recorded ''grants receivable'', based on management's ''estimate'' that the GOQ would reimburse Sidbec; the financial statements also explained how it would be handled ''[i]f the Government was to decide to pay a smaller amount'' than recorded in the ''grants receivable'' account. Nevertheless, over time, the GOQ did provide grants to Sidbec covering, in full, all principal and interest payments due on the six loans.

We have determined that the GOQ funds provided to Sidbec to finance Sidbec-Normines and its discontinued

mining operations were in the form of grants (see Comment 6). Based on our analysis of the record and the comments received from interested parties (in Comments 3, 4, 5, and 7), we determine that these grants constitute countervailable subsidies within the meaning of section 771(5) of the Act and are non-recurring in nature. We also have determined that they are specific within the meaning of section 771(5A)(D) of the Act because they were provided only to one enterprise, Sidbec, and were not part of a broader program.

To calculate the countervailable subsidy, we followed our standard declining balance grant methodology, as discussed above. We reduced the benefit stream by applying the privatization calculation described in the Restructuring section of the GIA (58 FR at 37269).

We divided the benefit attributable to the POI by SDI total sales during the same period. On this basis, we determine the countervailable subsidy for this program to be 8.03 percent *ad valorem* for SDI.

II. Programs Determined To Be Not Countervailable

A. Canadian Steel Trade Employment Congress Skill Training Program

The GOC, through the Human Resources Development Canada (HRDC), and provincial regional governments provide financial support to private sector-led human resource projects through the Sectoral Partnerships Initiative (SPI). The GOC stated that SPI has been active in over eighty Canadian industrial sectors, including steel through the Canada Steel Trades and Employment Congress (CSTEC). CSTEC's activities are divided into two types of assistance: 1) worker adjustment assistance, for unemployed steel workers; and 2) skills training assistance, for currently employed workers.

With regard to the worker adjustment assistance, funds flowing from HRDC do not go to the companies, but rather to unemployed workers in the form of assistance for retraining costs or income support. We have determined that these funds are not countervailable because the companies are not relieved of any obligations.

As discussed below (*see* Comment 16), based on the record, we have determined that funds received by SDI, Stelco and Ivaco from CSTEC for training purposes did not provide countervailable benefits during the POI, because these SPI benefits, which constitute a domestic subsidy, were not specific to the Canadian steel industry.

B. 1987 Grant to Sidbec-Dosco, Inc.

Petitioners alleged that in 1987, Sidbec-Dosco, Inc. received a grant from the GOQ. SDI stated that the GOQ did not provide a contribution to Sidbec-Dosco, Inc. in 1987. At verification, we found no evidence that the GOQ provided a grant to Sidbec-Dosco, Inc. in 1987. In 1987, Sidbec underwent a reorganization in order to consolidate all steel-related assets under Sidbec-Dosco, Inc. The Department discovered that this transaction involved an intracompany reorganization, and that this arrangement was exclusively between Sidbec and Sidbec-Dosco, Inc. Therefore, we have determined that no countervailable benefits were conferred.

C. 1987 Debt-to-Equity Conversion

Petitioners alleged that, in 1987, Sidbec-Dosco, Inc. received an equity infusion from either the GOC or GOQ. Specifically, petitioners stated that Sidbec (which was wholly-owned by the GOQ) converted loans to Sidbec-Dosco, Inc. into Sidbec-Dosco, Inc. shares. Both the GOC and the GOQ stated that they did not participate in a debt-to-equity conversion involving either Sidbec or Sidbec-Dosco, Inc. in 1987. We found no evidence at verification that the GOQ provided an infusion of equity, either through a debt-to-equity conversion or otherwise, to Sidbec-Dosco, Inc. in 1987. Furthermore, as with the alleged 1987 grant, we found that the basis for petitioners' allegation in fact involved a transfer of assets associated with the intracompany reorganization. Therefore, we have determined that no countervailable benefits were conferred.

D. Contributed Surplus

On July 1, 1997, we initiated an investigation on petitioners' allegation that C$51.7 million in contributed surplus constituted a countervailable subsidy. SDI reported that this contributed surplus was related to a capital expenditure program for fixed assets, and all of the assistance was received prior to 1980, which is outside the AUL period being used for Sidbec in this investigation. Additionally, the GOQ stated that Sidbec received these funds (which originated from both from the GOQ and the GOC) prior to the AUL period. At verification, we reviewed documentation which indicated that Sidbec received this C$51.7 million contributed surplus prior to the AUL period. Therefore, based on record information, we have determined that these funds did not provide countervailable benefits during the POI.

E. Payments Against Accumulated Grants Receivable

On July 1, 1997, we initiated an investigation on petitioners' allegation that C$43.8 million in payments against accumulated grants receivable in 1988 constituted a countervailable subsidy. SDI reported that these grants receivable are included in the amounts of the 1983–1992 grants discussed above that went to the discontinued mining operations of Sidbec-Normines. At verification of the GOQ, we confirmed that all GOQ payments made to Sidbec between 1983 and 1993 are accounted for by the 1983–1992 grants discussed above (*see* Comment 11 below). Therefore, based on record information, we have determined that no additional countervailable benefits were provided.

F. 1982 Assistance to Sidbec-Dosco, Inc.

Petitioners alleged that in 1982, Sidbec-Dosco, Inc. received an infusion of emergency funds, either in the form of a grant or an equity infusion, from the GOQ. At verification, we gathered additional information on the alleged 1982 assistance to Sidbec-Dosco, Inc. Record evidence indicates that the GOQ did not provide any governmental assistance to either Sidbec or Sidbec-Dosco, Inc. in 1982 (*see, e.g.*, Government of Quebec Verification report).

G. 1980 and 1981 Grants

On July 25, 1997, petitioners' alleged that through a review of Sidbec's 1980 through 1982 financial statements indicated that the GOQ provided grants to Sidbec in 1980 and 1981. At verification, we gathered information on the alleged grants to Sidbec. Record evidence indicates that the GOQ did not provide any grants to Sidbec in 1980 or 1981 (*see, e.g.*, Government of Quebec Verification report).

III. Programs Determined To Be Not Used

A. Industrial Development of Quebec

The Industrial Development of Quebec (IDQ) is a law administered by the Societe de Developpement Industriel du Quebec (SDIQ), a GOQ agency that funds a wide range of industrial development projects in many industrial sectors. Under Article 2(a) of the IDQ, SDIQ provided funding to help companies utilize modern technologies in order to ''increase efficiency and exploit the natural resources of Quebec'' (*see* GOQ July 3, 1997 response at page 12). In 1982, the GOQ rescinded the applicable law authorizing SDIQ to provide these grants.

The Department verified that Ivaco received grants in 1984 and 1985 which had been authorized prior to the program's rescission in 1982. With respect to these grants, we analyzed the total amount of funding Ivaco received in each year, and we have determined that the benefits Ivaco received under this program for each year constituted a *de minimis* portion (*i.e.*, less than 0.5 percent) of total sales value, and therefore should be expensed in each year they were received. Therefore, because the grants provided under this program were expensed in the year of receipt, we have determined that no countervailable benefits were bestowed on Ivaco during the POI.

Interested Party Comments

Comment 1: Respondent SDI maintains that the Department's determination to treat Sidbec, Sidbec-Dosco, Inc., and Sidbec-Normines as one entity in the preliminary determination in part because they prepared consolidated financial statements is legally insufficient. First, SDI claims that, after cessation of Sidbec-Normines' operations in 1984, in accordance with GAAP, Sidbec-Normines' financial results were not consolidated with those of Sidbec or Sidbec-Dosco, Inc. Thus, concludes SDI, the Department's decision to treat Sidbec-Normines as being the same as Sidbec was based on an incorrect premise: for only two of the years in which the Department found subsidies were Sidbec-Normines' financial results consolidated with the other two companies.

SDI contends that the facts in *Certain Steel Products from France,* cited by the Department in the preliminary determination, ''are clearly and sharply distinguishable from those here.'' Specifically, SDI asserts that, in *Certain Steel Products from France,* the collapsed parties, Usinor and Sacilor, each produced the subject merchandise, each received subsidies whose benefits were still countervailable in the period of investigation, and merged together before the investigation was initiated. SDI also cites *Ferrosilicon from Venezuela,* 58 FR 27539, 27542 (May 10, 1993), in which the Department treated a parent corporation and its subsidiary as two distinct entities, as supporting the principle of ''choos(ing) substance over form'' in terms of addressing the treatment of distinct corporate entities. By relying only on GAAP, SDI maintains that the Department failed to examine whether Sidbec-Dosco, Inc. in fact benefitted from the subsidies at issue. SDI also argues that this approach conflicts with Department practice. Citing *Prestressed Concrete Wire from France,* 47 FR 47031, 47036 (Oct. 22, 1982), SDI states that the Department noted that: ''(i)t cannot be concluded solely from the consolidation of financial statements that the subsidiaries or the parent are not operating independently.''

Petitioners argue that respondents misread the preliminary determination by describing the Department's decision to treat Sidbec, Sidbec-Dosco, Inc., and Sidbec-Normines as a single entity as based on the fact that their financial statements are consolidated. According to petitioners, the Department collapsed the analysis of these three entities, not merely because of their financial statements, but also because of the close relationship of these entities as well as their common goal of creating a fully integrated steel company in Quebec.

Petitioners believe that the close relationship between Sidbec and Sidbec-Dosco, Inc. renders them indistinguishable for the purposes of weighing subsidy benefits. Petitioners argue that Sidbec was a crown corporation established to create an integrated steel facility in Quebec. Petitioners assert that, pursuant to that mission, it acquired Sidbec-Dosco, Inc. Petitioners also state that Sidbec founded Sidbec-Normines, in which it held a majority interest for the express purpose of supplying pelletized iron to Sidbec-Dosco, Inc. Petitioners claim that throughout the period of subsidies, Sidbec, Sidbec-Dosco, Inc. and Sidbec-Normines shared the same identity of interest: the production of steel from iron ore mined in Quebec. Petitioners conclude that the Department should not permit a result allowing Sidbec-Dosco to circumvent the countervailing duty law because the subsidies were formally bestowed on Sidbec.

Petitioners also have noted that in *Certain Steel from Germany,* the Department found that subsidies from the parent, DHS, passed through to its newly acquired subsidiary, Dillinger, even though the forgiven debt was incurred with respect to sales of another DHS subsidiary, Saarstahl. Thus, according to petitioners, attribution of subsidies from a parent to its subsidiaries may be entirely appropriate even in situations involving no production of subject merchandise.

Finally, petitioners have argued that, even if the Department chooses not to treat Sidbec, Sidbec-Dosco, Inc. and Sidbec-Normines as a single entity, it must allocate benefits to Sidbec, and through Sidbec to Sidbec-Dosco, Inc. Petitioners agree with SDI that, ''in determining whether a benefit is found for the subject merchandise, the Department normally must examine the recipient of the subsidy.'' Petitioners point to the 1997 Proposed Rules, which state as a general rule that the Department will normally attribute a subsidy received by a corporation to the products produced by that corporation and that if the corporation is a holding company, subsidies will normally be attributed to the consolidated sales of the holding company.

Department's Position: In the preliminary determination, the Department stated: ''Because Sidbec, Inc.'s financial statements were consolidated including both its mining and steel manufacturing activities, and because the alleged subsidies under investigation were granted through Sidbec, Inc., we are treating Sidbec, Inc., Sidbec-Dosco, Inc. and Sidbec-Normines as one entity for the purposes of determining benefits to the subject merchandise from alleged subsidies.'' *Preliminary Determination,* 62 FR at 41934. This statement needs clarification.

There are two ways in which the Department, in applying the countervailing duty law, treats the parent entity and its subsidiaries as one when determining who ultimately benefits from a subsidy. First, the Department ''generally allocate[s] subsidies received by parents over sales of their entire group of companies.'' *GIA,* 58 FR at 37262. One example of this practice is *Final Affirmative Countervailing Duty Determination; Certain Hot-rolled Lead and Bismuth Carbon Steel Products from France,* 58 FR 6221 (Jan. 27, 1993) (''*France Bismuth*''), where the ''Department allocated subsidies to all French subsidiaries of the parent company, a French holding company, which was the recipient of the subsidies.'' *GIA,* 58 FR at 37262. Second, the Department has found that a subsidy provided to one company can bestow a countervailable benefit on another company in the same corporate family. As we explained in *Final Affirmative Countervailing Duty Determination; Certain Pasta from Italy,* 61 FR 30288, 30290, 30308 (June 14, 1996) (''*Pasta from Italy*''), in certain situations, the Department will treat two (or more) affiliated companies as a single entity, so that a subsidy to either company is deemed a subsidy to the other company and allocated over the combined sales of the two companies. Thus, in *Pasta from Italy,* the Department treated two affiliated companies as a single entity because they were sufficiently related to each other, *i.e.*, one company owned 20 percent or more of the other company, and both companies produced the

subject merchandise. The Department also treated two affiliated companies related by 20 percent or more ownership as a single entity where one company, a service company, did not produce the subject merchandise but nevertheless was ''deeply involved in the operations of'' the other company, which did produce the subject merchandise. *Id.* at 30290. *See also GIA*, 58 FR at 37262 (discussing *Armco, Inc.* v. *United States*, 733 F. Supp. 1514 (CIT, 1990), where the court ''endorsed countervailing the parent company for subsidies received by the subsidiary because both were part of the same business enterprise, and the parent exercised control over its subsidiary'').

In this investigation, from the beginning of the AUL period until 1984, when Sidbec-Normines' mining operations were shut down, Sidbec was the parent of both Sidbec-Dosco, Inc. and Sidbec-Normines, owning 100 percent of Sidbec-Dosco, Inc. and 50.1 percent of Sidbec-Normines, as well as 100 percent ownership of two other relatively less significant companies—Sidbec-Feruni, Inc. (steel scrap) and Sidbec International Inc. (sales of iron ore). In addition, Sidbec's financial statements included both Sidbec-Dosco, Inc. and Sidbec-Normines among the consolidated companies. Consistent with our past practice, therefore, we have treated any untied subsidy received by the parent, Sidbec, during this period as benefitting all of the companies in the Sidbec group, including Sidbec-Dosco, Inc. and Sidbec-Normines. We note that we also would treat Sidbec and Sidbec-Dosco, Inc. as a single entity during this period (and, in fact, continuing until 1987, at which time the Sidbec group was reorganized and Sidbec became a holding company and Sidbec-Dosco, Inc. assumed responsibility for all steel wire rod production), with the result that any untied subsidies received by either Sidbec or Sidbec-Dosco, Inc. during this period would be allocated to the sales of both companies. In this regard, both Sidbec and Sidbec-Dosco, Inc. were producers of the subject merchandise, Sidbec owned 100 percent of Sidbec-Dosco, Inc. and their steel wire rod operations were intertwined. Nevertheless, we need not reach that issue, given that Sidbec was the only entity that received subsidies during the entire AUL period, and these subsidies already are attributable to all of the members of the Sidbec group, including Sidbec-Dosco, Inc., under our normal practice when dealing with subsidies to the head of a consolidated group, as exemplified by *France Bismuth*.

From 1984, when Sidbec-Normines' mining operations were shut down, until 1987, the relationship between Sidbec and Sidbec-Dosco, Inc. did not materially change. Consequently, our practice dictates that we attribute any untied subsidies received by Sidbec during this period to the Sidbec group, which continues to include Sidbec and Sidbec-Dosco, Inc., but no longer Sidbec-Normines, whose production had ceased.

In 1987, the Sidbec group was reorganized, Sidbec became a holding company, and Sidbec-Dosco, Inc. took over all steel wire rod production for the Sidbec group. From 1987 until the privatization of Sidbec-Dosco, Inc. in 1994, we still must attribute any untied subsidies received by Sidbec—now a holding company, like Usinor Sacilor in *France Bismuth*—to the Sidbec group, which included Sidbec-Dosco, Inc.

Finally, from the privatization of Sidbec-Dosco, Inc. in 1994 through the POI, our practice dictates that we treat all of the subsidies previously received by Sidbec during the AUL period and attributable to Sidbec-Dosco, Inc. as passing to SDI, subject to and in accordance with the Department's privatization and, if relevant, tying methodologies (*see* Comment 13). In this regard, at the time of privatization and, indeed, since 1987, when Sidbec transferred all of its steel wire rod assets to Sidbec-Dosco, Inc., all of the subsidies previously provided to Sidbec resided with Sidbec-Dosco, Inc., with the exception of the small portion of those subsidies allocable to Sidbec's steel scrap subsidiary.

With respect to respondents' comments, first we note that it is not material whether Sidbec-Normines' financial results were included in Sidbec's consolidated financial statements after the closing of Sidbec-Normines' mining operations in 1984. It is only material that Sidbec-Normines was part of the Sidbec group until its mining operations were shut down in 1984. The post-1984 grants provided to Sidbec related to the closure of Sidbec-Normines' mining operations and are attributable to the remaining production of the Sidbec group, which is the steel wire rod production of Sidbec (until 1987) and Sidbec-Dosco, Inc. Meanwhile, the pre-1984 grants provided to Sidbec, even if considered tied to Sidbec-Normines' iron ore production, similarly are attributable to the remaining production of the Sidbec group (*see* Comment 3).

We do not agree with respondents that *Ferrosilicon from Venezuela* is relevant to the Department's determination. There, the Department was addressing the issue of whether two companies, FESILVEN and CVG, should be treated as a single entity, so that a subsidy to either company would be deemed a subsidy to the other and allocated over the combined sales of the two companies, as in *Pasta from Italy*. The Department explained why it refused to treat the two companies as a single entity as follows: ''While CVG does have extensive control over FESILVEN, FESILVEN has other shareholders. Moreover, CVG is merely a holding company with ownership interest in other companies producing other products. Therefore, we do not see an identity of interests sufficient to warrant treating CVG and FESILVEN as a single company.'' 58 FR at 27542. In this case, the issue is what production benefits from the subsidy to Sidbec once Sidbec-Normines ceased production. As explained above, the Department is following the precedent, exemplified by *France Bismuth*, pursuant to which it is the Department's practice to allocate subsidies received by a parent over sales of its entire group of companies.

Respondent SDI's reliance on *Prestressed Concrete Wire from France* also is misplaced. There, the Department was addressing whether subsidies provided to an input supplier, Usinor, had been passed on to the producer of the finished product, CCG, which was a wholly owned subsidiary of Usinor. The Department held that the mere fact that CCG was consolidated on Usinor's financial statement was not enough to serve as a basis for concluding that the price charged by Usinor to CCG for the input was not at arm's length. Indeed, the Department ultimately held that the price was at arm's length after reviewing both Usinor's and CCG's dealings with unrelated companies. In contrast, the issue in this case is not whether the government has provided a subsidized input. Rather, the issue is whether subsidies provided to Sidbec should be atttributed to all of the Sidbec group's sales. Consequently, *Prestressed Concrete Wire from France* is not relevant here.

We also do not agree with respondent SDI's construction of the Department's final determination in *Certain Steel Products from France*. SDI misunderstands both the facts of that case and the Department's determination. There, contrary to respondent SDI's statements, Usinor and Sacilor were not producers of the subject merchandise; rather, each of them was a parent of a large group of consolidated companies, among which were producers of the subject merchandise and producers of other

products. During the middle of the AUL period, in 1986, Usinor and Sacilor were merged and Usinor Sacilor emerged as a parent, holding company for the companies that previously had been part of the Usinor group and the Sacilor group. In addressing the subsidies provided by the French government to Usinor and Sacilor and, after 1986, to Usinor Sacilor, the Department followed its precedent in *France Bismuth*, where the Department six months earlier had faced the same consolidated groups of companies, the same subsidies and the same POI. Thus, the Department attributed subsidies provided to Usinor and Sacilor prior to the creation of Usinor Sacilor in 1986 to their respective groups of companies, and these subsidies together with all subsidies bestowed after 1986 were attributed to the Usinor Sacilor group (exclusive of Usinor Sacilor's foreign producing subsidiaries because, as in *France Bismuth*, the Department had found the subsidies at issue to be tied to French production). Consequently, the Department's approach in the final determination here—to allocate untied subsidies received by Sidbec, the parent, over sales of its entire group of companies—is entirely consistent with *Certain Steel Products from France*.

Comment 2: Respondents GOQ and SDI contend that the Department's treatment of Sidbec-Normines as being at one with Sidbec and Sidbec-Dosco, Inc. is in error because Sidbec-Normines was a joint venture, distinct from both Sidbec and Sidbec-Dosco, Inc. According to respondent SDI, even though Sidbec-Normines was included in Sidbec's consolidated financial statements up until 1984 the results of Sidbec-Normines were treated separately from those of Sidbec-Dosco, Inc. or other Sidbec-related companies. Additionally, the GOQ notes (citing *Ferrosilicon From Venezuela*, 58 FR 27539, 27541 (May 10, 1993), which was sustained in *Aimcor v. United States*, 871 F. Supp. 447, 450 (CIT 1994)) that, where the Department has found the presence of other shareholders (as in the case of Sidbec-Normines), it has declined to treat related companies as a single entity.

Respondent SDI adds that the Department's determination to treat Sidbec, Sidbec-Dosco, Inc. and Sidbec-Normines as one entity in the preliminary determination in part because subsidies were granted to a parent corporation provides insufficient grounds for countervailing the product of a subsidiary. Citing *Aimcor v. United States*, 871 F. Supp. 447, 452 (CIT 1994), construing *Armco Inc. v. United States*, 733 F. Supp. 1514, 1516 (CIT 1990), SDI notes that the Court stated that the Department must ''examine simply more than the corporate structure in deciding whether a countervailable benefit has been bestowed.''

Petitioners argue that the existence of Sidbec-Normines as a joint venture does not alter the Department's approach, in applying the countervailing duty law, of treating the parent entity and its subsidiaries as one when determining who ultimately benefits from a subsidy. Petitioners cite to *Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom*, 58 FR 6237, 6240 (Jan. 27, 1993), as a case in which the Department noted that ''the subsidies provided to a company presumably are utilized to finance operations and investments in the entire company, including productive units that are subsequently sold or spun off into joint ventures.''

While petitioners acknowledge that there are decisions where the Department has treated parent and subsidiary corporations as distinct entities for purposes of subsidy analysis (*e.g., Ferrosilicon from Venezuela* and *Brass Sheet and Strip from France*), petitioners believe that there are more important precedents for this case. For example, petitioners assert that *Certain Steel Products from Belgium* holds that corporate formalities or maneuvering will not be permitted to subvert the purposes of the statute. Additionally, petitioners maintain that this approach was specifically endorsed by the court in *Armco, Inc.* v. *United States*, 733 F. Supp. 1514, 1524 (CIT 1990), which held that the Department ''must beware of permitting statutorily proscribed bounties that are avowedly of a countervailable nature to escape countervailing duties merely because of intra-corporate machinations.''

Department's Position: The parties' arguments address the propriety of the Department treating Sidbec, Sidbec-Dosco, Inc., and Sidbec-Normines as a single entity, as in the *Pasta from Italy* line of precedent. Moreover, the Department is following its past practice of attributing untied subsidies received by a parent company to all of the companies in the parent's consolidated group. *See* also response to Comment 5.

Comment 3: Addressing the 1983–1992 grants, respondent SDI argues that, in order for the Department to find a countervailable benefit within the meaning of the statute (section 701(a)(1) of the Act), two conditions must be met: (1) a countervailable subsidy has been bestowed, directly or indirectly; and (2) the countervailable subsidy has been bestowed upon the manufacture, production or export of subject merchandise. SDI claims that, in the instant case, the Department failed to make this examination, and instead assumed without inquiry that the manufacturer of the subject merchandise received a benefit from subsidies given to its parent. Further, SDI claims that the Department has made this examination in other cases, such as *Carbon Steel Structural Shapes from Luxembourg*, 47 FR 39364, 39365 (Sept. 7, 1982) and *Brass Sheet and Strip from France*, 52 FR 1218 (Jan. 12, 1987).

Petitioners argue that Sidbec and Sidbec-Dosco, Inc. were closely intertwined, and thus the Department was correct to consider subsidies provided to the parent as benefitting the subsidiary. Petitioners argue that Sidbec was not just a holding company, noting that, until 1987, Sidbec itself owned all of the steel making facilities at Longueuil, Quebec, and a significant portion of the facilities in Contrecoeur. Sidbec, in turn, leased these facilities to Sidbec-Dosco Inc., which operated them together with its own plants as a single unit. Petitioners claim that this is evidence that there was a closely aligned identity of interests which existed between Sidbec and its subsidiary. Therefore, according to petitioners, any payments to Sidbec must have benefitted those productive facilities, the only ones Sidbec owned.

Moreover, petitioners assert that, because Sidbec-Normines was formed to supply pelletized iron ore for Sidbec-Dosco's steelmaking facilities, and because the only use of pelletized iron ore is to make steel, the establishment of Sidbec-Normines was part of the overall mission to give Sidbec ''integrated production from mining through semi-fabricated product stages.''

Department's Position: We disagree with respondent SDI. We concluded in the preliminary determination that (1) a countervailable subsidy has been bestowed, directly or indirectly, and (2) the countervailable subsidy had been bestowed upon the manufacture, production or export of subject merchandise. We make the same conclusions here in the final determination, with the clarification made above in Comment 1 regarding the attribution of subsidies within the Sidbec group.

With respect to whether a countervailable subsidy had been bestowed, directly or indirectly, we have concluded that the 1983–92 grants were provided directly to Sidbec and that they were specific and non-recurring in nature.

With respect to whether the countervailable subsidy had been bestowed upon the manufacture, production, or export of subject merchandise, we have followed our past practice, as described in the GIA, and treated the 1983–92 grants, which were designed to offset Sidbec's losses relating to Sidbec-Normines and its discontinued mining operations, as benefitting the steel wire rod production of Sidbec and Sidbec-Dosco, Inc. and, ultimately, SDI.

Specifically, while the grants provided in 1983 and 1984 before Sidbec-Normines' mining operations were tied to Sidbec-Normines' iron ore production (*see* response to Comment 5), these subsidies became attributable to the remaining production of the Sidbec group once the shutdown of Sidbec-Normines' mining operations occurred. The Department explained this approach in the GIA as follows:

> The Department maintains its position that subsidies are not extinguished either in whole or in part when a company closes facilities. Rather, the subsidies continue to benefit the merchandise being produced by the company. The rationale underlying this position is that once inefficient facilities are closed, the company can dedicate its resources to production at its remaining facilities. Thus, subsidies do not diminish or disappear upon the closure of certain facilities but rather are spread throughout, and benefit, the remainder of the company's operations.

GIA, 58 FR at 37269. Thus, for example, in *Final Affirmative Countervailing Duty Determinations; Certain Steel Products from Spain,* 58 FR 37374 (July 9, 1993) (''*Certain Steel Products from Spain*''), the Department faced a situation where AHM had received subsidies benefitting both its hot-rolled steel and cold-rolled steel operations and subsequently closed down its hot-rolled steel operations. The Department allocated the portion of the subsidies previously attributed to the hot-rolled steel operations to AHM's cold-rolled steel subsidiary, SIDMED. *See GIA,* 58 FR at 37269; *Certain Steel Products from Spain,* 58 FR at 37374–5, 37379.

Meanwhile, the grants provided in the years subsequent to the shutdown of Sidbec-Normines' mining operations in 1984 plainly reflect payments to effect that shutdown and, therefore, benefit the remaining production of the Sidbec group. According to the GIA, which describes the Department's practice in this area:

> The closing of plants result[s] in the increased efficiency of the company as a whole. In turn, the increased efficiency makes the company more competitive. It necessarily follows that closure subsidies benefit a company's remaining production beyond the year of receipt. The basis for finding funds for government-directed plant closure countervailable is that these funds relieve the company of the costs it would have incurred in closing down the plant. Therefore, because the company has been relieved of a cost, the funds benefit the company as a whole, and the appropriate denominator for calculating the benefit of such funds would be total sales of all products.

GIA, 58 FR at 37270 (citing *British Steel Corp.* v. *United States,* 605 F. Supp. 286 (CIT 1985)). The Department applied this approach in *Final Affirmative Countervailing Duty Determinations; Certain Steel Products from Italy,* 58 FR 37327 (July 9, 1993) (''*Certain Steel Products from Italy*''), where the head of the Falck group received subsidies to close down certain steel facilities. *See GIA,* 58 FR at 37270.

Thus, consistent with its past practice, the Department finds that grants provided both before and after the closure of Sidbec-Normines' mining operations in 1984 benefit the Sidbec group's remaining production as of 1985 onward, including the production of the subject merchandise, steel wire rod.

Comment 4: SDI contends that the Department's reliance on certain language from the GIA, 58 FR at 37269, pertaining to spreading benefits throughout the remainder of the company's operations, is misplaced. Specifically, SDI argues that the GIA language applies to closed facilities within the same corporation. The GOQ adds that, in *British Steel Corp.* v. *United States,* 605 F. Supp. 286 (CIT 1985) (which the Department incorporated into its remarks involving plant closure in the GIA in order to indicate judicial support for the Department's position), unlike the situation with Sidbec, the discontinued facilities had produced the subject merchandise, not some other merchandise, and were part of the respondent company, not a distinct corporation.

SDI also asserts that the rationale expressed in the language quoted by the Department from the GIA also applies to subsidies ''previously received.'' With regard to funds received following closure of Sidbec-Normines, SDI concludes that the language is inapposite. Instead, SDI believes that the relevant language from the GIA would be that language dealing with payments for the actual closure of a facility within a company. And, in this respect, because the entire operation of Sidbec-Normines was shut down, there was no remaining enterprise to benefit from the restructuring. Moreover, there is nothing on the record to support a conclusion that the closure increased the competitiveness or efficiency of Sidbec-Dosco.

Department's Position: We disagree with respondent SDI that the GIA's rationale for countervailing subsidies received prior to a plant closure and the GIA's rationale for countervailing subsidies to effect the closing down of a plant apply only to situations where the closed plant was part of the same individual company as the remaining production which is deemed to be benefitted. Although the language to which respondent SDI cites in the GIA only references ''a company,'' the GIA's statements are equally applicable under the circumstances here, where the Department is dealing with a consolidated group of companies (the Sidbec group). Specifically, it is appropriate to allocate the subsidies at issue to the remaining production of the consolidated group in this case given that the closed plant (the Sidbec-Normines mining operations) had been operated by a subsidiary (Sidbec-Normines) whose only production of any type came from the closed plant, and the parent of the consolidated group (Sidbec) is the group's shareholder in the subsidiary and has financed and is obligated to pay the debts of the subsidiary. Plainly, the subsidies at issue allow Sidbec ''to dedicate its resources to production at its remaining facilities.'' *GIA,* 58 FR at 37269. As the Department explained in the GIA, ''subsidies do not diminish or disappear upon the closure of certain facilities.'' *Id.* Moreover, in the scenario here, it is plain that Sidbec, the parent, is being relieved of ''the costs it would have incurred in closing down the plant,'' *id.*, so that its remaining production (including steel wire rod) undeniably benefitted from the subsidies which it received.

We note, as well, that in one of the *Certain Steel Products* cases, the Department dealt with subsidy funds provided to a parent company for the closing of one of its subsidiaries' facilities. In that case, *Certain Steel Products from the United Kingdom,* the Department, on remand from the Court of International Trade, had to determine how to treat, *inter alia,* 1984/85 equity infusions provided to British Steel Corporation (''BSC'') for the purpose of paying for the closure of facilities which, as here, were dedicated to the production of non-subject merchandise. Indeed, the facilities were the very same facilities at issue in this case, the Sidbec-Normines mining operations, as BSC's subsidiary, British Steel Corporation (International) (''BSCI''),

held an ownership interest in Sidbec-Normines. The Department treated the equity infusions as benefitting the worldwide consolidated sales of the BSC (actually, its successor, British Steel plc) group, *see* Final Results of Redetermination Pursuant to Court Remand on General Issue of Sales Denominator, in *British Steel plc* v. *United States,* Consol. Ct. No. 93–09–00550–CVD (CIT), dated June 23, 1995, and the court upheld this treatment, *see British Steel plc* v. *United States,* 929 F. Supp. 426, 457–58 (CIT 1996).

Similarly, we disagree with respondent GOQ's argument that the rationales in the GIA are limited to the situation where the closed plant produced the subject merchandise. Indeed, the GIA addresses situations where the closed plant produced non-subject merchandise, both in the context of subsidies received prior to a plant closure (*Certain Steel Products from Spain*) and in the context of subsidies to effect the closing down of a plant (*Certain Steel Products from Italy*). *See GIA,* 58 FR at 37269, 37270.

Comment 5: Respondents GOQ and SDI assert that evidence on the record shows that the countervailed funds were all (with the exception of the 1988 debt-to-equity conversion) specifically tied to Sidbec's mining operations. SDI argues that the Department fully verified that Sidbec repaid loans provided to refinance part of the debt of Sidbec's mining operations using funds provided by the GOQ.

Respondents SDI, the GOQ, and the GOC contend that the Department has departed from past practice, precedent, its Proposed Rules, and the Agreement on Subsidies and Countervailing Measures of the World Trade Organization (SCM Agreement) by countervailing subsidies tied to the mining operations. First, SDI and the GOQ argue that it is the Department's longstanding practice (as reflected in both the 1989 Proposed Rules and the 1997 Proposed Rules) that, if the Department determines that a countervailable benefit is tied to a product other than the merchandise, it will not find a countervailable subsidy on the merchandise. SDI and the GOQ cite, *inter alia, Certain Iron-Metal Castings From India,* 62 FR 32297, 32302 (June 13, 1997), *Certain Laminated Hardwood Trailer Flooring from Canada,* 62 FR 5201, 5211 (Feb. 4, 1997), and *Pasta From Italy,* 61 FR 30288, 30303 (June 14, 1996), as examples of the Department's ''tied benefits'' practice. Thus, argues SDI and the GOQ, to find a countervailable subsidy to Sidbec-Dosco (through which Quebec's obligations to Sidbec-Normines, as a separately incorporated joint venture, could not possibly flow) from subsidies given by the GOQ for purposes related to Sidbec-Normines would be in contravention of the Department's past practice relating to tied subsidies. The GOQ and the GOC add that the SCM Agreement does not permit the attribution to output by one company of countervailable benefits directed to, and received by, a separate corporate entity engaged in the production of a completely different product. SDI further argues that this is true where the subsidy is channeled through a parent company acting ''merely as a conduit'' for subsidies to a subsidiary corporation.

SDI also maintains that, because the subsidies benefitted the mining operations (regardless of whether they were provided before or after closure of the mining facility) then they cannot be held to benefit the downstream product except through an upstream subsidy analysis.

Petitioners assert that both the intended use and the likely effect of these subsidies was to benefit Sidbec, not Sidbec-Normines. Petitioners point to *Industrial Nitrocellulose From France* as illustrating that the Department's inquiry attempts to determine the ultimate destination or likely beneficiary of the subsidy, in large part by considering the government's intent in bestowing the subsidy. Petitioners claim that, applying these principles, the GOQ's subsidies are clearly not tied to Sidbec-Normines. Petitioners note that the ultimate destination and likely beneficiary of these subsidies was Sidbec, since the nature of these benefits was to provide loan forgiveness to Sidbec. Furthermore, petitioners argue that if Sidbec did pay the loan principal directly to Sidbec-Normines, the ultimate beneficiary of such forgiveness was not Sidbec-Normines, which had received the loans and was shutting down its operations, but Sidbec, which would remain in existence and was otherwise liable for repayment of the loans.

Petitioners add that an analysis focusing on the intended use of the subsidies yields the same result: namely, that Sidbec was the intended user, since the GOQ's specific intent in bestowing the subsidy was to relieve Sidbec of its loan guarantee obligations.

Finally, petitioners stress that the Department's approach to tied subsidies, like its approach to the relationship of the various Sidbec corporate entities, must be reasonable. Petitioners cite *Industrial Nitrocellulose from France,* noting that the Department analyzed the legislative history of the tied subsidies provision and concluded that ''the single most important principle that both committees stressed here was that the Department should reasonably allocate subsidies to the products that they benefit * * * The main issue * * * is not whether we have considered the intent or the effect, but whether we have appropriately and reasonably allocated the benefits.''

Department's Position: We disagree with respondents. While Sidbec-Normines' mining operations were still in existence, it is true that the 1983 and 1984 grants would affect only iron ore. However, these grants could only be considered to be tied to iron ore up to 1984—the year Sidbec-Normines ceased production. Once the company no longer produced iron ore, the remaining benefits from these grants—we allocate grants over a period of time equal to a company's AUL—could only be attributed to the remaining production of the Sidbec group, which consists of steel products, including wire rod. Grants made to Sidbec after the closure of Sidbec-Normines' mining operations cannot be tied to non-existent production, *i.e.,* iron ore. Rather, the Department's practice, as described in the GIA, is to treat these ''closure subsidies {as} benefit{ting} a company's remaining production.'' *GIA,* 58 FR at 37270.

We also disagree with respondent SDI's argument that the 1983–92 grants cannot be attributed to Sidbec's steel wire rod production without an upstream subsidy analysis under section 701(e) of the Act, 19 U.S.C. § 1671(e). Given that Sidbec-Normines' mining operations were shut down in the 1984 during Sidbec's AUL period, the upstream subsidy provision is no longer germane. As the Department made clear in the GIA, closure payments for plants producing subject and non-subject merchandise alike are countervailable. *GIA,* 58 FR at 37270.

Comment 6: The GOQ argues that the financial assistance referred to by the Department as ''1982–92 Equity Infusions'' in fact were grants representing principal payments made by the GOQ on certain loans taken out by Sidbec in connection with its investment in Sidbec-Normines. According to the GOQ, this financial assistance was no different from the interest payments that the GOQ made on these same loans which the Department correctly treated as grants. Specifically, the GOQ argues that nothing was given in return for the funds, nor was anything expected or intended. The GOQ contends that, according to Departmental practice, all of the monies should be characterized as

grants. The GOQ further asserts that the Department verified that all the financial assistance given by the GOQ to Sidbec were grants.

SDI argues that the Department's conclusion that, because certain funds received by Sidbec were included in its financial statements under ''contributed surplus'' they were equity infusions, is not supported by precedent or accounting principles. SDI states that the funds referred to by the Department as ''1982–92 Equity Infusions'' were contributed for the express purpose of paying Sidbec obligations incurred in connection with its investment in Sidbec-Normines, and did not result in the receipt of shares by the investor.

Petitioners argue that the GOQ's payments of contributed surplus are equity infusions because they are additions to shareholder's equity and increase the value of total shareholders' equity in the company. Petitioners contend that the intent to increase the company's equity value is indeed significant. Petitioners argue that by infusing funds into Sidbec's equity account, the GOQ increased the likelihood that equity would reach positive levels, thus allowing the GOQ to recover previously granted funds.

Department's Position: We agree with the GOQ and SDI. The line item ''Contribution by the gouvernement de la province de Quebec for Discontinued Mining Operation'' appearing in Sidbec's Consolidated Contributed Surplus refers not to equity payments, but to grants, and these payments by the GOQ in fact took the form of grants (*see* GOQ Verification Exhibits G–14 through G–16).

The Department distinguishes grants from equity and debt by following its stated methodology as outlined in the GIA (*see* GIA, 58 FR at 37254). The Department defines grants as funds provided without expectation of a: (1) repayment of the grant amount; (2) payment of any kind stemming directly from the receipt of the grant (including interest or claims on profits of the firm (*i.e.,* dividends) with the exception of offsets as defined in the 1989 Proposed Regulations Section 355.46); or (3) claim on any funds in case of company liquidation.

At verification, the Department discovered that the GOQ funds provided to Sidbec related to principal payments due under loans that Sidbec had taken out, and which were guaranteed by Sidbec's shareholder, the GOQ (*see* Verification Exhibit G–8), relating to Sidbec-Normines and its discontinued mining operations. Although the GOQ as a guarantor had the right to seek reimbursement from Sidbec for the funds which it advanced, the Department has found that the GOQ provided these funds to Sidbec without a repayment obligation, and without compensation in the form of shares. In this regard, the Decrees authorizing the GOQ to provide these funds indicate that these funds were provided as direct subsidies to service the debt on loans taken out to finance Sidbec's mining obligations, and that the GOQ did not receive anything from Sidbec in return. Additionally, we confirmed at verification that the GOQ neither received new shares nor had its existing shares in Sidbec revalued as a result of its payments (*see, e.g.,* Decree 374–91, Exhibit 15 of the GOQ Verification Report). Thus, the Department concludes that these funds were provided to Sidbec in the form of grants, and that the investor did not expect a reasonable return on the investment (*i.e.,* the funds were a simple gift).

Comment 7: The GOQ argues that all of the money countervailed in the Department's preliminary determination originated from the GOQ's decision to enter a joint mining venture (*i.e.,* Sidbec-Normines) with Quebec Cartier Mining Company (QCMC) and the British Steel Corporation (International). The GOQ notes that it chose to assume the joint venture's obligations to private investors, and opted to fulfill these obligations by directing funds through Sidbec. The GOQ maintains that it financed these obligations to Sidbec-Normines through a series of loans, which it obligated itself to pay through guarantees, and that the loans (to which the GOQ was a party) were made through private banks. Furthermore, the GOQ and SDI argue that the GOQ assumed responsibility for repayment of these loans (*i.e.,* principal and interest).

On this basis, the GOQ argues that the grants provided to Sidbec for payment of the mining debts, *i.e.,* 1983–1992 grants, were recurring because they were automatically provided (as they were guaranteed) on a yearly (principal) or monthly (interest) basis. As recurring grants, the GOQ and GOC assert that it is the Department's practice to allocate (expense) a recurring grant to the year in which the subsidy is received. According to the GOQ, all funds at issue were provided in the form of recurring grants, and none of those funds was received in the POI. Thus, the GOQ concludes that none of the money provided to Sidbec should be allocated to the POI, and none of the infusions can be considered countervailable.

SDI asserts that the provision of funds pursuant to the mining operations was a commitment made by the GOQ to make full and prompt payment of all Sidbec obligations under the mining venture. Therefore, when the GOQ undertook the obligation, it made a commitment to pay, on a recurring basis, the principal and interest on loans incurred by Sidbec pursuant to its mining venture. SDI argues that these were not ''exceptional'' grants because the recipient (Sidbec) could expect to receive them each year.

SDI states that Sidbec's financial statements show the recurring nature of these payments. Additionally, SDI argues that the loan agreements pertaining to the countervailed monies had fixed and predetermined dates upon which the interest payments were due. Moreover, since the GOQ was a party to the loans, the government could anticipate when the interest was payable. Therefore, the funding Sidbec received to pay the accumulated interest was regular and predictable, establishing the recurring nature of these payments.

Petitioners argue that if the Department decides that the GOQ's coverage of Sidbec's payments of principal are not equity but grants, then the Department should follow its practice and determine these payments as nonrecurring (*see* GIA 58 FR at 37226). Petitioners argue that all government subsidies to Sidbec were non-recurring because they required government approval and authorization on each individual expenditure prior to the distribution of the funds.

Petitioners state that the approval process was extensive and exacting because each year, prior to issuing the grant, the GOQ had to seek budgetary authority. Additionally, the grant had to be approved at several stages of review, approval and regulation. Further, petitioners argue that the grant process was filled with inconsistencies concerning the use of discretion, since the GOQ sometimes failed to pay the full amount of interest incurred by Sidbec which lead to the entry of ''grants receivable'' in Sidbec's financial statements. Therefore, petitioners contend that this variability is inconsistent with the regularity and predictability necessary for a non-recurring grant. Petitioners also maintain that a consideration in deciding whether a program is recurring or non-recurring is ''whether there is reason to believe that the program will not continue into the future.'' In applying this criterion, according to petitioners, the Department in *Final Countervailing Duty Determination Certain Hot Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom,* 58 FR 6237, 6242 (January 27, 1993) (*U.K. Bismuth*), deemed equity

infusions to be non-recurring even though the equity capital was received every fiscal year for eight years. The Department stated in *U.K. Bismuth* that the recipient ''had reason to believe that the program would not continue once the company reached viability.'' Petitioners similarly contend that, in this case, Sidbec had reason to believe that the equity infusions would not continue indefinitely.

Lastly, petitioners assert that, although Sidbec made a profit in 1989, the GOQ continued to pay the company principal and interest costs, and did not seek to require Sidbec's repayment of these funds. According to petitioners, this indicates that these payments were discretionary, and therefore were non-recurring.

Department's Position: We disagree with respondents GOC, GOQ and SDI. The 1983–92 grants were non-recurring in nature.

The Department's policy with respect to grants is (1) to expense recurring grants in the year of receipt, and (2) to allocate non-recurring grants over the average useful life of assets in the industry, unless the sum of grants provided under a particular program is less than 0.50 percent of a firm's total or export sales (depending on whether the program is a domestic or export subsidy) in the year in which the grants were received (*see GIA*, 58 FR at 37226). We consider grants to be non-recurring when ''the benefits are exceptional, the recipient cannot expect to receive benefits on an ongoing basis from review period to review period, and/or the provision of funds by the government must be approved every year.'' *Id.* (quoting *France Bismuth*, 58 FR at 6722). If any of these questions are answered in the affirmative, the Departments considers the benefits to be non-recurring.*Id.* Examples of types of grants which the Department normally has considered non-recurring are: equity infusions, research and development grants, grants for loss coverage, grants for the purchase of fixed assets, debt forgiveness, and assumption of debt (including payments of principal and interest). *See id.* The grants at issue fall into this category, although that fact alone is not determinative of the recurring/non-recurring question.

The Department has stated that ''the element of 'government approval' relates to the issue of whether the program provides benefits automatically, essentially as an entitlement, or whether it requires a formal application and/or specific government approval prior to the provision of each yearly benefit. The approval of benefits under the latter type of program cannot be assumed and is not automatic'' (*see id.*) At verification, the Department discovered that for each year of grants issued to cover Sidbec-Normines debt, the GOQ had to engage in a multi-layered process seeking budgetary authority (in the form of Decrees) prior to issuance of the funds in the form of Decrees (*see* verification Exhibits G–13 through G–16). Therefore, the Department concludes that government approval was necessary prior to the receipt of each individual grant.

The Department also concludes that the record evidence does not indicate that Sidbec could expect to receive benefits on an ongoing basis. Although Sidbec may have had expected that payment from the GOQ would continue so long as Sidbec was unprofitable, given that the GOQ was the guarantor on the underlying loans, Sidbec could not expect that payments from the GOQ in the years when Sidbec was unprofitable would be outright grants rather than payments for which the GOQ would later exercise its right as guarantor to seek reimbursement from Sidbec, the guarantee. Moreover, Sidbec could not expect that the GOQ would make payments, whether or not outright grants, in years when Sidbec was profitable (even though the GOQ in fact did do so).

Other facts in the record also support this conclusion. For example, in its financial statements for certain years, Sidbec recorded ''grants receivable,'' based on management's ''estimate'' that the GOQ would reimburse Sidbec; however, the financial statements also explained how reimbursement would be handled ''[i]f the GOQ was to decide to pay a smaller amount'' than recorded in the ''grants receivable'' account (*see, e.g.*, Note 3 of Exhibit 14 of SDI's May 27, 1997 questionnaire response). Again, this indicates the uncertainty associated with the GOQ's payments.

Two similar cases include *U.K. Bismuth*, which petitioners have cited and discussed, and the *Certain Steel Products from Mexico* final determination addressed in the GIA. In *Certain Steel Products from Mexico*, the respondent had argued that the subsidies at issue—equity infusions—were recurring because they ''were regularly and routinely approved by the legislature'' and the ''infusions were provided for nine consecutive years.'' *GIA*, 58 FR at 37228. The petitioners, meanwhile, pointed out the requirement for ''specific government authorization'' and that the ''infusions were made on a case-by-case basis depending on the financial need of the company.'' *Id.* The Department found the subsidies to be non-recurring because the benefits were exceptional, had to be ''separately approved or authorized by'' the Mexican government and the respondent could not expect to receive the benefits on an ongoing basis. *Id.*

Lastly, we note that the Department cannot determine that these payments were unexceptional simply because the payments spanned several years. Such a broad approach, of course, would lead to the illogical conclusion that any multi-year distribution of payments makes a subsidy program ''recurring''.

Comment 8: Respondent SDI argues that the Department applied its equityworthiness test to the wrong company. Specifically, SDI contends that the Department should examine the financial status of Sidbec-Dosco, Inc., not Sidbec. Respondent SDI argues that the GOQ's 1988 debt-to-equity conversion in Sidbec was authorized for the purpose of investing in Sidbec-Dosco, Inc. SDI stated that the legislation explains that the object of the law is to ''acquire shares of the capital stock of Sidbec-Dosco, Inc.'' Therefore, SDI maintains that while the conduit of these funds was Sidbec, the actual beneficiary of the equity infusion was Sidbec-Dosco, Inc. and, accordingly, the equityworthiness of Sidbec-Dosco, Inc. alone should be at issue in this determination. SDI asserts that, in *Final Affirmative Countervailing Duty Determination; Brass Sheet and Strip from France*, 52 FR 1218, (Jan. 12, 1987) (''*Brass Sheet and Strip from France*''), the Department properly examined a corporate structure similar to the one in this investigation. SDI states that in *Brass Sheet and Strip from France*, the parent company, Pechiney, was a holding company 85 percent-owned by the Government of France, and Pechiney in turn owned virtually all the stock of the subject manufacturer. SDI points and that the Department examined the equityworthiness of Pechiney's subsidiary, not Pechiney, the parent. According to SDI, as in Pechiney's case, in the instant investigation a reasonable private investor would have examined the financial indicators of the subsidiary, Sidbec-Dosco, Inc., not its parent, Sidbec.

SDI also argues that *Preliminary Affirmative Countervailing Duty Determination Oil Country Tubular Goods from Austria*, 60 FR 4600, 4601 (Jan. 24, 1995) (''*OCTG from Austria*'') stands for the proposition that, only where the Department cannot use or is not provided with the relevant information, will it resort to use of the parent's financial indicators, rather than those of the subsidiary, the equity

recipient. SDI concludes that in this case, the Department had the relevant information (*i.e.,* Sidbec-Dosco, Inc's financial statements).

SDI argues, moreover, that the financial statements of Sidbec-Dosco, Inc. demonstrate a reasonably healthy company, and that market studies forecast a healthy steel industry into which a reasonable private investor could have expected a reasonable return.

Petitioners argue that the Department should reject SDI's claim that the Department should evaluate financial indicators for Sidbec-Dosco, Inc. rather than Sidbec because it is inconsistent with both the corporate structure of Sidbec and the normal behavior of a reasonable investor. Petitioners contend that, until the reorganization, Sidbec directly owned steel facilities whose operations functioned as one unit with those of Sidbec-Dosco, Inc. Thus, petitioners conclude that any financial problems of Sidbec would limit its ability to fund Sidbec-Dosco, Inc. Petitioners assert that the case on which SDI principally relies (*Brass Sheet and Strip from France*) is not on point because the parent's consolidated financial data contained information on ''numerous'' other subsidiaries producing non-subject merchandise.

Petitioners also argue that, even if the Department relied on Sidbec-Dosco Inc.'s financial indicators rather than the consolidated financial statements of Sidbec, Sidbec-Dosco, Inc. would still be unequityworthy in 1988. Petitioners contended that Sidbec-Dosco Inc.'s financial indicators do not support a conclusion that a reasonable private investor would have expected a reasonable rate of return from an investment in Sidbec-Dosco, Inc. in the years 1985, 1986, 1987, and 1988 because these financial indicators do not point to a healthy company. Therefore, petitioners state that using Sidbec-Dosco, Inc.'s financial indicators would not change the results of the analysis.

Department's Position: We disagree with SDI's claim that the Department should evaluate financial indicators for Sidbec-Dosco, Inc. rather than Sidbec for the three-year period dictated by our equityworthiness methodology, *i.e.,* 1985–1987. As stated in Comment 1, the Department would have treated Sidbec and Sidbec-Dosco, Inc. as a single entity up through 1987. During that time period, the steel operations of Sidbec and Sidbec-Dosco, Inc. were intertwined and any reasonable investor would have looked to the financial indicators of the parent, Sidbec, as a gauge for how Sidbec (up until at least the end of 1987, when it transferred its steel assets to Sidbec-Dosco, Inc. and became a holding company) and Sidbec-Dosco, Inc. would perform. It was the steel assets of both companies which had just begun to reside in Sidbec-Dosco, Inc. in 1988, when the debt-to-equity conversion at issue took place. A private investor would not have confined its evaluation to Sidbec-Dosco, Inc.'s performance in 1985–1987, as that would only provide a partial picture of the steel operations of Sidbec-Dosco, Inc. in 1988. These circumstances are quite distinct from these addressed in *Brass Sheet and Strip from France* and *OCTG from Austria.* Thus, for the final determination, the Department has evaluated the financial indicators of Sidbec, rather than Sidbec-Dosco, Inc., to make its equityworthiness determination regarding the 1988 debt-to-equity conversion.

Comment 9: With respect to the GOQ's 1988 debt-to-equity conversion, the GOQ asserts that the Department must measure the GOQ's action against the standard of a reasonable private investor faced with the same choices as the GOQ under the same circumstances, in determining whether this transaction constituted a countervailable event. The GOQ argues that its decision to convert this debt-to-equity in 1988 satisfies this standard and therefore cannot constitute a countervailable event.

Moreover, the GOQ notes that the Department's standard equityworthiness methodology was formulated for equity infusions, and is not designed to analyze debt-to-equity conversions. According to the GOQ, no money changed hands.

In any event, respondent GOQ also argues that the record shows that Sidbec was equityworthy at the time of the debt-to-equity conversion. The GOQ suggests that *Final Affirmative Countervailing Duty Determination; Steel Wire Rod From Trinidad and Tobago,* 49 FR 480, 483 (Jan. 4, 1984), supports the argument that it is commercially reasonable to rely on contemporaneous studies. For this case, the GOQ claims that it acted as a private investor, relying on three internal studies that all concluded that a debt-to-equity conversion was the best option for the GOQ in order to maximize its long-term return on its investment in Sidbec. The GOQ asserts that the Department's practice in determining the reasonableness of a government action is to examine the information available to that government at the time of a debt-to-equity conversion. The GOQ maintains that the trends for both Sidbec's financial performance and that of the steel industry had been very positive for more than three years by the end of 1988, when the GOQ made its final decision to convert some of Sidbec's existing debt into equity.

Petitioners argue that the Department does not differentiate between equity infusions and conversions when making an equityworthiness determination.

Petitioners also argue that any improvements registered in Sidbec-Dosco, Inc.'s financial statements or forecasts for the overall Canadian steel market for 1987 to 1988 could not offset the magnitude of Sidbec's previous losses. Petitioners contend that, even if Sidbec's financial performance improved, the Department generally does not consider ''a couple of years'' of improved performance as warranting a finding of equityworthiness when a firm has been found unequityworthy for a number of years. Additionally, petitioners assert that information on future prospects is only one factor to consider, and the Department generally places ''greater reliance on past indicators as they are known with certainty and provide a clear track record of the company's performance, unlike studies of future expected performance which necessarily involve assumptions and speculation.'' (*GIA,* 58 FR at 37244).

Department's Position: We disagree with the GOQ that the Department should employ an analysis different from its standard equityworthiness methodology in determining the countervailability of the debt-to-equity conversion. What the GOQ proposes is essentially an inside investor standard. In past practice, however, the Department has rejected the insider investor arguments which have been forwarded by the GOQ in this case. The Department has stated that ''it is essential to recognize that the Department must render its equityworthiness determination on the basis of objective and verifiable evidence. The argument that an inside investor may have a greater appreciation of the workings of the firm does not provide the Department with a reliable means of distinguishing between those inside investor motivations that may be commercially based and those that are not'' (*see* GIA, 58 FR 37250). Further, the Department has stated that ''a determination of equityworthiness cannot be measured by, nor equated with, the decision of a creditor exchanging its debt for an equity position in a company in order to improve its chances for recouping money already loaned to that enterprise. Nor can it be based on whether an optimal debt to equity ratio can be achieved through the conversion of

debt. These may both be important commercial considerations, but they are considerations that relate to interests distinct from the viability of any given investment. The Department is fundamentally concerned with whether it would have been reasonable for a private investor to invest money in the company in question. Such an examination must take place each time an investment occurs, whether it is an investment with 'new' money or a conversion of previous debt to equity. However, the proper focus of the Department's analysis is whether the individual investment, taken alone, made sound commercial sense'' (*see* GIA, 58 FR 37250). Therefore, the Department determines that its equityworthiness analysis is appropriate.

We also disagree with the GOQ's argument that a debt-to-equity conversion should not be treated as an equity infusion because no new money was provided by the GOQ. We reject this argument because of the principle laid down in the GIA, quoted immediately above, and our past practice, as evidenced by cases such as *France Bismuth,* 58 FR at 6227–28, and *Certain Steel Products from France,* 58 FR at 37312, 37313, where we treated debt-to-equity conversions as equity infusions.

Finally, we disagree with the GOQ that Sidbec was equityworthy at the time of the 1988 debt-to-equity conversion. As we have discussed above (*see* Equityworthiness Section of this Notice), the factors which the Department examines when making an equityworthiness determination showed Sidbec to be unequityworthy.

We also note that at verification, GOQ officials stated that in the mid-1980s, Sidbec was not attractive to investors, because even though it showed some ''minor'' profits, the profits were not sufficient to attract a private investor. *See* Government of Quebec Verification Report. Therefore, by the GOQ's own admission, it performed this conversion because no private investor would provide the capital.

Further, the ultimate aim of the studies commissioned by the GOQ was the privatization of Sidbec-Dosco, Inc. The GOQ stated in its July 3, 1997 questionnaire response that a GOQ memorandum noted that ''a debt-to-equity conversion offered the greatest potential return to the GOQ.'' Specifically, the report concluded that, ''as a result of the contemplated debt-to-equity conversion, Sidbec would have a capital structure comparable to other integrated steel companies. Therefore, the report concluded that the debt-to-equity conversion would make the company much more marketable should the government wish to sell it, or shares in it, in the future.'' These statements lead the Department to the conclusion that this debt-to-equity conversion was undertaken for the purpose of relieving Sidbec of debt to make the company attractive to private investors. It also leads us to the conclusion that normal commercial considerations would not have led a private investor to make an equity infusion when the GOQ did.

The Department is not aware of any record information suggesting that the marginally improved health of the Canadian steel market and the worldwide steel industry generally in the mid-1980s could offset the poor financial condition of Sidbec. As we explained in our preliminary determination, ''throughout the period 1982 to 1985, Sidbec reported substantial losses. Although Sidbec reported a profit in 1986 and 1987, this profit trend was not of such a magnitude to offset the substantial losses suffered from 1982 through 1985.'' Similarly, the marginally improved health of the steel market in recent years was not significant enough to change the prior assessment of Sidbec's health.

Comment 10: SDI argues that the Department erred in its preliminary determination of Sidbec's equityworthiness because the Department allegedly analyzed the entire 1982–92 period in determining whether the 1988 debt-to-equity conversion was a countervailable action. Instead, SDI argues, the Department should have limited its equityworthiness analysis to 1988 (the time the equity infusion was made) and the three years preceding the investment, as well as the future prospects of the company and the industry as a whole. Respondent SDI indicated that both the Department's practice and Proposed Rules dictate that equityworthiness can only be established by examining financial performance prior to and at the time of the equity infusion occurs; later performance is irrelevant in determining whether a ''reasonable private investor'' would have invested at the time.

Petitioners argue that the Department properly applied its standard equityworthiness methodology in its preliminary determination. Petitioners point out that the Department analyzed Sidbec's financial performance indicators for the entire period from 1982 through 1992 because the allegations concerning equity infusions and the debt-to-equity conversion covered this entire period.

Department's Position: Petitioners are correct in interpreting the results of the Department's equityworthiness analysis. We did not use later performance in evaluating the 1988 debt-to-equity conversion or any of the equity infusions (which we have decided in this final determination actually are grants) made in the years 1983 through 1992. Rather, for each equity transaction, we followed our standard equityworthiness methodology, as set forth above in our equityworthiness section of this notice, and analyzed current and past financial indicators reaching back three years and future prospects as of the time of the equity transaction.

Comment 11: Petitioners argue that the Department failed to countervail benefits from payments to Sidbec, authorized by the GOQ, against accumulated grants receivable. Specifically, petitioners assert that while some of the grants receivable covered by a 1988 payment were countervailed in previous years, the Department must countervail that portion of the grants receivable which was not covered by the payment. Petitioners speculate that the Department did not countervail these payments in the preliminary determination in order to avoid double counting. However, petitioners argue that, because Sidbec's financial statements ''clearly distinguish'' government grants from grants receivable, countervailing grants receivable would not result in double counting. Petitioners recommend that the Department countervail the total payment against grants receivable in 1988, while subtracting the value of grants receivable in 1987 and 1988 from the 1987 and 1988 grant amounts countervailed in the preliminary determination. Petitioners state that the Department should follow this methodology because the grants receivable can only have conveyed a countervailable benefit in the year when they were received.

Respondents GOQ and SDI claim that the payments against accumulated grants receivable cannot be countervailed because the funds are tied to interest due on an instrument taken by Sidbec to pay for costs of Normines' mining operations and therefore has no relationship to the subject merchandise (*see* Comment 5 for a discussion of funds granted pertaining to mining operations). The respondents also argue that the Department already accounted for this sum in the preliminary determination. According to the respondents the Department verified the source of the money in question, and

traced it back to monies already accounted for in the preliminary determination. Additionally, respondent SDI argues that, by definition, ''grants receivable'' have not yet been received, and therefore cannot be countervailed in the years in which they are recorded as ''grants receivable.'' Finally, the GOQ suggests that, in the alternative, the Department could do what petitioners have asked. The GOQ argues that, should the Department decide to accept petitioners' argument, the end result, using petitioners' suggested method to avoid double counting, would be a net reduction in the margin.

Department's Position: We believe that the focus of our effort to calculate the countervailable subsidy should be twofold. First, we need to ensure that grants receivable (which eventually may become grants received) are not improperly included in the countervailing duty margin. A grant receivable is not a subsidy; only a grant is. Second, we need to ensure that all countervailable subsidies have been captured by our methodology. In order to achieve these goals with respect to GOQ grants to Sidbec, the Department reconciled payments to Sidbec as recorded in the GOQ's public accounts to amounts received per Sidbec's accounting records. In doing so, the Department confirmed that all GOQ payments made between 1983 and March 31, 1993 (the end of the GOQ's 1992 fiscal year) were accounted for in the Department's preliminary determination. *See* Sidbec Verification Report, Exhibit 7. Therefore, the Department finds that no adjustments are necessary in the final determination.

Comment 12: Respondent SDI argues that the purchase price for Sidbec-Dosco, Inc. used by the Department in the preliminary determination did not reflect the true purchase price. SDI states that the purchase price used by the Department represented the cash payment by the buyer; however, it grossly understated the actual purchase price because it failed to take into account the additional consideration paid by the buyer for the shares of Sidbec-Dosco, Inc. The specific nature of the additional consideration is proprietary.

The petitioners did not comment on respondent SDI's argument.

Department's Position: We disagree with SDI. SDI does not cite any past Departmental practice where the Department has included in its purchase price calculation the additional consideration to which SDI refers, nor does any sound financial analysis support SDI's approach (*see Memorandum to the File, Final Analysis Memorandum for the Investigation of Steel Wire Rod from Canada*).

We note that although Article 6.1 of the Stock Purchase Agreement provided for the buyer to assume other obligations in the purchase of Sidbec-Dosco, Inc., Articles 3.1 and 3.2 of the Stock Purchase Agreement specifically outline the actual purchase price that Ispat Mexicana , through its subsidiary, Brohenco, paid for Sidbec-Dosco, Inc. Nowhere in Articles 3.1 and 3.2 is reference made to other obligations being included in the purchase price of Sidbec-Dosco, Inc. Additionally, the record includes clear statements from both SDI and the GOQ in their questionnaire responses indicating the amount of money that Ispat Mexicana paid for outstanding shares of Sidbec-Dosco, Inc. (*see* SDI May 27, 1997 questionnaire response and GOQ July 3, 1997 questionnaire response). This amount does not include the additional consideration to which SDI now refers. Furthermore, at verification, SDI officials specifically stated that the official price at which Ispat Mexicana purchased Sidbec-Dosco, Inc. from Sidbec was the price that agreed with the amount in the questionnaire responses (*see* SDI verification report, Sept. 17, 1997). We also reviewed documents at verification showing the Department this same purchase price. Moreover, at Sidbec, we verified the price that Ispat Mexicana paid for Sidbec-Dosco, Inc. and that this price agreed with the questionnaire responses (*see* Sidbec verification report, Sept. 17, 1997). Furthermore, at Sidbec, we examined sale documentation and found that the purchase price in this documentation agreed with the purchase price in the responses (*see* Exhibit S–1).

Therefore, for the final determination, the Department will continue to use the purchase price from the preliminary determination.

Comment 13: SDI asserts that any possible countervailable subsidies were extinguished by privatization. SDI argues that the privatization methodology used in the preliminary determination is incorrect for the following reasons: (1) The accepted practice in virtually every part of the world for valuing a company for purposes of acquisition is to look at the discounted stream, or present value, of future earnings; (2) the forecasted earnings are calculated by excluding any interest payments, and any income or expenses which do not impact on cash flow, such as depreciation; and (3) the forecasted tax burden is also calculated and subtracted from the pre-tax earnings. SDI contends that after calculating the future earnings, the earnings are discounted using the relevant cost of capital (to the purchaser) and then summed, and that this sum represents the value of the company as if all the financing were share capital. Also, if there are loans or other debts outstanding, these liabilities are subtracted from the sum of discounted future values in order to arrive at the net (unleveraged) value of the company. SDI points out that grants taken by the company effectively decrease the amount of the loans that the company would otherwise have to take to finance the given level of investment, and the value of the company increases by the amount of the grants and this, in turn, increases the amount that the purchaser is willing to pay for the company. Moreover, SDI points out that if the operations are not financed completely by loans, but are financed in part by grants and equity infusions, the value of the company is reduced only by the amount of the loans, not the grants and equity infusions, when calculating the present value of future earnings. SDI argues that Ispat Mexicana's purchase of Sidbec-Dosco, Inc. paid back the grants dollar for dollar. Therefore, SDI argued that the subsidies that Sidbec-Dosco, Inc. received prior to privatization are extinguished at the point of privatization.

The GOC asserts that it has concerns with the Department's privatization methodology. The GOC contends that it was advised that the sale of Sidbec-Dosco, Inc. was an arm's length transaction and fully reflected the market value of the company's assets. Therefore, the Department should conclude that any alleged subsidies were extinguished at privatization.

Department's Position: We disagree with both the GOC and SDI.

In deciding how to treat non-recurring subsidies after a privatization, the Department has followed the methodology which was discussed in the ''Restructuring'' section of the GIA, 58 FR at 37266–69. There we stated that ''subsidies were not extinguished when a productive unit was sold. Instead, some portion of prior subsidies received 'by the seller ''travel (with the productive unit) to its new home'':

> The Department determines that a company's sales of a ''business'' or ''productive unit'' does not alter the effect of previously bestowed subsidies. The Department does not examine the impact of subsidies on particular assets or tie the benefit level of subsidies to changes in the company under investigation. Therefore, it follows that when a company sells a productive unit, the sale does nothing to alter

the subsidies enjoyed by that productive unit.

Id. At 37268 (quoting *U.K. Bismuth*). We then described the calculation that we would use to measure the portion of the subsidies which passed through. This calculation takes into account the sale price for the productive unit and calls for an allocation of previously bestowed subsidies between the buyer and seller. *See id.* at 37269.

Consistent with this approach, we treated a portion of the subsidies received by Sidbec as passing through to SDI. We calculated the allocated amounts pursuant to the formula developed in the Restructuring section of the GIA, 58 FR at 37269.

As to the argument that an arm's length transaction, at fair market value, extinguishes prior subsidies, the decision of the United States Court of Appeals for the Federal Circuit in *Saarstahl AG* v. *United States,* 78 F.3d 1539 (Fed. Cir. 1996) (''*Saarstahl*''), is controlling. There, the Federal Circuit found that an arm's length transaction, at fair market value, does not automatically extinguish subsidies previously bestowed on a government-owned company, given that the countervailing duty statute does not require the Department to find that the buyer—here, Ispat Mexicana—has a competitive benefit resulting from those subsidies. The Federal Circuit indicated that the Department can impose countervailing duties upon the buyer once it finds (1) a subsidy with regard to the production of the subject merchandise, and (2) injury to the domestic industry by reason of imports of that merchandise. *See id.* at 1542–43. These prerequisites have been met in this final determination.

The Department continues to believe that its approach with regard to privatization is reasonable, and this approach has received support from the Federal Circuit, as indicated above. Therefore, for the final determination, the Department has continued to follow that approach in addressing the restructuring at issue.

Comment 14: SDI argues that the Department's finding that Sidbec was uncreditworthy in its preliminary determination is not supported by evidence on the record. SDI contends that the Department did not consider evidence of comparable long-term commercial financing received by Sidbec when making its funding. SDI argues that it provided the Department with evidence of commercial debt obtained contemporaneously with the receipt of government grants. SDI maintains that Sidbec entered into a long-term capital lease obligation and the terms of the lease stated that Sidbec would pay the rent. SDI argues that the lease was not guaranteed by the government; hence, the lease constituted comparable long-term financing obtained through private commercial sources.

SDI further argues that the Department should have considered the creditworthiness of Sidbec-Dosco, Inc., the producer of the subject merchandise, and not Sidbec. SDI stated that in (*LHF from Canada*), the Department examined the creditworthiness of two related companies ''directly engaged in the production of LHF,'' and not the creditworthiness of the entire consolidated group. SDI noted that the Department should have made a similar determination in this case. Additionally, SDI states that Sidbec-Dosco Inc.'s financial ratios indicates that it was creditworthy during in the years prior to the 1988 debt-to-equity conversion, and that the Department erred in using Sidbec's financial ratios when determining creditworthiness. Finally, SDI asserts that the Department failed to consider record evidence showing that Sidbec-Dosco, Inc. received comparable long-term financing from commercial sources during the AUL from 1985–1988.

SDI asserts that the above errors resulted in the Department adding a risk premium to the discount rate. Citing the 1997 Proposed Rules, 62 FR at 8829–30, SDI argues that the risk premium is greater than the benchmark of 4.3 percent that the Department proposes as ''a more accurate measure of risk involved in lending to firms with little or no access to commercial bank loans'' that captures ''more precisely the speculative nature of loans to uncreditworthy companies and the premium they would have to pay the lender to assume that risk.'' Therefore, the Department's use of a risk premium is not legally correct.

Petitioners argue that the Department should reject SDI's argument that the Department should base its creditworthiness analysis on Sidbec-Dosco, Inc., and not Sidbec, financial ratios because of the nature of Sidbec's corporate relationship with Sidbec-Dosco, Inc. Petitioners state that this analysis is accurate because no reasonable creditor would lend to Sidbec-Dosco, Inc. without evaluating the financial condition of Sidbec. However, petitioners assert that if the Department does consider Sidbec-Dosco Inc.'s financial ratios, Sidbec-Dosco, Inc. still had a high debt-to-equity ratio and ultra-low quick ratio and thus would not be attractive to a commercial lender.

Petitioners contend that Sidbec's lease obligation is not proof of creditworthiness. Petitioners note that in the preliminary determination for *Steel Wire Rod From Germany,* the Department found that respondent Ispat Hamburger Stahlwerke was uncreditworthy in 1994 even though it had long-term lease agreements. Therefore, the Department should disregard the evidence of Sidbec's long-term lease.

Petitioners state that they agree with SDI in its suggestion that the Department use the new uncreditworthiness calculation from the proposed countervailing duty regulations in this review. However, petitioners contend that the Department should use the entire methodology, including the formula in Section 351.504(a)(3)(iii). Petitioners note that while it may not be appropriate to apply the new regulations to all of these investigations, it believes it is entirely correct when petitioners and the respondent agree that it would yield to a more accurate measure.

Department's Position: The creditworthiness analysis that the Department performed in its preliminary determination (and subsequently in this final determination) is consistent with our decision (*see* Comment 1) to analyze the subsidies at issue as benefitting the consolidated group of the parent/holding company, Sidbec. Therefore, for the final determination, we have limited our analysis to Sidbec. *See, e.g., Final Affirmative Countervailing Duty Determination: Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Italy,* 60 FR 3199 (June 19, 1995).

Since the Department has limited its analysis of creditworthiness to Sidbec, we feel that it is not appropriate to address the Sidbec-Dosco, Inc.'s long-term commercial loans in this final determination. We also note that, in any event, SDI did not provide complete data regarding these borrowings.

Additionally, we disagree with SDI that Sidbec's long-term capital lease is comparable long-term commercial financing. The lease that SDI points to is a capital lease, which is secured by a first-rank specific charge (*see* Exhibit 13, Note 8 of SDI's May 27, 1997 questionnaire response), which is not unlike a typical mortgage. In this case, the lessor has first lien rights on the capital equipment should the lessee, Sidbec, be in default. On this basis, the Department distinguishes this capital lease from a typical long-term

commercial loan, which is not secured in this way. The Department therefore does not consider Sidbec's lease to be comparable long-term commercial financing. Lastly, the Department has determined that the use of a risk premium is appropriate and legally correct in this case because the Department continues to operate under its existing practice rather than the 1997 Proposed Rules.

Comment 15: Respondent SDI contends that the Department erred in calculating the *ad valorem* countervailing duty rate by using an FOB sales value as the denominator in its formula. SDI cites the GIA (58 FR at 37237) as supporting the concept of using respondents' sales value as recorded in their financial statements and accounts as the denominator when calculating the *ad valorem* subsidy rate. SDI notes that, in contrast, Commerce in this case has used an estimated FOB factory sales value for domestic sales, and an estimated FOB port sales value for export sales, even though Sidbec-Dosco (Ispat) maintains its sales records and reports sales figures in its financial statements on a delivered price basis.

Petitioners did not comment on this argument.

Department's Position: The Department acknowledges that, in the GIA, it stated that it would be ''more appropriate to use respondents' sales value as recorded in their financial statement and accounts in the denominator when calculating the ad valorem subsidy rate.'' GIA, 58 FR at 37237. However, an adjustment (a ratio of invoice value of exports to the United States to the FOB value of exports to the United States) was still necessary under the GIA methodology to ensure that Customs would collect the correct amount of subsidy based on an FOB invoice price of the imported merchandise. In the 1997 Proposed Rules, the Department noted that the methodology discussed in the GIA had not proven useful, because so few companies had the data in the form necessary to calculate the ratio. While SDI maintains that it does possess the necessary information, it is also true that, so long as the estimates used to calculate the FOB value are reasonable, there should be no net effect on the calculated margin. The Department verified SDI's estimated freight calculations, and found them to be reasonable. *See* SDI Verification Report. Therefore, for the purposes of calculating a final margin, we have made no adjustments.

Comment 16: The GOQ supports the Department's preliminary determination not to countervail benefits received through the Canadian Steel Trades and Employment Congress (CSTEC), but argues that the Department should acknowledge that benefits under the Sectoral Partnerships Initiative (of which CSTEC is a part) are generally available to Canadian industry, and that only ''additional training'' qualifies for government funding through CSTEC. The GOQ also notes that petitioners made no claim in their subsidy submission that CSTEC programs constituted a subsidy to Canadian employers, nor did they request that CSTEC be included in the calculation of a Canadian countervailing duty margin.

Petitioners did not comment on this argument.

Department's Position: At verification of the response of the Government of Canada and CSTEC, the Department reviewed documentation supporting record evidence that benefits under the Sectoral Partnerships Initiative, of which CSTEC is a part, are not *de jure* specific to the Canadian steel industry, as is discussed above in Part II. *See Government of Canada Verification Report,* page 4; *Canada Steel Trades and Employment Congress Verification Report,* page 1. *See* also GOC July 2, 1997 Supplemental Questionnaire response, exhibit 4 (*Sectoral Activities Update Report; Spring 1996,* which shows that over 50 separately classified industrial sectors were included in SPI). Additionally, there is no record evidence suggesting that the administration of SPI vis-a-vis the steel industry would lead the Department to determine that SPI is *de facto* specific with respect to the steel industry. Therefore, benefits received under this program are not countervailable.

Comment 17: Respondent GOQ states that in the Department's preliminary determination it concluded that funding by the Societe de Developpement Industriel du Quebec (SDIQ) did not confer a countervailable subsidy during the POI. Respondent notes that verification confirmed that no SDIQ benefits were received by steel wire rod producers or sellers during the POI, and that SDIQ monies received by a steel company prior to the POI constituted a *de minimis* portion of total sales value in those years. Moreover, the GOQ argues that the verified record demonstrates that SDIQ monies received by the respondent companies could not possibly be countervailed in that the monies were not specific to the steel wire rod industry because SDIQ provided benefits to over 1,100 companies. The GOQ contends that while there were many users, from a wide variety of industries, no steel producer was a dominant user, and steel did not receive a disproportionate share. Therefore, SDIQ was not specific.

The petitioners did not comment on this argument.

Department's Position: We agree with the GOQ that respondent Ivaco was the only steel wire rod producer to receive any benefits from SDIQ during the AUL period. As we explained above (*see* Part III), Ivaco received *de minimis* benefits in two years prior to the POI, and we therefore expensed them in the years of receipt. As a result, we did not countervail any benefits under this program.

Comment 18: Respondent SDI states the Department did not correctly sum its depreciation expense that it used to calculate its AUL. SDI notes that the Department's AUL calculation only summed nine years of depreciation expense as opposed to ten years, and therefore, the Department should correct the summing of its depreciation expense in its final determination.

The petitioners did not comment on this argument.

Department's Position: We agree with respondent SDI. In the preliminary determination, the Department incorrectly calculated SDI's depreciation expense that it used to calculate SDI's AUL. The Department has recalculated SDI's depreciation expense by summing the appropriate number of years (*i.e.*, ten). This recalculation has changed the length of the AUL period (*see* Memorandum to the File, Final Analysis Memorandum in the Investigation of Steel Wire Rod from Canada).

Comment 19: Respondent GOQ states that petitioner alleged that Sidbec's 1982 financial statements indicated that Sidbec received C$51.7 million contributed surplus from the GOQ and the GOC. The GOQ notes that the Department verified that this contributed surplus represents funds provided to Sidbec before the AUL period. Therefore, the GOQ maintains that these funds are not relevant to the investigation.

Petitioners did not comment on this argument.

Department's Position: We agree with respondent GOQ. Although Sidbec's 1980 consolidated financial statement indicated that Sidbec did receive a C$51.7 million contributed surplus, the Department verified that Sidbec received this C$51.7 million contributed surplus from 1977 to 1979 (*See* Sidbec Verification Exhibit S–4). Consequently, these funds were provided outside of the Department's calculated AUL period for SDI.

Comment 20: Petitioners state that a review of Sidbec's 1980 through 1982

financial statements indicates that the GOQ provided grants to Sidbec in 1980 and 1981. Petitioners state that the 1980 financial statement described these grants as ''an amount that the government has consented to pay to the company to finance specific investment projects'' and Sidbec officials stated at verification that Sidbec had received these amounts (*see* Sidbec's Verification report). Therefore, petitioners argue that Sidbec received grants from the GOQ. Lastly, petitioners state although the regulatory time limit for alleging new subsidies has passed, if the Department does not include these subsidies it will reward Sidbec's refusal to provide the Department with requested information.

The GOQ states that the amounts of funding are not grants, but are payments for equity purchased in 1979. The GOQ argues that the Department verified the funding to be grants provided in 1980 and 1981, and were the last of two installment payments on equity that the GOQ purchased from Sidbec in 1979. The GOQ notes that it passed legislation which allowed it to purchase shares of Sidbec stock in 1979, that legislation permitted the GOQ to pay for those shares in installments over three years, and Sidbec's 1980 balance sheet confirms that the shares were issued prior to 1979. Furthermore, the GOQ argues that the date of issuance of the shares, not the dates on which the purchase price was fully paid, establishes as a matter of law the date on which an equity infusion is made. The GOQ asserts that the shares were issued in 1979.

Additionally, respondent SDI notes that Sidbec's financial statements for 1980 and 1981 do not provide a basis for countervailing these amounts. According to SDI, states that there is no evidence on the record to indicate that Sidbec-Dosco, Inc. received any funding in either 1980 or 1981.

Lastly, both the GOQ and SDI state that these equity infusions were outside of the Department's calculated AUL period.

Department's Position: We disagree with petitioners. At verification of Sidbec, officials informed the Department that Sidbec did receive equity infusions from the GOQ from 1979 through 1981. *See* Sidbec Verification Report, dated September 17, 1997. Therefore, we determine that no countervailable benefits were conferred through this program.

Comment 21: Respondent GOQ notes that petitioners alleged that in 1987 Sidbec-Dosco received a grant from the GOQ. The GOQ states that the Department verified that no such program existed and that Sidbec-Dosco never received any money from the GOQ during 1987 or any other year during the AUL.

The petitioners did not comment on this argument.

Department's Position: We agree with respondent GOQ. At verification, we found no evidence that the GOQ provided a grant to Sidbec-Dosco, Inc. in 1987. Sidbec underwent a reorganization in 1987 in order to consolidate all steel-related assets under Sidbec-Dosco, Inc., and all assets previously belonging to Sidbec had been leased to Sidbec-Dosco, Inc. We discovered that this transaction reflected an intracomapany reorganization, and that this arrangement was exclusively between Sidbec and Sidbec-Dosco, Inc. and was designed to effect the reorganization. *See* GOQ and Sidbec-Dosco (Ispat) Verification Reports, dated Sept. 17, 1997. Therefore, we determine that no countervailable benefits were conferred through this program.

Comment 22: Respondent GOQ states that petitioners alleged that in 1987 Sidbec-Dosco, Inc. received an equity infusion (*i.e.*, a debt-to-equity conversion) from either the GOQ or the GOC. Respondent argues that the Department concluded in its preliminary determination that no countervailable benefits were provided under this program. The GOQ notes that the Department verified that the GOQ made no equity infusions into Sidbec-Dosco, Inc. or Sidbec in 1987.

The petitioners did not comment on this argument.

Department's Position: We agree with respondent GOQ. At verification, we found no evidence that the GOQ provided an equity infusion (*i.e.*, a debt-to-equity conversion) to Sidbec-Dosco, Inc. in 1987. We discovered that this transaction reflected an intracompany reorganization. *See* GOQ and Sidbec-Dosco (Ispat) Verification Reports, dated Sept. 17, 1997. Therefore, we determine that no countervailable benefits were conferred through this program.

Comment 23: Respondent GOQ asserts that the Department concluded in its preliminary determination that neither Sidbec nor Sidbec-Dosco, Inc. received any equity infusions in 1982. However, the Department noted that it was uncertain as to whether any grants were provided to either of these companies in 1982. The GOQ states that the record now shows that neither Sidbec nor Sidbec-Dosco, Inc. received any countervailable assistance in 1982, whether in the form of grants or equity.

The petitioners did not comment on this argument.

Department's Position: We agree with the GOQ. At verification, we found no evidence that the GOQ provided any form of governmental assistance to either Sidbec or Sidbec-Dosco, Inc. in 1982. *See* the GOQ and Sidbec-Dosco (Ispat) Verification Reports, dated Sept. 17, 1997. Therefore, we determine that no countervailable benefits were conferred through this program.

Suspension of Liquidation

In accordance with section 705(c)(1)(B)(i) of the Act, we have calculated individual rates for each of the companies under investigation.

To calculate the all others rate, we weight-average all individual company rates which are positive by each company's exports of the subject merchandise to the United States. In this case, because Stelco and Ivaco's rates are zero, we are using SDI's rate as the All Others rate.

In accordance with section 703(d) of the Act, we are directing the U.S. Customs Service to suspend liquidation of all entries of steel wire rod from Canada, except those of Ivaco and Stelco, which are entered, or withdrawn from warehouse, for consumption on or after the date of the publication of this notice in the **Federal Register**, and to require a cash deposit or bond for such entries of the merchandise in the amounts indicated below. Because there is no estimated net subsidy for Ivaco and Stelco, they are exempt from the suspension of liquidation. This suspension will remain in effect until further notice.

Manufacturers/exporters	Ad valorem rate (percent)
Sidbec-Dosco (Ispat) Inc.	8.95
Ivaco, Inc.	0
Stelco, Inc.	0
All Others	8.95

ITC Notification

In accordance with section 705(d) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all non-privileged and nonproprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order, without the written consent of the Deputy Assistant Secretary for AD/CVD Enforcement, Group III, Import Administration.

If the ITC determines that material injury, or threat of material injury, does

not exist, these proceedings will be terminated and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled. If, however, the ITC determines that such injury does exist, we will issue a countervailing duty order directing Customs officers to assess countervailing duties on steel wire rod from Canada.

Return or Destruction of Proprietary Information

This notice serves as the only reminder to parties subject to Administrative Protective Order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 355.34(d). Failure to comply is a violation of the APO.

This determination is published pursuant to section 705(d) of the Act.

Dated: October 14, 1997.

Robert LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 97–27986 Filed 10–21–97; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–428–823]

Final Affirmative Countervailing Duty Determination: Steel Wire Rod From Germany

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: October 22, 1997.

FOR FURTHER INFORMATION CONTACT: Cynthia Thirumalai or Daniel Lessard, Office of Antidumping/Countervailing Duty Enforcement, Group 1, Office 1, Import Administration, U.S. Department of Commerce, Room 1874, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482–4087 or 482–1778, respectively.

Final Determination

The Department determines that countervailable subsidies are being provided to Saarstahl AG (''Saarstahl'') and Ispat Hamburger Stahlwerke GmbH (''IHSW''), producers and exporters of steel wire rod from Germany. We also determine that Walzdraht Hochfeld GmbH (''WHG'') and Brandenburger Elektrostahlwerke GmbH (''BES'') received *de minimis* subsidies.

Case History

Since the publication of the preliminary affirmative determination (''*Preliminary Determination*'') in the **Federal Register**, 62 FR 41945 (August 4, 1997), the following events have occurred.

Verification of the responses of the Government of the Federal Republic of Germany (''GOG''), the Government of the Free and Hanseatic City of Hamburg (''GOH''), the Government of Saarland (''GOS''), the European Union (''EU''), Saarstahl, IHSW, WHG, and BES was conducted between August 20 and September 5, 1997.

Petitioners and respondents filed case and rebuttal briefs on September 19, 1997, and September 23, 1997, respectively. The hearing was held on September 24, 1997. Per the Department's request, post-hearing submissions were received from parties.

Scope of Investigation

The products covered by this investigation are certain hot-rolled carbon steel and alloy steel products, in coils, of approximately round cross section, between 5.00 mm (0.20 inch) and 19.00 mm (0.75 inch), inclusive, in solid cross-sectional diameter. Specifically excluded are steel products possessing the above noted physical characteristics and meeting the Harmonized Tariff Schedule of the United States (''HTSUS'') definitions for (a) stainless steel; (b) tool steel; (c) high nickel steel; (d) ball bearing steel; (e) free machining steel that contains by weight 0.03 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.4 percent of phosphorus, more than 0.05 percent of selenium, and/or more than 0.01 percent of tellurium; or (f) concrete reinforcing bars and rods.

The following products are also excluded from the scope of this investigation:

Coiled products 5.50 mm or less in true diameter with an average partial decarburization per coil of no more than 70 microns in depth, no inclusions greater than 20 microns, containing by weight the following: carbon greater than or equal to 0.68 percent; aluminum less than or equal to 0.005 percent; phosphorous plus sulfur less than or equal to 0.040 percent; maximum combined copper, nickel and chromium content of 0.13 percent; and nitrogen less than or equal to 0.006 percent. This product is commonly referred to as ''Tire Cord Wire Rod.''

Coiled products 7.9 to 18 mm in diameter, with a partial decarburization of 75 microns or less in depth and seams no more than 75 microns in depth; containing 0.48 to 0.73 percent carbon by weight. This product is commonly referred to as ''Valve Spring Quality Wire Rod.''

The products under investigation are currently classifiable under subheadings 7213.91.3000, 7213.91.4500, 7213.91.6000, 7213.99.0030, 7213.99.0090, 7227.20.0000, and 7227.90.6050 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this investigation is dispositive.

The Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the provisions of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act effective January 1, 1995 (the ''Act'').

Petitioners

The petition in this investigation was filed by Connecticut Steel Corp., Co-Steel Raritan, GS Industries, Inc., Keystone Steel & Wire Co., North Star Steel Texas, Inc. and Northwestern Steel and Wire (''petitioners''), six U.S. producers of wire rod.

Subsidies Valuation Information

Period of Investigation: The period for which we are measuring subsidies (the ''POI'') is calendar year 1996.

Allocation Period: Since benefits from nonrecurring subsidies are not confined to a single period of time, the Department must determine a reasonable period over which to allocate such benefits. In the past, the Department has relied upon information from the U.S. Internal Revenue Service on the industry-specific average useful life of assets to determine the allocation period for nonrecurring subsidies (*see* General Issues Appendix appended to *Final Affirmative Countervailing Duty Determination; Certain Steel Products from Austria*, 58 FR 37217, 37226 (July 9, 1993) (''*GIA*'')). However, in *British Steel plc. v. United States*, 879 F. Supp. 1254 (CIT 1995) (''*British Steel*''), the U.S. Court of International Trade (the ''Court'') ruled against this allocation methodology. In accordance with the Court's remand order, the Department calculated a company-specific allocation period for nonrecurring subsidies based on the average useful life (''AUL'') of renewable physical assets. This remand determination was affirmed by the Court on June 4, 1996. *British Steel*, 929 F. Supp. 426, 439 (CIT 1996).

In this investigation, the Department has followed the Court's decision in

British Steel. Therefore, for the purposes of this determination, the Department has calculated a company-specific AUL for IHSW. However, we did not rely on Saarstahl or BES's company-specific AULs for purposes of this final determination because the calculations were significantly distorted by the asset valuation methodologies employed by the companies in 1989 and 1992, respectively. This issue is addressed with respect to Saarstahl in Comment 11, below.

Based on information provided by IHSW regarding the company's depreciable assets, the Department has determined that the appropriate allocation period for IHSW is 10 years. With respect Saarstahl and BES, we based the companies' AUL on the depreciation schedule in Germany for Technical Machinery and Equipment (*i.e.*, 11 years). The calculation of an allocation period for WHG was unnecessary.

Creditworthiness: When the Department examines whether a company is creditworthy, it is essentially attempting to determine if the company in question could obtain commercial financing at commonly available interest rates. If a company receives comparable long-term financing from commercial sources, that company will normally be considered creditworthy. In the absence of comparable commercial borrowings, the Department examines the following factors, among others, to determine whether or not a firm is creditworthy:

1. Current and past indicators of a firm's financial health calculated from that firm's financial statements and accounts.
2. The firm's recent past and present ability to meet its costs and fixed financial obligations with its cash flow.
3. Future financial prospects of the firm including market studies, economic forecasts, and projects or loan appraisals.

For a more detailed discussion of the Department's creditworthiness methodology, *see e.g., Final Affirmative Countervailing Duty Determination: Certain Steel Products from France*, 58 FR 37304 (July 9, 1993) or *Final Affirmative Countervailing Duty Determination: Certain Steel Products from the United Kingdom*, 58 FR 37393 (July 9, 1993).

Petitioners have alleged that Saarstahl was uncreditworthy in 1989 and between 1993 and 1996. They further allege that HSW and IHSW were uncreditworthy in 1984 and 1994, respectively.

Because neither company received long-term financing in the relevant years, we examined other factors to determine the firms' creditworthiness. In making our determinations, we examined Saarstahl's and IHSW's current, quick, and interest/debt coverage ratios in addition to their net profit/loss for the three preceding years. Both Saarstahl and IHSW experienced operating losses in those years (except 1988 for Saarstahl), and the financial ratios demonstrate that both companies were in poor financial health. The current ratio (current assets divided by current liabilities) measures the margin of safety available to cover any drop in the value of current assets, while the quick ratio (current assets excluding inventory and prepaids divided by current liabilities) shows the company's ability to pay its short-term liabilities. For both companies, these ratios were very small, demonstrating the companies' difficulty in meeting their short-term liabilities and interest expenses. Furthermore, the interest/debt coverage ratios (net income plus interest expense plus taxes divided by interest expense) highlighted the firms' inability to meet existing interest obligations. We determine that Saarstahl was uncreditworthy in 1989 and IHSW was uncreditworthy in 1994.

Because Saarstahl did not receive any countervailable benefits in the form of loans, loan guarantees, or nonrecurring grants from the GOG or the GOS following its 1993 bankruptcy, we do not reach the question of Saarstahl's creditworthiness for this period. Moreover, because IHSW's allocation period is ten years, we are not examining subsidies received prior to 1987. Therefore, we do not need to analyze HSW's creditworthiness for that period.

Discount Rates: Information on the record indicates that German banks set interest rates for long-term, fixed rate commercial loans in reference to the yield earned on government bonds to which they normally add a margin, or spread, depending upon the borrower's creditworthiness. Because Saarstahl, IHSW, and BES did not provide company-specific discount rates, we used the German government bond rate plus a spread of 1.75 and 1.5 percent as the discount rate for Saarstahl in 1989 and IHSW in 1994, respectively. This rate represents the highest long-term interest rate which we could locate. As the discount rate for BES in 1994, we used the German government bond rate plus a spread of 1.15 percent (*i.e.*, the average of the spread between 0.8 and 1.5) because BES was not found to be uncreditworthy. We added a risk premium, as described in section 355.44(b)(6)(D)(iv) of the *Countervailing Duties; Notice of Proposed Rulemaking and Request for Public Comment*, 54 FR 23366, 23374 (May 31, 1989) (''*Proposed Regulations*''), to establish the uncreditworthy discount rate for Saarstahl in 1989 and IHSW in 1994.

Privatization: In the *GIA*, we applied a new methodology with respect to the treatment of subsidies recestived prior to the sale of a company (privatization) or the spinning-off of a productive unit.

Under this methodology, we estimate the portion of the purchase price attributable to prior subsidies. We compute this by first dividing the privatized company's subsidies by the company's net worth for each year during the period beginning with the earliest point at which nonrecurring subsidies would be attributable to the POI (*i.e.*, in this case 1986 for Saarstahl and 1987 for IHSW) and ending one year prior to the privatization.

For Saarstahl, we modified this methodology pursuant to the *Remand Determination: Certain Hot Rolled Lead and Bismuth Carbon Steel Products from Germany*, p. 4–5 (October 12, 1993). Specifically, we calculated the ratios in question by including in the calculation the assistance that Saarstahl received prior to privatization in the year the assistance was received. We did so even though we do not consider this prior assistance, at the time it was received, to be nonrecurring in nature and, thus, allocable over time. We followed a similar approach with respect to assistance received by IHSW in 1993.

We then take the simple average of the ratios of subsidies to net worth. This simple average of the ratios serves as a reasonable surrogate for the percent that subsidies constitute of the overall value of the company. Next, we multiply the average ratio by the purchase price to derive the portion of the purchase price attributable to repayment of prior subsidies. Finally, we reduce the benefit streams of the prior subsidies by the ratio of the repayment amount to the net present value of all remaining benefits at the time of privatization.

With respect to spin-offs, consistent with the Department's position regarding privatization, we analyze the spin-off of productive units to assess what portion of the sale price of the productive unit can be attributable to the repayment of prior subsidies. To perform this calculation, we first determine the amount of the seller's subsidies that the spun-off productive unit could potentially take with it. To calculate this amount, we divide the value of the assets of the spun-off unit by the value of the assets of the company selling the unit. We then

apply this ratio to the net present value of the seller's remaining subsidies. We next estimate the portion of the purchase price going towards repayment of prior subsidies in accordance with the privatization methodology outlined above.

In the current investigation, we are analyzing: (1) the privatization of Saarstahl in 1989 and subsequent spin-off in 1994 and (2) the privatization of IHSW in 1994. For BES we find it unnecessary to conduct a spin-off calculation because its potentially countervailable subsidies were received after BES was spun off.

Based upon our analysis of the petition, the responses to our questionnaires and the information reviewed at verification, we determine the following:

I. Programs Determined to Be Countervailable

A. Saarstahl

1. Forgiveness of Saarstahl's Debt in 1989

During the period 1978 to 1989, Saarstahl and its predecessor companies received massive amounts of assistance from the GOS and GOG. Repayment of these funds eventually became contingent upon Saarstahl returning to profitability and earning a profit above and beyond the losses accumulated after 1978. This contingent repayment obligation was known as a Rückzahlungsverpflichtung (''RZV'').

In 1989, the GOS reached an agreement with Usinor-Sacilor to combine Saarstahl with AD der Dillinger Huttenwerke (''Dillinger'') under a holding company, DHS-Dillinger Hutte Saarstahl AG (''DHS''). Pursuant to the combination agreement and as a condition for sale, in 1989 the GOG and GOS entered into a debt forgiveness contract (Entschuldungsvertrag, or ''EV'') which effectively forgave all the outstanding repayment obligations owed by Saarstahl to the two Governments (*i.e.*, a total of DM 3.945 billion in debt was forgiven). The EV specified, however, that if Saarstahl went bankrupt, the GOG and GOS claims could be revived, but their claims would be subordinated to those of all other creditors.

After several years of unprofitable operation, Saarstahl filed for bankruptcy in 1993 under the German Bankruptcy Regulations (Konkursordnung). In 1994, the GOS bought Saarstahl back from Usinor Sacilor for DM 1. At the time of its bankruptcy, Saarstahl's liabilities exceeded its assets by a factor of four, not including its liabilities to the GOG and GOS. Both Governments filed claims against the Saarstahl bankruptcy estate based on the RZV debt that was conditionally forgiven in 1989. These EV-related claims were rejected by the bankruptcy trustee as invalid in 1995 on the grounds that they were so subordinated that the GOG and GOS would never be repaid. The GOG and GOS chose not to appeal the rejection of their bankruptcy claims, on the grounds that the subordination of their claims made the likelihood of recovery very small, and not worth the high cost of litigating the matter.

In the *Final Affirmative Countervailing Duty Determination: Certain Hot Rolled Lead and Bismuth Carbon Steel Products from Germany*, 58 FR 6233, 6234 (January 27, 1993) (''*Lead and Bismuth*'') and the *Final Affirmative Countervailing Duty Determination: Certain Steel Products from Germany*, 58 FR 37315 (July 9, 1993) (''*Certain Steel*''), we found that Saarstahl's RZVs and similar related debt were forgiven by the 1989 EV, thus conferring a countervailable benefit on Saarstahl as of 1989. Respondents have argued that the attempt to revive the RZVs by the GOG and GOS disqualifies the signing of the 1989 EV as the countervailable event. However, as noted above, the EV-related bankruptcy claims of the GOG and GOS were rejected as invalid by the bankruptcy trustee. Thus, the 1993 bankruptcy proceeding left completely undisturbed the provisions of the 1989 EV agreement. Respondents further argue that the RZVs were worthless at the time of the EV. However, this argument was rejected in *Lead and Bismuth* at 6237, *Certain Steel* at 37323 and the attendant litigation (*see Saarstahl AG v. United States*, 967 F. Supp. 1311 (CIT 1997), and *British Steel plc v. United States*, 936 F. Supp. 1053, 1069–70 (CIT 1996).

Therefore, we determine that the debt forgiveness constitutes a financial contribution in 1989 within the meaning of section 771(5) of the Act. It is a direct transfer of funds from the GOG and GOS providing a benefit in the amount of the debt forgiveness, DM 3.945 billion. Because it was a one time event, we consider it to be a nonrecurring grant. Additionally, we analyzed whether the debt forgiveness provided to Saarstahl was specific ''in law or in fact,'' within the meaning of section 771(5A) of the Act. Consistent with *Lead and Bismuth* at 6233 and *Certain Steel* at 37315, we find that the debt forgiveness provided to Saarstahl was limited to a specific enterprise or industry because it was provided to one company.

To calculate the countervailable subsidy, we used our standard declining balance grant methodology. The amount of the subsidy allocated to the POI was adjusted in accordance with our privatization methodology (described above) to reflect the privatization of Saarstahl in 1989 and the spin-off of Saarstahl from DHS 1994. We then divided the portion of the benefit attributable to the POI by the total sales of Saarstahl during the same period. On this basis, we determine the countervailable subsidy for this program to be 16.62 percent *ad valorem* for Saarstahl.

2. Assurance of Liquidity Provided to Private Banks by the GOS

Toward the end of 1985, the GOS presented a long-term restructuring plan for Saarstahl to Saarstahl's creditors and requested that they forgive loans in the amount of DM 350 million. In a February 20, 1986 letter from the banks to the GOS, the banks agreed to forgive DM 217.33 million of debt owed to them by Saarstahl (DM 216.82 of which was forgiven in 1989), if the GOG and GOS fulfilled certain prerequisites. Two of the prerequisites were that the Governments forgive all debt owed to them by Saarstahl and that the GOS secure the future liquidity of Saarstahl. In an April 4, 1986 letter from the Governor of Saarland responding to the banks, the GOS agreed to forgive all debts owed to it by Saarstahl and to secure the liquidity of Saarstahl as it had in the past.

We determine that in assuring the future liquidity of Saarstahl the GOS provided a financial contribution to Saarstahl. Specifically, this assurance granted a ''potential direct transfer of funds'' within the meaning of section 771(5). By assuring the future liquidity of Saarstahl, the GOS effectively guaranteed that Saarstahl would have the funds to satisfy its future obligations, which included the outstanding debt owed to the banks. This assurance was consistent with the GOS's long history of supporting Saarstahl. We also determine that the assurance was provided to a specific enterprise or industry, Saarstahl.

While the GOS's assurance of future liquidity resembled a loan guarantee, it differed in certain important aspects from loan guarantees typically examined by the Department. First, the GOS did not promise to take responsibility for payment of the debt owed to the banks if Saarstahl failed to perform. Rather, the GOS reached an agreement with the private banks whereby the GOS would maintain Saarstahl's liquidity (*i.e.*, Saarstahl's ability to service its outstanding debts). Additionally, other characteristics of a

typical loan guarantee which potentially confer a benefit were not manifested in the liquidity assurance (*e.g.*, lower borrowing costs in the form of fees and/or reduced interest rates). Because there is no information on the record of this investigation indicating that the liquidity assurance resulted in more favorable terms on the remaining loans, we do not find additional countervailable benefits conferred by this assurance. Rather, the consequence of the assurance was that Saarstahl received partial debt forgiveness from the banks. Because of this, we are not using our normal methodology with respect to loan guarantees. Instead, we are calculating the benefit conferred by the liquidity assurance as the amount of debt forgiven. (We note however, that the assurance of future liquidity could have led to a finding of additional countervailable benefits, if it had resulted in lowering Saarstahl's borrowing costs on the unforgiven portion of the company's debt.)

To calculate the countervailable subsidy, we followed the methodology described in the *Forgiveness of Saarstahl's Debt in 1989* section, above. We then divided the portion of the benefit attributable to the POI by the total sales of Saarstahl during the same period. On this basis, we determine the countervailable subsidy for this program to be 0.91 percent *ad valorem* for Saarstahl.

3. ECSC Redeployment Aid Under Article 56(2)(b)

Under Article 56(2)(b) of the European Coal and Steel Community (''ECSC'') Treaty, persons employed in the iron, steel, and coal industries who lose their jobs may receive assistance for social adjustment. This assistance is provided to workers affected by restructuring measures, particularly workers withdrawing from the labor market into early retirement and workers forced into unemployment. The ECSC disburses assistance under this program on the condition that the affected country make an equivalent contribution. Payments were made to Saarstahl, on behalf of its workers, under Article 56(2)(b).

Since the ECSC portion of payments under this program comes from the operational budget, which is funded by levies on the companies, we determine that this portion (*i.e.*, 50 percent of the amount received) is not countervailable. However, with respect to the portion funded by the GOG, we must decide whether the government payments have relieved Saarstahl of an obligation it would otherwise have.

In Germany, benefits for workers who retire or are laid off are subject to negotiations between labor and management. Those negotiations result in a social plan for each company. Following the policy explained in the Prepension Programs section of the GIA at 37257, we have determined that Saarstahl and its workers were aware when they negotiated their social plans that the German government would pay a portion of the costs. Therefore, unless it can be specifically documented that benefits under this program did not lower a company's social plan obligations, we have determined that one half of the amount paid by the government constitutes a countervailable subsidy.

We consider the benefits provided under this program to be recurring because a company can expect to receive the benefits on an ongoing basis. Therefore, we limited our analysis to funds received in the POI, 1996. In the case of Saarstahl, funds received by the company during the POI relate to five social plans, the last of which relates to Saarstahl's 1993 bankruptcy. We verified that this bankruptcy social plan provides the maximum allowable benefits to workers under German bankruptcy law; therefore, we determine that the knowledge of ECSC 56(2)(b) benefits did not affect the company's social plan obligations. Consequently, GOG payments that relate to this social plan are not countervailable. For the payments made pursuant to the pre-bankruptcy social plans, we first calculated the GOG portion of assistance by taking 50 percent of the funds received by Saarstahl in 1996. As noted above, half of this amount is countervailable. We divided this amount by Saarstahl's total sales during the POI. On this basis, we determine the net subsidy to Saarstahl for this program to be 0.14 percent *ad valorem*.

B. IHSW

1994 IHSW Debt Forgiveness

In 1984, Hamburgische Landesbank Girozentrale (''HLB''), a bank wholly owned by the GOH, provided HSW with a line of credit in the amount of DM 130 million. The line of credit was granted for a period of one year and was renewed every year until 1994. Pursuant to a Kreditauftrag between the GOH and HLB, in the event that HSW failed to service this debt, the GOH was obligated to compensate the HLB for 60 percent of the credit line (*i.e.*, DM 78 million). In 1992 and 1993, HSW suffered significant losses, and the HLB refused to extend the credit line. At that point, the GOH assumed responsibility for the total amount loaned to HSW under the line of credit pursuant to an agreement between the GOH and HLB that extended the Kreditauftrag. At the beginning of 1994, the line of credit totaled approximately DM 174 million (*see* Comment 12 below).

In 1994, HSW was sold to Venuda Investments B.V. (''Venuda''), IHSW's parent company. At the time of privatization, the line of credit totaled DM 154 million. Under the terms of the sale, Venuda paid DM 10 million for HSW. With respect to the line of credit, DM 154 million of the total was sold to Venuda for approximately DM 60 million according to a formula based on the net current asset value of HSW in 1994 (*i.e.*, the difference between current assets and liabilities (less the debt owed to HLB)). Although the sale of HSW was structured to have two components, the sale of shares for DM 10 million and the sale of debt for approximately DM 60 million, we have treated this as a single transaction and we consider the payments made by Venuda to represent the price paid for HSW (*see* Comment 13 below).

Based on our view of the sale of HSW, *i.e.*, that the proceeds from both the share and debt purchase comprise the sale price, we determine that in the year that HSW was sold the DM 154 million owed by HSW under the line of credit was forgiven. This debt forgiveness constitutes a financial contribution in the form of a direct transfer of funds from the GOH providing a benefit in the amount of DM 154 million in 1994. While the Department will not consider a loan provided by a government-owned bank to be a loan provided by the government, *per se*, the actions taken by the GOH during the period 1984 through 1994 regarding the provision of the credit line clearly demonstrate that although the debt was owed to HLB, HLB was acting on behalf of the GOH in this instance (*see* Comment 16 below). Moreover, we analyzed whether the program is specific ''in law or in fact,'' within the meaning of section 771(5)(A) of the Act. Since the debt forgiveness was only provided to one company, we determine that it is limited to a specific enterprise.

To calculate the countervailable subsidy, we used our standard grant methodology. The amount of the subsidy allocated to the POI was adjusted in accordance with our privatization methodology (described above) to reflect the privatization of IHSW in 1994. We then divided the portion of the benefit attributable to the POI by the total sales of IHSW during the same period. On this basis, we determine the countervailable subsidy

for this program to be 5.61 percent *ad valorem* for IHSW.

II. Programs Determined to Be Not Countervailable

A. IHSW

Provision of Land Lease

According to section 771(5)(E) of the Act, the adequacy of remuneration with respect to a government's provision of a good or service ''* * * shall be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.'' Particular problems can arise in applying this standard when the government is the sole supplier of the good or service in the country or within the area where the respondent is located. In these situations, there may be no alternative market prices available in the country (*e.g.*, private prices, competitively-bid prices, import prices, or other types of market reference prices). Hence, it becomes necessary to examine other options for determining whether the good has been provided for less than adequate remuneration. This consideration of other options in no way indicates a departure from our preference for relying on market conditions in the relevant country, specifically market prices, when determining whether a good or service is being provided at a price which reflects adequate remuneration.

With respect to the leasing of land, some of the options may be to examine whether the government has covered its costs, whether it has earned a reasonable rate of return in setting its rates and whether it applied market principles in determining its prices. In the instant case, we have found no alternative market reference prices to use in determining whether the government has leased the land for less than adequate remuneration. As such, we have examined whether the government's price was determined according to the same market factors that a private lessor would use in determining whether to lease land to a company.

Pursuant to a 1986 lease agreement between HSW and the GOH, IHSW leases land located in the port of Hamburg from the GOH. The GOH owns approximately one-third of the commercial and industrial land in the port area and leases that land under approximately 450 different lease agreements. The GOH lease rates in the port area are established by the GOH Finance Deputation, an administrative authority established by the City Parliament of Hamburg consisting of government officials and civic members. The Finance Deputation sets the lease rates according to such factors as: (1) market value of property, (2) potential for use and facilities available in specific areas, (3) rentals for comparable areas being used, and (4) terms and conditions being paid in other Northern ports.

The GOH uses a standard lease for all enterprises in the port area. The lease has four rate categories which are based on the location of the property and other attributes (*e.g.*, land-locked, direct water access, railway access). Thus, IHSW's lease contains the same terms as all other similar lease agreements signed with enterprises in the port area.

We verified that there are a very large number of enterprises currently leasing land in the port from the GOH. These enterprises cover a wide variety of industries, such as container storage and shipping, oil tanks and refineries, shipyards, car importers, and coffee and grain mills and storage facilities. There are no special provisions made for different industries.

Because IHSW pays a standard rate charged by the GOH to all enterprises leasing land similar to IHSW's and because these prices are set in reference to market conditions, we determine that IHSW's lease rate is not countervailable.

Adequacy of remuneration is a new statutory provision which replaced ''preferentiality'' as the standard for determining whether the government's provision of a good or service constitutes a countervailable subsidy. The Department has had no experience administering section 771(5)(E) and Congress has provided no guidance as to how the Department should interpret this provision. This case and the other concurrent wire rod cases, mark the first instances in which we are applying the new standard. We anticipate that our policy in this area will continue to be refined as we address similar issues in the future.

B. BES

FRG Backing of THA Loan Guarantees

The German Democratic Republic (''GDR'') created the Treuhandanstalt (''THA'') via the Trusteeship Act of June 17, 1990. THA became the owner and administrator of all non-private GDR enterprises. THA's long-term goal was to privatize these enterprises. Following the monetary union of the Federal Republic of Germany (''FRG'') and the GDR on July 1, 1990, THA issued a global loan guarantee to ensure the liquidity of GDR enterprises. THA guarantees were available to all GDR enterprises in need of them and were backed up by the FRG's commitment to fund THA's activities, pursuant to Article 17 of the *Treaty Between the Federal Republic of Germany and the German Democratic Republic Establishing a Monetary, Economic and Social Union* effective July 1, 1990.

Since THA had no independent sources of funds and the GDR economy was in disarray, the THA loan guarantees standing alone would have been worthless and, as such, would not have motivated private banks to lend to GDR enterprises. Rather, it was the secondary backing of the guarantees by the FRG that led private banks to lend to GDR enterprises. It follows that any financial benefit to GDR enterprises in the form of guaranteed loans flowed from the provision of the FRG guarantee.

BES's predecessor, Stahl- und Walzwerk Brandenburg (''SWB'') took out three THA-guaranteed loans before unification and one shortly after unification. A little over a year after unification, THA assumed SWB's guaranteed loans.

Prior to German Unification on October 3, 1990, the GDR was recognized by the United States as a sovereign country—separate from the FRG. Therefore, any provision of assistance by the FRG to former GDR enterprises is transnational assistance—assistance not provided by the government having jurisdiction over the enterprises. The preamble to the *Proposed Regulations* summarizes our practice with respect to transnational assistance:

> Occasionally, the Department has encountered programs which are funded through foreign aid, either on a bilateral or multilateral basis. In such instances, the Department (and Treasury before it) has determined such programs to be noncountervailable, to the extent that funds for the program are not provided by the government of the country in question.

Section 355.44(o)(1) of the *Proposed Regulations* elaborates on the above:

> [A] countervailable benefit does not exist to the extent the Secretary determines that funding for a benefit is provided by a government other than the government of the country in which the merchandise is produced or from which the merchandise is exported, or by an international lending or development institution.

Based on the foregoing, we find that the secondary backing by the FRG of THA loan guarantees on borrowings prior to Unification is transnational assistance and, therefore, not

countervailable. Moreover, when THA assumed the debt it was merely fulfilling the obligations it had taken on as guarantor prior to Unification. Since the guarantees upon which THA acted were non-countervailable in nature, the subsequent debt assumption did not give rise to a countervailable benefit.

As noted above, SWB took one loan under the THA global guarantee after Unification. However, even if we were to treat the entire amount of the loan principal as a grant, the amount of the benefit would be expensed in the year of receipt, which was prior to the POI. Since there is no benefit allocable to the POI, we have not analyzed whether FRG backing of THA loan guarantees post-Unification gives rise to a countervailable subsidy.

III. Programs Determined to Be Not Used

Based on the information provided in the responses and the results of verification, we determine that the following programs were not used:

A. Saarstahl

Saarstahl's Bankruptcy Social Plan

In 1993, Saarstahl negotiated a new social plan in accordance with German bankruptcy law. This new plan provided two and one-half months salary to laid-off workers, the maximum allowable benefit under bankruptcy law. To ensure that laid-off workers did not have to wait for the bankruptcy proceeding to be settled before receiving their money, the GOS purchased the workers' claims against Saarstahl, paid off the workers and then filed a claim under its own name against Saarstahl in the bankruptcy proceeding. The claim filed by the GOS was in the same amount as a claim filed directly by the workers would have been and was accepted by the bankruptcy court in its full amount. Therefore, the potential liability against Saarstahl in respect of social plan benefits was unchanged by virtue of the GOS filing the claim instead of the workers. Since the action by the GOS in pre-paying the bankruptcy social plan benefits did not alter Saarstahl's potential liabilities under bankruptcy, the GOS has not assumed a legal obligation of Saarstahl. As a result, GOS payments to workers under Saarstahl's bankruptcy social plan do not confer a countervailable benefit.

B. IHSW

1984 Equity Infusion

In 1984, HSW emerged from bankruptcy proceedings and was taken over by a limited partnership called Protei Produktionsbeteiligungen GmbH & Co. KG (''Protei''). The vast majority of the equity Protei invested in the new HSW was provided via a DM 20 million loan by HLB. This DM 20 million financing was provided to HLB by the GOH. HSW used this capital to purchase the assets and business of Old HSW from its receiver.

According to the terms of the contract which provided these funds, repayment became due from the profits of Protei which, in turn, were derived from HSW's profits. The contract also provided that Protei could not liquidate HSW without the approval of HLB, and HLB reserved rights regarding the appointment of management and members of the supervisory committee. Between 1987 and 1988, DM 2.8 million in ''principal'' payments and DM 2.7 million in ''interest'' were paid by HSW, leaving an unpaid balance of DM 17.2 million.

We have determined that the DM 20 million ''loan'' to Protei should be treated as equity received in 1984 in light of the terms of the financing. Although the money was given in the form of a loan to Protei, the circumstances of the loan indicate that the funds were more in the nature of equity.

First, as noted above, payments on the loan were contingent on HSW being profitable: so, if the company never became profitable, there was no obligation for the loan to be repaid. Second, under the terms of the loan, Protei relinquished pro rata its share of profits from HSW based on the ratio between the DM 20 million loan and the total share capital of HSW. Hence, HLB's share of any future profits generated by HSW would be calculated as if the loan were paid-in capital. Third, although the loan was made to Protei, the particular structure of the partnership suggests that Protei served as a mechanism for the GOH to invest in HSW. Fourth, as noted above, the lender, HLB, imposed numerous conditions on Protei which served to insert HLB into important ownership/management decisions affecting HSW. Finally, when this loan was examined by the Commission of the European Communities (the ''Commission'') to determine whether it constituted state aid, the Commission determined that the loan should be considered as risk capital. Among the data developed by the Commission was a statement by the GOG that the GOH ''was exposed to financial risk fully comparable to the risk a shareholder injecting risk capital has to bear without becoming owner of the company.'' (The Commission's decision is printed in the *Official Journal of the European Communities*, No L 78, Vol 39, March 28, 1996, at pp. 31 ff.) While the Commission's characterization of this loan as equity is not dispositive, their reasoning in this instance is consistent with our analysis.

Given our determination that the DM 20 million financing in 1984 should be treated as equity and in light of HSW's AUL of 10 years, this 1984 equity infusion would not give rise to benefits in the POI even if the infusion were a countervailable subsidy. Therefore, we are treating this equity as well as two other programs as ''not used':

1. *1984 Steel Investment Allowance Grant*
2. *1984 Federal Ministry for Research and Technology (BMFT) Grant*

We have determined that subsidies received by IHSW under the following programs were also not used because they were repaid prior to the POI:

3. *Structural Improvement Assistance Grant*
4. *Loan Guarantee to HSW*

C. BES

Special Depreciation

The special depreciation program described in Section 4 of the Assisted Areas Act is the current manifestation of a 1990 GDR directive that allowed investors to claim special depreciation at an accelerated rate. This program was implemented in tandem with the Investment Allowance Act by the GDR to provide investment incentives to help enterprises in the former GDR (New States) transition into a market-based economy. After Unification, FRG lawmakers included an amended special depreciation provision, along with the Investment Allowance Act, in the June 24, 1991 Tax Modification Law (StAendG 1991). A 1996 FRG law forbids the special depreciation provision from being extended beyond the end of 1998.

The GOG has claimed that this program is not countervailable because it is a ''green light subsidy.'' We have not determined whether, in fact, this program meets the green light criteria within the meaning of section 771(5B)(C), of the Act, because any benefit would arise at the time of filing a tax return. Because BES did not file a tax return during the POI, we are treating this program as not used.

IV. Other BES Programs Examined

BES received assistance under two other programs for which the GOG has requested green light treatment: (1) Investment Grants Under the Regional Economies Act and (2) Investment Allowance Act Grants. BES received

grants under these programs in the years 1994 through 1996. However, regardless of whether we found the program to be countervailable, the combined net subsidy to BES does not rise above the *de minimis level.* Accordingly, we do not consider it necessary to address the issue of whether these programs are non-actionable as regional green light subsidies.

Interested Party Comments

Saarstahl

Comment 1: Effect of Bankruptcy on Saarstahl's 1989 Debt Forgiveness: Saarstahl argues that because the GOG and the GOS filed claims against it in the German bankruptcy court with respect to the RZVs, the 1989 debt forgiveness should be disregarded. Specifically, Saarstahl contends that the GOG and GOS did not forego revenue due to them under the RZVs in 1989, because the debts were revived in 1993. Moreover, when the bankruptcy claims were rejected from 1993 through 1996, Saarstahl's debt was forgiven under the non-specific German bankruptcy law and not under a specific relief action take by the Governments. Saarstahl claims that the Department may not disregard the revival of the Governments' rights to repayment just because the claim was later rejected by the bankruptcy trustees.

Petitioners state that the bankruptcy was an irrelevant subsequent event that does not affect the benefit stream from the countervailable 1989 forgiveness. Petitioners argue that the RZVs were not eliminated or restructured by the bankruptcy proceeding because the claims themselves were invalid. The revival contingency contained in the EV with respect to bankruptcy, according to petitioners, was structured in such a way as to make it meaningless. Because the claims were to be subordinated below all others, the EV made it impossible to collect on the RZVs. Thus, the EV effectively forgave the RZVs in 1989 because the revival contingency was structured not to be a real contingency at all.

Department's Position: We have continued to treat Saarstahl's RZVs and similar government debt as having been forgiven by the 1989 EV. We believe that the information in this case clearly supports this position. First, in its questionnaire response of June 30, 1997, Saarstahl states that if bankruptcy is initiated on grounds of insolvency, then subordinated claims do not have any asset value and, thus, cannot be considered a valid bankruptcy claim. Hence, as noted by petitioners, the revival contingency contained in the EV was structured in such a way as to make its possible application meaningless.

Second, Usinor Sacilor required that the RZVs be forgiven by the GOG and GOS prior to the combination of Saarstahl and Dillinger. This clear precondition to the combination of the two companies, which was accepted and fulfilled by the two Governments, demonstrates that from a commercial actor's perspective, the RVZs were a real liability. Moreover, the fact that Usinor Sacilor accepted the EV as the legal instrument by which Saarstahl's RZV debt was forgiven demonstrates the validity of the debt forgiveness element of the EV from a commercial perspective. Finally, information obtained at verification indicates that the GOG realized, prior to the filing of its claims, that the bankruptcy proceeding would not result in the reinstatement of the RZV debt obligation. Indeed, the GOG actions appeared to be largely perfunctory in nature reflecting other concerns, none of which included the realistic expectation that the claims would be recognized by the bankruptcy court (*see* GOG verification report at page 12). Therefore, we conclude that the debt obligations contained in the RZVs were relieved in 1989 and that the bankruptcy proceedings had no meaningful impact on the 1989 debt forgiveness agreement.

Comment 2: The Nature and Timing of Saarstahl's Subsidies: Saarstahl states that the Department erred by not allocating any portion of the assistance received by Saarstahl to the company's production in the years 1978 to 1988. Saarstahl asserts that the government assistance was a subsidy when it was first received because it did not comport with commercial considerations. In Saarstahl's view, the Department cannot delay the countervailable event until 1989 (when the debt forgiveness was agreed to), but rather must countervail the subsidies when they were first received.

Petitioners note that the Department has rejected most of these allocation arguments in the past, with the approval of the CIT. Petitioners argue that the Department should use the same analysis of the 1989 EV debt forgiveness as reflected in *Lead and Bismuth, Certain Steel,* and the *Preliminary Determination.* For petitioners, a contingent liability is different from the benefits allocated or capped by the Department's grant allocation formula. The recipient is able to use the full value of the subsidy upon receipt, but must repay all or part of the payment if the contingency occurs. Because of this repayment obligation, the face value of the contingent obligation is only treated as a benefit when forgiven, as occurred in 1989.

Department's Position: We verified that prior to 1989 Saarstahl did have a financial obligation to repay the RZVs. If the Department had examined Saarstahl's RZVs prior to 1989, it would have countervailed them as contingent liabilities and calculated the benefit by treating the outstanding face amount as an interest-free loan. This is consistent with the Department's long-standing policy with respect to contingent liabilities (*see e.g., Certain Steel from Sweden,* 58 FR 37385, 37388 (July 9, 1993)). Upon the forgiveness of such contingent liabilities, it is the Department's policy to treat the amount forgiven as a grant in the year of forgiveness (*see e.g., Certain Steel from Sweden* at 37392). We are not persuaded by Saarstahl that we should not apply our traditional methodology to the facts of this case.

Comment 3: RZVs as Equity: Saarstahl claims that the Department's decision to treat the 1989 forgiveness as the countervailable event rather than the receipt of the funds in 1978–1988 is inconsistent with the Department's treatment in this case of government assistance made to the owners of HSW. Saarstahl states that in the preliminary determination the Department treated a DM 20 million government loan to HSW as equity received in 1984. Saarstahl quotes the Department as saying, ''if the company never became profitable, there was no obligation for the loan to be repaid.'' (*Preliminary Determination* at 41950). Saarstahl states that the same situation is true for the monies received by Saarstahl; the economic effect of the RZVs was no different than equity. Saarstahl argues that the subsidies should be treated as equity capital because they served to offset massive losses that threatened the company's solvency. For Saarstahl, the equity capital nature of the assistance is even more clear in light of the fact that the GOG and GOS held a majority interest in Saarstahl during some of the time when the RZVs were in effect. Saarstahl asks that the Department treat the contingently repayable loans given to both Saarstahl and HSW in the same manner.

Petitioners state that the methodology used for IHSW's DM 20 million capital replacing loan is not an appropriate comparison to Saarstahl's situation. Petitioners argue that the forgiveness of the credit line in 1994 is a more appropriate comparison. While the credit line was first granted in 1984, petitioners note that the Department did not treat the principal as a benefit until

the loan was forgiven in 1994. Based on this comparison, petitioners find a consistent treatment of the two companies. Petitioners counter the RZVs-as-equity argument by referring to the hybrid instruments analysis from the GIA. Petitioners note that the hybrid instruments analysis' first test defines an instrument as debt if a repayment obligation exists when the payment is provided. Thus for petitioners, because the RZVs had a repayment obligation they cannot be treated as equity.

Department's Position: The terms of the assistance given to both IHSW and Saarstahl differ. Of particular note are the managerial and ownership rights conferred upon IHSW at the time the financing was provided. The terms of the RZVs did not confer similar rights to the GOS or GOG. While the GOS and GOG did become Saarstahl's majority shareholder in 1986, this was after an overwhelming majority of assistance had been disbursed and after all dispensation agreements had been put in place. While it is true that repayment in both agreements was contingent upon profitability, this contingency alone is not enough to transform a debt instrument to equity. As noted above in the program description, the repayment contingency for IHSW was just one of many terms that lead us to determine the assistance was equity.

Comment 4: Forgiveness of Saarstahl's Debt by the Private Banks; Saarstahl contends that the Department should treat the private bank loan forgiveness as non-countervailable. Saarstahl notes that for assistance to constitute a countervailable subsidy it must be provided, directly or indirectly, by a government or other public entity. According to Saarstahl, when the private banks forgave debt owed to them by Saarstahl the banks acted in their own economic self-interests and their actions cannot be attributed to the GOG and GOS.

Saarstahl notes that one of the lead negotiators on behalf of the banks confirmed at verification that the decision to forgive a portion of their loans to SVK was based entirely upon commercial considerations. The bank representative stated that the statement made by the GOS regarding the assurance of SVK's future liquidity had no effect upon the banks' decision to forgive the debt.

Saarstahl adds that if the Department were to treat the private bank loan forgiveness as a countervailable subsidy, the economic benefit accrued to SVK in 1986, not 1989. Saarstahl claims that while the bank loans were not legally forgiven until 1989, the banks treated the loans as if they were forgiven on January 1, 1986, as evidenced by the fact that they did not require SVK to make any principal or interest payments with respect to the portion of debt being forgiven after that date.

Petitioners argue that the evidence demonstrates that the assurance of liquidity played a crucial role with respect to the debt forgiveness by the private banks. Petitioners note that in the banks' February 20, 1986 letter to the GOS, the banks clearly set forth as a prerequisite for their debt forgiveness that the GOS secure the liquidity of Saarstahl. Petitioners state that in its April 4, 1986 response to that letter, the GOS stated that it would, as in the past, secure the liquidity of Saarstahl. Petitioners further note that the Department has already determined that the banks acted on the GOS's assurance of liquidity and that this determination was sustained by the CIT.

Department's Position: We agree with petitioners. The exchange of letters between the GOS and the banks demonstrates that the banks agreed to forgive a portion of SVK's (Saarstahl's predecessor) debt only on the condition that the GOS guarantee the liquidity of the company. In fact, the banks referred to the liquidity assurance as a ''prerequisite'' for their action. While the banks may have been acting in their own economic self-interests when they forgave the debt, the GOS's liquidity guarantee was a factor that made the debt forgiveness more commercially reasonable because the banks were assured that the GOS would maintain SVK's ability to service its remaining debts. Thus, the liquidity assurance provided the incentive necessary to ensure the banks' debt forgiveness.

With respect to the statements made by one of the banks' negotiators at verification, we have weighed the negotiator's claims against the written correspondence exchanged between the banks and the GOS. We have accorded greater weight to the written correspondence because it was contemporaneous with the events in question and reflects the position of all of the lenders as opposed to the views of a single official from a single bank.

Lastly, although SVK was not required to make principal or interest payments with respect to the portion of debt forgiven after January 1986, the loans were still recognized by the company as liabilities until they were forgiven in 1989. In accordance with the Department's standard practice for calculating the benefit from debt forgiveness, the benefit does not accrue to the company until the debt is actually forgiven. While Saarstahl may have enjoyed a benefit from not paying interest and principal as of 1986, the banks' decision not to collect interest and principal during that period represented a moratorium on debt payments until the forgiveness occurred in 1989.

Comment 5: Effect of Saarstahl Privatization; Saarstahl states that Congress revised the definition of subsidy, bringing countervailing duty law in accordance with the Uruguay Round, to say that a subsidy would only exist if a financial contribution is given to a person and that person thereby receives a countervailable benefit. With respect to this definition, Saarstahl argues that neither it, nor its parent company, DHS, received any countervailable benefit from the aid given to SVK (Saarstahl's predecessor company). Saarstahl notes that the government assistance to SVK was provided prior to privatization and that the buyers of SVK made a fair market payment in an arm's length transaction. Saarstahl further argues that the price paid for SVK constituted adequate remuneration and, thus, did not result in a subsidy being received. Hence Saarstahl concludes, assistance received by SVK prior to privatization should not be countervailed with respect to Saarstahl.

Petitioners cite the decision of the Court of Appeals for the Federal Circuit in *Saarstahl AG* v. *United States,* (78 F.3d 1539, 1544 (Fed. Cir. 1996)) to counter respondent's argument. Petitioners claim that the issue is whether the subsidies paid to Saarstahl survived the privatization and that the Department's decision in its preliminary determination, that the subsidies did survive the privatization, is in accordance with the deference given to the Department by the courts in such matters.

Department's Position: Section 771(5)(F) of the Act makes clear that the sale of a company at arm's length does not automatically extinguish prior subsidies. As we stated in the *Final Affirmative Countervailing Duty Determination; Certain Pasta from Italy Pasta* 61 FR 30287, 30289 (June 14, 1996), the methodology applied by the Department in *Certain Steel* is consistent with the new law. In this investigation we have applied this methodology to the sale of Saarstahl to DHS and to the sale of Saarstahl to the GOS.

Comment 6: Treatment of 1989 Repayment Amount; Petitioners argue that because the GOS repurchased Saarstahl in 1994, the repayment of subsidies that occurred in 1989 with the privatization should be reversed. Petitioners argue that the Department

should add the subsidy repayment back to Saarstahl's total benefit. Petitioners cite *Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom,* 61 FR 20238 (May 6, 1996) (*''UK Lead and Bismuth''*) to support their argument. Petitioners claim that in that case, the Department decided to aggregate the benefits of a company and its previously spun-off subsidiary when the two were reunited. Petitioners state that the Department should follow the same methodology here because the GOS's purchase of Saarstahl in 1994 placed the company in the same position it occupied prior to the 1989 privatization. Petitioners fear that if the Department does not aggregate the subsidies, it will establish a precedent whereby governments can eliminate subsidies by privatizing an entity and then reacquiring it and, thus, avoid the application of the countervailing duty statute.

Saarstahl argues that the GOS's purchase of it in 1994 did not reverse the 1989 privatization and corresponding subsidy repayment. When Saarstahl was privatized in 1989, the GOS received stock in Saarstahl's holding company, DHS. The GOS still holds stock in DHS and, thus, it has retained the repayment received in the privatization transaction.

Department's Position: Petitioners' citing of *UK Lead and Bismuth* is misplaced. With respect to the ''spin-off'' and ''spin-in'' issues in *UK Lead and Bismuth,* the Department faced an issue of allocation of prior subsidies between business entities, not the repayment of prior subsidies to a government. In *UK Lead and Bismuth,* a subsidiary of one company was spun off, taking a portion of the benefit of subsidies with it. There is no repayment of subsidies under our methodology in such a transaction, but rather an allocation of the benefit from prior subsidies between a productive unit and a corporate entity. When the productive unit was reunited with the parent company, the formerly apportioned subsidies were reunited as well. The privatization and corresponding repayment to the GOS with respect to Saarstahl does not involve an issue of allocation. When the GOS privatized Saarstahl in 1989 it received stock in DHS, which represents partial repayment and, therefore, extinguishment of prior subsidies. Thus, we are not adding back the amount considered to be repaid in 1989.

Comment 7: Creditworthiness of Saarstahl in 1989; Saarstahl argues that the Department should consider financial information pertaining to 1989 when evaluating the creditworthiness of the firm in that year. Specifically, Saarstahl is interested in the Department taking into account the effects of privatization on its financial health and its increase in net worth.

Petitioners state that a creditworthy analysis does consider a company's future prospects, but only in the form of market studies, country and industry economic forecasts, and project and loan appraisals prepared prior to the loan agreement. The information present with respect to the privatization of Saarstahl is not sufficient for either the Department, or a commercial lender, to determine a company's creditworthiness.

Department's Position: While a company's future financial prospects can be a factor in a creditworthiness determination, we do not have on record any market studies, country or industry economic forecasts or any other information regarding the company's prospects after privatization. Although we do have an excerpt from an asset appraisal, the purpose of this appraisal was to value the assets of Dillinger and Saarstahl prior to their combination. The appraisal does not meaningfully address the future financial prospects of either Saarstahl or DHS.

Furthermore, the mere fact that the net worth of the company rose after privatization does not make the company creditworthy. Standing alone it does not provide sufficient evidence that Saarstahl was creditworthy, especially in light of the company's poor economic performance in previous years.

Comment 8: Maximum Spread on Commercial Financing: Saarstahl argues that the Department should use a spread of 1.75 percentage points above the yield on government bonds as opposed to a spread of two to construct the uncreditworthy discount rate. The 1.75 point spread is based on the Department's conversation with a German private bank official, as outlined in the Department's GOS verification report.

Petitioners state that the Department should reject any request to lower the discount rate. However, if the Department does use the information provided by the private bank, it should still add a risk premium.

Department's Position: In its May 27, 1997 response, Saarstahl reported that German banks base interest rates for long-term commercial loans on the government bonds yield, adding a spread of zero to two percent to account for the creditworthiness of the borrower. The bank representative we spoke to at verification confirmed this mechanism, but noted that in the years prior to 1990, the spread was from 0.8 to 1.75 percent. When determining a discount rate for uncreditworthy firms, the Department will use the highest long-term commercial loan rate commonly available and then add a risk premium in order to reflect the inability of a company to obtain commercial credit. In this case then, we are using the yield on government bonds, and adding the 1.75 percentage least-creditworthy margin and a risk premium.

Comment 9: Purchase Price for Saarstahl: Petitioners argue that the creation of DHS was a merger of Saarstahl and Dillinger. Each owner contributed its company and in return got an amount of shares in DHS that reflected the value of its contribution. Petitioners note that the GOS contributed shares and cash in the creation of DHS and received back shares worth an equal amount. Because of this, petitioners argue that the GOS did not receive any compensation in the 1989 transaction. Instead, it held on to what it already had and then bought a greater share of DHS. Based on this, petitioners see the real purchase price for Saarstahl as zero with the result that there should be no repayment of subsidies.

Saarstahl argues that the Department did not overstate its purchase price. Rather the Department properly established the price for the GOS's interest in Saarstahl as the appraised value of the DHS stock that it received in exchange for its cash and share contribution. Saarstahl states that it is the nature of any commercial transaction to give up a valuable in return for another valuable of equal or greater value. In this instance, the GOS gave stock and cash and in return received DHS stock. Thus, the value of the DHS stock was an appropriate mechanism to establish the purchase price.

Department's Position: We agree with Saarstahl. With the privatization of Saarstahl in 1989, the GOS did not retain what it already had (shares in Saarstahl) and then buy a little more (shares in DHS). The GOS held a majority interest in Saarstahl before the privatization and after the privatization held a minority share in DHS. While there is no denying that Saarstahl was a part of DHS, the GOS's interest in the company had changed. The value of DHS was determined by an independent auditor and the GOS's share in this company reflects the value it received and thus the value it paid for the company. Thus, the transaction serves as the basis for calculating the purchase price of Saarstahl.

Comment 10: Penalizing Saarstahl Under Countervailing Duty Law and VRA. Saarstahl argues that because its exports were limited under a voluntary restraint agreement (''VRA'') from November 1, 1982, to March 31, 1992, the Department's actions in this case are unjust. According to Saarstahl, under the VRA, the United States did not initiate any antidumping or countervailing duty investigations during the period of the agreement. Saarstahl argues that going after such subsidies now penalizes Saarstahl after already facing export restrictions.

Petitioners state that Saarstahl received benefits from 1978 to 1989 in the form of interest-free contingent liabilities and these benefits were not countervailed by the Department, regardless of the export restraints. Petitioners find the Department's treatment of the RZVs as contingent obligations, which were forgiven in 1989, to be reasonable.

Department's Position: The VRA agreements neither permitted the provision of countervailable subsidies during the time in which the agreements were in effect, nor provided recipients of countervailable subsidies immunity from the imposition of countervailing duties after their expiration.

Comment 11: Asset Revaluations and Extraordinary Depreciation in Saarstahl's AUL: Petitioners contend that Saarstahl's changes to its fixed asset valuation and depreciation practices in 1989 and 1993 distort the AUL calculation. With respect to the 1989 privatization, petitioners argue that the new owner valued the transferred assets at their net book value (*i.e.*, the gross value minus accumulated depreciation). The company then treated the 1989 net value as the gross value in subsequent years. Petitioners argue that consistent with its position in the *Final Results of Redetermination Pursuant to Court Remand on General Issue of Allocation, British Steel plc v. United States,* Consol. Ct. No. 93–09–00550–CVD at 48 (June 30, 1995) (''*British Steel Remand*''), the Department should reject net book values in the AUL calculation because their use results in a calculation of the average remaining life of the assets, not the average useful life.

With respect to the extraordinary depreciation claimed by Saarstahl in 1993, petitioners note that the Department has stated in the *Notice of Proposed Rulemaking and Request for Public Comment,* 62 FR 8818, 8828 (February 26, 1997) that it may be necessary to make normalizing adjustments for factors that may distort the AUL calculation. The Department goes on to list extraordinary write-downs, as one situation that would require such an adjustment.

Further, petitioners dispute Saarstahl's claim that the value of the transferred assets should be viewed as the cost of acquiring those assets and, hence, treated as the gross book value of those assets after privatization. First, petitioners contend that the value of the assets transferred to Saarstahl from DHS (*i.e.,* at net book value) differed from the value of the same assets in the context of the privatization (*i.e.*, at ''modified book value''). Second, petitioners claim that the transfer of assets in this privatization was in the nature of a corporate restructuring and that the Department has determined that such restructuring does not constitute a ''sale.'' Lastly, petitioners contend that Saarstahl's compliance with Generally Accepted Accounting Principles should not affect the determination as to whether the company's AUL is valid. Because the calculation yields the average remaining useful life of the assets rather than an average useful life, it is distortive.

Saarstahl contends that the additional depreciation expenses taken by the company in 1989 and 1993 did not distort the AUL because these adjustments were necessary to bring the asset values reported in the company's financial records in line with the actual economic value of those assets. Citing the *British Steel Remand*, respondent claims that the Department routinely includes extraordinary depreciation expenses in its calculation of AUL because the inclusion of such expenses results in a calculation that better approximates a company's actual experience.

Saarstahl disagrees with petitioners' claim that the company used net book values in its AUL calculation. Instead, with the privatization in 1989, it used the cost of acquisition for the assets. In Saarstahl's view, this accounting treatment comports with the economic and commercial realities of the transfer. Saarstahl further argues that the 1989 privatization was not simply an internal corporate transfer as alleged by petitioners. In this privatization, the productive assets were transferred to a new owner.

Saarstahl adds that while the asset values listed in Saarstahl's balance sheet are different from those in the appraisal report related to the privatization transaction, this is explained by the fact that the values listed in the appraisal report and in the companies' financial statements were prepared for different purposes and include different items. Saarstahl notes, however, that these differences in no way led to an artificial suppression of Saarstahl's AUL. To the contrary, the amount recorded in the company's financial statements is actually higher than that suggested in the appraisal report.

Department's Position: We agree with petitioners' argument that Saarstahl's AUL calculation is distorted. In particular, given the change in the gross book value of Saarstahl's assets, the methodology employed in our preliminary determination yields what is essentially a mixture of the average useful life of the assets and the average remaining useful life in 1989. This is evident when we compare the AUL amounts calculated on an annual basis for years prior to 1989 and the amounts after the privatization and before Saarstahl's bankruptcy in 1993. This change in the gross book value had a significant impact upon the cumulative AUL calculated by the Department over a ten-year period (*i.e.*, 1987 through 1996). In this case, the impact was significant enough that the AUL could not be calculated from Saarstahl's own records. Thus, to approximate Saarstahl's AUL, we have used the depreciation schedule in Germany.

IHSW

Comment 12: Forgiveness of the DM 154 million Credit Line Owed to HLB by HSW: IHSW contends that the Department erred in preliminarily determining that the alleged forgiveness of the DM 154 million credit line owed to HLB by HSW constituted a countervailable subsidy. IHSW asserts that, pursuant to section 355.44(b)(9) of the *Proposed Regulations*, the Department will not consider a loan provided by a government-owned bank, *per se*, to be a loan from the government unless the government-owned bank: (1) Provided the loan at the direction of the government or with funds provided by the government, and (2) the terms of the loan were inconsistent with commercial considerations. IHSW argues that the HLB made prudent business decisions when it increased the credit line at the end of 1992 and 1993, because if the line of credit had not been extended, the company would have gone bankrupt, and the HLB's claims would have been worthless. Thus, according to IHSW, the increases were based on legitimate business considerations and were not at the direction of the GOH. With respect to the second factor considered by the Department, IHSW contends that the line of credit contained commercial loan terms (*e.g.*, interest rate, security) which were not inconsistent with commercial considerations.

Petitioners claim that IHSW's justification, or lack of justification, for

extension of the line of credit is by no means dispositive of whether the subsequent forgiveness of the debt under the line of credit was countervailable. Nonetheless, petitioners provide several arguments as to why the HLB acted under GOH compulsion and not in a commercially reasonable manner when it initially provided and subsequently increased the credit line to HSW. First, petitioners note that at the time of Old HSW's bankruptcy in 1983, the company owed DM 181 million to the GOH and the HLB. Petitioners argue that, given the history between HSW and the HLB as of 1984, it is completely illogical to suggest that a lender, after losing a significant amount of money on a debtor, would respond by loaning more funds to the same bad debtor.

Second, petitioners note that the line of credit was extended to HSW by the HLB pursuant to a 1984 *Kreditauftrag,* according to which the GOH was to compensate the HLB for 60 percent of the line of credit if HSW failed to service its debt. Petitioners state that GOH officials confirmed at verification that the *Kreditauftrag* was an exceptional occurrence.

Third, petitioners note that HSW's financial condition deteriorated in 1992 and 1993. Citing the EU decision concerning state aid granted by the GOH to HSW, petitioners contend that at the end of 1993 the HLB refused to prolong the credit line. At that point, according to petitioners, the GOH was forced to provide a *Kreditauftrag* covering 100 percent of the line of credit. Petitioners argue that the GOH's willingness to give a blanket guarantee to a company whose situation was steadily worsening eliminated any pretense that the extension of the line of credit was commercially reasonable.

Fourth, petitioners note that the EU concluded that ''no private investor, in the situation prevailing in December 1993, would have been prepared to inject new risk capital * * * {T}he behaviour of the {the city of Hamburg} could not be deemed to be behaviour of a normal investor in a market economy.'' Petitioners assert that the law on *kapitalersetzende Darlehen* (''KSD's''), a legal term that translates as ''capital-replacing loans,'' buttresses this conclusion. KSD's are treated as risk capital and are only repaid in insolvency proceedings if all other creditors receive full compensation. By the end of 1993, it was recognized that loans from the HLB or GOH would be subordinated to the claims of all other creditors in the case of bankruptcy. Thus, petitioners argue that no reasonable lender or investor would put further money in the company knowing that it would go to the pockets of other lenders who were less subordinated.

Lastly, petitioners contend that because the GOH refused to provide the Department with a report that explained the rationale for extending the line of credit, the Department should make an adverse inference that the HLB indeed refused to extend the line of credit and that it was acting under government compulsion. Petitioners add, however, that even without the use of adverse inferences, the evidence on the record shows that the HLB agreed to extend the credit line only if the GOH assumed full responsibility for the line of credit.

Department's Position: While we agree with IHSW's assertion that the Department will not consider a loan provided by a government-owned bank, *per se,* to be a loan from the government, the history of interaction among the GOH, the HLB, and HSW demonstrates that the HLB did not act in a commercially reasonable manner, but rather at the direction of the GOH, when it provided and subsequently extended the line of credit to HSW. Moreover, the credit line ceased to be consistent with commercial considerations when the HLB refused to extend the credit line in 1993.

The history of interaction among the GOH, HLB, and HSW demonstrates that the line of credit was clearly a loan provided at the direction of the GOH. In 1983, at the time of HSW's insolvency, the HLB held 49 percent of the company's shares and had claims totaling DM 181 million (DM 129 million of the claims was covered by the GOH). Also at that time, the bankruptcy trustee determined under German law that the funds loaned by the HLB did not qualify as claims against the insolvent estate because they were considered KSD's. Since the GOH (which had guaranteed a portion of the loans provided by the HLB) and the HLB had no chance of recovering their money if HSW was liquidated in insolvency, they jointly decided to restructure HSW to continue operations under a new company.

Also in 1984, the GOH provided HSW with DM 20 million in equity, through the HLB and Protei, so that the company could continue operations. This contribution contained strict contractual obligations, such that the EU determined that HSW was now a *de facto* public steel company. The EU noted that the ''entire contractual situation created in 1984 provided for the control of (GOH), through HLB, over HSW.''

It is against this background that the HLB opened a revolving credit line in the amount of DM 130 million in favor of HSW. However, even at that early date the HLB required that the GOH provide a guarantee (Kreditauftrag) for 60 percent of the credit line. In 1993, when the HLB refused to extend the credit line, the GOH was forced to provide an additional Kreditauftrag covering 100 percent of the credit line.

With respect to whether the loan was consistent with commercial considerations, the GOG, in response to the EC's investigation, indicated that the GOH and the HLB were aware that, in the event of HSW's bankruptcy, they would receive repayment from HSW only in a subordinated position in view of recent KSD precedent. Moreover, the HLB was not willing to extend the credit line absent the additional Kreditauftrag from the GOH covering 100 percent of the credit line. At that point, the provision of the credit line ceased to be consistent with commercial considerations. Rather, the HLB, acting as a reasonable commercial actor, refused to extend the line of credit, and the GOH was forced to accept full economic risk connected with the line of credit.

Comment 13: Line of Credit Purchased for Full Commercial Value: IHSW asserts that the line of credit was purchased from HLB by Venuda for commercial value in an arm's length transaction. Moreover, IHSW contends that the purchase of the loan was a separate and distinct transaction from the purchase of HSW's shares. Therefore, according to IHSW, there was no loan forgiveness and no countervailable benefit arising from Venuda's purchase of the loan. IHSW further claims that numerous forms of consideration given by Venuda for the assignment of the loan, and the fact that HSW may have been on the verge of bankruptcy, clearly show that Venuda purchased the loan in an arm's length transaction for commercial consideration. IHSW adds that numerous other factors (*e.g.*, restrictions from the GOH and lack of property ownership) further reduce the value of the company's assets significantly below the purchase price paid by Venuda. Thus, IHSW argues there was no loan forgiveness in the sale of HSW, and IHSW did not receive a financial contribution. IHSW adds that, even if the purchase of the line of credit is considered to be a part of the purchase of HSW, this would not change the fact that the loan to HSW was not forgiven because HLB received full commercial value for the loan.

IHSW further argues that if the credit line purchase by Venuda is viewed as a ''forgiveness,'' then the Department

should credit all payments and obligations assumed by IHSW pursuant to the loan purchase agreement against any alleged or implied benefit. IHSW adds that, at the very least, the DM 60 million paid by Venuda to HLB for the loan must be recognized as a repayment of part of the loan and any possible countervailable benefit curtailed by that amount.

Petitioners assert that the purchase of HSW's shares and the purchase of the credit line were clearly part of a single agreement by Venuda to purchase all of the government's interest in HSW, and cannot be separated. Petitioners note that during verification IHSW officials admitted that the purchase price of HSW included the approximately DM 60 million paid for the HLB loan. Petitioners add that large transactions, such as the sale of HSW, typically are complex and involve multiple parties and agreements. Thus, according to petitioners, treating the two transactions as the purchase price paid for HSW is consistent with commercial reality.

Petitioners further argue that IHSW's post-purchase investments and commitments do not constitute part of the purchase price. Petitioners contend that the payment for any good, service, or asset is the amount that is exchanged between the buyer and seller in exchange for the good, service, or asset. Petitioners assert that the only exchange between the buyer and seller in this case is the DM 10 million and DM 60 million that was paid to purchase the company. Petitioners add that IHSW's subsequent investments in the company, whether or not required by the purchase agreement, do not go to the seller. Therefore, according to petitioners, these payments do not warrant treatment as part of the purchase price for HSW or as a repayment of subsidies.

With respect to IHSW's claim that HSW owned too few of its assets and was encumbered with too many restrictions from the GOH to warrant the purchase price paid by Venuda, petitioners contend that there is absolutely no evidence that would permit the Department to evaluate IHSW's claim. Therefore, according to petitioners, IHSW's argument must fail.

Department's Position: We continue to view Venuda's purchase of HSW's loan and HSW's shares as a single transaction. At verification, IHSW officials explained that the purchase price paid for HSW's shares (*i.e.*, the DM 10 million) represented their valuation of HSW's non-current assets taking into consideration HSW's negative equity position, the company's remaining liabilities, and the obligations that the company was required to fulfill pursuant to various articles in the loan purchase agreement between HLB and Venuda. The DM 60 million payment represented Venuda's valuation and payment for HSW's net current assets at December 31, 1994 (*i.e.*, the difference between current assets and liabilities (less the debt owed to HLB)).

These verified facts demonstrate that it was not the HLB debt that was purchased for commercial value in an arm's length transaction—it was the company. Venuda valued and purchased a company that was free of all HLB debt. While part of the purchase price was structured to resemble a debt purchase, Venuda paid DM 60 million to purchase HSW's net current assets. Thus, forgiveness of the debt owed to HLB occurred separate and apart from the purchase of the company. Moreover, the debt forgiveness constitutes a financial contribution to HSW.

We also disagree with IHSW's argument that the Department should credit the post-purchase investments and commitments against any benefit from the alleged debt forgiveness. At verification, officials explained that the DM 10 million paid for the shares of HSW incorporated their valuation of HSW's remaining assets taking into consideration, *inter alia*, the obligations in question. Thus, the obligations in question related to the purchase of the company and not to the loan. Additionally, because we have determined that the debt forgiveness occurred separate from the sale of the company, the post-purchase investments and commitments do not affect the amount of debt forgiven.

Comment 14: The Loan Payments to a Related Party: IHSW contends that, in fact, the liability for the ''forgiven'' loan is still outstanding and payments on that loan are currently being made by IHSW's sister company, DSG, to an affiliated company, Picaro Limited. Thus, according to IHSW, inasmuch as the loan continues to be paid at the full amount there is no loan forgiveness and no countervailable benefit.

Petitioners argue that a loan cannot be said to have been repaid by the device of simply shifting funds around within a group of related companies. Petitioners add that the verification shows that the loan ''repayment'' actually returns to IHSW in the form of a shareholder contribution from Venuda.

Department's Position: The company under investigation, IHSW, does not carry the loan liability to Picaro Limited on its books. The debt in question is recorded in the books of an affiliated company, DSG. Thus, from the perspective of IHSW, the loan has been totally forgiven. The company is under no obligation to make payments on the loan—all loan payments are made by DSG.

Furthermore, we agree with petitioners that this loan cannot be considered outstanding with payments still occurring simply by shifting the liabilities within a group of related companies. Even if we were to examine this issue at the larger, corporate level, the loan payments are being made by DSG, a company which has no income other than the lease payments it receives from IHSW. These lease payments, which then become loan payments from DSG, are eventually reinvested into IHSW as shareholder contributions. Thus, even at this level of analysis the subject merchandise still benefits from the loan forgiveness because any payments that are made against the loan are reinvested to benefit production.

Comment 15: IHSW's AUL calculation: Petitioners contend that there is an error in IHSW's AUL calculation because the ending gross book value of productive assets in 1995 does not match the beginning gross book value in 1996. Petitioners argue that absent a change in methodology at the end of 1995, which IHSW has not reported, the closing asset value for one year should equal the opening asset value for the next.

IHSW asserts that its AUL calculation was correct and based on verified facts. IHSW notes that, as set forth in the 1996 annual audit reports for IHSW and HSW/DSG, a transfer of assets and liabilities occurred between DSG and IHSW. Moreover, respondents claims that the 1996 beginning gross book value was examined by the Department at verification in DSG's 1996 development of fixed assets.

Department's Position: We agree with IHSW that there is not an error in the company's AUL calculation. As noted by respondent, there was a transfer of assets between IHSW and HSW/DSG at the beginning of 1996. The transfer is documented on the record of this investigation (*see e.g.*, IHSW supplemental questionnaire response, July 3, 1997).

Comment 16: F.O.B. Sales Value: IHSW contends that basing the *ad valorem* subsidy rate calculation on an F.O.B. sales value is not in accordance with the universal commercial fact that freight costs, if born by the foreign producer, are included in the value of the merchandise supposedly benefitting from a subsidy or grant. IHSW further disputes the Department's rationale for this policy, *i.e.*, that customs valuation is performed on an F.O.B. basis. According to IHSW, most countries use

C.I.F. as the basis for customs valuation. Finally, respondent argues that the customs treatment has no relationship to the fact that the value of commercial transactions is the sum of all those factors embodied in the sale and evidenced by the sales price.

Petitioners contend that IHSW's argument that the denominator in the *ad valorem* calculation should be based on the C.I.F. value or ''sale price'' is mathematically invalid. Petitioners note that the Department allocates the countervailing duty margin over the customs value of sales because the U.S. Customs Service (''U.S. Customs'') will later multiply the resulting margin by the customs value to determine the total duty per entry. Petitioners assert that if the denominator uses any other measure of value, the duty calculation will be incorrect.

Department's Position: We agree with petitioners. Pursuant to section 402(2)(A) of the Act, U.S. Customs is directed to exclude from the customs value any expenses incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States. Thus, the Department requests sales data on an F.O.B basis so that the Department and Customs are consistent in the calculation and assessment of countervailing duties, respectively. *BES*

Comment 17: Countervailability of Pre-Unification Assistance to the New States: The GOG argues that loan guarantees issued by THA prior to Unification are not countervailable because they were available to all THA companies and hence, not specific to SWB. Both the GOG and BES point out that these guarantees were transnational in nature and are, therefore, not subject to the countervailing duty law (*see Georgetown Steel Corp. v. United States,* 801 F.2d 1308 (Fed. Cir. 1987)).

Petitioners argue that because the GDR eventually became part of the unified Germany and the ultimate beneficiary (*i.e.*, SWB/BES) likewise became a citizen of the same, any assistance provided to SWB/BES was not transnational in nature. In particular, petitioners point out that at the time that assistance was granted to SWB, both the FRG and the GDR had taken major steps in the direction of unification.

Department's Position: We agree with the GOG and BES that any financial benefit, received directly by SWB and/or indirectly by BES, through secondary FRG loan guarantees issued prior to Unification is not countervailable (*see* the section on FRG Backing of THA Loan Guarantees under Programs Determined Not To Be Countervailable above). As previously discussed, the GDR and the FRG were separate sovereign countries prior to Unification; therefore, the provision of FRG backing of THA loan guarantees to GDR enterprises constituted transnational assistance, notwithstanding the steps already taken toward Unification. That the two countries eventually were joined is not relevant because our analysis is focused on the nature of the benefit at the time it was bestowed.

Comment 18: Non-Use of Special Depreciation by BES: Petitioners acknowledge that the Department's normal practice is to recognize tax benefits when tax returns are filed. According to petitioners, this practice is justified in the context of recurring tax benefits (*see Final Affirmative Countervailing Duty Determination: Brass Sheet and Strip from Brazil*, 51 FR 40837, 40841 (November 10, 1986)) . Petitioners argue, however, that the Department should deviate from this practice here since BES did not file a tax return during the POI. By allowing BES to record no benefits in one year and then benefits from two tax years in another would result in changing two recurring benefits into a single nonrecurring benefit in the year of filing. In order to ensure continued treatment of Special Depreciation as a recurring benefit, petitioners argue that the Department should countervail the amount of Special Depreciation recorded in BES's books, regardless of the date of filing.

BES and the GOG argue that since BES did not file a tax return during the POI, it did not receive a financial benefit in the form of Special Depreciation.

Department's Position: We agree that with BES and the GOG that BES did not receive a financial benefit from Special Depreciation during the POI. This program provides a tax benefit. Therefore, under the Department's current practice, any financial contribution arising from Special Depreciation is realized when the ''cash flow'' effect occurs, *i.e.,* when the tax return is filed (*see Proposed Regulations*). In past cases where respondents did not file tax returns during the period in question, or had an operating loss or were otherwise unable to benefit from a tax concession, the Department has not altered its methodology to compensate for any unevenness of benefits over time (*see e.g., Certain Steel* at 37315 and *Ferrochrome From South Africa: Preliminary Results of the 1992 Review,* 61 FR 65546, 65547 (December 13, 1996)). A major reason for waiting until the tax return is filed is that only then can we be certain of the level of the benefit. In this case, we found at verification that BES did not file a tax return during the POI; accordingly, BES did not receive a benefit from the Special Depreciation program during the POI.

Comment 19: Other Arguments Regarding Countervailability: Interested parties made other arguments regarding the countervailability of assistance to BES. These arguments are now moot since we have found benefits pertaining to the FRG backing of THA loan guarantees to be not countervailable, special depreciation to be not used, and benefits from all other programs to be *de minimis*, assuming, *arguendo,* they are countervailable.

Comment 20: Improper Inclusion of BES: BES alleges that the Department did not have authority to initiate an investigation against it because petitioners did not allege that BES was receiving any countervailable subsidies and did not provide evidence of regional assistance programs targeted at the New States.

Department's position: The statute does not require company-specific allegations to initiate an investigation. A petitioner must only allege that the government of a country is providing countervailable subsidies with respect to the manufacture, production or export of a class or kind of merchandise imported or sold for exportation into the United States, and that such subsidies are causing injury to the U.S. industry. *See* section 701(a) and 702(a)(b)(1) of the Tariff Act. The petition met these requirements.

If sufficient allegations are made, the Department initiates a proceeding to determine whether the government of the country in question is providing subsidies to the subject industry. As an initial matter, the Department asks a petitioner to identify all the manufacturers or exporters of the subject merchandise. Normally, the Department sends all identified companies questionnaires, in addition to sending a complete set of questionnaires to the government involved. The Act requires the Department to attempt to determine an individual countervailable subsidy rate for each known exporter or producer of the subject merchandise. *See* section 777(e)(1). There is no authority to exclude a respondent from an investigation except through the determination that the company had an *ad valorem* subsidy rate of zero or *de minimis. See* 19 CFR Section 355.14.

Suspension of Liquidation: In accordance with section 705(c)(1)(B)(i) of the Act, we have calculated an

individual subsidy rate for each company investigated. For companies not investigated, we have determined an all-others rate by weighting individual company subsidy rates by each company's exports of the subject merchandise to the United States. The all-others rate does not include zero or *de minimis* rates.

In accordance with section 703(d)(5) of the Act, we are directing the U.S. Customs Service to continue to suspend liquidation of all entries of steel wire rod from Germany, except those of BES and WHG, which are entered, or withdrawn from warehouse for consumption, on or after the date of publication of this notice in the **Federal Register**, and to require a cash deposit or bond for such entries of the merchandise in the amounts indicated below. This suspension will remain in effect until further notice.

Company	Ad valorem rate
Saarstahl	17.67
IHSW	5.61
All others	11.08

Since the estimated net subsidy rate for BES and WHG is *de minimis,* these companies are not subject to the suspension of liquidation and will be excluded from any countervailing duty order.

ITC Notification

In accordance with section 705(d) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all non-privileged and nonproprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order, without the written consent of the Acting Deputy Assistant Secretary for AD/CVD Enforcement, Import Administration.

If the ITC determines that material injury, or threat of material injury, does not exist, these proceedings will be terminated and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled. If, however, the ITC determines that such injury does exist, we will issue a countervailing duty order directing Customs officers to assess countervailing duties on steel wire rod from Germany.

Verification

In accordance with section 782(i) of the Act, we verified the information used in making our final determination. We followed standard verification procedures, including meeting with government and company officials, and examination of relevant accounting records and original source documents. Our verification results are outlined in detail in the public versions of the verification reports, which are on file in the Central Records Unit (Room B–099 of the Main Commerce Building).

Return or Destruction of Proprietary Information

This notice serves as the only reminder to parties subject to Administrative Protective Order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 355.34(d). Failure to comply is a violation of the APO.

This determination is published pursuant to section 705(d) of the Act.

Dated: October 14, 1997.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 97–27985 Filed 10–21–97; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–274–803]

Final Affirmative Countervailing Duty Determination: Steel Wire Rod From Trinidad and Tobago

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: October 22, 1997.

FOR FURTHER INFORMATION CONTACT: Todd Hansen, Vincent Kane, or Sally Hastings, Office of Antidumping/ Countervailing Duty Enforcement, Group I, Office 1, Import Administration, U.S. Department of Commerce, Room 1874, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482–1276, 482–2815, or 482–3464, respectively.

Final Determination

The Department of Commerce (''the Department'') determines that countervailable subsidies are being provided to Caribbean Ispat Limited (''CIL''), a producer and exporter of steel wire rod from Trinidad and Tobago. For information on the estimated countervailing duty rates, please see the *Suspension of Liquidation* section of this notice.

Petitioners

The petition in this investigation was filed by Connecticut Steel Corp., Co-Steel Raritan, GS Industries, Inc., Keystone Steel & Wire Co., North Star Steel Texas, Inc. and Northwestern Steel and Wire (the petitioners), six U.S. producers of wire rod.

Case History

Since our preliminary determination on July 28, 1997 (62 FR 41927, August 4, 1997), the following events have occurred:

We conducted verification in Trinidad and Tobago of the questionnaire responses of the Government of Trinidad and Tobago (''GOTT'') and of CIL from August 18 through August 26, 1997. Petitioners and respondents filed case and rebuttal briefs on September 12 and September 17, 1997, respectively. A public hearing was held on September 19, 1997. On September 16, 1997, the GOTT and the U.S. Government initialed a proposed suspension agreement, whereby the GOTT agreed not to provide any new or additional export subsidies on the subject merchandise and to restrict the volume of direct and indirect exports of subject merchandise to the United States. On October 14, 1997, the U.S. Government and the GOTT signed a suspension agreement (*see, Notice of Suspension of Countervailing Duty Investigation: Steel Wire Rod from Trinidad and Tobago* which is being published concurrently with this notice). Based on a request from petitioners on October 14, 1997, the Department and the International Trade Commission (''ITC'') are continuing this investigation in accordance with section 704(g) of the Act. As such, this final determination is being issued pursuant to section 704(g) of the Act.

Scope of Investigation

The products covered by this investigation are certain hot-rolled carbon steel and alloy steel products, in coils, of approximately round cross section, between 5.00 mm (0.20 inch) and 19.0 mm (0.75 inch), inclusive, in solid cross-sectional diameter. Specifically excluded are steel products possessing the above noted physical characteristics and meeting the Harmonized Tariff Schedule of the United States (''HTSUS'') definitions for (a) stainless steel; (b) tool steel; (c) high nickel steel; (d) ball bearing steel; (e) free machining steel that contains by

weight 0.03 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.4 percent of phosphorus, more than 0.05 percent of selenium, and/or more than 0.01 percent of tellurium; or (f) concrete reinforcing bars and rods.

The following products are also excluded from the scope of this investigation:

Coiled products 5.50 mm or less in true diameter with an average partial decarburization per coil of no more than 70 microns in depth, no inclusions greater than 20 microns, containing by weight the following: carbon greater than or equal to 0.68 percent; aluminum less than or equal to 0.005 percent; phosphorous plus sulfur less than or equal to 0.040 percent; maximum combined copper, nickel and chromium content of 0.13 percent; and nitrogen less than or equal to 0.006 percent. This product is commonly referred to as ''Tire Cord Wire Rod.''

Coiled products 7.9 to 18 mm in diameter, with a partial decarburization of 75 microns or less in depth and seams no more than 75 microns in depth; containing 0.48 to 0.73 percent carbon by weight. This product is commonly referred to as ''Valve Spring Quality Wire Rod.''

The products under investigation are currently classifiable under subheadings 7213.91.3000, 7213.91.4500, 7213.91.6000, 7213.99.0030, 7213.99.0090, 7227.20.0000, and 7227.90.6050 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this investigation is dispositive.

The Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute are references to the provisions of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act effective January 1, 1995 (the ''Act''). All references to the Department's regulations at 19 CFR 355.34 refer to the edition of the Department's regulations published April 1, 1997.

Injury Test

Because Trinidad and Tobago is a ''Subsidies Agreement Country'' within the meaning of section 701(b) of the Act, the ITC is required to determine whether imports of wire rod from Trinidad and Tobago materially injure, or threaten material injury to, a U.S. industry. On April 30, 1997, the ITC published its preliminary determination finding that there is a reasonable indication that an industry in the United States is being materially injured or threatened with material injury by reason of imports from Trinidad and Tobago of the subject merchandise (62 FR 23485).

Subsidies Valuation Information

Period of Investigation: The period for which we are measuring subsidies (the ''POI'') is calendar year 1996.

Allocation Period: In the past, the Department has relied upon information from the U.S. Internal Revenue Service (''IRS'') on the industry-specific average useful life of assets in determining the allocation period for nonrecurring subsidies. *See General Issues Appendix* appended to *Final Countervailing Duty Determination; Certain Steel Products from Austria,* 58 FR 37217, 37226 (July 9, 1993) (''*General Issues Appendix*''). However, in *British Steel plc.* v. *United States,* 879 F. Supp. 1254 (CIT 1995) (''*British Steel*''), the U.S. Court of International Trade (the ''Court'') ruled against this methodology. In accordance with the Court's remand order, the Department calculated a company-specific allocation period for nonrecurring subsidies based on the average useful life (''AUL'') of non-renewable physical assets. This remand determination was affirmed by the Court on June 4, 1996. *British Steel,* 929 F. Supp. 426, 439 (CIT 1996).

In this investigation, the Department has followed the Court's decision in *British Steel.* Therefore, for purposes of this determination, the Department has calculated a company-specific AUL. Based on information provided by respondents, the Department has determined that the appropriate allocation period for CIL is 15 years.

Equityworthiness: In analyzing whether a company is equityworthy, the Department considers whether that company could have attracted investment capital from a reasonable, private investor in the year of the government equity infusion based on information available at that time. In this regard, the Department has consistently stated that a key factor for a company in attracting investment capital is its ability to generate a reasonable return on investment within a reasonable period of time.

In making an equityworthiness determination, the Department examines the following factors, among others:

1. Current and past indicators of a firm's financial condition calculated from that firm's financial statements and accounts;

2. Future financial prospects of the firm including market studies, economic forecasts, and projects or loan appraisals;

3. Rates of return on equity in the three years prior to the government equity infusion;

4. Equity investment in the firm by private investors; and

5. Prospects in world markets for the product under consideration.

In start-up situations and major expansion programs, where past experience is of little use in assessing future performance, we recognize that the factors considered and the relative weight placed on such factors may differ from those used in the analysis of an established enterprise.

For a more detailed discussion of the Department's equityworthiness criteria see the *General Issues Appendix* at 37244 and *Final Affirmative Countervailing Duty Determinations: Certain Steel Products from France,* 58 FR 37304 (July 9, 1993) (''*Steel from France*'').

In our preliminary determination, we determined that the Iron and Steel Company of Trinidad and Tobago (''ISCOTT'') was unequityworthy for the period 1986–1994. Additional information and documents gathered at verification have given us cause to review our preliminary determination. As discussed below, we determine that ISCOTT was unequityworthy from June 13, 1984 to December 31, 1991. For a discussion of this determination, see the section of this notice on ''Equity Infusions.''

Equity Methodology: In measuring the benefit from a government equity infusion to an unequityworthy company, the Department compares the price paid by the government for the equity to a market benchmark, if such a benchmark exists. A market benchmark can be obtained, for example, where the company's shares are publicly traded. (*See, e.g., Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Spain,* 58 FR 37374, 37376 (July 9, 1993).)

In this investigation, where a market benchmark does not exist, the Department is following the methodology described in the *General Issues Appendix* at 37239. Under this methodology, equity infusions made into an unequityworthy firm are treated as grants. Using the grant methodology for equity infusions into an unequityworthy company is based on the premise that an unequityworthiness finding by the Department is tantamount to saying that the company could not have attracted investment capital from a reasonable investor in the infusion year based on the available information.

Creditworthiness: When the Department examines whether a

company is creditworthy, it is essentially attempting to determine if the company in question could obtain commercial financing at commonly available interest rates. If a company receives comparable long-term financing from commercial sources, that company will normally be considered creditworthy. In the absence of comparable commercial borrowings, the Department examines the following factors, among others, to determine whether a firm is creditworthy:

1. Current and past indicators of a firm's financial health calculated from that firm's financial statements and accounts;
2. The firm's recent past and present ability to meet its costs and fixed financial obligations with its cash flow; and
3. Future financial prospects of the firm including market studies, economic forecasts, and projects or loan appraisals.

In start-up situations and major expansion programs, where past experience is of little use in assessing future performance, we recognize that the factors considered and the relative weight placed on such factors may differ from those used in the analysis of an established enterprise. For a more detailed discussion of the Department's creditworthiness criteria, see, *e.g., Steel from France* at 37304, and *Final Affirmative Countervailing Duty Determination; Certain Steel Products from the United Kingdom*, 58 FR 37393, 37395 (July 9, 1993) (''*Certain Steel from the U.K.*'').

In our preliminary determination, we determined that ISCOTT was uncreditworthy for the period 1986–1994. Additional information and documents gathered at verification have given us cause to review our preliminary determination. As discussed below, we determine that ISCOTT was uncreditworthy during the period June 13, 1984 to December 31, 1994. ISCOTT did not show a profit for any year during this period and continued to rely upon support from the GOTT to meet fixed payments. The company's gross profit ratio was consistently negative in each of the years in which it had sales. Additionally, the company's operating profit (net income before depreciation, amortization, interest and financing charges) was consistently negative. The firm continued to show an operating loss in each year it was in production, and was never able to cover its variable costs.

Regarding the period prior to June 13, 1984, and after December 31, 1994, we did not examine ISCOTT's creditworthiness because ISCOTT did not receive any countervailable loans, equity infusions, or nonrecurring grants during those periods.

Discount Rates: We have calculated the long-term uncreditworthy discount rates for the period 1984 through 1994, to be used in calculating the countervailable benefit from nonrecurring grants and equity infusions, using the same methodology described in our preliminary determination. Specifically, consistent with our practice (described in *Final Affirmative Countervailing Duty Determination: Grain-Oriented Electrical Steel from Italy*, 59 FR 18357, 18358 (April 18, 1994) (''*GOES*'')), we took the highest prime term loan rate available in Trinidad and Tobago in each year as listed in the *Central Bank of Trinidad and Tobago: Handbook of Key Economic Statistics* and added to this a risk premium of 12% of the median prime lending rate.

Privatization Methodology: In the *General Issues Appendix* at 37259, we applied a new methodology with respect to the treatment of subsidies received prior to the sale of a company (privatization).

Under this methodology, we estimate the portion of the purchase price attributable to prior subsidies. We compute this by first dividing the privatized company's subsidies by the company's net worth for each year during the period beginning with the earliest point at which nonrecurring subsidies would be attributable to the POI (in this case 1982 for CIL) and ending one year prior to the privatization. We then take the simple average of the ratios. The simple average of these ratios of subsidies to net worth serves as a reasonable surrogate for the percent that subsidies constitute of the overall value of the company. Next, we multiply the average ratio by the purchase price to derive the portion of the purchase price attributable to repayment of prior subsidies. Finally, we reduce the benefit streams of the prior subsidies by the ratio of the repayment amount to the net present value of all remaining benefits at the time of privatization.

In the current investigation, we are analyzing the privatization of ISCOTT in 1994.

Based upon our analysis of the petition and responses to our questionnaires, we determine the following:

I. Programs Determined To Be Countervailable

A. Export Allowance Under Act No. 14

Under the provisions of Act No. 14 of 1976, as codified in Section 8(1) of the Corporation Tax Act, companies in Trinidad and Tobago with export sales may deduct an export allowance in calculating their corporate income tax. The allowance is equal to the ratio of export sales over total sales multiplied by net income. Export sales to certain Caricom countries are not eligible for the export allowance and are excluded from the amount of export sales for purposes of calculating the export allowance.

A countervailable subsidy exists within the meaning of section 771(5) of the Act where there is a financial contribution from the government which confers a benefit and is specific within the meaning of section 771(5A) of the Act.

We have determined that the export allowance is a countervailable subsidy within the meaning of section 771(5) of the Act. The export allowance provides a financial contribution because in granting it the GOTT forgoes revenue that it is otherwise due. The export allowance is specific, under section 771(5A)(B), because its receipt is contingent upon export performance.

We verified that CIL made a deduction for the export allowance on its 1995 income tax return, which was filed during the POI. Because the export allowance is claimed and realized on an annual basis in the course of filing the corporate income tax return, we have determined that the benefit from this program is recurring. To calculate the countervailable subsidy from the export allowance, we divided CIL's tax savings during the POI by the total value of its export sales which were eligible for the export allowance during the POI. On this basis, we determine the countervailable subsidy from this program to be 3.72 percent *ad valorem*.

B. Equity Infusions

In 1978, ISCOTT and the GOTT entered into a Completion and Cash Deficiency Agreement (''CCDA'') with several private commercial banks in order to obtain a part of the financing needed for construction of ISCOTT's plant. Under the terms of the CCDA, the GOTT was obligated to provide certain equity financing toward completion of construction of ISCOTT's plant, to cover loan payments to the extent not paid by ISCOTT, and to provide cash as necessary to enable ISCOTT to meet its current liabilities.

In *Carbon Steel Wire Rod from Trinidad and Tobago: Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 49 FR 480 (January 4, 1984) (''*Wire Rod I*''), the Department determined that payments or advances made by the GOTT to ISCOTT during its start-up years were not countervailable. In making this determination, the Department took into consideration the fact that it is not unusual for a large, capital intensive project to have losses during the start-up years, the fact that several independent studies forecast a favorable outcome for ISCOTT, and the fact that ISCOTT enjoyed several important natural advantages. On these bases, advances to ISCOTT through April of 1983, the end of the original POI, were found to be not countervailable.

Given the Department's decision in *Wire Rod I* that the GOTT's initial decision to invest in ISCOTT and its additional investments through the first quarter of 1983 were consistent with commercial considerations, the issue presented in this investigation is whether and at what point the GOTT ceased to behave as a reasonable private investor. During the period from 1983 to 1989, a period of continuing losses, ISCOTT and the GOTT commissioned several studies to determine the financially preferable course of action for the company. The information contained in these studies is business proprietary, and is discussed further in a memorandum dated October 14, 1997, from Team to Richard W. Moreland, Acting Deputy Assistant Secretary for AD/CVD Enforcement (''*Equity Memorandum*''), a public version of which is available in the public file for this investigation located in the Central Records Unit, Department of Commerce, HCHB Room B–099 (''Public File''). Based on information contained in the studies and our review of the results of ISCOTT's operations over the period under consideration, we determine that the GOTT's investments made after June 13, 1984, were no longer consistent with the practice of a reasonable private investor. ISCOTT continued to be unable to cover its variable costs, yet the GOTT continued to provide funding to ISCOTT. Despite ISCOTT's continued losses and no reason to believe that under the conditions in place at that time there was any hope of improvement, the GOTT did not make further investment contingent upon actions that would have been required by a reasonable private investor.

In 1988, P.T. Ispat Indo (''Ispat''), a company affiliated with CIL, came forward and expressed an interest in leasing the plant. On April 8, 1989, the GOTT and Ispat reached agreement on a 10-year lease agreement with an option for Ispat to purchase the assets after five years. The first few years of the lease were marked by the GOTT learning to assume the role of a lessor and the management of CIL working to become familiar with the operations of ISCOTT and to develop relations with the former ISCOTT employees. Our review of internal documents, financial projections and historical financial data indicate that after December 31, 1991, the operations of the ISCOTT plant under CIL and ISCOTT's financial condition improved such that we determine that investments in ISCOTT after this date were consistent with the practice of a reasonable private investor. *See, Equity Memorandum* for further discussion of the information used in making this determination.

We have determined that the GOTT equity infusions into ISCOTT during the period from June 13, 1984 through December 31, 1991 constitute countervailable subsidies in accordance with section 771(5) of the Act. We determine that these equity infusions confer a benefit under 771(5)(E)(i) of the Act because these investments were not consistent with the usual investment practice of private investors. Also, they are specific within the meaning of section 771(5A) because they were limited to one company, ISCOTT.

To calculate the benefit, we followed the ''Equity Methodology'' described above. The benefit allocated to the POI was adjusted according to the ''Privatization Methodology'' described above. The adjusted amount was divided by CIL's total sales of all products during the POI. On this basis, we calculated a countervailable subsidy rate of 11.12 percent *ad valorem*.

C. Benefits Associated With the 1994 Sale of ISCOTT's Assets to CIL

In December 1994, CIL, the company created by Ispat to lease and operate the plant, exercised the purchase option in the plant lease and purchased the assets of ISCOTT. After the sale of its assets, ISCOTT was nothing but a shell company with liabilities exceeding its assets. CIL, on the other hand, had purchased most of ISCOTT's assets without being burdened by ISCOTT's liabilities.

The liabilities remaining with ISCOTT after the sale of productive assets to CIL had to be repaid, assumed, or forgiven. In 1995, the National Gas Company of Trinidad and Tobago Limited (''NGC''), which was owned by the GOTT, and the National Energy Corporation of Trinidad and Tobago Limited (''NEC''), a wholly owned subsidiary of NGC, wrote off loans owed to them by ISCOTT totaling TT $77,225,775. Similarly, Trinidad and Tobago National Oil Company Limited (''TRINTOC''), also owned by the GOTT, wrote off debts owed by ISCOTT totaling TT $10,492,830 as bad debt. While no specific government act eliminated this debt, CIL (and consequently the subject merchandise) received a benefit as a result of this debt being left behind in ISCOTT.

We have determined that this debt forgiveness constitutes a countervailable subsidy in accordance with section 771(5) of the Act because it represents a direct transfer of funds. Also, it is specific within the meaning of section 771(5A) because it was limited to one company.

In this case, to calculate the benefit during the POI, we used our standard grant methodology and applied an uncreditworthy discount rate. The debt outstanding after the December 1994 sale of assets to CIL (adjusted as described below) was treated as grants received at the time of the sale of the assets.

After the 1994 sale of assets, certain non-operating assets (*e.g.*, cash and accounts receivable) remained with ISCOTT. These assets were used to fund repayment of ISCOTT's remaining accounts payable. In order to account for the fact that certain assets, including cash, were left behind in ISCOTT, we have subtracted this amount from the liabilities outstanding after the 1994 sale of assets.

The benefit allocated to the POI was adjusted according to the ''Privatization Methodology'' described above. The adjusted amount was divided by CIL's total sales of all products during the POI. On this basis, we determine the net subsidy to be 1.17 percent *ad valorem*.

D. Provision of Electricity

According to section 771(5)(E) of the Act, the adequacy of remuneration with respect to a government's provision of a good or service

> * * * shall be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.

Particular problems can arise in applying this standard when the government is the sole supplier of the good or service in the country or within the area where the respondent is located. In this situation, there may be no alternative market prices available in the country (*e.g.*, private prices,

competitively-bid prices, import prices, or other types of market reference prices). Hence, it becomes necessary to examine other options for determining whether the good has been provided for less than adequate remuneration. This consideration of other options in no way indicates a departure from our preference for relying on market conditions in the relevant country, specifically market prices, when determining whether a good or service is being provided at a price which reflects adequate remuneration.

With respect to electricity, some of the options may be to examine whether the government has followed a consistent rate making policy, whether it has covered its costs, whether it has earned a reasonable rate of return in setting its rates, and/or whether it applied market principles in determining its rates. Such an approach is warranted where it is only the government that provides electricity within a country or where electricity cannot be sold across service jurisdictions within a country and there are divergent consumption and generation patterns within the service jurisdictions.

The Trinidad and Tobago Electric Commission (''TTEC''), which is wholly-owned by the GOTT, is the sole supplier of electric power in Trinidad and Tobago. For billing purposes, TTEC classifies electricity consumers into one of the following categories: residential, commercial, industrial, and street lighting. Industrial users are further classified into one of four categories depending on the voltage at which they take power and the size of the load taken. CIL is the sole user in the very large load category taking its power at 132 kV for loads over 25,000 KVA. Other large industrial users take power at 33 kV, 66 kV or 132 kV at loads from 230 Volts up to 25,000 KVA.

TTEC's rates and tariffs for the sale of electricity are set by the Public Utilities Commission (''PUC''), an independent authority. In setting electricity rates, the PUC takes into account cost of service studies done by TTEC. These studies are submitted to the PUC, where they are reviewed by teams of economists, statisticians, and auditors. Public hearings are held and views expressed orally and in writing. After considering all of the views and studies submitted, the PUC issues detailed orders with the new rates and explanations of how they were calculated. In establishing these rates, the PUC is required by section 32 of its regulations to ensure that the new rates will cover costs and expenses and allow for a return.

The electricity rates in effect during the POI were based on cost of service studies for 1987 and 1991. Based on these studies and staff audit reports, the PUC in 1992 issued Order Number 80 with the new electricity rates and a lengthy explanation of the bases for these rates. The order allowed for a specified return to TTEC on its sales of electricity. In 1993 and 1994, the first two years following the order, TTEC was profitable for the first time in years. However, TTEC had large losses in 1995 and losses in 1996 of about half the 1995 losses.

As noted above, TTEC is the only supplier in Trinidad and Tobago of electricity. Consequently, there are no competitively-set, private benchmark prices in Trinidad and Tobago to use in determining whether TTEC is receiving adequate remuneration within the meaning of section 771(5)(E) of the Act. Lacking such benchmarks, the only bases we have for determining what constitutes adequate remuneration are TTEC's costs and revenues.

Despite PUC's mandate to set rates that will cover the costs of providing electricity plus an adequate return, past history indicates that this directive has seldom been met. In addition, evidence in the cost of service studies, including the most recent cost of service study prepared in 1997, indicates that TTEC did not receive adequate remuneration on its sales of electricity to CIL. This evidence is proprietary and is discussed in the October 14, 1997 proprietary memorandum entitled *Adequate Remuneration for Electricity*. Consequently, we determine that the GOTT is bestowing a benefit on CIL through TTEC's provision of electricity. We further determine that this benefit is specific because CIL is the only user in its customer category and, hence, the only company paying fees and tariffs at that rate.

Adequacy of remuneration is a new statutory provision which replaced ''preferentiality'' as the standard for determining whether the government's provision of a good or service constitutes a countervailable subsidy. The Department has had no experience administering section 771(5)(E) and Congress has provided no guidance as to how the Department should interpret this provision. This case and the other concurrent wire rod cases, mark the first instances in which we are applying the new standard. We anticipate that our policy in this area will continue to be refined as we address similar issues in the future.

We calculated the benefit for electricity by comparing CIL's actual electricity rate in 1996 with the rate that would have yielded an adequate return to TTEC, as calculated in its 1996 cost of service study. (We used the cost of service study to calculate the benefit as there was no suitable market-based benchmarks for electricity in Trinidad and Tobago.) We divided the total shortfall based on CIL's POI electricity consumption by CIL's total sales of all products during the POI. On this basis, we calculated a countervailable subsidy rate of 1.46 percent *ad valorem*.

II. Programs Determined to Be Not Countervailable

A. Import Duty Concessions under Section 56 of the Customs Act

Section 56 of the Customs Act of 1983 provides for full or partial relief from import duties on certain machinery, equipment, and raw materials used in an approved industry. The approved industries that may benefit from this relief are listed in the Third Schedule to Section 56. In all, 76 industries are eligible to qualify for relief under Section 56.

Companies in these industries that are seeking import duty concessions apply by letter to the Tourism and Industries Development Company, which reviews the application and forwards it with a recommendation to the Ministry of Trade and Industry. If the Ministry of Trade and Industry approves the application, the applicant receives a Duty Relief License, which specifies the particular items for which import duty concessions have been authorized. CIL received import duty exemptions under Section 56 of the Customs Act during the POI.

In its June 30, 1997, supplemental response, the GOTT provided a breakdown by industry of the number of licenses issued during the first six months of the POI. During the POI, the Ministry of Trade and Industry issued a large number of licenses to a wide cross-section of industries. Some of the licenses were new issuances and others were renewals of licenses previously issued. The breakdown of licenses by industry indicated that the recipients of the exemption were not limited to a specific industry or group of industries. The breakdown also indicated that the steel industry was not a predominant user of the subsidy nor did it receive a disproportionate share of benefits under this program. For these reasons, we determine that import duty concessions under Section 56 of the Customs Act are not limited to a specific industry or group of industries and, hence, are not countervailable.

B. Point Lisas Industrial Estate Lease

As noted above in the *Provision of Electricity* section of this notice, particular problems can arise in applying the standard for adequate remuneration when the government is the sole supplier of the good or service in the country or within the area where the respondent is located. With respect to the leasing of land, some of the options to consider in determining whether the good has been provided for less than adequate remuneration may be to examine whether the government has covered its costs, whether it has earned a reasonable rate of return, and/or whether it applied market principles in determining its prices. In the instant case, we have found no alternative market reference prices to use in determining whether the government has provided (leased) the land for less than adequate remuneration. As such, we have examined whether the government's price was determined according to the same market factors that a private lessor would use in setting lease rates for a tenant.

The Point Lisas Industrial Port Development Company (''PLIPDECO'') owns and operates Point Lisas Industrial Estate. Prior to 1994, PLIPDECO was 98 percent government-owned. Since then, PLIPDECO's issued share capital has been held 43 percent by the government, eight percent by Caroni Limited, a wholly-owned government entity, and 49 percent by 2,500 individual and corporate shareholders whose shares are publicly traded on the Trinidad and Tobago Stock Exchange. We were unable to find any privately-owned industrial estates in Trinidad and Tobago to provide competitively-set, private, benchmark rates to determine the adequacy of PLIPDECO's lease rates.

ISCOTT, the predecessor company to CIL, entered into a 30-year lease contract for a site at Point Lisas in 1983, retroactive to 1978. The 1983 lease rate was revised in 1988. In 1989, the site was subleased to CIL at the revised rental fee. In 1994, ISCOTT and PLIPDECO signed a novation of the lease whereby ISCOTT's name was replaced on the lease by CIL's. During the POI, CIL paid the 1988 revised rental fee for the site.

Under section 771(5) of the Act, in order for a subsidy to be countervailable it must, *inter alia,* confer a benefit. In the case of goods or services, a benefit is normally conferred if the goods or services are provided for less than adequate remuneration. The adequacy of remuneration is determined in relation to prevailing market conditions for the good or service provided in the country of exportation.

In establishing lease rates for sites in the industrial estate, PLIPDECO uses a standard schedule of lease rates as a starting point for negotiating with prospective tenants. The standard lease rates reflect PLIPDECO's evaluation of the market value of land in the estate. Individual rates are negotiated based on a variety of factors, such as the size of the lot, the type of lease, the type of business, the attractiveness of the tenant, and the date on which the lease contract was signed. Because rates are negotiated individually with each tenant, the rate paid by CIL (and other tenants) is specific.

The site leased by ISCOTT in 1983 and now occupied by CIL is the largest site in the Point Lisas Industrial Estate with an overall area that is considerably more than double the size of the next largest site. After CIL's site and the next largest, the size of the remaining sites drops significantly. At verification, we examined leases of other sites in the estate and found only one site with a 30-year lease that was signed contemporaneously with CIL's lease. The remaining leases examined had terms of 99 years, or 30-year leases that were signed much later than CIL's. The method of calculating the lease rate on a 99-year lease is fundamentally different from the calculation on a 30-year lease, because tenants with 99-year leases effectively purchased the land at the start of the lease, making only token annual lease payments thereafter.

Tenants with 30-year leases make substantial annual lease payments throughout the lease but no large initial payment. Therefore, we decided not to compare a 99-year lease rate to CIL's 30-year lease rate. Eliminating the 99-year leases left only one lease with a site that was somewhat comparable in size to CIL's site. CIL's lease fee per square meter was in line with the lease fee for the next most comparable site.

Aside from the lease contract on the next most comparable site, we have no other readily available benchmark or guideline to determine whether the lease rate paid by CIL provides adequate remuneration to PLIPDECO. The standard lease cannot serve as an appropriate benchmark because it is used as the starting point for negotiations. All of the leases examined at verification had rates below the standard rate. Aside from the next largest site, the leases for other sites in the estate were also found to be unsuitable. The disparity in both the sizes of these leases and the years in which they were signed when compared with CIL's site and lease rendered their use inappropriate. Further, we found no privately owned industrial estates in Trinidad and Tobago. Therefore, in addition to a direct comparison of CIL's lease rate with that of the next most similar site, we also considered other factors in determining whether PLIPDECO received adequate remuneration.

PLIPDECO considered ISCOTT to be the anchor tenant in the estate because it was the first company to locate in the estate, and because of its size and its role as the first steel producer in Trinidad and Tobago. Further, ISCOTT's annual lease payments provided a considerable cash flow to PLIPDECO, especially in the early years of the estate when PLIPDECO was in need of funds for continued development. In addition, ISCOTT was expected to draw other companies into the estate. As we found at verification, PLIPDECO's expectations that ISCOTT would draw other companies into the estate were, in fact, realized. Although a precise dollar value cannot be placed on these factors, PLIPDECO took them into consideration when establishing ISCOTT's lease rate. That PLIPDECO took these factors into consideration is an indication that its negotiations were intended to assure adequate remuneration on its lease to CIL.

During the years for which we have information, 1992 through 1995, PLIPDECO has been consistently profitable. In addition, PLIPDECO's successful public stock offering of 49 percent of its shares in 1994 demonstrates that investors viewed the company as a good investment.

All of these facts support our determination that PLIPDECO is a company that has succeeded in achieving adequate remuneration in its dealings with CIL and with other tenants in the estate. Therefore, we determine that CIL's lease rates have provided adequate remuneration for its site in the Point Lisas Industrial Estate.

C. Provision of Natural Gas

As noted above in the *Provision of Electricity* section of this notice, particular problems can arise in applying the standard for adequate remuneration when the government is the sole supplier of the good or service in the country or within the area where the respondent is located. With respect to the provision of natural gas, some of the options may be to examine whether the government has covered its costs, whether it has earned a reasonable rate of return, and/or whether it applied market principles in determining its prices. In the instant case, we have found no alternative market reference

prices to use in determining whether the government has provided natural gas for less than adequate remuneration. As such, we have examined whether the government earned a reasonable rate of return and whether the government applied market principles in determining its prices.

NGC is the sole supplier of natural gas to industrial and commercial users in Trinidad and Tobago. NGC provides gas pursuant to individual contracts with each of its customers. Natural gas prices to small consumers are fixed prices with an annual escalator. Prices to large consumers are negotiated individually based on annual volume, contract duration, payment terms, use made of the gas, any take or pay requirement in the contract, NGC's liability for damages, and whether new pipeline is required. Prices must be approved by NGC's Board of Directors. Although NGC is 100 percent government-owned, the GOTT indicates that none of the current members of the board is a government official nor do any government laws or regulations regulate the pricing of natural gas.

The price paid by CIL for natural gas during the POI was established in a January 1, 1989 contract between ISCOTT and NGC that ISCOTT assigned to CIL on April 28, 1989. Average price data submitted by the GOTT for large industrial users of natural gas indicate that the price paid by CIL during the POI was in line with the average price paid by large industrial users overall.

At verification, NGC officials explained that the company operates on a strictly commercial basis, purchasing natural gas at the lowest prices it can negotiate and selling and distributing the gas at prices that assure the company's profitability. The years for which we have information on NGC's profitability, 1992 to 1995, demonstrate that the company has been consistently profitable.

Clearly, in its contract negotiations and its overall operations, NGC has demonstrated that it realizes an adequate return on its sales and distribution of natural gas to CIL and its other customers. For this reason, we have determined that the prices paid by CIL, which are in line with those paid by other large consumers, provide adequate remuneration to NGC for the natural gas supplied to CIL. Therefore, we have determined that NGC's provision of natural gas to CIL is not a countervailable subsidy under section 771(5) of the Act.

IV. Programs Determined To Be Not Used

A. Export Promotion Allowance

B. Corporate Tax Exemption

V. Program Determined Not To Exist

A. Loan Guarantee From the Trinidad and Tobago Electricity Commission

By 1988, ISCOTT had accumulated TT $19,086,000 in unpaid electricity bills owed to TTEC. To manage this debt, TTEC obtained a loan from the Royal Bank of Trinidad and Tobago which enabled TTEC to more readily carry the receivable due from ISCOTT. By 1991, ISCOTT extinguished its debt to TTEC.

At no time during this period did TTEC provide a guarantee to ISCOTT which enabled ISCOTT to secure a loan to settle the outstanding balance on its account. The financing obtained by TTEC from the Royal Bank benefitted TTEC rather than ISCOTT because it allowed TTEC to have immediate use of funds that otherwise would not have been available to it. On this basis, we determine that TTEC did not provide a loan guarantee to ISCOTT for purposes of securing a loan to settle the outstanding balance owed to TTEC. Therefore, we determine that this program did not exist.

Interested Party Comments

Comment 1: Treatment of shareholder advances: Petitioners claim that GOTT advances to ISCOTT should be treated as grants rather than as equity. In petitioners' view, these advances had none of the characteristics of debt or equity, such as provisions for repayment, dividends, or any additional claim on funds in the event of liquidation. Petitioners cite to *Certain Hot Rolled Lead and Bismuth Carbon Steel Products from France,* 58 FR 6221 (January 27, 1993) (''*Leaded Bar from France*''), where the Department treated shareholder advances as grants because no shares were distributed when the advances were made, despite the fact that shares were issued at a later date. Petitioners point out that the GOTT received no shares at the time of its advances to ISCOTT.

Respondents claim that the advances should be treated as equity. Respondents note that ISCOTT's annual reports consistently state that it was the practice for advances to be capitalized as equity, and that in fact, ISCOTT issued shares for nearly all advances through 1987. In addition, according to respondents, the CCDA states that pending the issuance of any shares, any payment from the GOTT shall constitute paid-up share capital. Respondents further note that *Wire Rod I,* the Department characterized GOTT funding as equity contributions. Respondents cite to *Certain Steel from the U.K.* at 37395, where the Department stated that despite the fact that the U.K. government did not receive any additional ownership, such as stock or additional rights, in return for the capital provided to BSC under Section 18(1) since it already owned 100 percent of the company, such advances to BSC were treated as equity.

Department's Position: We agree with respondents and have continued to treat advances from the GOTT as equity at the time of receipt. In *Certain Steel from the U.K.*, as in this case, requests for funding from the government were examined on a case-by-case basis. This treatment is consistent with our treatment of advances in *Wire Rod I* and our preliminary determination in this proceeding. Further, similar to *Certain Steel from the U.K.*, ISCOTT issued additional shares to the GOTT on several occasions to reduce the balance of the shareholder advances, whereas in *Leaded Bar from France* there was no understanding that shareholder advances were to be converted to equity, and conversion occurred only as part of a government-sponsored debt restructuring.

Comment 2: Equityworthiness: Petitioners claim that if the Department treats the stockholder advances as equity, ISCOTT's financial statements and information gathered at verification demonstrate that ISCOTT was unequityworthy after March 1983, and the Department should view the provision of equity as inconsistent with the practice of a reasonable private investor. Petitioners note that ISCOTT had losses in every year from 1982 through 1994. Petitioners argue that ISCOTT's inability to cover its variable costs while operating the steel plant demonstrates that the company should have been shut down. Petitioners urge the Department to follow its practice of placing greater reliance on past indicators rather than on flawed studies projecting dubious future expectations, which respondents have pointed to as evidence of ISCOTT's equityworthiness. Petitioners cite to the 1983 *Report of the Committee Appointed by Cabinet to Consider the Future of ISCOTT* (''*Committee Report*''), where under any of the options considered, ISCOTT was projected to show a loss, as further evidence that ISCOTT was unequityworthy.

Respondents claim that the financial ratios in this case must be interpreted in the context of a start-up enterprise.

Respondents contend that a venture capitalist would recognize that a start-up enterprise will incur losses for several years. Second, respondents point out that while the *Committee Report* cited by petitioners predicted an overall loss over the next five years, the trend was decidedly positive, with increasing profits projected for the last two years included in the study, 1986 and 1987.

Department's Position: We agree with petitioners, in part. At some point, a reasonable private investor would have come to question ISCOTT's continued inability to achieve forecasted operating results, and would have made future funding contingent on timely, fundamental changes in the company's operations, shutting down the plant, or privatizing ISCOTT. As discussed above in the *Equity Infusions* section of this notice, we are including advances from the GOTT to ISCOTT during the period June 13, 1984 through December 31, 1991, in our calculation of CIL's countervailable subsidy rate.

Comment 3: Loan guarantees under the CCDA: Respondents claim that the GOTT's principal and interest payments on ISCOTT's behalf made pursuant to loan guarantees under the CCDA are not countervailable. In the 1984 final, the Department found that the GOTT's loan guarantees under the CCDA were on terms consistent with commercial considerations. Therefore, payments which the GOTT made on these loans pursuant to the guarantees should also be considered consistent with commercial considerations. In *Carbon Steel Wire Rod from Saudi Arabia,* 51 FR 4206 (February 3, 1986), the Department determined that funding in 1983 made pursuant to a prior agreement, which was on terms consistent with commercial considerations, was not countervailable, even though funds provided pursuant to a new investment decision in 1983 were countervailable because the company was no longer equityworthy. Similarly, in *Final Affirmative Countervailing Duty Determination: Certain Corrosion resistant Carbon Steel Flat Products from New Zealand*, 58 FR 37366, 37368 (July 9, 1993), the Department confirmed that a government's payment of loans under a guarantee agreement is not countervailable if the underlying guarantee was commercially reasonable.

Respondents also seek to clarify that even if the GOTT had liquidated ISCOTT, the GOTT could not have avoided its payment obligations. As of 1983, all funding under the loans covered by the CCDA had been drawn down, and were subject to guarantees by the GOTT.

Petitioners argue that when the Department determined in 1984 that the GOTT's decision to enter into the CCDA was rational, it was not at that time determining that any and all future payments under the CCDA would necessarily be consistent with the private investor standard. Petitioners contend that if the GOTT had acted as a reasonable private investor, it would have shut ISCOTT down and stopped the financial hemorrhaging. Instead, petitioners argue, both ISCOTT and the GOTT were too preoccupied with non-commercial considerations to consider the reasonable course of action.

Department's Position: We disagree with respondents that the GOTT was inexorably committed to make continued payments on ISCOTT's behalf as a result of the loan guarantees contained in the CCDA. Had the GOTT's actions been consistent with those of a reasonable private investor, as a controlling shareholder in ISCOTT, the GOTT would have sought to minimize losses. Shutting down the plant would have been less expensive than continuing to operate the plant in such a manner that no projection was ever achieved and variable costs were never covered by revenues. The GOTT constructed the ISCOTT plant because it had studies indicating the plant was a viable investment. When CIL leased the ISCOTT plant, it demonstrated that ISCOTT was viable. The GOTT could have pursued less costly alternatives than continued funding of ISCOTT's operations with no requirement that timely and demonstrable actions, including consideration of shutting down the plant, be taken to reduce or eliminate the amount needed to fulfill all of its obligations under the CCDA.

Comment 4: Countervailability of cash deficiency payments under the CCDA: Respondents claim that the CCDA imposed a further legal obligation on the GOTT that was distinct from its commitment to meet ISCOTT's CCDA debt service obligations. Specifically, the CCDA required the GOTT to provide funds to ISCOTT to cover any other cash deficiency, such as an operating loss. Respondents argue that both external and internal studies demonstrate that GOTT's decisions to cover these cash deficiencies were consistent with those of a reasonable private investor.

Petitioners reply that the Department's prior determination that the GOTT's decision to enter into the CCDA was rational has no bearing on whether or not subsequent decisions to fund money-losing operations was rational. Petitioners contend that the rationality of guarantee payments must be evaluated anew each time, and that the GOTT should have realized that shutting down the ISCOTT plant would have been the least cost available alternative.

Department's Position: We agree with petitioners that our 1984 decision regarding the CCDA did not give the GOTT license to provide continued funding to ISCOTT immune from potential countervailability under U.S. law. A reasonable private investor acting on a guarantee would pursue the least-cost alternative, and would ensure that the amount of funding under such a guarantee is truly necessary. We are not persuaded that the GOTT's actions were consistent with those of a reasonable private investor, as discussed above in the *Equity Infusions* section of this notice.

Comment 5: Post-lease funding of ISCOTT: Respondents claim that after ISCOTT's assets were leased to CIL in May 1989, any funds provided to ISCOTT by the GOTT did not provide a subsidy to CIL's 1996 production. Respondents note that CIL has always been a separate and distinct company, with no ownership interest in, or other affiliation with, ISCOTT. Therefore, according to respondents, there is no basis for attribution of ISCOTT's subsidies to CIL. Respondents note that as discussed in *Final Affirmative Countervailing Duty Determination; Certain Hot Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom*, 58 FR 6237 (January 27, 1993) (''*Leaded Bar from the U.K.*''), the Department did not attribute any subsidies received by BSC after it had spun off its Special Steels Division into a joint venture, United Engineering Steels Limited (''UES''). In that case the Department did not attribute any subsidies received by BSC after the spin off to the joint venture, stating that there was ''no evidence of any mechanisms for passing through subsidies from British Steel plc to UES (*e.g.*, cash infusions) after the formation of the joint venture. Therefore we determine that any benefits received by BSC after the formation of the joint venture do not pass through to UES.'' Respondents contend that, similarly, in this case there is no evidence that subsidies received by ISCOTT after CIL took control of the steel-making facilities continued to benefit CIL.

Respondents further contend that any past subsidies found to have been received by ISCOTT cannot be found to have conferred a benefit on CIL's production of wire rod in 1996, as required by section 771(5)(E) of the Act. Respondent's argue that CIL never received any of the advances provided to ISCOTT, and note that CIL remained

a completely separate company from ISCOTT after purchasing ISCOTT's plant in an arm's length transaction. Respondents argue that the Department did not articulate how CIL received a benefit from financial contributions to ISCOTT, as required by the Subsidies and Countervailing Measures Agreement.

Petitioners claim that the Department has consistently found that past subsidies are not extinguished by an arm's length sale of a company that had received the subsidies. Petitioners cite to *Certain Hot-Rolled Lead and Bismuth Carbon Steel Products From the United Kingdom; Final Results of Countervailing Duty Administrative Review,* 61 FR 58377, (November 14, 1996) (*''Leaded Bar from the U.K. Review''*), where the Department found that a portion of the subsidies traveled with BSC's Special Steel Business assets when, in 1986, the government-owned BSC exchanged its Special Steels Business for shares in UES. Petitioners note that In *Final Affirmative Countervailing Duty Determination: Certain Pasta from Italy,* 61 FR 30288, (June 14, 1996) (*''Pasta from Italy''*), the Department made a similar finding. Petitioners contend that in these cases, the Department views subsidy payments to a company as a benefit to the entire company and all of its productive assets, and, for this reason, the sale of the company or a part of it does not extinguish the prior subsidies. Section 771(5)(F) of the Act makes it very clear that the Department has the discretion to find prior subsidies countervailable despite an arm's length sale of company or assets.

Department's Position: We disagree with respondents, and have allocated a portion of the nonrecurring subsidies received by ISCOTT prior to the sale of the steel plant to CIL. In *Leaded Bar from the U.K.,* the Department found that subsidies received by BSC after the spin-off did not pass through to UES. We note that in this case the sale of ISCOTT's assets to CIL occurred after the lease period, providing a mechanism for pass-through of subsidies received by ISCOTT to CIL. Consistent with the Department's past practice in *Pasta from Italy* and several pre-URAA cases, we determine that a portion of the subsidies received by ISCOTT, including subsidies received during the lease period, traveled with the assets sold to CIL.

Comment 6: Repayment of subsidies upon sale of assets: Petitioners claim that the sale of ISCOTT's assets at a fair value did not offset the distortion caused by the GOTT's original bestowal of subsidies. Moreover, according to petitioners, the countervailing duty statute establishes a presumption that a change in ownership of the productive assets of a foreign enterprise does not render past countervailable subsidies non-countervailable. Petitioners contend that once subsidies are allocated to a productive unit, they should travel with that unit upon sale or privatization. Therefore, petitioners argue that the Department should not recognize a partial repayment of the subsidy benefit stream at the time ISCOTT assets were sold.

Department's position: We disagree with petitioners and have continued to allocate a portion of the sales price of ISCOTT's assets to the previously bestowed subsidies. This is consistent with the URAA and the Department's past practice (*see, e.g., Leaded Bar from the U.K. Review*). Section 771(5)(F) of the Act reads:

> Change in Ownership.—A change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction.

The language of section 771(5)(F) of the Act purposely leaves discretion to the Department with regard to the impact of a change in ownership on the countervailability of past subsidies. Rather than mandating that a subsidy automatically transfer with a productive unit that is sold, as petitioners argue, the language in the statute clearly gives the Department flexibility in this area. Specifically, the Department is left with the discretion to determine, on a case-by-case basis, the impact of a change in ownership on the countervailability of past subsidies. Moreover, the SAA states that ''Commerce retain[s] the discretion to determine whether, and to what extent, the privatization of a government-owned firm eliminates any previously conferred countervailable subsidies* * *'' SAA at 928.

In this case, we have determined that when ISCOTT's assets were sold, a portion of the sales price reflected past subsidies. To account for that, we treated a portion of the sales price as repaying those past subsidies to the GOTT.

Comment 7: Calculation of amount of subsidies remaining with the seller of a productive unit: Respondents argue that the Department's methodology for calculating the amount of subsidies that pass through in a change of ownership transaction is inconsistent with the rest of the Department's practice with regard to nonrecurring subsidies because the Department does not provide for any amortization when calculating the percentage of the purchase price that is attributable to past subsidies. Respondents claim that if the Department continues to conclude that subsidies may survive privatization, it must revise its methodology for calculating the percentage of the purchase price that is attributed to previously bestowed subsidies to take into account the fact that subsidies received prior to privatization must be amortized from the time of receipt until the time of privatization. Respondents propose that the Department determine the amount of the purchase price attributable to previously bestowed subsidies as the ratio of the amount of subsidies remaining in the company to the company's net worth at the time of privatization.

Petitioners claim the ratio calculated under the Department's current methodology, commonly referred to as ''gamma,'' is intended to measure the share of the purchase price attributable to past subsidies, not the value of past subsidies at the time of privatization. Petitioners argue that the methodology proposed by respondents will yield anomalous results. Petitioners claim that the sale of a thinly-capitalized, heavily-subsidized company would result in 100 percent of the purchase price being allocated to previously bestowed subsidies, while all of the assets of the company benefitted from the past subsidies. According to petitioners, a similarly situated company with equity financing instead of debt would have a small amount of the purchase price allocated to previously bestowed subsidies using respondents' proposed methodology.

Department's position: In accordance with our past practice and policy, we have continued to calculate the portion of the purchase price attributable to past subsidies using historical subsidy and net worth data (*see, e.g., General Issues Appendix* at 37263). Because this methodology relies on several years' data, as opposed to data from just a single year, it offers a more reliable representation of the contribution that subsidies have made to the net worth of the productive unit being sold. We take into account the amortization of previously bestowed subsidies in our pass-through calculation as we apply gamma to the amount of the remaining, unamortized countervailable subsidy benefits to calculate the amount that remains with the seller.

Comment 8: Benefits associated with the 1994 sale of ISCOTT's assets to CIL: Respondents claim that the write-off of

ISCOTT's debts after the sale of the plant to CIL is not a countervailable subsidy to CIL. Typically, companies acquiring the assets of other companies do not also acquire the debt of these companies. In contrast, when companies acquire the stock of other companies, they would normally be expected to assume the debt of the acquired company. Respondents argue that the Department incorrectly relied on *GOES* as precedent, because the circumstances in that case were very different from the circumstances in the case of ISCOTT. Respondents note that in *GOES*, the Government of Italy liquidated Finsider and its main operating companies in 1988 and assembled the group's most productive assets into a new operating company, ILVA S.p.A. Respondents argue that the movement of assets and liabilities between two government-owned companies, as was the case in *GOES*, is very different from the arm's length nature of the sale of ISCOTT's assets to CIL. Respondents claim that the purchase price paid in an arm's length transaction, such as the sale of ISCOTT's assets to CIL, reflects the fact that the purchaser is not also assuming the liabilities of the seller.

Petitioners claim that the Department has precedent for its decision to countervail loans to ISCOTT, which were not transferred to CIL when CIL purchased ISCOTT's assets. Petitioners note that in *Final Affirmative Countervailing Duty Determination; Certain Steel Products from Austria*, 58 FR 37217, 37221 (July 9, 1993), the Department found that losses incurred by a government-owned steelmaker, which were not transferred to new companies upon their purchase of the steelmaker's assets, conferred a subsidy to the new companies. *Department's Position:* We have continued to treat the amount of ISCOTT's remaining liabilities in excess of the amount of remaining assets after the sale of ISCOTT's assets to CIL as a subsidy to ISCOTT at the time of the sale. In *Leaded Bar from the U.K.*, we explained why we allocate subsidies to productive units, stating:

> In the end, a ''bubble'' of subsidies would remain with a virtually empty corporate shell which would not be affected by any countervailing duties because it did not produce or export the countervailed merchandise to the United States.

Here, the ''empty corporate shell'' was ISCOTT, with no productive operations, no source of future earnings, and debts exceeding its assets. Under such circumstances, it was inevitable that ISCOTT would be unable to pay the balance owing on the notes payable, and, in fact, the notes were forgiven by the lenders in 1995. When a government funds an entity through loans which are later forgiven, the Department includes in its calculation of the countervailing duty rate for that entity an amount for debt forgiveness. In this situation, we determine that the debt forgiveness, which for all intents and purposes occurred at the time of the sale of ISCOTT's assets, is a countervailable subsidy.

While the purchase price may have been lower if CIL had assumed the responsibility for the notes payable in the purchase transaction, the result would be that less of any pre-existing subsidies would be repaid.

Comment 9: Calculation of net present value of unamortized subsidies: Petitioners claim that the Department appears to have improperly discounted the 1994 subsidy amount in calculating the net present value of subsidies to which the gamma calculation is applied.

Respondents claim that because the Department begins allocating subsidies in the year of receipt, the net present value amount for the 1994 subsidies should reflect one year of amortization.

Department's Position: We agree with petitioners that our preliminary calculation of the net present value of previously bestowed subsidies was not consistent with the Department's past practice in this regard, and we have corrected this error in our final calculations.

Comment 10: Amortization of nonrecurring subsidies: Respondents claim that in amortizing advances to ISCOTT, the Department began amortizing in the year after the year of receipt, without allocating any amount to the year of receipt.

Department's Position: We agree with respondents and have corrected our calculations.

Comment 11: Adequacy of remuneration for electricity: Respondents claim that CIL does not benefit from the provision of electricity for less than adequate remuneration because Section 32 of the PUC's regulations requires the Commission to set rates that will cover costs and earn a reasonable profit. In 1992, when setting the electricity rates in effect during the POI, the PUC set rates for each customer class based on cost of service studies for 1987 and 1991. These rates were calculated to cover costs and expenses plus yield a reasonable return. In addition, they were published rates that applied to all customers within each of the rate classes.

Further, respondents argue that the electricity rates set by the PUC in 1992 provided adequate remuneration because the PUC made upward adjustments to the rates that had been proposed by TTEC. For example, the PUC adopted a flat rate structure rather than the declining block structure. As high volume users, CIL and other large industrial users paid more under the flat rate structure than they would have under the declining block structure. The declining block structure would have allowed for a rate reduction as usage increased over the billing period.

Petitioners claim that TTEC did not receive adequate remuneration during the POI, nor did it receive an adequate return in two of the four preceding years, despite the assertions by PUC and TTEC officials that the utility is expected to cover costs and expenses and show a return. Further, TTEC intends to file a cost of service study based on 1996 operating costs and request a rate increase. Petitioners argue that this demonstrates that TTEC's current revenues are not adequate to cover costs. Petitioners urge the Department to calculate CIL's benefit from its electricity rates as a recurring grant valued as the difference between CIL's payment at the current rate and the amount it would pay if it were in the next largest rate class on which a profit was realized.

Department's Position: We agree with petitioners that CIL's rate did not provide adequate remuneration. Although the PUC's regulations may require it to set rates that cover costs plus a return, history demonstrates that the PUC has seldom achieved this. The rates in place in the year preceding the POI and during the POI resulted in losses for TTEC. Although a different rate structure such as declining block rates might have led to other results, particularly for CIL, we have no basis to depart from the structure that was actually adopted by the PUC.

We disagree, however, with the calculation methodology proposed by petitioners. Instead, we have relied upon the most recent cost of service study by TTEC which establishes a rate for CIL that will cover the cost of supplying electricity to CIL plus a reasonable return. This provides a better measure of adequate remuneration for a very large customer like CIL than applying the rate for smaller customers, as proposed by petitioners.

Comment 12: Adequacy of remuneration for lease: Petitioners claim that CIL's lease rate is less than the standard lease rate. In *Wire Rod I* (at 482), the Department found this lease rate to result in a subsidy of 2.246 percent. Further, the record in this investigation has information on only

four other leases. This limited information does not allow for a meaningful comparison with the lease rate paid by CIL. Even these four leases, however, suggest that CIL's lease does not provide adequate remuneration. For these reasons, CIL's lease rate should be found countervailable.

Respondents maintain that the rate CIL pays for its 105.7 hectares provides adequate remuneration to PLIPDECO. At verification, the Department attempted to find a suitable benchmark for CIL's lease and found only two companies with 30-year leases on sites of 10 hectares or more. Other companies with sites of 10 hectares or more had 99-year leases. These 99-year leases are structured much differently and cannot be compared to a 30-year lease. Of the two sites with 30-year leases, the first was the second largest site in the estate, and the lease for the property was signed at about the same time as CIL's. The second was a small site with a lease signed years after CIL's lease. Comparing the most comparable lease to CIL's reveals that CIL was paying a higher rate.

Department's Position: PLIPDECO officials informed us at verification that the standard lease rate is used as a starting point for negotiation and indicated that only very small sites would pay this rate. The lease rates of the four leases examined during verification were all less than the standard rate. Therefore, we concluded that the standard rate was not used as the lease rate in all cases and was not an appropriate benchmark for CIL's lease rate.

Moreover, neither the GOTT nor PLIPDECO limited the verification team's access to leases during verification. The team selected the leases to be reviewed on the basis of their similarity to CIL's lease. First, the team selected leases with sites of 10 hectares or more. Of these, only two had leases with the same 30-year term as CIL's. The others were 99-year leases. The team then selected two leases with sites of less than 10 hectares to review the lease terms on these smaller sites. Because CIL's site was 105.7 hectares, the team did not make further selections from the leases with sites under 10 hectares.

Although we did find that the 1983 lease conferred a subsidy in *Wire Rod I*, we note that CIL's lease rate increased significantly in 1988. In addition, the Department used the standard lease rate as its benchmark in *Wire Rod I*. However, as discussed above, our review in this proceeding showed that several leases had rates below the standard rate. Therefore, we have concluded that the standard rate is not an appropriate benchmark.

Comment 13: Export allowance program: Respondents argue that in computing the subsidy attributable to the export allowance program (''EAP'') for the POI, the Department should use CIL's income tax return for fiscal year 1996 rather than CIL's 1995 income tax return. In respondents' view, this would be consistent with the Department's established cash flow methodology as described in the *Countervailing Duties: Notice of Proposed Rulemaking and Request for Public Comments,* 54 FR 23366, 23384 (May 31, 1989) (''*1989 Proposed Regulations*'') at section 355.48(a). Under that policy, the Department will ordinarily deem a countervailable benefit to be received at the time that there is a cash flow effect on the firm receiving the benefit. Respondents assert that CIL experienced the cash flow effect of the EAP throughout 1996, when CIL paid its quarterly installments of the Business Levy.

Respondents also argue that use of the 1995 tax return distorts the countervailable subsidy by attributing to CIL the export allowance benefit earned in 1995, when both exports and total sales were greater than in 1996. Respondents contend that the Department's regulations give it the discretion to use the 1996 tax return and that the Department should use that discretion to avoid this distortion.

Petitioners agree with the Department's approach used in the preliminary determination and urge the Department to continue using the benefits reported in the 1995 tax return which was filed during the POI in calculating the amount of benefit received by CIL. Petitioners state that this approach is consistent with the Department's prior determinations and policy as well as section 351.508(2)(b) of the *Proposed Countervailing Duty Regulations,* 62 FR 8818, 8880 (February 26, 1997) (''*1997 Proposed Regulations*''). Petitioners also cite section 355.48(b)(4) of the *1989 Proposed Regulations*, which states that in the case of a direct tax benefit a firm can normally calculate the amount of the benefit when the firm files its tax return. Petitioners argue that CIL realized the benefit on October 29, 1996, the date when it filed its 1995 tax return, and that CIL did not realize benefits on its 1996 exports until it filed its 1996 tax return on August 25, 1997, after the POI. Petitioners dismiss respondents' arguments about cash flow methodology and estimated tax payment as meritless. Petitioners assert that CIL only claimed benefits from the export allowance when it filed its corporate tax return. Moreover, petitioners state that the filing of the formal income tax return is the earliest date upon which the Department can determine whether the EAP had been used.

Department's Position: We agree with petitioners that CIL received the benefit of the tax savings attributable to the EAP when it filed its corporate tax return. Consequently, we have continued to value this benefit based on the tax return filed during the POI.

In Trinidad and Tobago, a company pays either the corporation tax or Business Levy, whichever is higher. The corporation tax is calculated on the company's profits, and the Business Levy is calculated as a straight percentage of gross sales or receipts.

The Department's long-established practice in treating income tax benefits has been to recognize the benefit of income tax programs at the time the income tax return is actually filed, usually in the year following the tax year for which the benefit is claimed (*see, e.g., Final Affirmative Countervailing Duty Determination: Iron Ore Pellets from Brazil*, 51 FR 21961, 21967 (June 17, 1986)). It is at that time that the recipient normally realizes a difference in cash flow between the income tax paid with the benefit of the program and the tax that would have been paid absent the program. Even when companies make estimated quarterly income tax payments during the tax year, the Department has delayed recognition of the benefit until the tax return is filed and the amount of the benefit is definitively established.

In this case, CIL acknowledges that the 1996 EAP was not claimed until it filed its 1996 tax return in 1997. Nevertheless, CIL claims that because of the export allowance, it does not pay the corporate income tax. Instead, because it must pay the higher of the Business Levy or the corporate income tax, CIL typically pays the Business Levy. Moreover, because CIL makes quarterly deposits of its estimated Business Levy, the company claims the cash flow effect of the EAP occurs when these quarterly deposits are made.

Although we agree that CIL has typically paid the Business Levy rather than the corporate income tax as a result of the EAP, we do not agree that this should lead us to countervail the benefits arising from the EAP as if they were connected with the Business Levy.

First, CIL will only be certain that it will pay the Business Levy when the income tax is computed and the export allowance is claimed. Second, the amount of the benefit is not calculable prior to the filing of the corporate tax

return. An income tax benefit can potentially have numerous cash flow effects. The Department's practice is to single out the cash flow effect most directly associated with the tax benefit; in this case, the actual savings which arise when the taxes are due.

Verification

In accordance with section 782(i) of the Act, we verified the information used in making our final determination. We followed standard verification procedures, including meeting with government and company officials, and examination of relevant accounting records and original source documents. Our verification results are outlined in detail in the public versions of the verification reports, which in the Public File for this investigation.

Suspension of Liquidation

In accordance with section 703(d)(1)(A)(i) of the Act, we have calculated an *ad valorem* subsidy rate of 17.47 percent for CIL, the one company under investigation. We are also applying CIL's rate to any companies not investigated or any new companies exporting the subject merchandise.

We have concluded a suspension agreement with the GOTT which eliminates the injurious effects of imports from Trinidad and Tobago (*see, Notice of Suspension of Investigation: Steel Wire Rod from Trinidad and Tobago* being published concurrently with this notice). As indicated in the notice announcing the suspension agreement, pursuant to section 704(h)(3) of the Act, we are directing the U.S. Customs Service to continue suspension of liquidation. This suspension will terminate 20 days after publication of the suspension agreement or, if a review is requested pursuant to section 704(h)(1) of the Act, at the completion of that review. Pursuant to section 704(f)(2)(B) of the Act, however, we are not applying the final determination rate to entries of subject merchandise from Trinidad and Tobago; rather, we have adjusted the rate to zero to reflect the effect of the agreement.

ITC Notification

In accordance with section 705(d) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all non-privileged and nonproprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order, without the written consent of the Acting Deputy Assistant Secretary for AD/CVD Enforcement, Import Administration.

If the ITC's injury determination is negative, the suspension agreement will have no force or effect, this investigation will be terminated, and the Department will instruct the U.S. Customs Service to refund or cancel all securities posted (*see,* section 704(f)(3)(A) of the Act). If the ITC's injury determination is affirmative, the Department will not issue a countervailing duty order as long as the suspension agreement remains in force, and the Department will instruct the U.S. Customs Service to refund or cancel all securities posted (*see,* section 704(f)(3)(B) of the Act). This notice is issued pursuant to section 704(g) of the Act.

Return or Destruction of Proprietary Information

This notice serves as the only reminder to parties subject to Administrative Protective Order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 355.34(d). Failure to comply is a violation of the APO.

This determination is published pursuant to section 705(d) of the Act.

Dated: October 14, 1997.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 97–27984 Filed 10–21–97; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–307–814]

Final Affirmative Countervailing Duty Determination: Steel Wire Rod from Venezuela

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: October 21, 1997.

FOR FURTHER INFORMATION CONTACT: Christopher Cassel, Robert Copyak, or Richard Herring, Office of CVD/AD Enforcement VI, Import Administration, U.S. Department of Commerce, Room 1874, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482–2786.

Final Determination

The Department of Commerce (the Department) determines that countervailable subsidies are being provided to CVG-Siderurgica del Orinoco (SIDOR), the producer and exporter of steel wire rod from Venezuela. For information on the estimated countervailing duty rates, please see the *Suspension of Liquidation* section of this notice.

Petitioners

The petition in this investigation was filed by Connecticut Steel Corp., Co-Steel Raritan, GS Industries, Inc., Keystone Steel & Wire Co., North Star Steel Texas, Inc., and Northwestern Steel and Wire (the petitioners), six U.S. producers of wire rod.

Case History

Since our preliminary determination on July 28, 1997 (62 FR 41439, August 4, 1997), the following events have occurred:

We conducted verification of the countervailing duty questionnaire responses from August 27, 1997 through September 9, 1997. Petitioners and SIDOR (respondent) filed case briefs on September 23, 1997, and rebuttal briefs on September 26, 1997. A public hearing was held on October 1, 1997.

On September 12, 1997, the GOV and the U.S. Government initialed a proposed suspension agreement. On October 14, 1997, the U.S. Government and the GOV signed a suspension agreement (*see Notice of Suspension of Countervailing Duty Investigation: Steel Wire Rod from Venezuela*) which is being published concurrently with this notice in the **Federal Register**. On October 14, 1997, the petitioners also requested that the Department and the International Trade Commission (''ITC'') continue this investigation in accordance with section 704(g) of the Act. As such, this final determination is being issued pursuant to section 704(g) of the Act.

Scope of Investigation

The products covered by this investigation are certain hot-rolled carbon steel and alloy steel products, in coils, of approximately round cross section, between 5.00 mm (0.20 inch) and 19.0 mm (0.75 inch), inclusive, in solid cross-sectional diameter. Specifically excluded are steel products possessing the above noted physical characteristics and meeting the Harmonized Tariff Schedule of the United States (HTSUS) definitions for (a) stainless steel; (b) tool steel; (c) high nickel steel; (d) ball bearing steel; (e) free machining steel that contains by weight 0.03 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.4

percent of phosphorus, more than 0.05 percent of selenium, and/or more than 0.01 percent of tellurium; or (f) concrete reinforcing bars and rods.

The following products are also excluded from the scope of this investigation:

Coiled products 5.50 mm or less in true diameter with an average partial decarburization per coil of no more than 70 microns in depth, no inclusions greater than 20 microns, containing by weight the following: carbon greater than or equal to 0.68 percent; aluminum less than or equal to 0.005 percent; phosphorous plus sulfur less than or equal to 0.040 percent; maximum combined copper, nickel and chromium content of 0.13 percent; and nitrogen less than or equal to 0.006 percent. This product is commonly referred to as ''Tire Cord Wire Rod.''

Coiled products 7.9 to 18 mm in diameter, with a partial decarburization of 75 microns or less in depth and seams no more than 75 microns in depth; containing 0.48 to 0.73 percent carbon by weight. This product is commonly referred to as ''Valve Spring Quality Wire Rod.''

The products under investigation are currently classifiable under subheadings 7213.91.3000, 7213.91.4500, 7213.91.6000, 7213.99.0030, 7213.99.0090, 7227.20.0000, and 7227.90.6050 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this investigation is dispositive.

The Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the provisions of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act effective January 1, 1995 (the ''Act'').

Injury Test

Because Venezuela is a ''Subsidies Agreement Country'' within the meaning of section 701(b) of the Act, the ITC is required to determine whether imports of steel wire rod from Venezuela materially injure, or threaten material injury to, a U.S. industry. On April 30, 1997, the ITC published its preliminary determination, finding that there is a reasonable indication that an industry in the United States is being materially injured or threatened with material injury by reason of imports from Venezuela of the subject merchandise (62 FR 23485).

Verification

In accordance with section 782(i) of the Act, we verified the information used in making our final determination. We followed standard verification procedures, including meeting with government and company officials, and examination of relevant accounting records and original source documents. Our verification results are outlined in detail in the public versions of the verification reports, which are on file in the Central Records Unit (Room B–099 of the Main Commerce Building).

Subsidies Valuation Information

Period of Investigation: The period for which we are measuring subsidies (the ''POI'') is calendar year 1996.

Allocation Period: In the past, the Department has relied upon information from the U.S. Internal Revenue Service on the industry-specific average useful life of assets in determining the allocation period for non-recurring subsidies. *See General Issues Appendix (GIA),* appended to *Final Countervailing Duty Determination; Certain Steel Products from Austria,* 58 FR 37217, 37226 (July 9, 1993). However, in *British Steel plc. v. United States,* 879 F. Supp. 1254 (CIT 1995) (*British Steel*), the U.S. Court of International Trade (the Court) ruled against this allocation methodology. In accordance with the Court's remand order, the Department calculated a company-specific allocation period for non-recurring subsidies based on the average useful life (AUL) of non-renewable physical assets. This remand determination was affirmed by the Court on June 4, 1996. *British Steel,* 929 F. Supp. 426, 439 (CIT 1996).

In this investigation, the Department has followed the Court's decision in *British Steel.* Therefore, for the purposes of this final determination, the Department has calculated a company-specific AUL. Based on information provided by SIDOR regarding the company's depreciable assets, the Department has determined that the appropriate allocation period for SIDOR is 20 years.

Equityworthiness: In analyzing whether a company is equityworthy, the Department considers whether or not that company could have attracted investment capital from a reasonable, private investor in the year of the government equity infusion based on information available at that time. In this regard, the Department has consistently stated that a key factor for a company in attracting investment capital is its ability to generate a reasonable return on investment within a reasonable period of time.

In making an equityworthiness determination, the Department examines the following factors, among others:

1. Current and past indicators of a firm's financial condition calculated from that firm's financial statements and accounts;
2. Future financial prospects of the firm including market studies, economic forecasts, and project or loan appraisals;
3. Rates of return on equity in the three years prior to the government equity infusion;
4. Equity investment in the firm by private investors; and
5. Prospects in the marketplace for the product under consideration.

For a more detailed discussion of the Department's equityworthiness criteria, *see* the *GIA,* 58 FR at 37244.

Petitioners alleged that SIDOR was unequityworthy from 1977 through 1992. (As explained below, while the GOV's conversion of SIDOR's external debt into equity was made effective in October 1992, we consider 1991 to be the relevant year to examine the company's equityworthiness. Therefore, throughout this notice, we will refer to the transaction as the ''1991 debt-to-equity conversion.'') On this basis, petitioners claim that any equity infusions into SIDOR by the GOV from 1977 through 1990, and the 1991 decision to convert SIDOR's external debt into equity were inconsistent with the usual investment practices of private investors. In addition, we examined whether land transferred from CVG to SIDOR in 1993 and 1994 to cancel unpaid capital subscriptions was inconsistent with the usual investment practices of private investors.

1. 1977 through 1990 Equity Infusions

On March 18, 1997, we initiated an investigation of SIDOR's equityworthiness for the years 1977 through 1990. *See* Memorandum dated March 18, 1997, from The Team to Jeffrey P. Bialos, Re: Initiation of Countervailing Duty Investigation: Steel Wire Rod from Venezuela (*Initiation Memo*), (on file in the public record of the Central Records Unit of the Department of Commerce, Room B–099). In past investigations, the Department preliminarily determined that SIDOR was equityworthy in 1977, and unequityworthy for the years 1978 through 1984. *See Preliminary Affirmative Countervailing Duty Determination; Carbon Steel Wire Rod From Venezuela,* 50 FR 28234, 28237 (July 11, 1985) (*1985 Wire Rod from Venezuela*), and *Preliminary Affirmative Countervailing Duty Determination; Certain Steel Products From Venezuela,* 50 FR 11227, 11230 (March 20, 1985) (*Steel Products from Venezuela*). The

Department also previously initiated an investigation of SIDOR's equityworthiness for the period 1985 through 1990. *See Initiation Memo,* and *Final Affirmative Countervailing Duty Determination: Circular Welded Non-Alloy Pipe from Venezuela*, 57 FR 42964 (September 17, 1992) (*Non-Alloy Pipe from Venezuela*). Although we previously found SIDOR to be equityworthy in 1977, that decision was a preliminary finding. *See* the Memorandum, dated October 15, 1991, to Eric I. Garfinkel, Re: Initiation of Countervailing Duty Investigation: Circular Welded Non-Alloy Steel Pipe From Venezuela, *appended to* the *Initiation Memo.* As such, we concluded that this preliminary finding warranted reinitiating.

In this investigation, SIDOR did not provide any new information regarding the company's financial position for the years 1977 through 1990. Because no information has been presented in this investigation that calls into question the Department's prior determinations that the company was unequityworthy for the years 1978 through 1990, we continue to find that the GOV equity investments made in those years were inconsistent with the usual investment practices of private investors. Moreover, with respect to the 1977 equity infusion, neither party has provided any information beyond what the Department examined in the prior proceeding in which we preliminarily found the company to be equityworthy for that year (*see Steel Products from Venezuela*). Therefore, because no new information has been submitted in this proceeding to indicate that our prior preliminary decision in *Steel Products from Venezuela* was incorrect, we find that it is appropriate to follow that earlier determination, and determine SIDOR to be equityworthy in 1977.

2. 1991 GOV Debt-to-Equity Conversion

We also initiated an investigation of SIDOR's equityworthiness with respect to the conversion of SIDOR's external debt into equity, which was approved by the Venezuelan Congress on May 18, 1993. *See Initiation Memo.* The transaction was made retroactive to October 28, 1992, and is reflected in SIDOR's 1992 financial statements. However, in the questionnaire responses, the GOV stated that the decision to convert 60 percent of SIDOR's external debt into equity was reached in October 1991, and that the terms of the transaction did not change by the time the transaction was approved by the Venezuelan Congress in 1993. Therefore, we consider 1991 to be the relevant year for purposes of determining whether the conversion of SIDOR's external debt into equity was consistent with the usual investment practices of private investors.

In our preliminary determination, we found SIDOR to be equityworthy in 1991. Therefore, we determined that the GOV's decision to capitalize SIDOR's external debt in 1991 was consistent with the usual investment practices of private investors. *See Preliminary Affirmative Countervailing Duty Determination: Steel Wire Rod From Venezuela*, 62 FR 41939, 41941 (August 4, 1997) (*Preliminary Determination*). In reaching our preliminary finding, we evaluated SIDOR's financial ratios for the three years prior to 1991. We also took into account respondent's claim that a major restructuring process, begun in 1989 and aimed at improving SIDOR's profitability and international competitiveness, had significantly improved the company's financial position by 1991. *See Preliminary Determination,* 62 FR at 41941. However, we also stated that additional issues must be examined before reaching a final determination with respect to the conversion of SIDOR's debt into equity. We have reexamined our preliminary finding that SIDOR was equityworthy in 1991, and, taking into account our findings at verification, and the financial results in light of high inflation, we now determine that SIDOR was not equityworthy in 1991.

In reaching our decision, we considered the specific investment factors relied upon by Venezuelan commercial bankers to evaluate the financial condition of potential customers. The bankers stated that in a high inflationary economy where financial statements are not adjusted to reflect the impact of high inflation, potential customers are evaluated not only on the basis of their financial ratios. Rather, a number of additional aspects of a company's operations are also taken into account, including: (1) a company's ability to generate real, inflation-adjusted revenue growth and cash flow, (2) the reputation of the company, and (3) the company's competitiveness. In analyzing these factors, the bankers stressed that a key issue for investors is whether a company has successfully survived the crises of the economy, including inflation, over the last years. *See* the September 19, 1997, Memorandum to Barbara E. Tillman Re: Meetings with Commercial and Investment Banks in the Countervailing Duty Investigation of Steel Wire Rod from Venezuela (*Memo Re: Meetings with Commercial Bankers*) at 2–6 (on file in the public record of the Central Records Unit of the Department of Commerce, Room B–099). Accordingly, in evaluating SIDOR's equityworthiness in 1991, we have expanded our standard analysis to consider these additional factors.

As petitioners correctly point out, the bankers indicated that SIDOR did not represent a sound investment during the early 1990s. Furthermore, in one banker's view, no private investor would have provided SIDOR with U.S. $1.0 billion in 1991. Respondent attempts to discount these statements by arguing that the bankers also concluded that an inside investor ''may well have made such an investment.'' *Memo Re: Meetings with Commercial Bankers* at 6. This argument is not persuasive. The Department has never distinguished between ''inside'' and ''outside'' investors. In the *GIA,* we stated ''it would be inappropriate, if not impossible, to fashion a unique inside investor standard as a variation of the Department's reasonable private investor standard,'' because ''the Department must render its equityworthiness determinations on the basis of objective and verifiable evidence.'' 58 FR at 37249, 37250.

Furthermore, SIDOR's competitive position was not favorable in 1991. SIDOR's restructuring efforts were insufficient to justify the conversion of almost U.S. $1.0 billion of the company's external debt. As one banker noted, ''[t]he government is not able to make the difficult restructuring changes to SIDOR. . . to make [the company a] competitive entity.'' *Memo Re: Meetings with Commercial Bankers* at 7. Our own evaluation of the restructuring process, discussed below, reaches the same conclusion. In light of the information gathered at verification, respondent's assertion that the bankers thought SIDOR's long-term prospects justified the debt restructuring is not convincing.

An analysis of SIDOR's inflation adjusted revenue growth for 1988 through 1991, also an important investment criterion, shows that SIDOR's revenue growth was not keeping pace with inflation in 1988 and 1989. While real revenue growth was 9.44 percent in 1990, in the preceding two years it was negative 13.38 percent and negative 5.15 percent, respectively. *See* the October 14, 1997, Memorandum for the File, Re: Calculations for the Final Affirmative Countervailing Duty Determination: Wire Rod From Venezuela (POI 1996) (*Final Calculations Memo*) (public version on file in the Central Records Unit of the Department of Commerce, Room B–099).

In our preliminary finding, we noted that inflation was an important issue

that we would examine prior to reaching the final decision with respect to the 1991 transaction. Venezuelan commercial bankers discounted the importance of an analysis of certain financial ratios because the impact of inflation on historical financial statements is not very well understood. *See Memo Re: Meetings with Commercial Bankers* at 3. However, there are certain areas of the financials which can be analyzed in real terms and adjusting these for inflation results in a less favorable picture of the company's earnings. For example, because sales revenues are recorded during the fiscal periods and reflect the effects of inflation, the costs related to these sales may be understated as the value of inventory used for these sales may have been produced and recorded prior to the sale. Adjusting ''costs of goods sold'' to reflect the erosion of currency values shows that real costs would increase resulting in a lower net profit or higher net loss. If such an adjustment is made to SIDOR's cost of goods sold, the company's net profit margin deteriorates significantly: the positive nominal profit margin of 0.06 percent in 1988 and 3.31 percent in 1989 become negative 6.67 percent and negative 11.92 percent, respectively. The nominal profit margin for 1990 worsens from negative 5.42 percent to negative 11.77 percent. *See Final Calculation Memo* at 22. With a negative real profit margin in each of these years, SIDOR's return on equity similarly turns negative from 1988 through 1990.

In their case brief, petitioners constructed an inflation-adjusted return on equity (ROE) for SIDOR by comparing the company's nominal ROE with the rate of inflation in that year. According to this analysis, with annual inflation rates of over 30 percent, no well-run private company would be found equityworthy in Venezuela. This is an unreasonable conclusion. As noted above, we calculated an adjusted profit margin for SIDOR, based on an adjustment of the company's cost of goods sold. This is a reasonable adjustment to the company's financial results to account for high inflation during the 1988 through 1990 period.

Nevertheless, we recognize that the rate of return from a company during years of high inflation would require the company to earn very high returns, and investors would consider whether the investment would ultimately yield a real rate of return. An analysis of SIDOR's financial ratios clearly indicates that the company's rate of return, in nominal terms, was very low, or negative. In the context of the high rates of inflation during these years, the company's rate of return was very poor, and yields an unfavorable future financial outlook.

Respondent has argued that SIDOR was worth more than its nominal book value because the historical financial statements understated the value of the company's assets, and because a company's fixed assets maintain their value and increase in nominal value with inflation. *See* Respondent's September 26, 1997, rebuttal brief. While we acknowledge that this may be the case, this increase in the nominal value of the company's real assets is not compelling for determining that SIDOR was equityworthy during these years. An investor is investing in an on-going operation, and the important factor is the efficient operation of the assets in order to yield a return on those assets. As we noted in the *GIA*, a reasonable investor's decision to invest in an operating steel company such as SIDOR would be based on many factors, not just the level of nominal value of the underlying assets. *See* 58 FR at 37247. The value of the corporation's underlying assets is more important when a company is terminating and liquidating. This is not the primary consideration of an equity investor. In any case, respondent has failed to quantify this argument in any meaningful way. Only in 1994 did SIDOR begin to apply inflation adjustments to the historical figures in its financial statements, and the company has admitted that ''there is no accurate way to retroactively adjust [unadjusted statements] for inflation.'' SIDOR's July 3, 1997, questionnaire response at 10 (on file in the Central Records Unit of the Department of Commerce, Room B–099).

Another important factor during the 1988–1991 period is that little private investment was actually taking place in Venezuela. Rather, given the economic instability in the country, as evidenced by rising interest rates and steady currency devaluations, private money was in fact fleeing the country for alternative foreign currency-denominated investments. *See Memo Re: Meetings with Commercial Bankers* at 1–2. There were few exchange controls at the time, and currency was easily invested in foreign currency-denominated assets. While it is certainly true that some private investment was taking place in Venezuela during the early 1990s, SIDOR would have been an unlikely recipient of such funds, and certainly not in the magnitude of the GOV's 1991 debt conversion.

In preliminarily finding SIDOR equityworthy, we relied upon respondent's claim that the company's restructuring process, starting in 1989, had significantly improved SIDOR's competitiveness. At verification, officials from the Ministry of Finance (Hacienda) and SIDOR again stated that the restructuring process greatly improved the company's financial health and placed SIDOR on the path to becoming an internationally competitive steel company. *See* the September 19, 1997, Memorandum to Barbara E. Tillman Re: Verification of Information Provided in the SIDOR Questionnaire Responses (SIDOR VR) at 3–9, and the September 20, 1997, Memorandum to Barbara E. Tillman Re: Verification of the Government of Venezuela Questionnaire Responses (GOV VR) at 3–6 (public versions on file in the Central Records Unit of the Department of Commerce, Room B–099). Respondent also claims that the GOV's decision to convert U.S. $1.0 billion of SIDOR's external debt into equity was in large part due to the company's commitment to meet specific short- and long-term goals, and the projections of the company's financial position if it met these goals. While we acknowledge that SIDOR may have made some progress as a result of the restructuring process, we do not agree that these changes provide a basis for finding that SIDOR was equityworthy in 1991. In the *GIA*, we stated that any projections of future earnings based on restructuring plans would have to be reconciled with an analysis of past performance. 58 FR at 37245. As we will show, the projections do not provide a sufficient basis to overcome SIDOR's past performance and the company's poor reputation. Rather, but for the debt capitalization by the GOV, SIDOR's cash flow would have become so unstable that the company would have been unviable. *See* SIDOR VR at 8.

At verification, SIDOR officials explained that the 1989 restructuring process was aimed at making the company more competitive internationally and returning it to profitability. To achieve this, SIDOR intended to measure and improve several key indicators of the company's performance, including:

(1) work force productivity, as measured by tons of steel produced per worker per year;

(2) debt to equity ratio;

(3) unit cost of production and sales;

(4) the timing of deliveries; and

(5) the ratio between inventories and sales, taking into account net sales.

See SIDOR VR at 4. SIDOR also started a cost reduction program and determined that the company's product mix had to be reduced by specializing in the more profitable flat products. To

become more competitive, SIDOR also reduced its work force. According to SIDOR, by 1991, the company had greatly improved all of the indicators and had released 3000 workers. An additional program to improve SIDOR's performance was initiated in 1991, as part of the debt restructuring that was agreed upon in principal in that year. Unlike the 1989 restructuring program, under this program, SIDOR made specific commitments to the GOV, and agreed to reach these performance targets by 1993. The targets included (1) an 11.0 percent reduction in per unit production costs; (2) an increase in labor productivity as measured by tons of liquid steel production per man year; (3) a reduction of inventories to 25 percent; and (4) an increase in sales volume to 2,400,000 tons per year, and capacity utilization of over 80 percent. *See* SIDOR VR at 8. According to SIDOR officials, if these targets were reached by that time, SIDOR would become competitive globally. *Id.*

However, we disagree with these arguments. It may be true that SIDOR's inability to meet its commitments to the GOV was, as respondent claims, compounded by the difficulties in the Venezuelan economy. However, petitioners correctly note that not all of the performance targets were linked directly to the success of Venezuela's economy or to worsening inflation. *See* SIDOR VR at 8. Moreover, as the bankers noted, a key factor in determining a company's potential was its ability to perform adequately *in spite of* the worsening economic conditions.

In conjunction with GOV's 1991 agreement to capitalize 60 percent of the company's external debt, although SIDOR prepared a report containing certain financial projections for the Economic Council of the Presidential Cabinet, there were no independent evaluations of this potential investment. *See* SIDOR VR at Exhibit 21 (Public Document). In analyzing SIDOR's potential, the report details a plan of action to improve the company's competitiveness. However, the report includes scant projections of the company's projected financial performance, such as profitability, and other financial indicators—important information that a private investor would consider. Rather, the report's focus is on SIDOR's projected cash flow, with and without the capitalization of 60 percent of the company's external debt. The report acknowledges that ''[d]espite implementing a cost reduction program * * * the high debt burden impedes SIDOR from accomplishing its modernization plans {and the capitalization of 60 percent of SIDOR's external debt} is the minimum required to guarantee the continued operation of the firm.'' *Id.* Moreover, respondent acknowledges that the economic indicators used in the projections ''had proved to be too optimistic.'' Respondent's September 26, 1997, Rebuttal Brief at 17. Accordingly, the company's own projections and statements indicate that, absent the debt capitalization, SIDOR's cash flow would be insufficient for the company to meet its debt obligations, and the company would become unviable.

We analyzed similar circumstances in *Certain Steel From Mexico* which involved AHMSA, a Mexican steel producer. In that case, it appeared that the financial projections were done to show that the government of Mexico's assumption of AHMSA's debt could achieve a level of cash flow to prevent the company from defaulting on its loans. Our conclusion in that case is the same we have reached here: ''the focus of the analysis was not to demonstrate to a reasonable investor that [the company] was a good investment.'' *GIA*, 58 FR at 37245. Rather, in this case, the focus of SIDOR's report for the Economic Council of the Presidential Cabinet was to show that SIDOR would have been unable to continue operations without the capitalization of 60 percent of the company's external debt. Again, our evaluation of AHMSA's projections in *Certain Steel From Mexico*, are also appropriate in this case. At that time, we stated that the reasonable investor would weigh a company's past performance ''far more than a financial projection done by the company itself in an attempt to garner more financial aid from the {government}.'' *GIA*, 58 FR at 37245.

The analysis above makes clear that SIDOR was not an equityworthy company in 1991. Accordingly, we determine that the 1991 conversion of SIDOR's external debt into equity was not consistent with the usual investment practices of private investors.

3. 1993 and 1994 CVG Land Transfers to SIDOR

In the *Preliminary Determination*, we found that in 1993 and 1994, CVG transferred land to SIDOR to cancel unpaid capital subscriptions. We also found that SIDOR was equityworthy in each of these years. *See Preliminary Determination*, 62 FR at 41941. For many of the same reasons outlined above, we have reevaluated our preliminary determination that SIDOR was equityworthy in these years. For example, SIDOR's real revenue growth from 1991 to 1993 was negative 16.97 percent, negative 8.73 percent, and negative 22.48 percent, respectively. We have also calculated SIDOR's cost of sales, adjusted for the rate of inflation, in each year from 1990 through 1993. This adjustment yields negative profit margins in each of the three years preceding the 1993 and 1994 land transfers, except 1991. However, even in that year, the adjusted return was very small, 0.18 percent. *See Final Calculation Memo* at 22. In each year that SIDOR experienced a loss after adjusting for inflation, the company's return on equity would also be negative, meaning that SIDOR was not able to generate a real return on investment in those years. Accordingly, we now determine that SIDOR was unequityworthy in 1993 and 1994.

Equity Methodology: In measuring the benefit from a government equity infusion to an unequityworthy company, the Department compares the price paid by the government for the equity to a market benchmark, if such a benchmark exists. A market benchmark can be obtained, for example, where the company's shares are publicly traded. *See, e.g., Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Spain*, 58 FR 37374, 37376 (July 9, 1993).

Where a market benchmark does not exist, the Department has determined in this investigation to continue to follow the methodology described in the *GIA*, 58 FR at 37239. Following this methodology, equity infusions made on terms inconsistent with the usual practice of a private investor are treated as grants. Using the grant methodology for equity infusions into an unequityworthy company is based on the premise that an unequityworthiness finding by the Department is tantamount to saying that the company could not have attracted investment capital from a reasonable investor in the infusion year based on the available information.

Creditworthiness: When the Department examines whether a company is creditworthy, it is essentially attempting to determine if the company in question could obtain commercial financing at commonly available interest rates. If a company receives comparable long-term financing from commercial sources, that company will normally be considered creditworthy. In the absence of comparable commercial borrowings, the Department examines the following factors, among others, to determine whether or not a firm is creditworthy:

1. Current and past indicators of a firm's financial health calculated from

that firm's financial statements and accounts.

2. The firm's recent past and present ability to meet its costs and fixed financial obligations with its cash flow.

3. Future financial prospects of the firm including market studies, economic forecasts, and projects or loan appraisals.

For a more detailed discussion of the Department's creditworthiness criteria, *see,* e.g., Final Affirmative Countervailing Duty Determinations: Certain Steel Products from France, 58 FR 37304 (July 9, 1993); and *Final Affirmative Countervailing Duty Determinations: Certain Steel Products from the United Kingdom,* 58 FR 37393 (July 9, 1993).

Petitioners have alleged that SIDOR was uncreditworthy in each of the years the company received GOV equity infusions, *i.e.,* 1977 through 1992 (with the exception of 1988). In *Non-Alloy Pipe from Venezuela,* the Department initiated an examination of SIDOR's creditworthiness for the years 1985 through 1990. *See* 57 FR at 42964. For all other years, the Department initiated an examination of SIDOR's creditworthiness based upon an analysis of SIDOR's cash flow and financial ratios. *See Creditworthy/Equityworthy Memo.* As outlined above under the ''Equityworthiness'' section, for all the years except 1989 through 1992, SIDOR did not submit financial data beyond what was examined in the initiation stage, stating that such information was inaccessible. Therefore, because SIDOR has not provided any information that undermines the Department's initiation analysis, we determine that SIDOR was uncreditworthy from 1978 through 1987 and from 1989 through 1990.

We also now consider SIDOR to be uncreditworthy in 1991, the year of the GOV's decision to convert 60 percent of SIDOR's external debt into equity. The company's financial picture in the three years prior to 1991 was erratic. As outlined under the equityworthiness section above, in 1991, SIDOR's real revenue growth was negative in 1988 and 1989, and, after making an adjustment for inflation, the company's profit margin was negative in each of the three years preceding 1991. According to Venezuelan commercial bankers, this is a key factor in evaluating a company's ability to meet its debt obligation. *See Memo Re: Meetings with Commercial Bankers* at 3. While the bankers also stated that they would lend to Venezuelan companies with a debt-to-equity ratio of up to 300 percent, they further indicated that a key factor would be whether the company had survived the crises of the economy. This cannot be said of SIDOR. The company's own projections at the time made clear that without the GOV's conversion of SIDOR's external debt, the company would not have been able to meet its debt obligations. *See* SIDOR VR at Exhibit 21 and the ''Equityworthiness'' discussion above.

We have also determined that SIDOR was unequityworthy in 1993 and 1994. Therefore, we have also examined the company's financial statements over the period 1990 through 1993, to analyze SIDOR's ability to obtain commercial financing at commonly available interest rates. For the three years after 1991, SIDOR's liquidity improved significantly, with current assets exceeding current liabilities by over two to one. In addition, SIDOR's ability to service its long-term debt also improved, and the cash flow to debt ratio increased to over 14 percent in 1992 and 1993. While SIDOR's financial picture remained weak during the period 1990 through 1993, the lessened debt burden and improved liquidity indicate that SIDOR would have been able to obtain commercial financing at commonly available interest rates in 1993 and 1994. Therefore, we determine SIDOR to be creditworthy in each of these years.

Discount Rates: For uncreditworthy companies, our practice is to use as the discount rate the highest long-term fixed interest rate commonly available to firms in the country plus an amount equal to 12 percent of the prime rate. Because we were unable to locate a prime rate in Venezuela, we added 12 percent to the discount rate. *See e.g., Final Affirmative Countervailing Duty Determination: Certain Steel Products From Brazil,* 58 FR 37295, 37298 (July 9, 1993) (*Brazil Steel*), *Final Affirmative Countervailing Duty Determination: Grain-Oriented Electrical Steel From Italy,* 59 FR 18357, 18358 (April 18, 1994). (*GOES*).

In the *Preliminary Determination,* we calculated the benefit from non-recurring countervailable subsidies received by SIDOR through 1987 by using as the discount rate the long-term corporate bond rates in Venezuela, published by Morgan Guaranty Trust Company in *World Financial Markets. See* 62 FR at 41942. For the period after 1987, we used as the discount rate the average short-term interest rate, because the long-term corporate bond rates were not available after 1987, and because the primary mechanism for obtaining long-term domestic currency financing in Venezuela has been through short-term, roll-over, loans.

Based on our findings at verification, we now determine that it is not appropriate to use long-term corporate bond rates as the discount rate. Central Bank of Venezuela officials stated at verification that ''[c]ommercial banks in Venezuela have never given long-term loans. The general practice is to give one-year loans at a short-term rate and roll it over each year with a new short-term rate.'' *GOV VR* at 3.

In the *Preliminary Determination,* we also stated that it was appropriate to adjust the discount rate to take into account inflation because Venezuela has experienced intermittent periods of high inflation over the past twenty years, and because SIDOR has adjusted its financial statements to take into account the effects of inflation since 1994. *See Preliminary Determination,* 62 FR at 41942. We have modified our approach for this final determination and no longer consider it appropriate to make such an adjustment to the short-term discount rate. In addition, we now determine that, in calculating the benefit from non-recurring subsidies, it is appropriate to account for inflation only for the period 1987 through 1996. Therefore, for the years 1978 through 1986, we are using, as the discount rate, the short-term bolivar interest rates described above. As noted above, these rates represent the primary mechanism for obtaining long-term domestic currency financing in Venezuela.

We have determined that the most reasonable way to account for inflation for the is to convert the equity infusions into U.S. dollars, and to then apply, as the discount rate, a long-term dollar lending rate. Therefore, for our discount rate, we used data for U.S. dollar lending in Venezuela for long-term non-guaranteed loans from private lenders, as published in the World Bank Debt Tables: External Finance for Developing Countries. This conforms with our practice in *Brazil Steel. See* 58 FR at 37298. The changes to our calculation methodology are discussed more fully below under the *GOV Equity Infusions into SIDOR and Interested Party Comment* sections of the notice. Because we determine SIDOR to be uncreditworthy for the years 1978 through 1991 (except 1988), we added to the discount rates a risk premium equal to 12 percent of the discount rate in each of those years.

Based upon our analysis of the petition and the responses to our questionnaires, we determine the following:

I. Programs Determined To Be Countervailable

A. GOV Equity Infusions into SIDOR

SIDOR received GOV equity infusions in every year from 1977 through 1991, except 1988. SIDOR is a 100-percent government-owned company. Its parent company is Corporacion Venezolana de Guayana (CVG), a holding company owned by the GOV charged with promoting industrial development in the Guayana Region. The majority of the equity infusions were made by the Fondo de Inversiones de Venezuela (FIV), a GOV investment fund. The remaining funds were provided by the Hacienda, primarily as interest payments on loans. According to the response of the GOV, the government equity infusions into SIDOR were provided pursuant to special laws adopted with respect to government-approved expansion projects of SIDOR. Thus, these equity infusions were specific under section 771(5A)(D) of the Act.

The first law, published in the Gaceta Oficial No. 30,587 on January 2, 1975, authorized SIDOR's 1974–79 ''Plan IV'' expansion. This expansion was aimed at increasing SIDOR's steel production by 3.6 million tons as well as increasing the company's rolling capacity for flat and non-flat products. The government equity infusions under Plan IV were not disbursed in the amounts or at the time originally projected in this plan. However, the amounts received by SIDOR were recorded in the company's annual financial statements in the year they were received. Equity funds also were provided to SIDOR in accordance with a 1987 law passed by the Venezuelan Congress. This law was published in the Gaceta Oficial No. 33,771 on December 21, 1987. The FIV received both preferred and common shares for these equity investments into SIDOR.

As noted above, funds were also provided to SIDOR by the Hacienda. Funds provided by the Hacienda between 1977 and 1981 were authorized under Article 11 of a 1976 Special Law for Public Credit and were also made pursuant to a June 26, 1977, agreement between the Hacienda, FIV, CVG and SIDOR. Under this agreement, the Hacienda agreed to pay SIDOR's interest on loans from the FIV in return for shares in the company. Equity payments made between 1984 and 1986 were provided pursuant to government Decree 390 of December 1984, authorizing the Hacienda to help SIDOR service its foreign debt. Finally, a 1987 loan from the Hacienda to SIDOR was converted into equity, but recorded as an advance for future capital increase.

SIDOR records all Hacienda equity funds in the years the funds were received. However, the capital investments appeared in SIDOR's annual financial statements as ''Advances for Future Capital Increase.'' In 1989, all advances were converted into shares issued to Hacienda, the delay stemming from a disagreement between the Hacienda and CVG as to who should take ownership of the shares. The issue was resolved in 1989, and on the same day the shares were issued to Hacienda, they were transferred to CVG, SIDOR's parent company. We have treated these Hacienda funds as capital investments in each year in which they were received by SIDOR.

According to the agreement under which the Hacienda funds were provided, the funds are to be treated as capital infusions.

In 1991, following several years of restructuring by SIDOR, the GOV agreed to convert 60 percent of SIDOR's debt and the interest accrued on the debt into equity which was converted into shares provided to Hacienda. This debt related to SIDOR's pre-1986 foreign currency loans that had been restructured in accordance with government Decree 1261 of November 15, 1990. As a result of this conversion, the Hacienda now holds 39.68 percent of SIDOR's shares. As of December 31, 1996, the remaining 60.32 percent were held by SIDOR's parent company, CVG.

In 1993 and 1994, also in connection with SIDOR's Plan IV expansion project, CVG transferred some of the land on which the company constructed the Plan IV expansion. The land was used as payment for unpaid capital subscriptions from CVG. At the time, CVG purchased only about half of the 1,860,000 shares in SIDOR it had subscribed to. We consider the land transfers to be capital investments in each year in which they were received by SIDOR.

We determine that the equity infusions into SIDOR in the years 1978 through 1987, 1989 through 1991, 1993 and 1994 confer a benefit under section 771(5)(E)(i) of the Act because the GOV investments were not consistent with the usual investment practice of private investors. *See* the discussion on ''Equityworthiness'' above. Also, these equity infusions are specific within the meaning of section 771(5A)(D) because they were limited to one company.

As explained in the ''Subsidies Valuation Information'' section, we have treated equity infusions in unequityworthy companies as grants given in the year the capital was received. We have further determined these infusions to be non-recurring subsidies. Therefore, we have allocated the benefits over 20 years.

Venezuela experienced periods of high inflation during the period 1978 through 1996 (the rates ranged from 7 percent to 103 percent). In the *Preliminary Determination*, we found that it was appropriate to take into account the effects of inflation to accurately value the benefit from GOV equity infusions. *See* 62 FR at 41943. We did this by adjusting the principal component of the benefit by the inflation index, using the year of receipt as the reference year to measure inflation. We also adjusted the interest component by adding the rate of inflation in each year to the discount rate.

Based on our verification and comments from interested parties, we find that the methodology used in the preliminary determination to account for inflation should be changed. First, prior to 1987, inflation was relatively low and, as such, we do not consider it appropriate to adjust for inflation prior to 1987. In 1987, inflation increased to 40 percent and thereafter remained consistently high, reaching 103 percent in 1996. The period after 1986, therefore, can clearly be distinguished from the prior years as marked by consistently high inflation. Accordingly, when calculating the benefit to SIDOR during the POI from the GOV equity infusions, we adjusted the nominal values of the equity infusions to account for inflation from 1987 through 1996. *See* the *Interested Party Comment* section of this notice for a more detailed discussion of this adjustment.

As we noted under the ''Discount Rate'' section above, in calculating the benefit from equity infusions received prior to 1987, we have used the short-term bolivar interest rates. For the period 1987 through 1996, we have accounted for inflation in our benefit calculation by converting the equity infusions into U.S. dollars after 1986. This conforms with our past practice and with business practices in Venezuela. *See Brazil Steel*, 58 FR at 37298. For example, a principle source of funding for capital investment in Venezuela was ''overseas foreign currency-denominated financing.'' *See Memo Re: Meetings with Commercial Bankers* at 2. Also, SIDOR's long-term loans were denominated in foreign currency. Accordingly, for equity infusions received prior to 1987, we converted the remaining face value of the grant in 1987 into U.S. dollars using the bolivar/dollar exchange rate

prevailing in that year. For the remaining allocation period, we then applied the long-term U.S. dollar interest rate described in the ''Discount Rate'' section of this notice. For equity infusions received after 1986, we converted the infusion into U.S. dollars at the exchange rate in effect on the day the infusion was received by SIDOR. The discount rate used was the same described above.

To calculate the total benefit from the infusions to SIDOR, we summed the benefit allocated to the POI from each equity infusion. After converting the benefit from U.S. dollars into bolivars, we then divided that total benefit by SIDOR's total sales of all products during the POI. On this basis, we determine the net subsidy for this program to be 23.61 percent *ad valorem* for SIDOR.

B. Dividend Advances From the Hacienda

Between 1977 and 1981, pursuant to a June 26, 1977, agreement among the Hacienda, FIV, CVG and SIDOR, the Hacienda paid dividends on behalf of SIDOR on the preferred shares held by FIV. These were recorded in SIDOR's accounting records as ''Dividend Advances.'' These dividend advances are still reported in SIDOR's 1996 financial statement. According to the 1996 financial statement, the final treatment of these dividend advances has not been decided. Because the payment by the Hacienda of dividends on behalf of SIDOR is based on an agreement signed by the Hacienda, FIV, CVG and SIDOR, the payment of dividends by the Hacienda, a government agency, is limited to one company, SIDOR, and is, thus, specific under section 771(5A)(D) of the Act. To determine whether a benefit has been provided, the Department must determine whether SIDOR was obligated to pay dividends to FIV on the preferred shares. If the Hacienda relieved SIDOR of a payment obligation, then the payment of dividends by the Hacienda on behalf of SIDOR constitutes a countervailable subsidy.

According to its supplemental questionnaire response, SIDOR had fiscal losses in the years the dividend payments were made. Therefore, SIDOR stated that it was not obligated to pay any dividends. To determine whether SIDOR was obligated to pay the dividends to FIV on the preferred shares, we examined the 1977 agreement among the Hacienda, FIV, CVG and SIDOR. We verified that under this agreement, the preferred shares yielded a fixed yearly dividend equivalent to seven percent of their nominal value. Therefore, SIDOR was obligated to pay fixed yearly dividends to FIV. Because the payment of dividends by the Hacienda to FIV relieved SIDOR of a financial obligation, we determine that the outstanding balance of the ''Dividend Advances'' constitutes a benefit under section 771(5)(E) of the Act.

In order to calculate the benefit from this program, we treated the dividend advances as interest-free short-term loans because the advances appear to be liabilities of SIDOR. The 1977 agreement under which these dividends were paid does not state that these are capital infusions into SIDOR by the Hacienda. In addition, neither the GOV or SIDOR has treated these dividend advances as capital infusions. Thus, it appears, that SIDOR is still liable for repayment of the dividend advances.

To calculate the benefit in the POI, we took the amount of the dividend advances reported in SIDOR's 1996 financial statement and calculated the amount of interest the company would have paid in 1996 if it had received an interest-free loan equal to the amount of the dividend advances. We used as our benchmark interest rate the annual average short-term interest rate reported by the GOV in its supplemental response. We used this as the benchmark because we verified that SIDOR did not have short-term bolivar lending during the period of investigation. The calculated interest savings was then divided by SIDOR's total sales in the POI. On this basis, we determine the net subsidy for this program to be 0.08 percent *ad valorem* for SIDOR.

II. Programs Determined To Be Not Countervailable

A. GOV Loan to SIDOR in 1990

We initiated an investigation of this program based upon petitioners' allegation that the GOV replaced a $1,507 million commercial loan to SIDOR with a 15-year loan from the government. We verified that this 1990 GOV loan to SIDOR was part of a debt restructuring program which was examined and found not countervailable in the *Final Affirmative Countervailing Duty Determination: Ferrosilicon From Venezuela; and Countervailing Duty Order for Ferrosilicon From Venezuela*, 58 FR 27539 (May 10, 1993). Because petitioners have provided no new information or evidence of changed circumstances to warrant a reconsideration of that determination, we continue to find this GOV debt restructuring program, under which this 1990 loan was received, not countervailable.

B. Government Provision of Electricity

Electricity is provided to SIDOR by EDELCA, a government-owned utility company. Both SIDOR and EDELCA are part of the CVG Group. EDELCA is the largest utility company in Venezuela and generates 70 percent of the electricity consumed in Venezuela. Electricity rates between EDELCA and its industrial customers are not regulated. Tariff rates are set by EDELCA for a one-year period corresponding to the calendar year.

Almost all of EDELCA's clients are industrial customers or other utility companies in Venezuela. The rates between EDELCA and the other utility companies are regulated by the Regulatory Commission of Electric Energy (RCEE), while the rates charged by EDELCA to its industrial clients are not regulated. In 1990, EDELCA began using dollar per-unit rates rather than bolivar per-unit rates for its industrial rates in order to protect its tariff structure against the effects of inflation. In that year, EDELCA also changed its rate structure to one based upon its costs plus a return on its capital. To calculate its costs, EDELCA divided capital costs by capacity and factored in general operating costs, transmission costs, administrative costs, and a ten percent return on capital. To calculate its base industrial tariff rate, it then determined how much higher a price the company would need to charge in order to generate enough income to service its debt and maintain a profit. This base rate then served as the basis for the industrial rates set in subsequent years. Because this base rate was calculated in dollars, it has generally been increased in each subsequent year by the U.S. Consumer Price Index.

EDELCA makes small adjustments to this base rate to take into account different transmission and transformation costs for its customers. We verified that certain industrial clients with higher transmission costs due to the distance from the generation site paid slightly more than the basic rate in order to account for EDELCA's increased cost of transmission. In addition, some other industrial clients, such as SIDOR, maintained their own substations and transformers. These customers received a slightly lower rate.

According to section 771(5)(E) of the Act, the adequacy of remuneration with respect to a government's provision of a good or service ''* * * shall be determined in relation to prevailing market conditions for the good or service being provided or the goods

being purchased in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.'' Particular problems can arise in applying this standard when the government is the sole supplier of the good or service in the country or within the area where the respondent is located. In this situation, there may be no alternative market prices available in the country (*e.g.*, private prices, competitively-bid prices, import prices, or other types of market reference prices). Hence, it becomes necessary to examine other options for determining whether the good has been provided for less than adequate remuneration. This consideration of other options in no way indicates a departure from our preference for relying on market conditions in the relevant country, specifically market prices, when determining whether a good or service is being provided at a price which reflects adequate remuneration.

With respect to electricity, some of the options may be to examine whether the government has followed a consistent rate-making policy, whether it has covered its costs, whether it has earned a reasonable rate of return in setting its rates, and/or whether it applied market principles in determining its rates. Such an approach is warranted where it is only the government that provides electricity within a country or where electricity cannot be sold across service jurisdictions within a country and there are divergent consumption and generation patterns within the service jurisdictions.

In the instant case, we verified that during the period of investigation EDELCA set its industrial rates, including the rate charged to SIDOR, based upon market principles, including adjusting its standard industrial rate for differences in transmission and transformation costs and for level of consumption. In addition, we note that EDELCA's rate making policy incorporates a return on its costs and that the return earned by EDELCA on it sales to SIDOR was higher than the average return of its industrial clients. We verified that EDELCA's pricing policies with respect to SIDOR and its industrial customers are consistent with the pricing policies of private utility companies in Venezuela. Therefore, we find that the rates charged by EDELCA to SIDOR are not countervailable under section 771(5)(E) of the Act.

Adequacy of remuneration is a new statutory provision which replaced ''preferentiality'' as the standard for determining whether the government's provision of a good or service constitutes a countervailable subsidy. The Department has had no experience administering section 771(5)(E) and Congress has provided no guidance as to how the Department should interpret this provision. This case and the other concurrent wire rod cases mark the first instances in which we are applying the new standard. We anticipate that our policy in this area will continue to be refined as we address similar issues in the future.

III. Programs Determined To Be Not Used

A. Government Guarantees of SIDOR's Private Debt in 1987 and 1988

In 1987 and 1988, the GOV guaranteed loans provided to SIDOR by Credito Italiano and Kreditanstalt Fuer Wiederaufbau (KfW), respectively. Both of these loans were Deutschmark-denominated loans linked to the London Interbank Offering Rate (LIBOR).

We verified that the 1987 and 1988 loans were specifically applied for and authorized as part of a program to finance the expansion of SIDOR's pipe mill. The approval documents specify that the loans were for the expansion of SIDOR's pipe mill, in particular for purchasing equipment. These were authorized under the December 10, 1987, ''Law for the Contracting and Financing of the First Stage of the Project to Expand and Modernize SIDOR's Pipe Mill.'' Because we verified that the KfW and Credito Italiano loans were tied to financing the expansion of SIDOR's pipe mill, we determine that the loans and the government guarantees of the loans are tied to non-subject merchandise and, thus, do not provide a benefit to wire rod. Therefore, we determine that the GOV loan guarantees did not confer countervailable benefits on the production and/or exportation of subject merchandise, and that this program was not used during the POI.

B. Government Provision of Iron Ore

Iron ore is a bulky, low-priced commodity that is traded on the international market and is used in the production of steel. Petitioners alleged that Ferrominera, a government-owned company, provided iron ore to SIDOR for less than adequate remuneration. SIDOR and Ferrominera are two of the 37 companies which comprise the CVG Group, a holding company owned by the GOV. SIDOR purchases all of its iron ore from Ferrominera. Ferrominera is the only producer of iron ore in Venezuela, and 99 percent of its domestic sales are to the steel industry.

As explained in our preliminary determination, SIDOR and Ferrominera maintain two separate contracts—one for the supply of iron ore and one for its transportation. SIDOR and Ferrominera have a multi-year supply contract under which Ferrominera sets SIDOR's iron ore prices on an annual basis. The unit price (*i.e.*, the price per ''metric ton natural iron unit'') is set in U.S. dollars, and the terms of sale are FOB, place of loading. When Ferrominera announced a new price for 1996, SIDOR objected and tried to renegotiate the price. Because of this objection, Ferrominera did not apply the new price. After negotiations failed, SIDOR and Ferrominera entered into arbitration conducted by the CVG Group.

For the preliminary determination, we calculated a program rate by comparing the price of iron ore that Ferrominera charged SIDOR during 1996 with a benchmark price constructed from published price information on the record. However, at verification we learned that the CVG arbitration decision was not made until March 1997; thus the price that SIDOR had to pay for the iron ore was not finally set until after our period of investigation. Because the 1996 price of iron ore was not finalized until after the period of investigation and final payment was not made by SIDOR until July 1997, we consider it inappropriate to assess the countervailability of Ferrominera's provision of iron ore to SIDOR for purposes of this final determination.

We have taken this approach in light of our practice to countervail subsidies based on the timing of the receipt of the subsidy. *See, e.g., Final Affirmative Countervailing Duty Determination: Certain Pasta From Italy*, 61 FR 30288 (June 14, 1996), and *Certain Welded Carbon Steel Pipes and Tubes and Welded Carbon Steel Line Pipe From Turkey: Final Results of Countervailing Duty Administrative Reviews*, 62 FR 43984 (August 18, 1997). Because the final price for the iron ore was not set and paid until 1997, the receipt of any potential benefit under this program is 1997, which is outside the period of investigation. Moreover, because the standard for adequate remuneration specifies that transportation is one of the factors to consider in determining whether the provision of a good is for less than adequate remuneration, we do not consider it appropriate in this case to analyze the transportation services for the delivery of iron ore separately from the pricing contract of such ore.

Therefore, the issue of whether iron ore is provided to SIDOR for less than adequate remuneration will be examined in an administrative review conducted under section 751 of the Act, if a countervailing duty order is issued.

We note that the interested parties submitted comments on whether iron ore was provided to SIDOR for less than adequate remuneration. These comments dealt with the methodology which should be employed in analyzing whether iron ore was provided for less than adequate remuneration. Because we are not making a determination with respect to the countervailability of this program, and because none of the comments were related to the issue of the timing of the potential benefit, it is not necessary to address the comments submitted by the interested parties for purposes of this final determination.

C. Preferential Tax Incentives Under Decree 1477

Petitioners alleged that Decree 1477 provides partial or total income tax exemptions and other tax credits to companies in disadvantaged regions, including Bolivar, where SIDOR is located. According to petitioners, companies that relocated or commenced an expansion after March 23, 1976, qualify for tax incentives. We verified that SIDOR never applied for or received benefits under this program. Therefore, we determine that this program was not used by SIDOR during the POI.

IV. Program Determined To Be Terminated

Special Permissive Regulations for Exporters (REFE)

The REFE program was enacted September 9, 1994, to enable companies and individuals to access foreign currency more easily. Prior to 1994, companies and individuals were not allowed to maintain foreign currency accounts. Rather, they had to make specific requests for access to foreign currency from the Office of Technical Exchange Administration (OTAC, Officina Technica de Administration de Combina). In 1994, Venezuela endured a banking crisis. In response to this crisis, the GOV halted all exchange of bolivars for foreign currency, leaving companies and individuals with virtually no access to foreign currency. During July and August, 1994, companies in Venezuela were unable to service foreign currency-denominated debt. In response to this situation, the GOV initiated the REFE program. The REFE program allowed companies and individuals to use directly their foreign currency receipts. Under the program, a company could maintain a foreign account with which it could directly service its foreign currency debts or directly pay for imported inputs.

We verified that on April 17, 1996, the GOV terminated the REFE program with the enactment of Decree 1,292, which established the free convertibility of currency in Venezuela and removed the exchange control regulations then in place. With the establishment of the free convertibility of currency, we also determine that there are no residual benefits from the REFE program. Thus, we determine that the REFE program is terminated.

Interested Party Comment

Comments not already addressed in the ''Subsidies Valuation'' and program sections above, are addressed separately below:

Comment: Issues regarding the equity methodology. Both petitioners and respondent argue that the methodology the Department used in the preliminary determination to calculate the benefit arising from equity infusions into SIDOR incorrectly accounts for inflation. Petitioners' position is that the Department should not have used variable short-term interest rates as discount rates. Rather, they argue that the Department should account for inflation by dollarizing (i.e., converting the grant amount into dollars and using a discount rate denominated in dollars) for both the amounts of the subsidies and the interest rates used to allocate them across time. They contend that, at a minimum, the Department should dollarize the period 1987 to 1996.

Respondent argues that, contrary to prior practice, the Department adjusted the benefit derived from the allocated principal for periods which were not consistently hyperinflationary. They argue that hyperinflation is defined as 50 percent inflation or higher, and that therefore the Department's methodology should include inflation adjustments only for the period 1994–1996. Second, they argue that, in adjusting the interest benefit derived from the outstanding balance of the equity infusion, the Department double-counted the effects of inflation by combining the benchmark rate from the year of receipt of the equity infusion and the inflation rate for 1996. Finally, they contend that, in calculating the risk premium for an uncreditworthy company, the Department used an incorrect basis in certain years which overstated the risk premium. They propose that national average short-term interest rates should be used to calculate the risk premium for all years in which countervailable equity infusions were received.

Department's position: As outlined above, for this final determination, we have altered our methodology for calculating the benefit to SIDOR from GOV equity infusions. Some of the modifications to the calculation methodology reflect our agreement with arguments made by both respondent and petitioners. For example, we agree with respondent that it is not appropriate to account for inflation over the entire allocation period. Also, we accept petitioners argument that, to capture the impact of inflation on the nominal benefit to SIDOR in the years 1987 through 1996, it is appropriate to convert the subsidy amounts into U.S. dollars. Additional changes, in particular the use of short-term discount rates through 1986 and U.S. dollar discount rates from 1987 through 1996, reflect our findings at verification and the practices in Venezuelan financial markets.

During the period 1978 through 1986, the annual inflation rates in Venezuela ranged from 7 to 21 percent. In 1987, however, the annual inflation rate increased to 41 percent. Since then, it has not fallen below 30 percent and has reached levels as high as 100 percent by 1996. The period after 1986, therefore, can clearly be distinguished from the prior years, because the latter period was marked by consistently high and rising inflation.

According to respondent, inflation in Venezuela only reached ''hyperinflationary'' levels from 1994 to 1996, when the rates ranged between 57 and 103 percent. Therefore, respondent argues that in calculating the benefit from GOV equity infusions, inflation should be taken into account only during the period 1994 through 1996. In support of this, respondent cites certain steel products from Mexico, where the Department found that Mexico was hyperinflationary from 1983 through 1988, when inflation ranged between 57 and 131 percent. *See Final Affirmative Countervailing Duty Determination: Certain Steel Products From Mexico*, 58 FR 37352, 37355 (July 9, 1993). We did not account for inflation in that case when the rate was between 19 and 29 percent. Accordingly, respondent implies that the methodology used in *Steel From Mexico* stands for the proposition that the Department only takes into account inflation during periods in which annual inflation is 50 percent or higher.

We disagree with respondent's interpretation of the approach used in that case. In *Steel From Mexico*, we did not specify that an economy must reach

a certain level of annual inflation before we will account for inflation in the benefit calculation. Adopting a threshold would miss the point of adjusting for inflation. Rather, in *Steel From Mexico*, our concern was how to treat a period of high inflation that was in the middle of the allocation stream and clearly anomalous with respect to the periods before and after. As respondent noted, the inflation rate in Mexico dropped from 114 percent in 1988 to 20 percent in 1989, bringing to an end the period of anomalous rates. In contrast, inflation in Venezuela has been consistently high from 1987 onwards, reaching 81 percent in 1989, and topping 100 percent in 1996, the POI. At no time after 1987 did inflation return to the lower levels experienced during the period prior to 1986. Petitioners correctly note that, during periods of consistently high inflation, as experienced by Venezuela after 1986, the nominal value of a company's non-monetary assets increases with inflation. Therefore, untied subsidies that are allocated over time and which benefit a company's productive activities also increase in real terms because of inflation. Adjusting for inflation during anomalous periods of high inflation merely recognizes this fact, and the adjustment takes into account the value, in real terms, of the subsidy. With respect to this, the methodology used in the *Preliminary Determination* to calculate the interest component of the benefit, was incorrect. In particular, we incorrectly added the rate of inflation to the discount rate. This approach treats inflation as a benefit in each year. However, as explained above, inflation increases the real value of non-monetary assets, such as machinery, over time, and is not a benefit in each year. In any case, we have modified our approach by converting the equity infusions into dollars after 1986, so that an adjustment to the interest component is no longer necessary.

As explained in the ''GOV Equity Infusions into SIDOR'' section above, we determine that, for periods of high inflation in Venezuela (*i.e.*, 1987 through the POI) it is appropriate to convert non-recurring subsidies into dollars. This approach is consistent with the Department's past practice, in particular when no appropriate long-term domestic discount rate exists for use in our grant calculation. Further, as petitioners correctly note, this approach conforms with SIDOR's actual business practices and commercial practices in Venezuela. *See Memo Re: Meetings with Commercial Bankers* at 2.

Respondent argues that inflation was not a constant phenomenon in Venezuela. For this reason, respondent claims that other cases in which the Department adopted a dollarization methodology, such as *Brazil Steel*, are not relevant because, in that case, inflation was consistently above 350 percent. We disagree with respondent because, once again, the issue is not whether annual inflation reaches a certain threshold level in a country. Rather, as noted above, adjusting the benefit for inflation merely accounts for the fact that, when inflation is consistently high, the value of non-monetary assets increases, and the value of the subsidy that benefits the non-monetary assets also increases. By converting the subsidy into dollars at the beginning of a high inflation period and later converting the benefit allocable to the POI back into domestic currency at the exchange rate prevailing in the POI, we are taking into account that increase in the real value of the subsidy.

Respondent claims that the risk premium used by the Department for the 1978 through 1986 period is overstated, and that the Department should use the short-term interest rates, with a risk premium, to calculate the benefit. Because we are now using the rate advocated by respondent for the 1978 through 1986 period, the issue is now moot.

Suspension of Liquidation

In accordance with section 705(c)(1)(B) of the Act, we have calculated a subsidy rate for SIDOR, the one company under investigation. This subsidy rate is 23.69 percent *ad valorem*. This rate would also be applicable to any companies not investigated or any new companies exporting the subject merchandise.

We have concluded a suspension agreement with the Government of Venezuela which eliminates the injurious effects of imports from Venezuela (see, *Notice of Suspension of Investigation: Steel Wire Rod from Venezuela* being published concurrently with this notice). As indicated in the notice announcing the suspension agreement, pursuant to section 704(h)(3) of the Act, we are directing the U.S. Customs Service to continue suspension of liquidation. This suspension will terminate 20 days after publication of the suspension agreement or, if a review is requested pursuant to section 704(h)(1) of the Act, at the completion of that review. Pursuant to section 704(f)(2)(B) of the Act, however, we are not applying the final determination rate to entries of subject merchandise from Venezuela; rather, we have adjusted the rate to zero to reflect the effect of the agreement.

We will notify the International Trade Commission (ITC) of our determination. In addition, we are making available to the ITC all non-privileged and non-proprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order, without the written consent of the Deputy Assistant Secretary for Import Administration.

If the ITC's injury determination is negative, the suspension agreement will have no force or effect, this investigation will be terminated, and the Department will instruct the U.S. Customs Service to refund or cancel all securities posted (*see*, section 704(f)(3)(A) of the Act). If the ITC's injury determination is affirmative, the Department will not issue a countervailing duty order as long as the suspension agreement remains in force, and the Department will instruct the U.S. Customs Service to refund or cancel all securities posted (*see*, section 704(f)(3)(B) of the Act).

This notice is issued pursuant to section 704(g) of the Act.

Return or Destruction of Proprietary Information

This notice serves as the only reminder to parties subject to Administrative Protective Order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 355.34(d). Failure to comply is a violation of the APO.

This determination is published pursuant to section 705(d) of the Act.

Dated: October 14, 1997.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 97–27983 Filed 10–21–97; 8:45 am]

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Federal Register

Wednesday
October 22, 1997

Part V

Department of Education

34 CFR Parts 300, 301, and 303

Assistance to States for the Education of Children With Disabilities, Preschool Grants for Children With Disabilities, and Early Intervention Program for Infants and Toddlers With Disabilities; Proposed Rule

DEPARTMENT OF EDUCATION

34 CFR Parts 300, 301 and 303

RIN 1820–AB40

Assistance to States for the Education of Children With Disabilities, Preschool Grants for Children With Disabilities, and Early Intervention Program for Infants and Toddlers With Disabilities

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the regulations governing the Assistance to States for Education of Children with Disabilities program, the Preschool Grants for Children with Disabilities program, and the Early Intervention Program for Infants and Toddlers with Disabilities. These amendments are needed to implement changes recently enacted by the Individuals with Disabilities Education Act Amendments of 1997.

DATES: Comments must be received by the Department on or before January 20, 1998.

The Department plans to hold public meetings in conjunction with this NPRM. The dates and times of the meetings are in the section titled *Public Meetings* under Invitation to Comment elsewhere in this preamble.

ADDRESSES: All comments concerning these proposed regulations should be addressed to Thomas Irvin, Office of Special Education and Rehabilitative Services, U.S. Department of Education, Room 3090, Mary E. Switzer Building, 330 C Street., SW., Washington, DC 20202. Comments may also be sent through the Internet to: comment@ed.gov

You must include the term ''Assistance for Education'' in the subject line of your electronic message.

Comments that concern information collection requirements must be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble. A copy of those comments may also be sent to the Department representative named in the **ADDRESSES** section.

The Department plans to hold public meetings in conjunction with this NPRM. The locations of the meetings are in the section titled *Public Meetings* under Invitation to Comment elsewhere in this preamble.

FOR FURTHER INFORMATION CONTACT: Thomas Irvin (202) 205–8969 or JoLeta Reynolds (202) 205–5507. Individuals who use a telecommunications device for the deaf (TDD) may call (202) 205–5465.

Individuals with disabilities may obtain this document in an alternate format (e.g., Braille, large print, audiotape, or computer diskette) on request to Katie Mimcy, Director of the Alternate Formats Center. Telephone: (202) 205–8113.

SUPPLEMENTARY INFORMATION:

Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations. To ensure that public comments have maximum effect in developing the final regulations, the Department urges commenters to identify clearly the specific section or sections of the proposed regulations that each comment addresses and to arrange comments in the same order as the proposed regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Room 3090, Mary E. Switzer Building, 300 C St., SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

On request the Department supplies an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking docket for these proposed regulations. An individual with a disability who wants to schedule an appointment for this type of aid may call (202) 205–8113 or (202) 260–9895. An individual who uses a TDD may call the Federal Information Relay Service at 1–800–877–8339, between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

To assist the Department in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden, the Secretary invites comments on whether there may be further opportunities to reduce any regulatory burdens found in these proposed regulations.

Public Meetings

In a notice published in the **Federal Register** on September 17, 1997 (62 FR 48923–48925), the Department announced public meetings to obtain public comment on the statutory requirements of the IDEA Amendments of 1997. The Department will use those public meeting dates and times for public comment on this NPRM.

Individuals who wish to make a statement at any of the meetings are encouraged to do so. Time allotted for each individual to testify will be limited and will depend on the number of speakers wishing to testify at each session. It is likely that each participant choosing to comment will be limited to four minutes. Persons interested in making oral public comment will be able to sign-up to make a statement on the day of the meeting at the Department's public meeting on-site registration desk on a first-come-first served basis. If no time slots remain, then the Department will reserve a limited amount of additional time at the end of each hearing to accommodate those individuals. (Every effort will be made to have ample time to hear all individuals who wish to make a statement.) For individuals who want to speak at the public meeting, registration will begin at 1:00 p.m., in all cities except Washington, DC where it will begin at 12:00 Noon, in each hotel or public building at the registration table outside the room where the public meeting will be held. The dates, times, and locations of the meetings are as follows:

October 23, 1997—2:00 p.m.–7:00 p.m.

Region I—Logan Ramada Hotel, 75 Service Road, Logan International Airport, Boston, MA 02128

October 27, 1997—2:00 p.m.–7:00 p.m.

Region IV—Radisson Hotel Atlanta, 165 Courtland and International Blvd., Atlanta, GA 30303

October 28, 1997—2:00 p.m.–7:00 p.m.

Region VI—Radisson Hotel Dallas, 1893 West Mockingbird Lane, Dallas, TX 75235

November 4, 1997—1:00 p.m.–5:00 p.m.

Department of Education, Government Service Administration (GSA), 7th and D Streets, S.W. (Auditorium), Washington, D.C. 20407

November 18, 1997—2:00 p.m.–7:00 p.m.

Region VIII—Four Points, 3535 Quebec Street, Denver, CO 80207

November 21, 1997—2:00 p.m.–7:00 p.m.

Region IX—Holiday Inn Select/ Chinatown, 750 Kearny Street, San Francisco, CA 94108

November 24, 1997—2:00 p.m.–7:00 p.m.

Region V—Sheraton North Shore, 933 Skokie Boulevard, Northbrook, IL 60062

The meeting sites are accessible to individuals with disabilities. An individual with a disability who will need an auxiliary aid or service to participate in the meeting (e.g., interpreting service, assistive listening device, or materials in an alternate format) should consult the notice mentioned in this document for the person to contact at least two weeks before the scheduled meeting date to ensure that accommodations requested will be available. Although the Department will attempt to meet a request received after that date, the requested accommodation may not be available because of insufficient time to arrange it.

Background

On June 4, 1997, the Individuals with Disabilities Education Act (IDEA) Amendments of 1997 were enacted into law as Pub. L. 105–17.

The statute passed by Congress and signed by the President reauthorizes and makes significant changes to IDEA to better accomplish the following purposes: (1) Ensure that all children with disabilities have available a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living; (2) ensure that the rights of children with disabilities and parents of those children are protected; (3) assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities; (4) assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families; (5) ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting systemic-change activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and (6) assess, and ensure the effectiveness of, efforts to educate children with disabilities.

On June 27, 1997, the Secretary published a notice in the **Federal Register** requesting from the public advice and recommendations on regulatory issues under the IDEA Amendments of 1997. As of the end of August, 1997, 334 comments were received in response to the Notice, including letters from parents and public and private agency personnel, and from parent-advocate and professional organizations. The comments addressed each major provision of the IDEA Amendments of 1997 (such as the new funding provisions, discipline procedures, provisions relating to evaluation of children, individualized education programs, participation of private school children with disabilities, methods of ensuring services from noneducational agencies, and changes in the procedural safeguards). All of these comments were reviewed and considered in developing this Notice of Proposed Rulemaking. The Secretary appreciates the thoughtful attention of the commenters in responding to the June 27th notice.

Proposed Regulatory Changes

The IDEA Amendments of 1997 significantly updated the Assistance to States program under Part B of the Act, as in effect before June 4, 1997. The changes made by those Amendments call for corresponding updates to virtually all of the current regulations under this part, as well as new regulatory provisions to incorporate new statutory requirements such as those relating to performance goals and indicators, procedural safeguards notice, mediation, and discipline.

In addition to incorporating new requirements from the Act, some new provisions and notes are proposed to assist in clarifying the new statutory requirements, or providing guidance with respect to implementing those requirements. Finally, some changes are needed to incorporate longstanding interpretations of the Act that have been addressed in nonregulatory guidance in the past, or to ensure a more meaningful implementation of the Act and its regulations for children with disabilities, parents and public agencies.

To accommodate the reader in understanding these proposed changes, the Secretary has elected to publish the full text of the regulations, as they would be when amended, rather than simply publish an amendatory document that shows only the changes proposed to current regulations. Although this approach increases the length of this NPRM, it provides a more meaningful way for parents, agency officials, and the general public to review the changes within the context of the existing regulations.

The following summary of the proposed regulatory changes describes how the Secretary would incorporate the statutory changes of the IDEA Amendments of 1997 into the applicable subparts of the Department's regulations for the Assistance to States program (34 CFR part 300) and Preschool Grants program (34 CFR part 301) for children with disabilities, along with conforming changes to the Early Intervention program for Infants and Toddlers with Disabilities (34 part 303). The Department plans to publish additional technical amendments to Part 303 at a later date. Those amendments will revise the Part 303 regulations consistent with the changes made by the IDEA Amendments of 1997. This summary identifies changes that are statutory and describes any regulations that the Secretary is proposing in this NPRM to implement these statutory provisions.

Commenters are requested to direct their comments to issues that can be changed through regulation and not to statutory requirements. Commenters also are reminded that, under section 607(b) of the IDEA, the Secretary is not authorized to make regulatory changes to lessen the protections for children with disabilities in the IDEA regulations that were in effect on July 20, 1983, absent statutory changes indicating a Congressional intent to lessen those protections.

Throughout this preamble, issues that the Secretary is proposing to regulate on are introduced by phrases such as, ''The Secretary proposes * * *'' or ''In this proposed section, the Secretary proposes * * *''. Commenters are asked to focus their comments on these parts of the proposed regulation.

Appendix C to the current regulations (Interpretation of IEP program requirements) would be updated and revised consistent with the changes made by the IDEA Amendments of 1997 and these proposed regulations. Revised Appendix C is presented as Appendix C to this NPRM.

To aid readers in referring between this NPRM and current regulations, a distribution table for the part 300 regulations is presented in Appendix D to these proposed regulations. That table identifies each current regulatory section and the comparable proposed regulatory section, if any.

These proposed regulations would implement the new statutory changes relating to the three formula grant programs in the IDEA: (1) the Assistance to States for the Education of Children with Disabilities Program under Part B of the Act (34 CFR part 300); (2) the Preschool Grants Program under section 619 of the Act (34 CFR part 301); and (3) the Early Intervention Program for Infants and Toddlers with Disabilities under Part H of the Act (to be renamed part C on July 1, 1998) (34 CFR part 303).

1. Part 300—Assistance to States for the Education of Children With Disabilities

The new statutory amendments to the IDEA, while retaining (and strengthening) the basic rights and protections included in the Act since 1975, also have redirected the focus of the law as in effect before June 4, 1997, to heighten attention to improving results for children with disabilities. This shift in focus was necessary in order to make needed improvements in the Part B program, based on 20 years of experience and research in the education of children with disabilities. The amendments to the Part B program were the result of over three years of intensive work by stakeholders from all realms of life and at all governmental levels, who have a vested interest in the education of children with disabilities.

Background and Need for Improvements

Before enactment of the 1975 amendments to the IDEA (then known as the Education of the Handicapped Act (EHA)), approximately one million children with disabilities were excluded entirely from the public education system, and more than half of all children with disabilities in the United States did not receive appropriate educational services that would enable them to enjoy full equality of opportunity. The 1975 amendments to the EHA—the Education for All Handicapped Children Act (Pub. L. 94–142)—directly addressed the problems that existed at that time by establishing the right to education for all children with disabilities.

As a result of the Pub. L. 94–142 Amendments to the IDEA, significant progress has been made in addressing the problems that existed in 1975. Today, every State in the nation has laws in effect ensuring the provision of a free appropriate public education (FAPE) to all children with disabilities. The number of young adults with disabilities enrolled in post-secondary education has tripled, and the unemployment rate for individuals with disabilities in their twenties is almost half that of their older counterparts.

Despite the progress that has been made since 1975, the promise of the law has not been fulfilled for many children covered by the Act. Too many students with disabilities are failing courses and dropping out of school. Almost twice as many students with disabilities drop out as compared to students without disabilities. And, when students with disabilities drop out of school, they are less likely to ever return to school and are more likely to be unemployed or have problems with the law. Further, almost half of the students with disabilities do not participate in statewide assessments, and, therefore, schools are not held accountable for results. Students from minority backgrounds continue to be placed disproportionately in separate special education settings.

Over 20 years of experience and research in implementing Part B of the IDEA has demonstrated that the education of children with disabilities can be made more effective by—

(1) Having high expectations of these children and ensuring their access to the general curriculum to the maximum extent possible;

(2) Strengthening the role of parents and fostering partnerships between parents and schools;

(3) Aligning the Part B program with State and local improvement efforts so that students with disabilities can benefit from them;

(4) Providing incentives for whole-school approaches and pre-referral intervention to reduce the need to label children as disabled in order to address their learning needs;

(5) Focusing resources on teaching and learning, while reducing paperwork and requirements that do not assist in improving educational results; and

(6) Supporting high-quality, intensive professional development for all personnel who work with disabled children to ensure that they have the skills and knowledge necessary to effectively assist these children to be prepared for employment and independent living.

The IDEA Amendments of 1997 are designed to make improvements in the Part B program that address many of the factors based on experience and research that are identified in the preceding paragraphs. A description of some of these improvements is included in the following paragraphs, together with an identification of where the statutory provisions have been incorporated into these proposed regulations:

Improving Results for Children With Disabilities

The focus of the changes in the new amendments is directed at improving results for children with disabilities—by promoting early identification and early provision of services, and ensuring the access of these children to the general curriculum and general educational reforms. The amendments include a number of provisions to address this goal.

A. Early Identification and Provision of Services

The Early Intervention Program for Infants and Toddlers with disabilities and the Preschool Grants program have demonstrated the importance of early intervention. Children who receive services at an early age are often better able to learn once they reach school age. In addition, research on school-aged children who are experiencing significant reading or behavior problems has shown that the common practice of waiting until the third or fourth grade to refer those children to special education only increases these problems. Appropriate interventions need to happen as early as possible in a child's life, when it is clear that the child needs help, and at a time, developmentally, when the child could profit most from receiving services.

The IDEA Amendments of 1997 include provisions that encourage States to reach out to young children who are experiencing learning problems, and allow States and local school districts to utilize ''developmental delay'' eligibility criteria as an alternative to specific disability categories through age 9. Implemented properly, this provision will allow children to receive earlier and more appropriate interventions.

The amendments also allow for more flexible use of IDEA-funded staff who work in general education classrooms or other education-related settings so that they can work with both children who have disabilities and others who may need their help. These provisions are included in §§ 300.7 and 300.235 of this NPRM.

B. IEPs That Focus on Improving Results Through the General Curriculum

The new amendments enhance the participation of disabled children in the general curriculum through improvements to the IEP by—(1) Relating a child's education to what nondisabled children are receiving; (2) providing for the participation of regular education teachers in developing, reviewing, and revising the IEP; and (3) requiring that the IEP team consider the specific needs of each child, as appropriate, such as the need for behavior interventions and assistive technology. These provisions are included in §§ 300.344, and 300.346–300.347 of these proposed regulations.

C. Education With Nondisabled Children

Research data show that for most students with disabilities integration into general education programs with nondisabled children is often associated

with improved results, higher levels of employment and independent living. The data also show that if disabled students are simply placed in general education classrooms without necessary supports and modifications they are more likely to drop out of school than their nondisabled peers. The new amendments address this issue by requiring that the IEP include: (1) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class; and (2) a statement of the specific special education and related services and supplementary aids and services to be provided to the child or on behalf of the child, and a statement of program modifications or supports for school personnel that will be provided for the child. These provisions are incorporated in § 300.347 of these proposed regulations.

D. Higher Expectations for Disabled Students and Agency Accountability

A critical element in improving educational results for disabled children is promoting high expectations for them commensurate with their particular needs, and ensuring meaningful and effective access to the general curriculum. Data and experience show that when schools have high expectations for these children, ensure their access to the general curriculum, whenever appropriate, and provide them the necessary supports and accommodations, many can achieve to higher standards, and all can achieve more than society has historically expected.

Despite the current knowledge base in this regard, the education system often fails to promote such high expectations or to establish meaningful education goals, and about half of all disabled children are excluded from State and district-wide assessments.

The new amendments specifically address these concerns by requiring (1) the development of State performance goals for children with disabilities that must address certain key indicators of the success of educational efforts for these children—including, at a minimum, performance on assessments, dropout rates, and graduation rates, and regular reports to the public on progress toward meeting the goals; (2) that children with disabilities be included in general State and district-wide assessments, with appropriate accommodations, if necessary, and (3) that schools report to parents on the progress of their disabled child as often as such reports are provided to parents of nondisabled children. These provisions are included in §§ 300.137–300.138 and 300.347 of the proposed regulations.

The IDEA Amendments of 1997 also contemplate that State performance goals and indicators will have a crucial role in determining personnel training and development needs, and offer additional funding, through the State Improvement Program authorized under Part D of the Act, to help States meet their goals for children with disabilities. These provisions are addressed in §§ 300.380–300.382. Additionally, States are encouraged to offer funding to school districts to foster capacity building and systemic improvement activities, as addressed in proposed §§ 300.622–300.624. School districts are also authorized to establish school-based improvement programs, as described in §§ 300.234 and 300.245–300.250.

E. Strengthening the Role of Parents and Fostering Partnerships Between Parents and Schools

In order to achieve better results for children with disabilities, it is critical to strengthen the role of parents, and to provide a means for parents and school staff to work together in a constructive manner. The IDEA Amendments of 1997 include several provisions aimed at promoting the involvement of parents, including providing that they: (1) Have an opportunity to participate in meetings with respect to the identification, evaluation, or educational placement of their child or the provision of FAPE to the child; (2) are included in any group that makes decisions on the educational placement of their child; and (3) receive regular reports on their child's progress (by such means as report cards) as often as reports are provided to parents of nondisabled children.

The amendments also require that, at a minimum, parents be offered mediation as a voluntary option whenever a hearing is requested to resolve a dispute between the parents and the agency about any matters specified in the preceding paragraph. These provisions are included in §§ 300.347, 300.501, and 300.506 of this NPRM.

F. Reducing Unnecessary Paperwork and Other Burdens

The IDEA Amendments of 1997 include several provisions that reduce unnecessary paperwork, and direct resources to teaching and learning. For example, the amendments permit initial evaluations and reevaluations to be based on existing evaluation data and reports, and do not require that eligibility be re-established when a triennial evaluation is conducted if the IEP team agrees that the child continues to have a disability. The amendments also eliminate unnecessary paperwork requirements that discourage the use of IDEA funds for teachers who work in regular classrooms, while ensuring that the needs of students with disabilities are met. These provisions are included under §§ 300.234 and 300.533 of this NPRM.

In addition, these amendments permit States and local educational agencies to establish eligibility only once by providing policies and procedures to demonstrate that the eligibility conditions under part B are met. Thereafter, only amendments to those policies and procedures necessitated by identified compliance problems or changes in the law would be required. These provisions are included under §§ 300.110–300.111 and 300.180–300.181.

Subpart A—General

Purposes, Applicability, and Regulations That Apply to This Program

Proposed § 300.1 would retain the statement of the purposes of this part in the existing regulations, except for conforming those purposes to the new statutory changes. Consistent with section 601(d)(1)(A) of the Act, the purpose in proposed § 300.1(a) (relating to ensuring that all children with disabilities have available to them a free appropriate public education designed to meet their unique needs) would be amended to add ''and to prepare them for employment and independent living.'' This change represents a significant shift in the emphasis of the Assistance to States program—to an outcome oriented approach that focuses on better results for children with disabilities rather than on simply ensuring their access to education.

Consistent with section 601(d)(1)(C) of the Act, the purpose in § 300.1(c) (relating to assisting States and localities to provide for the education of children with disabilities) would be amended by adding ''educational service agencies'' and ''Federal agencies'' to the list of entities that would be assisted under this part.

A note would be added following proposed § 300.1 that emphasizes the importance of independent living in promoting the integration and full inclusion of individuals with disabilities into the mainstream of American society, consistent with the new statutory purpose under § 300.1(a) (relating to employment and independent living). The note describes the philosophy of independent living

contained in Section 701 of the Rehabilitation Act of 1973.

Proposed § 300.2 (relating to the applicability of these regulations to State, local, and private agencies) would maintain the current regulatory provisions of this section, except for the following changes to conform the section to the new statutory provisions: First, paragraph (b) would be amended to eliminate the reference to State plans. The newly revised Act (Section 612(a)) no longer requires States to submit State plans. (See Subpart B, ''State Eligibility—General,'' for discussion of the statutory elimination of State plan requirements). Second, consistent with new statutory provisions relating to children with disabilities who are incarcerated, paragraph (b)(4) of § 300.2 would be amended to replace the term ''State correctional facilities'' with the term ''State and local juvenile and adult correctional facilities''.

Proposed § 300.3 would update the list of regulations that apply to this program. Under proposed paragraph (a) of this section, the regulations in 34 CFR part 76 (State Administered Programs) would continue to apply to the Part B program, except for the following sections:

Sections 76.125–76.137 (relating to ''Consolidated Grant Applications for Insular Areas'') no longer apply. A new statutory provision in section 611(b)(4) of the Act expressly prohibits the consolidation of Part B grants provided to the outlying areas (defined in § 300.718) or to the ''freely associated States'' (defined in section 611(b)(6) of the Act).

Sections 76.650–76.662 (relating to ''Participation of Children Enrolled in Private Schools'') would no longer apply because the applicable provisions of these regulations, that have applied to the Part B program for many years, would be incorporated into Subpart D of this part (''Children in Private Schools''), and specifically under the provisions relating to ''Children with Disabilities Enrolled by their Parents in Private Schools'' (§§ 300.450–300.462).

All other regulations identified in § 300.3 of the existing regulations for this part would be retained under proposed § 300.3, except for 34 CFR part 86 (''Drug-Free Schools and Campuses'') because those regulations are no longer applicable to State administered programs, and now apply only to institutions of higher education.

Definitions

The proposed regulations under this part would retain the scheme used in the current regulations relating to defining terms that are used in this part—that is, Subpart A would include definitions of all terms that are used in two or more subparts of the regulations, whereas any term that would be used in only a single section or subpart would only be listed in Subpart A, together with a reference to the specific section in which the term is defined. The list of these terms would be included in an introductory note (Note 1) immediately following the heading ''Definitions'', and would be updated, as follows:

Two terms would be deleted from the list in Note 1 (''first priority children'' (§ 300.320(a)), and ''second priority children'' (§ 300.320(b)). Statutory provisions regarding priorities in the use of funds were deleted by the IDEA Amendments of 1997.

The term ''individualized education program'' (or ''IEP'') that appears in the list in Note 1 of the existing regulations, would be moved to proposed § 300.14, and would be defined along with the other terms of general applicability that are included under Subpart A.

Several terms that were added by the IDEA Amendments of 1997, but are not terms of general applicability, would be added to the list in Note 1. Following is a list showing each new term and the statutory and regulatory citations for that term:

- Base year (Relates to the new funding formula) (Section 611(e)(2)(A); § 300.707).
- Controlled substance (Relates to the discipline provisions) (Section 615(k)(10)(A); § 300.520).
- Excess costs (The term was defined in prior law, but the statutory definition was not included in the current regulations. The definition of the term, as updated by the IDEA Amendments of 1997, would be incorporated into these regulations (Section 602(7); § 300.284).
- Freely associated States (Relates to the Pacific Basin entities that are eligible for assistance under this part) (Section 611(b)(6); § 300.722).
- Indian; Indian Tribe (Relates to the eligibility of the Secretary of the Interior to receive amounts under this part) (Sections 602(9) and 602(10); § 300.264).
- Outlying area (Relates to grant requirements under this part) (Section 602.18; § 300.718).
- Substantial evidence (Relates to discipline provisions) (Section 615(k)(10)(C); § 300.521).
- Weapon (Relates to discipline provisions) (Section 615(k)(10)(D); § 300.520).

The following terms are not defined in the Act, but the Secretary proposes to add them to the list in Note 1 in order to provide additional clarification to certain provisions that would be added:

- Comparable in quality (A definition of this term would be added to § 300.455 to clarify what services must be provided by an LEA to children with disabilities who are enrolled by their parents in religiously affiliated or other private schools).
- Extended school year services (A definition of this term would be added to a new provision under proposed § 300.309 that would require each public agency to consider extended school year services on a case by case basis in ensuring that a free appropriate public education (FAPE) is available to each child with a disability. The definition would clarify that the meaning of the term ''extended school year services'' applies to providing services during the summer months. (A description of this provision is included under Subpart C, § 300.309, in this preamble).
- Meetings (A definition of this term would be added to § 300.501, relating to participation of parents in meetings about their child on matters covered under this part).
- Financial Costs (A definition of this term is included in proposed § 300.142(e) on use of private insurance proceeds).

A second note (Note 2) following the heading ''Definitions'' would maintain the note from the current regulations that lists abbreviations of certain terms that would be used throughout the regulations, but would update that list, as follows: The terms ''Comprehensive system of personnel development'' (''CSPD'') and ''individualized family service plan'' (''IFSP'') would be added; and, consistent with a statutory change (section 602(4)), the term ''educational service agency'' (''ESA'') would replace the term ''intermediate educational unit'' (''IEU'').

Proposed § 300.4 (Definition of ''Act'') would delete the obsolete reference to the Education of the Handicapped Act from the current regulatory definition of this term.

Proposed §§ 300.5 and 300.6 (Definitions of ''assistive technology device'' and ''assistive technology service'') would retain the current regulatory definitions of those terms, with the exception of a minor technical change for consistency in using the singular ''child with a disability.'' The note following the definitions of those terms in the existing regulations (that states that the definitions are substantively identical to the definitions of those terms used in the Technology-Related Assistance for Individuals with Disabilities Act of 1988) would be retained in abbreviated form.

Proposed § 300.7 would make the following changes to the current regulatory definition of ''children with disabilities'': The term would be restated in the singular (''Child with a disability''), and the definition itself would also be restated in singular rather than plural terms. This change is made because it more appropriately comports with the individualized focus of Part B of the Act. Paragraph (a)(1) of this section would be revised, consistent with section 602(3)(A)(i) of the Act, to clarify that the term ''serious emotional disturbance'' will hereinafter be referred to as ''emotional disturbance''. A corresponding change would be made in the definitions of the individual disability categories under proposed paragraph (b), by changing the term ''serious emotional disturbance'' to ''emotional disturbance'' and moving the definition of that term from paragraph (b)(9) to paragraph (b)(4).

Consistent with section 602(3)(B) of the Act, proposed § 300.7(a)(2) (relating to a State's discretion to use the term ''developmental delay'' for children aged 3 through 5) would be revised, as follows: The age range for using that term would be extended from ages 3 through 5 to ages 3 through 9; and the decision to use the term ''developmental delay'' would be at the discretion of both the State and the local educational agency (LEA). The State's definition of the category may be different under Parts B and H (to become Part C on July 1, 1998).

Note 1 following § 300.7 of the current regulations (relating to children with autism) would be added without change to proposed § 300.7, and four new notes would be added to that section, as follows:

Note 2 would address the statutory change under paragraph (a)(2) of this section relating to use of the term ''developmental delay''. The note would clarify that (1) if a State adopts the term for children aged 3 through 9, or a subset of that age range, LEAs that elect to use the term must conform to the State's definition; (2) LEAs could not otherwise use ''developmental delay'' as a basis for establishing a child's eligibility under this part; and (3) even if a State adopts the term, the State may not require an LEA to use it. This clarification is necessary to avoid confusion and potential compliance problems in implementing this new statutory provision, and to otherwise facilitate its implementation.

Note 3 would further address the use of the term ''developmental delay'' by including a statement from the House Committee Report that emphasizes the value of using ''developmental delay'' in establishing eligibility for young children in order to prevent locking the child into an eligibility category that may be inappropriate or incorrect during a period when it is often difficult to determine the precise nature of the disability.

Note 4 would describe congressional intent in changing the term ''serious emotional disturbance'' to ''emotional disturbance''. The note would include a statement from the House Committee Report that explains that the statutory change (1) is intended to have no substantive or legal significance, and (2) is intended strictly to eliminate the pejorative connotation of the term ''serious.'' The Report further makes clear that this statutory revision does not change the meaning of the definition of ''serious emotional disturbance'' that is included in the existing regulations for this part.

Note 5 would address the conditions under which a child with attention deficit disorder (ADD) or attention deficit hyperactivity disorder (ADHD) is eligible under Part B of the Act. The note clarifies that some children with ADD or ADHD who are eligible under this part meet the criteria for ''other health impairments'' if (1) the ADD or ADHD is determined to be a chronic health problem that results in limited alertness that adversely affects educational performance, and (2) special education and related services are needed because of the ADD or ADHD. (The note clarifies that the term ''limited alertness'' includes a child's heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment.)

The note further clarifies that (1) some children with ADD or ADHD may be eligible for services under other disability categories in § 300.7(b) if they meet the applicable criteria for those disabilities, and (2) if those children are not eligible under this part, the requirements of section 504 of the Rehabilitation Act of 1973 and its implementing regulations may still be applicable.

Proposed § 300.8 would add a definition of ''day'' to clarify that unless otherwise indicated, the term ''day'' means calendar day. Although the Department has traditionally interpreted ''day'' to mean calendar day, the term has never been defined in the regulations. It is important to include such a definition in these proposed regulations because under the new statutory provisions added by the IDEA Amendments of 1997, the term is applied differently under certain provisions, including the use of ''school days''; ''business days''; and ''business days (including any holidays that fall on business days).''

Proposed § 300.9 would add the definition of ''educational service agency'' that appears in section 602(4) of the Act. That term was added by the IDEA Amendments of 1997 to replace the term ''intermediate educational unit'' that was used in prior law and in the current regulations.

Proposed § 300.10 would add the definition of ''equipment'' that appears in section 602(6) of the Act. That definition is substantively identical to the definition of ''equipment'' in prior law. However, that definition is not included in the current regulations. The Secretary believes that, for the regulations to be most useful to parents, school officials, and members of the general public, the regulations should contain all applicable statutory provisions in one document, rather than simply referencing definitions or other provisions that are contained in other regulations. With very few exceptions, these proposed regulations have been developed to include all applicable provisions of the Act.

Proposed § 300.11 would incorporate the existing regulatory definition of the term ''free appropriate public education,'' except that the reference to the IEP requirements in paragraph (d) of that section would change from §§ 300.340–300.350 to §§ 300.340–300.351, to conform to a proposed change made in those requirements.

The Secretary proposes to add in proposed § 300.12 a definition of ''general curriculum'' to clarify that, for purposes of this part, there is a single curriculum that applies to all children within the jurisdiction of the public agency, including nondisabled children and children with disabilities. The purpose of adding this definition is to eliminate (or significantly reduce) the possibility of misinterpreting the new requirements in the Act relating to the participation of children with disabilities in the general curriculum. Some commenters on the June 27, 1997 **Federal Register** notice have expressed concern that a public agency could assume that there is a ''general curriculum'' for nondisabled and another ''general curriculum'' for certain categories of children with disabilities. If the requirements of this part were implemented based on that assumption this would seriously limit the possibility of accomplishing the purposes of Part B of the Act that are set out in the IDEA Amendments of 1997.

A note would be added following this section to clarify that the term ''general curriculum'' relates to the content of the

curriculum and not to the setting in which it is used. The note further clarifies that the general curriculum could be used in any educational setting along a continuum of alternative placements, as long as the setting is consistent with the least restrictive environment provisions of § 300.550–300.553 and is applicable to an individual child with a disability. A number of comments were received requesting clarification relating to this matter.

Proposed § 300.13 would retain the current regulatory definition of the term ''include''.

Proposed § 300.14 would include a definition of the term ''individualized education program'' (IEP). Because the term ''IEP'' has traditionally been defined under § 300.340 (an introductory section to the IEP requirements of §§ 300.340–300.350) the definition in proposed § 300.14 would simply reference the definition in § 300.340.

Proposed § 300.15 would add a definition of ''individualized education program team'' (or ''IEP team''). The definition states that the term ''IEP team'' means a group of individuals described in § 300.344 that is responsible for developing, reviewing and revising an IEP for a child with a disability. Because the term ''IEP team'' is used throughout these regulations, it is important to include a definition of that term in Subpart A. However, to preserve the structural integrity of the current regulatory provisions on IEPs in §§ 300.340–300.350, the substantive definition of ''IEP team'', which conforms to the statutory definition under section 614(d)(1)(B), would be included in § 300.344.

Proposed § 300.16 would add a definition of ''individualized family service plan'' (or ''IFSP''), because that term is used in several subparts within these regulations. The definition of the term would be a reference to 34 CFR 303.340(b).

Proposed § 300.17 would incorporate the statutory definition of ''local education agency'' from section 602(15) of the Act. This definition, which updates the prior statutory definition of ''LEA'' to conform to the definition of that term in the Improving America's Schools Act, would replace the current regulatory definition of ''LEA.''

A note would be added following proposed § 300.17 to clarify that a public charter school is eligible to receive funds under Part B of the Act if it meets the definition of ''LEA.'' The note further clarifies that if a public charter school receives Part B funds it must comply with the requirements that apply to LEAs. Because of the widespread interest in establishing charter schools as a major part of educational reform, this clarification is necessary in order to ensure that, to the extent applicable, these schools are in full compliance with the requirements of this part.

Proposed § 300.18 would incorporate the statutory definition of ''native language'' from section 602(16) of the Act. The new definition is substantively similar to the current regulatory definition of ''native language.'' The note following the current regulatory definition of ''native language'' would be retained, unchanged, except for clarifying that the term ''native language'' is also used in the procedural safeguards notice under proposed § 300.504(c). (The procedural safeguards notice is a new statutory provision that was added by section 614(d) of the Act.)

Proposed § 300.19 would incorporate the current regulatory definition of ''parent'' (under a new paragraph (a)). A proposed new paragraph (b) would be added to address questions raised by public agencies and other agencies representing children with disabilities about whether foster parents, who have a long-term relationship with a disabled child, could serve as the child's parent, in lieu of requiring the appointment of a surrogate parent to represent the child.

Proposed paragraph (b) of this section would permit State law to provide that a foster parent qualifies as a parent under Part B of the Act if the natural parents' authority to make educational decisions on the child's behalf has been extinguished under State law, and if the foster parent (1) has an ongoing, long-term parental relationship with the child; (2) is willing to participate in making educational decisions in the child's behalf; and (3) has no interest that would conflict with the interest of the child.

The note following the current regulatory definition of ''parent'' (relating to other persons, such as a grandparent, who may act as a parent) would also be incorporated into these proposed regulations. The note would be revised to add conforming language about a foster parent, as described in paragraph (b) of this section.

Proposed § 300.20 would retain the current regulatory definition of ''public agency,'' but would revise that definition to replace the term ''IEUs'' with the term ''ESAs.''

Proposed § 300.21 would incorporate without change the current regulatory definition of the term ''qualified.''

Proposed § 300.22 would retain the current regulatory definition of ''related services,'' except for making the following changes: In proposed paragraph (a), the term ''speech pathology and audiology'' would be replaced by the term ''speech-language pathology and audiology services,'' and the term ''orientation and mobility services'' would be added to the list of related services. These changes would be made to conform to a statutory change in section 602(22) of the Act.

Proposed § 300.22(b) would be amended to add a definition of the term ''orientation and mobility services'' identified in paragraph (a) of this section. The definition (included as a new paragraph (b)(6)) states that the term ''orientation and mobility services'' means services provided to blind or visually impaired students by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home and community.

In proposed § 300.22(b)(9) (relating to psychological services) and (b)(13) (relating to social work services in schools) the definitions of those terms would be amended to add a reference to assisting in developing positive behavioral intervention strategies to the list of functions performed by these related services providers. These providers could be helpful in ensuring effective implementation of the new statutory provision in section 614(d)(3)(B) (proposed § 300.346) that requires that the IEP team, in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions.

In proposed § 300.22(b)(14), the current regulatory definition of the term ''speech-pathology'' would be retained, but the term would be changed to ''speech-language pathology services,'' to conform to the statutory change identified in paragraph (a) of this section.

The note following the current regulatory definition of ''related services'' would be retained as Note 1 following proposed § 300.22, except for the following changes: The list of other related services in the first paragraph of that note would be amended (1) by adding other important services, including travel training, nutrition services, and independent living services, and (2) to clarify that the services would be provided if necessary for the child to receive FAPE.

Several notes would also be added to proposed § 300.22, as follows:

Note 2 would acknowledge the critical importance of orientation and mobility services for children who are blind or have visual impairments, and

point out that there are children with other disabilities who may also need to be taught the skills they need to navigate their environments (e.g., travel-training). The note includes a statement from the House Committee report on Pub. L. 105–17 that emphasizes the importance of travel training for certain children with disabilities.

Note 3 would clarify that, with respect to various related services defined in this section, nothing would prohibit the use of paraprofessionals to assist in the provision of those services if doing so is consistent with the personnel standards requirements of proposed § 300.136(f).

Note 4 would explain that (1) most children with disabilities should receive the same transportation services as non-disabled children, and (2) for some disabled children, integrated transportation may be achieved by providing needed accommodations such as lifts and other adaptations on regular school transportation vehicles.

Proposed § 300.23 would incorporate the statutory definition of ''secondary school'' from section 602(23) of the Act. This definition updates the prior statutory definition of ''secondary school'' to conform to the definition of that term in the Improving America's Schools Act. The term ''secondary school'' is not defined in the current regulations.

Proposed § 300.24 would retain the current regulatory definition of ''special education,'' except for the following changes:

In § 300.24(a)(2), the term ''speech pathology'' would be changed to ''speech-language pathology services,'' to conform to the terms used in section 602(22) of the Act.

Under a new § 300.24(b)(3), a definition of ''specially designed instruction'' would be added to clarify that the term means adapting the content, methodology, or delivery of instruction to (1) address the unique needs of an eligible child under this part that result from the child's disability, and (2) ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. Although the term is a key component in the definition of ''special education'' in both prior law and the current Act, it has never been defined. With the shift in emphasis of the Part B program toward greater participation of children with disabilities in the general curriculum, this definition should facilitate implementation of the program.

Proposed § 300.24(b)(4) would replace the outdated definition of ''vocational education'' in the current regulations with a new definition that states that the term ''vocational education'' means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

The note following the definition of ''special education'' in the current regulations would be retained under proposed § 300.24, but would be revised to clarify that a related services provider may be a provider of specially designed instruction if, under State law, the person is qualified to provide that instruction.

Proposed § 300.25 would incorporate the statutory definition of ''State'' from section 602(27) of the Act to mean each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas. This definition updates the prior statutory definition of ''State.'' The term is not defined in the current regulations.

Proposed § 300.26 would incorporate the definition of ''supplementary aids and services'' from section 602(29) of the Act. Although the term was included in prior law, it was not defined until the enactment of the IDEA Amendments of 1997. The term is defined as aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with the LRE provisions in §§ 300.550–300.556.

Proposed § 300.27 would retain the current regulatory definition of ''transition services,'' except for the following changes: The organizational structure of the definition has been changed to conform to the definition of the term in section 602(30) of the Act. The new definition simply describes what the term means, but does not attempt to regulate under the definition. The current regulatory definition uses the regulatory term ''must'' in defining what services must be provided. Consistent with the new statutory definition, the term ''related services'' is added as one of the services or activities covered by the term.

Proposed § 300.28 would add a list of terms found in the part B regulations that are defined in the Education Department General Administrative Regulations (EDGAR).

Subpart B—State and Local Eligibility

State Eligibility—General

Under the prior statute, States were required both to meet certain eligibility requirements and to submit State plans to the Department, and were subject to periodic resubmission requirements. The newly revised Act replaces that scheme with an eligibility determination based on a demonstration satisfactory to the Secretary that the State has in effect policies and procedures to ensure that it meets each of a list of conditions. (Section 612(a)). A State that already has on file with the Secretary policies and procedures demonstrating that it meets any of these requirements will be considered to have met that requirement for the purpose of receiving a grant under Part B of the Act. (Section 612(c)(1)). A technical change will be made to Part 76 with the publication of the final regulations to reflect the substitution of this demonstration of State eligibility for State plans.

Under section 612(c) (2) and (3), the policies and procedures submitted by a State remain in effect until a State submits modifications that the State decides are necessary or until the Secretary requires modifications based on changes to the Act or its implementing regulations, new interpretations by a Federal court or the State's highest court, or an official finding of noncompliance with Federal law or regulations. The provisions regarding State eligibility apply to modifications in the same manner and to the same extent as they do to a State's original policies and procedures.

Section 612(d) specifies that if the Secretary determines that a State is eligible to receive a grant under Part B of the Act, the Secretary notifies the State of that determination, and that the Secretary shall not make a final determination that a State is not eligible until providing the State reasonable notice and an opportunity for a hearing. These provisions are incorporated in the proposed regulations in §§ 300.110–300.113.

State Eligibility—Specific Conditions

The statutory eligibility conditions that must be addressed by each State in order to receive a grant under Part B of the Act are contained in proposed §§ 300.121–300.156. The IDEA Amendments of 1997 made a number of changes to the eligibility conditions and State plan requirements previously contained in the Act. These proposed regulations incorporate these statutory changes, with appropriate modifications described below, into the regulations

regarding State plan contents. Some changes of a technical nature have been made to preexisting regulatory provisions in order to reflect the fact that States now demonstrate eligibility, rather than submit State plans, as was the case under the prior law. In addition, some reordering and reorganization of current regulatory provisions is done for the sake of coherence.

Proposed § 300.121 would add to the current § 300.121 the new statutory provision, under section 612(a)(1)(A), that the right to a free appropriate public education (FAPE) extends to children with disabilities who have been suspended or expelled from school. The issue of what the right to FAPE means for children who have been suspended or expelled from school has been the subject of numerous comments to the Department in response to the June 27, 1997 notice, many of which raise this issue in the context of lengthy discussions about all of the provisions in the Act concerning discipline for children with disabilities. Proposed § 300.121(c) reflects the Secretary's interpretation that the IDEA Amendments of 1997 take a balanced approach to the issue of discipline for students with disabilities that reflect both the need to protect the rights of children with disabilities to appropriate educational services and the need of schools to be able to ensure that all children, including children with disabilities, have safe schools and orderly learning environments. The positions taken in these proposed regulations on the issue of continued services for children with disabilities who have been properly suspended or expelled and on the other disciplinary provisions of the Act (see proposed §§ 300.520–300.529) reflect this need for a balanced, fair interpretation of these new statutory provisions.

With regard to the issue of the provision of FAPE for children with disabilities who have been suspended or expelled, the Secretary believes that the statute struck a balance between the longstanding interpretation of the Department that schools are not required by the Act to provide services to children with disabilities who are suspended for ten school days or less, and the desire to ensure that children with disabilities not be removed from education for prolonged amounts of time in any school year.

In proposed § 300.121(c)(1), the Secretary proposes to define children with disabilities who have been suspended or expelled from school for purposes of this section to mean children with disabilities who have been removed from their current educational placement for more than 10 school days in a given school year.

In proposed § 300.121(c)(2), the Secretary proposes to clarify that the right to FAPE under these circumstances begins on the eleventh school day from the date of the child's removal from the current educational placement. For example, if a child with a disability who has not previously been suspended in the school year receives a three week suspension, services must be provided by the eleventh school day of that suspension. If a child with a disability who has received two five school day suspensions in the fall term is suspended again in the spring of that school year, services must be provided from the first day of the third suspension.

A second issue regarding the statutory right to FAPE for children with disabilities who have been suspended or expelled is how to reconcile the right to FAPE with the statutory recognition, in sections 612(a)(1)(A) and 615(k)(5)(A), that children with disabilities properly could be subjected to the same disciplinary measures applied to nondisabled children if their behavior was not a manifestation of their disability. The Secretary proposes in § 300.121(c)(2) to address this question by requiring that in providing FAPE to children with disabilities who have been suspended or expelled, a public agency shall meet the requirements for interim alternative educational settings under section 615(k)(3) of the Act. The Secretary believes requiring that education for children who have been suspended or expelled meets the standards in section 615(k)(3) allows accommodation of both the statutory obligation to provide FAPE to these children and recognizes in section 615(k)(5) that, through an appropriate suspension or expulsion, school districts can legitimately remove children from their current educational placement. Under proposed § 300.622, States may elect to use funds available for capacity building and improvement activities to support public agency services to children who have been suspended or expelled.

Two notes would also be added to proposed § 300.121. The first would be added to reflect the Department's longstanding interpretative position that the obligation to make FAPE available to children 3 through 21 begins on each child's third birthday, and an IEP or IFSP must be in effect by that date that specifies the special education and related services that must be provided, consistent with proposed § 300.342, including extended school year services, if appropriate. For children receiving early intervention services under Part C of the Act and who will be participating in a preschool program under Part B of the Act, the transition requirements of proposed § 300.132 would apply.

The second note to follow proposed § 300.121 would recognize that, under the statute, school districts are not relieved of their obligations to provide appropriate special education and related services to individual disabled students who need them even though the students are advancing grade to grade, and that decisions about eligibility under Part B of the Act for these students must be determined on an individual basis.

Proposed § 300.122 revises the current § 300.122 to eliminate an obsolete provision about the provision of FAPE to children with disabilities before September 1, 1980, and incorporates the new statutory limitation to the obligation to make FAPE available to certain individuals in adult correctional facilities. Section 612(a)(1)(B)(ii) provides that the obligation to make FAPE available to all children with disabilities does not apply to individuals aged 18 through 21 to the extent that State law does not require that special education and related services under Part B of the Act be provided to students with disabilities who, in the educational placement prior to their incarceration in an adult correctional facility, were not actually identified as being a child with a disability or did not have an IEP under Part B of the Act. This provision, with minor modifications for clarity, would be reflected in proposed § 300.122(a)(2). A note, Note 2, would be added following § 300.122 quoting the House Committee Report explaining the statutory change.

The Secretary also proposes to amend § 300.122 to make clear that the right to FAPE does not apply to children with disabilities who have graduated from high school with a regular high school diploma. This reflects the Secretary's understanding that the right to FAPE is ended either by a student successfully finishing a regular secondary education program or reaching an age between 18 and 21 at which, under State law, the right to FAPE has ended. In addition, the changes made by the IDEA Amendments of 1997, particularly as they relate to the content of children's IEPs in section 614(d) of the Act, reinforce the Secretary's belief that FAPE is closely related to enabling children with disabilities to progress in the same general curriculum that is provided nondisabled children. The Secretary also believes that it is

important to clarify that the right to FAPE is not ended if a student with disabilities is awarded some other certificate of completion or attendance instead of a regular high school diploma. This change should not be interpreted as prohibiting the use of Part B funds to provide services to a student with disabilities who has already achieved a regular high school diploma, but who still is in the State's mandated age range if an LEA or SEA wishes to do so.

Note 1 following proposed § 300.122 would explain that graduation is a change of placement under Part B and, as such, would require prior written notice to the parents, and student if appropriate. The note would also explain that under § 300.534(c) a reevaluation is required before graduation. The note would further explain that other documents, such as certificates of attendance or other certificates granted instead of a regular high school diploma, would not end a student's entitlement to FAPE.

Proposed §§ 300.123–300.124 include, with only minor changes reflecting the new State eligibility scheme of the statute, the current regulatory provisions concerning State policies and procedures relating to the full educational opportunity goal and the full educational opportunity timetable. Current regulatory provisions concerning the full educational opportunity goal regarding facilities, personnel, and services, and priorities would be eliminated as these provisions were removed from the statute by the IDEA Amendments Act of 1997. Section 612(a)(2) of the Act requires each State to have established a full educational opportunity goal and timetable.

Proposed § 300.125 incorporates the current regulatory provision, revised as discussed, concerning child find obligations (identification, location, and evaluation of children with disabilities) with the new statutory provision that this obligation includes children with disabilities attending private schools, in accordance with section 612(a)(3)(A) of the Act. The requirement in the current regulation to provide yearly information about child find activities would be eliminated in light of the fact that periodic State plans are no longer required by statute. The provisions requiring data on and the method for determining which children are not receiving special education and related services also would be removed from the regulation, reflecting statutory changes. A new § 300.125(c) would be added that includes the construction clause of section 612(a)(3)(B). That clause clarifies that nothing in the Act requires that children be classified by their disability so long as each child who has a disability and, by reason thereof, needs special education and related services, is regarded as a child with a disability under Part B of the Act. The notes following the current regulatory provision regarding child find would be retained, but shortened and updated as appropriate. Two additional notes would be added to reflect longstanding policy positions of the Department. A new Note 2 would recognize that the services and placement needed by each child with a disability must be based on the child's unique needs and may not be determined or limited based on the child's disability category.

Note 3, which is largely retained from the current regulations, explains the important relationship between child find activities under this part and child find activities under Part 303 for children with disabilities from birth through age 2. The Secretary believes that developing effective child find activities for this age population will provide significant benefits not just for very young children with disabilities but also for schools and other public agencies that may find their responsibilities easier because of early attention to these children's needs.

A Note 4 following this section would reflect that each State's child find obligation under the statute includes highly mobile children, such as migrant and homeless children.

Proposed § 300.126 incorporates the evaluation procedures from sections 612(a)(7) and 612(a)(6)(B), by cross-referencing the provisions of proposed §§ 300.530–300.536, which include all of the statutory evaluation provisions of sections 612(a)(6)(B) and 614(a)–(c) and related evaluation procedures from current regulations. This provision would replace the current regulatory section on State procedures on protection in evaluation procedures.

Proposed § 300.127 includes, with only minor changes reflecting the new statutory State eligibility scheme, the provisions of the current regulation concerning State policies and procedures on the confidentiality of personally identifiable information. This provision reflects section 612(a)(8) of the Act. The note following this section would be updated to reflect current information about the regulations implementing the Family Educational Rights and Privacy Act.

Proposed § 300.128 is the same as the current regulatory provision concerning individualized education programs (IEPs), except as revised to reflect the new statutory State eligibility scheme and the requirements of section 612(a)(4) of the Act.

Proposed § 300.129 incorporates the current regulatory provision concerning procedural safeguards, as revised as discussed, and the statutory provision, in section 612(a)(6)(A), that children and their parents are afforded the procedural safeguards required by section 615.

Proposed § 300.130 would remove from the existing regulatory provision regarding least restrictive environment (LRE) the data collection requirements, and make other conforming revisions, as discussed, in light of the new State eligibility structure of the Act, consistent with section 612(a)(5)(A). (Data on LRE would still be collected under section 618(a)(1)(A) (iii) and (iv) of the Act.) Additionally, the following new statutory requirements regarding a State's funding formula are added as proposed § 300.130(b): (1) If a State uses a funding mechanism to distribute State funds on the basis of the type of setting in which a child is served, the funding mechanism may not result in placements that violate the LRE requirements; and (2) if the State does not have policies and procedures to ensure compliance with this new requirement, the State must provide the Secretary an assurance that the State will revise the funding mechanism as soon as feasible to ensure that the mechanism does not result in placements that violate LRE. A note would also be added to this provision quoting language from the House Committee Report recognizing that this statutory addition does not eliminate the need for a continuum of alternative placements that is designed to meet the unique needs of each child with a disability.

Proposed § 300.132 adds to the existing regulatory provision concerning the transition of individuals from Part H (to be renamed part C on July 1, 1998) to Part B the new statutory language (from section 612(a)(9)) concerning ''effective'' transitions, and the provision that LEAs will participate in transition planning conferences arranged by the designated lead agency under Part H (to be renamed Part C).

Proposed § 300.133 updates the existing regulatory provision concerning children in private schools to reflect the new statutory structure, and the changes made in subpart D of this proposed regulation, consistent with section 612(a)(10) of the Act.

Proposed § 300.135 reflects the new statutory requirements concerning a comprehensive system of personnel development (CSPD). Section 612(a)(14)

provides that a State's CSPD must meet the requirements for a State improvement plan relating to personnel development. A note following this section would quote the House Committee Report to the effect that the State's CSPD must include procedures for acquiring and disseminating significant knowledge and for adopting appropriate promising practices, materials, and technology. The note would also explain that a State could use the information provided to meet the State eligibility requirement under Part B of the Act as a part of a State improvement program plan under Part D of the Act.

Proposed § 300.136 reflects the existing regulatory provision on personnel standards, revised as discussed, and the requirements of section 612(a)(15) of the Act. A new paragraph (f) adds the new statutory provision from section 612(a)(15)(B)(iii) that allows paraprofessionals and assistants who are appropriately trained and supervised, under State law, regulations or policy to be used to assist in the provision of services under Part B of the Act. Also added is the new provision, from section 612(a)(15)(C), that a State may adopt a policy that includes a requirement that LEAs in the State make an ongoing good-faith effort to recruit and hire appropriately and adequately trained personnel to provide special education and related services, including, in a geographic area where there is a shortage of those personnel, the most qualified individuals available who are making satisfactory progress toward completing applicable course work necessary to meeting State standards within three years. This provision would be incorporated in § 300.136(g). A note following this section would be added explaining that a State may exercise the option in paragraph (g) even though the State has reached its established date for retraining or hiring of personnel to meet appropriate professional requirements under paragraph (c) of this section so as to avoid any unwarranted confusion on this issue. Another note would be added to clarify that if a State has only one entry level degree requirement for a specific profession or discipline, it is not precluded by § 300.136(b)(1) from modifying that standard if necessary to ensure the provision of FAPE to all children with disabilities in the State.

Proposed § 300.137 would add to the regulation the new statutory provision of section 612(a)(16) concerning performance goals and indicators. Basically, this provision requires that States have goals for the performance of children with disabilities, and indicators of progress that at a minimum address the performance of children with disabilities on assessments, drop-out rates, and graduation rates. The provision also requires reporting every two years to the Secretary and the public on the progress of the State, and revisions to a State's improvement plan under Part D of the Act as needed to improve performance, if the State receives a grant under that authority. The current regulatory provision concerning procedures for evaluation of the effectiveness of programs would be removed, reflecting a statutory change.

Proposed § 300.138 would add the new requirement of section 612(a)(17)(A) concerning inclusion of children with disabilities in general State and district-wide assessments, including conducting alternative assessments not later than July 1, 2000 for children who cannot participate in State and district-wide assessment programs. A note following this section would explain that only a small number of children with disabilities should need alternative assessments. The provision of section 612(a)(17)(B) concerning reports related to these assessments are contained in proposed § 300.139.

The Secretary proposes to interpret the statutory requirements to make clear that whenever the SEA reports to the public on student performance on wide-scale assessments, the reports must include aggregated results of all children, including children with disabilities, as well as disaggregated data on the performance of children with disabilities. The Secretary believes that the IDEA Amendments of 1997 were designed to foster consideration of children with disabilities as a part of the student population as a whole. It would not be in keeping with that focus if, in reporting assessment data, results for children with disabilities were not included in reports on the student population as a whole. A note following this section would explain that States would not be precluded from also reporting data in a way that would, for example, allow them to continue trend analysis of student performance, if children with disabilities had not been included in those analyses in the past.

Proposed § 300.141 incorporates the current regulatory provision, revised as discussed, concerning SEA responsibility for all educational programs, consistent with the requirement in section 612(a)(11) of the Act.

Proposed § 300.142 would replace the current regulatory provision concerning interagency agreements with the requirements of section 612(a)(12) regarding methods of ensuring services. This provision requires that the Chief Executive Officer or designee in each State ensure that an interagency agreement or some other mechanism for interagency coordination is in effect between noneducational agencies that are obligated under other law to provide or pay for services that are considered special education or related services under Part B of the Act and the SEA to ensure that those services are provided. In addition to the statutory requirements, a paragraph (e) would reflect the Department's interpretation that it would violate the statutory obligation to provide free services if a public agency required a parent to use private insurance proceeds to pay for services required under the Act. The Department has long taken the position that Part B of the Act and section 504 of the Rehabilitation Act prohibit a public agency from requiring parents to use insurance proceeds to pay for the services that must be provided to an eligible child under the FAPE requirements of those statutes, if they would incur a financial cost to secure those services. (See Notice of Interpretation published on December 30, 1980 (45 FR 66390)). This paragraph also would include a definition of the term ''financial cost,'' so that both parents and school districts will have a common understanding of the term. This definition reflects the Department's longstanding interpretation of the statutory obligation to provide services at no cost as applied to parents' private insurance. A note following this section would explain how this paragraph applies if a family is covered by both private insurance and Medicaid.

The Secretary believes that the same basic principle, that services be available at no cost to parents, would be equally applicable to parents whose children are eligible for public insurance, but that there is no current need to regulate on the public insurance issue because there is no risk of financial loss to parents under current public insurance programs such as Medicaid. The Secretary invites comment on whether a policy on public insurance similar to the proposed section regarding private insurance should be added to the final regulation.

The Secretary also proposes to add a new paragraph (f) to specify that proceeds from public or private insurance may not be treated as program income for purposes of 34 CFR 80.25. That section imposes limitations on how program income can be treated by grantees that would lead to States returning reimbursements from public and private insurance to the Federal

government or requiring that the funds be used under this part, which could discourage States and school districts from using all the resources available in paying for these services. Given the current small percentage that Federal funds under this part are to total funding for services under this part, and the fact that children with disabilities are guaranteed services under this part, the Secretary believes that States and school districts should be given some flexibility in how they use and account for funds received as reimbursements from other sources. A note would be added after this section explaining the consequences, under the Maintenance of Effort (MOE) requirements, of various State and local choices in accounting for these funds.

Two other notes would also be added following proposed § 300.142. One would quote the House Committee Report relating to the methods of insuring services provision. The other would explain that if a public agency cannot get parent consent to use public or private insurance for a service, the agency may use funds under Part B of the Act for that service. In addition, the note would explain that to avoid financial cost to parents who otherwise would consent to the use of private insurance, the public agency may use funds under this part to pay the costs of accessing the insurance, such as deductible or co-pay amounts.

Proposed § 300.143 incorporates, with revisions as described, the existing regulatory provision concerning State procedures for informing each public agency of its responsibility for ensuring effective implementation of procedural safeguards for the children with disabilities served by that public agency.

Proposed § 300.144 would retain, with revisions as described, the existing regulatory provisions concerning State procedures that the SEA does not make a final determination regarding an LEA's eligibility for assistance under Part B without first giving reasonable notice and an opportunity for a hearing (consistent with section 612(a)(13)). The Secretary also proposes to retain as proposed § 300.145 the existing regulatory provision regarding recovery of funds for misclassified children. The statutory provision regarding recovery of funds for misclassified children was removed by the IDEA Amendments of 1997. In light of the fact that funds under section 611 of the Act will continue to be distributed based on a child count until some time in the future, however, the Secretary believes that prudent administration of Federal funds dictates that States continue to recover funds allocated among districts on the basis of incorrect child counts. The Secretary does not believe that this requirement will impose additional burden on States as all States already have these procedures. When the funding formula changes to the permanent formula under proposed § 300.706, this provision will be removed.

Proposed § 300.146 would add the new requirement of section 612(a)(22) regarding SEA examination of data to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities among State agencies and LEAs in the State and as compared to the rates for nondisabled children. As provided in the statute, if discrepancies are occurring, the SEA reviews and, if appropriate, revises its policies, procedures, and practices relating to the development and implementation of IEPs, the use of behavioral interventions, and procedural safeguards.

Proposed § 300.147 adds the new statutory requirements of section 612(b) concerning information that is required if an SEA is providing direct services. The Secretary interprets the statutory provision regarding requirements that must be met by an SEA as not including requirements relating to certain use of funds provisions, reflecting the different rules for SEA and LEA use of Part B funds. This regulation would replace the current regulatory provision on SEA provision of direct services.

Proposed § 300.148 adds the new statutory requirement of section 612(a)(20) concerning public participation in the adoption of any policies and procedures needed to comply with Part B of the Act. The proposed regulation would apply the procedures for public participation regarding State plans in the current regulations, with appropriate revisions as described, to the adoption of State policies and procedures in the future. Those procedures are in this NPRM in proposed §§ 300.280–300.284. The Secretary believes that these procedures are necessary to ensure that there is an adequate opportunity for public participation in the development of State policies and procedures related to the provision of special education and related services to children with disabilities. In addition, the Secretary does not see any indication in the IDEA Amendments of 1997 of an intention by Congress to lessen requirements concerning public participation in the development of State policies and procedures. The existing regulatory provision concerning consultation would be deleted, reflecting a statutory change. The existing regulatory provision concerning other Federal programs also would be deleted, in accordance with statutory changes.

Proposed § 300.150 incorporates the statutory requirement of section 612(a)(21)(A) that the State establish and maintain an advisory panel to provide guidance with respect to special education and related services for children with disabilities in the State.

Proposed § 300.152 incorporates the existing regulatory provision, and a note concerning commingling of Part B funds with State funds, with appropriate revisions, reflecting the requirements of section 612(a)(18)(B).

Proposed § 300.153 maintains the existing regulatory provision, regarding State-level nonsupplanting, appropriately revised, consistent with section 612(a)(18)(C). The note in the existing regulatory provision on nonsupplanting would be removed as it would be confusing in light of the new statutory State-level maintenance of effort requirement addressed in proposed § 300.154.

Proposed § 300.154 reflects the new statutory requirement of section 612(a)(19) which prohibits the State from reducing the amount of State financial support for special education and related services below the level of that support for the preceding fiscal year. If the State does reduce State support, the Secretary is directed to reduce funds to the State in the subsequent year by an amount equal to the amount by which the State failed to meet the requirement. The statute also provides that waivers are possible under certain described circumstances, and, if granted, in the year following the waiver the State must meet the level of support it had provided in the year before the waiver.

Proposed §§ 300.155 and 300.156 would simplify, in light of statutory changes, the provision in current regulations regarding policies and procedures for use of Part B funds, and annual descriptions of the use of Part B funds. Proposed § 30.156(b) would incorporate the longstanding Department practice of permitting a State to submit a letter instead of filing a new report when the State's use of funds that are retained by the State has not changed from the prior report submitted.

LEA and State Agency Eligibility—General

Similar to the State eligibility scheme as described, under section 613(a) LEAs and State agencies now also must demonstrate eligibility. Section 613(b)

specifies that if an LEA or State agency has policies and procedures on file with the State that meet a requirement of the new Act, the SEA shall consider the LEA or State agency to have met that requirement. Policies and procedures remain in effect until modified as the LEA or State agency decides necessary, or until required by the SEA because of changes to the Act or its implementing regulations, a new interpretation of the Act by Federal or State courts, or an official finding of noncompliance with Federal or State law or regulations. A provision would be added to clarify that the same rules apply to modifications to LEA or State agency policies and procedures as apply to the original ones consistent with the statutory provision regarding State eligibility. These provisions are in proposed §§ 300.180—300.182.

The excess costs provisions in the current regulations would be condensed and streamlined in these proposed regulations in §§ 300.184–300.185.

Proposed §§ 300.190 and 300.192 reflect the new statutory requirements of section 613(e) concerning joint establishment of eligibility and requirements for education service agencies (formerly intermediate educational units). These provisions eliminate the $7,500 minimum grant requirement of prior law and add an explicit prohibition on an SEA from requiring a charter school that is an LEA to jointly establish eligibility unless the SEA is explicitly permitted to do so under State law.

Proposed § 300.194 reflects the new statutory provision in section 613(i) concerning State agency eligibility. The Secretary proposes, in these regulations, to require that these agencies meet all the conditions of Subpart B of these proposed regulations that apply to LEAs, in keeping with the authorization in section 613(i)(2).

Proposed § 300.196 reflects the statutory provision of section 613(c) that if the SEA determines that an LEA or State agency is not eligible, the SEA notifies the LEA or State agency of that determination, and provides the LEA or State agency with reasonable notice and an opportunity for a hearing.

Proposed § 300.197 adds the statutory requirements concerning SEA actions if an LEA is failing to comply with the requirements of Part B.

LEA Eligibility—Specific Conditions

In accordance with the statutory changes in section 613(a), proposed § 300.220 simplifies the basic eligibility conditions for LEAs. This provision would replace most of the current regulations concerning the content of LEA applications. Under these proposed regulations LEAs must have in effect policies, procedures, and programs that are consistent with State policies and procedures required to demonstrate State eligibility.

With regard to implementation of the State's comprehensive system of personnel development, proposed § 300.221 reflects the requirement in section 613(a)(3) that the LEA demonstrate that all personnel necessary to carry out this part are appropriately and adequately prepared, consistent with State requirements, and that to the extent the LEA determines appropriate, it contributes to and uses the CSPD established by the State.

Proposed § 300.230 reflects the statutory provision of section 613(a)(2)(A) that funds under Part B of the Act must be used in accord with the requirements of Part B, may only be used for the excess costs of providing special education and related services to children with disabilities, and must supplement and not supplant other State, local and Federal funds.

Proposed § 300.231 reflects the new statutory provision that LEAs not reduce the level of expenditure of LEA funds.

Proposed § 300.232 incorporates new statutory exceptions to the local maintenance of effort (MOE) requirement. With regard to the exception relating to the voluntary departure or departure for just cause of special education personnel, the Secretary in these proposed regulations proposes to clarify that the exception only applies if personnel departing are replaced by qualified, lower-salaried personnel. This limitation would not permit a public agency to meet the MOE requirement by removing personnel and failing to replace them. The Secretary does not believe that the statutory provision was intended to permit a reduction in expenditures through attrition unless one of the other exceptions also applied. Other statutory exceptions added include exceptions covering a decrease in enrollment of children with disabilities; the termination of an obligation of the agency to pay for an exceptionally costly program, as determined by the SEA, because the child has left the agency, has reached the age at which the agency no longer has an obligation, or the child no longer needs special education; and the termination of costly expenditures for long-term purchases. A note following this section would quote from the House Committee Report on the issue of exceptions to maintenance of effort for voluntary departure of special education personnel, which provides the basis for the clarification of this exception.

Proposed § 300.233 reflects the new statutory provision in section 613(a)(2)(C) that in years when the Federal appropriation under section 611 is more than $4,100,000,000 an LEA may treat as local funds up to 20 percent of the amount of funds it receives under Part B that exceed the amount it received under Part B in the prior year. Under certain circumstances, an SEA may be authorized under State law to prevent an LEA from exercising this authority.

Proposed § 300.234 incorporates a new statutory provision concerning use of Part B funds in schoolwide project schools under section 1114 of the Elementary and Secondary Education Act of 1965. The amount of Part B funds that may be used in a schoolwide project is limited, by statute, to the amount arrived at by multiplying the per child amount the LEA receives under Part B by the number of children with disabilities participating in the schoolwide project school. The Secretary interprets the statutory provision regarding use of funds to require that these funds may be used without regard to the excess costs requirement, and that in calculating supplement, not supplant and maintenance of effort under Part B, these funds be considered as Federal Part B funds. An explicit statement that except as to the flexibility granted concerning how the Part B funds are used, all other requirements of Part B must be met by an LEA using Part B funds in a schoolwide project school would also be added. This reflects the Secretary's interpretation that this provision cannot be used as a basis for not providing services to children with disabilities in accordance with the other requirements of the Act. A note following this section would caution that children in schoolwide project schools must still receive services in accordance with a properly developed IEP and must still be afforded all of the rights and services guaranteed to children with disabilities under the Act.

Proposed § 300.235 incorporates the provisions of section 613(a)(4) regarding permissive use of Part B funds for special education and related services and supplementary aids and services provided to a child with disabilities that also benefit other children and to develop and implement a coordinated services system. The provision would make clear that an LEA will not be found to violate the commingling, excess costs, supplement not supplant, or maintenance of effort requirements

based on its use of funds in accordance with this provision.

Proposed §§ 300.240–300.250 reflect the new statutory provisions of section 613(a) (5), (6) and (7), (f) and (g) related to treatment of charter schools and their students, information for the SEA to carry out its duties under Part B, public availability of documents related to LEA eligibility, coordinated services systems, and school-based improvement plans. A note following proposed § 300.241 would explain that the provisions of the Part 300 regulations that apply to public schools also apply to children in public charter schools and that children with disabilities in charter schools retain all their rights under these regulations.

Secretary of the Interior—Eligibility

Proposed §§ 300.260—300.267 incorporate the revised statutory provisions concerning the payment to the Secretary of the Interior into the existing regulations on this topic. In proposed § 300.260 references to State eligibility requirements would be updated to reflect the new State eligibility requirements of the Act. In proposed § 300.262 the amount the Secretary of the Interior may use of the payment for administrative costs would be changed to 5 percent of its payment or $500,000 whichever is greater, reflecting the increase in the minimum for State administration in section 611. Provisions in the statute regarding a plan for coordination of services for all Indian children residing on reservations covered by Part B (section 611(i)(4)), definitions of the terms ''Indian'' and ''Indian tribe'' (section 602 (9) and (10)), and provisions regarding the establishment of an advisory board and reports by that board (sections 611(i) (5) and (6)(A)) would also be added.

Public Participation

Proposed §§ 300.280–300.284 incorporate the existing regulatory provisions concerning public participation, revised to reflect the statutory changes from State plans to State eligibility demonstrations. The Secretary believes that these provisions remain necessary to ensure adequate public participation in the development of State policies and procedures regarding the provision of special education and related services to children with disabilities under Part B of the Act, and sees nothing in the changes in the IDEA Amendments of 1997 that indicates a Congressional intent to reduce these requirements.

Subpart C—Services

Free Appropriate Public Education

Proposed § 300.300 is essentially the same as in the current regulation, with minor changes to update and accommodate new statutory provisions. Proposed §§ 300.301–300.308 also are restatements of the current regulatory provisions at these sections.

Reflecting the Secretary's long standing interpretation of the obligation to make FAPE available based on individual needs, a new § 300.309 would be added to address extended school year services. This provision would require that each public agency ensure that extended school year services are available to each child with a disability to the extent necessary to ensure that a free appropriate public education is available to the child, based on an individual determination of the child's needs by the child's IEP team. The term ''extended school year services'' is defined to be special education and related services that are provided to a child with a disability beyond the normal school year, in accordance with the child's IEP, at no cost to the child's parents, and that meet the standards of the SEA. A note following this section would explain that agencies may not limit extended school year services only to children with particular categories of disability or unilaterally limit the duration of services. The note would also explain that nothing in Part B requires that every child with a disability is entitled to, or must receive, extended school year services. A second note would explain that States may establish standards for decisions regarding which children should receive extended school year services and provides examples of acceptable factors that may be considered. These changes reflect the Secretary's policy guidance over the years on this topic, which itself has been informed by a number of Federal court decisions over the last twenty years under Part B of the Act. The Secretary believes that the changes are necessary to ensure that children with disabilities who need extended school year services have appropriate access to those services, and that those services are a part of FAPE.

Proposed § 300.311 reflects new statutory provisions in sections 612(a)(1)(B) and 614(d)(6) concerning students with disabilities who are in adult correctional facilities. Paragraph (a) would specify that the obligation to make FAPE available to all children with disabilities does not apply to students aged 18 through 21 to the extent that State law does not require that special education and related services under Part B be provided to students with disabilities who, in the last educational placement prior to their incarceration in an adult correctional facility, were not actually identified as being a child with a disability and did not have an IEP under Part B. This language is taken from the statute, with minor changes for the sake of clarity. Paragraph (b) would provide that certain requirements of Part B do not apply to students with disabilities who are convicted as adults under State law and incarcerated in adult prisons: the provisions relating to participation of children with disabilities in general assessments, and the provisions relating to transition planning and transition services for students whose eligibility under Part B will end, because of their age, before they will be released from prison. The Secretary interprets the provision concerning transition services to require consideration of the student's sentence and eligibility for early release because the required determination must happen before the student actually is released from prison. Reflecting statutory requirements, paragraph (c) would specify that the IEP team of a student with a disability who is convicted as an adult under State law and incarcerated in an adult prison may modify the student's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

Evaluations and Reevaluations

Proposed §§ 300.320 and 300.321 would be added to reflect the basic statutory requirements concerning evaluations and reevaluations contained in section 614 (a) and (b) of the Act. Evaluations and reevaluations would be addressed in greater detail in the discussion of proposed §§ 300.530–300.536.

Individualized Education Programs

Proposed § 300.340 would restate the current regulatory definitions of ''IEP'' and ''participating agency.''

Proposed § 300.341 would restate the current regulatory provision concerning the SEA responsibility for development and implementation of IEPs, with one minor wording change. Throughout these proposed regulations, the Secretary proposes to use the term ''religiously-affiliated'' rather than the term ''parochial'' as the former is more inclusive and accurately reflects the type of schools described. These proposed regulations distinguish between children placed in private schools by public agencies and those

placed in private schools by their parents. Proposed §§ 300.401 and 300.402 address children placed by public agencies in private schools. Proposed § 300.403 concerns placement in private schools when the provision of FAPE is at issue. Proposed §§ 300.450–300.462 concern children placed by their parents in private schools.

Proposed § 300.342 (a) and (b) would restate, with minor nonsubstantive changes, the current regulatory provisions regarding when IEPs must be in effect. A new paragraph (c) would be added regarding the use of IFSPs for children aged 3 through 5 as provided for in the statute at section 614(d)(2)(B), and reflecting the Secretary's interpretation that this provision permits, if State policy provides and the public agency and parent agree, the use of an IFSP that meets the content requirements of section 636(d) of the Act in place of a document meeting the IEP content requirements of section 614(d) of the Act, for children aged 3 through 5. With regard to the requirement for agreement by the parents to using an IFSP instead of an IEP, the Secretary proposes to require written informed consent that is based on an explanation of the differences between an IFSP and an IEP in light of the importance of the IEP as the statutory vehicle for ensuring the provision of FAPE to children with disabilities. For most children who are five-years old, and for many 3- and 4-year olds as well, the use of an IEP that must be tied to the general curriculum provided to nondisabled age peers, is encouraged.

The Secretary proposes to add a new paragraph (d) to this section representing the Secretary's understanding of section 201(a)(2)(C) of Pub. L. 105–17 that IEPs that meet the requirements of section 614(d) (1)–(5) must be in effect as of July 1, 1998. Delaying implementation of these provisions beyond that date would be inconsistent with the right of children with disabilities to an IEP that meets the new requirements as of July 1, 1998. The note following this section from current regulations would be retained with minor changes, and a new note added to clarify that the provisions of section 614(d)(6) of the Act, relating to services to children with disabilities in adult prisons, took effect on June 4, 1997.

Proposed § 300.343(a) restates the current regulatory provision concerning the general standard for conducting IEP meetings. In paragraph (b) of this section, the Secretary would add a new provision on timelines for IEPs that would require that an offer of services based on an IEP must be made within a reasonable period of time from a public agency's receipt of parent consent to an initial evaluation reflecting the Department's longstanding interpretation of the requirements of the statute. A note following this section would be added to explain that for most children it would be reasonable to expect that a public agency would offer services based on an IEP within 60 days of receipt of parent consent for initial evaluation. The Secretary proposes this reasonable time standard in light of the importance of appropriate educational services for children with disabilities to enable them to receive FAPE and the frequent long delays observed between referral for special education evaluation and actual provision of services. Paragraph (b) would retain the current regulatory timeline of 30 days from the determination that the child is a child with a disability to an IEP meeting. A new paragraph (c) would also be added to this section that revises the current regulatory provision concerning review of IEPs to reflect new statutory requirements in section 614(d)(4). The note following this section in current regulations would be deleted as unnecessary and confusing in light of changes proposed to the regulation.

Proposed § 300.344 would revise the current regulatory provision concerning IEP team membership to reflect the requirements of section 614(d)(1)(B). Under this provision the IEP team includes the parents of the child with a disability; at least one regular education teacher (if the child is, or may be, participating in regular education); at least one special education teacher or, if appropriate, at least one special education provider of the child; a representative of the LEA who meets certain specified requirements; an individual who can interpret the instructional implications of evaluation results; at the discretion of the parent or agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel; and, if appropriate, the child.

The Secretary proposes to expand the current regulatory provision requiring the agency to invite students to participate in IEP meetings if the meeting will include consideration of the statement of needed transition services to also include meetings that will include consideration of transition service needs, in accordance with § 300.347(b)(1) and note 5 following that section. This reflects the Department's longstanding regulatory position that a student with a disability be involved in the development of an IEP if transition services are being considered. The current regulatory provision regarding taking other steps to ensure consideration of the student's preferences and interest if the student does not attend the IEP meeting would be maintained. This section also would maintain the current regulatory provisions concerning inviting representatives of any other agency that is likely to be responsible for providing or paying for transition services, including taking other steps to obtain participation if a representative invited to a meeting does not attend.

Note 1 following this section would be revised in light of the statutory changes. It would also explain that an LEA may designate one or more regular education teachers of the child to attend the IEP meeting, if the child has more than one. It would further state that if all of the child's teachers are not participating in the IEP meeting, LEAs are encouraged to seek input from teachers who will not be attending, and should ensure that teachers who do not attend the IEP meeting are informed about the results of the meeting, including receiving a copy of the IEP. Finally, the note would explain that LEAs are encouraged, in the case of a child whose behavior impedes the learning of the child or others, to have a person knowledgeable about positive behavior strategies at the meeting. Note 2 following this section in the current regulations would be removed.

Proposed § 300.345 largely would maintain the current regulatory provision concerning parent participation in IEP meetings based on the statutory requirements at section 614(d)(1)(B). It would be revised only by adding to the parent notification provisions that for students of any age, if a purpose of the IEP meeting is either the development of a statement of transition service needs or consideration of needed transition services, the agency's notice to the parent must indicate that purpose, and that the agency must invite the student to attend. This change merely modifies the current regulation to accommodate the new statutory provision requiring a statement of transition service needs for students beginning no later than age 14 contained in proposed § 300.347.

Proposed § 300.346 would add a new provision to the regulations based on the requirements of section 614(d)(3) concerning development of the IEP. That section requires that in developing each child's IEP the IEP team consider the strengths of the child and the concerns of the parents for enhancing the education of their child and the results of the initial or most recent

evaluation of the child. That section requires that the IEP team also consider a number of special factors that may apply to individual children. For example, if a child's behavior impedes his or her learning or that of others, the IEP team must consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior. These statutory requirements are included in proposed § 300.346(a). Proposed § 300.346(b) would clarify that IEP teams consider these factors in review and revision of IEPs as well as in their initial development. A paragraph (c) also would be added to clarify that if in considering a factor, the IEP team determines that a child needs a particular device or service (including an intervention, accommodation, or other program modification) in order for the child to receive FAPE, the IEP team must include a statement to that effect in the child's IEP. It would be an anomalous result if an IEP team determined that a service or device was needed to address one of the statutory special factors, and that service or device were not included in the child's IEP.

Paragraph (d) of this proposed section would add the statutory requirements of section 614(d) (3)(C) and (4)(B) which specify that the regular education teacher, to the extent appropriate, must participate in the development, review, and revision of the IEP of the child, including assisting in the determination of appropriate positive behavioral interventions and strategies and the determination of supplementary aids and services, program modifications, and support for school personnel. Paragraph (e) of this section would incorporate the new statutory provision of section 614(e) which specifies that IEP teams are not required to include information under one component of a child's IEP that is already included under another. Three notes would also be added following this section. The first would recognize the importance of the consideration of the special factors in development of a child's IEP. As appropriate, consideration of these factors must include a review of valid evaluation data and the observed needs of the child resulting from the evaluation process. The second note would acknowledge the statement in the House Committee Report regarding Pub. L. No. 105–17 that states that for children who are deaf or hard of hearing the IEP team should implement the special consideration provision in a manner consistent with the ''Deaf Students Education Services'' policy guidance from the Department. The third note would explain how the considerations addressed in this section affect the development of an IEP for a child who is limited-English proficient. This is one of several notes addressing the responsibility of public agencies to effectively meet the needs of children with limited English proficiency who have a disability or are suspected of having a disability. The Secretary requests public comment on whether additional clarification would be useful.

Proposed § 300.347 would replace the current regulatory provision on the contents of IEPs with the new statutory requirements from section 614(d)(1)(A) regarding the contents of an IEP. In addition, proposed § 300.347 would maintain the current regulatory provision regarding transition services on a student's IEP which states that if the IEP team determines that services are not needed in one or more of certain of the areas specified in the definition of transition services, the IEP team must include a statement to that effect and the basis upon which the determination was made. In addition, the Secretary would add, as paragraph (d), a statement that special rules concerning the content of IEPs apply for children with disabilities who are in adult prisons, consistent with section 614(d)(6) of the Act. The notes following the current regulatory provision on IEP contents would be shortened and condensed into one note regarding transition services. Notes would be added following this section explaining several issues raised by the new provisions on IEP contents—the emphasis on the general curriculum, the focus of the IEP on enabling children with disabilities to access the general curriculum, the relationship of teaching and related service methodologies or approaches and the content of the IEP, the new reporting to parents requirement and the new statement of transition service needs. A final note would explain that it would not be a violation of Part B of the Act for a public agency to begin planning for transition service needs for students younger than age 14 and transition services for students younger than age 16.

Proposed § 300.348 would maintain the current regulatory provision concerning agency responsibility for transition services, consistent with section 614 (d)(5) and (d)(1)(A)(vii). Current regulatory provisions concerning private school placements by public agencies and children with disabilities in private schools would be retained as proposed §§ 300.349 and 300.350, with minor wording changes. These sections reflect the Secretary's interpretation of how public agencies meet their responsibilities regarding conducting IEP meetings under section 614(d)(1)(B) in light of the requirements of section 612(a)(10) (A) and (B) regarding providing services to children with disabilities in private schools. The current regulatory provision concerning IEP accountability would also be maintained as proposed § 300.351. The Secretary believes that this provision continues to represent the appropriate interpretation of the statutory provisions concerning IEPs. However, the note following this section has been revised in light of the heightened focus in the IDEA Amendments of 1997 on providing children with disabilities the instruction, services and modifications that will enable them to achieve a high standards.

Direct Services by the SEA

Proposed § 300.360(a) would replace the current regulatory provision describing the SEA's use of funds, that otherwise would have gone to an LEA, to provide direct services, with the new statutory requirements on this issue. Paragraphs (b) and (c) would be maintained from the current regulations, reflecting the Secretary's continuing interpretation of how SEAs implement direct services. The note following this section would be retained, with material deleted that has been rendered obsolete by the new statute. Proposed § 300.361 would be retained from the current regulations, consistent with the requirements of section 613(h)(2) of the Act.

Section 611(f)(3) authorizes several new uses of money that the State may retain at the State level, including to establish and implement the mediation process; to assist LEAs in meeting personnel shortages; to develop a State Improvement Plan under subpart 1 of Part D of the Act; to carry out activities at the State and local levels to meet performance goals and to support implementation of the State Improvement Plan; to supplement other amounts used to develop and implement a Statewide coordinated services system (but not more than one percent of the grant under section 611 of the Act); and for capacity building and system improvement subgrants to LEAs. The current regulatory provision would be expanded by adding these new statutory provisions as § 300.370(a) (3)–(8). Proposed § 300.370(a) (1) and (2) reflect statutory provisions that were in the prior law and are retained in section 611(f)(3). The provision in the current regulations concerning State matching would be deleted, reflecting the deletion of this requirement from the statute.

Proposed § 300.372 would replace the current regulatory provision regarding the applicability of the nonsupplanting provision to funds that the State uses with the new requirements from section 611(f)(1)(C) that the SEA may use funds retained without regard to the prohibition on commingling and the prohibition on supplanting other funds.

Comprehensive System of Personnel Development

The regulatory provisions in proposed §§ 300.380–300.382 would be revised to reflect new statutory requirements concerning a State's comprehensive system of personnel development (CSPD). Proposed § 300.380 would require that each State's CSPD be consistent with Part B of the Act and the CSPD provision of Part H (to be renamed Part C); be designed to ensure an adequate supply of qualified special education, regular education and related services personnel; be updated at least every five years; and meet the requirements of §§ 300.381–300.382, which contain the provisions of section 653 (b)(2)(D) and (c)(3)(D), as required by section 612(a)(14). Because the statute makes the CSPD the same as the personnel sections of a State Improvement Plan, the Secretary proposes to add a provision to make clear that a State with a State Improvement grant would be considered to have met the requirements of this section.

Proposed § 300.381 would require a State to include an analysis of State and local needs for professional development of personnel to serve children with disabilities that must include at least certain minimum specified information. Proposed § 300.382 would require States to describe the strategies in a number of specified areas that they will use to address the needs identified under proposed § 300.381, including identified needs for in-service and pre-service preparation to ensure that all personnel who work with children with disabilities (including both professional and paraprofessional personnel who provide special education, general education, related services, or early intervention services) have the skills and knowledge necessary to meet the needs of children with disabilities.

Subpart D—Children in Private Schools

Children With Disabilities in Private Schools Placed or Referred by Public Agencies

Sections 300.400–300.402 of these proposed rules would incorporate the existing rules regarding children with disabilities placed in private schools by public agencies and children with disabilities placed in private schools by their parents. These proposed rules reflect the unchanged statutory provision in section 612(a)(10)(B) that children with disabilities placed in or referred to private schools or facilities by an SEA or LEA must be provided special education and related services (1) in accordance with an IEP, and (2) at no cost to their parents. Section 612(a)(10)(B) further requires that the SEA must ensure that the private facilities meet State standards and that children placed in those facilities have the same rights they would have if served by a public educational agency. The IDEA Amendments of 1997 added new requirements concerning children placed by their parents in private schools. Section 612(a)(10)(C)(i) provides that an LEA is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the LEA made FAPE available to the child and the parents elected to place the child in the private school. Parent reimbursement is subject to certain requirements described in the next paragraph of this preamble. This provision would be reflected in proposed § 300.403(a). Proposed § 300.403(b) would be retained from the current regulations to clarify that due process procedures can be used to resolve disagreements about the provision of FAPE and financial responsibility of the public agency.

Section 612(a)(10)(C)(ii) describes the circumstances under which a parent may seek reimbursement from a public agency for a private school placement. This provision states that a court or a hearing officer may require the public agency to reimburse parents for the cost of a private school placement if the court or hearing officer finds that the public agency had not made FAPE available to the child in a timely manner. It also states that reimbursement may be reduced or denied if (1) at the child's most recent IEP meeting the parents did not inform the IEP team that they were rejecting the public agency's proposed placement, including stating their concerns and their intent to enroll their child in a private school at public expense; (2) ten (10) business days (including holidays that occur on a business day) prior to the removal of the child from public school, the parents did not give written notice that they were rejecting the public agency proposal and their intent to enroll their child in a private school at public expense; (3) prior to the parents' removal of the child from a public school, the public agency notified the parents, through the prior written notice required under section 615(b)(7) of the Act, of its intention to evaluate the child, but the parents did not make the child available for evaluation; or (4) upon a judicial finding of unreasonableness regarding the actions of the parents. Reimbursement may not be reduced or denied for failure to provide that notice if: (1) The parent is illiterate and cannot write in English; (2) compliance with an evaluation would likely result in physical or serious emotional harm to the child; (3) the school prevented the parent from providing the notice; or (4) the parents had not received notice, pursuant to section 615 of the Act, of the notice requirement. These provisions would be incorporated in the proposed regulations at § 300.403(c)–(e).

Children With Disabilities Enrolled by their Parents in Private Schools

Proposed § 300.450 would retain the current regulatory definition of ''private school children with disabilities.''

Section 612(a)(10)(A) of the Act provides that to the extent consistent with the number and location of children with disabilities who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this part by providing for these children special education and related services, by spending a proportionate amount of the Federal funds available under Part B of the Act on services for these children. Those services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law. The statute also requires that the SEA's and LEA's child find activities apply to children with disabilities who are placed by their parents in private, including parochial, schools.

Proposed §§ 300.451–300.462 would incorporate these statutory requirements, and appropriate provisions from existing regulatory requirements (from 34 CFR 76.650–76.662) regarding the participation of private school students with disabilities. The term ''religiously-affiliated'' would be used instead of the statutory term ''parochial'' as the Secretary assumes that all religious schools were intended by Congress to be included, not just those organized on a parish basis. The child find obligation from the statute is reflected in proposed § 300.451. Proposed § 300.452 describes the basic statutory obligation to provide special

education and related services to private school children with disabilities and says that obligation is met by meeting the requirements of §§ 300.453–300.462. In § 300.453, the Secretary interprets the statutory limitation on the amount of funds that LEAs must spend on providing special education and related services to private school children with disabilities as the same proportion of the LEA's total subgrant under sections 611 and 619 of the Act as the number of private school children with disabilities aged 3 through 21 and 3 through 5, respectively, is to the total numbers of children with disabilities in its jurisdiction in each of those age ranges. A note would be added after this section to clarify that SEAs and LEAs are not prohibited from providing more services to private school children with disabilities than is required under the Act.

Proposed § 300.454(a) specifies that no individual private school child with a disability has a right to receive some or all of the special education and related services the child would receive if enrolled in a public school. This provision reflects the Secretary's longstanding regulatory interpretation of the statutory limitations on the obligation to provide services to private school children with disabilities, which now specifically reference the limited amount of funds that LEAs must spend on these services. LEAs should have the authority to decide, after consultation with representatives of private school children with disabilities, how best to provide services to this population. Proposed § 300.454 (b)–(e) specifies that LEAs make decisions about which children to serve and what services to be provided to private school children with disabilities, and how those services will be provided and evaluated after timely and meaningful consultation with appropriate representatives of private school children with disabilities that gives those representatives a genuine opportunity to express their views on these subjects. These rules are similar to requirements governing how decisions are made about services provided to private school children under Title I of the Elementary and Secondary Education Act, and are based on the consultation provisions in 34 CFR 76.652 that have applied to services to private school children with disabilities under the Act for many years.

Proposed § 300.455 specifies that services provided to private school children with disabilities must be comparable in quality to services provided to children with disabilities enrolled in public schools and provides a definition of ''comparable in quality.'' This proposed section also specifies that the IEPs developed for these children must address the services that the LEA has determined that it will provide to the child, in light of the services that the LEA has determined, through the consultation process, that it will make available to private school children with disabilities. (The proposed regulations will maintain the current regulatory provision at § 300.341(b)(2) requiring that IEPs be developed for children enrolled in private schools and receiving special education and related services from a public agency.)

Proposed § 300.456(a) would incorporate the statutory provision that services may be provided on-site at the child's private school, to the extent consistent with law. The term ''religiously-affiliated'' is used instead of the statutory term, ''parochial.'' A note would be included after this section that recognizes that under recent decisions of the U.S. Supreme Court, LEAs may provide special education and related services on-site at religiously-affiliated private schools in a manner that does not violate the Establishment Clause of the First Amendment to the U.S. Constitution.

Proposed § 300.456(b) would specify that transportation to a site other than the child's private school must be provided if necessary for the child to benefit from or participate in the other services offered, based on the Secretary's longstanding position that all children with disabilities must be provided transportation to and from other services provided under the Act, if that transportation is necessary to enable them to benefit from those other services. Paragraph (b)(2) of this section would clarify that the cost of that transportation may be included in calculating whether the LEA has met the requirement of § 300.453. A second note following this section would explain that transportation is not required between the student's home and the private school, but only between the site of the services, if other than the private school, and the student's private school or the student's home, depending on the time of the services.

In proposed § 300.457(a), the Secretary interprets the statutory provision regarding services to private school children with disabilities to mean that the due process procedures of the Act do not apply to complaints that an LEA has failed to meet the requirements of §§ 300.452–300.462, including the provision of services indicated on the child's IEP. This provision is based on the statutory scheme, which does not include any individual right to services for private school students placed by their parents. Proposed § 300.457(b) would clarify that complaints that an SEA or LEA has failed to meet the requirements of §§ 300.451–300.462 may be filed under the State complaint procedures addressed in this NPRM at §§ 300.660–300.662.

Proposed §§ 300.458–300.462 would incorporate, with only minor changes that are not intended to be substantive, the requirements from 34 CFR §§ 76.657–76.662 that have applied to the Part B program of the Act for many years. The Secretary believes that these provisions are necessary to ensure that funds under Part B of the Act are not used to benefit private schools or in ways that could raise questions of inappropriate assistance to religion.

Proposed §§ 300.480–300.487 would repeat, with only minor nonsubstantive changes, the bypass provisions from the current regulations. The bypass provisions in section 612(f) are unchanged from prior law.

Subpart E—Procedural Safeguards

Due Process Procedures for Parents and Children

Proposed § 300.500 would combine in one section two current regulatory provisions that establish the general responsibility of SEAs for establishing and implementing procedural safeguards and define ''consent,'' ''evaluation,'' and ''personally identifiable.'' The provision in proposed § 300.500(a) regarding the general responsibility of SEAs would be updated to include all the procedural safeguards in the proposed regulations, consistent with the requirements of section 615(a) of the Act. Similarly, the definition of ''evaluation'' in proposed § 300.500(b)(2) would be updated to refer to all of the evaluation procedures in Subpart E of the proposed regulation, which are based on the statutory provisions of sections 612(a)(6)(B) and 614 (a)–(c). A new note following this section would be added to clarify that a parent's revocation of consent is not retroactive in effect. For example, if a parent grants consent for an evaluation, and after the evaluation is completed the parent revokes consent for the evaluation, the IEP team would still be able to consider that evaluation in making decisions about the child's program and placement.

Based on the requirements of section 615(b)(1), proposed § 300.501(a) would be revised to address the parents' opportunity to inspect and review all educational records, as in the current regulation, and the new statutory

requirements that parents be given an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child. In paragraph (b) of this section the Secretary proposes that the statutory obligation to afford parents the opportunity to participate in meetings means that parents must be given notice of the meeting, including the purpose, time and location, and who will be in attendance, early enough so that they have an opportunity to attend, because these requirements seem essential to giving parents an opportunity to participate in these meetings. In paragraph (b)(2), the Secretary proposes to define ''meeting'' to make clear that only certain conversations about providing educational services to a child are covered, to eliminate potential confusion about the scope of this requirement. Paragraph (c) of this section would incorporate the requirement of section 614(f) that public agencies ensure that parents are members of any group that makes decisions on the educational placement of their child. The Secretary proposes in this paragraph to require that public agencies use procedures like those required for parent involvement in IEP team meetings, to ensure that parents are members of the group that makes decisions on the educational placement of their child, including notice of the meeting as described, using other methods to involve parents in the meeting when parents cannot be physically present, maintaining a record of attempts to ensure the participation of the parents, and taking steps to ensure that parents are able to understand and participate in the meetings. The Secretary would adopt this position as necessary to ensure that parents participate in these meetings, as required by section 614(f), and as these procedures have been used for many years by all public agencies regarding parent participation in IEP meetings. In many, if not most instances, placement decisions will be made as a part of IEP meetings, as is already the case in many jurisdictions.

Proposed § 300.502 (a), (c), and (d) would contain, with minor modifications, the current regulatory provisions setting out the general requirements regarding independent educational evaluations, parent-initiated evaluations, and requests for evaluations by hearing officers, consistent with the statutory provision of section 615(b)(1). Proposed paragraph (b) would restate the current regulatory provision concerning the parent's right to evaluation at public expense to make clear that if a parent requests an independent educational evaluation, the agency, without unnecessary delay, must either initiate a due process hearing to show that its evaluation is appropriate, or insure that an independent educational evaluation is provided at public expense, reflecting the Secretary's interpretation that a public agency must take action to respond to a parent's request for an independent educational evaluation, and may not just refuse to respond. Paragraph (e) of this proposed section would restate, with modifications, the current regulatory provision concerning agency criteria for evaluations. The Secretary proposes to add a new paragraph (e)(2) to clarify that other than the agency's criteria for an agency-initiated evaluation, the public agency may not impose conditions or timelines on a parent's right to obtain an independent educational evaluation at public expense. This proposal reflects the Department's analysis of the statutory provision that an independent educational evaluation must be available if the parent objects to an evaluation that a school district is using. A note following this section would explain that a public agency may not impose conditions on obtaining an independent educational evaluation other than the agency criteria for the agency's own evaluations, but must either timely provide the independent educational evaluation at public expense or initiate a due process hearing. A second note would be added to encourage public agencies to make information about the agency's criteria for evaluations known to the public, so that parents who disagree with an agency evaluation will know what standards an independent evaluation should meet. A third note would explain how agency criteria apply to an independent educational evaluation.

Proposed § 300.503(a)(1) would repeat, unchanged, the current regulatory provision concerning the basic obligation to provide prior written notice, based on the statutory requirements for prior notice. Proposed paragraph (a)(2) would be added to clarify that an agency may provide the prior written notice at the same time that it requests parent consent, if an action proposed by a public agency requires parent consent and prior written notice, reflecting the Secretary's interpretation that these activities are closely related. The new statutory requirements concerning the content of prior written notice from section 615(c) would be addressed in proposed § 300.503(b) (1) through (7). These new content requirements are different from, and would replace, the provision in current regulations on the content of prior written notice. The Secretary proposes to add to this paragraph a requirement that the prior written notice include a statement informing parents about the State complaint procedures, including a description of how to file a complaint and the timelines under those procedures. The Secretary believes that insuring that parents know about these procedures, which are an alternative mechanism to due process, should help, in conjunction with the new statutory provisions regarding mediation that are also contained in these proposed regulations, to reduce the number of disagreements between parents and school districts that go to due process. Based on the requirement of section 615(b) (3) and (4) of the Act, paragraph (c) of proposed § 300.503 would maintain the provision from current regulations concerning providing this notice in language understandable to the general public and in the native language or other mode of communication used by the parent, unless it is clearly not feasible to do so.

Proposed § 300.504 would contain the new statutory provisions concerning procedural safeguards notice, including in paragraph (a) when that notice must be provided, and in paragraph (b) what content it must include, as provided in section 615(d) of the Act. Paragraph (c) of this section would address the statutory requirements, also from section 615(d), that this notice be in language understandable to the general public and in the native language or other mode of communication used by the parent unless clearly not feasible to do so, in the same way as similar requirements would be treated regarding prior written notice.

Changes were made in how the statute addresses parent consent (in sections 614 (a)(1)(C) and (c)(3)), and so the existing regulatory provision would be revised in the following ways at proposed § 300.505. Paragraph (a) would be revised in recognition of the new statutory provision concerning parent consent for reevaluations. The Secretary proposes to read this provision to require parent consent before conducting a new test as a part of a reevaluation. The statute now discusses evaluation and reevaluation as including reviewing existing data and, if appropriate, conducting new assessments or tests when new information is needed. The Secretary does not believe that in adding a parent right to consent to reevaluations that Congress intended to require school

personnel to obtain parent consent before reviewing existing data about a child. Therefore, the proposed regulation would make clear that as to reevaluations, parent consent is needed only before conducting a new test as part of that reevaluation. Paragraph (b) of this section would reflect the statutory requirement of section 641(a)(1)(C)(ii) regarding parent refusals to consent.

Paragraph (c)(1) of this proposed section would reflect the statutory requirement of section 614(c)(3) of the Act that parent consent need not be obtained for reevaluation if the public agency can demonstrate that it has taken reasonable measures to obtain that consent, and the parent fails to respond. In paragraph (c)(2) of this section the Secretary proposes to describe the demonstration of ''reasonable measures'' as procedures consistent with those required to demonstrate attempts to involve a parent in an IEP meeting. Those procedures, which are unchanged from the current regulations, would be in proposed § 300.345(d) (1) and (2). Proposed paragraphs (d) and (e) of this section would restate current regulatory provisions concerning additional State consent requirements and a limitation on using parent consent for a Part B service or activity as a condition on other benefits to the parent or child. Note 1 following the consent provision in the current regulations would be removed as unnecessary. Note 2 from current regulations would be shortened and revised consistent with the proposed regulatory changes and renumbered as Note 1. Note 3 in current regulations would be renumbered as Note 2 and a new Note 3 would be added addressing agency choices when a parent refuses to consent to a reevaluation.

Proposed § 300.506 would reflect the new statutory provisions of section 615(e) of the Act concerning mediation in paragraphs (a), (b), and (d)(1), which set forth the general responsibility to establish and implement mediation procedures, specific requirements regarding the mediation process, and the statutory provision concerning requiring parents who elect not to use mediation to meet with a disinterested party who would explain the benefits of mediation and encourage its use. In paragraph (c) the Secretary proposes to clarify the requirement that mediation be conducted by an impartial mediator by specifying that a mediator may not be an employee of an LEA or State agency acting as an LEA or an SEA that is providing direct services to the child who is the subject of the mediation and must not have a personal or professional conflict of interest. This position reflects the explanation of this statutory provision in congressional committees' reports. Given Congress' interest in encouraging the use of mediation, it is unlikely that it would have considered any person not meeting basic standards of impartiality to be an acceptable mediator. The Secretary believes that these standards will encourage the use of mediation by ensuring parties to a dispute the availability of an objective third party to mediate disputes. The Secretary proposes to add, in paragraph (d)(2), a clarification that a public agency may not deny or delay a parent's right to a due process hearing based on a parent's failure to participate in the meeting described in proposed paragraph (d)(1). This proposal is made in recognition of the statutory provision of section 615(e)(2)(A)(ii) which provides that the mediation process not be used to deny or delay a parent's right to due process. A note following this section would quote language from the House Committee Report, noting the Committee's intention that if a mediator is not selected at random from the list maintained by the SEA, both the parents and the agency must be involved in selecting the mediator and in agreement about the selection. A second note would note the discussion of House Committee Report's the confidentiality provisions regarding mediation.

Proposed § 300.507(a)(1) would set out the general provision, from section 615(b)(6) of the Act, regarding the right of parents and public agencies to initiate a due process hearing on any matter relating to the identification, evaluation, educational placement or provision of FAPE to a child. In paragraph (a)(2), the Secretary would interpret the requirement of section 615(e)(1) that mediation be available whenever a hearing is requested, as requiring that parents be notified of the availability of mediation whenever a due process hearing is initiated. Paragraph (a)(3) would restate the requirement from the current regulations that the public agency inform the parent of free or low-cost legal and other relevant services if the parents request it, and whenever a due process hearing is initiated. Paragraph (b) of this proposed section would reflect the statutory requirement of section 615(f)(1) of the Act that the hearing be conducted by the SEA or public agency directly responsible for the education of the child. Paragraph (c) of this proposed section would reflect the new statutory requirements of section 615(b) (7) and (8) concerning the notice that a parent is required to provide to a public agency in a request for a due process hearing, and the model form that must be developed by the SEA to assist parents in filing a request for due process that includes the information required in proposed paragraphs (c) (1) and (2). In paragraph (c)(4) the Secretary proposes to clarify that failure to provide the notice specified in paragraphs (c) (1) and (2) cannot be used to deny or delay a parent's right to a due process hearing, as the Secretary believes that Congress did not intend that failure of a parent to provide this notice would prevent them from using procedures necessary to protect their child's right to FAPE. A note following this section would be added to clarify that a public agency may not deny a parent's request for due process, even if it believes that the issues raised are not new, and that this determination must be made by a hearing officer. A second note would quote the House Committee Report noting that a consequence of failure to provide this notice may be a possible reduction in attorneys' fees, noting that the provision is designed to encourage early resolution of disputes and foster partnerships between parents and school districts.

Proposed § 300.508 would maintain the current regulatory requirements concerning impartial hearing officers, consistent with the requirement of section 615(f)(3).

Proposed § 300.509 would add, to existing regulatory provisions concerning rights of all parties to a due process hearing, the new statutory requirement of section 615(f)(2) of the Act regarding disclosure, at least 5 business days prior to a hearing, of all evaluations and recommendations based on those evaluations that have been completed by that date and that a party intends to introduce at the hearing. This provision would be in addition to the existing regulatory requirement of disclosure of any evidence to be introduced at the hearing at least 5 days before the hearing. The provisions from current regulations concerning the parties' rights to obtain a verbatim record of the hearing and the findings of fact and decisions of the hearing officer would be modified consistent with statutory changes in section 615(h) (3) and (4) of the Act, which give parents the right to choose either a written or electronic version of these documents. Paragraph (c)(1) of this proposed section would maintain the existing regulatory provision concerning parents' rights to have the child who is the subject of the hearing present, and to open the hearing to the public. Paragraph (c)(2) would specify that the record of the hearing and the findings of fact and decisions of

hearings must be provided to parents at no cost. This reflects the Department's longstanding interpretation that parents must have access to copies of records of hearings and findings of fact and decisions at no cost so that the right to appeal due process hearing decisions in order to protect their child's right to FAPE is not foreclosed. Proposed paragraph (d) of this section would maintain the current regulatory provision requiring public agencies, after deleting personally identifiable information, to transmit findings and decisions of due process hearings to the State advisory panel and make them available to the public, consistent with section 615(h)(4).

Proposed § 300.510(a) maintains, with minor changes, the current regulatory provision regarding finality of decisions, consistent with section 615(i)(1)(A). Proposed § 300.510 (b), (c), and (d), reflecting the statutory requirements, maintain current regulatory provisions concerning the State level review procedure, including the reviewing official's duties; the responsibility, after deleting personally identifiable information, to make findings and decisions in reviews available to the public and transmit them to the State advisory panel; and finality of review decisions. The notes following the provision on these subjects in current regulations would be retained.

Proposed §§ 300.511 and 300.512(a) would maintain the current regulatory provisions concerning the timelines for due process hearings and State review proceedings and the right of an aggrieved party to bring a civil action. Proposed § 300.512 (b) and (c) would add the statutory requirements of section 615 (i)(2) and (i)(3)(A) of the Act regarding the duties of the court in reviewing a due process decision or State level review and the jurisdiction of the Federal district courts. Proposed § 300.511(d) would add to the regulation the statutory rule of construction of section 615(l) of the Act regarding the applicability of other laws such as the Constitution, the Americans with Disabilities Act of 1990, and title V of the Rehabilitation Act of 1973, to actions seeking relief that is also available under section 615 of the Act.

Proposed § 300.513(a) would maintain the current regulatory provision concerning attorneys' fees, reflecting the requirements of section 615(i)(3)(B)–(G). The Secretary proposes to add a new paragraph (b) to specify that funds provided under Part B of the Act may not be used to pay attorneys' fees awarded under the Act. The Secretary does not believe that funds awarded under the Act for special education and related services should be used to pay attorneys' fees because it would divert limited Federal resources from direct services. A note would be added following this section to explain that States may permit hearing officers to award attorneys' fees to prevailing parents.

Proposed § 300.514(a) would revise the current regulation consistent with the new statutory provision in section 615(j), which adds, as an explicit exception to the ''pendency'' provision, the provisions of section 615(k)(7) of the Act. Proposed paragraph (b) of this section would retain the current regulatory provision concerning due process complaints involving an initial admission to public school. The Secretary proposes to add a new paragraph (c) to clarify that if a hearing officer in a due process hearing or a review official in a State level review agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and local agency and the parents for purposes of determining the child's current placement during subsequent appeals. The pendency provision is designed as a protection to be used by parents of children with disabilities when there is a dispute between the parents and school district about the identification, evaluation, or placement of the child, or about any matter related to the provision of a free appropriate public education to the child. When parents are in agreement with the decision reached in a due process hearing or appeal, the pendency provision should not be invoked to prevent the implementation of that decision. The note from current regulations concerning children who are endangering themselves or others would be retained.

Proposed § 300.515 would maintain, without change, the current regulatory provisions concerning surrogate parents, consistent with the provisions of section 615(b)(2) of the Act.

Proposed § 300.517 would add the new statutory provision regarding transfer of parent rights at the age of majority from section 615(m) of the Act. The Secretary would interpret this to clarify that whenever an agency transfers rights the agency must notify both the individual and the parents of the transfer, consistent with basic standards of due process. With regard to the permissive transfer of rights to individuals who are in correctional institutions, the reference to Federal correctional facilities would be removed, as States do not have an obligation to provide special education and related services under the Act to individuals in Federal facilities. Minor changes for the sake of clarity, that are not intended to affect the substance, would be made to the provision in paragraph (b) regarding a ''special rule.''

Discipline Procedures

Proposed § 300.520 would incorporate the provisions of section 615(k)(1) of the Act regarding the ability of school personnel to remove a child with a disability from his or her current placement for not more than 10 school days, and the ability of school personnel to place a child with a disability in an interim alternative educational setting for not more than 45 days, if the child carries a weapon to school or a school function or knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance at school or a school function. These provisions would be incorporated in paragraph (a) of this proposed section.

Section 615(k)(1) also requires an IEP meeting to review a child's behavioral intervention plan or to develop an assessment plan to address that behavior. The Secretary proposes to adopt these requirements in paragraph (b) with the following clarifications: (1) The statute's provision that the IEP team meeting occur within 10 days of taking a disciplinary action would specify that this meeting occur within 10 business days of the disciplinary action rather than 10 calendar days; and (2) if the child does not have a behavioral intervention plan, the purpose of the IEP meeting is to develop an assessment plan and appropriate behavioral interventions to address that behavior. The Secretary believes that the business day interpretation would allow school personnel an adequate amount of time to convene the meeting, while ensuring that it occur within the window of time during which a child may be removed from the regular placement under proposed § 300.520(a)(1). The Secretary believes that the purpose of the IEP meeting should be not just development of an assessment plan, but also development of appropriate behavioral interventions so that some behavioral interventions can be instituted without delay. The Secretary also proposes to specify, in paragraph (c), that if a child with a disability is removed from his or her current educational placement for 10 school days or less in a given school year, and no further removal or disciplinary action is contemplated, the IEP team review of the child's behavioral interventions, or need for them, need not be conducted. In light of the legislative history of the IDEA Amendments of 1997, the Secretary

does not believe that these procedures were contemplated if children with disabilities would only be out of their regular educational placements for short periods of time in a given school year; that is, for less than 10 school days in a school year.

Paragraph (d) of proposed § 300.520 would incorporate the statutory definitions of ''controlled substance,'' ''illegal drug,'' and ''weapon'' from section 615(k)(10) (A), (B), and (D) of the Act. A note following this section would explain the Department's longstanding interpretation that removing a child from his or her current educational placement for no more than 10 school days does not constitute a change in placement under the Part B regulations. However, a series of short-term suspensions totaling more than 10 days could amount to a change of placement based on the circumstances of the individual case. A second note following this section would encourage public agencies whenever removing a child with disabilities from the regular placement to review as soon as possible the circumstances surrounding the child's removal and consider whether the child was receiving services in accordance with the child's IEP and whether the child's behavior could be addressed through minor classroom or program adjustments or whether the child's IEP team should be reconvened to address changes in that document.

Proposed § 300.521 reflects the provisions of section 615(k)(2) of the Act regarding the authority of a hearing officer to place a child with a disability in an interim alternative educational setting for not more than 45 days if the hearing officer determines that the public agency has demonstrated by substantial evidence that maintaining the child in the child's current educational placement is likely to result in injury to the child or to others, and considers the appropriateness of the child's current placement, whether the agency has made reasonable efforts to minimize the risk of harm, including the use of supplementary aids and services, and then determines that the interim alternative educational setting meets certain requirements. The Secretary is proposing to clarify how this determination is made by specifying that the determination is made by a hearing officer in an expedited due process hearing. The Secretary believes that a due process hearing was contemplated by Congress in view of the requirement that the agency demonstrate the likely risk of harm by ''substantial evidence'', which is defined at section 615(k)(10) as beyond a preponderance of the evidence. Paragraph (e) of this section would include the statutory definition of this term.

Proposed § 300.522 would incorporate the section 615(k)(3) requirements that the alternative educational setting be determined by the IEP team and that it be selected so as to enable the child to continue to participate in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP, and include services and modifications designed to address the behavior, so that it does not recur. This statutory language would be interpreted only as necessary to make clear that, consistent with proposed §§ 300.520 and 300.121, these requirements would have to be met if a child is removed from his or her current educational placement for more than 10 school days in a school year.

Proposed § 300.523 would reflect the provisions of section 615(k)(4) concerning when and how a manifestation determination review is conducted with the following modifications: (1) a paragraph (b) would include the Secretary's proposal that if a child with disabilities is removed from the child's current educational placement for 10 school days or less in a given school year, and no further disciplinary action is contemplated, the manifestation review need not be conducted; (2) a paragraph (e) would clarify that if the IEP team determines that any of the standards described in the statute are not met, the team must consider the child's behavior to be a manifestation of the child's disability; and (3) a paragraph (f) would make clear that the manifestation review may be conducted at the same meeting in which the behavioral review of proposed § 300.520(b) is done. The interpretation in paragraph (e) on how the manifestation determination is made, using on the standards described in the statute, is based on the explanation of this decision process in the congressional committee reports. A note following this section would quote the language of the House Committee Report on how the manifestation determination is made. A second note would explain that if the decision is that the behavior is a manifestation of the child's disability, the LEA must take steps to remedy any deficiencies found during that review in the child's IEP or placement or in their implementation. Often these steps will enable a child whose behavior is a manifestation of his or her disability to return to the child's current educational placement before the expiration of the 45-day period.

Proposed § 300.524 (a) and (b) would reflect the provisions of section 615(k)(5) regarding behavior that is not a manifestation of a child's disability. Proposed paragraph (c) would clarify that the requirements of the ''pendency'' provision apply if a parent requests a hearing to appeal a decision that a child's behavior is not a manifestation of the child's disability. Section 615(j) of the Act provides that the only exceptions to the ''pendency'' rule are those specified in section 615(k)(7) of the Act, which concerns placement during parent appeals of 45-day interim alternative educational placements. A note following this section would further explain this issue.

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability, including disciplining children with disabilities for behavior that is a manifestation of their disability. For example, disciplining a child with a seizure disorder for behavior that results from that disability would violate Section 504. The Secretary invites comment on whether further clarification of this point should be provided in these regulations.

Proposed § 300.525 would reflect the requirements of section 615(k)(6) regarding parent appeals of manifestation determinations or any decision regarding placement, including the requirement for an expedited hearing, and the standards used by the hearing officer in reviewing these decisions.

Proposed § 300.526 would adopt the requirements of section 615(k)(7) involving placement if a parent requests a hearing to challenge the interim alternative educational setting or the manifestation determination, including the requirement that the child remain in the interim alternative educational setting until the decision of the hearing officer or the expiration of the 45-day period, whichever comes first, the requirement that an LEA may request an expedited due process hearing to seek to demonstrate to the hearing officer that it would be dangerous to return the child to his of her current educational placement, and the standards that the hearing officer uses in reaching a decision. Proposed paragraph (c)(3) would clarify that these placements would be for a duration of not more than 45 days, as the 45-day limit is one of the standards in section 615(k)(2) referred to in section 615(k)(7)(C). A note following this section would explain that if the LEA maintains that the child is still dangerous at the

expiration of the 45 days and the issue has not been resolved through due process, the LEA could seek a subsequent expedited hearing on the issue of dangerousness.

Proposed § 300.527 would incorporate the statutory requirements of section 615(k)(8) regarding the application of these rules to children not yet determined eligible for special education and related services, with certain clarifications. Paragraph (b)(1) would clarify that oral communication from the child's parents would constitute a basis for knowledge only if the parent is illiterate in English or has a disability that prevents a written statement. Proposed paragraphs (c)(2)(ii) and (iii) would clarify that if the parents have requested an evaluation, the child remains in the educational placement determined by school authorities until the evaluation is completed, and that if the result of the evaluation is that the child is a child with a disability, the agency must provide special education and related services in accordance with the provisions of Part B, including the requirements of proposed §§ 300.520–300.529 and section 612(a)(1)(A) of the Act.

In proposed § 300.528, the Secretary proposes to specify what an expedited due process hearing must entail, including time frames and hearing procedures, the qualifications of hearing officers, and appeal rights. These provisions are based on the Secretary's belief that all expedited hearings under these discipline procedures should result in decisions within a very short period of time in order to protect the interests of both schools and children with disabilities, and that a 10-business-day limit would allow these hearings to result in decisions before the expiration of a potential 10-school-day removal of a child from the regular placement. The Secretary believes that requiring that due process hearing officers under these procedures meet the same requirements that apply to hearing officers under other due process procedures under the Act and that the hearings meet the same basic standards that apply to other due process hearings will ensure that these proceeding meet basic standards of due process, and are perceived as fair, while allowing some flexibility by allowing States to adjust their own procedural rules to accommodate these very swift hearings.

Proposed § 300.529 incorporates the provisions of section 615(k)(9) of the Act regarding reporting crimes committed by a child with a disability to appropriate authorities and transmitting copies of the special education and disciplinary records of the child to the authorities to whom the agency reports the crime.

Procedures for Evaluation and Determinations of Eligibility

Proposed § 300.530 would reflect section 612(a)(7), which gives general responsibility to the SEA to ensure that each public agency establishes and implements evaluation procedures that meet the requirements of the Act. Proposed § 300.531 incorporates the requirement of section 614(a)(1) that each public agency conduct a full and complete initial evaluation before initiating the provision of special education and related services to a child with a disability. Proposed § 300.532 incorporates the requirements of section 614(b) (2) and (3) and section 612(a)(6)(B) with the requirements of current regulations that a variety of assessment tools and strategies must be used to gather information about the child; that evaluation materials include those tailored to assess specific areas of educational need and not merely designed to provide a single general intelligence quotient; and that tests must be selected and administered so as to best insure that the test results accurately reflect the child's aptitude or achievement level or whatever the test purports to measure, rather than the child's impaired sensory, manual, or speaking skills. Three notes following proposed § 300.532 would explain how a public agency meets its obligation to properly evaluate a child who is limited English proficient and suspected of having a disability.

Proposed § 300.533 would reflect the provisions of section 614(c) (1), (2), and (4) of the Act regarding review of existing evaluation data and determinations of whether more data is needed. Proposed § 300.534 would incorporate the requirements of section 614 (b) (4) and (5) and (c)(5) of the Act regarding determinations of eligibility.

Proposed § 300.535 would maintain from the current regulations the procedures for determining eligibility.

Proposed § 300.536 would reflect the statutory provisions of section 614(a)(2) concerning reevaluation and the existing regulatory provision regarding review of IEPs, with minor modifications.

Additional Procedures for Evaluating Children with Specific Learning Disabilities

Proposed § 300.540 would be changed from the current regulation only as necessary to reflect the new requirements as described, concerning the composition of the teams of individuals who make determinations about eligibility. Proposed §§ 300.541 and 300.542, regarding the criteria for determining the existence of a specific learning disability and observation of a child suspected of having a specific learning disability, would be unchanged from current regulations. Proposed § 300.543, concerning the written report, would be changed from current regulations only to make clear that for a child suspected of having a specific learning disability, this report satisfies the requirement for documentation of the determination of eligibility as described with reference to proposed § 300.534(a).

The Secretary intends to review carefully over the next several years the additional procedures for evaluating children suspected of having a specific learning disability contained in proposed §§ 300.540–300.543 in light of research, expert opinion and practical knowledge of identifying children with a specific learning disability with the purpose of considering whether legislative proposals should be advanced for revising these procedures.

Least Restrictive Environment

Proposed §§ 300.550–300.556 are taken from current regulations, with the exceptions noted. These provisions interpret the statutory provision regarding placement in the least restrictive environment in Section 612(a)(5)(A), which is substantively the same as prior law. A minor change to proposed § 300.550(a) would be made to reflect the new organization of the statute around State eligibility requirements, and a conforming change to the note following proposed § 300.552 to update a reference to another section of this regulation. A note following proposed § 300.551 would be added explaining that home instruction is generally only appropriate for children who are medically fragile and those who are unable to participate with nondisabled children in any activities. Section 300.552 from current regulations would be revised to incorporate the provisions of current regulations in § 300.533(a) (3) and (4) regarding how the placement decision is made. A note following this section would be added to explain that the group of persons making the placement decision may also serve as the child's IEP team, as long as all appropriate IEP team members are included. Another note would be added suggesting that if IEP teams appropriately consider and include in IEPs positive behavioral interventions and supplementary aids and services many children who would otherwise be disruptive will be able to

participate in regular education classrooms.

Confidentiality of Information

With the following exceptions, proposed §§ 300.560–300.575 and § 300.577 retain the provisions of current regulations on confidentiality of information, with only very minor, nonsubstantive changes. These provisions interpret the statutory provision regarding confidentiality in sections 612(a)(8) and 617(c). A new note would be added as Note 2 following proposed § 300.574 explaining the relationship between these procedures and the new requirements concerning transfer of rights to students at the age of majority, as discussed under proposed § 300.517. A new regulation would be added (proposed § 300.576) reflecting the statutory authority from section 613(j) of the Act for SEAs to require LEAs to include in records of a child with a disability a statement of current or previous disciplinary action, and transmit that statement to the same extent that disciplinary information is included in, and transmitted with, records of nondisabled children, including a description of information relevant to the discipline. The statute also requires that if a State adopts such a policy and the child transfers from one school to another, any transmission of the child's records must include both the child's current IEP and any statement of current or previous disciplinary action taken against the child.

Department Procedures

Proposed §§ 300.580–300.586 largely restate existing regulatory provisions concerning Department procedures for State plan disapproval as Department procedures for determinations of State ineligibility, in light of the restructuring of the Act to eliminate the State plan. Reflecting the requirement in section 612(d) of the Act, a new proposed § 300.580 would state that if the Secretary determines a State is eligible to receive a grant, the Secretary notifies the State.

A new § 300.587 would be added to incorporate the statutory provisions of section 616(a) of the Act regarding enforcement by the Department if a SEA or LEA fails to comply with Part B of the Act or its regulations. This section would incorporate the types of enforcement actions available to the Department—withholding payments in whole or in part, and referral to the Department of Justice, mentioned in section 616(a), and taking any other enforcement action authorized by law, such as other actions authorized under 20 U.S.C. 1234. The Secretary proposes to regulate to clarify the type of notice and hearing provided before withholding and referral for enforcement action because the type of hearing appropriate before announcement of an enforcement action that itself involves an adversarial hearing logically will be different than the adversarial hearing before a withholding or eligibility decision. Proposed paragraph (e) of this section would address enforcement in situations in which a State has assigned responsibility for children with disabilities who are convicted as adults under State law and incarcerated in adult prisons to an agency other than the SEA.

In proposed § 300.589, the Secretary proposes to revise the current regulatory provision regarding the statutory requirement in section 612(a)(18)(C) permitting a waiver, in whole or in part, of the supplement, not supplant rule for use of funds provided under Part B if the State demonstrates by clear and convincing evidence that all children with disabilities in the State have FAPE available to them, and the Secretary concurs with the evidence provided by the State. Section 612(a)(19)(C)(ii) now also provides that the Secretary may waive the new maintenance of State financial support requirement of section 612(a)(19)(A) if the Secretary determines that the State meets the standard described in section 612(a)(18)(C). Section 612(a)(19)(E) directs the Secretary to issue proposed regulations establishing procedures, including objective criteria and consideration of the results of compliance reviews of the State conducted by the Department, within 6 months of the enactment of the IDEA Amendments of 1997 (or December 4, 1997) and final regulations on this topic within one year of enactment (or June 4, 1998). The Secretary proposes to implement these requirements by providing that a State wishing to request a waiver must submit: (1) an assurance that FAPE is and will remain available to all children with disabilities in the State; (2) the evidence that the State wishes the Secretary to consider that details the basis on which the State has concluded that FAPE is available to all children with disabilities in the State and State procedures regarding child find, monitoring, State complaint handling and due process hearings; (3) a summary of all State and Federal monitoring reports and hearing decisions for the prior three years that include any finding that FAPE was not available and evidence that FAPE is now available to all children addressed in those reports and decisions; and (4) evidence that the State in reaching its conclusion that FAPE is available to all children with disabilities in the State consulted with interested organizations and parents in the State and a summary of that input. If the Secretary determines that the State has made a prima facie showing that FAPE is available to all children with disabilities in the State, the Secretary conducts a public hearing on whether FAPE is and will be available to all children with disabilities in the State. If the Secretary concludes that the evidence clearly and convincingly demonstrates that FAPE is and will be available to all children with disabilities in the State, the Secretary provides a waiver for a one-year period. The Secretary also proposes that a State use these same procedures to obtain a waiver in subsequent years. The Secretary believes that these procedures would appropriately allow States to demonstrate that all children with disabilities in the State are, and will be, appropriately served so that a waiver could be granted without violating the rights of children with disabilities.

Subpart F—State Administration

General

Proposed § 300.600 (a) through (c) would retain, with minor nonsubstantive changes, the provisions of current regulations concerning SEA responsibility for all educational programs for children with disabilities in the State, consistent with section 612(a)(11). Paragraph (d) of this section would add the new provision from section 612(a)(11)(C) of the Act which permits the Governor (or other authorized individual under State law), consistent with State law, to assign to another public agency of the State the responsibility of ensuring that the requirements of Part B of the Act are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons. The note following this section in current regulations would be maintained.

Proposed § 300.601 would retain, with only minor, nonsubstantive revisions, the current regulation specifying that Part B of the Act not be construed to permit a State to reduce medical and other assistance available to children with disabilities or alter the eligibility of a child with a disability to receive services that are also part of FAPE, based on the statutory provision at section 612(e).

Proposed § 300.602 would reflect the new statutory cap on the amount of funds that States can retain for administration and other State-level activities. Section 611(f)(1) provides that each year the Secretary will determine and report to each State an amount that is 25 percent of the amount the State received under section 611 for fiscal year 1997 cumulatively adjusted annually by the lesser of the percentage increase of the State's allocation from the prior year's allocation or the rate of inflation, which will be the maximum amount that the State can retain for these purposes.

Use of Funds

Section 611(f)(2) specifies that a State can use for State administration of the Part B program, including section 619, not more than twenty percent of the amount that the State may retain, or $500,000 adjusted cumulatively for inflation, whichever is greater, and that each outlying area can retain $35,000 for that purpose. This provision is reflected in proposed § 300.620.

Proposed § 300.621 would maintain the requirements of current regulations on the allowable uses of funds retained by the State for State administration, reflecting the Secretary's interpretation of section 611(f)(2) of the Act. The Secretary believes that these provisions adequately address the statutory purpose of these funds while giving States reasonable flexibility in how they use these funds.

Section 611(f)(4) of the Act creates a new category of subgrants that SEAs, under certain circumstances, will make to LEAs for capacity building and improvement.

Proposed § 300.622 would reflect this new authority, including the statutorily prescribed purposes of these subgrants to LEAs.

Proposed § 300.623 would describe the amount reserved for capacity-building and improvement subgrants to LEAs, consistent with the requirement of section 611(f)(4)(B) of the Act. A note would be added following this section that would explain that the amount of funds available for these capacity-building and improvement subgrants to LEAs will vary year to year, and that in each year following a year in which these subgrants are made, these funds become part of the required flow-through subgrants to all LEAs.

In proposed § 300.624, the Secretary proposes to provide clear authority for States to establish priorities to award capacity building and improvement subgrants competitively or on a targeted basis because the Secretary believes that this flexibility is necessary to enable States to design these subgrants to suit State needs. A note following this provision would recognize that the purpose of these subgrants is to address particular needs that are not readily addressed through formula assistance, and that SEAs can use these subgrants to promote innovation, capacity building, and systemic improvement.

State Advisory Panel

Proposed § 300.650 would retain the provisions of current regulation concerning establishment of State advisory panels, consistent with section 612(a)(21)(A) of the Act. A note would be added to follow this section making clear that the State advisory panel advises the State regarding the education of all children with disabilities in the State, including in situations where the State has divided State responsibility for eligible children with disabilities who have been convicted as adults and are incarcerated in adult prisons.

Proposed § 300.651 would reflect the new statutory membership requirements for the State advisory panel, as provided in section 612(a)(21) (B) and (C), including a new statutory requirement that a majority of the members of the panel must be individuals with disabilities or parents of children with disabilities.

Proposed § 300.652 would reflect the duties of the advisory panel, as specified in section 612(a)(21)(D) of the Act.

Proposed § 300.653 would maintain from the current regulations the advisory panel procedures, representing the Secretary's interpretation of reasonable rules for the operations of an advisory panel under the Act.

State Complaint Procedures

The current Part 300 regulations establish a State complaint mechanism that individuals, organizations, and other interested parties can use to bring to the SEA's attention, for resolution, allegations that a public agency is violating a requirement of Part B or its implementing regulations. The Secretary views these State complaint procedures as an important, less costly, less time consuming, and less formal alternative to due process hearings and other dispute resolution mechanisms through which disagreements under Part B and its regulations may be resolved. Proposed §§ 300.660–300.662 would retain these State complaint procedures with the changes described.

The Secretary proposes in proposed § 300.660(b) to revise the current regulation to require that States widely disseminate to parents and others information about the State's complaint procedures. The Secretary intends, through this requirement, in conjunction with the provision in proposed § 300.503(b)(8) that would require that prior written notice to parents of children with disabilities include a description of the State complaint procedures and how to file a complaint, to ensure that persons interested in special education in a State know that there are alternatives to resorting to due process hearings that can be used to resolve disputes. A new note would be added following this section that would explain that in resolving an alleged denial of FAPE, an SEA may award compensatory education if appropriate.

Proposed § 300.661 would retain from current regulation the minimum State complaint procedures in current regulations, with one exception. In this proposed regulation the Secretary proposes to delete the provision regarding Secretarial review. This change reflects a recommendation of the Department's Inspector General in his report of August, 1997 on the utility and efficiency of the Secretarial review process under the IDEA. In that report the Inspector General noted that in the Secretarial review process the Department's limited resources for implementation of the IDEA are being diverted to an activity that is providing minimal benefits to children with disabilities or to the program. The Secretary expects that removing the Secretarial review provision will allow the Department to spend more of its time and attention on evaluating States' systems for ensuring compliance with program requirements, which will have benefit for all parties interested in special education.

Two new notes would be added following proposed § 300.661. The first would clarify that if a complaint is received that raises an issue that is also the subject of a due process hearing, or multiple issues, some of which are also the subject of a due process hearing, the SEA must set aside the issues in due process until the end of the hearing, but resolve the remaining issues in the complaint within the 60-day complaint time line. The second proposed note would explain that if an issue raised in a complaint previously had been the subject of a due process hearing, the hearing decision would be binding, and the SEA would satisfy its obligation under these procedures by informing the complainant that the hearing decision is binding as to that issue. The note would also explain that the SEA would have to resolve an alleged failure

to implement a due process hearing decision.

The Secretary proposes in proposed § 300.662 to maintain the provisions of current regulation regarding filing a complaint, and add a new paragraph (c) that would specify that complaints must be received within one year of the alleged violation, unless a longer period is reasonable because the violation is continuing or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received by the SEA. The Secretary believes that SEAs should not be required in the future to use their resources to resolve complaints that do not involve issues that are relevant to the current operation of the State's special education program and that do not involve the possibility of educational remedy for particular children. A note following this section would be added to explain that SEAs must resolve complaints that meet the complaint requirements, even if filed by an organization or individual from another State.

Subpart G—Allocation of Funds; Reports

Allocations

Proposed § 300.700 would adopt the special definition of ''State'' from section 611(h)(2) of the Act with regard to distribution of funds provided under section 611 of the Act.

Proposed § 300.701 would describe the purpose of the grants under section 611 of the Act and the maximum amount of those grants, as provided in section 611(a) of the Act.

Proposed § 300.702 would incorporate the statutory definition of ''average per-pupil expenditure in public elementary and secondary schools in the United States'' from section 611(h)(1) of the Act.

The IDEA Amendments of 1997 create a new formula for distribution of funds under section 611 of the Act that is first applied when the appropriation for section 611 of the Act is more than a certain trigger amount—$4,924,672,200. Until that time, funds under section 611 will continue to be distributed based on the formula under section 611 before enactment of the IDEA Amendments of 1997, with certain minor changes stipulated in the statute.

Proposed § 300.703(a) would incorporate the general order of distribution of funds, consistent with section 611(d)(1) of the Act, which applies to both the interim and new formula distribution.

Proposed § 300.703(b) would incorporate the interim formula for distribution among States, including the new statutory provision permitting States to count the number of children receiving special education and related services as of the last Friday in October or December 1, at the State's discretion, as specified in section 611(d)(2) of the Act.

Proposed § 300.706 reflects the section 611(e) (1) and (2) requirements for when the permanent formula takes effect, and calculation of the ''base year'' amount for purposes of that new formula.

Proposed § 300.707 would include the requirements of the new formula from section 611(e)(3) of the Act, which specifies that funds in excess of those distributed to a State in the base year are allocated 85 percent on relative population of children aged 3 through 21 who are of the same age as children with disabilities for whom the State ensures the availability of FAPE and 15 percent on the basis of relative populations of children of those ages who are living in poverty, based on the most recent data available and satisfactory to the Secretary.

Proposed § 300.708 would specify the statutory floors and a cap in the size of any State's increased allocation, as provided in section 611(e)(3) (B) and (C) of the Act. The requirements of section 611(e)(4), regarding what happens if the section 611 appropriation decreases, would be incorporated in proposed § 300.709.

Proposed § 300.710 would retain, with minor modifications, the provisions of current regulations regarding allocations to a State in which a bypass is implemented for private school children with disabilities, consistent with section 612(f)(2) of the Act.

Under section 611(g) of the Act, States will use a mechanism for distributing the formula subgrant funds to LEAs that parallels the distribution among States. This will include an interim formula, based on the formula in the Act prior to the enactment of the IDEA Amendments of 1997, and, after the 611 appropriation is greater than $4,924,674,200, a new permanent procedure that, like the one at the State level, allocates new funds 85 percent based on the relative numbers of children enrolled in public and private elementary and secondary schools in the agency's jurisdiction, and 15 percent in accordance with the relative numbers of children living in poverty, as determined by the SEA.

Proposed § 300.711 would reflect the requirement of section 611(g)(1) that funds not retained at the State level for State administration and other State purposes, or distributed to LEAs as capacity building and improvement subgrants, must be distributed to LEAs and State agencies under the statutory formula that applies in that year. Proposed § 300.712 would set forth the statutory interim formula and permanent procedure for distribution of funds to LEAs and State agencies, reflecting section 611(g)(2) of the Act. A note following this section would explain that States should use the best data that is available to them on enrollment in public and private schools, and that States have discretion in determining what data to use regarding children living in poverty, and suggests some options for poverty data. Proposed § 300.713 would reflect the statutory requirements of section 611(g)(3) concerning treatment of former Chapter 1 State agencies in the distribution of funds. The Secretary proposes minor adjustments to make the count date for children in these agencies compatible with the count date used by the State for LEA reporting because requiring a different count date in a State that chooses to count in LEAs on the last Friday in October could result in double counting.

Proposed § 300.714 would retain with minor nonsubstantive changes the current regulatory provision concerning reallocation of LEA funds to other LEAs. This provision reflects the requirements of section 611(g)(4) of the Act.

Proposed §§ 300.715 and 300.716 reflect the statutory provisions of sections 611(c) and 611(i) (1) (A) and (B) and (3) regarding payments to the Secretary of the Interior for the education of Indian children and for Indian children aged 3 through 5. The new statutory provisions concerning grants to the outlying areas and freely associated States of section 611(b) would be incorporated in proposed §§ 300.717 through 300.722.

Reports

Proposed §§ 300.750 through 300.754 would retain, from the current regulation, the provisions concerning report requirements for the annual report of children served, the information required in the report, certification, criteria for counting children, and other responsibilities of the SEA regarding these reports. These provisions are consistent with the statutory requirement in section 611(d) that directs that funds appropriated for section 611 of the Act continue to be allocated based on a child count as in effect before enactment of the IDEA Amendments of 1997 for some time into the future. Minor changes would be

made to reflect the fact that a child count for distribution of funds will not be required under the permanent funding formula, and to reflect the new State option on when the count will be conducted. A reference to the old Chapter 1 handicapped program would be eliminated, as that program no longer exists.

Proposed § 300.755 would incorporate the new statutory requirements regarding State collection and examination of data to determine if significant disproportionality based on race is occurring in the State regarding the identification and placement of children with disabilities.

Proposed § 300.756 would reflect new rules specified in section 605 of the Act regarding use of funds provided under Part B of the Act for the acquisition of equipment or construction.

2. Part 301—Preschool Grants for Children With Disabilities

Subpart A—General

Proposed § 301.1 in the proposed regulations would conform the regulatory purpose for the Preschool Grants for Children with Disabilities Program with the provisions of section 619(a) of the Act, to provide grants to States to assist them in providing special education and related services to children with disabilities aged three through five years, and, at a State's discretion, to two-year-old children with disabilities who will turn three during the school year.

Proposed § 301.4 would list regulations found in parts other than Part 301 that also apply to the Preschool Grants program. The proposed regulations would be consistent with the existing regulations, with three exceptions. First, the proposed regulations would specify that the provisions of 34 CFR 76.125–76.137 do not apply to the program, consistent with the requirements of section 611(b)(4) providing that consolidation of grants is no longer possible for the outlying areas. Second, the proposed regulations would specify that the requirements of 34 CFR 76.650–76.662 do not apply, in light of the changes proposed under Part 300 regarding the provision of services to children placed by their parents in private schools. Third, the reference to Part 86 would be removed, as that part no longer applies to SEAs and LEAs.

Proposed § 301.5 would specify the definitions that apply to certain terms used in Part 301. The section would be unchanged from the existing regulations, with the following exceptions: Consistent with the IDEA Amendments of 1997, proposed § 301.5(a) would replace the term ''intermediate educational unit'' with ''educational service agency,'' and proposed § 301.5(c) would add a definition of ''State'' and delete definitions of ''comprehensive service delivery system'' and ''excess appropriation.''

Subpart B—State Eligibility for a Grant

Proposed § 301.10 would be conformed with section 619(b) of the Act, and provide that a State is eligible to receive a grant under the program if the State is eligible under 34 CFR Part 300 and the State demonstrates to the satisfaction of the Secretary that it has in effect policies and procedures that assure the provision of FAPE to all children with disabilities aged three through five years in accordance with the requirements of 34 CFR Part 300, and for any two-year-old children who are provided services by the State or by an LEA. Proposed § 301.12 would restate the current regulation concerning sanctions if a State does not make FAPE available to all preschool children with disabilities to conform to the changes made by the IDEA Amendments of 1997 and other law.

Subpart C—Allocation of Funds to States

Proposed § 301.20 would be conformed with section 619(c)(1) of the Act, and provide that, after reserving funds for studies and evaluations under section 674(e) of the Act, the Secretary will allocate the remaining amount among the States in accordance with §§ 301.21–301.23.

Proposed § 301.21 would incorporate the requirements of section 619(c)(2)(A) of the Act which sets forth the basis on which, subject to certain limitations (described in this NPRM under § 301.22), allocations to States under the Preschool Grants program would be calculated if the amount available to States were equal to or greater than the amount allocated to States for the preceding fiscal year. Consistent with this statutory provision, proposed § 301.21(a) would provide that, except as provided in § 301.22, the Secretary will first allocate to each State the amount it received for fiscal year 1997, and then allocate 85 percent of any remaining funds to States on the basis of their relative populations of children aged 3 through 5 and allocate 15 percent of those remaining funds to States on the basis of their relative populations of all children aged 3 through 5 who are living in poverty. Also reflecting the statutory requirements, proposed § 301.21(b) would further provide that in making these calculations, the Secretary will use the most recent population data, including data on children living in poverty, that are available and satisfactory to the Secretary.

Consistent with section 619(c)(2)(B) of the Act, proposed § 301.22 (a) and (b) would set forth floors and caps for calculating the allocations to States under the Preschool Grants program in fiscal years in which the amount available to States under § 301.20 were equal to or greater than the amount allocated to States for the preceding fiscal year. Proposed § 301.22(c) would also be conformed to section 619(c)(2)(C) of the Act and provide for ratable reductions if available funds are insufficient to make allocations to the States consistent with the provisions of § 301.22 (a) and (b).

Proposed § 301.23 would, consistent with the requirements of section 619(c)(3) of the Act, set forth the basis on which allocations to States under the Preschool Grants program would be calculated if the amount available to States under § 301.20 were less than the amount allocated to States for the preceding fiscal year. Proposed § 301.23(a) would provide that if the amount available for allocations were greater than the amount allocated to the States for fiscal year 1997, each State would be allocated the sum of the amount it received for fiscal year 1997 plus an amount that bears the same relation to any remaining funds as the increase the State received for the preceding fiscal year over fiscal year 1997 bears to the total of all of those increases for all States. Proposed § 301.23(b) would provide that if the amount available for allocations is equal to or less than the amount allocated to the States for fiscal year 1997, each State would be allocated the amount it received for that year, ratably reduced, if necessary.

Consistent with section 619(d) of the Act, proposed § 301.24 would provide that for each fiscal year a State may retain for administration and other State-level activities, in accordance with §§ 301.25 and 301.26, not more, as calculated by the Secretary, than 25 percent of the amount the State received under the section 619 of the Act for fiscal year 1997, cumulatively adjusted by the Secretary for each succeeding fiscal year by the lesser of—(1) the percentage increase, if any, from the preceding fiscal year in the State's allocation under section 619 of the Act; or (2) the rate of inflation, as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index For All Urban

Consumers, published by the Bureau of Labor Statistics of the Department of Labor.

Consistent with section 619(e) of the Act, proposed § 301.25 would provide that a State may use not more than 20 percent of the maximum amount it may retain under § 301.24 for any fiscal year for (a) administering section 619 of the Act (including the coordination of activities under Part B of the Act with, and providing technical assistance to, other programs that provide services to children with disabilities); or for the administration of Part C of the Act, or both, if the SEA is the lead agency for the State under that part.

Consistent with section 619(f) of the Act, proposed § 301.26 would provide that a State must use any funds that it retains under § 301.24 and does not use for administration under § 301.25 for any of the following: (1) support services (including establishing and implementing the mediation process required by section 615(e) of the Act), which may benefit children with disabilities younger than 3 or older than 5 as long as those services also benefit children with disabilities aged 3 through 5; (2) direct services for children eligible for services under section 619 of the Act; (3) developing a State improvement plan under subpart 1 of part D of the Act; (4) activities at the State and local levels to meet the performance goals established by the State under section 612(a)(16) of the Act and to support implementation of the State improvement plan under subpart 1 of part D of the Act if the State receives funds under that subpart; or (5) supplementing other funds used to develop and implement a Statewide coordinated services system designed to improve results for children and families, including children with disabilities and their families, but not to exceed one percent of the amount received by the State under section 619 of the Act for a fiscal year. A note following this section would provide an example of an authorized use of these funds.

Subpart D—Allocation of Funds to Local Educational Agencies

Proposed § 301.30 would provide that a State must distribute any funds that it does not retain under § 301.24 to LEAs that have established their eligibility under section 613 of the Act, consistent with the requirements of section 619(g)(1) of the Act.

Proposed § 301.31 would, in conformity with section 619(g)(1), set forth the basis on which a State must distribute the funds described in § 301.30 to LEAs that have established their eligibility under section 613 of the Act. Proposed § 301.31(a) would require that the State first award to each of those agencies the amount it would have received under section 619 of the Act for fiscal year 1997 if the State had distributed 75 percent of its grant for that year under section 619(c)(3), as then in effect. Proposed § 301.31(b) would further require that, after making the base payment allocations required by § 301.28(a), the State allocate 85 percent of any remaining funds to each LEA on the basis of the relative numbers of children enrolled in public and private elementary and secondary schools within the agency's jurisdiction, and 15 percent of those remaining funds in accordance with their relative numbers of children living in poverty, as determined by the SEA. A note following this section would explain that States should use the best data that is available to them on enrollment in public and private schools, and that States have discretion in determining what data to use regarding children living in poverty, and proposes some options for poverty data.

Proposed § 301.32(a) would, in conformity with section 619(g)(2) of the Act, provide that: (a) If an SEA determines that an LEA is adequately providing FAPE to all children with disabilities aged 3 through 5 residing in the area served by that agency with State and local funds, the SEA may reallocate any portion of the funds under section 619 of the Act that the LEA does not need in order to provide FAPE to other LEAs that are not adequately providing special education and related services to all children with disabilities aged 3 through 5 residing in the areas they serve.

Proposed § 301.32(b) would provide that if a State provides services to preschool children with disabilities because some or all LEAs are unable or unwilling to provide appropriate programs, the SEA may use payments that would have been available to those LEAs to provide special education and related services to children with disabilities aged 3 through 5 years, and to two-year-old children with disabilities, residing in the areas served by those LEAs and ESAs.

3. Part 303—Early Intervention Program for Infants and Toddlers With Disabilities

A few changes would be made to the Part 303 regulations to conform to similar changes proposed for the Part 300 regulations. As indicated, other changes to incorporate statutory changes made by the IDEA Amendments of 1997 with regard to the Early Intervention Program for Infants and Toddlers with Disabilities will be made at a later date as technical changes.

In § 303.18, the Secretary proposes to add a new paragraph (b) specifying that a State may provide that a foster parent qualifies as a parent under Part 303 if certain specified standards are met. The note following this section would be revised, consistent with the change to the regulation. These changes would be consistent with changes proposed in proposed § 300.19.

In § 303.403, the Secretary proposes to add a new subparagraph (b)(4) to provide that prior notice to parents under this part includes information about the State complaint procedures required by §§ 303.510—303.512, including how to file a complaint and the timelines under the State complaint procedures. This change would conform to proposed § 300.503, concerning the content of prior notice under Part 300. The Secretary believes that if parents know about these procedures, they may use them as an alternative to the more costly and formal mechanisms of due process and mediation.

In § 303.510, the Secretary proposes to amend paragraph (b) to specify that the lead agency's State complaint procedures must include procedures for widely disseminating to parents and others the State's complaint procedures. The Secretary intends, through this requirement and the change proposed in § 303.403, to insure that persons interested in early intervention services for infants and toddlers with disabilities in the State know that there are alternatives to resorting to due process hearings that can be used to resolve disputes. A note would be added following this section to explain that in resolving a complaint alleging a failure to provide services in accordance with an IFSP, a lead agency may award compensatory services as a remedy. These changes would be consistent with changes proposed to § 300.660.

In § 303.511, the Secretary proposes to add a new paragraph (c) that would specify that complaints must be received by the public agency within one year of the alleged violation, unless a longer period is reasonable because the violation is continuing or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received. The Secretary believes that public agencies should not be required in the future to use their resources to resolve complaints that do not involve issues that are relevant to the current operation of the State's program and that do not involve the possibility of remedy for particular

children. A note would be added following this section to explain that the lead agency must resolve any complaint that meets the requirements of this section, even if it has been filed by an organization or individual from another State. These changes would conform to changes in proposed § 300.662.

In § 303.512, the Secretary proposes to delete the provision from the current regulation regarding Secretarial review. This change reflects a recommendation of the Department's Inspector General in his report of August 1997 on the utility and efficiency of the Secretarial review process under the IDEA. In that report, the Inspector General noted that the Secretarial review process is diverting the Department's limited resources to an activity that is providing minimal benefits to children with disabilities and the program. The Secretary expects that removing the Secretarial review provision will allow the Department to spend more of its time and attention on evaluating States' systems for ensuring compliance with program requirements, which will have benefit for all parties interested in these programs. Two notes would be added following this section. Note 1 would clarify that if a complaint raises an issue that is also the subject of a due process hearing, or multiple issues, some of which are also the subject of a due process hearing, the State must set aside the issues in due process until the end of the hearing, but resolve the remaining issues in the complaint within the 60-day complaint timeline. Note 2 would explain that if an issue raised in a complaint previously had been the subject of a due process hearing, the hearing decision would be binding, and the State would satisfy its obligation under these procedures by informing the complainant that the hearing decision is binding as to that issue. The note would also explain that the State would have to resolve an alleged failure to implement a due process hearing decision. These changes would conform to changes in proposed § 300.661.

In § 303.520, a new paragraph (d) would be added that would provide that a lead agency may not require parents, if they would incur a financial cost, to use private insurance proceeds to pay for the services that must be provided to an eligible child under this part. The Department recognizes the important policy underlying this program that requires States to use all available sources of funding for providing services. Therefore, this new provision would permit States to require families to use private insurance if the families would incur no financial cost. Proposed paragraph (d) would incorporate the Department's interpretation that requiring parents to use their private insurance if that would result in a financial cost to the family is not compatible with the statutory requirement that early intervention services be at no cost except where Federal or State law provides for a system of payments by families, including a schedule of sliding fees. It would also identify what is meant by the term ''financial cost.'' A note would be added following this section to explain how this applies if families are covered by both private insurance and Medicaid.

As noted in the section of this preamble discussing the Part 300 regulations, the Secretary believes that the same basic principle would be equally applicable to parents who are eligible for public insurance, but that there is no current need to regulate on the public insurance issue because there is no risk of financial loss to parents under current public insurance programs such as Medicaid. The Secretary invites comment on whether a policy on public insurance similar to the proposed section on private insurance should be added to the final regulation. A second note would be added to explain that if a State cannot get parent consent to use public or private insurance for a service, the agency may use funds under this part to pay for that service. In addition, the note would explain that to avoid financial cost to parents who otherwise would consent to the use of private insurance, the lead agency may use funds under this part to pay the costs of accessing the insurance, such as deductible or co-pay amounts.

In addition, the Secretary proposes to add a new paragraph (e) to specify that proceeds from public or private insurance may not be treated as program income for purposes of 34 CFR § 80.25. That section imposes limitations on how program income can be spent that could lead to States returning reimbursements from public and private insurance to the Federal government or requiring those funds be used under this part, which could discourage States from using all the resources available in paying for services under this part. Given the current small percentage that Federal funds under this part are of total funding for this program, and the fact that eligible infants and toddlers with disabilities are guaranteed services under this part, the Secretary believes that States should be given some flexibility in how they use and account for funds received as reimbursements from other sources. A note would be added after this section explaining the consequences, under the nonsupplanting requirement, of various State choices in accounting for these funds. These changes would be similar to provisions in proposed § 300.142.

Goals 2000: Educate America Act

The Goals 2000: Educate America Act (Goals 2000) focuses the Nation's education reform efforts on the eight National Education Goals and provides a framework for meeting them. Goals 2000 promotes new partnerships to strengthen schools and expands the Department's capacities for helping communities to exchange ideas and obtain information needed to achieve the goals.

These proposed regulations would address the following National Education Goals:

- All children in America will start school ready to learn.
- The high school graduation rate will increase to at least 90 percent.
- All students will leave grades 4, 8, and 12 having demonstrated competency in challenging subject matter, including English, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography; and every school in America will ensure that all students learn to use their minds well, so they may be prepared for responsible citizenship, further learning, and productive employment in our Nation's modern economy.
- United States students will be first in the world in mathematics and science achievement.
- Every adult American will be literate and will possess the knowledge and skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship.
- Every school in the United States will be free of drugs, violence, and the unauthorized presence of firearms and alcohol and will offer a disciplined environment conducive to learning.
- The Nation's teaching force will have access to programs for the continued improvement of their professional skills and the opportunity to acquire the knowledge and skills needed to instruct and prepare all American students for the next century.
- Every school will promote partnerships that will increase parental involvement and participation in promoting the social, emotional, and academic growth of children.

Executive Order 12866

1. Potential Costs and Benefits

These proposed regulations have been reviewed in accordance with Executive

Order 12866. Under the terms of the order the Secretary has assessed the potential costs and benefits of this regulatory action.

These proposed regulations implement changes made to the Individuals with Disabilities Education Act by the IDEA Amendments of 1997 and make other changes determined by the Secretary as necessary for administering this program effectively and efficiently.

The IDEA Amendments of 1997 made a number of significant changes to the law. While retaining the basic rights and protections that have been in the law since 1975, the amendments strengthened the focus of the law on improving results for children with disabilities. The amendments accomplished this through changes that promote the early identification of and provision of services to children with disabilities, the development of individualized education programs that enhance the participation of children with disabilities in the general curriculum, the education of children with disabilities with nondisabled children, higher expectations for children with disabilities and accountability for their educational results, the involvement of parents in their children's education, and reducing unnecessary paperwork and other burdens to better direct resources to improved teaching and learning.

All of these objectives are reflected in the proposed regulations, which largely reflect the changes to the statute made by IDEA Amendments of 1997.

In assessing the potential costs and benefits—both quantitative and qualitative—of these proposed regulations, the Secretary has determined that the benefits of the proposed regulations justify the costs.

The Secretary has also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Burdens specifically associated with information collection requirements are identified and explained elsewhere in this preamble under the heading Paperwork Reduction Act of 1995.

To assist the Department in complying with the specific requirements of Executive Order 12866, the Secretary invites comment on whether there may be further opportunities to reduce any potential costs or increase potential benefits resulting from these proposed regulations without impeding the effective and efficient administration of the program.

This is a significant regulatory action under section 3(f)(1) of Executive Order 12866, and an economic analysis was conducted consistent with section 6(a)(3)(C) of the Executive Order. Due to the lack of data, the Secretary particularly request public comments to assist in determining whether these regulations are economically significant under the Executive Order.

Summary of Potential Benefits and Costs

Benefits and Costs of Statutory Changes: For the information of readers, the following is an analysis of the costs and benefits of the most significant statutory changes made by IDEA Amendments of 1997 that are incorporated into the IDEA regulations. Based on this analysis, the Secretary has concluded that the statutory changes included in this regulation will not, in total, impose significant costs in any one year, and may result in savings to State and local educational agencies. An analysis of specific provisions follows:

Participation in Assessments

Proposed § 300.138 incorporates statutory requirements relating to the inclusion of children with disabilities in general State and district-wide assessments and the conduct of alternate assessments for children who cannot be appropriately included in general assessments.

Although children with disabilities have not been routinely included in State and district-wide assessments, the requirement to include children with disabilities in assessment programs in which they can be appropriately included, with or without accommodations, does not constitute a change in Federal law. Because the Secretary regards this statutory change as a clarification, not a change, in the law, no cost impact is assigned to this requirement, which is incorporated in § 300.138(a) requiring the participation of children with disabilities in general assessments.

However, States were not previously required to conduct alternate assessments for children who could not participate in the general assessments. The statutory requirement to develop and conduct alternate assessments beginning July 1, 2000, therefore, imposes a new cost for States and districts.

The impact of this change will depend on the extent to which States and districts administer general assessments, the number of children who cannot appropriately participate in those assessments, the cost of developing and administering alternate assessments, and the extent to which children with disabilities are already participating in alternate assessments.

In analyzing the impact of this requirement, the Secretary assumes that alternate tests would be administered to children with disabilities on roughly the same schedule as general assessments. This schedule will vary considerably from State to State and within States, depending on their assessment policy. In most States, this kind of testing does not begin before the third grade. In many States and districts, general assessments are not administered to children in all grades, but rather at key transition points (typically grades 4, 8, and 11).

The extent to which States and districts will need to provide for alternate assessments will also vary depending on how the general assessments are structured. Based on the experience of States that have implemented alternate assessments for children with disabilities, the Secretary estimates that about one to two percent of the children in any age cohort will be taking alternate assessments.

Based on this information, the Secretary predicts that about 18 to 36 million of the children who are expected to be enrolled in public schools in school year 2000–2001 will be candidates for general assessments. Of these, the Secretary estimates that approximately 200,000 to 700,000 will be children with disabilities who may require alternate assessments.

The costs of developing and administering these assessments are also difficult to gauge. In its report *Educating One and All,* the National Research Council states that the estimated costs of performance-based assessments programs range from less than $2 per child to over $100 per student tested. The State of Maryland has reported start-up costs of $191 per child for testing a child with a disability and $31 per child for the ongoing costs of administering an alternate assessment.

The cost impact of requiring alternate assessments will be reduced to the extent that children with disabilities are already participating in alternate assessments. Many children with disabilities are already being assessed outside the regular assessment program in order to determine their progress in meeting the objectives in their IEPs. In many cases, these assessments might be adequate to meet the new statutory requirement.

Based on all of this information, the Secretary has concluded that the cost impact of this statutory change is not likely to be significant, and will be

justified by the benefits of including all children in accountability systems.

Incidental Benefits

The change made by section 613(a)(4) of the IDEA, incorporated in proposed § 300.235, generates savings by reducing the time that would have been spent by special education personnel on maintaining records on how their time is allocated in regular classrooms among children with and without disabilities.

To calculate the impact of this change, one needs to estimate the number of special education personnel who will be providing services to children with and without disabilities in regular classrooms and the amount and value of time that would have been required to document their allocation of time between disabled and nondisabled children.

Based on State-reported data on placement, it appears that about 4 million children will spend part of their day in a regular classroom this school year. It is difficult to predict the extent to which these children will be receiving services in the regular classroom from a special education teacher or related services provider. However, the Secretary believes that this statutory change will not only eliminate unnecessary paperwork in situations in which special education personnel have been working in the regular classroom and documenting their allocation of time, but will encourage the provision of special education services in the regular classroom—a change that will benefit children with disabilities.

Individualized Education Programs

The proposed regulations incorporate a number of statutory changes in section 614(d) that relate to the IEP process and the content of the IEP. With the exception of one requirement (the requirement to include a regular education teacher in IEP meetings), the Secretary has determined that, on balance, these changes will not increase the cost of developing IEPs. Moreover, all the changes will produce significant benefits for children and families. Key changes include:

Clarifying that the team must consider a number of special factors to the extent they are applicable to the individual child. The Secretary does not regard the statutory changes that are incorporated in § 300.346 as imposing a new burden on school districts because the factors that are listed should have been considered, as appropriate, under the IDEA before the enactment of IDEA Amendments of 1997. These include: behavioral interventions for a child whose behavior impedes learning, language needs for a child with limited English proficiency, Braille for a blind or visually impaired child, the communication needs of the child, and the child's need for assistive technology.

Strengthening the focus of the IEP on access to the general curriculum in statements about the child's levels of performance and services to be provided. The Secretary does not regard the statutory changes that are incorporated in § 300.347 relating to the general curriculum as burdensome because the changes merely refocus the content of statements that were already required to be included in the IEP on enabling the child to be involved in and progress in the general curriculum.

Requiring an explanation of the extent to which a child will not be participating with nondisabled children. This statutory requirement, which is incorporated in § 300.347(a)(4), does not impose a burden because it replaces the requirement for a statement of the extent to which the child will be able to participate in regular educational programs.

Requiring the IEP to include a statement of any needed modifications to enable a child to participate in an assessment, and, in cases in which a child will not be participating in a State or districtwide assessment, to include a statement regarding why the assessment is not appropriate and how the child will be assessed. The Secretary does not believe the inclusion of these statements, required statute and incorporated in § 300.447(a)(5), will be unduly burdensome. Many school districts already include statements in the IEP regarding assessments, including information about needed accommodations.

Allowing the IEP team to establish benchmarks rather than short-term objectives in each child's IEP. There is considerable variation across States, districts, schools, and children in the amount of time spent on developing and describing short-term objectives in each child's IEP. While it would be difficult to estimate the impact of this statutory change, contained in § 300.347(a)(2), it clearly affords schools greater flexibility and an opportunity to reduce paperwork in those cases in which the team has previously included unnecessarily detailed curriculum objectives in the IEP document.

Prior to the enactment of the IDEA Amendments of 1997, IDEA required the participation of the ''child's teacher,'' typically read as the child's special education teacher, but it did not explicitly require a regular education teacher. The IDEA Amendments of 1997, incorporated in § 300.344(a)(2) of this proposed regulation require the participation of the child's special education teacher and a regular education teacher if the child is or may be participating in the regular education classroom.

The impact of this change will be determined by the number of children with disabilities who are or who may be participating in the regular classroom in a given year, the number and length of IEP meetings, the opportunity cost of the regular education teacher's participation, and the extent to which regular education teachers are already attending IEP meetings.

State-reported data for school year 1994–95 indicates that about 3.8 million children with disabilities aged 3 through 21 spend at least 40 percent of their day in a regular classroom (children reported as placed in regular classes and resource rooms). The participation of the regular education teacher would be required for all of these children since these children are spending at least part of their day in the regular classroom.

State data also show that an additional 1.2 million children were served in separate classrooms. A regular education teacher's participation will clearly be required for those children in separate classes who are spending part of their school day in regular classes (less than 40 percent of their day). Other children may be participating with nondisabled children in some activities in the same building. While a child's individual needs and prospects will determine whether a regular education teacher would need to attend a child's IEP meeting in those cases, the Secretary believes that some proportion of these children are children for whom participation in regular classrooms is a possibility, therefore requiring the participating of a regular education teacher.

Although the prior statute did not require the participation of a regular education teacher, it is not uncommon for States or school districts to require a child's regular education teacher to attend IEP meetings.

Based on all of this information, the Secretary estimates that the participation of a regular education teacher may be required in an additional 3.7 to 5.2 million IEP meetings in the next school year.

While the opportunity costs of including a regular education teacher in these meetings will be significant because of the number of meetings involved, the Secretary believes these costs will be more than justified by the benefits to be realized by teachers,

schools, children, and families. Involving the regular education teacher in the development of the IEP will not only provide the regular education teacher with needed information about the child's disability, performance, and educational needs, but will help ensure that a child receives the supports the child needs in the regular classroom, including services and modifications that will enable the child to progress in the general curriculum.

Parentally-Placed Students in Private Schools

This statutory change, which is incorporated in § 300.453, would require school districts to spend a proportionate amount of the funds received under Part B of the IDEA on services to children with disabilities who are enrolled by their parents in private elementary and secondary schools.

The change does not have an impact on most States because the statute does not represent a change in the Department's interpretation of the law as it was in effect prior to the enactment of IDEA Amendments of 1997. However, prior to the change in the law in three Federal circuits, the courts concluded that school districts generally were responsible for paying for the total costs of special education and related services needed by students with disabilities who have been parentally placed in private schools. Therefore, this change does produce potential savings for school districts in those 12 States affected by these court decisions. The States are: Colorado, Connecticut, Kansas, Louisiana, Mississippi, New Mexico, New York, Oklahoma, Texas, Utah, Vermont, and Wyoming.

To determine the impact of the change, one needs to estimate the number of parentally placed children with disabilities that LEAs would have been required to serve, but for this change. Using private school enrollment data for school year 1993–94 and projected growth rates, the Secretary estimates that approximately 1.2 million students will be enrolled in private schools in these 12 States in this school year.

There is no reliable data on the number of children with disabilities who are parentally placed in private schools. However, if one assumes that children with disabilities are found in private schools in the same proportion as they are found in public schools in these States, or at least in the same proportion that children with speech impairments and learning disabilities are found in public schools, one would estimate that there are between 60,000 and 89,000 children with disabilities who are parentally placed in private schools.

If one assumes that, on average, the cost of providing a free appropriate education to these students would be approximately equal to the average excess costs for educating students with disabilities—$6,797 per child for school year 1997–98, the costs of providing FAPE to these children would be significant.

Under the statutory change, public schools would still be required to provide services to parentally-placed children in an amount proportionate to their share of the total population of children with disabilities. Therefore, in estimating the impact of this statutory change, one needs to subtract the cost of the public school obligation from the total projected savings. This amount will vary with the proportion of children attending private schools and the size of the Federal appropriation. While the precise amount of this obligation is indeterminate, the Secretary has concluded that the total net savings to the public sector attributable to the change in the law for these 12 States will be very significant.

Mediation

Proposed § 300.506 reflects the new statutory provisions in section 615(e) of the IDEA, which require States to establish and implement mediation procedures that would make mediation available to the parties whenever a due process hearing is requested. The Act specifies how mediation is to be conducted.

The impact of this change will depend on the following factors: the number of due process hearings that will be requested, the extent to which the parties to those hearings will agree to participate in mediation, the cost of mediation, the extent to which mediation would have been used in the absence of this requirement to resolve complaints, and the extent to which mediation obviates the need for a due process hearing.

Data for previous years suggests one can expect about one complaint for every 1000 children served or about 5,800 requests for due process hearings during the next year. This projection probably overstates the number of complaints because it does not take into account the effect of IDEA Amendments of 1997, which, on balance, can be expected to result in better implementation of the law and higher parental satisfaction with the quality of services and compliance with the IDEA.

Many of these complaints would have been resolved through mediation even without the statutory change. Over 39 States had mediation systems in place prior to the enactment of IDEA Amendments of 1997. Data for 1992 indicate that, on average, States with mediation systems held mediations in about 60 percent of the cases in which hearings were requested. Nevertheless, the Secretary expects the number of mediations to increase even in States that already have mediation systems. Although most States report using mediation as a method of resolving disputes, there have been considerable differences in its implementation and use. In general, the extent to which mediation has been used in States probably depends on the extent to which parents and others were informed of its availability and possible benefits in resolving their complaints and the extent to which the mediator was perceived as a neutral third-party. The Secretary believes that the changes made by IDEA Amendments of 1997 will eliminate some of the differences in State mediation systems that have accounted for its variable use and effectiveness.

The benefits of making mediation more widely available are expected to be substantial, especially in relation to the costs. States with well-established mediation systems conduct considerably fewer due process hearings. For example, in California hearings were held in only 5 and 7 percent of the cases in which they were requested in 1994 and 1995, respectively. The average mediation appears to cost between $350 and $1,000, while a due process hearing can cost tens of thousands of dollars. Based on the experience that many different States have had with mediation, the Secretary estimates that hundreds of additional complaints will be resolved through mediation. The benefits to school districts and benefits to families are expected to be substantial.

Discipline

The proposed regulations (§§ 300.121, 300.122, 300.520, and 300.521) incorporate a number of significant changes to the IDEA that relate to the procedures for disciplining children with disabilities.

Some of the key changes contained in section 615(k) afford school districts additional tools for responding to serious behavioral problems, and in that regard, do not impose any burdens on schools or districts.

The statutory change reflected in proposed § 300.520 would give school officials the authority to remove children who engaged in misconduct involving weapons or illegal drugs.

Under prior law, school officials had the authority to remove children who brought guns, but could not remove children who engaged in misconduct involving other weapons or illegal drugs over the objection of their parents unless they prevailed in a due process proceeding or obtained a temporary restraining order from a court. The statutory change reflected in proposed § 300.521 would give school officials the option of seeking relief from a hearing officer rather than a court in the case of a child the school is seeking to remove because the child poses a risk of injury to the child or others. In both cases, the child would continue to receive services in an alternative educational setting that is required to meet certain standards. It is difficult to assess the impact of either of these statutory changes on schools because there is virtually no information available on the extent to which parents disagree with districts that propose to remove these children. This new authority would only be used in those cases. Nevertheless, the Secretary believes the benefits of this authority to be substantial insofar as the changes help schools provide for a safe environment for all children, while ensuring that any children with disabilities who are moved to an alternative setting continue to receive the services they need.

The statutory change reflected in proposed § 300.520(b) will require school officials to convene the IEP team in cases in which removal for more than 10 school days is contemplated to develop an assessment plan and behavioral interventions (or to review the child's behavioral intervention plan if there is one). These would include all cases in which a school is proposing to suspend a child for more than 10 days in a given year or to expel a child.

Because of the dearth of data on the number and length of suspensions, it is difficult to estimate the impact of this change. However, based on data collected by the Office for Civil Rights on the number of children suspended each year, the Secretary estimates about 300,000 children with disabilities will be suspended for at least one school day this year. Based on an analysis of data from selected States, the Secretary estimates that this review may have to be conducted for only a portion of these children since most of the children who are suspended receive only short-term suspensions. Although there will be a cost associated with convening the IEP team, in many cases, this review will be conducted at the same time as the required manifestation determination and much of the information needed for that determination could be used in conducting this review. Moreover, the benefits of this review are expected to be substantial. The Secretary believes that the development and implementation of appropriate behavioral interventions for children with disabilities will reduce the need for disciplinary actions and all the concomitant costs.

The requirement in section 612(a)(1)(A), incorporated in proposed § 300.121, that all children aged 3 through 21 must have made available to them a free appropriate public education, including children who have been suspended or expelled from school, does not represent a change in the law as the law was interpreted by the Department prior to the enactment of the IDEA Amendments of 1997. It clarifies the Department's long-standing position that the IDEA requires the continuation of special education and related services even to children who have been expelled from school for conduct that has been determined not to be a manifestation of their disability.

However, this statutory change does represent a change in the law in two circuits in which Federal Circuit courts disagreed with the Department's interpretation of the law—the 4th and 7th Circuits. The affected States are: Virginia, Maryland, North Carolina, South Carolina, West Virginia, Illinois, Indiana, and Wisconsin.

To assess the impact of this change, one needs to estimate the extent to which students would have been excluded from education, but for this change in the statute, and the cost of providing the required services to these students during the period they are expected to be excluded from their regular school due to a long-term suspension or expulsion.

There is a paucity of data available on disciplinary actions, and very little for the States in the 4th and 7th circuits. Using data collected by the Office for Civil Rights for school year 1994, the Secretary estimates that approximately 60,000 students aged 6 through 21 will be suspended during this school year. But to determine the impact of the prohibition on ceasing services in these States, one needs to know the number of suspensions each student received and their duration—information that is not provided by OCR data. However, more detailed data compiled by a few States would suggest that a relatively small percentage of students who are suspended receive suspensions of greater than 10 days at a time and a much smaller number of students are expelled.

No information is available on the cost of providing services in an alternative setting for a student who has been suspended temporarily or expelled from school. However, it is reasonable to assume that the cost probably would be no greater than the average daily *total* costs of serving children with disabilities and no less than the cost of providing instruction in a Home or Hospital setting, or between $29 and $70 per day.

While this statutory change will have a cost impact on the States in the fourth and seventh circuits, the Secretary believes the costs for these States will be justified by the benefits of continuing educational services for children who are the least likely to succeed without the help they need.

The statutory change reflected in proposed § 300.122 could generate potential savings for all States by removing the obligation to provide educational services to individuals 18 years old or older who were incarcerated in adult prisons and who were not previously identified as disabled. We have no information on the number of prisoners with disabilities who were not previously identified.

Triennial Evaluation

The existing regulations require a school district to conduct an evaluation of each child served under the IDEA every three years to determine, among other things, whether the child is still eligible for special education. The IDEA Amendments of 1997 change this requirement to reduce unnecessary testing and therefore reduce costs. Specifically, section 614(c) of the IDEA, incorporated in proposed § 300.533, allows the evaluation team to dispense with tests to determine the child's continued eligibility if the team concludes this information is not needed. However, these tests must be conducted if the parents so request.

The savings resulting from this change will depend on the following factors: the number of children for whom an evaluation is conducted each year to comply with the requirement for a triennial evaluation, the cost of the evaluation, and an estimate of the extent to which testing will be reduced because it is determined by the IEP team to be unnecessary and is not requested by the parents.

Based on an analysis of State-reported data, the Secretary estimates that approximately 1.4 million children will be eligible for triennial evaluations in school year 1997–98 or roughly 25 percent of the children to be served.

The IDEA Amendments of 1997 make it clear that districts no longer need to conduct testing to determine whether a

child still has a disability, if the evaluation team determines this information is not needed and the parent agrees. However, while the regulation permits the team to dispense with unneeded testing to determine whether the child still has a disability, the team still has an obligation to meet to review any existing evaluation data and to identify what additional data are needed to determine whether the child is still eligible for special education and related services, the present levels of performance of the child, and whether any modifications in the services are needed. In view of these requirements, the Secretary assumes that there will be some cost associated with conducting the triennial evaluation even in those cases in which both the team and the parents agree to dispense with testing. The Secretary estimates that the elimination of unnecessary testing could reduce the personnel costs by as much as 25 to 75 percent. While there is no national data on the average cost of conducting a triennial evaluation under the current regulations, the Secretary believes that a triennial evaluation has typically required the participation of several professionals for several hours and has cost as much as $1000.

If one assumes, for purposes of this analysis, that savings are achievable in roughly half of the triennial evaluations that will be conducted and that elimination of unnecessary testing could reduce personnel costs by at least 25 percent, one would project substantial savings for LEAs that are attributable to this change.

Benefits and Costs of Proposed Non-statutory Regulatory Changes: The following is an analysis of the benefits and costs of the nonstatutory proposed regulatory changes that includes consideration of the special effects these proposals may have for small entities.

The proposed regulations primarily affect State and local educational agencies, which are responsible for carrying out the requirements of Part B of the IDEA as a condition of receiving Federal financial assistance under that Act. Some of the proposed changes also affect children attending private schools and consequently indirectly affect private schools.

For purposes of this analysis as it relates to small entities, the Secretary has focused on local educational agencies because these proposed regulations most directly affect local school districts. The Secretary proposes to use a definition of small school district developed by the National Center for Education Statistics for purposes of its recent publication, ''Characteristics of Small and Rural School Districts.'' In that publication, NCES defines a small district as ''one having fewer students in membership than the sum of (a) 25 students per grade in the elementary grades it offers (usually K–8) and (b) 100 students per grade in the secondary grades it offers (usually 9–12)''. Using this definition, approximately 34 percent of the Nation's school districts would be considered small and serve about 2.5 percent of the Nation's students. NCES reports that approximately 12 percent of these students have IEPs.

Both small and large districts will experience economic impacts from this proposed rule. Little data are available that would permit a separate analysis of how the proposed changes affect small districts in particular. Therefore, the Secretary specifically invites comments on the differential effects of the proposed regulations on small districts.

For purposes of this analysis, the Secretary assumes that the effect of the proposed regulations on small entities would be roughly proportional to the number of children with disabilities served by those districts.

For school year 1997–98, we estimate that approximately 50 million children will be enrolled in public elementary and secondary schools. Using the NCES definition and assuming all districts grew at the same rate between school year 1993–94 and 1997–98, the Secretary estimates that approximately 1.25 million children are enrolled in small districts. Applying the NCES estimate of 12 percent, we estimate that these districts serve approximately 150,000 children with disabilities of the 5.806 million children with disabilities served nationwide.

There are many changes in the proposed regulations that are expected to result in economic impacts—both positive and negative. For purposes of this analysis, we estimated the impact of those non-statutory changes that were not required by changes that were made in the statute by the IDEA amendments.

The following is a summary of the estimated economic and non-economic impact of the key changes in this proposed regulation:

Section 300.12—Definition of ''General Curriculum''—This proposed regulation does not limit flexibility or impose any burden. Its inclusion helps to clarify what is intended by this term.

Sections 300.19(b) and 303.18(b)—Definition of ''Parent''—Proposed paragraph (b), which defines the circumstances under which a State may treat a foster parent as a parent for purposes of IDEA, does not impose any burden on State or local agencies. The proposed definition is intended to promote the appropriate involvement of foster parents consistent with the best interests of the child by ensuring that those who best know the child are involved in decisions about the child's education. To the extent there is any economic impact of this proposal, it should reduce costs on States and local agencies that they would otherwise incur for training and appointing surrogate parents for children whose educational interests under this proposal could appropriately be represented by their foster parents.

Section 300.24(b)(3)—Definition of ''Specially-designed instruction''—Proposed paragraph (b)(3) defines ''specially-designed instruction'' in order to give more definition to the term ''special education,'' which is defined in this section as ''specially-designed instruction.'' The definition is intended to clarify that the purpose of adapting the content, methodology or delivery of instruction is to address the child's unique needs and to ensure access to the general curriculum. This provision increases the potential of children with disabilities to participate more effectively in the general curriculum.

Section 300.121—Continuation of Services—Proposed section 300.121 would add the statutory provision that the right to a free appropriate public education extends to children with disabilities who have been suspended or expelled from school. Proposed paragraph (c)(1) would define children who have been suspended or expelled from school to mean children who have been removed from their current educational placement for more than 10 school days in a given school year. Proposed paragraph (c) would clarify that in providing FAPE to these children an agency shall meet the requirements provided in the statute for interim alternative educational settings for children removed for possessing weapons or drugs or if they are likely to injure themselves or others if they remain in their current placement.

In determining whether and how to regulate on this issue, the Secretary considered the impact of various alternatives on small and large school districts and children with disabilities and their families, and tried to strike an appropriate balance between the educational needs of students and the burden on schools.

Many of the comments received in response to the Department's notice published in July expressed concern that the statute may be read to require school districts to continue to provide services to a child who has been suspended regardless of the duration of the suspension. School districts argue

that if the statute is interpreted to require these services, this will impose a significant burden on schools and interfere with their ability to ensure a safe and orderly environment for all children.

Some will argue that the statute could and should be read to give schools the flexibility they had under IDEA before it was amended not to provide services to children suspended for fewer than 10 school days at a time, regardless of the cumulative effect, as long as there is no pattern of exclusion that warrants treating an accumulation that exceeds 10 school days as a change in placement.

While it is difficult to quantify the cost of requiring schools to provide services to all children who are suspended for one or more school days, the Secretary agrees that the burden for schools districts could be substantial. Based on data collected by the Office for Civil Rights for school year 1992 and data on the number of children who are currently being served under the IDEA, the Secretary estimates that approximately 300,000 children with disabilities will be suspended for at least one school day during the next school year. Many of these children will be suspended on more than one occasion for one or more days. Because of the differences among the children who are expected to be suspended and the range of their service needs, the costs of and the burden associated with providing individualized services in an alternative setting to every child who is suspended for one or more school days could be substantial, especially for small districts, who are expected to suspend about 8,000 children with disabilities during this school year.

At the same time, the Secretary is concerned about the adverse educational impact on a child who has been suspended for more than a few days and on more than one occasion. In balancing these concerns, the Secretary proposes an alternative that takes into account both impacts. Schools will be relieved of the potential obligation to provide services for a significant population of children who are briefly suspended a few times during the course of the school year, and required to anticipate possible service needs of children with chronic or more serious behavioral problems who are repeatedly excluded from school.

Section 300.122(a)(3)—Exception to right to FAPE (Graduation)—Proposed paragraph (a)(3) provides that a student's right to FAPE ends when the student has graduated with a regular high school diploma, but not if the student graduates with some other certificate, such as a certificate of attendance, or a certificate of completion. Given the importance of a regular high school diploma for a student's post-school experiences, including work and further education, the Secretary believes that there is a significant benefit to children protected by the Act to make clear that the expectation for children with disabilities is the same as for nondisabled children. The impact of this proposal, however, is difficult to assess. Many States, including most of those that report a high number of children with disabilities leaving school with a certificate of completion or some other certificate that is not a regular high school diploma, indicate that students with disabilities have the right to continue to work to earn a regular high school diploma after receiving that certificate. Little information is available to evaluate how many students who now can return to school after receiving some other certificate of completion do so, or how many would return to school under this proposal, although several State directors of special education indicated that relatively few students who now can return, do so. The Secretary anticipates that there may be some small impact on small districts, but does not expect it to be substantial, because of the likely small number of students who would return and could not do so now.

Section 300.139—Reporting on Assessments—Proposed 300.139 would require SEA reports on wide-scale assessments to include children with disabilities in aggregated results for all children to better ensure accountability for results for all children. This proposed regulation is expected to have a minimal impact on the cost of reporting assessment results. It could increase the number of data elements reported depending on whether States continue to report trend data for a student population that does not include children with disabilities to the extent required by section 300.138. There will be no impact on small (or large) school districts since this requirement applies to reports that are prepared by the State educational agency.

Sections 300.142(f) and 303.520(e)—Program Income—These provisions would specify that proceeds from public and private insurance will not be treated by the Department as ''program income'' under other regulations that limit how program income can be used. Therefore, this proposal increases flexibility for State and local agencies in using the proceeds from insurance.

Section 300.156(b)—Annual Description of Part B Set-aside Funds—Proposed paragraph (b) provides that if a State's plans for the use of its State level or State agency funds do not differ from those for the prior year the State may submit a letter to that effect instead of submitting a description of how the funds would be used. The effect of this proposed regulation is inconsequential because it implements the Department's long-standing interpretation that a letter is sufficient in this case.

Section 300.232(a)—Exception to the LEA Maintenance of Effort—Proposed paragraph (a) makes it clear that an LEA may only reduce expenditures associated with departing personnel if those personnel are replaced by qualified, lower-salaried personnel. Congress made its intent clear in this regard in the Committee Report, which is quoted, in part, in a Note following this proposed regulation. Allowing LEAs to reduce their expenditures by not replacing departing personnel would violate congressional intent and diminish special education services in those districts.

Section 300.342(c)—Use of IFSP—Proposed paragraph (c) would require school districts to obtain written informed consent from parents before using an IFSP instead of an IEP, which is based on an explanation of the differences between the two documents. The proposed regulation would impose a cost burden on districts in those States that elect to allow parents to opt for the use of an IFSP instead of an IEP. However, once a form is developed that explains the differences between an IFSP and an IEP, the cost of providing this form to parents and obtaining written consent are probably minimal, and are justified by the benefits of ensuring that parents understand the role of the IEP in providing access to the general education curriculum.

Section 300.342(d)—Effective Date of IEP Requirements—Proposed paragraph (d) would provide that IEPs are to meet the requirements of the statute by July 1, 1998, which is the statutory effective date for the new IEP requirements. Given the potential benefits to families and schools of complying with these requirements, the Secretary believes that implementation of these requirements should not depend on parents exercising their rights or vary within and across districts and States. The impact of this proposal is difficult to estimate because the cost of complying includes both the one-time cost of providing all affected parties with the information, training, and materials needed to implement the new requirements appropriately and the

annual costs of complying with new IEP requirements such as including the regular education teacher on the IEP team. The impact of these costs on State and local agencies is increased the sooner these costs are incurred.

The Secretary anticipates some impact on small districts, but does not expect it to be substantial because of the number of children involved—about 150,000 children with disabilities in total.

Section 300.344(b)—Including the Child in the IEP Meeting—Proposed paragraph (b) would require the school to invite students to participate in IEP meetings if the meeting will include consideration of transition services needs or transition services. The effect of this provision is to give 14- and 15-year-olds, and in some cases, younger students the opportunity to participate. The existing regulations have required schools to invite students to meetings in which transition services were to be discussed. These would include all students aged 16 years and older, and in some cases, younger students. The law has also given other children when appropriate the opportunity to participate in the IEP meeting. Therefore, in some cases, 14- and 15-year-olds may be already participating. The Secretary believes that the costs of notifying students about a meeting or trying to ensure that the students' interests and preferences are accommodated are more than justified by the benefits of including students in a discussion of their own transition needs, including their planned course of study in secondary school.

Section 300.501(b)—Parental Access to Meetings—Proposed paragraph (b) of section 300.501 would define when and how to provide notice to parents of meetings in which they are entitled to participate. It would further define what is meant by the term ''meeting.'' The Secretary believes these proposed regulations impose the minimal requirements necessary to implement the statute. The language in paragraph (b)(1) helps to clarify what is required to provide parents with a meaningful opportunity to attend meetings while the language in (b)(2) is designed to reduce unnecessary burden by clarifying what constitutes a ''meeting.''

Section 300.501(c)—Placement Meetings—Paragraph (c) of 300.501 specifies that the procedures used to be to meet the new statutory requirement of parental involvement in placement decisions. It provides that the procedures used for parental involvement in IEP meetings also be used for placement meetings. These include specific requirements relating to notice, methods for involving parents in the meeting, and recordkeeping of attempts to ensure their participation. Because in many cases placement decisions will be made as part of IEP meetings, as is already the case in most jurisdictions, the Secretary believes the impact of this proposed regulation will be minimal. In those cases in which placement meetings are conducted separately from the IEP meetings, the Secretary believes the benefits of making substantial efforts to secure the involvement of parents and provide for their meaningful participation in any meeting to discuss their child's placement more than justify the costs.

Section 300.502(b) and (c)—Right to an Independent Evaluation—Proposed paragraph (b) would clarify language from the current regulations that make it clear that if a parent requests an independent educational evaluation (IEE), the agency must either initiate a due process hearing to show that its evaluation is appropriate or provide for an IEE at public expense. The Secretary interprets the provision permitting parents to request an IEE to require the agency to take action. This requirement at most represents a small burden for school districts because if the agency did not take action, parents would be free to request due process to compel action.

Proposed paragraph (c) provides that a public agency may not impose conditions or timelines related to obtaining an independent evaluation. The Secretary believes that this requirement, which arguably limits the flexibility of school districts, is critical to ensuring that school districts do not find ways to circumvent the right provided by the IDEA to parents to obtain an independent evaluation.

Sections 300.503(b)(8) and 303.403(b)(4)—Notice to Parents Regarding Complaint Procedures—These provisions require that the required prior written notice to parents include information about how to file a complaint under State complaint procedures. Because districts are already required to provide a written notice to parents, the Secretary estimates that the additional cost of adding this information will be one-time and minimal. The burden on small districts could be minimized if each SEA were to provide its LEAs with appropriate language describing the State procedures for inclusion in the parental notices. Making parents award of a low cost and less adversarial mechanism that they can use to resolve disputes with school districts should result in cost savings and more cooperative relationships between parents and districts.

Section 300.505 (a)(1)(iii) and (c)(2)—Parental Consent for Reevaluation—Proposed paragraph (a)(1)(iii) would clarify that the new statutory right of parents to consent to a reevaluation of their child means parental consent prior to the administration of any test that is needed as a part of a reevaluation. The Secretary does not believe that the intent of this change was to require school districts to obtain parental consent before reviewing existing data about the child and the child's performance, an activity that school districts, as a matter of good practice, should be engaged in on an on-going basis. That interpretation would impose a significant burden on school districts with little discernable benefit to the children served under these regulations.

Proposed paragraph (c)(2) would use the procedures that are in current regulations dealing with inviting parents to IEP meetings as a basis for defining what it means to undertake ''reasonable measures'' in obtaining parental consent. The intent of the proposal is to meaningfully operationalize the statutory right of parents to consent to a reevaluation of their child. Given the importance of parental involvement in all parts of the process, the Secretary believes that any burden imposed by the proposed recordkeeping requirements is justified by the benefits of securing parental consent to the reevaluation.

Section 300.506(c)—Impartial Mediation—Proposed paragraph (c) would interpret the statutory requirement that mediation be conducted by an impartial mediator to mean that a mediator may not be an employee of an LEA or a State agency that is providing direct services to the child and must not have a personal or professional conflict of interest. The Secretary believes that, by definition, parents would not regard an employee of the other party to the dispute to be impartial or a person who has a personal or professional conflict of interest. The Secretary believes providing for impartiality would help promote the use of mediation, which is voluntary, and improve its overall effectiveness in resolving disagreements. The impact of disallowing these individuals from serving as mediators is not likely to have a significant impact on States, given current practices. Many States contract with private organizations to conduct their mediations. Others use employees of the State educational agency, which, in most cases, is not the agency providing direct services. Given

the significant benefits to children, families, and school districts of expeditiously resolving disagreements without resort to litigation, the Secretary concluded that benefits of this proposal easily justify any cost or inconvenience to States.

Section 300.506(d)(2)—Failure to Participate in Meeting—Proposed paragraph (d)(2) would specify that a parent's failure to participate in a meeting at which a disinterested person explains the benefits of and encourages the use of mediation could not be used as a reason to deny or delay the parent's right to a due process hearing. This change is not likely to limit the benefits to school districts of mediation as the Secretary believes that it is extremely unlikely that parents who are unwilling to participate in such a meeting with a disinterested person would be willing to engage in the voluntary mediation provided for in the statute.

Section 300.507(c)(4)—Failure to Provide Notice—Proposed paragraph (c)(4) makes it clear that failure by parents to provide the notice required by the statute cannot be used by a school district to delay or deny the parents' right to due process. This proposed regulation would eliminate the possibility that public agencies will delay a due process hearing pending receipt of a notice that they deem to be acceptable. This regulation does not impose any cost on school districts and would help ensure that parents are afforded appropriate and timely access to due process.

Section 300.513(b)—Attorneys' Fees—Proposed paragraph (b) would provide that funds provided under Part B of IDEA could not be used to pay attorneys' fees. This proposal does not increase the burden on school districts or otherwise substantially affect the ability of school districts to pay attorneys' fees that are awarded under the Act or to pay for their own attorneys. It merely establishes that attorneys' fees must be paid by a source of funding other than Part B based on the Department's position that limited Federal resources not be used for these costs. The Secretary does not expect this proposal to have a cost impact on small (or large) districts because all districts have non-Federal sources of funding that are significantly greater than the funding provided under IDEA. Currently, funds provided to States under the IDEA represent about eight percent of special education expenditures.

Section 300.514(c)—Hearing Officer Decisions—Proposed 300.514(c) would clarify that if a hearing officer in a due process hearing or a review official in a State level review agrees with the parents that a change in placement is appropriate, the child's placement must be treated in accordance with that agreement. It is difficult to assess the impact of this proposal because the statutory language is ambiguous. If paragraph (c) were not included in the regulation. In some cases, parents can be expected to successfully argue, as they have in the past, that the hearing officer's decision to change the placement of a child be implemented. In other cases, as was the case in *Board of Education Sacramento Unified School District* v. *Holland* (9th Cir., 1994), a change to the placement initially sought by the parents and approved by the hearing officer may not occur until all appeals have been exhausted. The cost impact of this proposal is also indeterminate because in some cases implementation of the hearing officer's decision will result in moving children to more costly placements and, in other cases, to less costly placements. In either case, the Secretary concluded that the benefits to the child of securing an appropriate placement justify any potential increase in costs or other burdens to the school district.

The Secretary estimates that the effect of this proposal on small districts will be minimal. The Secretary estimates that no more than 2000 due process hearings will be conducted during the next school year, of which only a small proportion are expected to involve small districts (fewer than 60). Not all of these will involve disputes about placement and the hearing officer or State review official can be expected to agree with the parents in only a portion of the cases.

Section 300.520 (b) and (c)—Behavioral Interventions—Proposed paragraph (b) of this section would specify that the IEP team meeting to consider behavioral interventions occur within 10 business days of the behavior that leads to discipline rather than 10 calendar days, and would clarify that, if the child does not have a behavior intervention plan, the purpose of the meeting is to develop an assessment plan and appropriate behavioral interventions to address that behavior. In proposing the business day alternative, the Secretary determined that it would minimize the burden on school districts and would not have a significant impact on children with disabilities, in light of other regulatory proposals in the discipline area. The change to clarify that the IEP meeting develop appropriate behavioral interventions to address the child's behavior may impose some additional burden on school districts, but the Secretary determined that burden was justified by the benefit to the child, the child's teacher, and the educational process as a whole if appropriate behavioral intervention strategies are implemented without delay to address the behavior that led to discipline.

Proposed paragraph (c) of section 300.520 makes it clear that if a child is removed from his or her current placement for 10 school days or fewer in a given year, the school is not required to convene the IEP team to develop an assessment plan and behavioral interventions. (A school would be required to do so if a child were suspended for more than 10 school days in a given school year.) In determining whether to regulate on this issue, the Secretary considered the potential benefits of providing behavioral interventions to children who need them and the impact on school districts of convening the IEP team to develop behavioral interventions if children are suspended.

Based on consideration of the costs and benefits to children and schools, the Secretary concluded that the IEP team should not be required to meet and develop or review behavioral interventions for a child unless the child was engaged in repeated or significant misconduct. The Secretary determined that the costs and burden of convening the team the first time a child is suspended outweigh any potential benefits to the child if the child is receiving a short-term suspension for an infraction. However, the Secretary also considered the significant benefits that early intervention can produce for students and schools by effectively addressing behavioral problems. The Secretary concluded that if a child is engaged in behavior that warrants removal for more than 10 school days in a given year, intervention is in order.

The Secretary believes that this proposal may reduce costs for school districts because, in the absence of a regulation on this issue, the statute will be read by some to require that the IEP team be convened to develop an assessment plan the first time a child is suspended, regardless of the duration of the suspension or the child's disciplinary record. Alternatively, the statute could be read, in the absence of regulation, to require the IEP team to be convened only for suspensions that exceed 10 school days at a time.

Little data are available that would permit the Secretary to assess the economic impact of this proposal on school districts or the number of children who will benefit. Based on data collected by the Office for Civil Rights, the Secretary estimates that

approximately 300,000 children with disabilities will be suspended during the next school year for at least one school day. Based on an analysis of State-reported data from selected States, we estimate that most of the children who are suspended receive only short-term suspensions, but we have no information on the length or frequency of individual suspensions.

Section 300.521—Due Process Hearing for Removal—Proposed 300.521 specifies that a hearing officer is to make the determination authorized by section 615(k)(2) of the IDEA (regarding whether a child's current educational placement is substantially likely to result in injury to self or others) in a due process hearing.

The Secretary concluded that a hearing that meets the requirement for a due process hearing is the most appropriate forum for expeditiously and fairly determining whether the district has demonstrated by substantial evidence (defined by statute as ''beyond a preponderance of the evidence'') that maintaining the current placement is substantially likely to result in injury and to consider the appropriateness of the child's current placement and the efforts of the district to minimize the risk of harm.

The Secretary believes that the cost impact of this proposed regulation on large and small districts will be minimal because of the limited number of cases in which school districts and parents will disagree about the proposed removal of a dangerous child. (If the parents agree to removing a child, a school district may do so without the approval of a hearing officer.) In those few cases in which there is disagreement, the Secretary believes that the benefits of conducting a due process hearing justify the costs.

Section 300.523—Manifestation Determination—Proposed paragraph (b) would make it clear that if a child was removed for 10 or fewer school days in a given school year, and no further disciplinary action is contemplated, the school is not required to conduct a manifestation review. As was the case in considering section 300.520(c), the Secretary considered the potential benefits to the child and impact on districts of convening the IEP team if children are suspended.

The Secretary similarly concluded that the IEP team should not be required to meet and determine whether the child's behavior was a manifestation of the disability unless the child was engaged in repeated or significant misconduct. The cost of convening the team, whether to develop a behavioral assessment or to conduct a manifestation review, outweigh the potential benefits to a child who has been briefly suspended a few times. However, in proposing this regulation, the Secretary also considered the adverse impact on the child if the child is repeatedly suspended without any effort to determine whether the child should be punished for his or her behavior. One of the primary purposes of the manifestation review is to determine whether the child's disability has impaired his or her ability to understand the impact and consequences of his or her behavior and whether the child's disability has impaired the child's ability to control the behavior subject to discipline. Conducting this review, along with the behavioral assessment, will help ensure that the district responds appropriately to the child's behavior.

The Secretary believes that this proposal may reduce costs for school districts to the extent the statute is being read by some to require a manifestation review every time a child is suspended. Alternatively, this proposal may limit flexibility to the extent the statute could be read not to require a review for any single suspension that is fewer than 10 school days.

Section 300.528—Procedures for an Expedited Due Process Hearing—Proposed 300.528 defines what an expedited due process hearing to remove a dangerous child must entail. As discussed, the Secretary does not believe the requirement for the hearing officer to conduct a due process hearing to have a substantial cost impact because of the small number of cases involved. In proposing this regulation, the Secretary attempted to provide some flexibility to the States in establishing timelines and procedures in order to accommodate the interests of school officials in obtaining an expeditious decision. However, the Secretary has little basis for projecting the cost of hearings conducted in accordance with the proposed regulations in comparison to other appropriate procedures.

Section 300.587—Procedures for Enforcement—This proposal would clarify the types of notice and hearing that the Department would provide before taking an enforcement action under Part B of the IDEA. Providing clarity about the applicable procedures for the various types of enforcement actions will benefit potential subjects of enforcement actions and the Department by ensuring that time and resources are not spent on unnecessary disputes about procedures or needless process.

Section 300.589—Waiver Procedures—This proposal describes the procedures to be used by the Secretary in considering a request from an SEA of a waiver of the supplement, not supplant and maintenance of effort requirements in IDEA. This proposed regulation does not impose any cost on local school districts. The proposed procedures will affect any State requesting a waiver under Part B. While the Secretary believes the benefits of the proposed process to children with disabilities justify any possible cost or burden for State educational agencies, the Secretary welcomes public comment on the impact of this proposal and alternative ways for the Secretary to implement these statutory provisions.

Section 300.624—Capacity-building Subgrants—This proposal would make it clear that States could establish priorities in awarding these subgrants. This proposal, which provides permissive authority to be used at the discretion of each State, clarifies the intent of the statutory change and imposes no burden on State agencies. Allowing States to use these funds to foster State-specific improvements should lead to improving educational results for children with disabilities.

Sections 300.660(b) and 303.510(b)—Information about State Complaint Procedures—Proposed paragraph (b) would require States to widely disseminate their complaint procedures. While this proposed requirement would increase costs for those State educational agencies that have not established procedures for widely disseminating this information, the Secretary could have prescribed specific mechanisms for this dissemination but chooses not to, in order to give SEAs flexibility in determining how to accomplish this. The requirement would not have any direct impact on small districts and would benefit parents who believe that a public agency is violating a requirement of these regulations, by providing them the information they would need to get an official resolution of their issue without having to resort to a more formal, and generally more costly, dispute resolution mechanism.

Sections 300.661 and 303.512—Secretarial Review—This proposal would delete the provision providing for Secretarial review of complaints filed under State complaint procedures. The effect of this proposal on small (and large) districts would be inconsequential because of the small number of requests for these reviews. This proposal was developed in recognition of the report of the Department's Inspector General of August 1997, that noted that this procedure provides very limited benefits to children with disabilities or

to the IDEA programs and involves a considerable expenditure of the resources of the Office of Special Education Programs and other offices of the Department. The Inspector General's report concluded that greater benefit to the programs and individuals covered by the IDEA would be achieved if the Department eliminated the Secretarial review process and focused on improving State procedures for resolving complaints and implementing the IDEA programs. This change, and the changes proposed in §§ 300.660(b) and 300.503(b)(8) and §§ 303.510(b) and 303.403(b)(4) that would require greater public notice about the State complaint procedures, would implement those recommendations.

Sections 300.662 and 303.511—State Reviews—This proposal would relieve States of the requirement to review complaints about violations that occurred more than three years before the complaint. This proposed limitation on the age of the complaints is expected to reduce the cost to SEAs of investigating and reviewing complaints. There is no reason to believe this proposal would adversely affect small districts. There is also no reason to expect that this proposal would have a significant negative impact on individuals or entities submitting complaints under these procedures as it is unlikely that complaints alleging a violation that occurred more than three years in the past and that do not allege a continuing violation or request compensatory services would result in an outcome that puts the protected individuals under these regulations in a better position than they would have been in if no complaint had been filed. On the other hand, allowing States to focus their complaint resolution procedures on issues that are relevant to the current operation of the State's special education program may serve to improve services for these children.

2. Clarity of the Regulations

Executive Order 12866 requires each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed regulations clearly stated? (2) Do the proposed regulations contain technical terms or other wording that interfere with their clarity? (3) Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity? Would the proposed regulations be easier to understand if they were divided into more (but shorter) sections? (A ''section'' is preceded by the symbol ''§'' and a numbered heading; for example, § 300.2 *Applicability to State, local, and private agencies.*) (4) Is the description of the proposed regulations in the ''Supplementary Information'' section of this preamble helpful in understanding the proposed regulations? How could this description be more helpful in making the proposed regulations easier to understand? (5) What else could the Department do to make the proposed regulations easier to understand?

A copy of any comments that concern how the Department could make these proposed regulations easier to understand should be sent to Stanley M. Cohen, Regulations Quality Officer, U.S. Department of Education, 600 Independence Avenue, SW. (room 5121, FB–10), Washington, DC 20202–2241.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities.

The small entities that would be affected by these proposed regulations are small local educational agencies (LEAs) receiving Federal funds under this program. However, the regulations would not have a significant economic impact on the small LEAs affected because the regulations would not impose excessive regulatory burdens or require unnecessary Federal supervision. The regulations would impose minimal requirements to ensure the proper expenditure of program funds.

Paperwork Reduction Act of 1995

Sections 300.110, 300.121, 300.123–300.130, 300.133, 300.135–300.137, 300.141–300.145, 300.155–300.156, 300.180, 300.192, 300.220–300.221, 300.240, 300.280–300.281, 300.284, 300.341, 300.343, 300.345, 300.347, 300.380–300.382, 300.402, 300.482–300.483, 300.503–300.504, 300.506, 300.508, 300.510–300.511, 300.532, 300.535, 300.543, 300.561–300.563, 300.565, 300.569, 300.571–300.572, 300.574–300.575, 300.589, 300.600, 300.653, 300.660–300.662, 300.750–300.751, 300.754, 303.403, 303.510–303.512, and 303.520 contain information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department of Education has submitted a copy of these sections to the Office of Management and Budget (OMB) for its review.

Collection of Information: Assistance for Education of All Children with Disabilities: Complaint Procedures, §§ 300.600–300.662 and 303.510–303.512. Each SEA is required to adopt written procedures for resolving any complaint that meets the requirements in these proposed regulations.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 10 hours to issue a written decision to a complaint. There is an estimated average annual total of 1079 complaints submitted for processing. Thus, the total annual reporting and recordkeeping burden for this collection is estimated to be 10,790 hours.

Collection of Information: Assistance for Education of All Children with Disabilities: State Eligibility, §§ 300.110, 300.121, 300.123–300.130, 300.133, 300.135–300.137, 300.141–300.145, 300.155–300.156, 300.280–300.281, 300.284, 300.380–300.382, 300.402, 300.482–300.483, 300.510–300.511, 300.589, 300.600, 300.653, 303.403, and 303.520. Each State must have on file with the Secretary policies and procedures to demonstrate to the satisfaction of the Secretary that the State meets the specified conditions for assistance under this part. In the past, States were required to submit State plans every three years with one-third of the entities submitting plans to the Secretary each year. With the new statute, States will no longer be required to submit State plans. Rather, the policies and procedures currently approved by, and on file with, the Secretary that are not inconsistent with the IDEA Amendments of 1997 will remain in effect unless amended.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 30 hours for each response for 58 respondents, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Thus, the total annual reporting and recordkeeping burden for this collection is estimated to be 1740 hours.

Collection of Information: Assistance for Education of All Children with Disabilities: LEA Eligibility, §§ 300.180, 300.192, 300.220–300.221, 300.240, 300.341, 300.343, 300.345, 300.347, 500.503–300.504, 300.532, 300.535, 300.543, 300.561–300.563, 300.565, 300.569, 300.571–300.572, and 300.574–300.575. Each local educational agency (LEA) and each State agency must have on file with the State educational agency (SEA) information to demonstrate that the agency meets the specified requirements for assistance under this part. In the past, each LEA

was required to submit a periodic application to the SEA in order to establish its eligibility for assistance under this part. Under the new statutory changes, LEAs are no longer required to submit such applications. Rather, the policies and procedures currently approved by, and on file with, the SEA that are not inconsistent with the IDEA Amendments of 1997 will remain in effect unless amended.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 2 hours for each response for 15,376 respondents, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Thus, the total annual reporting and recordkeeping burden for this collection is estimated to be 30,752 hours. The Secretary invites comment on the estimated time it wills take for LEAs to meet this reporting and recordkeeping requirement.

Collection of Information: Assistance for Education of All Children with Disabilities: List of Hearing Officers and Mediators, §§ 300.506 and 300.508. Each State must maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services. Each public agency must, also, keep a list of the persons who serve as hearing officers.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 25 hours for each response for 58 respondents, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Thus, the total annual reporting and recordkeeping burden for this collection is estimated to be 3050 hours.

Collection of Information: Assistance for Education of All Children with Disabilities: Report of Children and Youth with Disabilities Receiving Special Education, §§ 300.750–300.751, and 300.754. Each SEA must submit an annual report of children served.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 262 hours for each response for 58 respondents, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Thus, the total annual reporting and recordkeeping burden for this collection is estimated to be 15,196 hours.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for U.S. Department of Education.

The Department considers comments by the public on these proposed collections of information in—

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
- Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

OMB is required to make a decision concerning the collections of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Department on the proposed regulations.

Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, this document is intended to provide early notification of the Department's specific plans and actions for this program.

Assessment of Educational Impact

The Secretary particularly requests comments on whether the proposed regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Anyone may also view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or portable document format (pdf) on the World Wide Web at either of the following sites:

http://gcs.ed.gov/fedreg.htm

http://www.ed.gov/news.html

To use the pdf you must have the Adobe Acrobat Reader Program with Search, which is available free at either of the previous sites. If you have questions about using the pdf, call the U.S. Government Printing Office toll free at 1–888–293–6498.

Anyone may also view these documents in text copy only on an electronic bulletin board of the Department. Telephone: (202) 219–1511 or, toll free, 1–800–222–4922. The documents are located under Option G—Files/Announcements, Bulletins and Press Releases.

Note: The official version of this document is the document published in the **Federal Register**.

List of Subjects

34 CFR Part 300

Administrative practice and procedure, Education of individuals with disabilities, Elementary and secondary education, Equal educational opportunity, Grant programs—education, Privacy, Private schools, Reporting and recordkeeping requirements.

34 CFR Part 301

Education of individuals with disabilities, Elementary and secondary education, Grant programs—education, Infants and children, Reporting and recordkeeping requirements.

34 CFR Part 303

Education of individuals with disabilities, Grant programs—education, Infants and children, Reporting and recordkeeping requirements.

(Catalog of Federal Domestic Assistance Number: 84.027 Assistance for the Education of All Children with Disabilities, 84.173 Preschool Grants for Children with Disabilities, and 84.181 Early Intervention Program for Infants and Toddlers with Disabilities)

Dated: October 6, 1997.

Richard W. Riley,

Secretary of Education.

The Secretary proposes to amend Title 34 of the Code of Federal Regulations by revising parts 300, 301, and 303 as follows:

1. Part 300 is revised to read as follows:

PART 300—ASSISTANCE FOR EDUCATION OF ALL CHILDREN WITH DISABILITIES

Subpart A—General

Purposes, Applicability, and Regulations That Apply to This Program

Subpart B—State and Local Eligibility—General

State Eligibility—General

State Eligibility—Specific Conditions

LEA and State Agency Eligibility—General

LEA Eligibility—Specific Conditions

Secretary of the Interior—Eligibility

Public Participation

Subpart C—Services

Free Appropriate Public Education

Evaluations and Reevaluations 300.320 Initial evaluations.

Individualized Education Programs

Direct Services by SEA

Authority: 20 U.S.C. 1411–1420, unless otherwise noted.

Subpart A—General

Purposes, Applicability, and Regulations That Apply to This Program

§ 300.1 Purposes.

The purposes of this part are—

(a) To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living;

(b) To ensure that the rights of children with disabilities and their parents are protected;

(c) To assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities; and

(d) To assess, and ensure the effectiveness of, efforts to educate children with disabilities.

(Authority: 20 U.S.C. 1400 note)

Note: With respect to paragraph (a) of this section (related to preparing children with disabilities for employment and independent living, section 701 of the Rehabilitation Act of 1973 describes the philosophy of independent living as including a philosophy of consumer control, peer support, self-help, self-determination, equal access, and individual and system advocacy, in order to maximize the leadership, empowerment, independence, and productivity of individuals with disabilities, and the integration and full inclusion of individuals with disabilities into the mainstream of American society.

§ 300.2 Applicability to State, local, and private agencies.

(a) *States.* This part applies to each State that receives payments under Part B of the Act.

(b) *Public agencies within the State.* The provisions of this part apply to all political subdivisions of the State that are involved in the education of children with disabilities. These political subdivisions include—

(1) The State educational agency;

(2) LEAs and educational service agencies;

(3) Other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for students with deafness or students with blindness); and

(4) State and local juvenile and adult correctional facilities.

(c) *Private schools and facilities.* Each public agency in the State is responsible for ensuring that the rights and protections under Part B of the Act are given to children with disabilities

(1) Referred to or placed in private schools and facilities by that public agency, or

(2) Placed in private schools by their parents under the provisions of § 300.403(c).

(Authority: 20 U.S.C. 1412)

Note: The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

§ 300.3 Regulations that apply.

The following regulations apply to this program:

(a) 34 CFR part 76 (State-Administered Programs) except for §§ 76.125–76.137 and 76.650–76.662.

(b) 34 CFR part 77 (Definitions).

(c) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(d) 34 CFR part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments).

(e) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(f) 34 CFR part 82 (New Restrictions on Lobbying).

(g) 34 CFR part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(h) The regulations in this part—34 CFR part 300 (Assistance for Education of Children with Disabilities).

(Authority: 20 U.S.C. 1221e–3(a)(1))

Definitions

Note 1: Definitions of terms that are used throughout these regulations are included in this Subpart. Other terms are defined in the specific subparts in which they are used. A list of those terms and the specific sections in which they are defined:

Appropriate professional requirements in the State (§ 300.136(a)(1))
Average per-pupil expenditure in public elementary and secondary schools in the United States (§ 300.702)
Base year (§ 300.706(b)(1))
Comparable quality (§ 300.455(c))
Consent (§ 300.500(b)(1))
Controlled Substance (§ 300.520(d)(1))
Destruction (§ 300.560)
Direct services (§ 300.370(b)(1))
Education records (§ 300.560)
Evaluation (§ 300.500(b)(2))
Excess costs (§ 300.184(b))
Extended school year services (§ 300.309(b))
Financial costs (§ 300.142(e)(2))
Freely associated States (§ 300.722)
Highest requirements in the State applicable to a specific profession or discipline (§ 300.136(a)(2))
Illegal drug (§ 300.520(d)(2))
Independent educational evaluation (§ 300.503(a)(3)(i))
Indian (§ 300.264(a))
Indian tribe (§ 300.264(b))
Outlying area (§ 300.718)
Participating agency, as used in the IEP requirements in §§ 300.347 and 300.348 (§ 300.340(b))
Participating agency, as used in the confidentiality requirements in §§ 300.560–300.576(§ 300.340(b))
Party or parties (§ 300.583(a))
Personally identifiable (§ 300.500(b)(3))
Private school children with disabilities (§ 300.450)
Profession or discipline (§ 300.136(a)(3))
Public expense (§ 300.502(a)(3)(ii))
Revoke consent at any time (§ 300.500 note)
State, special definition (§ 300.700)
State-approved or recognized certification, licensing, registration, or other comparable requirements (§ 300.136(a)(4))
Substantial evidence (§ 300.521(e))
Support services (§ 300.370(b)(2))
Weapon (§ 300.520(d)(3))

Note 2: The following abbreviations for selected terms are used throughout these regulations: ''CSPD'' means ''comprehensive system of personnel development.''

''ESA'' means ''education service agency.''
''FAPE'' means ''free appropriate public education.''
''IDEA'' means ''Individuals with Disabilities Education Act.''
''IEP'' means ''individualized education program.''
''IFSP'' means ''individualized family service plan.''
''LEA'' means ''Local educational agency.''

''LRE'' means ''least restrictive environment.''
''SEA'' means ''State educational agency.''

Each abbreviation is used interchangeably with its nonabbreviated term.

§ 300.4 Act.

As used in this part, *Act* means the Individuals with Disabilities Education Act, as amended (IDEA).

(Authority: 20 U.S.C. 1400(a))

§ 300.5 Assistive technology device.

As used in this part, *Assistive technology device* means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability.

(Authority: 20 U.S.C. 1401(1))

§ 300.6 Assistive technology service.

As used in this part, *Assistive technology service* means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. The term includes—

(a) The evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment;

(b) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities;

(c) Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

(d) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(e) Training or technical assistance for a child with a disability or, if appropriate, that child's family; and

(f) Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that child.

(Authority: 20 U.S.C. 1401(2))

Note: The Act's definitions of ''Assistive technology device'' and ''Assistive technology service'' are substantially identical to the definitions of these terms used in the Technology-Related Assistance for Individuals with Disabilities Act of 1988.

§ 300.7 Child with a disability.

(a) (1) As used in this part, the term *child with a disability* means a child evaluated in accordance with §§ 300.530–300.536 as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance (hereafter referred to as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or a multiple disability, and who because of that impairment needs special education and related services.

(2) The term *child with a disability* for children aged 3 through 9 may include a child—

(i) Who is experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development;

(ii) Who, for that reason, needs special education and related services; and

(iii) If the State adopts the term for children of this age range (or a subset of that range) and the LEA chooses to use the term.

(b) The terms used in this definition are defined as follows:

(1) *Autism* means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (b)(4) of this section.

(2) *Deaf-blindness* means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.

(3) *Deafness* means a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a child's educational performance.

(4) *Emotional disturbance* is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.

(5) *Hearing impairment* means an impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance but that is not included under the definition of deafness in this section.

(6) *Mental retardation* means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance.

(7) *Multiple disability* means concomitant impairments (such as mental retardation-blindness, mental retardation-orthopedic impairment, etc.), the combination of which causes such severe educational problems that the problems cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blindness.

(8) *Orthopedic impairment* means a severe orthopedic impairment that adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).

(9) *Other health impairment* means having limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia,

epilepsy, lead poisoning, leukemia, or diabetes, that adversely affects a child's educational performance.

(10) *Specific learning disability* is defined as follows:

(i) *General.* The term means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(ii) *Disorders not included.* The term does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(11) *Speech or language impairment* means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance.

(12) *Traumatic brain injury* means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. The term applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. The term does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma.

(13) *Visual impairment including blindness* means an impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness.

(Authority: 20 U.S.C. 1401(3) (A) and (B); 1401(26))

Note 1: If a child manifests characteristics of the disability category ''autism'' after age 3, that child still could be diagnosed as having ''autism'' if the criteria in paragraph (b)(1) of this section are satisfied.

Note 2: As used in paragraph (a)(2) of this section, the phrase ''at the discretion of the State and LEA'' means that if the State adopts the term ''developmental delay'' for children aged 3 through 9, or for a subset of that age range (e.g., children aged 3 through 5, etc.), LEAs that choose to use ''developmental delay,'' rather than identify these children as being in a particular disability category, must conform to the State's definition of the term. However, a State may not require an LEA to use ''developmental delay'' for this age range. LEAs in a State that does not adopt the term ''developmental delay'' for children in this age range, or for a sub-set of this age range, cannot independently use ''developmental delay'' as a basis for establishing a child's eligibility.

Note 3: With respect to paragraph (a)(2) of this section (relating to ''developmental delay''), the House Committee Report on Pub. L. 105–17 includes the following statement:

The Committee believes that, in the early years of a child's development, it is often difficult to determine the precise nature of the disability. Use of ''developmental delay'' as part of a unified approach will allow the special education and related services to be directly related to the child's needs and prevent locking the child into an eligibility category which may be inappropriate or incorrect, and could actually reduce later referrals of children with disabilities to special education. (H. Rep. No. 105–95, p. 86 (1997))

Note 4: With respect to paragraph (b)(4) of this section (relating to using the term ''emotional disturbance'' instead of ''serious emotional disturbance''), the House Committee Report on Pub. L. 105–17 includes the following statement:

The committee wants to make clear that changing the terminology from ''serious emotional disturbance'' to ''serious emotional disturbance (hereinafter referred to as 'emotional disturbance')'' in the definition of a ''child with a disability'' is intended to have no substantive or legal significance. It is intended strictly to eliminate the pejorative connotation of the term ''serious.'' It should in no circumstances be construed to change the existing meaning of the term under 34 CFR 300.7(b)(9) as promulgated September 29, 1992 (H. Rep. No. 105–95, p. 86 (1997))

Note 5: A child with attention deficit disorder (ADD) or attention deficit hyperactivity disorder (ADHD) may be eligible under Part B of the Act if the child's condition meets one of the disability categories described in § 300.7, and because of that disability the child needs special education and related services. Some children with ADD or ADHD who are eligible under Part B of the Act meet the criteria for ''other health impairments'' (see paragraph (b)(9) of this section). Those children would be classified as eligible for services under the ''other health impairments'' category if (1) the ADD or ADHD is determined to be a chronic health problem that results in limited alertness, that adversely affects educational performance, and (2) special education and related services are needed because of the ADD or ADHD. The term ''limited alertness'' includes a child's heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment.

Other children with ADD or ADHD may be eligible under Part B of the Act because they satisfy the criteria applicable to other disability categories in § 300.7(b). For example, children with ADD or ADHD would be eligible for services under the ''specific learning disability category'' if they meet the criteria in paragraph (b)(10) of this section, or under the ''emotional disturbance'' category if they meet the criteria in paragraph (b)(4). Even if a child with ADD or ADHD is found to be not eligible for services under Part B of the Act, the requirements of Section 504 of the Rehabilitation Act of 1973 and its implementing regulations at 34 CFR Part 104 may still be applicable.

§ 300.8 Day.

As used in this part, the term *day* means calendar day unless otherwise indicated as school day or business day.

(Authority: 20 U.S.C. 1221e–3)

§ 300.9 Educational service agency.

As used in this part, the term *educational service agency*—

(a) Means a regional public multiservice agency—

(1) Authorized by State law to develop, manage, and provide services or programs to LEAs; and

(2) Recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary and secondary schools of the State; and

(b) Includes any other public institution or agency having administrative control and direction over a public elementary or secondary school.

(Authority: 20 U.S.C. 1401(4))

§ 300.10 Equipment.

As used in this part, the term *equipment* means—

(a) Machinery, utilities, and built-in equipment and any necessary enclosures or structures to house the machinery, utilities, or equipment; and

(b) All other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture; printed, published and audio-visual instructional materials; telecommunications, sensory, and other technological aids and devices; and books, periodicals, documents, and other related materials.

(Authority: 20 U.S.C. 1401(6))

§ 300.11 Free appropriate public education.

As used in this part, the term *free appropriate public education* means special education and related services that—

(a) Are provided at public expense, under public supervision and direction, and without charge;

(b) Meet the standards of the SEA, including the requirements of this part;

(c) Include preschool, elementary school, or secondary school education in the State; and

(d) Are provided in conformity with an IEP that meets the requirements of §§ 300.340–300.351.

(Authority: 20 U.S.C. 1401(8))

§ 300.12 General curriculum.

As used in this part, the term *general curriculum* means the curriculum adopted by an LEA, schools within the LEA, or where applicable, the SEA for all children from preschool through secondary school.

(Authority: 20 U.S.C. 1401)

Note: The term ''general curriculum'', as defined in this section, relates to the content of the curriculum and not to the setting in which it is used. Thus, to the extent applicable to an individual child with a disability and consistent with the LRE provisions under §§ 300.500—300.553, the general curriculum could be used in any educational environment along a continuum of alternative placements described under § 300.551.

§ 300.13 Include.

As used in this part, the term *include* means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

(Authority: 20 U.S.C. 1221e–3)

§ 300.14 Individualized education program.

As used in this part, the term *individualized education program or IEP* has the meaning given the term in § 300.340.

(Authority: 20 U.S.C. 1401(11))

§ 300.15 Individualized education program team.

As used in this part, the term *individualized education program team* or *IEP team* means a group of individuals described in § 300.344 that is responsible for developing, reviewing, or revising an IEP for a child with a disability.

(Authority: 20 U.S.C. 1221e–3)

Note: The IEP team may also serve as the placement team.

§ 300.16 Individualized family service plan.

As used in this part, the term *individualized family service plan* or *IFSP* has the meaning given the term in 34 CFR 303.340(b).

(Authority: 20 U.S.C. 1401(12))

§ 300.17 Local educational agency.

(a) As used in this part, the term *local educational agency* means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township school district, or other political subdivision of a State, or for a combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools.

(b) The term includes—

(1) An educational service agency, as defined in § 300.9; and

(2) Any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(c) The term includes an elementary or secondary school funded by the Bureau of Indian Affairs, but only to the extent that the inclusion makes the school eligible for programs for which specific eligibility is not provided to the school in another provision of law and the school does not have a student population that is smaller than the student population of the LEA receiving assistance under this Act with the smallest student population, except that the school may not be subject to the jurisdiction of any SEA other than the Bureau of Indian Affairs.

(Authority: 20 U.S.C. 1401(15))

Note: A public charter school that meets the definition of ''LEA'' is eligible to receive Part B funds as an LEA. If a public charter school receives Part B funds it must comply with the requirements of this part that apply to LEAs.

§ 300.18 Native language.

As used in this part, the term *native language*, if used with reference to an individual of limited English proficiency, means the language normally used by that individual, or, in the case of a child, the language normally used by the parents of the child.

(Authority: 20 U.S.C. 1401(16))

Note: The term ''native language'' is used in the prior notice, procedural safeguards notice, and evaluation sections: § 300.503(c), § 300.504(c) and § 300.532(a)(2). In using the term, the Act does not prevent the following means of communication:

(1) In all direct contact with a child (including evaluation of the child), communication would be in the language normally used by the child and not that of the parents, if there is a difference between the two.

(2) For individuals with deafness or blindness, or for individuals with no written language, the mode of communication would be that normally used by the individual (such as sign language, braille, or oral communication).

§ 300.19 Parent.

(a) As used in this part, the term *parent* means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with § 300.515. The term does not include the State if the child is a ward of the State.

(b) State law may provide that a foster parent qualifies as a parent under Part B of the Act if—

(1) The natural parents' authority to make educational decisions on the child's behalf has been extinguished under State law;

(2) The foster parent has an ongoing, long-term parental relationship with the child;

(3) The foster parent is willing to participate in making educational decisions in the child's behalf; and

(4) The foster parent has no interest that would conflict with the interests of the child.

(Authority: 20 U.S.C. 1401(19))

Note: The term ''parent'' is defined to include persons acting in the place of a parent, such as a grandparent or stepparent with whom a child lives, as well as persons who are legally responsible for a child's welfare, and at the discretion of the State, a foster parent who meets the requirements in paragraph (b) of this section.

§ 300.20 Public agency.

As used in this part, the term *public agency* includes the SEA, LEAs, ESAs, and any other political subdivisions of the State that are responsible for providing education to children with disabilities.

(Authority: 20 U.S.C. 1412 (a)(1)(A), (a)(11))

§ 300.21 Qualified.

As used in this part, the term *qualified* means that a person has met SEA-approved or -recognized certification, licensing, registration, or other comparable requirements that apply to the area in which he or she is providing special education or related services.

(Authority: 20 U.S.C. 1221e–3)

§ 300.22 Related services.

(a) As used in this part, the term *related services* means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early

identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

(1) *Audiology* includes—

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of pupils, parents, and teachers regarding hearing loss; and

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) *Counseling services* means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) *Early identification and assessment of disabilities in children* means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) *Medical services* means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

(5) *Occupational therapy* includes —

(i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning if functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

(6) *Orientation and mobility services* means services provided to blind or visually impaired students by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home, and community, including —

(i) Teaching students spatial and environmental concepts and use of information received by the senses (such as sound, temperature and vibrations) to establish, maintain, or regain orientation and line of travel (for example, using sound at a traffic light to cross the street);

(ii) Teaching students to use the long cane, as appropriate, to supplement visual travel skills or as a tool for safely negotiating the environment for students with no available travel vision;

(iii) Teaching students to understand and use remaining vision and distance low vision aids, as appropriate; and

(iv) Other concepts, techniques, and tools, as determined appropriate.

(7) *Parent counseling and training* means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(8) *Physical therapy* means services provided by a qualified physical therapist.

(9) *Psychological services* includes —

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning;

(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations;

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents; and

(vi) Assisting in developing positive behavioral intervention strategies.

(10) *Recreation* includes —

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(11) *Rehabilitation counseling services means* services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to a student with disabilities by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended.

(12) *School health services* means services provided by a qualified school nurse or other qualified person.

(13) *Social work services in schools* includes —

(i) Preparing a social or developmental history on a child with a disability;

(ii) Group and individual counseling with the child and family;

(iii) Working with those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school;

(iv) Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program; and

(v) Assisting in developing positive behavioral intervention strategies.

(14) *Speech-language pathology services* includes—

(i) Identification of children with speech or language impairments;

(ii) Diagnosis and appraisal of specific speech or language impairments;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language impairments;

(iv) Provision of speech and language services for the habilitation or prevention of communicative impairments; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language impairments.

(15) *Transportation* includes—

(i) Travel to and from school and between schools;

(ii) Travel in and around school buildings; and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.

(Authority: 20 U.S.C. 1401(22))

Note 1: All related services may not be required for each individual child. The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, art, music, and dance therapy, travel training, nutrition services, and independent living services), if they are required to assist a child with a disability to benefit from special education in order for the child to receive FAPE.

There are certain kinds of services that might be provided by persons from varying professional backgrounds and with a variety of operational titles, depending upon requirements in individual States. For example, counseling services might be provided by social workers, psychologists, or guidance counselors, and psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists, depending upon State standards.

Each related service defined under Part B of the Act may include appropriate administrative and supervisory activities that are necessary for program planning, management, and evaluation.

Note 2: While ''orientation and mobility services'' was added to the list of examples of related services in recognition of its critical importance to children who are blind or have visual impairments, children with other disabilities may also need to be taught the skills they need to navigate their environments (e.g. ''travel training''). The House Committee Report on Public Law 105–17 states:

* * *it is important to keep in mind that children with other disabilities may also need instruction in traveling around their school, or to and from school. A high school aged child with a mental disability, for example, might need to be taught how to get from class to class so that he can participate in his inclusive program. The addition of orientation and mobility services to the list of identified related services is not intended to result in the denial of appropriate services for children with disabilities who do not have visual impairments or blindness. (H. Rep. No. 105–95, p.86 (1997))

In addition, travel training is important to enable students to attain systematic orientation to and safe movement within their environment in school, home, at work, and in the community.

Note 3: With respect to paragraph (b) of this section, nothing in this part prohibits the use of paraprofessionals to assist in the provision of services described under this section, if doing so is consistent with § 300.136(f).

Note 4: It should be assumed that most children with disabilities receive the same transportation services as nondisabled children. For some children with disabilities, integrated transportation may be achieved by providing needed accommodations such as lifts and other equipment adaptations on regular school transportation vehicles.

§ 300.23 Secondary school.

As used in this part, the term *secondary school* means a nonprofit institutional day or residential school that provides secondary education, as determined under State law, except that it does not include any education beyond grade 12.

(Authority: 20 U.S.C. 1401(23))

§ 300.24 Special education.

(a) (1) As used in this part, the term *special education* means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—

(i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(ii) Instruction in physical education.

(2) The term includes speech-language pathology services, or any other related service, if the service consists of specially-designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, and is considered special education rather than a related service under State standards.

(3) The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.

(b) The terms in this definition are defined as follows:

(1) *At no cost* means that all specially-designed instruction is provided without charge, but does not preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program.

(2) *Physical education* is defined as follows:

(i) The term means the development of—

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports).

(ii) The term includes special physical education, adaptive physical education, movement education, and motor development.

(3) *Specially-designed instruction* means adapting content, methodology or delivery of instruction—

(i) To address the unique needs of an eligible child under this part that result from the child's disability; and

(ii) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.

(4) *Vocational education* means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

(Authority: 20 U.S.C. 1401(25))

Note: The definition of special education is a particularly important one under these regulations, since a child does not have a disability under Part B of the Act unless he or she needs special education. (See the definition of child with a disability in § 300.7). The definition of related services (§ 300.22) also depends on this definition, since to be a related service, a service must be necessary for a child to benefit from special education. Therefore, if a child does not need special education, there can be no related services, and the child is not a child with a disability and is therefore not covered under the Act. A related services provider may be a provider of specially-designed instruction if under State law the person is qualified to provide such instruction.

§ 300.25 State.

As used in this part, the term *State* means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas.

(Authority: 20 U.S.C. 1401(27))

§ 300.26 Supplementary aids and services.

As used in this part, the term *supplementary aids and services* means, aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with §§ 300.550–300.556.

(Authority: 20 U.S.C. 1401(29))

§ 300.27 Transition services.

As used in this part, *transition services* means a coordinated set of activities for a student with a disability that—

(a) Is designed within an outcome-oriented process, that promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(b) Is based on the individual student's needs, taking into account the student's preferences and interests; and

(c) Includes—

(1) Instruction;

(2) Related services;

(3) Community experiences;

(4) The development of employment and other post-school adult living objectives; and

(5) If appropriate, acquisition of daily living skills and functional vocational evaluation.

(Authority: 20 U.S.C. 1401(30))

Note: Transition services for students with disabilities may be special education, if they are provided as specially designed instruction, or related services, if they are required to assist a student with a disability to benefit from special education. The list of activities in paragraph (c) of this section is not intended to be exhaustive.

§ 300.28 Definitions in EDGAR.

The following terms used in this part are defined in 34 CFR 77.1:

Application
Award
Contract
Department
EDGAR
Fiscal year
Grant
Project
Secretary
Subgrant

(Authority: 20 U.S.C. 1221e–3(a)(1))

Subpart B—State and Local Eligibility—General State Eligibility—General

§ 300.110 Condition of assistance.

A State is eligible for assistance under Part B of the Act for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets the conditions in §§ 300.121–300.156.

(Authority: 20 U.S.C. 1412(a))

§ 300.111 Exception for prior State policies and procedures on file with the Secretary.

If a State has on file with the Secretary policies and procedures approved by the Secretary that demonstrate that the State meets any requirement of § 300.110, including any policies and procedures filed under Part B of the Act as in effect before June 4, 1997, the Secretary considers the State to have met the requirement for purposes of receiving a grant under Part B of the Act.

(Authority: 20 U.S.C. 1412(c)(1))

§ 300.112 Amendments to State policies and procedures.

(a) *Modifications made by a State.* (1) Subject to paragraph (b) of this section, policies and procedures submitted by a State in accordance with this subpart remain in effect until the State submits to the Secretary the modifications that the State decides are necessary.

(2) The provisions of this subpart apply to a modification to a State's policies and procedures in the same manner and to the same extent that they apply to the State's original policies and procedures.

(b) *Modifications required by the Secretary.* The Secretary may require a State to modify its policies and procedures, but only to the extent necessary to ensure the State's compliance with this part, if—

(1) After June 4, 1997, the provisions of the Act or the regulations in this part are amended;

(2) There is a new interpretation of this Act or regulations by a Federal court or a State's highest court; or

(3) There is an official finding of noncompliance with Federal law or regulations.

(Authority: 20 U.S.C. 1412(c) (2) and (3))

§ 300.113 Approval by the Secretary.

(a) *General.* If the Secretary determines that a State is eligible to receive a grant under Part B of the Act, the Secretary notifies the State of that determination.

(b) *Notice and hearing before determining a State is not eligible.* The Secretary does not make a final determination that a State is not eligible to receive a grant under Part B of the Act until after providing the State reasonable notice and an opportunity for a hearing in accordance with the procedures in §§ 300.581–300.587.

(Authority: 20 U.S.C. 1412(d))

§§ 300.114–300.120 [Reserved]

State Eligibility—Specific Conditions

§ 300.121 Free appropriate public education.

(a) *General.* Each State must have on file with the Secretary information that shows that, subject to § 300.122, the State has in effect a policy that ensures that all children with disabilities aged 3 through 21 residing in the State have the right to FAPE, including children with disabilities who have been suspended or expelled from school.

(b) *Required information.* The information described in paragraph (a) of this section must—

(1) Include a copy of each State statute, court order, State Attorney General opinion, and other State documents that show the source of the State's policy relating to FAPE; and

(2) Show that the policy—

(i) Applies to all public agencies in the State; and

(ii) Applies to all children with disabilities, including children who have been suspended or expelled from school.

(c) *FAPE for children suspended or expelled from school.*

(1) For the purposes of this section, the term ''children with disabilities who have been suspended or expelled from school'' means children with disabilities who have been removed from their current educational placement for more than 10 school days in a given school year.

(2) The right to FAPE for children with disabilities who have been suspended or expelled from school begins on the eleventh school day in a school year that they are removed from their current educational placement.

(3) In providing FAPE to children with disabilities who have been suspended or expelled from school, a public agency shall meet the requirements of § 300.522.

(Authority: 20 U.S.C. 1412(a)(1))

Note 1: With respect to paragraph (a) of this section, a public agency's obligation to make FAPE available to each eligible child means that the obligation begins no later than the child's third birthday. Thus, an IEP or an IFSP must be in effect for the child by that date, in accordance with § 300.342. The IEP would specify the special education and related services that are needed in order to ensure that the child receives FAPE, including any extended school year services, if appropriate. If a child who is receiving early intervention services under Part C of the Act will be participating in a preschool program under Part B of the Act, the transition requirements of § 300.132 would apply.

Note 2: School districts are not relieved of their obligation to provide appropriate special education and related services to individual disabled students who need them even though they are advancing from grade to grade. The decision whether a student with a disability who is advancing from grade to grade is eligible for services under this part must be determined on an individual basis by the child's IEP team.

§ 300.122 Exception to FAPE for certain ages.

(a) *General.* The obligation to make FAPE available to all children with disabilities does not apply with respect to—

(1) Children aged 3, 4, 5, 18, 19, 20, or 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in one or more of those age groups;

(2) Students aged 18 through 21 to the extent that State law does not require that special education and related services under Part B of the Act be provided to students with disabilities who, in the last educational placement prior to their incarceration in an adult correctional facility—

(i) Were not actually identified as being a child with a disability under § 300.7; and

(ii) Did not have an IEP under Part B of the Act.

(3)(i) Students with disabilities who have graduated from high school with a regular high school diploma.

(ii) The exception in paragraph (a)(3)(i) of this section does not apply to students who have graduated but have not been awarded a regular high school diploma.

(b) *Documents relating to exceptions.* The State must have on file with the Secretary—

(1)(i) Information that describes in detail the extent that the exception in paragraph (a)(1) of this section applies to the State; and

(ii) A copy of each State law, court order, and other documents that provide a basis for the exception; and

(2) With respect to paragraph (a)(2) of this section, a copy of the State law that excludes from service under Part B of the Act certain students who are

incarcerated in an adult correctional facility.

(Authority: 20 U.S.C. 1412(a)(1)(B))

Note 1: Under paragraph (a)(3) of this section, a student's eligibility for FAPE ceases upon graduation from high school with a regular high school diploma. Under Part B of the Act, graduation is considered to be a change in placement, and would require that prior written notice, in accordance with § 300.503, be given to the parents and the student, if appropriate. The notice would inform the parents and the student of this fact and of their right to challenge the student's pending graduation (through the due process procedures in § 300.507), if they believe that the student has not met the requirements for graduation with a regular high school diploma. Since graduation changes a student's eligibility status, a reevaluation would be required under § 300.534(c).

In a small number of cases, a school district may be awarding a special certificate to some children with disabilities. If a high school awards a student with a disability certificate of attendance or other certificate of graduation instead of a regular high school diploma, the student would still be entitled to FAPE until the student reaches the age at which eligibility ceases under the age requirements within the State or has earned a regular high school diploma.

Note 2: With respect to paragraph (a)(2) of this section, (relating to certain students with disabilities in adult prisons), the House Committee Report on Pub. L. 105–17 includes the following statement:

The bill provides that a State may also opt not to serve individuals who, in the educational placement prior to their incarceration in adult correctional facilities, were not actually identified as a child with a disability under section 602(3) or did not have an IEP under Part B of the Act. The Committee means to * * * make clear that services need not be provided to all children who were at one time determined to be eligible under Part B of the Act. The Committee does not intend to permit the exclusion from services under part B of children who had been identified as children with disabilities and had received services under an IEP, but who had left school prior to their incarceration. In other words, if a child had an IEP in his or her last educational placement, the child has an IEP for purposes of this provision. The Committee added language to make clear that children with disabilities aged 18 through 21, who did not have an IEP in their last educational setting but who had actually been identified should not be excluded from services.(H. Rep. No. 105–95, p. 91 (1997))

§ 300.123 Full educational opportunity goal.

The State must have on file with the Secretary detailed policies and procedures through which the State has established a goal of providing full educational opportunity to all children with disabilities aged birth through 21.

(Authority: 20 U.S.C. 1412(a)(2))

§ 300.124 FEOG—timetable.

The State must have on file with the Secretary a detailed timetable for accomplishing the goal of providing full educational opportunity for all children with disabilities.

(Authority: 20 U.S.C. 1412(a)(2))

§ 300.125 Child find.

(a) *General requirement.* The State must have in effect policies and procedures to ensure that—

(1) All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated; and

(2) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.

(b) *Documents relating to child find.* The State must have on file with the Secretary the policies and procedures described in paragraph (a) of this section, including—

(1) The name of the State agency (if other than the SEA) responsible for coordinating the planning and implementation of the policies and procedures under paragraph (a) of this section;

(2) The name of each agency that participates in the planning and implementation of the child find activities and a description of the nature and extent of its participation;

(3) A description of how the policies and procedures under paragraph (a) of this section will be monitored to ensure that the SEA obtains—

(i) The number of children with disabilities within each disability category that have been identified, located, and evaluated; and

(ii) Information adequate to evaluate the effectiveness of those policies and procedures; and

(4) A description of the method the State uses to determine which children are currently receiving special education and related services.

(c) *Construction.* Nothing in the Act requires that children be classified by their disability so long as each child who has a disability listed in § 300.7 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of the Act.

(Authority: 20 U.S.C. 1412 (a)(3) (A) and (B))

Note 1: Collection and use of data are subject to the confidentiality requirements of §§ 300.560–300.577.

Note 2: The services and placement needed by each child with a disability to receive FAPE must be based upon the child's unique needs and may not be determined or limited based upon a category of disability.

Note 3: Under both Parts B and C of the Act, States are responsible for identifying, locating, and evaluating infants and toddlers from birth through 2 years of age who have disabilities or who are suspected of having disabilities. In States where the SEA and the State's lead agency for the Part C program are different and the Part C lead agency will be participating in the child find activities described in paragraph (a) of this section, the nature and extent of the Part C lead agency's participation must, under paragraph (b)(2) of this section, be provided. With the SEA's agreement, the Part C lead agency's participation may include the actual implementation of child find activities for infants and toddlers. The use of an interagency agreement or other mechanism for providing for the Part C lead agency's participation would not alter or diminish the responsibility of the SEA to ensure compliance with all child find requirements, including the requirement in paragraph (a)(1) of this section that all children with disabilities who are in need of special education and related services are evaluated.

Note 4: Each State has an obligation to ensure that State and local child find responsibilities under Part B of the Act extend to highly mobile children (such as migrant and homeless children).

§ 300.126 Procedures for evaluation and determination of eligibility.

The State must have on file with the Secretary policies and procedures that ensure that the requirements of §§ 300.530–300.536 are met.

(Authority: 20 U.S.C. 1412(a) (6)(B), (7))

§ 300.127 Confidentiality of personally identifiable information.

(a) The State must have on file in detail the policies and procedures that the State has undertaken in order to ensure the protection of the confidentiality of any personally identifiable information, collected, used, or maintained under Part B of the Act.

(b) The Secretary uses the criteria in §§ 300.560–300.577 to evaluate the policies and procedures of the State under paragraph (a) of this section.

(Authority: 20 U.S.C. 1412(a)(8))

Note: The regulations implementing the Family Educational Rights and Privacy Act are in 34 CFR Part 99. Those regulations are incorporated in §§ 300.560–300.577.

§ 300.128 Individualized education programs.

(a) *General.* The State must have on file with the Secretary information that shows that an IEP, or IFSP that meets the requirements of section 636(d) of the Act, is developed, reviewed, and revised for each child with a disability in accordance with §§ 300.340–300.351.

(b) *Required information.* The information described in paragraph (a) of this section must include—

(1) A copy of each State statute, policy, and standard that regulates the manner in which IEPs are developed, implemented, reviewed, and revised; and

(2) The procedures that the SEA follows in monitoring and evaluating those programs.

(Authority: 20 U.S.C. 1412(a)(4))

§ 300.129 Procedural safeguards.

(a) The State must have on file with the Secretary procedural safeguards that ensure that the requirements of §§ 300.500–300.529 are met.

(b) Children with disabilities and their parents must be afforded the procedural safeguards identified in paragraph (a) of this section.

(Authority: 20 U.S.C. 1412(a)(6)(A))

§ 300.130 Least restrictive environment.

(a) *General.* The State must have on file with the Secretary procedures that ensure that the requirements of §§ 300.550–300.556 are met.

(b) *Additional requirement.*

(1) If the State uses a funding mechanism by which the State distributes State funds on the basis of the type of setting in which a child is served, the funding mechanism may not result in placements that violate the requirements of paragraph (a) of this section.

(2) If the State does not have policies and procedures to ensure compliance with paragraph (b)(1) of this section, the State must provide the Secretary an assurance that the State will revise the funding mechanism as soon as feasible to ensure that the mechanism does not result in placements that violate that paragraph.

(Authority: 20 U.S.C. 1412(a)(5))

Note: With respect to the LRE requirement of this section, and the continuum of alternative educational placements described in § 300.551, the House Committee Report on Pub. L. 105–17 states:

The committee supports the longstanding policy of a continuum of alternative placements designed to meet the unique needs of each child with a disability. Placement options available include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. For disabled children placed in regular classes, supplementary aids and services and resource room services or itinerant instruction must also be offered as needed. (H. Rep. 105–95, p. 91 (1997))

§ 300.131 [Reserved]

§ 300.132 Transition of children from Part C to preschool programs.

The State must have on file with the Secretary policies and procedures to ensure that—

(a) Children participating in early-intervention programs assisted under Part C of the Act, and who will participate in preschool programs assisted under Part B of the Act, experience a smooth and effective transition to those preschool programs in a manner consistent with section 637(a)(8) of the Act;

(b) By the third birthday of a child described in paragraph (a) of this section, an IEP or, if consistent with § 300.342(c) and section 636(d) of the Act, an IFSP, has been developed and must be implemented for the child; and

(c) Each LEA will participate in transition planning conferences arranged by the designated lead agency under section 637(a)(8) of the Act.

(Authority: 20 U.S.C. 1412(a)(9))

§ 300.133 Private schools.

The State must have on file with the Secretary policies and procedures that ensure that the requirements of §§ 300.400–300.403 and §§ 300.450–300.462 are met.

(Authority: 20 U.S.C. 1413(a)(4))

§ 300.134 [Reserved]

§ 300.135 Comprehensive system of personnel development.

(a) *General.* The State must have in effect, consistent with the purposes of this part and with section 635(a)(8) of the Act, a comprehensive system of personnel development that —

(1) Is designed to ensure an adequate supply of qualified special education, regular education, and related services personnel; and

(2) Meets the requirements for a State improvement plan relating to personnel development in section 653 (b)(2)(B) and (c)(3)(D) of the Act.

(b) *Information.* The State must have on file with the Secretary information that shows that the requirements of paragraph (a) of this section are met.

(Authority: 20 U.S.C. 1412(a)(14))

Note: With respect to meeting the CSPD requirement of this section, the House Committee Report on Pub. L. 105–17 states:

Section 612, as [in] current law, requires that a State have in effect a Comprehensive System of Personnel Development (CSPD) that is designed to ensure an adequate supply of qualified personnel, including the establishment of procedures for acquiring and disseminating significant knowledge derived from educational research and for adopting, where appropriate, promising practices, materials, and technology. (H. Rep. 105–95, p. 93 (1997))

States will be able to use the information provided to meet the requirement in § 300.135(a)(2) as a part of their State Improvement Plan under section 653 of the Act, if they choose to do so.

§ 300.136 Personnel standards.

(a) As used in this part —

(1) *Appropriate professional requirements in the State* means entry level requirements that—

(i) Are based on the highest requirements in the State applicable to the profession or discipline in which a person is providing special education or related services; and

(ii) Establish suitable qualifications for personnel providing special education and related services under Part B of the Act to children and youth with disabilities who are served by State, local, and private agencies (see § 300.2);

(2) *Highest requirements in the State applicable to a specific profession or discipline* means the highest entry-level academic degree needed for any State-approved or -recognized certification, licensing, registration, or other comparable requirements that apply to that profession or discipline;

(3) *Profession or discipline* means a specific occupational category that —

(i) Provides special education and related services to children with disabilities under Part B of the Act;

(ii) Has been established or designated by the State; and

(iii) Has a required scope of responsibility and degree of supervision; and

(4) *State-approved or -recognized certification, licensing, registration, or other comparable requirements* means the requirements that a State legislature either has enacted or has authorized a State agency to promulgate through rules to establish the entry-level standards for employment in a specific profession or discipline in that State.

(b) (1) The State must have on file with the Secretary policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained.

(2) The policies and procedures required in paragraph (b)(1) of this section must provide for the establishment and maintenance of standards that are consistent with any State-approved or -recognized certification, licensing, registration, or other comparable requirements that apply to the profession or discipline in which a person is providing special education or related services.

(c) To the extent that a State's standards for a profession or discipline, including standards for temporary or emergency certification, are not based on the highest requirements in the State applicable to a specific profession or discipline, the State must provide the steps the State is taking and the procedures for notifying public agencies and personnel of those steps and the timelines it has established for the retraining or hiring of personnel to meet appropriate professional requirements in the State.

(d) (1) In meeting the requirements in paragraphs (b) and (c) of this section, a determination must be made about the status of personnel standards in the State. That determination must be based on current information that accurately describes, for each profession or discipline in which personnel are providing special education or related services, whether the applicable standards are consistent with the highest requirements in the State for that profession or discipline.

(2) The information required in paragraph (d)(1) of this section must be on file in the SEA and available to the public.

(e) In identifying the highest requirements in the State for purposes of this section, the requirements of all State statutes and the rules of all State agencies applicable to serving children and youth with disabilities must be considered.

(f) A State may allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulations, or written policy, in meeting the requirements of this part to be used to assist in the provision of special education and related services to children with disabilities under Part B of the Act.

(g) In implementing this section, a State may adopt a policy that includes a requirement that LEAs in the State make an ongoing good faith effort to recruit and hire appropriately and adequately trained personnel to provide special education and related services to children with disabilities, including, in a geographic area of the State where there is a shortage of personnel that meet these qualifications, the most qualified individuals available who are making satisfactory progress toward completing applicable course work necessary to meet the standards described in paragraph (b)(2) of this section, consistent with State law and the steps described in paragraph (c) of this section, within three years.

(Authority: 20 U.S.C. 1412(a)(15))

Note 1: The regulations require that the State use its own existing highest requirements to determine the standards appropriate to personnel who provide special education and related services under Part B of the Act. The regulations do not require States to set any specified training standard, such as a master's degree, for employment of personnel who provide services under Part B of the Act. In some instances, States are required under paragraph (c) of this section to show that they are taking steps to retrain or to hire personnel to meet the standards adopted by the SEA that are based on requirements for practice in a specific profession or discipline that were established by other State agencies. States in this position need not, however, require personnel providing services under Part B of the Act to apply for and obtain the license, registration, or other comparable credential required by other agencies of individuals in that profession or discipline. The regulations permit each State to determine the specific occupational categories required to provide special education and related services and to revise or expand these categories as needed. The professions or disciplines defined by the State need not be limited to traditional occupational categories.

Note 2: A State may exercise the option under paragraph (g) of this section even though the State has reached its established date, under paragraph (c) of this section, for training or hiring all personnel in a specific profession or discipline to meet appropriate professional requirements in the State. As a practical matter, it is essential that a State have a mechanism for serving students if instructional needs exceed available personnel who meet appropriate professional requirements in the State for a specific profession or discipline. A State that continues to have shortages of personnel meeting appropriate professional requirements in the State must address those shortages in its comprehensive system of personnel development under § 300.135.

Note 3: If a State has established only one entry-level academic degree for employment of personnel in a specific profession, modification of that standard as necessary to ensure the provision of FAPE to all children in the State would not violate the provisions of § 300.136(b) and (c).

§ 300.137 Performance goals and indicators.

The State must have on file with the Secretary information to demonstrate that the State—

(a) Has established goals for the performance of children with disabilities in the State that—

(1) Will promote the purposes of this part, as stated in § 300.1; and

(2) Are consistent, to the maximum extent appropriate, with other goals and standards for all children established by the State;

(b) Has established performance indicators that the State will use to assess progress toward achieving those goals that, at a minimum, address the performance of children with disabilities on assessments, drop-out rates, and graduation rates;

(c) Every two years, will report to the Secretary and the public on the progress of the State, and of children with disabilities in the State, toward meeting the goals established under paragraph (a) of this section; and

(d) Based on its assessment of that progress, will revise its State improvement plan under subpart 1 of Part D of the Act as may be needed to improve its performance, if the State receives assistance under that subpart.

(Authority: 20 U.S.C. 1412(a)(16))

§ 300.138 Participation in assessments.

The State must have on file with the Secretary information to demonstrate that—

(a) Children with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations if necessary;

(b) As appropriate, the State or LEA—

(1) Develops guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in State and district-wide assessment programs;

(2) Develops alternate assessments in accordance with paragraph (b)(1) of this section; and

(3) Beginning not later than, July 1, 2000, conducts the alternate assessments described in paragraph (b)(2) of this section.

(Authority: 20 U.S.C. 1412(a)(17)(A))

Note: With respect to paragraph (b) of this section, it is assumed that only a small percentage of children with disabilities will need alternative assessments.

§ 300.139 Reports relating to assessments.

(a) *General.* In implementing the requirements of § 300.138, the SEA shall make available to the public, and report to the public with the same frequency and in the same detail as it reports on the assessment of nondisabled children, the following information:

(1) The number of children with disabilities participating—

(i) In regular assessments; and

(ii) The number of those children participating in alternate assessments.

(2) The performance results of the children described in paragraph (a)(1) of this section—

(i) On regular assessments (beginning not later than July 1, 1998); and

(ii) On alternate assessments (not later than July 1, 2000), if doing so would be statistically sound and would not result in the disclosure of performance results identifiable to individual children.

(b) *Combined reports.* Reports to the public under paragraph (a) of this section must include—

(1) Aggregated data that include the performance of children with disabilities together with all other children; and

(2) Disaggregated data on the performance of children with disabilities.

(c) *Disaggregation of data.* Data relating to the performance of children described under paragraph (a)(2) of this section must be disaggregated—

(1) For assessments conducted after July 1, 1998; and

(2) For assessments conducted before July 1, 1998, if the State is required to disaggregate the data prior to July 1, 1998.

(Authority: 20 U.S.C. 612(a)(17)(B))

Note: Paragraph (b) of this section requires a public agency to report aggregated data that include children with disabilities. However, a public agency is not precluded from also analyzing and reporting data in other ways (such as, maintaining a trendline that was established prior to including children with disabilities in those assessments).

§ 300.140 [Reserved]

§ 300.141 SEA responsibility for general supervision.

(a) The State must have on file with the Secretary information that shows that the requirements of § 300.600 are met.

(b) The information described under paragraph (a) of this section must include a copy of each State statute, State regulation, signed agreement between respective agency officials, and any other documents that show compliance with that paragraph.

(Authority: 20 U.S.C. 1412(a)(11))

§ 300.142 Methods of ensuring services.

(a) *Establishing responsibility for services.* The Chief Executive Officer or designee of that officer shall ensure that an interagency agreement or other mechanism for interagency coordination is in effect between each noneducational public agency described in paragraph (b) of this section and the SEA, in order to ensure that all services described in paragraph (b)(1) of this section that are needed to ensure FAPE is provided, including the provision of these services during the pendency of any dispute under paragraph (a)(3) of this section. The agreement or mechanism must include the following:

(1) *Agency financial responsibility.* An identification of, or a method for defining, the financial responsibility of each agency for providing services described in paragraph (b)(1) of this section to ensure FAPE to children with disabilities. The financial responsibility of each public agency described in paragraph (b) of this section, including the State Medicaid agency and other public insurers of children with disabilities, must precede the financial responsibility of the LEA (or the State agency responsible for developing the child's IEP).

(2) *Conditions and terms of reimbursement.* The conditions, terms, and procedures under which an LEA must be reimbursed by other agencies.

(3) *Interagency disputes.* Procedures for resolving interagency disputes (including procedures under which LEAs may initiate proceedings) under the agreement or other mechanism to secure reimbursement from other agencies or otherwise implement the provisions of the agreement or mechanism.

(4) *Coordination of services procedures.* Policies and procedures for agencies to determine and identify the interagency coordination responsibilities of each agency to promote the coordination and timely and appropriate delivery of services described in paragraph (b)(1) of this section.

(b) *Obligation of noneducational public agencies.*

(1) *General.* If any public agency other than an educational agency is otherwise obligated under Federal or State law, or assigned responsibility under State policy or pursuant to paragraph (a) of this section, to provide or pay for any services that are also considered special education or related services (such as, but not limited to, services described in § 300.5 relating to assistive technology devices, § 300.6 relating to assistive technology services, § 300.22 relating to related services, § 300.26 relating to supplementary aids and services, and § 300.27 relating to transition services) that are necessary for ensuring FAPE to children with disabilities within the State, the public agency shall fulfill that obligation or responsibility, either directly or through contract or other arrangement.

(2) *Reimbursement for services by noneducational public agency.* If a public agency other than an educational agency fails to provide or pay for the special education and related services described in paragraph (b)(1) of this section, the LEA (or State agency responsible for developing the child's IEP) shall provide or pay for these services to the child. The LEA or State agency may then claim reimbursement for the services from the noneducational public agency that failed to provide or pay for these services and that agency shall reimburse the LEA or State agency in accordance with the terms of the interagency agreement or other mechanism described in paragraph (a)(1) of this section, and the agreement described in paragraph (a)(2) of this section.

(c) *Special rule.* The requirements of paragraph (a) of this section may be met through—

(1) State statute or regulation;

(2) Signed agreements between respective agency officials that clearly identify the responsibilities of each agency relating to the provision of services; or

(3) Other appropriate written methods as determined by the Chief Executive Officer of the State or designee of that officer.

(d) *Information.* The State must have on file with the Secretary information to demonstrate that the requirements of paragraphs (a) through (c) of this section are met.

(e) *Children with disabilities who are covered by private insurance.*

(1) A public agency may not require parents of children with disabilities, if they would incur a financial cost, to use private insurance proceeds to pay for the services that must be provided to an eligible child under this part.

(2) For the purposes of this section, the term *financial costs* includes —

(i) An out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim, but not including incidental costs such as the time needed to file an insurance claim or the postage needed to mail the claim;

(ii) A decrease in available lifetime coverage or any other benefit under an insurance policy; and

(iii) An increase in premiums or the discontinuation of the policy.

(f) *Proceeds from public or private insurance.* Proceeds from public or private insurance may not be treated as program income for purposes of 34 CFR 80.25.

(Authority: 20 U.S.C. 1412(a)(12) (A), (B), and (C); 1401(8))

Note 1: The House Committee Report on Pub. L. 105–17 related to methods of ensuring services states:

A provision is added to the Act to strengthen the obligation to ensure that all services necessary to ensure a free appropriate public education are provided through the coordination of public educational and non-educational programs. This subsection is meant to reinforce two important principles: (1) That the State agency or LEA responsible for developing a child's IEP can look to noneducational agencies such as Medicaid to provide those services they (the non-educational agencies) are otherwise responsible for; and (2) that the State agency or LEA remains responsible for

ensuring that children receive all the services described in their IEPs in a timely fashion, regardless of whether another agency will ultimately pay for the services.

The Committee places particular emphasis in the bill on the relationship between schools and the State Medicaid Agency in order to clarify that health services provided to children with disabilities who are Medicaid-eligible and meet the standards applicable to Medicaid, are not disqualified for reimbursement by Medicaid agencies because they are provided services in a school context in accordance with the child's IEP. (H. Rep. 105-95, p. 92 (1997))

Note 2: The intent of paragraph (e) of this section is to make clear that services required under Part B of the Act must be provided at no cost to the child's parents, whether they have public or private insurance. The Department, in a Notice of Interpretation published Dec. 30, 1980 at 45 FR 66390 noted that both Part B of the Act and Section 504 of the Rehabilitation Act of 1973 prohibit a public agency from requiring parents, where they would incur a financial cost, to use insurance proceeds to pay for services that are required to be provided to a child with a disability under the FAPE requirements of those statutes. The use of parents' insurance proceeds to pay for services in these circumstances must be voluntary. For example, a family could not be required to access private insurance that is required to enable a child to receive Medicaid services, where that insurance use results in financial costs to the family.

Note 3: If the public agency cannot get parent consent to use private insurance, the public agency may use funds under this part to pay for the service. In addition, in order to avoid financial costs to parents who otherwise would consent to use private insurance, the public agency may use funds under this part to pay the costs of accessing the insurance, e.g., deductible or co-pay amounts.

Note 4: Paragraph (f) clarifies that, if a public agency receives funds from public or private insurance for services under this part, the public agency is not required to return those funds to the Department or to dedicate those funds for use in this program, although a public agency retains the option of using those funds in this program. If a public agency spends reimbursements from Federal funds (*e.g.*, Medicaid) for services under this part, those funds will not be considered ''State or local'' funds for purposes of the maintenance of effort provisions in §§ 300.154 and 300.231. This is because the expenditure that is reimbursed is considered to be an expenditure of funds from the source that provides the reimbursement.

§ 300.143 SEA implementation of safeguards.

The State must have on file with the Secretary the procedures that the SEA (and any agency assigned responsibility pursuant to § 300.600(d)) follows to inform each public agency of its responsibility for ensuring effective implementation of procedural safeguards for the children with disabilities served by that public agency.

(Authority: 20 U.S.C. 1412(a)(11); 1415(a))

§ 300.144 Hearing relating to LEA eligibility.

The State must have on file with the Secretary procedures to ensure that the SEA does not make any final determination that an LEA is not eligible for assistance under Part B of the Act without first giving the LEA reasonable notice and an opportunity for a hearing under 34 CFR 76.401(d).

(Authority: 20 U.S.C. 1412(a)(13))

§ 300.145 Recovery of funds for misclassified children.

The State must have on file with the Secretary policies and procedures that ensure that the State seeks to recover any funds provided under Part B of the Act for services to a child who is determined to be erroneously classified as eligible to be counted under section 611 (a) or (d) of the Act.

(Authority: 20 U.S.C. 1221e–3(a)(1))

§ 300.146 Suspension and expulsion rates.

The State must have on file with the Secretary information to demonstrate that the following requirements are met:

(a) *General.* The SEA examines data to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities—

(1) Among LEAs in the State; or

(2) Compared to the rates for nondisabled children within the agencies.

(b) *Review and revision of policies.* If the discrepancies described in paragraph (a) of this section are occurring, the SEA reviews and, if appropriate, revises (or requires the affected State agency or LEA to revise) its policies, procedures, and practices relating to the development and implementation of IEPs, the use of behavioral interventions, and procedural safeguards, to ensure that these policies, procedures, and practices comply with the Act.

(Authority: 20 U.S.C. 612(a)(22))

§ 300.147 Additional information if SEA provides direct services.

(a) If the SEA provides FAPE to children with disabilities, or provides direct services to these children, the agency—

(1) Shall comply with any additional requirements of §§ 300.220–300.230(a) and 300.234–300.250 as if the agency were an LEA; and

(2) May use amounts that are otherwise available to the agency under Part B of the Act to serve those children without regard to § 300.184 (relating to excess costs).

(b) The SEA must have on file with the Secretary information to demonstrate that it meets the requirements of paragraph (a)(1) of this section.

(Authority: 20 U.S.C. 1412(b))

§ 300.148 Public participation.

(a) The State must ensure that, prior to the adoption of any policies and procedures needed to comply with this part, there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities consistent with §§ 300.280–300.284.

(b) The State must have on file with the Secretary information to demonstrate that the requirements of paragraph (a) of this section are met.

(Authority: 20 U.S.C. 1412(a)(20))

§ 300.149 [Reserved]

§ 300.150 State advisory panel.

The State must have on file with the Secretary information to demonstrate that the State has established and maintains an advisory panel for the purpose of providing policy guidance with respect to special education and related services for children with disabilities in the State in accordance with the requirements of §§ 300.650–300.653.

(Authority: 20 U.S.C. 1412(a)(21)(A))

§ 300.151 [Reserved]

§ 300.152 Prohibition against commingling.

The State must have on file with the Secretary an assurance satisfactory to the Secretary that the funds under Part B of the Act are not commingled with State funds.

(Authority: 20 U.S.C. 1412(a)(18)(B))

Note: This assurance is satisfied by the use of a separate accounting system that includes an audit trail of the expenditure of the Part B funds. Separate bank accounts are not required. (See 34 CFR 76.702 (Fiscal control and fund accounting procedures).)

§ 300.153 State-level nonsupplanting.

(a) *General.* (1) Except as provided in § 300.230, funds paid to a State under Part B of the Act must be used to supplement the level of Federal, State, and local funds (including funds that are not under the direct control of the SEA or LEAs) expended for special education and related services provided to children with disabilities under Part B of the Act and in no case to supplant these Federal, State, and local funds.

(2) The State must have on file with the Secretary information to demonstrate to the satisfaction of the Secretary that the requirements of paragraph (a)(1) of this section are met.

(b) *Waiver.* If the State provides clear and convincing evidence that all children with disabilities have available to them FAPE, the Secretary may waive, in whole or in part, the requirements of paragraph (a) of this section if the Secretary concurs with the evidence provided by the State under § 300.589.

(Authority: 20 U.S.C. 1412(a)(18)(c))

§ 300.154 Maintenance of State financial support.

(a) *General.* The State must have on file with the Secretary information to demonstrate that the State will not reduce the amount of State financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year.

(b) *Reduction of funds for failure to maintain support.* The Secretary reduces the allocation of funds under section 611 of the Act for any fiscal year following the fiscal year in which the State fails to comply with the requirement of paragraph (a) of this section by the same amount by which the State fails to meet the requirement.

(c) *Waivers for exceptional or uncontrollable circumstances.* The Secretary may waive the requirement of paragraph (a) of this section for a State, for one fiscal year at a time, if the Secretary determines that—

(1) Granting a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State; or

(2) The State meets the standard in § 300.589 for a waiver of the requirement to supplement, and not to supplant, funds received under Part B of the Act.

(d) *Subsequent years.* If, for any fiscal year, a State fails to meet the requirement of paragraph (a) of this section, including any year for which the State is granted a waiver under paragraph (c) of this section, the financial support required of the State in future years under paragraph (a) of this section must be the amount that would have been required in the absence of that failure and not the reduced level of the State's support.

(Authority: 20 U.S.C. 612(a)(19))

§ 300.155 Policies and procedures for use of Part B funds.

The State must have on file with the Secretary policies and procedures designed to ensure that funds paid to the State under Part B of the Act are spent in accordance with the provisions of Part B.

(Authority: 20 U.S.C. 1412(a)(18)(A))

§ 300.156 Annual description of use of Part B funds.

(a) In order to receive a grant in any fiscal year a State must annually describe—

(1) How amounts retained under § 300.602 will be used to meet the requirements of this part;

(2) How those amounts will be allocated among the activities described in §§ 300.621 and 300.370 to meet State priorities based on input from LEAs; and

(3) The percentage of those amounts, if any, that will be distributed to LEAs by formula.

(b) If a State's plans for use of its funds under §§ 300.370 and 300.620 for the forthcoming year do not change from the prior year, the State may submit a letter to that effect to meet the requirement in paragraph (a) of this section.

(Authority: 20 U.S.C. 1411(f)(5))

LEA and State Agency Eligibility—General

§ 300.180 Condition of assistance.

An LEA or State agency is eligible for assistance under Part B of the Act for a fiscal year if the agency demonstrates to the satisfaction of the SEA that it meets the conditions in §§ 300.220–300.250.

(Authority: 20 U.S.C. 1413(a))

§ 300.181 Exception for prior LEA or State agency policies and procedures on file with the SEA.

If an LEA or State agency described in § 300.194 has on file with the SEA policies and procedures that demonstrate that the LEA or State agency meets any requirement of § 300.180, including any policies and procedures filed under Part B of the Act as in effect before June 4, 1997, the SEA shall consider the LEA or State agency to have met the requirement for purposes of receiving assistance under Part B of the Act.

(Authority: 20 U.S.C. 1413(b)(1))

§ 300.182 Amendments to LEA policies and procedures.

(a) *Modification made by an LEA or a State agency.* (1) Subject to paragraph (b) of this section, policies and procedures submitted by an LEA or a State agency in accordance with this subpart remain in effect until it submits to the SEA the modifications that the LEA or State agency decides are necessary.

(2) The provisions of this subpart apply to a modification to an LEA's or State agency's policies and procedures in the same manner and to the same extent that they apply to the LEA's or State agency's original policies and procedures.

(b) *Modifications required by the SEA.* The SEA may require an LEA or a State agency to modify its policies and procedures, but only to the extent necessary to ensure the LEA's or State agency's compliance with this part, if—

(1) After June 4, 1997, the provisions of the Act or the regulations in this part are amended;

(2) There is a new interpretation of the Act by Federal or State courts; or

(3) There is an official finding of noncompliance with Federal or State law or regulations.

(Authority: 20 U.S.C. 1413(b))

§ 300.183 [Reserved]

§ 300.184 Excess cost requirement.

(a) *General.* Amounts provided to an LEA under Part B of the Act may be used only to pay the excess costs of providing special education and related services to children with disabilities.

(b) *Definition.* As used in this part, the term *excess costs* means those costs that are in excess of the average annual per-student expenditure in an LEA during the preceding school year for an elementary or secondary school student, as may be appropriate. Excess costs must be computed after deducting—

(1) Amounts received—

(i) Under Part B of the Act;

(ii) Under Part A of title I of the Elementary and Secondary Education Act of 1965; or

(iii) Under Part A of title VII of that Act; and

(2) Any State or local funds expended for programs that would qualify for assistance under any of those parts.

(c) *Limitation on use of Part B funds.* (1) The excess cost requirement prevents an LEA from using funds provided under Part B of the Act to pay for all of the costs directly attributable to the education of a child with a disability, subject to paragraph (c)(2) of this section.

(2) The excess cost requirement does not prevent an LEA from using Part B funds to pay for all of the costs directly attributable to the education of a child with a disability in any of the ages 3, 4, 5, 18, 19, 20, or 21, if no local or State funds are available for nondisabled

children in that age range. However, the LEA must comply with the nonsupplanting and other requirements of this part in providing the education and services.

(Authority: 20 U.S.C. 1401(7), 1413(a)(2)(A))

§ 300.185 Meeting the excess cost requirement.

(a)(1) *General.* An LEA meets the excess cost requirement if it has spent at least a minimum average amount for the education of its children with disabilities before funds under Part B of the Act are used.

(2) The amount described in paragraph (a)(1) of this section is determined using the formula in § 300.184(b). This amount may not include capital outlay or debt service.

(b) *Joint establishment of eligibility.* If two or more LEAs jointly establish eligibility in accordance with § 300.190, the minimum average amount is the average of the combined minimum average amounts determined under § 300.184 in those agencies for elementary or secondary school students, as the case may be.

(Authority: 20 U.S.C. 1413(a)(2)(A))

Note: The excess cost requirement means that the LEA must spend a certain minimum amount for the education of its children with disabilities before Part B funds are used. This ensures that children served with Part B funds have at least the same average amount spent on them, from sources other than Part B, as do the children in the school district in elementary or secondary school as the case may be.

Excess costs are those costs of special education and related services that exceed the minimum amount. Therefore, if an LEA can show that it has (on the average) spent the minimum amount for the education of each of its children with disabilities, it has met the excess cost requirement, and all additional costs are excess costs. Part B funds can then be used to pay for these additional costs.

§§ 300.186–300.189 [Reserved]

§ 300.190 Joint establishment of eligibility.

(a) *General.* An SEA may require an LEA to establish its eligibility jointly with another LEA if the SEA determines that the LEA would be ineligible under this section because the agency would not be able to establish and maintain programs of sufficient size and scope to effectively meet the needs of children with disabilities.

(b) *Charter school exception.* An SEA may not require a charter school that is an LEA to jointly establish its eligibility under paragraph (a) of this section unless it is explicitly permitted to do so under the State's charter school statute.

(c) *Amount of payments.* If an SEA requires the joint establishment of eligibility under paragraph (a) of this section, the total amount of funds made available to the affected LEAs must be equal to the sum of the payments that each LEA would have received under §§ 300.711–300.714 if the agencies were eligible for these payments.

(Authority: 20 U.S.C. 1413(e) (1), and (2))

§ 300.191 [Reserved]

§ 300.192 Requirements for establishing eligibility.

(a) *Requirements for LEAs in general.* LEAs that establish joint eligibility under this section must—

(1) Adopt policies and procedures that are consistent with the State's policies and procedures under §§ 300.121–300.156; and

(2) Be jointly responsible for implementing programs that receive assistance under Part B of the Act.

(b) *Requirements for educational service agencies in general.* If an educational service agency is required by State law to carry out programs under Part B of the Act, the joint responsibilities given to LEAs under Part B of the Act—

(1) Do not apply to the administration and disbursement of any payments received by that educational service agency; and

(2) Must be carried out only by that educational service agency.

(c) *Additional requirement.* Notwithstanding any other provision of §§ 300.190–300.192, an educational service agency shall provide for the education of children with disabilities in the least restrictive environment, as required by § 300.130.

(Authority: 20 U.S.C. 1413(e) (3), and (4))

§ 300.193 [Reserved]

§ 300.194 State agency eligibility.

Any State agency that desires to receive a subgrant for any fiscal year under §§ 300.711–300.714 must demonstrate to the satisfaction of the SEA that—

(a) All children with disabilities who are participating in programs and projects funded under Part B of the Act receive FAPE, and that those children and their parents are provided all the rights and procedural safeguards described in this part; and

(b) The agency meets the other conditions of this subpart that apply to LEAs.

(Authority: 20 U.S.C. 1413(i))

§ 300.195 [Reserved]

§ 300.196 Notification of LEA or State agency in case of ineligibility.

If the SEA determines that an LEA or State agency is not eligible under Part B of the Act, the SEA shall—

(a) Notify the LEA or State agency of that determination; and

(b) Provide the LEA or State agency with reasonable notice and an opportunity for a hearing.

(Authority: 20 U.S.C. 1413(c))

§ 300.197 LEA and State agency compliance.

(a) *General.* If the SEA, after reasonable notice and an opportunity for a hearing, finds that an LEA or State agency that has been determined to be eligible under this section is failing to comply with any requirement described in §§ 300.220–300.250, the SEA shall reduce or may not provide any further payments to the LEA or State agency until the SEA is satisfied that the LEA or State agency is complying with that requirement.

(b) *Notice requirement.* Any State agency or LEA in receipt of a notice described in paragraph (a) of this section shall, by means of public notice, take the measures necessary to bring the pendency of an action pursuant to this section to the attention of the public within the jurisdiction of the agency.

(c) In carrying out its functions under this section, each SEA shall consider any decision resulting from a hearing under §§ 300.507–300.528 that is adverse to the LEA or State agency involved in the decision.

(Authority: 20 U.S.C. 1413(d))

LEA Eligibility—Specific Conditions

§ 300.220 Consistency with State policies.

(a) *General.* The LEA, in providing for the education of children with disabilities within its jurisdiction, must have in effect policies, procedures, and programs that are consistent with the State policies and procedures established under §§ 300.121–300.156.

(b) *Policies on file with SEA.* The LEA must have on file with the SEA the policies and procedures described in paragraph (a) of this section.

(Authority: 20 U.S.C. 1413(a)(1))

§ 300.221 LEA and State agency implementation of CSPD.

The LEA must have on file with the SEA information to demonstrate that—

(a) All personnel necessary to carry out Part B of the Act within the jurisdiction of the agency are appropriately and adequately prepared, consistent with the requirements of §§ 300.380–300.382; and

(b) To the extent the LEA determines appropriate, it shall contribute to and use the comprehensive system of personnel development of the State established under § 300.135.

(Authority: 20 U.S.C. 1413(a)(3))

§ 300.222–300.229 [Reserved]

§ 300.230 Use of amounts.

The LEA must have on file with the SEA information to demonstrate that amounts provided to the LEA under Part B of the Act—

(a) Will be expended in accordance with the applicable provisions of this part;

(b) Will be used only to pay the excess costs of providing special education and related services to children with disabilities, consistent with §§ 300.184–300.185; and

(c) Will be used to supplement State, local, and other Federal funds and not to supplant those funds.

(Authority: 20 U.S.C. 1413(a)(2)(A))

§ 300.231 Maintenance of effort.

(a) *General.* Except as provided in § 300.232 and § 300.233, funds provided to the LEA under Part B of the Act may not be used to reduce the level of expenditures for the education of children with disabilities made by the LEA from local funds below the level of those expenditures for the preceding fiscal year.

(b) *Information.* The LEA must have on file with the SEA information to demonstrate that the requirements of paragraph (a) of this section are met.

(Authority: 20 U.S.C. 1413(a)(2)(A))

§ 300.232 Exception to maintenance of effort.

An LEA may reduce the level of expenditures by the LEA under Part B of the Act below the level of those expenditures for the preceding fiscal year if the reduction is attributable to—

(a) The voluntary departure, by retirement or otherwise, or departure for just cause, of special education or related services personnel, who are replaced by qualified, lower-salaried staff;

(b) A decrease in the enrollment of children with disabilities;

(c) The termination of the obligation of the agency, consistent with this part, to provide a program of special education to a particular child with a disability that is an exceptionally costly program, as determined by the SEA, because the child—

(1) Has left the jurisdiction of the agency;

(2) Has reached the age at which the obligation of the agency to provide FAPE to the child has terminated; or

(3) No longer needs the program of special education; or

(d) The termination of costly expenditures for long-term purchases, such as the acquisition of equipment or the construction of school facilities.

(Authority: 20 U.S.C. 1413(a)(2)(B))

Note: With respect to the voluntary departure of special education personnel described in paragraph (a) of this section, the House Committee Report on Pub. L. 105–17 (1) clarifies that the intended focus of this exception is on special education personnel who are paid at or near the top of the salary schedule, and (2) sets out guidelines under which this exception may be invoked by an LEA:

This exception is included in recognition that, in some situations, when higher-salaried personnel depart from their positions in special education, they are replaced by qualified, lower-salaried staff. In such situations, as long as certain safeguards are in effect, the LEA should not be required to maintain the level of the higher-salaried personnel. In order for the LEA to invoke this exception, the agency must ensure that such voluntary retirement or resignation and replacement are in full conformity with existing school board policies in the agency, with the applicable collective bargaining agreement in effect at that time, and with applicable State statutes. (H. Rep. 105–95, p. 96 (1997))

§ 300.233 Treatment of federal funds in certain fiscal years.

(a)(1) Subject to paragraphs (a)(2) and (b) of this section, for any fiscal year for which amounts appropriated to carry out section 611 of the Act exceeds $4,100,000,000, an LEA may treat as local funds up to 20 percent of the amount of funds it receives under Part B of the Act that exceeds the amount it received under Part B of the Act for the previous fiscal year.

(2) The requirements of §§ 300.230(c) and 300.231 do not apply with respect to the amount that may be treated as local funds under paragraph (a)(1) of this section.

(b) If an SEA determines that an LEA is not meeting the requirements of this part, the SEA may prohibit the LEA from treating funds received under Part B of the Act as local funds under paragraph (a)(1) of this section for any fiscal year, but only if it is authorized to do so by the State constitution or a State statute.

(Authority: 20 U.S.C. 1413(a)(2)(C))

§ 300.234 Schoolwide programs under title I of the ESEA.

(a) An LEA may use funds received under Part B of the Act for any fiscal year to carry out a schoolwide program under section 1114 of the Elementary and Secondary Education Act of 1965, except that the amount used in any program may not exceed—

(1)(i) The amount received by the LEA under Part B for that fiscal year; divided by

(ii) The number of children with disabilities in the jurisdiction of the LEA; multiplied by

(2) The number of children with disabilities participating in the schoolwide program.

(b) The funds described in paragraph (a) of this section may be used without regard to the requirements of § 300.230(a).

(c) The funds described in paragraph (a) of this section must be considered as Federal Part B funds for purposes of the calculations required by §§ 300.230 (b) and (c).

(d) Except as provided in paragraphs (b) and (c) of this section, all other requirements of Part B must be met by an LEA using Part B funds in accordance with paragraph (a) of this section.

Note: Although IDEA funds may be combined in a schoolwide project, and thus used for services that are not special education and related services, all other requirements of the IDEA must still be met for children with disabilities in schoolwide project schools that combine IDEA funds in a schoolwide project. Thus, children with disabilities in schoolwide project schools must still receive services in accordance with a properly developed IEP and must still be afforded all of the rights and services guaranteed to children with disabilities under the IDEA.

(Authority: 20 U.S.C. 1413(a)(2)(D))

§ 300.235 Permissive use of funds.

(a) *General.* Subject to paragraph (b) of this section, funds provided to an LEA under Part B of the Act may be used for the following activities:

(1) *Services and aids that also benefit nondisabled children.* For the costs of special education and related services and supplementary aids and services provided in a regular class or other education-related setting to a child with a disability in accordance with the IEP of the child, even if one or more nondisabled children benefit from these services.

(2) *Integrated and coordinated services system.* To develop and implement a fully integrated and coordinated services system in accordance with § 300.244.

(b) *Application for certain use of funds.* An LEA does not violate §§ 300.152, 300.230, and 300.231 based on its use of funds provided under Part B of the Act in accordance with

paragraphs (a)(1) and (a)(2) of this section.

(Authority: 20 U.S.C. 1413(a)(4))

§ 300.236–300.239 [Reserved]

§ 300.240 Information for SEA.

(a) The LEA shall provide the SEA with information necessary to enable the SEA to carry out its duties under Part B of the Act, including, with respect to §§ 300.137 and 300.138, information relating to the performance of children with disabilities participating in programs carried out under Part B of the Act.

(b) The LEA must have on file with the SEA an assurance satisfactory to the SEA that the LEA will comply with the requirements of paragraph (a) of this section.

(Authority: 20 U.S.C. 1413(a)(6))

§ 300.241 Treatment of charter schools and their students.

The LEA must have on file with the SEA information to demonstrate that in carrying out this part with respect to charter schools that are public schools of the LEA, the LEA will—

(a) Serve children with disabilities attending those schools in the same manner as it serves children with disabilities in its other schools; and

(b) Provide funds under Part B of the Act to those schools in the same manner as it provides those funds to its other schools.

(Authority: 20 U.S.C. 1413(a)(5))

Note: The provisions of this part that apply to other public schools also apply to public charter schools. Therefore, children with disabilities who attend public charter schools and their parents retain all rights under this part. With respect to this provision, the House Committee Report on Pub. L. 105–17 states:

''The Committee expects that charter schools will be in full compliance with Part B.'' (H. Rep. 105–95, p. 97 (1997))

§ 300.242 Public information.

The LEA must have on file with the SEA information to demonstrate to the satisfaction of the SEA that it will make available to parents of children with disabilities and to the general public all documents relating to the eligibility of the agency under Part B of the Act.

(Authority: 20 U.S.C. 1413(a)(7))

§ 300.243 [Reserved]

§ 300.244 Coordinated services system.

(a) *General.* An LEA may not use more than 5 percent of the amount the agency receives under Part B of the Act for any fiscal year, in combination with other amounts (which must include amounts other than education funds), to develop and implement a coordinated services system designed to improve results for children and families, including children with disabilities and their families.

(b) *Activities.* In implementing a coordinated services system under this section, an LEA may carry out activities that include—

(1) Improving the effectiveness and efficiency of service delivery, including developing strategies that promote accountability for results;

(2) Service coordination and case management that facilitate the linkage of IEPs under Part B of the Act and IFSPs under Part C of the Act with individualized service plans under multiple Federal and State programs, such as title I of the Rehabilitation Act of 1973 (vocational rehabilitation), title XIX of the Social Security Act (Medicaid), and title XVI of the Social Security Act (supplemental security income);

(3) Developing and implementing interagency financing strategies for the provision of education, health, mental health, and social services, including transition services and related services under the Act; and

(4) Interagency personnel development for individuals working on coordinated services.

(c) *Coordination with certain projects under Elementary and Secondary Education Act of 1965.* If an LEA is carrying out a coordinated services project under title XI of the Elementary and Secondary Education Act of 1965 and a coordinated services project under Part B of the Act in the same schools, the agency shall use the amounts under §§ 300.244 in accordance with the requirements of that title.

(Authority: 20 U.S.C. 1413(f))

§ 300.245 School-based improvement plan.

(a) *General.* Each LEA may, in accordance with paragraph (b) of this section, use funds made available under Part B of the Act to permit a public school within the jurisdiction of the LEA to design, implement, and evaluate a school-based improvement plan that is consistent with the purposes described in section 651(b) of the Act and that is designed to improve educational and transitional results for all children with disabilities and, as appropriate, for other children consistent with § 300.235 (a) and (b) in that public school.

(b) *Authority.*

(1) *General.* A SEA may grant authority to an LEA to permit a public school described in § 300.245 (through a school-based standing panel established under § 300.247(b)) to design, implement, and evaluate a school-based improvement plan described in § 300.245 for a period not to exceed 3 years.

(2) *Responsibility of LEA.* If a SEA grants the authority described in paragraph (b)(1) of this section, an LEA that is granted this authority must have the sole responsibility of oversight of all activities relating to the design, implementation, and evaluation of any school-based improvement plan that a public school is permitted to design under this section.

(Authority: 20 U.S.C. 1413 (g)(1) and (g)(2)).

§ 300.246 Plan requirements.

A school-based improvement plan described in § 300.245 must—

(a) Be designed to be consistent with the purposes described in section 651(b) of the Act and to improve educational and transitional results for all children with disabilities and, as appropriate, for other children consistent with § 300.235 (a) and (b), who attend the school for which the plan is designed and implemented;

(b) Be designed, evaluated, and, as appropriate, implemented by a school-based standing panel established in accordance with § 300.247(b);

(c) Include goals and measurable indicators to assess the progress of the public school in meeting these goals; and

(d) Ensure that all children with disabilities receive the services described in their IEPs.

(Authority: 20 U.S.C. 1413(g)(3))

§ 300.247 Responsibilities of the LEA.

An LEA that is granted authority under § 300.245(b) to permit a public school to design, implement, and evaluate a school-based improvement plan shall—

(a) Select each school under the jurisdiction of the agency that is eligible to design, implement, and evaluate the plan;

(b) Require each school selected under paragraph (a) of this section, in accordance with criteria established by the LEA under paragraph (c) of this section, to establish a school-based standing panel to carry out the duties described in § 300.246(b);

(c) Establish—

(1) Criteria that must be used by the LEA in the selection of an eligible school under paragraph (a) of this section;

(2) Criteria that must be used by a public school selected under paragraph (a) of this section in the establishment of a school-based standing panel to carry out the duties described in

§ 300.246(b) and that ensure that the membership of the panel reflects the diversity of the community in which the public school is located and includes, at a minimum—

(i) Parents of children with disabilities who attend a public school, including parents of children with disabilities from unserved and underserved populations, as appropriate;

(ii) Special education and general education teachers of public schools;

(iii) Special education and general education administrators, or the designee of those administrators, of those public schools; and

(iv) Related services providers who are responsible for providing services to the children with disabilities who attend those public schools; and

(3) Criteria that must be used by the LEA with respect to the distribution of funds under Part B of the Act to carry out this section;

(d) Disseminate the criteria established under paragraph (c) of this section to local school district personnel and local parent organizations within the jurisdiction of the LEA;

(e) Require a public school that desires to design, implement, and evaluate a school-based improvement plan to submit an application at the time, in the manner and accompanied by the information, that the LEA shall reasonably require; and

(f) Establish procedures for approval by the LEA of a school-based improvement plan designed under Part B of the Act.

(Authority: 20 U.S.C. 1413(g)(4))

§ 300.248 Limitation.

A school-based improvement plan described in § 300.245(a) may be submitted to an LEA for approval only if a consensus with respect to any matter relating to the design, implementation, or evaluation of the goals of the plan is reached by the school-based standing panel that designed the plan.

(Authority: 20 U.S.C. 1413(g)(5))

§ 300.249 Additional requirements.

(a) *Parental involvement.* In carrying out the requirements of §§ 300.245–300.250, an LEA shall ensure that the parents of children with disabilities are involved in the design, evaluation, and, if appropriate, implementation of school-based improvement plans in accordance with this section.

(b) *Plan approval.* An LEA may approve a school-based improvement plan of a public school within the jurisdiction of the agency for a period of 3 years, if—

(1) The approval is consistent with the policies, procedures, and practices established by the LEA and in accordance with §§ 300.245–300.250; and

(2) A majority of parents of children who are members of the school-based standing panel, and a majority of other members of the school-based standing panel that designed the plan, agree in writing to the plan.

(Authority: 20 U.S.C. 1413(g)(6))

§ 300.250 Extension of plan.

If a public school within the jurisdiction of an LEA meets the applicable requirements and criteria described in §§ 300.246 and 300.247 at the expiration of the 3-year approval period described § 300.249(b), the agency may approve a school-based improvement plan of the school for an additional 3-year period.

(Authority: 20 U.S.C. 1413(g)(7))

Secretary of the Interior— Eligibility

§ 300.260 Submission of information.

The Secretary may provide the Secretary of the Interior amounts under § 300.715 for a fiscal year only if the Secretary of the Interior submits to the Secretary information that—

(a) Meets the requirements of section 612(a)(1), (3)–(9), (10) (B), (C), (11)–(12), (14)–(17), (20), (21) and (22) of the Act (including monitoring and evaluation activities);

(b) Meets the requirements of section 612(b) and (e) of the Act;

(c) Meets the requirements of section 613(a) (1), (2)(A)(i), (6) and (7) of the Act;

(d) Meets the requirements of this part that implement the sections of the Act listed in paragraphs (a)–(c) of this section;

(e) Includes a description of how the Secretary of the Interior will coordinate the provision of services under Part B of the Act with LEAs, tribes and tribal organizations, and other private and Federal service providers;

(f) Includes an assurance that there are public hearings, adequate notice of the hearings, and an opportunity for comment afforded to members of tribes, tribal governing bodies, and affected local school boards before the adoption of the policies, programs, and procedures described in paragraph (a) of this section;

(g) Includes an assurance that the Secretary of the Interior will provide the information that the Secretary may require to comply with section 618 of the Act, including data on the number of children and youth with disabilities served and the types and amounts of services provided and needed;

(h) Includes an assurance that the Secretary of the Interior and the Secretary of Health and Human Services have entered into a memorandum of agreement, to be provided to the Secretary, for the coordination of services, resources, and personnel between their respective Federal, State, and local offices and with State and LEAs and other entities to facilitate the provision of services to Indian children with disabilities residing on or near reservations (the agreement must provide for the apportionment of responsibilities and costs including, but not limited to, child find, evaluation, diagnosis, remediation or therapeutic measures, and (if appropriate) equipment and medical or personal supplies as needed for a child to remain in school or a program).

(i) Includes an assurance that the Department of the Interior will cooperate with the Department in its exercise of monitoring and oversight of this application, and any agreements entered into between the Secretary of the Interior and other entities under Part B of the Act, and will fulfill its duties under Part B of the Act. Section 616(a) of the Act applies to the information described in this section.

(Authority: 20 U.S.C. 1411(i)(2))

§ 300.261 Public participation.

In fulfilling the requirements of § 300.260 the Secretary of the Interior shall provide for public participation consistent with §§ 300.280–300.284.

(Authority: 20 U.S.C. 1411(i))

§ 300.262 Use of Part B funds.

(a) The Department of the Interior may use five percent of its payment under § 300.715 in any fiscal year, or $500,000, whichever is greater, for administrative costs in carrying out the provisions of this part.

(b) Payments to the Secretary of the Interior under § 300.716 must be used in accordance with that section.

(Authority: 20 U.S.C. 1411(i))

§ 300.263 Plan for coordination of services.

(a) The Secretary of the Interior shall develop and implement a plan for the coordination of services for all Indian children with disabilities residing on reservations covered under Part B of the Act.

(b) The plan must provide for the coordination of services benefiting these children from whatever source, including tribes, the Indian Health Service, other BIA divisions, and other Federal agencies.

(c) In developing the plan, the Secretary of the Interior shall consult with all interested and involved parties.

(d) The plan must be based on the needs of the children and the system best suited for meeting those needs, and may involve the establishment of cooperative agreements between the BIA, other Federal agencies, and other entities.

(e) The plan also must be distributed upon request to States, State and LEAs, and other agencies providing services to infants, toddlers, and children with disabilities, to tribes, and to other interested parties.

(Authority: 20 U.S.C. 1411(i)(4))

§ 300.264 Definitions.

(a) *Indian.* As used in this part, the term *Indian* means an individual who is a member of an Indian tribe.

(b) *Indian tribe.* As used in this part, the term *Indian tribe* means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaska Native village or regional village corporation (as defined in or established under the Alaska Native Claims Settlement Act).

(Authority: 20 U.S.C. 1401(9) and (10))

§ 300.265 Establishment of advisory board.

(a) To meet the requirements of section 612(a)(21) of the Act, the Secretary of the Interior shall establish, not later than December 4, 1997 under the BIA, an advisory board composed of individuals involved in or concerned with the education and provision of services to Indian infants, toddlers, children, and youth with disabilities, including Indians with disabilities, Indian parents or guardians of the children, teachers, service providers, State and local educational officials, representatives of tribes or tribal organizations, representatives from State Interagency Coordinating Councils under section 641 of the Act in States having reservations, and other members representing the various divisions and entities of the BIA. The chairperson must be selected by the Secretary of the Interior.

(b) The advisory board shall—

(1) Assist in the coordination of services within the BIA and with other local, State, and Federal agencies in the provision of education for infants, toddlers, and children with disabilities;

(2) Advise and assist the Secretary of the Interior in the performance of the Secretary's responsibilities described in section 611(i) of the Act;

(3) Develop and recommend policies concerning effective inter- and intra-agency collaboration, including modifications to regulations, and the elimination of barriers to inter- and intra-agency programs and activities;

(4) Provide assistance and disseminate information on best practices, effective program coordination strategies, and recommendations for improved educational programming for Indian infants, toddlers, and children with disabilities; and

(5) Provide assistance in the preparation of information required under § 300.260(g).

(Authority: 20 U.S.C. 1411(i)(5))

§ 300.266 Annual reports.

The advisory board established under § 300.265 shall prepare and submit to the Secretary of the Interior and to the Congress an annual report containing a description of the activities of the advisory board for the preceding year.

(Authority: 20 U.S.C. 1411(i)(6)(A))

§ 300.267 Applicable regulations.

The Secretary of the Interior shall comply with the requirements of §§ 300.301–300.303, 300.305–300.309, 300.340–300.348, 300.351, 300.360–300.382, 300.400–300.402, 300.500–300.586, 300.600–300.621, and 300.660–300.662.

(Authority: 20 U.S.C. 1411(i)(2)(A))

Public Participation

§ 300.280 Public hearings before adopting State policies and procedures.

Prior to its adoption of State policies and procedures related to this part, the SEA shall—

(a) Make the policies and procedures available to the general public;

(b) Hold public hearings; and

(c) Provide an opportunity for comment by the general public on the policies and procedures.

(Authority: 20 U.S.C. 1412(a)(20))

§ 300.281 Notice.

(a) The SEA shall provide notice to the general public of the public hearings.

(b) The notice must be in sufficient detail to inform the general public about—

(1) The purpose and scope of the State policies and procedures and their relation to Part B of the Act;

(2) The availability of the State policies and procedures;

(3) The date, time, and location of each public hearing;

(4) The procedures for submitting written comments about the policies and procedures; and

(5) The timetable for submitting the policies and procedures to the Secretary for approval.

(c) The notice must be published or announced—

(1) In newspapers or other media, or both, with circulation adequate to notify the general public about the hearings; and

(2) Enough in advance of the date of the hearings to afford interested parties throughout the State a reasonable opportunity to participate.

(Authority: 20 U.S.C. 1412(a)(20))

§ 300.282 Opportunity to participate; comment period.

(a) The SEA shall conduct the public hearings at times and places that afford interested parties throughout the State a reasonable opportunity to participate.

(b) The policies and procedures must be available for comment for a period of at least 30 days following the date of the notice under § 300.281.

(Authority: 20 U.S.C. 1412(a)(20))

§ 300.283 Review of public comments before adopting policies and procedures.

Before adopting the policies and procedures, the SEA shall—

(a) Review and consider all public comments; and

(b) Make any necessary modifications in those policies and procedures.

(Authority: 20 U.S.C. 1412(a)(20))

§ 300.284 Publication and availability of approved policies and procedures.

After the Secretary approves a State's policies and procedures, the SEA shall give notice in newspapers or other media, or both, that the policies and procedures are approved. The notice must name places throughout the State where the policies and procedures are available for access by any interested person.

(Authority: 20 U.S.C. 1412(a)(20))

Subpart C—Services

Free Appropriate Public Education.

§ 300.300 Provision of FAPE.

(a) *General.* Subject to paragraphs (b) and (c) of this section and § 300.311, each State receiving assistance under this part shall ensure that FAPE is available to all children with disabilities, aged 3 through 21, residing in the State, including children with disabilities who have been suspended or expelled from school.

(b) *Exception for age ranges 3–5 and 18–21.* (1) This paragraph provides the rules for applying the requirements in paragraph (a) of this section to children with disabilities aged 3, 4, 5, 18, 19, 20 and 21 within the State:

(2) If State law or a court order requires the State to provide education

for children with disabilities in any disability category in any of these age groups, the State must make FAPE available to all children with disabilities of the same age who have that disability.

(3) If a public agency provides education to nondisabled children in any of these age groups, it must make FAPE available to at least a proportionate number of children with disabilities of the same age.

(4) If a public agency provides education to 50 percent or more of its children with disabilities in any disability category in any of these age groups, it must make FAPE available to all its children with disabilities of the same age who have that disability. This provision does not apply to children aged 3 through 5 for any fiscal year for which the State receives a grant under section 619(a)(1) of the Act.

(5) If a public agency provides education to a child with a disability in any of these age groups, it must make FAPE available to that child and provide that child and his or her parents all of the rights under Part B of the Act and this part.

(6) A State is not required to make FAPE available to a child with a disability in one of these age groups if—

(i) State law expressly prohibits, or does not authorize, the expenditure of public funds to provide education to nondisabled children in that age group; or

(ii) The requirement is inconsistent with a court order that governs the provision of free public education to children with disabilities in that State.

(c) *Children aged 3 through 21 on Indian reservations.* With the exception of children identified in § 300.715(b) and (c), the SEA shall ensure that all of the requirements of Part B are implemented for all children aged 3 through 21 on reservations.

(Authority: 20 U.S.C. 1412(a)(1), 1411(i)(1)(C), S. Rep. No. 94–168, p. 19 (1975))

Note 1: The requirement to make FAPE available applies to all children with disabilities within the State who are in the age ranges required under § 300.300 and who need special education and related services. This includes children with disabilities already in school and children with less severe disabilities.

Note 2: In order to be in compliance with § 300.300, each State must ensure that the requirement to identify, locate, and evaluate all children with disabilities is fully implemented by public agencies throughout the State.

Note 3: Under the Act, the age range for the child find requirement (birth through 21) is greater than the mandated age range for providing FAPE. One reason for the broader age requirement under ''child find'' is to enable States to be aware of and plan for younger children who will require special education and related services, especially in any case in which infants and toddlers with disabilities are not participating in the early intervention program under Part C of the Act. It also ties in with the full educational opportunity goal requirement that has the same age range as child find. Moreover, while a State is not required to provide FAPE to children with disabilities below the age ranges mandated under § 300.300, the State may, at its discretion, extend services to those children. (See note 3 following § 300.125 regarding the relationship between the child find requirements under Part B of the Act and those under Part C of the Act.)

§ 300.301 FAPE—methods and payments.

(a) Each State may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of this part. For example, if it is necessary to place a child with a disability in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement.

(b) Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a child with a disability.

(Authority: 20 U.S.C. 1401(8), 1412(a)(1))

§ 300.302 Residential placement.

If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(Authority: 20 U.S.C. 1412(a)(1), 1412(a)(10)(B))

Note: This requirement applies to placements that are made by public agencies for educational purposes, and includes placements in State-operated schools for children with disabilities, such as a State school for students with deafness or students with blindness.

§ 300.303 Proper functioning of hearing aids.

Each public agency shall ensure that the hearing aids worn in school by children with hearing impairments, including deafness, are functioning properly.

(Authority: 20 U.S.C. 1412(a)(1))

Note: The report of the House of Representatives on the 1978 appropriation bill includes the following statement regarding hearing aids:

In its report on the 1976 appropriation bill the Committee expressed concern about the condition of hearing aids worn by children in public schools. A study done at the Committee's direction by the Bureau of Education for the Handicapped reveals that up to one-third of the hearing aids are malfunctioning. Obviously, the Committee expects the Office of Education will ensure that hearing impaired school children are receiving adequate professional assessment, follow-up and services. H. R. Rep. No. 95–381, p. 67 (1977)

§ 300.304 Full educational opportunity goal.

Each SEA shall ensure that each public agency establishes and implements a goal of providing full educational opportunity to all children with disabilities in the area served by the public agency.

(Authority: 20 U.S.C. 1412(a)(2))

Note: In meeting the full educational opportunity goal, the Congress also encouraged LEAs to include artistic and cultural activities in programs supported under Part B of the Act. This point is addressed in the following statements from the Senate Report on Pub. L. 94–142:

The use of the arts as a teaching tool for the handicapped has long been recognized as a viable, effective way not only of teaching special skills, but also of reaching youngsters who had otherwise been unteachable. The Committee envisions that programs under this bill could well include an arts component and, indeed, urges that LEAs include the arts in programs for the handicapped funded under this Act. Such a program could cover both appreciation of the arts by the handicapped youngsters, and the utilization of the arts as a teaching tool per se.

Museum settings have often been another effective tool in the teaching of handicapped children. For example, the Brooklyn Museum has been a leader in developing exhibits utilizing the heightened tactile sensory skill of the blind. Therefore, in light of the national policy concerning the use of museums in federally supported education programs enunciated in the Education Amendments of 1974, the Committee also urges LEAs to include museums in programs for the handicapped funded under this Act. (S. Rep. No. 94–168, p. 13 (1975))

§ 300.305 Program options.

Each public agency shall take steps to ensure that its children with disabilities have available to them the variety of educational programs and services available to nondisabled children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education.

(Authority: 20 U.S.C. 1412(a)(2), 1413(a)(1))

Note: The list of program options is not exhaustive, and could include any program or activity in which nondisabled students participate.

§ 300.306 Nonacademic services.

(a) Each public agency shall take steps to provide nonacademic and

extracurricular services and activities in the manner as is necessary to afford children with disabilities an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.

(Authority: 20 U.S.C. 1412(a)(1))

§ 300.307 Physical education.

(a) *General.* Physical education services, specially designed if necessary, must be made available to every child with a disability receiving FAPE.

(b) *Regular physical education.* Each child with a disability must be afforded the opportunity to participate in the regular physical education program available to nondisabled children unless—

(1) The child is enrolled full time in a separate facility; or

(2) The child needs specially designed physical education, as prescribed in the child's IEP.

(c) *Special physical education.* If specially designed physical education is prescribed in a child's IEP, the public agency responsible for the education of that child shall provide the services directly or make arrangements for those services to be provided through other public or private programs.

(d) *Education in separate facilities.* The public agency responsible for the education of a child with a disability who is enrolled in a separate facility shall ensure that the child receives appropriate physical education services in compliance with paragraphs (a) and (c) of this section.

(Authority: 20 U.S.C. 1412(a)(25), 1412(a)(5)(A))

Note: The Report of the House of Representatives on Public Law 94–142 includes the following statement regarding physical education:

Special education as set forth in the Committee bill includes instruction in physical education, which is provided as a matter of course to all non-handicapped children enrolled in public elementary and secondary schools. The Committee is concerned that although these services are available to and required of all children in our school systems, they are often viewed as a luxury for handicapped children.

* * * * *

The Committee expects the Commissioner of Education to take whatever action is necessary to assure that physical education services are available to all handicapped children, and has specifically included physical education within the definition of special education to make clear that the Committee expects such services, specially designed where necessary, to be provided as an integral part of the educational program of every handicapped child. (H.R. Rep. No. 94–332, p. 9 (1975))

§ 300.308 Assistive technology.

Each public agency shall ensure that assistive technology devices or assistive technology services, or both, as those terms are defined in §§ 300.5–300.6, are made available to a child with a disability if required as a part of the child's—

(a) Special education under § 300.24;

(b) Related services under § 300.22; or

(c) Supplementary aids and services under §§ 300.26 and 300.550(b)(2).

(Authority: 20 U.S.C. 1412(a)(12)(B)(i))

§ 300.309 Extended school year services.

(a) *General.* (1) Subject to paragraph (a)(2) of this section, each public agency shall ensure that extended school year services are available to each child with a disability to the extent necessary to ensure that FAPE is available to the child.

(2) The determination of whether a child with a disability needs extended school year services must be made on an individual basis by the child's IEP team, in accordance with §§ 300.340–300.351.

(b) *Definition.* As used in this section, the term *extended school year services* means special education and related services that—

(1) Are provided to a child with a disability—

(i) Beyond the normal school year of the public agency;

(ii) In accordance with the child's IEP; and

(iii) At no cost to the parents of the child; and

(2) Meet the standards of the SEA.

(Authority: 20 U.S.C. 1412(a)(1))

Note 1: In implementing the requirements of this section, an LEA may not limit extended school year services to particular categories of disability or unilaterally limit the duration of services. Imposing those limitations would violate the individually-oriented focus of Part B of the Act. However, with respect to paragraph (b) of this section, nothing in this part requires that every child with a disability is entitled to, or must receive, extended school year services.

Note 2: States may establish standards for use in determining on an individual basis, whether a child with a disability needs extended school year services so long as those standards are not inconsistent with the requirements of Part B of the Act. Factors that States may wish to consider include: likelihood of regression, slow recoupment, and predictive data based on the opinion of professionals.

§ 300.310 [Reserved]

§ 300.311 FAPE requirements for students with disabilities in adult prisons.

(a) *Exception to FAPE for certain students.* The obligation to make FAPE available to all children with disabilities does not apply with respect to students aged 18 through 21 to the extent that State law does not require that special education and related services under Part B of the Act be provided to students with disabilities who, in the last educational placement prior to their incarceration in an adult correctional facility—

(1) Were not actually identified as being a child with a disability under § 300.7; and

(2) Did not have an IEP under Part B of the Act.

(b) *Requirements that do not apply.* The following requirements do not apply to students with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

(1) The requirements contained in § 300.138 and § 300.347(a)(5)(i) (relating to participation of children with disabilities in general assessments).

(2) The requirements in § 300.347(b) (relating to transition planning and transition services), with respect to the students whose eligibility under Part B of the Act will end, because of their age, before they will be eligible to be released from prison based on consideration of their sentence and eligibility for early release.

(c) *Modifications of IEP or placement.* (1) Subject to paragraph (c)(2) of this section, the IEP team of a student with a disability, who is convicted as an adult under State law and incarcerated in an adult prison, may modify the student's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(2) The requirements of §§ 300.340(a), 300.347(a) relating to IEPs, and 300.550(b) relating to LRE, do not apply with respect to the modifications described in paragraph (c)(1) of this section.

(Authority: 20 U.S.C. 1412(a)(1), 1414(d)(6))

Evaluations and Reevaluations

§ 300.320 Initial evaluations.

(a) Each public agency shall ensure that a full and individual evaluation is conducted for each child being considered for special education and related services under Part B of the Act—

(1) To determine if the child is a ''child with a disability'' under § 300.7; and

(2) To determine the educational needs of the child.

(b) In implementing the requirements of paragraph (a) of this section, the public agency shall ensure that—

(1) The evaluation is conducted in accordance with the procedures described in §§ 300.530—300.535; and

(2) The results of the evaluation are used by the child's IEP team in meeting the requirements of §§ 300.340—300.351.

(Authority: 20 U.S.C. 1414 (a) and (b))

§ 300.321 Reevaluations.

Each public agency shall ensure that—

(a) A reevaluation of each child with a disability is conducted in accordance with the requirements of §§ 300.530—330.536; and

(b) The results of any reevaluations are used by the child's IEP team under §§ 300.340–300.350 in reviewing and, as appropriate, revising the child's IEP.

(Authority: 20 U.S.C. 1414(a)(2))

§ 300.322–300.324 [Reserved]

Individualized Education Programs

§ 300.340 Definitions.

(a) As used in this part, the term *individualized education program* means a written statement for a child with a disability that is developed, reviewed, and revised in accordance with §§ 300.341–300.351.

(b) As used in §§ 300.347 and 300.348, *participating agency* means a State or local agency, other than the public agency responsible for a student's education, that is financially and legally responsible for providing transition services to the student.

(Authority: 20 U.S.C. 1401(11))

§ 300.341 State educational agency responsibility.

(a) *Public agencies.* The SEA shall ensure that each public agency develops and implements an IEP for each child with a disability served by that agency.

(b) *Private schools and facilities.* The SEA shall ensure that an IEP is developed and implemented for each child with a disability who—

(1) Is placed in or referred to a private school or facility by a public agency; or

(2) Is enrolled in a religiously-affiliated school or other private school and receives special education or related services from a public agency.

(Authority: 20 U.S.C. 1412(a)(4), (a) (10) (A) and (B))

Note: This section applies to all public agencies, including other State agencies (e.g., departments of mental health and welfare) that provide special education to a child with a disability either directly, by contract, or through other arrangements. Thus, if a State welfare agency contracts with a private school or facility to provide special education to a child with a disability, that agency would be responsible for ensuring that an IEP is developed for the child.

§ 300.342 When IEPs must be in effect.

(a) At the beginning of each school year, each LEA, SEA, or other State agency, shall have in effect, for each child with a disability within its jurisdiction, an individualized education program, as defined in § 300.340.

(b) An IEP must—

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings described under § 300.343.

(c)(1) In the case of a child with a disability aged 3 through 5 (or, at the discretion of the SEA a 2-year-old child with a disability who will turn age 3 during the school year), an IFSP that contains the material described in section 636 of the Act, and that is developed in accordance with §§ 300.340–300.346 and 300.349–300.351, may serve as the IEP of the child if using that plan as the IEP is—

(i) Consistent with State policy; and

(ii) Agreed to by the agency and the child's parents.

(2) In implementing the requirements of paragraph (c)(1) of this section, the public agency shall—

(i) Provide to the child's parents a detailed explanation of the differences between an IFSP and an IEP; and

(ii) If the parents choose an IFSP, obtain written informed consent from the parents.

(d)(1) All IEPs in effect on July 1, 1998 must meet the requirements of §§ 300.340–300.351.

(2) The provisions of §§ 300.340—300.350 that were in effect on June 3, 1997 remain in effect until July 1, 1998.

(Authority: 20 U.S.C. 1414(d)(2) (A) and (B), Pub. L. 105–17, sec. 201(a)(1)(C))

Note 1: It is expected that the IEP of a child with a disability will be implemented immediately following the meetings under § 300.343. Exceptions to this would be if (1) the meetings occur during the summer or a vacation period, unless the child requires services during that period, or (2) there are circumstances that require a short delay (e.g., working out transportation arrangements). However, there can be no undue delay in providing special education and related services to the child.

Note 2: Certain requirements regarding IEPs for students who are incarcerated in adult prisons apply as of June 4, 1997.

Note 3: At the time that a child with a disability moves from an early intervention program under Part C of the Act to a preschool program under this part, the parent, if the agency agrees, has the option, under paragraph (c) of this section, to allow the child to continue receiving early intervention services under an IFSP, or to begin receiving special education and related services in accordance with an IEP. Because of the importance of the IEP as the statutory vehicle for ensuring FAPE to a child with a disability, paragraph (c)(2) of this section provides that the parents' agreement to use an IFSP for the child instead of an IEP requires written informed consent by the parents that is based on an explanation of the differences between an IFSP and an IEP.

§ 300.343 IEP meetings.

(a) *General.* Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising the IEP of a child with a disability (or, if consistent with State policy and at the discretion of the LEA, and with the concurrence of the parents, an IFSP described in section 636 of the Act for each child with a disability, aged 3 through 5).

(b) *Timelines.* (1) Each public agency shall ensure that an offer of services in accordance with an IEP is made to parents within a reasonable period of time from the agency's receipt of parent consent to an initial evaluation.

(2) In meeting the timeline in paragraph (b)(1) of this section, a meeting to develop an IEP for the child must be conducted within 30-days of a determination that the child needs special education and related services.

(c) *Review and revision of IEP.* Each public agency shall ensure that the IEP team—

(1) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and

(2) Revises the IEP as appropriate to address—

(i) Any lack of expected progress toward the annual goals described in § 300.347(a), and in the general curriculum, if appropriate;

(ii) The results of any reevaluation conducted under this section;

(iii) Information about the child provided to, or by, the parents, as described in § 300.533(a)(1);

(iv) The child's anticipated needs; or

(v) Other matters.

(Authority: 20 U.S.C. 1414(d)(3))

Note: For most children, it would be reasonable to expect that a public agency offer services in accordance with an IEP within 60 days of receipt of parent consent to initial evaluation.

§ 300.344 IEP team.

(a) *General.* The public agency shall ensure that the IEP team for each child with a disability includes—

(1) The parents of the child;

(2) At least one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);

(3) At least one special education teacher, or if appropriate, at least one special education provider of the child;

(4) A representative of the LEA who—

(i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(ii) Is knowledgeable about the general curriculum; and

(iii) Is knowledgeable about the availability of resources of the LEA;

(5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a) (2) through (6) of this section;

(6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(7) If appropriate, the child.

(b) *Transition services participants.* (1) Under paragraph (a)(7) of this section, the public agency shall invite a student with a disability of any age if a purpose of the meeting will be the consideration of the statement of transition services needs or statement of needed transition services for the student under § 300.347(b)(1).

(2) If the student does not attend the IEP meeting, the public agency shall take other steps to ensure that the student's preferences and interests are considered.

(3)(i) In implementing the requirements of paragraph (b)(1) of this section, the public agency also shall invite a representative of any other agency that is likely to be responsible for providing or paying for transition services.

(ii) If an agency invited to send a representative to a meeting does not do so, the public agency shall take other steps to obtain participation of the other agency in the planning of any transition services.

(Authority: 20 U.S.C. 1414(d)(1)(B))

Note: The regular education teacher participating in a child's IEP meeting should be the teacher who is, or may be, responsible for implementing the IEP, so that the teacher can participate in discussions about how best to teach the child.

If the child has more than one teacher, the LEA may designate which teacher or teachers will participate. In a situation in which all of the child's teachers do not participate in the IEP meeting, the LEA is encouraged to seek input from teachers who will not be attending, and should ensure that any teacher not attending the meeting is informed about the results of the meeting (including receiving a copy of the IEP). In the case of a child whose behavior impedes the learning of the child or others, the LEA is encouraged to have a person knowledgeable about positive behavior strategies at the IEP meeting.

Similarly, the special education teacher or provider participating in a child's IEP meeting should be the person who is, or will be, responsible for implementing the IEP. If, for example, the child's disability is a speech impairment, the teacher could be the speech-language pathologist.

§ 300.345 Parent participation.

(a) Each public agency shall take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting or are afforded the opportunity to participate, including—

(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b)(1) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting and who will be in attendance.

(2) For a student with a disability beginning at age 14, or younger, if appropriate, the notice must also—

(i) Indicate that a purpose of the meeting will be the development of a statement of the transition services needs of the student required in § 300.347(b)(1)(i); and

(ii) Indicate that the agency will invite the student.

(3) For a student with a disability beginning at age 16, or younger, if appropriate, the notice must—

(i) Indicate that a purpose of the meeting is the consideration of needed transition services for the student required in § 300.347(b)(1)(ii);

(ii) Indicate that the agency will invite the student; and

(iii) Identify any other agency that will be invited to send a representative.

(c) If neither parent can attend, the public agency shall use other methods to ensure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place, such as—

(1) Detailed records of telephone calls made or attempted and the results of those calls;

(2) Copies of correspondence sent to the parents and any responses received; and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to ensure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.

(f) The public agency shall give the parent, on request, a copy of the IEP.

(Authority: 20 U.S.C. 1414(d)(1)(B)(i))

Note: The notice in paragraph (a) of this section could also inform parents that they may bring other people to the meeting consistent with § 300.344(a)(6). As indicated in paragraph (d) of this section, the procedure used to notify parents (whether oral or written or both) is left to the discretion of the agency, but the agency must keep a record of its efforts to contact parents.

§ 300.346 Development, review, and revision of IEP.

(a) *Development of IEP.*

(1) *General.* In developing each child's IEP, the IEP team, shall consider—

(i) The strengths of the child and the concerns of the parents for enhancing the education of their child; and

(ii) The results of the initial or most recent evaluation of the child.

(2) *Consideration of special factors.* The IEP team also shall—

(i) In the case of a child whose behavior impedes his or her learning or that of others, consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior;

(ii) In the case of a child with limited English proficiency, consider the language needs of the child as these needs relate to the child's IEP;

(iii) In the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) Consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and

communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) Consider whether the child requires assistive technology devices and services.

(b) *Review and Revision of IEP*. In conducting a meeting to review, and, if appropriate, revise a child's IEP, the IEP team shall consider the factors described in paragraph (a) of this section.

(c) *Statement in IEP*. If, in considering the special factors described in paragraph (a) (1) and (2) of this section, the IEP team determines that a child needs a particular device or service (including an intervention, accommodation, or other program modification) in order for the child to receive FAPE, the IEP team must include a statement to that effect in the child's IEP.

(d) *Requirement with respect to regular education teacher*. The regular education teacher of a child with a disability, as a member of the IEP team, must, to the extent appropriate, participate in the development, review, and revision of the child's IEP, including assisting in—

(1) The determination of appropriate positive behavioral interventions and strategies for the child; and

(2) The determination of supplementary aids and services, program modifications, and supports for school personnel, consistent with § 300.347(a)(3).

(e) *Construction*. Nothing in this section shall be construed to require the IEP team to include information under one component of a child's IEP that is already contained under another component of the child's IEP.

(Authority: 20 U.S.C. 1414 (d) (3) and (4)(B) and (e))

Note 1: The requirements of paragraph (a)(2) of this section (relating to consideration of special factors) were added by Pub. L. 105–17. These considerations are essential in assisting the IEP team to develop meaningful goals and other components of a child's IEP, if the considerations point to factors that could impede learning. The results of considering these special factors must, if appropriate, be reflected in the IEP goals, services, and provider responsibilities. As appropriate, consideration of these factors must include a review of valid evaluation data and the observed needs of the child resulting from the evaluation process.

Note 2: With respect to paragraph (a)(2)(iv) of this section (relating to special considerations for a child who is deaf or hard of hearing), the House Committee Report on Pub. L. 105–17 states that the IEP team should implement the provision in a manner consistent with the policy guidance entitled ''Deaf Students Education Services,'' published in the **Federal Register** (57 FR 49274, October 30, 1992) by the Department (H. Rep. No. 105–95, p–104 (1997))

Note 3: In developing an IEP for a child with limited English proficiency (LEP), the IEP team must consider how the child's level of English language proficiency affects special education and related services that the child needs in order to receive FAPE. Under Title VI of the Civil Rights Act of 1964, school districts are required to provide LEP students with alternative language services to enable the student to acquire proficiency in English and to provide the student with meaningful access to the content of the educational curriculum that is available to all students, including special education and related services. A LEP student with a disability may require special education and related services for those aspects of the educational program which address the development of English language skills and other aspects of the student's educational program. For a LEP student with a disability, under paragraph (c) of this section, the IEP must address whether the special education and related services that the child needs will be provided in a language other than English.

§ 300.347 Content of IEP.

(a) *General*. The IEP for each child must include—

(1) A statement of the child's present levels of educational performance, including—

(i) How the child's disability affects the child's involvement and progress in the general curriculum; or

(ii) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;

(2) A statement of measurable annual goals, including benchmarks or short-term objectives, related to—

(i) Meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; and

(ii) Meeting each of the child's other educational needs that result from the child's disability;

(3) A statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child and a statement of the program modifications or supports for school personnel that will be provided for the child—

(i) To advance appropriately toward attaining the annual goals;

(ii) To be involved and progress in the general curriculum in accordance with paragraph (a)(1) of this section and to participate in extracurricular and other nonacademic activities; and

(iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this paragraph;

(4) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(3) of this section;

(5)(i) A statement of any individual modifications in the administration of State or district-wide assessments of student achievement that are needed in order for the child to participate in the assessment; and

(ii) If the IEP team determines that the child will not participate in a particular State or district-wide assessment of student achievement (or part of an assessment), a statement of—

(A) Why that assessment is not appropriate for the child; and

(B) How the child will be assessed;

(6) The projected date for the beginning of the services and modifications described in paragraph (a)(3) of this section, and the anticipated frequency, location, and duration of those services and modifications; and

(7) A statement of—

(i) How the child's progress toward the annual goals described in paragraph (a)(2) of this section will be measured; and

(ii) How the child's parents will be regularly informed (through such means as periodic report cards), at least as often as parents are informed of their nondisabled children's progress, of—

(A) Their child's progress toward the annual goals; and

(B) The extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

(b) *Transition services*. (1) The IEP must include—

(i) For each student beginning at age 14 and younger if appropriate, and updated annually, a statement of the transition service needs of the student under the applicable components of the student's IEP that focuses on the student's courses of study (such as participation in advanced-placement courses or a vocational education program); and

(ii) For each student beginning at age 16 (or younger, if determined appropriate by the IEP team), a statement of needed transition services for the student, including, if appropriate, a statement of the interagency responsibilities or any needed linkages.

(2) If the IEP team determines that services are not needed in one or more of the areas specified in § 300.27(c)(1) through (c)(4), the IEP must include a

statement to that effect and the basis upon which the determination was made.

(c) *Transfer of rights.* Beginning at least one year before a student reaches the age of majority under State law, the student's IEP must include a statement that the student has been informed of his or her rights under Part B of the Act, if any, that will transfer to the student on reaching the age of majority, consistent with § 300.517.

(d) *Students with disabilities convicted as adults and incarcerated in adult prisons.* Special rules concerning the content of IEPs for students with disabilities convicted as adults and incarcerated in adult prisons are contained in § 300.311(b) and (c).

(Authority: 20 U.S.C. 1414(d)(1)(A) and (d)(6)(A)(ii))

Note 1: Although the statute does not mandate transition services for all students below the age of 16, the provision of these services could have a significantly positive effect on the employment and independent living outcomes for many of these students in the future, especially for students who are likely to drop out before age 16.

Note 2: The IEP provisions added by Pub. L. 105–17 are intended to provide greater access by children with disabilities to the general curriculum and to educational reforms, as an effective means of ensuring better results for these children in preparing them for employment and independent living.

With respect to increased emphasis on the general curriculum, the House Committee Report on Pub. L. 105–17 includes the following statement:

The Committee wishes to emphasize that, once a child has been identified as being eligible for special education, the connection between special education and related services and the child's opportunity to experience and benefit from the general education curriculum should be strengthened. The majority of children identified as eligible for special education and related services are capable of participating in the general education curriculum to varying degrees with some adaptations and modifications. This provision is intended to ensure that children's special education and related services are in addition to and are affected by the general education curriculum, not separate from it. (H. Rep. No. 105–95, p-99 (1997))

Note 3: With respect to the impact on States and LEAs in implementing the new IEP provisions relating to accessing the general curriculum, the House Committee Report on Pub. L. 105–17 includes the following statement:

The new emphasis on participation in the general education curriculum is not intended by the Committee to result in major expansions in the size of the IEP of dozens of pages of detailed goals and benchmarks or objectives in every curricular content standard skill. The new focus is intended to produce attention to the accommodations and adjustments necessary for disabled children to access the general education curriculum and the special services which may be necessary for the appropriate participation in particular areas of the curriculum due to the nature of the disability.

Note 4: With respect to paragraph (a) of this section, the House Committee Report on Pub. L. 105–17 includes the following statement:

The Committee intends that, while teaching and related services methodologies or approaches are an appropriate topic for discussion and consideration by the IEP team during IEP development or annual review, they are not expected to be written into the IEP. Furthermore, the Committee does not intend that changing particular methods or approaches necessitates an additional meeting of the IEP team.

Specific day to day adjustments in instructional methods and approaches that are made by either a regular or special education teacher to assist a disabled child to achieve his or her annual goals would not normally require action by the child's IEP team. However, if changes are contemplated in the child's measurable annual goals, benchmarks, or short-term objectives, or in any of the services or program modifications, or other components described in the child's IEP, the LEA must ensure that the child's IEP team is reconvened in a timely manner to address those changes. (H. Rep. No. 105–95, pp-100–101 (1997))

Note 5: The provision in paragraph (a)(7)(ii) of this section concerning regularly informing parents of their child's progress toward annual goals and the extent to which this progress is sufficient to enable the child to achieve the goals by the end of the year is intended to be in addition to, rather than in place of, regular reporting to the parents (as for nondisabled children) of the child's progress in subjects or curricular areas for which the child is not receiving special education.

Note 6: With respect to paragraph (b)(1) of this section (relating to transition service needs beginning at age 14), the House Committee report on Pub. L. 105–17 includes the following statement:

The purpose of this requirement is to focus attention on how the child's educational program can be planned to help the child make a successful transition to his or her goals for life after secondary school. This provision is designed to augment, and not replace, the separate transition services requirement, under which children with disabilities beginning no later than age sixteen receive transition services, including instruction, community experiences, the development of employment and other post-school objectives, and, when appropriate, independent living skills and functional vocational evaluation. For example, for a child whose transition goal is a job, a transition service could be teaching the child how to get to the job site on public transportation. (H. Rep. No. 105–95, p. 101 (1997))

Note 7: Each State must, at a minimum, ensure compliance with the transition services requirements in paragraph (b) of this section. However, it would not be a violation of this part for a public agency to begin planning for transition services needs and needed transition services for students younger than age 14 and age 16, respectively.

§ 300.348 Agency responsibilities for transition services.

(a) If a participating agency, other than the local educational agency, fails to provide the transition services described in the IEP in accordance with § 300.347(b)(1)(ii), the local educational agency shall reconvene the IEP team to identify alternative strategies to meet the transition objectives for the child set out in the IEP.

(b) Nothing in this part relieves any participating agency, including a State vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to students with disabilities who meet the eligibility criteria of that agency.

(Authority: 20 U.S.C. 1414(d)(5); 1414(d)(1)(A)(vii))

§ 300.349 Private school placements by public agencies.

(a) *Developing individualized education programs.* (1) Before a public agency places a child with a disability in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an IEP for the child in accordance with § 300.347.

(2) The agency shall ensure that a representative of the private school or facility attends the meeting. If the representative cannot attend, the agency shall use other methods to ensure participation by the private school or facility, including individual or conference telephone calls.

(b) *Reviewing and revising individualized education programs.* (1) After a child with a disability enters a private school or facility, any meetings to review and revise the child's IEP may be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency shall ensure that the parents and an agency representative—

(i) Are involved in any decision about the child's IEP; and

(ii) Agree to any proposed changes in the program before those changes are implemented.

(c) *Responsibility.* Even if a private school or facility implements a child's IEP, responsibility for compliance with this part remains with the public agency and the SEA.

(Authority: 20 U.S.C. 1412(a)(10)(B))

§ 300.350 Children with disabilities in religiously-affiliated or other private schools.

If a child with a disability is enrolled in a religiously-affiliated or other private school and receives special education or related services from a public agency, the public agency shall—

(a) Initiate and conduct meetings to develop, review, and revise an IEP for the child, in accordance with § 300.347; and

(b) Ensure that a representative of the religiously-affiliated or other private school attends each meeting. If the representative cannot attend, the agency shall use other methods to ensure participation by the private school, including individual or conference telephone calls.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.351 Individualized education program—accountability.

Each public agency must provide special education and related services to a child with a disability in accordance with an IEP. However, Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and benchmarks or objectives.

(Authority: 20 U.S.C. 1414(d)); Cong. Rec. at H7152 (daily ed., July 21, 1975))

Note: This section is intended to relieve concerns that the IEP constitutes a guarantee by the public agency and the teacher that a child will progress at a specified rate. However, this section does not relieve agencies and teachers from making good faith efforts to assist the child in achieving the goals and objectives or benchmarks listed in the IEP. Part B is premised on children receiving the instruction, services and modifications that they need to enable them to make progress in their education. Further, the section does not limit a parent's right to complain and ask for revisions of the child's IEP, or to invoke due process procedures (§ 300.507), if the parent feels that these efforts are not being made. This section does not prohibit a State or public agency from establishing its own accountability systems regarding teacher, school or agency performance.

Direct Service by the SEA

§ 300.360 Use of LEA allocation for direct services.

(a) *General.* An SEA shall use the payments that would otherwise have been available to an LEA or to a State agency to provide special education and related services directly to children with disabilities residing in the area served by that local agency, or for whom that State agency is responsible, if the SEA determines that the LEA or State agency—

(1) Has not provided the information needed to establish the eligibility of the agency under Part B of the Act;

(2) Is unable to establish and maintain programs of FAPE that meet the requirements of this part;

(3) Is unable or unwilling to be consolidated with one or more LEAs in order to establish and maintain the programs; or

(4) Has one or more children with disabilities who can best be served by a regional or State program or service-delivery system designed to meet the needs of these children.

(b) In meeting the requirements in paragraph (a) of this section, the SEA may provide special education and related services directly, by contract, or through other arrangements.

(c) The excess cost requirements of §§ 300.184 and 300.185 do not apply to the SEA.

(Authority: 20 U.S.C. 1413(h)(1))

Note: The SEA, as a recipient of Part B funds, is responsible for ensuring that all public agencies in the State comply with the provisions of the Act, regardless of whether they receive Part B funds. If an LEA elects not to apply for its Part B allotment, the State would be required to use those funds to ensure that FAPE is made available to children residing in the area served by that local agency. However, if the local allotment is not sufficient for this purpose, additional State or local funds would have to be expended in order to ensure that FAPE and the other requirements of the Act are met.

Moreover, if the LEA is the recipient of any other Federal funds, it would have to be in compliance with 34 CFR 104.31–104.39 of the regulations implementing Section 504 of the Rehabilitation Act of 1973. It should be noted that the term ''FAPE'' has different meanings under Part B and Section 504. For example, under Part B, FAPE is a statutory term that requires special education and related services to be provided in accordance with an IEP. However, under Section 504, each recipient must provide an education that includes services that are ''designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met * * *''. (34 CFR 104.33(b)). Those regulations state that implementation of an IEP, in accordance with Part B, is one means of meeting the FAPE requirement under section 504.

§ 300.361 Nature and location of services.

The SEA may provide special education and related services under § 300.360(a) in the manner and at the location it considers appropriate (including regional and State centers). However, the manner in which the education and services are provided must be consistent with the requirements of this part (including the LRE provisions of §§ 300.550–300.556).

(Authority: 20 U.S.C. 1413(h)(2))

§§ 300.362–300.369 [Reserved]

§ 300.370 Use of State agency allocations.

(a) Each State shall use any funds it retains under § 300.602 and does not use for administration under § 300.620 for any of the following:

(1) Support and direct services, including technical assistance and personnel development and training.

(2) Administrative costs of monitoring and complaint investigation, but only to the extent that those costs exceed the costs incurred for those activities during fiscal year 1985.

(3) To establish and implement the mediation process required by § 300.506, including providing for the costs of mediators and support personnel.

(4) To assist LEAs in meeting personnel shortages.

(5) To develop a State Improvement Plan under subpart 1 of Part D of the Act.

(6) Activities at the State and local levels to meet the performance goals established by the State under § 300.137 and to support implementation of the State Improvement Plan under subpart 1 of Part D of the Act if the State receives funds under that subpart.

(7) To supplement other amounts used to develop and implement a Statewide coordinated services system designed to improve results for children and families, including children with disabilities and their families, but not to exceed one percent of the amount received by the State under section 611 of the Act. This system must be coordinated with and, to the extent appropriate, build on the system of coordinated services developed by the State under Part C of the Act.

(8) For subgrants to LEAs for the purposes described in § 300.622.

(b) For the purposes of paragraph (a) of this section—

(1) *Direct services* means services provided to a child with a disability by the State directly, by contract, or through other arrangements; and

(2) *Support services* includes implementing the comprehensive system of personnel development under §§ 300.380–300.382, recruitment and training of hearing officers and surrogate parents, and public information and parent training activities relating to FAPE for children with disabilities.

(Authority: 20 U.S.C. 1411(f)(3))

§ 300.371 [Reserved]

§ 300.372 Applicability of nonsupplanting requirement.

A State may use funds it retains under § 300.602 without regard to—

(a) The prohibition on commingling of funds in § 300.152; and

(b) The prohibition on supplanting other funds in § 300.153.

(Authority: 20 U.S.C. 1411(f)(1)(C))

Comprehensive System of Personnel Development

§ 300.380 General.

(a) Each State shall develop and implement a comprehensive system of personnel development that—

(1) Is consistent with the purposes of this part and with section 635(a)(8) of the Act;

(2) Is designed to ensure an adequate supply of qualified special education, regular education, and related services personnel;

(3) Meets the requirements of §§ 300.381 and 300.382; and

(4) Is updated at least every five years.

(b) A State that has a State improvement grant has met the requirements of paragraph (a) of this section.

(Authority: 20 U.S.C. 1412(a)(14))

§ 300.381 Adequate supply of qualified personnel.

Each State must include, at least, an analysis of State and local needs for professional development for personnel to serve children with disabilities that includes, at a minimum—

(a) The number of personnel providing special education and related services; and

(b) Relevant information on current and anticipated personnel vacancies and shortages (including the number of individuals described in paragraph (a) of this section with temporary certification), and on the extent of certification or retraining necessary to eliminate these shortages, that is based, to the maximum extent possible, on existing assessments of personnel needs.

(Authority: 20 U.S.C. 1453(b)(2)(B))

§ 300.382 Improvement strategies.

Each State must describe the strategies the State will use to address the needs identified under § 300.381. These strategies must include how the State will address the identified needs for in-service and pre-service preparation to ensure that all personnel who work with children with disabilities (including both professional and paraprofessional personnel who provide special education, general education, related services, or early intervention services) have the skills and knowledge necessary to meet the needs of children with disabilities. The plan must include a description of how—

(a) The State will prepare general and special education personnel with the content knowledge and collaborative skills needed to meet the needs of children with disabilities including how the State will work with other States on common certification criteria;

(b) The State will prepare professionals and paraprofessionals in the area of early intervention with the content knowledge and collaborative skills needed to meet the needs of infants and toddlers with disabilities;

(c) The State will work with institutions of higher education and other entities that (on both a pre-service and an in-service basis) prepare personnel who work with children with disabilities to ensure that those institutions and entities develop the capacity to support quality professional development programs that meet State and local needs;

(d) The State will work to develop collaborative agreements with other States for the joint support and development of programs to prepare personnel for which there is not sufficient demand within a single State to justify support or development of such a program of preparation;

(e) The State will work in collaboration with other States, particularly neighboring States, to address the lack of uniformity and reciprocity in credentialing of teachers and other personnel;

(f) The State will enhance the ability of teachers and others to use strategies, such as behavioral interventions, to address the conduct of children with disabilities that impedes the learning of children with disabilities and others;

(g) The State will acquire and disseminate, to teachers, administrators, school board members, and related services personnel, significant knowledge derived from educational research and other sources, and how the State will, if appropriate, adopt promising practices, materials, and technology;

(h) The State will recruit, prepare, and retain qualified personnel, including personnel with disabilities and personnel from groups that are under-represented in the fields of regular education, special education, and related services;

(i) The plan is integrated, to the maximum extent possible, with other professional development plans and activities, including plans and activities developed and carried out under other Federal and State laws that address personnel recruitment and training; and

(j) The State will provide for the joint training of parents and special education, related services, and general education personnel.

(Authority: 20 U.S.C. 1453 (c)(3)(D))

§ 300.383—300.387 [Reserved]

Subpart D—Children in Private Schools

Children With Disabilities in Private Schools Placed or Referred by Public Agencies

§ 300.400 Applicability of §§ 300.400—300.402.

Sections §§ 300.401—300.402 apply only to children with disabilities who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services.

(Authority: 20 U.S.C. 1412(a)(10)(B))

§ 300.401 Responsibility of SEA.

Each SEA shall ensure that a child with a disability who is placed in or referred to a private school or facility by a public agency—

(a) Is provided special education and related services—

(1) In conformance with an IEP that meets the requirements of §§ 300.340—300.350;

(2) At no cost to the parents; and

(3) At a school or facility that meets the standards that apply to the SEA and LEAs (including the requirements of this part); and

(b) Has all of the rights of a child with a disability who is served by a public agency.

(Authority: 20 U.S.C. 1412(a)(10)(B))

§ 300.402 Implementation by SEA.

In implementing § 300.401, the SEA shall—

(a) Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires;

(b) Disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a child with a disability; and

(c) Provide an opportunity for those private schools and facilities to participate in the development and revision of State standards that apply to them.

(Authority: 20 U.S.C. 1412(a)(10)(B))

§ 300.403 Placement of children by parent s if FAPE is at issue.

(a) *General.* Subject to § 300.451, this part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made

FAPE available to the child and the parents elected to place the child in a private school or facility.

(b) *Disagreements about FAPE.* Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures of §§ 300.500—300.515.

(c) *Reimbursement for private school placement.* If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment.

(d) *Limitation on reimbursement.* The cost of reimbursement described in paragraph (c) of this section may be reduced or denied—

(1) If—

(i) At the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;

(2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in § 300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(e) *Exception.* Notwithstanding the notice requirement in paragraph (d)(1) of this section, the cost of reimbursement may not be reduced or denied for failure to provide the notice if—

(1) The parent is illiterate and cannot write in English;

(2) Compliance with paragraph (d)(1) of this section would likely result in physical or serious emotional harm to the child;

(3) The school prevented the parent from providing the notice; or

(4) The parents had not received notice, pursuant to section 615 of the Act, of the notice requirement in paragraph (d)(1) of this section.

(Authority: 20 U.S.C. 1412(a)(10)(C))

Children With Disabilities Enrolled by Their Parents in Private Schools

§ 300.450 Definition of "private school children with disabilities."

As used in this part, *private school children with disabilities* means children with disabilities enrolled by their parents in private schools or facilities other than children with disabilities covered under §§ 300.400–300.402.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.451 Child find for private school children with disabilities.

Each public agency must locate, identify and evaluate all private school children, including religiously-affiliated school children, who have disabilities residing in the jurisdiction of the agency in accordance with §§ 300.125 and 300.220.

(Authority: 20 U.S.C. 1412(a)(10)(A)(ii))

§ 300.452 Basic requirement—services.

To the extent consistent with their number and location in the State, provision must be made for the participation of private school children with disabilities in the program assisted or carried out under Part B of the Act by providing them with special education and related services in accordance with §§ 300.453–300.462.

(Authority: 20 U.S.C. 1412(a)(10)(A)(i))

§ 300.453 Expenditures.

To meet the requirement of § 300.452, each LEA must spend on providing special education and related services to private school children with disabilities—

(a) For children aged 3 through 21, an amount that is the same proportion of the LEA's total subgrant under sections 611(g) of the Act as the number of private school children with disabilities aged 3 through 21 residing in its jurisdiction is to the total number of children with disabilities in its jurisdiction aged 3 through 21; and

(b) For children aged 3 through 5, an amount that is the same proportion of the LEA's total subgrant under section 619(g) of the Act as the number of private school children with disabilities aged 3 through 5 residing in its jurisdiction is to the total number of children with disabilities in its jurisdiction aged 3 through 5.

(Authority: 20 U.S.C. 1412(a)(10)(A))

Note: SEAs and LEAs are not prohibited from providing services to private school children with disabilities in excess of those required by this part, consistent with State law or local policy.

§ 300.454 Services determined.

(a) *No individual right to special education and related services.* No private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school. Decisions about the services that will be provided to private school children with disabilities under §§ 300.452–300.462, must be made in accordance with paragraphs (b), (c) and (d) of this section.

(b) *Consultation with representatives of private school children with disabilities.* Each LEA shall consult, in a timely and meaningful way, with appropriate representatives of private school children with disabilities in light of the funding under § 300.453, the number of private school children with disabilities, the needs of private school children with disabilities, and their location to decide—

(1) Which children will receive services under § 300.452;

(2) What services will be provided;

(3) How the services will be provided; and

(4) How the services provided will be evaluated.

(c) *Genuine opportunity.* Each LEA shall give appropriate representatives of private school children with disabilities a genuine opportunity to express their views regarding each matter that is subject to the consultation requirements in this section.

(d) *Timing.* The consultation required by paragraph (b) of this section must occur before the LEA makes any decision that affects the opportunities of private school children with disabilities to participate in services under §§ 300.452–300.462.

(e) *Decisions.* The LEA shall make the final decisions with respect to the services to be provided to eligible private school children.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.455 Services provided.

(a) *Comparable services.* The services provided private school children with disabilities must be comparable in

quality to services provided to children with disabilities enrolled in public schools.

(b) *Services provided in accordance with an IEP.* The IEP for each private school child with a disability who receives services under § 300.452 must address the services that the LEA has determined that it will provide the child in light of the services that the LEA has determined, through the process described in §§ 300.453–300.454, it will make available to private school children with disabilities.

(c) *Definition.* As used in this section, *comparable in quality*—

(1) Means that services provided private school children with disabilities must be provided by similarly qualified personnel;

(2) Does not require the same amount of service for private school children with disabilities as for children with disabilities in public schools; and

(3) Does not require that any particular child receive service or receive the same amount of service the child would receive in a public school.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.456 Location of services.

(a) *On-site.* Services provided to private school children with disabilities may be provided on-site at a child's private school, including a religiously-affiliated school, to the extent consistent with law.

(b) *Transportation.* (1) Transportation of private school children with disabilities to a site other than a child's private school must be provided if necessary for a child to benefit from or participate in the other services offered.

(2) The cost of that transportation may be included in calculating whether the LEA has met the requirement of § 300.453.

(Authority: 20 U.S.C. 1412(a)(10)(A))

Note 1: The decisions of the Supreme Court in *Zobrest v. Catalina Foothills School Dist.* (1993) and *Agostini v. Felton* (1997) make clear that LEAs may provide special education and related services on-site at religiously-affiliated private schools in a manner that does not violate the Establishment Clause of the First Amendment to the U. S. Constitution.

Note 2: With regard to transportation services, school districts are not required to provide transportation from the student's home to the private school, but only to the site where the services are offered, and either return the student to the private school or to the student's home, depending on the timing of the services.

§ 300.457 Complaints.

(a) *Due process inapplicable.* The procedures in §§ 300.504–300.515 do not apply to complaints that an LEA has failed to meet the requirements of §§ 300.452–300.462, including the provision of services indicated on the child's IEP.

(b) *State complaints.* Complaints that an SEA or LEA has failed to meet requirements of §§ 300.451–300.462 may be filed under the procedures in §§ 300.660–300.662.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.458 Separate classes prohibited.

An LEA may not use funds available under section 611 or 619 of the Act for classes that are organized separately on the basis of school enrollment or religion of the students if—

(a) The classes are at the same site; and

(b) The classes include students enrolled in public schools and students enrolled in private schools.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.459 Requirement that funds not benefit a private school.

(a) An LEA may not use funds provided under section 611 or 619 of the Act to finance the existing level of instruction in a private school or to otherwise benefit the private school.

(b) The LEA shall use funds provided under Part B of the Act to meet the special educational needs of students enrolled in private schools, but not for—

(1) The needs of a private school; or

(2) The general needs of the students enrolled in the private school.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.460 Use of public school personnel.

An LEA may use funds available under sections 611 and 619 of the Act to make public personnel available in other than public facilities—

(a) To the extent necessary to provide services under §§ 300.450–300.462 for private school children with disabilities; and

(b) If those services are not normally provided by the private school.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.461 Use of private school personnel.

An LEA may use funds available under sections 611 or 619 of the Act to pay for the services of an employee of a private school if—

(a) The employee performs the services outside of his or her regular hours of duty; and

(b) The employee performs the services under public supervision and control.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.462 Requirements concerning property, equipment and supplies for the benefit of private school children with disabilities.

(a) A public agency must keep title to and exercise continuing administrative control of all property, equipment, and supplies that the public agency acquires with funds under section 611 or 619 of the Act for the benefit of private school children with disabilities.

(b) The public agency may place equipment and supplies in a private school for the period of time needed for the program.

(c) The public agency shall ensure that the equipment and supplies placed in a private school—

(1) Are used only for Part B purposes; and

(2) Can be removed from the private school without remodeling the private school facility.

(d) The public agency shall remove equipment and supplies from a private school if—

(1) The equipment and supplies are no longer needed for Part B purposes; or

(2) Removal is necessary to avoid unauthorized use of the equipment and supplies for other than Part B purposes.

(e) No funds under Part B of the Act may be used for repairs, minor remodeling, or construction of private school facilities.

(Authority: 20 U.S.C. 1412(a)(10)(A))

Procedures for By-Pass

§ 300.480 By-pass—general.

(a) The Secretary implements a by-pass if an SEA is, and was on December 2, 1983, prohibited by law from providing for the participation of private school children with disabilities in the program assisted or carried out under Part B of the Act, as required by section 612(a)(10)(A) of the Act and by §§ 300.452–300.462.

(b) The Secretary waives the requirement of section 612(a)(10)(A) of the Act and of §§ 300.452–300.462 if the Secretary implements a by-pass.

(Authority: 20 U.S.C. 1412(f)(1))

§ 300.481 Provisions for services under a by-pass.

(a) Before implementing a by-pass, the Secretary consults with appropriate public and private school officials, including SEA officials, in the affected State to consider matters such as—

(1) The prohibition imposed by State law that results in the need for a by-pass;

(2) The scope and nature of the services required by private school children with disabilities in the State, and the number of children to be served under the by-pass; and

(3) The establishment of policies and procedures to ensure that private school children with disabilities receive services consistent with the requirements of section 612(a)(10)(A) of the Act and §§ 300.452–300.462.

(b) After determining that a by-pass is required, the Secretary arranges for the provision of services to private school children with disabilities in the State in a manner consistent with the requirements of section 612(a)(10)(A) of the Act and §§ 300.452–300.462 by providing services through one or more agreements with appropriate parties.

(c) For any fiscal year that a by-pass is implemented, the Secretary determines the maximum amount to be paid to the providers of services by multiplying—

(1) A per child amount that may not exceed the amount per child provided by the Secretary under Part B of the Act for all children with disabilities in the State for the preceding fiscal year; by

(2) The number of private school children with disabilities (as defined by §§ 300.7(a) and 300.450) in the State, as determined by the Secretary on the basis of the most recent satisfactory data available, which may include an estimate of the number of those children with disabilities.

(d) The Secretary deducts from the State's allocation under Part B of the Act the amount the Secretary determines is necessary to implement a by-pass and pays that amount to the provider of services. The Secretary may withhold this amount from the State's allocation pending final resolution of any investigation or complaint that could result in a determination that a by-pass must be implemented.

(Authority: 20 U.S.C. 1412(f)(2))

Due Process Procedures

§ 300.482 Notice of intent to implement a by-pass.

(a) Before taking any final action to implement a by-pass, the Secretary provides the affected SEA with written notice.

(b) In the written notice, the Secretary—

(1) States the reasons for the proposed by-pass in sufficient detail to allow the SEA to respond; and

(2) Advises the SEA that it has a specific period of time (at least 45 days) from receipt of the written notice to submit written objections to the proposed by-pass and that it may request in writing the opportunity for a hearing to show cause why a by-pass should not be implemented.

(c) The Secretary sends the notice to the SEA by certified mail with return receipt requested.

(Authority: 20 U.S.C. 1412(f)(3)(A))

§ 300.483 Request to show cause.

An SEA seeking an opportunity to show cause why a by-pass should not be implemented shall submit a written request for a show cause hearing to the Secretary.

(Authority: 20 U.S.C. 1412(f)(3))

§ 300.484 Show cause hearing.

(a) If a show cause hearing is requested, the Secretary—

(1) Notifies the SEA and other appropriate public and private school officials of the time and place for the hearing; and

(2) Designates a person to conduct the show cause hearing. The designee must not have had any responsibility for the matter brought for a hearing.

(b) At the show cause hearing, the designee considers matters such as—

(1) The necessity for implementing a by-pass;

(2) Possible factual errors in the written notice of intent to implement a by-pass; and

(3) The objections raised by public and private school representatives.

(c) The designee may regulate the course of the proceedings and the conduct of parties during the pendency of the proceedings. The designee takes all steps necessary to conduct a fair and impartial proceeding, to avoid delay, and to maintain order.

(d) The designee may interpret applicable statutes and regulations, but may not waive them or rule on their validity.

(e) The designee arranges for the preparation, retention, and, if appropriate, dissemination of the record of the hearing.

(Authority: 20 U.S.C. 1412(f)(3))

§ 300.485 Decision.

(a) The designee who conducts the show cause hearing—

(1) Issues a written decision that includes a statement of findings; and

(2) Submits a copy of the decision to the Secretary and sends a copy to each party by certified mail with return receipt requested.

(b) Each party may submit comments and recommendations on the designee's decision to the Secretary within 15 days of the date the party receives the designee's decision.

(c) The Secretary adopts, reverses, or modifies the designee's decision and notifies the SEA of the Secretary's final action. That notice is sent by certified mail with return receipt requested.

(Authority: 20 U.S.C. 1412(f)(3))

§ 300.486 Filing requirements.

(a) Any written submission under §§ 300.482–300.485 must be filed by hand-delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(b) The filing date under paragraph (a) of this section is the date the document is—

(1) Hand-delivered;

(2) Mailed; or

(3) Sent by facsimile transmission.

(c) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(d) If a document is filed by facsimile transmission, the Secretary or the hearing officer, as applicable, may require the filing of a follow-up hard copy by hand-delivery or by mail within a reasonable period of time.

(e) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(Authority: 20 U.S.C. 1412(f)(3))

§ 300.487 Judicial review.

If dissatisfied with the Secretary's final action, the SEA may, within 60 days after notice of that action, file a petition for review with the United States Court of Appeals for the circuit in which the State is located. The procedures for judicial review are described in section 612(f)(3)(B)–(D) of the Act.

(Authority: 20 U.S.C. 1412(f)(3)(B)–(D))

Subpart E—Procedural Safeguards

Due Process Procedures for Parents and Children

§ 300.500 General responsibility of public agencies; definitions.

(a) *Responsibility of SEA and other public agencies.* Each SEA shall ensure that each public agency establishes, maintains, and implements procedural safeguards that meet the requirements of §§ 300.500–§ 300.529.

(b) *Definitions of ''consent,'' ''evaluation,'' and ''personally identifiable.''* As used in this part—

(1) *Consent* means that—

(i) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;

(ii) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and

(iii) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time;

(2) *Evaluation* means procedures used in accordance with §§ 300.530–300.536 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class; and

(3) *Personally identifiable* means that information includes—

(i) The name of the child, the child's parent, or other family member;

(ii) The address of the child;

(iii) A personal identifier, such as the child's social security number or student number; or

(iv) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

(Authority: 20 U.S.C. 1415(a))

Note: With respect to paragraph (b)(1)(iii) of this section, the parent's ability to revoke consent, if invoked, is not retroactive, *i.e.*, it does not negate an action that has occurred after the consent was given and before it was revoked.

§ 300.501 Opportunity to examine records; parent participation in meetings.

(a) *General.* The parents of a child with a disability must be afforded, in accordance with the procedures of §§ 300.562–300.569, an opportunity to—

(1) Inspect and review all education records with respect to—

(i) The identification, evaluation, and educational placement of the child; and

(ii) The provision of FAPE to the child; and

(2) Participate in all meetings with respect to—

(i) The identification, evaluation, and educational placement of the child; and

(ii) The provision of FAPE to the child.

(b) *Parent participation in meetings.* (1) Each public agency shall provide notice consistent with § 300.345 (a)(1) and (b)(1) to ensure that parents of children with disabilities have the opportunity to participate in meetings described in paragraph (a)(2) of this section.

(2) For purposes of this section, the term ''meetings'' means a prearranged event in which public agency personnel come together at the same time and place to discuss any matter described in paragraph (a)(2) of this section relating to an individual child with a disability. The term does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision if those issues are not addressed in the child's IEP. The term also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

(c) *Parent involvement in placement decisions.* (1) Each public agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

(2) In implementing the requirements of paragraph (c)(1) of this section, the public agency shall use procedures consistent with the procedures described in § 300.345 (a) through (b)(1).

(3) If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the public agency shall use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.

(4) A placement decision may be made by a group without the involvement of the parents, if the public agency is unable to obtain the parents' participation in the decision. In this case, the public agency must have a record of its attempt to ensure their involvement, including information that is consistent with the requirements of § 300.345(d).

(5) The public agency shall take whatever action is necessary to ensure that the parents understand, and are able to participate in, any group discussions relating to the educational placement of their child, including arranging for an interpreter for parents with deafness, or whose native language is other than English.

(Authority: 20 U.S.C. 1414(f), 1415(b)(1))

§ 300.502 Independent educational evaluation.

(a) *General.* (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

(3) For the purposes of this part—

(i) *Independent educational evaluation* means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and

(ii) *Public expense* means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with § 300.301.

(b) *Parent right to evaluation at public expense.* A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either initiate a hearing under § 300.507 to show that its evaluation is appropriate, or insure an independent educational evaluation is provided at public expense unless the agency demonstrates in a hearing under § 300.507 that the evaluation obtained by the parent did not meet agency criteria. If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(c) *Parent-initiated evaluations.* If the parent obtains an independent educational evaluation at private expense, the results of the evaluation—

(1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and

(2) May be presented as evidence at a hearing under this subpart regarding that child.

(d) *Requests for evaluations by hearing officers.* If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(e) *Agency criteria.* (1) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation.

(2) Except for the criteria described in paragraph (e)(1) of this section, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

(Authority: 20 U.S.C. 1415(b)(1))

Note 1: If a parent requests an independent educational evaluation at public expense, there is no requirement under Part B of the Act that the parent specify areas of disagreement with the public agency's evaluation as a prior condition to obtaining

the independent educational evaluation. Thus, unless a public agency chooses to initiate a due process hearing in accordance with paragraph (b) of this section, the agency must respond to the parent's request by insuring an independent educational evaluation is provided at public expense in a timely manner. A public agency may not impose conditions on obtaining an independent educational evaluation, other than the agency criteria described in paragraph (e) of this section.

Note 2: This section requires public agencies to provide parents with information on how and where an independent educational evaluation of their child at public expense can be obtained. Public agencies are encouraged to make this information widely available to parents in a manner that is readily understandable to the general public so that if parents disagree with an agency evaluation they will have access to the criteria the agency will apply to an IEE.

A public agency may not require that evaluations obtained by parents meet all agency criteria, if doing so would be inconsistent with the parents' right to an IEE. For example, the agency could not require a parent to meet a criterion that required the IEE to be conducted by an agency employee.

§ 300.503 Prior notice by the public agency; content of notice.

(a) *Notice.* (1) Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency—

(i) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

(ii) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

(2) If the notice described under paragraph (a)(1) of this section relates to an action proposed by the public agency that also requires parental consent under § 300.505, the agency may give notice at the same time it requests parent consent.

(b) *Content of notice*. The notice required under paragraph (a) of this section must include—

(1) A description of the action proposed or refused by the agency;

(2) An explanation of why the agency proposes or refuses to take the action;

(3) A description of any other options that the agency considered and the reasons why those options were rejected;

(4) A description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action;

(5) A description of any other factors that are relevant to the agency's proposal or refusal;

(6) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(7) Sources for parents to contact to obtain assistance in understanding the provisions of this part; and

(8) A statement informing the parents about the State complaint procedures under §§ 300.660–300.662, including a description of how to file a complaint and the timelines under those procedures.

(c) *Notice in understandable language.* (1) The notice required under paragraph (a) of this section must be—

(i) Written in language understandable to the general public; and

(ii) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(2) If the native language or other mode of communication of the parent is not a written language, the SEA or LEA shall take steps to ensure—

(i) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(ii) That the parent understands the content of the notice; and

(iii) That there is written evidence that the requirements in paragraphs (c)(2) (i) and (ii) of this section have been met.

(Authority: 20 U.S.C. 1415 (b) (3), (4) and (c), 1414(b)(1))

§ 300.504 Procedural safeguards notice.

(a) *General.* A copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents, at a minimum—

(1) Upon initial referral for evaluation;

(2) Upon each notification of an IEP meeting;

(3) Upon reevaluation of the child; and

(4) Upon receipt of a request for due process under § 300.507.

(b) *Contents.* The procedural safeguards notice must include a full explanation of all of the procedural safeguards available under §§ 300.403, 300.500–300.529, and 300.560–300.577 relating to—

(1) Independent educational evaluation;

(2) Prior written notice;

(3) Parental consent;

(4) Access to educational records;

(5) Opportunity to present complaints;

(6) The child's placement during pendency of due process proceedings;

(7) Procedures for students who are subject to placement in an interim alternative educational setting;

(8) Requirements for unilateral placement by parents of children in private schools at public expense;

(9) Mediation;

(10) Due process hearings, including requirements for disclosure of evaluation results and recommendations;

(11) State-level appeals (if applicable in that State);

(12) Civil actions; and

(13) Attorneys' fees.

(c) *Notice in understandable language.* (1) The notice required under paragraph (a) of this section must be—

(i) Written in language understandable to the general public; and

(ii) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(2) If the native language or other mode of communication of the parent is not a written language, the SEA or LEA shall take steps to ensure—

(i) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(ii) That the parent understands the content of the notice; and

(iii) That there is written evidence that the requirements in paragraphs (c)(2) (i) and (ii) of this section have been met.

(Authority: 20 U.S.C. 1415(d))

§ 300.505 Parental consent.

(a)(1) Parental consent must be obtained before—

(i) Conducting an initial evaluation;

(ii) Initial provision of special education and related services to a child with a disability in a program providing special education and related services; and

(iii) Except as provided in paragraph (c) of this section, before conducting any new test as a part of a reevaluation of an eligible child under Part B of the Act.

(2) Consent for initial evaluation may not be construed as consent for initial placement described in paragraph (a)(1)(ii) of this section.

(b) *Refusal.* If the parents of the child with a disability refuse consent for initial evaluation or a reevaluation, the agency may continue to pursue those evaluations by using the due process procedures under §§ 300.507–300.509, or the mediation procedures under § 300.506 if appropriate, except to the extent inconsistent with State law relating to parental consent.

(c) *Failure to respond to request for reevaluation.*

(1) Informed parental consent need not be obtained for reevaluation if the public agency can demonstrate that it has taken reasonable measures to obtain that consent, and the child's parent has failed to respond.

(2) To meet the reasonable measures requirement in paragraph (c)(1) of this section, the public agency must use procedures consistent with those in §§ 300.345(d).

(d) *Additional State consent requirements.* In addition to the parental consent requirements described in paragraph (a) of this section, a State may require parental consent for other services and activities under this part if it ensures that each public agency in the State establishes and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE.

(e) *Limitation.* A public agency may not require parental consent as a condition of any benefit to the parent or the child except for the service or activity for which consent is required under paragraph (a) of this section.

(Authority: 20 U.S.C. 1415(b)(3); 1414 (a)(1)(C) and (c)(3))

Note 1: Paragraph (b) of this section means that if the parents of a child with a disability refuse consent for an initial evaluation or any reevaluation, and the agency wishes to pursue the evaluation or reevaluation, it may do so by using the due process or mediation procedures under Part B of the Act unless doing so would be inconsistent with State law relating to parent consent. For example, if State law provides that parents' right to consent to an initial evaluation cannot be overridden, the agency under Part B would not be able to take any action regarding that initial evaluation once parents had refused consent. If State law provided a mechanism different than due process or mediation under Part B as the means to override a parent refusal of consent, the agency would use that State mechanism if it wished to pursue the evaluation.

Note 2: If a State adopts a consent requirement in addition to those described in paragraph (a) of this section and consent is refused, paragraph (e) of this section requires that the public agency must nevertheless provide the services and activities that are not in dispute. For example, if a State requires parental consent to the provision of all services identified in an IEP and the parent refuses to consent to physical therapy services included in the IEP, the agency is not relieved of its obligation to implement those portions of the IEP to which the parent consents.

If the parent refuses to consent and the public agency determines that the service or activity in dispute is necessary to provide FAPE to the child, paragraph (d) of this section requires that the agency must implement its procedures to override the refusal. This section does not preclude the agency from reconsidering its proposal if it believes that circumstances warrant.

Note 3: If parents refuse consent to a reevaluation that the agency needs to provide appropriate services to the child consistent with § 300.536, the agency must either take appropriate measures, consistent with paragraph (b) of this section to override the parents' refusal of consent, or, if State law prohibits override of parent consent for reevaluation, the agency may cease providing services to the child under Part B of the Act.

§ 300.506 Mediation.

(a) *General.* Each public agency shall ensure that procedures are established and implemented to allow parties to disputes involving any matter described in § 300.503(a)(1) to resolve the disputes through a mediation process which, at a minimum, must be available whenever a hearing is requested under §§ 300.507 or 300.520–300.528.

(b) *Requirements.* The procedures must meet the following requirements:

(1) The procedures must ensure that the mediation process—

(i) Is voluntary on the part of the parties;

(ii) Is not used to deny or delay a parent's right to a due process hearing under § 300.506, or to deny any other rights afforded under Part B of the Act; and

(iii) Is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(2) The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(3) The State shall bear the cost of the mediation process, including the costs of meetings described in paragraph (b)(2) of this section.

(4) Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute.

(5) An agreement reached by the parties to the dispute in the mediation process must be set forth in a written mediation agreement.

(6) Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of the process.

(c) *Impartiality of mediator.* An individual who serves as a mediator under this part—

(1) May not be an employee of—

(i) Any LEA or any State agency described under § 300.194; or

(ii) An SEA that is providing direct services to a child who is the subject of the mediation process; and

(2) Must not have a personal or professional conflict of interest.

(d) *Meeting to encourage mediation.* (1) A public agency may establish procedures to require parents who elect not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party—

(i) Who is under contract with a parent training and information center or community parent resource center in the State established under section 682 or 683 of the Act, or an appropriate alternative dispute resolution entity; and

(ii) Who would explain the benefits of the mediation process, and encourage the parents to use the process.

(2) A public agency may not deny or delay a parent's right to a due process hearing under § 300.507 if the parent fails to participate in the meeting described in paragraph (d)(1) of this section.

(Authority: 20 U.S.C. 1415(e))

Note 1: With respect to paragraph (b)(2) of this section, the House Committee Report on Pub. L. 105–17 includes the following statement:

* * * the bill provides that the State shall maintain a list of individuals who are qualified mediators. The Committee intends that whenever such a mediator is not selected on a random basis from that list, both the parents and the agency are involved in selecting the mediator, and are in agreement with the individual who is selected. (H. Rep. No. 105–95, p. 106 (1997))

Note 2: With regard to the provision in paragraph (b)(6) that mediation discussions must be confidential and may not be used in any subsequent due process hearings or civil proceedings, the House Committee Report on Pub. L. 105–17 notes that ''nothing in this bill shall supersede any parental access rights under the Family Educational Rights and Privacy Act of 1974 or foreclose access to information otherwise available to the parties.'' (H. Rep. No. 105–95, p. 107 (1997)). The Report also includes an example of a confidentiality pledge, which makes clear that the intent of this provision is to protect discussions that occur in the mediation process from use in subsequent due process hearings and civil proceedings under the Act, and not to exempt from discovery, because it was disclosed during mediation, information that otherwise would be subject to discovery.

§ 300.507 Impartial due process hearing; parent notice; disclosure.

(a) *General.* (1) A parent or a public agency may initiate a hearing on any of the matters described in § 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).

(2) When a hearing is initiated under paragraph (a)(1) of this section, the public agency shall inform the parents of the availability of mediation described in § 300.506.

(3) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if—

(i) The parent requests the information; or

(ii) The parent or the agency initiates a hearing under this section.

(b) *Agency responsible for conducting hearing.* The hearing described in paragraph (a) of this section must be conducted by the SEA or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the SEA.

(c) *Parent notice to the public agency.*

(1) *General.* The public agency must have procedures that require the parent of a child with a disability or the attorney representing the child, to provide notice (which must remain confidential) to the public agency in a request for a hearing under paragraph (a)(1) of this section.

(2) *Content of parent notice.* The notice required in paragraph (c)(1) of this section must include—

(i) The name of the child;

(ii) The address of the residence of the child;

(iii) The name of the school the child is attending;

(iv) A description of the nature of the problem of the child relating to the proposed initiation or change, including facts relating to the problem; and

(v) A proposed resolution of the problem to the extent known and available to the parents at the time.

(3) *Model form to assist parents.* Each SEA shall develop a model form to assist parents in filing a request for due process that includes the information required in paragraphs (c)(1) and (2) of this section.

(4) *Right to due process hearing.* A public agency may not deny or delay a parent's right to a due process hearing for failure to provide the notice required in paragraphs (c)(1) and (2) of this section.

(Authority: 20 U.S.C. 1415(b)(5), (b)(6), (b)(7), (b)(8), (e)(1) and (f)(1))

Note 1: Part B of the Act and the regulations under Part B of the Act do not provide any authority for a public agency to deny a parent's request for an impartial due process hearing, even if the agency believes that the parent's issues are not new. Thus, the determination of whether or not a parent's request for a hearing is based on new issues can only be made by an impartial hearing officer.

Note 2: The House Committee Report on Pub. L. 105–17 notes that attorneys' fees to prevailing parents may be reduced if the attorney representing the parents did not provide the public agency with specific information about the child and the basis of the dispute described in paragraphs (c)(1) and (2) of this section. With respect to the intent of the new notice provision, the House report includes the following statement:

* * * The Committee believes that the addition of this provision will facilitate an early opportunity for schools and parents to develop a common frame of reference about problems and potential problems that may remove the need to proceed to due process and instead foster a partnership to resolve problems. (H. Rep. 105–95, p. 105 (1997))

§ 300.508 Impartial hearing officer.

(a) A hearing may not be conducted—

(1) By a person who is an employee of the State agency or the LEA that is involved in the education or care of the child; or

(2) By any person having a personal or professional interest that would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(c) Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(Authority: 20 U.S.C. 1415(f)(3))

§ 300.509 Hearing rights.

(a) *General.* Any party to a hearing conducted pursuant to §§ 300.507 or 300.520—300.528, or an appeal conducted pursuant to § 300.510, has the right to—

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least 5 days before the hearing;

(4) Obtain a written, or, at the option of the parents, electronic, verbatim record of the hearing; and

(5) Obtain written, or, at the option of the parents, electronic findings of fact and decisions.

(b) *Additional disclosure of information requirement.* (1) At least 5 business days prior to a hearing conducted pursuant to § 300.507(a), each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(2) A hearing officer may bar any party that fails to comply with paragraph (b)(1) of this section from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(c) *Parental rights at hearings.* (1) Parents involved in hearings must be given the right to—

(i) Have the child who is the subject of the hearing present; and

(ii) Open the hearing to the public.

(2) The record of the hearing and the findings of fact and decisions described in paragraphs (a)(4) and (a)(5) of this section must be provided at no cost to parents.

(d) *Findings and decision to advisory panel and general public.* The public agency, after deleting any personally identifiable information, shall—

(1) Transmit the findings and decisions referred to in paragraph (a)(5) of this section to the State advisory panel established under § 300.650; and

(2) Make those findings and decisions available to the public.

(Authority: 20 U.S.C. 1415(f)(2)and (h))

§ 300.510 Finality of decision; appeal; impartial review.

(a) *Finality of decision.* A decision made in a hearing conducted pursuant to §§ 300.507 or 300.520—300.528 is final, except that any party involved in the hearing may appeal the decision under the provisions of paragraph (b) of this section and § 300.512.

(Authority: 20 U.S.C. 1415(i)(1)(A))

(b) *Appeal of decisions; impartial review.*

(1) *General.* If the hearing required by § 300.507 is conducted by a public agency other than the SEA, any party aggrieved by the findings and decision in the hearing may appeal to the SEA.

(2) *SEA responsibility for review.* If there is an appeal, the SEA shall conduct an impartial review of the hearing. The official conducting the review shall—

(i) Examine the entire hearing record;

(ii) Ensure that the procedures at the hearing were consistent with the requirements of due process;

(iii) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in § 300.508 apply;

(iv) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

(v) Make an independent decision on completion of the review; and

(vi) Give a copy of written findings and the decision to the parties.

(c) *Findings and decision to advisory panel and general public.* The SEA, after deleting any personally identifiable information, shall—

(1) Transmit the findings and decisions referred to in paragraph (b)(2)(vi) of this section to the State advisory panel established under § 300.650; and

(2) Make those findings and decisions available to the public.

(d) *Finality of review decision.* The decision made by the reviewing official is final unless a party brings a civil action under § 300.511.

(Authority: 20 U.S.C. 1415(g); H. R. Rep. No. 94—664, at p. 49 (1975))

Note 1: The SEA may conduct its review either directly or through another State agency acting on its behalf. However, the SEA remains responsible for the final decision on review.

Note 2: All parties have the right to continue to be represented by counsel at the State administrative review level, whether or not the reviewing official determines that a further hearing is necessary. If the reviewing official decides to hold a hearing to receive additional evidence, the other rights in § 300.509 relating to hearings also apply.

§ 300.511 Timelines and convenience of hearings and reviews.

(a) The public agency shall ensure that not later than 45 days after the receipt of a request for a hearing—

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The SEA shall ensure that not later than 30 days after the receipt of a request for a review—

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved.

(Authority: 20 U.S.C. 1415)

§ 300.512 Civil action.

(a) *General.* Any party aggrieved by the findings and decision made under §§ 300.507 or 300.520–300.528 who does not have the right to an appeal under § 300.510(b)(2), and any party aggrieved by the findings and decision under § 300.510(e), has the right to bring a civil action with respect to the complaint presented pursuant to § 300.507. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(b) *Additional requirements.* In any action brought under paragraph (a) of this section, the court—

(1) Shall receive the records of the administrative proceedings;

(2) Shall hear additional evidence at the request of a party; and

(3) Basing its decision on the preponderance of the evidence, shall grant the relief that the court determines to be appropriate.

(c) *Jurisdiction of district courts.* The district courts of the United States have jurisdiction of actions brought under section 615 of the Act without regard to the amount in controversy.

(d) *Rule of construction.* Nothing in this part restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under section 615 of the Act, the procedures under §§ 300.507 and 300.510 must be exhausted to the same extent as would be required had the action been brought under section 615 of the Act.

(Authority: 20 U.S.C. 1415 (i)(2), (i)(3)(A), and 1415(l))

§ 300.513 Attorneys' fees.

(a) In any action or proceeding brought under section 615 of the Act, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.

(b) Funds under Part B of the Act may not be used to pay attorney's fees.

(Authority: 20 U.S.C. 1415(i)(3)(B))

Note: There is nothing in this part that prohibits a State from enacting a law that permits hearing officers to award attorneys' fees to parents who are prevailing parties under Part B of the Act.

§ 300.514 Child's status during proceedings.

(a) Except as provided in § 300.526, during the pendency of any administrative or judicial proceeding regarding a complaint, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.

(c) If the decision of a hearing officer in a due process hearing or a review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of paragraph (a) of this section.

(Authority: 20 U.S.C. 1415(j))

Note: This section does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

§ 300.515 Surrogate parents.

(a) *General.* Each public agency shall ensure that the rights of a child are protected if—

(1) No parent (as defined in § 300.19) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) *Duty of public agency.* The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method—

(1) For determining whether a child needs a surrogate parent; and

(2) For assigning a surrogate parent to the child.

(c) *Criteria for selection of surrogates.* (1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies shall ensure that a person selected as a surrogate—

(i) Is not an employee of the SEA, the LEA, or any other agency that is involved in the education or care of the child;

(ii) Has no interest that conflicts with the interest of the child he or she represents; and

(iii) Has knowledge and skills that ensure adequate representation of the child.

(d) *Non-employee requirement; compensation.* (1) A person assigned as a surrogate may not be an employee of a public agency that is involved in the education or care of the child.

(2) A person who otherwise qualifies to be a surrogate parent under

paragraphs (c) and (d)(1) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(e) *Responsibilities.* The surrogate parent may represent the child in all matters relating to—

(1) The identification, evaluation, and educational placement of the child; and

(2) The provision of FAPE to the child.

(Authority: 20 U.S.C. 1415(b)(2))

§ 300.516 [Reserved]

§ 300.517 Transfer of parental rights at age of majority.

(a) *General.* A State may provide that, when a child with a disability reaches the age of majority under State law that applies to all children (except for a child with a disability who has been determined to be incompetent under State law)—

(1)(i) The public agency shall provide any notice required by this part to both the individual and the parents; and

(ii) All other rights accorded to parents under Part B of the Act transfer to the child; and

(2) All rights accorded to parents under Part B of the Act transfer to children who are incarcerated in an adult or juvenile, State, or local correctional institution.

(3) Whenever a State transfers rights under this part pursuant to paragraph (a) (1) or (2), the agency shall notify the individual and the parents of the transfer of rights.

(b) *Special rule.* If, under State law, a child with a disability, described in paragraph (a) of this section, is determined not to have the ability to provide informed consent with respect to the educational program of the student, the State shall establish procedures for appointing the parent, or, if the parent is not available another appropriate individual, to represent the educational interests of the student throughout the student's eligibility under Part B of the Act.

(Authority: 20 U.S.C. 1415(m))

Discipline Procedures

§ 300.520 Authority of school personnel.

(a) School personnel may order—

(1) The removal of a child with a disability from the child's current educational placement to an appropriate interim alternative educational setting, another setting, or suspension, including a suspension without the provision of educational services, for not more than 10 school days (to the extent the alternatives would be applied to children without disabilities); and

(2) A change in placement of a child with a disability to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days, if—

(i) The child carries a weapon to school or to a school function under the jurisdiction of a State or a local educational agency; or

(ii) The child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a State or local educational agency.

(b) Except as provided in paragraph (c) of this section, either before or not later than 10 business days after taking the action described in paragraph (a) of this section—

(1) If the LEA did not conduct a functional behavioral assessment and implement a behavioral intervention plan for the child before the behavior that resulted in the suspension described in paragraph (a) of this section, the agency shall convene an IEP meeting to develop an assessment plan and appropriate behavioral interventions to address that behavior; or

(2) If the child already has a behavioral intervention plan, the IEP team shall review the plan and modify it, as necessary, to address the behavior.

(c) If the child with a disability is removed from the child's current educational placement for 10 school days or fewer under paragraph (a)(1) of this section in a given school year, and no further removal or disciplinary action is contemplated, the activities in paragraph (b) of this section need not be conducted.

(d) For purposes of this section, the following definitions apply:

(1) *Controlled substance* means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(2) *Illegal drug*—

(i) Means a controlled substance; but

(ii) Does not include such a substance that is legally possessed or used under the supervision or a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

(3) *Weapon* has the meaning given the term ''dangerous weapon'' under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.

(Authority: 20 U.S.C. 1415(k) (1), (10))

Note 1: Removing a child with disabilities from the child's current educational placement for not more than 10 school days does not constitute a change of placement under the Part B regulation. A series of removals from a child's current educational placement in a school year each of which is less than 10 school days but cumulate to more than 10 school days in a school year may constitute a change in placement, if, in any given case, factors such as the length of each removal, the total amount of time that the child is removed, and the proximity of the removals to one another, lead to the conclusion that the child has been excluded from the current placement to such an extent that there has been a change of placement.

Note 2: Although paragraph (c) of this section provides that public agencies need not conduct the review described in paragraph (b) if a child is removed from the regular placement for 10 school days or fewer and no further removal or disciplinary action is contemplated, public agencies are strongly encouraged to review as soon as possible the circumstances surrounding the behavior that led to the child's removal and consider whether the child was being provided services in accordance with the IEP, and whether the behavior could be addressed through minor classroom or program adjustments or whether the child's IEP team should be reconvened to address possible changes in that document.

§ 300.521 Authority of hearing officer.

A hearing officer under section 615 of the Act may order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer, in an expedited due process hearing—

(a) Determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of the child is substantially likely to result in injury to the child or to others;

(b) Considers the appropriateness of the child's current placement;

(c) Considers whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and

(d) Determines that the interim alternative educational setting meets the requirements of § 300.522.

(e) As used in this section, the term *substantial evidence* means beyond a preponderance of the evidence.

(Authority: 20 U.S.C. 1415(k) (2), (10))

§ 300.522 Determination of setting.

(a) *General.* The alternative educational setting referred to in §§ 300.520 and 300.521 must be determined by the IEP team.

(b) *Additional requirements.* Any interim alternative educational setting in which a child is placed under § 300.520 or 300.521 must—

(1) Be selected so as to enable the child to continue to participate in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP; and

(2) Include services and modifications designed to address the behavior described in § 300.520 or 300.521, or any other behavior that results in the child being removed from the child's current educational placement for more than 10 school days in a school year, so that it does not recur.

(Authority: 20 U.S.C. 1415(k)(3))

§ 300.523 Manifestation determination review.

(a) *General.* If an action is contemplated as described in § 300.520 or 300.521, or if an action involving a removal of a child from the child's current educational placement for more than 10 school days in a given school year is contemplated for a child with a disability who has engaged in other behavior that violated any rule or code of conduct of the LEA that applies to all children—

(1) Not later than the date on which the decision to take that action is made, the parents must be notified of that decision and of all procedural safeguards accorded under this section; and

(2) Immediately, if possible, but in no case later than 10 school days after the date on which the decision to take that action is made, a review must be conducted of the relationship between the child's disability and the behavior subject to the disciplinary action.

(b) *Exception.* If, under § 300.520(a)(1), the child with disabilities is removed from the child's current educational placement for 10 school days or fewer in a given school year, and no further disciplinary action is contemplated, the review in paragraph (a) of this section need not be conducted.

(c) *Individuals to carry out review.* A review described in paragraph (a) of this section must be conducted by the IEP team and other qualified personnel.

(d) *Conduct of review.* In carrying out a review described in paragraph (a) of this section, the IEP team may determine that the behavior of the child was not a manifestation of the child's disability only if the IEP team—

(1) First considers, in terms of the behavior subject to disciplinary action, all relevant information, including—

(i) Evaluation and diagnostic results, including the results or other relevant information supplied by the parents of the child;

(ii) Observations of the child; and

(iii) The child's IEP and placement; and

(2) Then determines that—

(i) In relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

(ii) The child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

(iii) The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

(e) *Decision.* If the IEP team determines that any of the standards in (d)(2) of this section were not met, the behavior must be considered a manifestation of the child's disability.

(f) *Meeting.* The review described in paragraph (a) of this section may be conducted at the same IEP meeting that is convened under § 300.520(b).

(Authority: 20 U.S.C. 1415(k)(4))

Note 1: The House Committee Report on Pub. L. No 105–17 states that the determination described in § 300.523(c)(2):

. . . .recognizes that where there is a relationship between a child's behavior and a failure to provide or implement an IEP or placement, the IEP team must conclude that the behavior was a manifestation of the child's disability. Similarly, where the IEP team determines that an appropriate placement and IEP were provided, the IEP team must then determine that the remaining two standards have been satisfied. This section is not intended to require an IEP team to find that a child's behavior was a manifestation of a child's disability based on a technical violation of the IEP or placement requirements that are unrelated to the educational/behavior needs of the child. (House Rep. No. 105–95, pp. 110–111)

Note 2: If the result of the manifestation determination is that the behavior is a manifestation of the child's disability, the LEA must take immediate steps to remedy any deficiencies found in the child's IEP or placement, or their implementation. For a child who has been placed in a 45-day placement under § 300.520(a)(2) or 300.521 and for whom the child's behavior subject to discipline is a manifestation of the child's disability, these remedies often should enable the child to return to the child's current educational placement before the expiration of the 45-day period.

§ 300.524 Determination that behavior was not manifestation of disability.

(a) *General.* If the result of the review described in § 300.523 is a determination, consistent with § 300.523(e), that the behavior of the child with a disability was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except as provided in section 612(a)(1) of the Act.

(b) *Additional requirement.* If the public agency initiates disciplinary procedures applicable to all children, the agency shall ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action.

(c) *Child's status during due process proceedings.* Section 300.514 applies if a parent requests a hearing to challenge a determination, made through the review described in § 300.523, that the behavior of the child was not a manifestation of the child's disability.

(Authority: 20 U.S.C. 1415(k)(5))

Note: The provision in paragraph (c) of this section means that during the pendency of any administrative or judicial proceeding to challenge a determination that the child's behavior is not a manifestation of the child's disability, the child remains in the child's current educational placement or the child's placement under § 300.526, whichever applies.

§ 300.525 Parent appeal.

(a) *General.*

(1) If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement, the parent may request a hearing.

(2) The State or local educational agency shall arrange for an expedited hearing in any case described in this section if requested by a parent.

(b) *Review of decision.*

(1) In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of the child's disability consistent with the requirements of § 300.523(e).

(2) In reviewing a decision under § 300.520(a)(2) to place the child in an interim alternative educational setting, the hearing officer shall apply the standards in § 300.521.

(Authority: 20 U.S.C. 1415(k)(6))

§ 300.526 Placement during appeals.

(a) *General.* If a parent requests a hearing regarding a disciplinary action

described in § 300.520(a)(2) or 300.521 to challenge the interim alternative educational setting or the manifestation determination, the child must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in § 300.520(a)(2) or 300.521, whichever occurs first, unless the parent and the State or local educational agency agree otherwise.

(b) *Current placement.* If a child is placed in an interim alternative educational setting pursuant to— § 300.520(a)(2) or 300.521 and school personnel propose to change the child's placement after expiration of the interim alternative placement, during the pendency of any proceeding to challenge the proposed change in placement the child must remain in the current placement (the child's placement prior to the interim alternative educational setting), except as provided in paragraph (c) of this section.

(c) *Expedited hearing.*

(1) If school personnel maintain that it is dangerous for the child to be in the current placement (placement prior to removal to the interim alternative education setting) during the pendency of the due process proceedings, the LEA may request an expedited due process hearing.

(2) In determining whether the child may be placed in the alternative educational setting or in another appropriate placement ordered by the hearing officer, the hearing officer shall apply the standards in § 300.521.

(3) A placement ordered pursuant to paragraph (c)(2) of this section may not be longer than 45 days.

(Authority: 20 U.S.C. 1415(k)(7))

Note: An LEA may seek subsequent expedited hearings under paragraph (c)(1) of this section if, at the expiration of the time period of the placement ordered under paragraph (c) of this section, the LEA maintains that the child is still dangerous and the issue has not been resolved through due process.

§ 300.527 Protections for children not yet eligible for special education and related services.

(a) *General.* A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated any rule or code of conduct of the local educational agency, including any behavior described in §§ 300.520 or 300.521, may assert any of the protections provided for in this part if the LEA had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(b) *Basis of knowledge.* An LEA must be deemed to have knowledge that a child is a child with a disability if—

(1) The parent of the child has expressed concern in writing (or orally if the parent is illiterate in English or has a disability that prevents a written statement) to personnel of the appropriate educational agency that the child is in need of special education and related services;

(2) The behavior or performance of the child demonstrates the need for these services;

(3) The parent of the child has requested an evaluation of the child pursuant to §§ 300.530–300.536; or

(4) The teacher of the child, or other personnel of the local educational agency, has expressed concern about the behavior or performance of the child to the director of special education of the agency or to other personnel of the agency.

(c) *Conditions that apply if no basis of knowledge.*

(1) *General.* If an LEA does not have knowledge that a child is a child with a disability (in accordance with paragraph (b) of this section) prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as measures applied to children without disabilities who engaged in comparable behaviors consistent with paragraph (c)(2) of this section.

(2) *Limitations.*

(i) If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under § 300.520 or 300.521, the evaluation must be conducted in an expedited manner.

(ii) Until the evaluation is completed, the child remains in the educational placement determined by school authorities.

(iii) If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with the provisions of this part, including the requirements of §§ 300.520–300.529 and section 612(a)(1)(A) of the Act.

(Authority: 20 U.S.C. 1415(k)(8))

§ 300.528 Expedited due process hearings.

(a) Expedited due process hearings under §§ 300.521–300.526 must—

(1) Result in a decision within 10 business days of the request for the hearing, unless the parents and school officials otherwise agree;

(2) Meet the requirements of § 300.508, except that a State may provide that the time periods identified in § 300.509(a)(3) and § 300.509(b) for purposes of expedited due process hearings under §§ 300.521–300.526 are not less than two business days; and

(3) Be conducted by a due process hearing officer who satisfies the requirements of § 300.508.

(b) A State may establish different procedural rules for expedited hearings under §§ 300.521–300.526 than it has established for due process hearings under § 300.507.

(c) The decisions on expedited due process hearings are appealable under a State's normal due process appeal procedures.

(Authority: 20 U.S.C. 1415(k)(2), (6), (7))

§ 300.529 Referral to and action by law enforcement and judicial authorities.

(a) Nothing in this part prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(b) An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.

(Authority: 20 U.S.C. 1415(k)(9))

Procedures for Evaluation and Determination of Eligibility

§ 300.530 General.

Each SEA shall ensure that each public agency establishes and implements procedures that meet the requirements of §§ 300.530–300.536.

(Authority: 20 U.S.C. 1414(b)(3); 1412(a)(7))

§ 300.531 Initial evaluation.

Each public agency shall conduct a full and individual initial evaluation, in accordance with §§ 300.532 and 300.533, before the initial provision of special education and related services to a child with a disability under Part B of the Act.

(Authority: 20 U.S.C. 1414(a)(1))

§ 300.532 Evaluation procedures.

Each public agency shall ensure, at a minimum, that—

(a) Tests and other evaluation materials used to assess a child under Part B of the Act—

(1) Are selected and administered so as not to be discriminatory on a racial or cultural basis; and

(2) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(b) A variety of assessment tools and strategies are used to gather relevant functional and developmental information about the child, including information provided by the parent, that may assist in determining—

(1) Whether the child is a child with a disability under § 300.7; and

(2) The content of the child's IEP, including information related to enabling the child—

(i) To be involved in and progress in the general curriculum; or

(ii) For a preschool child, to participate in appropriate activities.

(c) Any standardized tests that are given to a child—

(i) Have been validated for the specific purpose for which they are used; and

(ii) Are administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the tests;

(d) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient;

(e) Tests are selected and administered so as best to ensure that if a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure);

(f) No single procedure is used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child;

(g) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

(h) The public agency uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors; and

(i) The public agency uses assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child.

(Authority: 20 U.S.C. 1414 (a)(6)(B), (b) (2) and (3))

Note 1: Under Title VI of the Civil Rights Act of 1964, in order to properly evaluate a child who may be limited English proficient, the public agency must first determine the child's proficiency in English and the child's native language. Under Title VI, an accurate assessment of the child's language proficiency must include objective assessment of reading, writing, speaking, and understanding. Under this section and § 300.534(b), information about the child's language proficiency must be considered in determining how to conduct the evaluation of the child to prevent misclassification. Under both Title VI and Part B of the Act, the public agency has a responsibility to ensure that children with limited English proficiency are not evaluated on the basis of criteria that essentially measure English language skills.

Note 2: In some situations, there may be no one on the staff of a public agency who is able to administer a test or other evaluation in a child's native language, as required under paragraph (a)(2) of this section, but an appropriate individual is available in the surrounding area. Ways that a public agency can identify an individual in the surrounding area who is able to administer a test or other evaluation in the child's native language include contacting neighboring school districts, local universities, and professional organizations. For LEP students, in situations where it is clearly not feasible to provide and administer tests in the child's native language or mode of communication, the public agency still needs to obtain and consider accurate and reliable information that will enable the agency to make an informed decision as to whether the child has a disability and the effects of the disability on the child's educational needs.

Note 3: If an assessment is not conducted under standard conditions, information about the extent to which the assessment varied from standard conditions, such as the qualifications of the person administering the test or the method of test administration, needs to be included in the evaluation report. This information is needed so that the team of qualified professionals can evaluate the effects of these variances on the validity and reliability of the information reported and to determine whether additional assessments are needed.

§ 300.533 Determination of needed evaluation data.

(a) *Review of existing evaluation data.* As part of an initial evaluation (if appropriate) and as part of any reevaluation under Part B of the Act, a team that includes the individuals required by § 300.344, and other qualified professionals, as appropriate, shall—

(1) Review existing evaluation data on the child, including—

(i) Evaluations and information provided by the parents of the child;

(ii) Current classroom-based assessments and observations; and

(iii) Observations by teachers and related services providers; and

(2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine—

(i) Whether the child has a particular category of disability, as described in § 300.7, or, in case of a reevaluation of a child, whether the child continues to have such a disability;

(ii) The present levels of performance and educational needs of the child;

(iii) Whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and

(iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general curriculum.

(b) *Need for additional data.* The public agency shall administer tests and other evaluation materials as may be needed to produce the data identified under paragraph (a) of this section.

(c) *Requirements if additional data are not needed.* (1) If the determination under paragraph (a) of this section is that no additional data are needed to determine whether the child continues to be a child with a disability, the public agency shall notify the child's parents—

(i) Of that determination and the reasons for it; and

(ii) Of the right of the parents to request an assessment to determine whether the child continues to be a child with a disability.

(2) The public agency is not required to conduct the assessment described in paragraph (c)(1)(ii) of this section unless requested to do so by the child's parents.

(Authority: 20 U.S.C. 1414(c)(1), (2) and (4))

Note: The requirement in paragraph (a) of this section and § 300.534(a)(1) that review of evaluation data and eligibility decisions be made by groups that include ''qualified professionals,'' is intended to ensure that the teams making these determinations include individuals with the knowledge and skills necessary to interpret the evaluation data and make an informed determination as to whether the child is a child with a disability under § 300.7, and to determine whether the child needs special education and related services. The composition of the team will

vary depending upon the nature of the child's suspected disability and other relevant factors. For example, if a student is suspected of having a learning disability, a professional whose sole expertise is visual impairments would be an inappropriate choice. If a student is limited English proficient, it will be important to include a person on the team of qualified professionals who is knowledgeable about the identification, assessment, and education of limited English proficient students.

§ 300.534 Determination of eligibility

(a) Upon completing the administration of tests and other evaluation materials—

(1) A team of qualified professionals and the parent of the child must determine whether the child is a child with a disability, as defined in § 300.7; and

(2) The public agency must provide a copy of the evaluation report and the documentation of determination of eligibility to the parent.

(b) A child may not be determined to be a child with a disability if the determinant factor for that determination is—

(1) Lack of instruction in reading or math; or

(2) Limited English proficiency.

(c) A public agency must evaluate a child with a disability in accordance with §§ 300.532 and 300.533 before determining that the child is no longer a child with a disability.

(Authority: 20 U.S.C. 1414(b)(4) and (5), (c)(5))

§ 300.535 Procedures for determining eligibility and placement.

(a) In interpreting evaluation data for the purpose of determining if a child is a child with a disability under § 300.7, and the educational needs of the child, each public agency shall—

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; and

(2) Ensure that information obtained from all of these sources is documented and carefully considered.

(b) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with §§ 300.340–300.350.

(Authority: 20 U.S.C. 1412(a)(6), 1414(b)(4))

Note: Paragraph (a)(1) includes a list of examples of sources that may be used by a public agency in determining whether a child is a child with a disability, as defined in § 300.7. The agency would not have to use all the sources in every instance. The point of the requirement is to ensure that more than one source is used in interpreting evaluation data and in making these determinations. For example, while all of the named sources would have to be used for a child whose suspected disability is mental retardation, they would not be necessary for certain other children with disabilities, such as a child who has a severe articulation impairment as his primary disability. For such a child, the speech-language pathologist, in complying with the multiple source requirement, might use (1) a standardized test of articulation, and (2) observation of the child's articulation behavior in conversational speech.

§ 300.536 Reevaluation.

Each public agency shall ensure—

(a) That the IEP of each child with a disability is reviewed in accordance with §§ 300.340–300.350; and

(b) That a reevaluation of each child, in accordance with §§ 300.530(b), 300.532, and 300.533, is conducted if conditions warrant a reevaluation, or if the child's parent or teacher requests a reevaluation, but at least once every three years.

(Authority: 20 U.S.C. 1414(a)(2))

Additional Procedures for Evaluating Children With Specific Learning Disabilities

§ 300.540 Additional team members.

The determination of whether a child suspected of having a specific learning disability is a child with a disability as defined in § 300.7, must be made by the child's parents and a team of qualified professionals which must include—

(a)(1) The child's regular teacher; or

(2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or

(3) For a child of less than school age, an individual qualified by the SEA to teach a child of his or her age; and

(b) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.

(Authority: 20 U.S.C. 1411 note)

§ 300.541 Criteria for determining the existence of a specific learning disability.

(a) A team may determine that a child has a specific learning disability if—

(1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, if provided with learning experiences appropriate for the child's age and ability levels; and

(2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas:

(i) Oral expression.

(ii) Listening comprehension.

(iii) Written expression.

(iv) Basic reading skill.

(v) Reading comprehension.

(vi) Mathematics calculation.

(vii) Mathematics reasoning.

(b) The team may not identify a child as having a specific learning disability if the severe discrepancy between ability and achievement is primarily the result of—

(1) A visual, hearing, or motor impairment;

(2) Mental retardation;

(3) Emotional disturbance; or

(4) Environmental, cultural or economic disadvantage.

(Authority: 20 U.S.C. 1411 note)

§ 300.542 Observation.

(a) At least one team member other than the child's regular teacher shall observe the child's academic performance in the regular classroom setting.

(b) In the case of a child of less than school age or out of school, a team member shall observe the child in an environment appropriate for a child of that age.

(Authority: 20 U.S.C. 1411 note)

§ 300.543 Written report.

(a) For a child suspected of having a specific learning disability, the documentation of the team's determination of eligibility, as required by § 300.534(a)(2), must include a statement of—

(1) Whether the child has a specific learning disability;

(2) The basis for making the determination;

(3) The relevant behavior noted during the observation of the child;

(4) The relationship of that behavior to the child's academic functioning;

(5) The educationally relevant medical findings, if any;

(6) Whether there is a severe discrepancy between achievement and ability that is not correctable without special education and related services; and

(7) The determination of the team concerning the effects of environmental, cultural, or economic disadvantage.

(b) Each team member shall certify in writing whether the report reflects his or her conclusion. If it does not reflect his or her conclusion, the team member must submit a separate statement presenting his or her conclusions.

(Authority: 20 U.S.C. 1411 note)

Least Restrictive Environment

§ 300.550 General.

(a) A State shall demonstrate to the satisfaction of the Secretary that the

State has in effect policies and procedures to ensure that it meets the requirements of §§ 300.550–300.556.

(b) Each public agency shall ensure—

(1) That to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(2) That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(Authority: 20 U.S.C. 1412(a)(5))

§ 300.551 Continuum of alternative placements.

(a) Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must—

(1) Include the alternative placements listed in the definition of special education under § 300.17 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

(Authority: 20 U.S.C. 1412(a)(5))

Note: Home instruction is usually appropriate for only a limited number of children, such as children who are medically fragile and are not able to participate in a school setting with other children.

§ 300.552 Placements.

In determining the educational placement of a child with a disability, each public agency shall ensure that—

(a) The placement decision—

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.550–300.554;

(b) The child's placement—

(1) Is determined at least annually;

(2) Is based on the child's IEP; and

(3) Is as close as possible to the child's home;

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled; and

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.

(Authority: 20 U.S.C. 1412(a)(5))

Note 1: With respect to paragraph (a)(1) of this section, nothing in this part would prohibit a public agency from allowing the group of persons that makes the placement decision also to serve as the child's IEP team, so long as all individuals described in § 300.344 are included.

Note 2: Section 300.552 includes some of the main factors that must be considered in determining the extent to which a child with a disability can be educated with children who are not disabled. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to ensure that each child with a disability receives an education that is appropriate to his or her individual needs.

The requirements of § 300.552, as well as the other requirements of §§ 300.550–300.556, apply to all preschool children with disabilities who are entitled to receive FAPE. Public agencies that provide preschool programs for nondisabled preschool children must ensure that the requirements of § 300.552(c) are met. Public agencies that do not operate programs for nondisabled preschool children are not required to initiate those programs solely to satisfy the requirements regarding placement in the LRE embodied in §§ 300.550–300.556. For these public agencies, some alternative methods for meeting the requirements of §§ 300.550–300.556 include—

(1) Providing opportunities for the participation (even part-time) of preschool children with disabilities in other preschool programs operated by public agencies (such as Head Start);

(2) Placing children with disabilities in private school programs for nondisabled preschool children or private school preschool programs that integrate children with disabilities and nondisabled children; and

(3) Locating classes for preschool children with disabilities in regular elementary schools.

In each case the public agency must ensure that each child's placement is in the LRE in which the unique needs of that child can be met, based upon the child's IEP, and meets all of the other requirements of §§ 300.340–300.351 and §§ 300.550–300.556.

The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (34 CFR part 104—Appendix, Paragraph 24) includes several points regarding educational placements of children with disabilities that are pertinent to this section:

1. With respect to determining proper placements, the analysis states: ''* * * it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs * * *.''

2. With respect to placing a child with a disability in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this factor into account in making placement decisions. The parents' right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home, and this issue may be raised by the parent under the due process provisions of this subpart.

Note 3: If IEP teams appropriately consider positive behavioral interventions and supplementary aids and services and if necessary include those services in IEPs, many children who otherwise would be disruptive will be able to participate in regular education classrooms.

§ 300.553 Nonacademic settings.

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 300.306, each public agency shall ensure that each child with a disability participates with nondisabled children in those services and activities to the maximum extent appropriate to the needs of that child.

(Authority: 20 U.S.C. 1412(a)(5))

Note: Section 300.553 is taken from a requirement in the regulations for Section 504 of the Rehabilitation Act of 1973. With respect to this requirement, the analysis of the Section 504 regulations includes the following statement: ''[This paragraph] specifies that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children.'' (34 CFR part 104—Appendix, Paragraph 24.)

§ 300.554 Children in public or private institutions.

Each SEA shall make arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures) as may be necessary to ensure that § 300.550 is effectively implemented.

(Authority: 20 U.S.C. 1412(a)(5))

Note: The requirement to educate children with disabilities with nondisabled children also applies to children in public and private institutions or other care facilities. Each SEA

must ensure that each applicable agency and institution in the State implements this requirement. Regardless of other reasons for institutional placement, no child in an institution who is capable of education in a regular public school setting may be denied access to an education in that setting.

§ 300.555 Technical assistance and training activities.

Each SEA shall carry out activities to ensure that teachers and administrators in all public agencies—

(a) Are fully informed about their responsibilities for implementing § 300.550; and

(b) Are provided with technical assistance and training necessary to assist them in this effort.

(Authority: 20 U.S.C. 1412(a)(5))

§ 300.556 Monitoring activities.

(a) The SEA shall carry out activities to ensure that § 300.550 is implemented by each public agency.

(b) If there is evidence that a public agency makes placements that are inconsistent with § 300.550, the SEA shall—

(1) Review the public agency's justification for its actions; and

(2) Assist in planning and implementing any necessary corrective action.

(Authority: 20 U.S.C. 1412(a)(5))

Confidentiality of Information

§ 300.560 Definitions.

As used in §§ 300.560–300.577—

Destruction means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

Education records means the type of records covered under the definition of ''education records'' in 34 CFR part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974).

Participating agency means any agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under Part B of the Act.

(Authority: 20 U.S.C. 1221e–3, 1412(a)(8), 1417(c))

§ 300.561 Notice to parents.

(a) The SEA shall give notice that is adequate to fully inform parents about the requirements of § 300.127, including—

(1) A description of the extent that the notice is given in the native languages of the various population groups in the State;

(2) A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

(3) A summary of the policies and procedures that participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and

(4) A description of all of the rights of parents and children regarding this information, including the rights under the Family Educational Rights and Privacy Act of 1974 and implementing regulations in 34 CFR part 99.

(b) Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.562 Access rights.

(a) Each participating agency shall permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency shall comply with a request without unnecessary delay and before any meeting regarding an IEP or any hearing relating to the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes—

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.563 Record of access.

Each participating agency shall keep a record of parties obtaining access to education records collected, maintained, or used under Part B of the Act (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.564 Records on more than one child.

If any education record includes information on more than one child, the parents of those children have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.565 List of types and locations of information.

Each participating agency shall provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.566 Fees.

(a) Each participating agency may charge a fee for copies of records that are made for parents under this part if the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

(b) A participating agency may not charge a fee to search for or to retrieve information under this part.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.567 Amendment of records at parent's request.

(a) A parent who believes that information in the education records collected, maintained, or used under this part is inaccurate or misleading or violates the privacy or other rights of the child may request the participating agency that maintains the information to amend the information.

(b) The agency shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the agency decides to refuse to amend the information in accordance with the request, it shall inform the parent of the refusal and advise the parent of the right to a hearing under § 300.568.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

§ 300.568 Opportunity for a hearing.

The agency shall, on request, provide an opportunity for a hearing to

challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.569 Result of hearing.

(a) If, as a result of the hearing, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall amend the information accordingly and so inform the parent in writing.

(b) If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it shall inform the parent of the right to place in the records it maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

(c) Any explanation placed in the records of the child under this section must—

(1) Be maintained by the agency as part of the records of the child as long as the record or contested portion is maintained by the agency; and

(2) If the records of the child or the contested portion is disclosed by the agency to any party, the explanation must also be disclosed to the party.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.570 Hearing procedures.

A hearing held under § 300.568 must be conducted according to the procedures under 34 CFR 99.22.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.571 Consent.

(a) Parental consent must be obtained before personally identifiable information is—

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information under this part, subject to paragraph (b) of this section; or

(2) Used for any purpose other than meeting a requirement of this part.

(b) An educational agency or institution subject to 34 CFR part 99 may not release information from education records to participating agencies without parental consent unless authorized to do so under part 99.

(c) The SEA shall provide policies and procedures that are used in the event that a parent refuses to provide consent under this section.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.572 Safeguards.

(a) Each participating agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

(b) One official at each participating agency shall assume responsibility for ensuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under § 300.127 and 34 CFR part 99.

(d) Each participating agency shall maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.573 Destruction of information.

(a) The public agency shall inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.

(b) The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

Note: Under § 300.573, the personally identifiable information on a child with a disability may be retained permanently unless the parents request that it be destroyed. Destruction of records is the best protection against improper and unauthorized disclosure. However, the records may be needed for other purposes. In informing parents about their rights under this section, the agency should remind them that the records may be needed by the child or the parents for social security benefits or other purposes. If the parents request that the information be destroyed, the agency may retain the information in paragraph (b) of this section.

§ 300.574 Children's rights.

The SEA shall provide policies and procedures regarding the extent to which children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

Note 1: Under the regulations for the Family Educational Rights and Privacy Act of 1974 (34 CFR 99.5(a)), the rights of parents regarding education records are transferred to the student at age 18.

Note 2: If the rights accorded to parents under Part B of the Act are transferred to a student who reaches the age of majority, consistent with § 300.517, the rights regarding educational records in §§ 300.562–300.573 must also be transferred to the student. However, the public agency must provide any notice required under section 615 of the Act to the student and the parents.

§ 300.575 Enforcement.

The SEA shall provide the policies and procedures, including sanctions, that the State uses to ensure that its policies and procedures are followed and that the requirements of the Act and the regulations in this part are met.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.576 Disciplinary information.

(a) The State may require that a LEA include in the records of a child with a disability a statement of any current or previous disciplinary action that has been taken against the child and transmit the statement to the same extent that the disciplinary information is included in, and transmitted with, the student records of nondisabled children.

(b) The statement may include a description of any behavior engaged in by the child that required disciplinary action, a description of the disciplinary action taken, and any other information that is relevant to the safety of the child and other individuals involved with the child.

(c) If the State adopts such a policy, and the child transfers from one school to another, the transmission of any of the child's records must include both the child's current individualized education program and any statement of current or previous disciplinary action that has been taken against the child.

(Authority: 20 U.S.C. 1413(j))

§ 300.577 Department use of personally identifiable information.

If the Department or its authorized representatives collect any personally identifiable information regarding children with disabilities that is not subject to 5 U.S.C. 552a (the Privacy Act of 1974), the Secretary applies the requirements of 5 U.S.C. 552a (b)(1)–(2), (4)–(11); (c); (d); (e)(1), (2), (3)(A), (B), and (D), (5)–(10); (h); (m); and (n); and the regulations implementing those provisions in 34 CFR part 5b.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

Department Procedures

§ 300.580 Determination by the Secretary that a State is eligible.

If the Secretary determines that a State is eligible to receive a grant under Part B of the Act, the Secretary notifies the State of that determination.

(Authority: 20 U.S.C. (1412(d))

§ 300.581 Notice and hearing before determining that a State is not eligible.

(a) *General.* (1) The Secretary does not make a final determination that a State is not eligible to receive a grant under Part B of the Act until providing the State—

(i) With reasonable notice; and

(ii) With an opportunity for a hearing.

(2) In implementing paragraph (a)(1)(i) of this section, the Secretary sends a written notice to the SEA by certified mail with return receipt requested.

(b) *Content of notice*. In the written notice described in paragraph (a)(2) of this section, the Secretary—

(1) States the basis on which the Secretary proposes to make a final determination that the State is not eligible;

(2) May describe possible options for resolving the issues;

(3) Advises the SEA that it may request a hearing and that the request for a hearing must be made not later than 30 calendar days after it receives the notice of the proposed final determination that the State is not eligible; and

(4) Provides information about the procedures followed for a hearing.

(Authority: 20 U.S.C. (1412(d)(2))

§ 300.582 Hearing official or panel.

(a) If the SEA requests a hearing, the Secretary designates one or more individuals, either from the Department or elsewhere, not responsible for or connected with the administration of this program, to conduct a hearing.

(b) If more than one individual is designated, the Secretary designates one of those individuals as the Chief Hearing Official of the Hearing Panel. If one individual is designated, that individual is the Hearing Official.

(Authority: 20 U.S.C. (1412(d)(2))

§ 300.583 Hearing procedures.

(a) As used in §§ 300.581–300.586 the term *party* or *parties* means the following:

(1) An SEA that requests a hearing regarding the proposed disapproval of its State plan under this part.

(2) The Department official who administers the program of financial assistance under this part.

(3) A person, group or agency with an interest in and having relevant information about the case that has applied for and been granted leave to intervene by the Hearing Official or Panel.

(b) Within 15 days after receiving a request for a hearing, the Secretary designates a Hearing Official or Panel and notifies the parties.

(c) The Hearing Official or Panel may regulate the course of proceedings and the conduct of the parties during the proceedings. The Hearing Official or Panel takes all steps necessary to conduct a fair and impartial proceeding, to avoid delay, and to maintain order, including the following:

(1) The Hearing Official or Panel may hold conferences or other types of appropriate proceedings to clarify, simplify, or define the issues or to consider other matters that may aid in the disposition of the case.

(2) The Hearing Official or Panel may schedule a prehearing conference of the Hearing Official or Panel and parties.

(3) Any party may request the Hearing Official or Panel to schedule a prehearing or other conference. The Hearing Official or Panel decides whether a conference is necessary and notifies all parties.

(4) At a prehearing or other conference, the Hearing Official or Panel and the parties may consider subjects such as—

(i) Narrowing and clarifying issues;

(ii) Assisting the parties in reaching agreements and stipulations;

(iii) Clarifying the positions of the parties;

(iv) Determining whether an evidentiary hearing or oral argument should be held; and

(v) Setting dates for—

(A) The exchange of written documents;

(B) The receipt of comments from the parties on the need for oral argument or evidentiary hearing;

(C) Further proceedings before the Hearing Official or Panel (including an evidentiary hearing or oral argument, if either is scheduled);

(D) Requesting the names of witnesses each party wishes to present at an evidentiary hearing and estimation of time for each presentation; or

(E) Completion of the review and the initial decision of the Hearing Official or Panel.

(5) A prehearing or other conference held under paragraph (b)(4) of this section may be conducted by telephone conference call.

(6) At a prehearing or other conference, the parties shall be prepared to discuss the subjects listed in paragraph (b)(4) of this section.

(7) Following a prehearing or other conference the Hearing Official or Panel may issue a written statement describing the issues raised, the action taken, and the stipulations and agreements reached by the parties.

(d) The Hearing Official or Panel may require parties to state their positions and to provide all or part of the evidence in writing.

(e) The Hearing Official or Panel may require parties to present testimony through affidavits and to conduct cross-examination through interrogatories.

(f) The Hearing Official or Panel may direct the parties to exchange relevant documents or information and lists of witnesses, and to send copies to the Hearing Official or Panel.

(g) The Hearing Official or Panel may receive, rule on, exclude, or limit evidence at any stage of the proceedings.

(h) The Hearing Official or Panel may rule on motions and other issues at any stage of the proceedings.

(i) The Hearing Official or Panel may examine witnesses.

(j) The Hearing Official or Panel may set reasonable time limits for submission of written documents.

(k) The Hearing Official or Panel may refuse to consider documents or other submissions if they are not submitted in a timely manner unless good cause is shown.

(l) The Hearing Official or Panel may interpret applicable statutes and regulations but may not waive them or rule on their validity.

(m)(1) The parties shall present their positions through briefs and the submission of other documents and may request an oral argument or evidentiary hearing. The Hearing Official or Panel shall determine whether an oral argument or an evidentiary hearing is needed to clarify the positions of the parties.

(2) The Hearing Official or Panel gives each party an opportunity to be represented by counsel.

(n) If the Hearing Official or Panel determines that an evidentiary hearing would materially assist the resolution of the matter, the Hearing Official or Panel gives each party, in addition to the opportunity to be represented by counsel—

(1) An opportunity to present witnesses on the party's behalf; and

(2) An opportunity to cross-examine witnesses either orally or with written questions.

(o) The Hearing Official or Panel accepts any evidence that it finds is relevant and material to the proceedings and is not unduly repetitious.

(p)(1) The Hearing Official or Panel—

(i) Arranges for the preparation of a transcript of each hearing;

(ii) Retains the original transcript as part of the record of the hearing; and

(iii) Provides one copy of the transcript to each party.

(2) Additional copies of the transcript are available on request and with payment of the reproduction fee.

(q) Each party shall file with the Hearing Official or Panel all written motions, briefs, and other documents and shall at the same time provide a copy to the other parties to the proceedings.

(Authority: 20 U.S.C. (1412(d)(2))

§ 300.584 Initial decision; final decision.

(a) The Hearing Official or Panel prepares an initial written decision that addresses each of the points in the notice sent by the Secretary to the SEA under § 300.581.

(b) The initial decision of a Panel is made by a majority of Panel members.

(c) The Hearing Official or Panel mails by certified mail with return receipt requested a copy of the initial decision to each party (or to the party's counsel) and to the Secretary, with a notice stating that each party has an opportunity to submit written comments regarding the decision to the Secretary.

(d) Each party may file comments and recommendations on the initial decision with the Hearing Official or Panel within 15 days of the date the party receives the Panel's decision.

(e) The Hearing Official or Panel sends a copy of a party's initial comments and recommendations to the other parties by certified mail with return receipt requested. Each party may file responsive comments and recommendations with the Hearing Official or Panel within seven days of the date the party receives the initial comments and recommendations.

(f) The Hearing Official or Panel forwards the parties' initial and responsive comments on the initial decision to the Secretary who reviews the initial decision and issues a final decision.

(g) The initial decision of the Hearing Official or Panel becomes the final decision of the Secretary unless, within 25 days after the end of the time for receipt of written comments, the Secretary informs the Hearing Official or Panel and the parties to a hearing in writing that the decision is being further reviewed for possible modification.

(h) The Secretary may reject or modify the initial decision of the Hearing Official or Panel if the Secretary finds that it is clearly erroneous.

(i) The Secretary conducts the review based on the initial decision, the written record, the Hearing Official's or Panel's proceedings, and written comments. The Secretary may remand the matter for further proceedings.

(j) The Secretary issues the final decision within 30 days after notifying the Hearing Official or Panel that the initial decision is being further reviewed.

(Authority: 20 U.S.C. (1412(d)(2))

§ 300.585 Filing requirements.

(a) Any written submission under §§ 300.581–300.585 must be filed by hand-delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(b) The filing date under paragraph (a) of this section is the date the document is—

(1) Hand-delivered;

(2) Mailed; or

(3) Sent by facsimile transmission.

(c) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(d) If a document is filed by facsimile transmission, the Secretary, the Hearing Official, or the Panel, as applicable, may require the filing of a follow-up hard copy by hand-delivery or by mail within a reasonable period of time.

(e) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(Authority: 20 U.S.C. 1413(c))

§ 300.586 Judicial review.

If a State is dissatisfied with the Secretary's final action with respect to the eligibility of the State under section 612 of the Act, the State may, not later than 60 days after notice of that action, file with the United States Court of Appeals for the circuit in which that State is located a petition for review of that action. A copy of the petition must be forthwith transmitted by the clerk of the court to the Secretary. The Secretary then files in the court the record of the proceedings upon which the Secretary's action was based, as provided in section 2112 of title 28, United States Code.

(Authority: 20 U.S.C. 1416(b))

§ 300.587 Enforcement.

(a) *General.* The Secretary initiates an action described in paragraph (b) of this section if the Secretary finds—

(1) That there has been a failure by the State to comply substantially with any provision of Part B of the Act, this part, or 34 CFR part 301; or

(2) That there is a failure to comply with any condition of an LEA's or SEA's eligibility under Part B of the Act, this part or 34 CFR part 301, including the terms of any agreement to achieve compliance with Part B of the Act, this part, or Part 301 within the timelines specified in the agreement.

(b) *Types of action.* The Secretary, after notifying the SEA (and any LEA or State agency affected by a failure described in paragraph (a)(2) of this section)—

(1) Withholds in whole or in part any further payments to the State under Part B of the Act;

(2) Refers the matter to the Department of Justice for enforcement; or

(3) Takes any other enforcement action authorized by law.

(c) *Nature of withholding.* (1) If the Secretary determines that it is appropriate to withhold further payments under paragraph (b)(1) of this section, the Secretary may determine that the withholding will be limited to programs or projects, or portions thereof, affected by the failure, or that the SEA shall not make further payments under Part B of the Act to specified LEA or State agencies affected by the failure.

(2) Until the Secretary is satisfied that there is no longer any failure to comply with the provisions of Part B of the Act, this part, or 34 CFR part 301, as specified in paragraph (a) of this section, payments to the State under Part B of the Act are withheld in whole or in part, or payments by the SEA under Part B of the Act are limited to local educational agencies and State agencies whose actions did not cause or were not involved in the failure, as the case may be.

(3) Any SEA, LEA, or other State agency that has received notice under paragraph (a) of this section shall, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the jurisdiction of that agency.

(4) Before withholding under paragraph (b)(1) of this section, the Secretary provides notice and a hearing pursuant to the procedures in §§ 300.581–300.586.

(d) *Referral for appropriate enforcement.* (1) Before the Secretary makes a referral under paragraph (b)(2) of this section for enforcement, or takes any other enforcement action authorized by law under paragraph (b)(3), the Secretary provides the State—

(i) With reasonable notice; and

(ii) With an opportunity for a hearing.

(2) The hearing described in paragraph (d)(1)(ii) of this section consists of an opportunity to meet with the Assistant Secretary for the Office of Special Education and Rehabilitative Services to demonstrate why the Department should not make such a referral for enforcement.

(e) *Divided State agency responsibility*. For purposes of this part, if responsibility for ensuring that the requirements of this part are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons is assigned to a public agency other than the SEA pursuant to § 300.600(d), and if the Secretary finds that the failure to comply substantially with the provisions of Part B of the Act or this part are related to a failure by the public agency, the Secretary takes one of the enforcement actions described in paragraph (b) of this section to ensure compliance with Part B of the Act and this part, except—

(1) Any reduction or withholding of payments to the State under paragraph (b)(1) of this section is proportionate to the total funds allotted under section 611 of the Act to the State as the number of eligible children with disabilities in adult prisons under the supervision of the other public agency is proportionate to the number of eligible individuals with disabilities in the State under the supervision of the State educational agency; and

(2) Any withholding of funds under paragraph (e)(1) of this section is limited to the specific agency responsible for the failure to comply with Part B of the Act or this part.

(Authority: 20 U.S.C. 1416)

Note: Other enforcement actions authorized by law include issuance of a complaint to compel compliance through a cease and desist order under 20 U.S.C. 1234e and entering into a compliance agreement to bring a recipient into compliance under 20 U.S.C. 1234f.

§§ 300.588 [Reserved]

§ 300.589 Waiver of requirement regarding supplementing and not supplanting with Part B funds.

(a) Except as provided under §§ 300.232–300.235, funds paid to a State under Part B of the Act must be used to supplement and increase the level of Federal, State, and local funds (including funds that are not under the direct control of SEAs or LEAs) expended for special education and related services provided to children with disabilities under Part B of the Act and in no case to supplant those Federal, State, and local funds. A State may use funds it retains under § 300.602 without regard to the prohibition on supplanting other funds (See § 300.372).

(b) If a State provides clear and convincing evidence that all eligible children with disabilities throughout the State have FAPE available to them, the Secretary may waive for a period of one year in whole or in part the requirement under § 300.153 (regarding State-level nonsupplanting) if the Secretary concurs with the evidence provided by the State.

(c) If a State wishes to request a waiver under this section, it must submit to the Secretary a written request that includes—

(1) An assurance that FAPE is currently available, and will remain available throughout the period that a waiver would be in effect, to all eligible children with disabilities throughout the State, regardless of the public agency that is responsible for providing FAPE to them. The assurance must be signed by an official who has the authority to provide that assurance as it applies to all eligible children with disabilities in the State;

(2) All evidence that the State wishes the Secretary to consider in determining whether all eligible children with disabilities have FAPE available to them, setting forth in detail—

(i) The basis on which the State has concluded that FAPE is available to all eligible children in the State; and

(ii) The procedures that the State will implement to ensure that FAPE remains available to all eligible children in the State, which must include—

(A) The State's procedures under § 300.125 for ensuring that all eligible children are identified, located and evaluated;

(B) The State's procedures for monitoring public agencies to ensure that they comply with all requirements of this part;

(C) The State's complaint procedures under §§ 300.660–300.662; and

(D) The State's hearing procedures under §§ 300.507–300.511 and 300.520–300.528;

(3) A summary of all State and Federal monitoring reports, and State complaint decisions (see §§ 300.660–300.662) and hearing decisions (see §§ 300.507–300.511 and 300.520–300.528), issued within three years prior to the date of the State's request for a waiver under this section, that includes any finding that FAPE has not been available to one or more eligible children, and evidence that FAPE is now available to all children addressed in those reports or decisions; and

(4) Evidence that the State, in determining that FAPE is currently available to all eligible children with disabilities in the State, has consulted with the State advisory panel under § 300.650, the State's Parent Training and Information Center or Centers, the State's Protection and Advocacy organization, and other organizations representing the interests of children with disabilities and their parents, and a summary of the input of these organizations.

(d) If the Secretary determines that the request and supporting evidence submitted by the State makes a prima facie showing that FAPE is, and will remain, available to all eligible children with disabilities in the State, the Secretary, after notice to the public throughout the State, conducts a public hearing at which all interested persons and organizations may present evidence regarding the following issues:

(1) Whether FAPE is currently available to all eligible children with disabilities in the State.

(2) Whether the State will be able to ensure that FAPE remains available to all eligible children with disabilities in the State if the Secretary provides the requested waiver.

(e) Following the hearing, the Secretary, based on all submitted evidence, will provide a waiver for a period of one year if the Secretary finds that the State has provided clear and convincing evidence that FAPE is currently available to all eligible children with disabilities in the State, and the State will be able to ensure that FAPE remains available to all eligible children with disabilities in the State if the Secretary provides the requested waiver.

(f) A State may receive a waiver of the requirement of section 612(a)(19)(A) and § 300.154(a) if it satisfies the requirements of paragraphs (b) through (e) of this section.

(g)(1) The Secretary may grant subsequent waivers for a period of one year each, if the Secretary determines that the State has provided clear and convincing evidence that all eligible children with disabilities throughout the State have, and will continue to have throughout the one-year period of the waiver, FAPE available to them.

(Authority: 20 U.S.C. 1412(a)(18)(C), (19)(C)(ii) and (E))

Subpart F—State Administration; General

§ 300.600 Responsibility for all educational programs.

(a) The SEA is responsible for ensuring—

(1) That the requirements of this part are carried out; and

(2) That each educational program for children with disabilities administered within the State, including each program administered by any other State or local agency—

(i) Is under the general supervision of the persons responsible for educational programs for children with disabilities in the SEA; and

(ii) Meets the education standards of the SEA (including the requirements of this part).

(b) The State must comply with paragraph (a) of this section through State statute, State regulation, signed agreement between respective agency officials, or other documents.

(c) Part B of the Act does not limit the responsibility of agencies other than educational agencies for providing or paying some or all of the costs of FAPE to children with disabilities in the State.

(d) Notwithstanding paragraph (a) of this section, the Governor (or another individual pursuant to State law), may assign to any public agency in the State the responsibility of ensuring that the requirements of Part B of the Act are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons.

(Authority: 20 U.S.C. 1412(a)(11))

Note: The requirement in § 300.600(a) reflects the desire of the Congress for a central point of responsibility and accountability in the education of children with disabilities within each State. With respect to SEA responsibility, the Senate Report on Pub. L. 94–142 includes the following statements:

This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children, and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the SEA shall be the responsible agency * * *.

Without this requirement, there is an abdication of responsibility for the education of handicapped children. In many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency. (S. Rep. No. 94–168, p. 24 (1975))

In meeting the requirements of this section, there are a number of acceptable options that may be adopted, including the following:

(1) Written agreements are developed between respective State agencies concerning SEA standards and monitoring. These agreements are binding on the local or regional counterparts of each State agency.

(2) The Governor's office issues an administrative directive establishing the SEA responsibility.

(3) State law, regulation, or policy designates the SEA as responsible for establishing standards for all educational programs for individuals with disabilities, and includes responsibility for monitoring.

(4) State law mandates that the SEA is responsible for all educational programs.

§ 300.601 Relation of Part B to other Federal programs.

Part B of the Act may not be construed to permit a State to reduce medical and other assistance available to children with disabilities, or to alter the eligibility of a child with a disability, under title V (Maternal and Child Health) or title XIX (Medicaid) of the Social Security Act, to receive services that are also part of FAPE.

(Authority: 20 U.S.C. 1412(e))

§ 300.602 State-level activities.

(a) Each State may retain not more than the amount described in paragraph (b) of this section for administration in accordance with §§ 300.620 and 300.621 and other State-level activities in accordance with § 300.370.

(b) For each fiscal year, the Secretary determines and reports to the SEA an amount that is 25 percent of the amount the State received under this section for fiscal year 1997, cumulatively adjusted by the Secretary for each succeeding fiscal year by the lesser of—

(1) The percentage increase, if any, from the preceding fiscal year in the State's allocation under section 611 of the Act; or

(2) The rate of inflation, as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor.

(Authority: 20 U.S.C. 1411(f)(1)(A) and (B))

Use of Funds

§ 300.620 Use of funds for State administration.

(a) For the purpose of administering Part B of the Act, including section 619 of the Act (including the coordination of activities under Part B of the Act with, and providing technical assistance to, other programs that provide services to children with disabilities)—

(1) Each State may use not more than twenty percent of the maximum amount it may retain under § 300.602(a) for any fiscal year or $500,000 (adjusted by the cumulative rate of inflation since fiscal year 1998, as measured by the percentage increase, if any, in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor), whichever is greater; and

(2) Each outlying area may use up to five percent of the amount it receives under this section for any fiscal year or $35,000, whichever is greater.

(b) Funds described in paragraph (a) of this section may also be used for the administration of Part C of the Act, if the SEA is the lead agency for the State under that part.

(Authority: 20 U.S.C. 1411(f)(2))

§ 300.621 Allowable costs.

(a) The SEA may use funds under § 300.620 for—

(1) Administration of State activities under Part B of the Act and for planning at the State level, including planning, or assisting in the planning, of programs or projects for the education of children with disabilities;

(2) Approval, supervision, monitoring, and evaluation of the effectiveness of local programs and projects for the education of children with disabilities;

(3) Technical assistance to LEAs with respect to the requirements of Part B of the Act;

(4) Leadership services for the program supervision and management of special education activities for children with disabilities; and

(5) Other State leadership activities and consultative services.

(b) The SEA shall use the remainder of its funds under § 300.620 in accordance with § 300.370.

(Authority: 20 U.S.C. 1411(f)(2))

§ 300.622 Subgrants to LEAs for capacity-building and improvement.

In any fiscal year in which the percentage increase in the State's allocation under 611 of the Act exceeds the rate of inflation (as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor), each State shall reserve, from its allocation under 611 of the Act, the amount described in § 300.623 to make subgrants to LEAs, unless that amount is less than $100,000, to assist them in providing direct services and in making systemic change to improve results for children with disabilities through one or more of the following:

(a) Direct services, including alternative programming for children who have been expelled from school, and services for children in correctional facilities, children enrolled in State-operated or State-supported schools, and children in charter schools.

(b) Addressing needs or carrying out improvement strategies identified in the

State's Improvement Plan under subpart 1 of Part D of the Act.

(c) Adopting promising practices, materials, and technology, based on knowledge derived from education research and other sources.

(d) Establishing, expanding, or implementing interagency agreements and arrangements between LEAs and other agencies or organizations concerning the provision of services to children with disabilities and their families.

(e) Increasing cooperative problem-solving between parents and school personnel and promoting the use of alternative dispute resolution.

(Authority: 20 U.S.C. 1411(f)(4)(A))

§ 300.623 Amount required for subgrants to LEAs.

For each fiscal year, the amount referred to in § 300.622 is—

(a) The maximum amount the State was allowed to retain under § 300.602(a) for the prior fiscal year, or, for fiscal year 1998, 25 percent of the State's allocation for fiscal year 1997 under section 611; multiplied by

(b) The difference between the percentage increase in the State's allocation under this section and the rate of inflation, as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor.

(Authority: 20 U.S.C. 1411(f)(4)(B))

Note: The amount required for these subgrants will vary from year to year and is determined by the size of the increase in the State's allocation. Funds used for the required subgrants to LEAs in one year become part of the required flow-through to LEAs under § 300.712 in the next year. In those years in which the State's allocation does not increase over the prior year by at least the rate of inflation, the required set-aside for these grants will be zero. However, States may always use, at their discretion, funds reserved for State-level activities under § 300.602 for these subgrants.

§ 300.624 State discretion in awarding subgrants.

The State may establish priorities in awarding subgrants under § 300.622 to LEAs competitively or on a targeted basis.

(Authority: 20 U.S.C. 1411(f)(4)(B))

Note: The purpose of these subgrants, as distinguished from the formula subgrants to LEAs, is to provide funding that the SEA can direct to address particular needs not readily addressed through formula assistance to school districts such as funding for services to children who have been suspended or expelled. The SEA can also use these funds to promote innovation, capacity-building, and systemic changes that are needed to improve educational results.

State Advisory Panel

§ 300.650 Establishment of advisory panels.

(a) Each State shall establish and maintain, in accordance with §§ 300.650—300.653, a State advisory panel on the education of children with disabilities.

(b) The advisory panel must be appointed by the Governor or any other official authorized under State law to make those appointments.

(c) If a State has an existing advisory panel that can perform the functions in § 300.652, the State may modify the existing panel so that it fulfills all of the requirements of §§ 300.650—300.653, instead of establishing a new advisory panel.

(Authority: 20 U.S.C. 1412(a)(21)(A))

Note: The advisory panel required by §§ 300.650—300.653 must advise the State regarding the education of all children with disabilities in the State. This includes advising the State on the education of eligible students with disabilities who have been convicted as adults and incarcerated in adult prisons, even if, consistent with § 300.600(d), a State assigns general supervision responsibility for those students to a public agency other than an SEA.

§ 300.651 Membership.

(a) *General.* The membership of the State advisory panel must consist of members appointed by the Governor, or any other official authorized under State law to make these appointments, that is representative of the State population and that is composed of individuals involved in, or concerned with the education of children with disabilities, including—

(1) Parents of children with disabilities;

(2) Individuals with disabilities;

(3) Teachers;

(4) Representatives of institutions of higher education that prepare special education and related services personnel;

(5) State and local education officials;

(6) Administrators of programs for children with disabilities;

(7) Representatives of other State agencies involved in the financing or delivery of related services to children with disabilities;

(8) Representatives of private schools and public charter schools;

(9) At least one representative of a vocational, community, or business organization concerned with the provision of transition services to children with disabilities; and

(10) Representatives from the State juvenile and adult corrections agencies.

(b) *Special rule.* A majority of the members of the panel must be individuals with disabilities or parents of children with disabilities.

(Authority: 20 U.S.C. 1412(a)(21)(B) and (C))

§ 300.652 Advisory panel functions.

The State advisory panel shall—

(a) Advise the SEA of unmet needs within the State in the education of children with disabilities;

(b) Comment publicly on any rules or regulations proposed by the State regarding the education of children with disabilities;

(c) Advise the SEA in developing evaluations and reporting on data to the Secretary under section 618 of the Act;

(d) Advise the SEA in developing corrective action plans to address findings identified in Federal monitoring reports under Part B of the Act; and

(e) Advise the SEA in developing and implementing policies relating to the coordination of services for children with disabilities.

(Authority: 20 U.S.C. 1412(a)(21)(D))

§ 300.653 Advisory panel procedures.

(a) The advisory panel shall meet as often as necessary to conduct its business.

(b) By July 1 of each year, the advisory panel shall submit an annual report of panel activities and suggestions to the SEA. This report must be made available to the public in a manner consistent with other public reporting requirements of Part B of the Act.

(c) Official minutes must be kept on all panel meetings and must be made available to the public on request.

(d) All advisory panel meetings and agenda items must be publicly announced prior to the meeting, and meetings must be open to the public.

(e) Interpreters and other necessary services must be provided at panel meetings for panel members or participants. The State may pay for these services from funds under § 300.620.

(f) The advisory panel shall serve without compensation but the State must reimburse the panel for reasonable and necessary expenses for attending meetings and performing duties. The State may use funds under § 300.620 for this purpose.

(Authority: 20 U.S.C. 1412(a)(21))

State Complaint Procedures

§ 300.660 Adoption of State complaint procedures.

Each SEA shall adopt written procedures for—

(a) Resolving any complaint that meets the requirements of § 300.662 by—

(1) Providing for the filing of a complaint with the SEA; and

(2) At the SEA's discretion, providing for the filing of a complaint with a public agency and the right to have the SEA review the public agency's decision on the complaint; and

(b) Widely disseminating to parents and other interested individuals, including parent training centers, protection and advocacy agencies, independent living centers, and other appropriate entities, the State's procedures under §§ 300.660—300.662.

(Authority: 20 U.S.C. 2831(a))

Note: In resolving a complaint alleging failure to provide appropriate services, an SEA, pursuant to its general supervisory authority under Part B of the Act, may award compensatory services as a remedy for the denial of FAPE.

§ 300.661 Minimum State complaint procedures.

Each SEA shall include the following in its complaint procedures:

(a) A time limit of 60 calendar days after a complaint is filed under § 300.660(a) to—

(1) Carry out an independent on-site investigation, if the SEA determines that such an investigation is necessary;

(2) Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

(3) Review all relevant information and make an independent determination as to whether the public agency is violating a requirement of Part B of the Act or of this part; and

(4) Issue a written decision to the complainant that addresses each allegation in the complaint and contains—

(i) Findings of fact and conclusions; and

(ii) The reasons for the SEA's final decision.

(b) An extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint.

(c) Procedures for effective implementation of the SEA's final decision, if needed, including technical assistance activities, negotiations, and corrective actions to achieve compliance.

(Authority: 20 U.S.C. 2831(a))

Note 1: If a written complaint is received that is also the subject of a due process hearing under § 300.507, or contains multiple issues, of which one or more may be part of that hearing, the State must set aside any part of the complaint that is being addressed in the due process hearing, until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process action must be resolved within the 60 calendar-day timeline using the complaint procedures described in this section.

Note 2: If an issue is raised in a complaint filed under this section that has previously been decided in a due process hearing involving the same parties, then the hearing decision is binding, and the SEA would inform the complainant to that effect. A complaint alleging a public agency's failure to implement a due process decision, however, would have to be resolved by the SEA.

§ 300.662 Filing a complaint.

(a) An organization or individual may file a signed written complaint under the procedures described in §§ 300.660–300.661.

(b) The complaint must include—

(1) A statement that a public agency has violated a requirement of Part B of the Act or of this part; and

(2) The facts on which the statement is based.

(c) The complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received in accordance with § 300.660(a) unless a longer period is reasonable because the violation is continuing, or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received under § 300.660(a).

(Authority: 20 U.S.C. 2831(a))

Note: The SEA must resolve any complaint that meets the requirements of this section, even if the complaint is filed by an organization or individual from another State.

Subpart G—Allocation of Funds; Reports Allocations

§ 300.700 Special definition of the term "State".

For the purposes of §§ 300.701, 300.703–300.714, the term *State* means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

(Authority: 20 U.S.C. 1411(h)(2))

§ 300.701 Grants to States.

(a) *Purpose of grants.* The Secretary makes grants to States and the outlying areas and provides funds to the Secretary of the Interior, to assist them to provide special education and related services to children with disabilities in accordance with Part B of the Act.

(b) *Maximum amounts.* The maximum amount of the grant a State may receive under section 611 of the Act for any fiscal year is—

(1) The number of children with disabilities in the State who are receiving special education and related services—

(i) Aged 3 through 5 if the State is eligible for a grant under section 619 of the Act; and

(ii) Aged 6 through 21; multiplied by—

(2) Forty (40) percent of the average per-pupil expenditure in public elementary and secondary schools in the United States.

(Authority: 20 U.S.C. 1411(a))

§ 300.702 Definition.

For the purposes of this section the term *average per-pupil expenditure in public elementary and secondary schools in the United States* means—

(a) Without regard to the source of funds—

(1) The aggregate current expenditures, during the second fiscal year preceding the fiscal year for which the determination is made (or, if satisfactory data for that year are not available, during the most recent preceding fiscal year for which satisfactory data are available) of all LEAs in the 50 States and the District of Columbia); plus

(2) Any direct expenditures by the State for the operation of those agencies; divided by

(b) The aggregate number of children in average daily attendance to whom those agencies provided free public education during that preceding year.

(Authority: 20 U.S.C. 1411(h)(1))

§ 300.703 Allocations to States.

(a) *General.* After reserving funds for studies and evaluations under section 674(e) of the Act, and for payments to the outlying areas and the Secretary of the Interior under §§ 300.717–300.722 and 300.715, the Secretary allocates the remaining amount among the States in accordance with paragraph (b) of this section and §§ 300.704–300.705 or 300.706–300.709.

(b) *Interim formula.* Except as provided in §§ 300.706–300.709, the Secretary allocates the amount described in paragraph (a) of this section among the States in accordance with section 611(a)(3), (4), (5) and (b)(1), (2) and (3) of the Act, as in effect prior to June 4, 1997, except that the determination of the number of children with disabilities receiving special education and related services under section 611(a)(3) of the Act (as then in effect) may be calculated as of December 1, or, at the State's discretion, the last Friday in October, of the fiscal year for which the funds were appropriated.

(Authority: 20 U.S.C. 1411(d))

§§ 300.704–300.705 [Reserved]

§ 300.706 Permanent formula.

(a) *Establishment of base year.* The Secretary allocates the amount described in § 300.703(a) among the States in accordance with §§ 300.706–300.709 for each fiscal year beginning with the first fiscal year for which the amount appropriated under 611(j) of the Act is more than $4,924,672,200.

(b) *Use of base year.*

(1) *Definition.* As used in this section, the term *base year* means the fiscal year preceding the first fiscal year in which this section applies.

(2) *Special rule for use of base year amount.* If a State received any funds under this section for the base year on the basis of children aged 3 through 5, but does not make FAPE available to all children with disabilities aged 3 through 5 in the State in any subsequent fiscal year, the Secretary computes the State's base year amount, solely for the purpose of calculating the State's allocation in that subsequent year under §§ 300.707–300.709, by subtracting the amount allocated to the State for the base year on the basis of those children.

(Authority: 20 U.S.C. 1411(e)(1) and (2))

§ 300.707 Increase in funds.

If the amount available for allocations to States under § 300.706 is equal to or greater than the amount allocated to the States under this section for the preceding fiscal year, those allocations are calculated as follows:

(a) Except as provided in § 300.708, the Secretary—

(1) Allocates to each State the amount it received for the base year;

(2) Allocates 85 percent of any remaining funds to States on the basis of their relative populations of children aged 3 through 21 who are of the same age as children with disabilities for whom the State ensures the availability of FAPE under Part B of the Act; and

(3) Allocates 15 percent of those remaining funds to States on the basis of their relative populations of children described in paragraph (a)(2) of this section who are living in poverty.

(b) For the purpose of making grants under this section, the Secretary uses the most recent population data, including data on children living in poverty, that are available and satisfactory to the Secretary.

(Authority: 20 U.S.C. 1411(e)(3))

§ 300.708 Limitation.

(a) Notwithstanding § 300.707, allocations under this section are subject to the following:

(1) No State's allocation may be less than its allocation for the preceding fiscal year.

(2) No State's allocation may be less than the greatest of—

(i) The sum of—

(A) The amount it received for the base year; and

(B) One-third of one percent of the amount by which the amount appropriated under section 611(j) of the Act exceeds the amount appropriated under section 611 of the Act for the base year;

(ii) The sum of—

(A) The amount it received for the preceding fiscal year; and

(B) That amount multiplied by the percentage by which the increase in the funds appropriated from the preceding fiscal year exceeds 1.5 percent; or

(iii) The sum of—

(A) The amount it received for the preceding fiscal year; and

(B) That amount multiplied by 90 percent of the percentage increase in the amount appropriated from the preceding fiscal year.

(b) Notwithstanding paragraph (a)(2) of this section, no State's allocation under § 300.707 may exceed the sum of—

(1) The amount it received for the preceding fiscal year; and

(2) That amount multiplied by the sum of 1.5 percent and the percentage increase in the amount appropriated.

(c) If the amount available for allocations to States under § 300.307 and paragraphs (a) and (b) of this section is insufficient to pay those allocations in full those allocations are ratably reduced, subject to paragraph (a)(1) of this section.

(Authority: 20 U.S.C. 1411(e)(3)(B) and (C))

§ 300.709 Decrease in funds.

If the amount available for allocations to States under § 300.706 is less than the amount allocated to the States under section 611 of the Act for the preceding fiscal year, those allocations are calculated as follows:

(a) If the amount available for allocations is greater than the amount allocated to the States for the base year, each State is allocated the sum of—

(1) The amount it received for the base year; and

(2) An amount that bears the same relation to any remaining funds as the increase the State received for the preceding fiscal year over the base year bears to the total of those increases for all States.

(b)(1) If the amount available for allocations is equal to or less than the amount allocated to the States for the base year, each State is allocated the amount it received for the base year.

(2) If the amount available is insufficient to make the allocations described in paragraph (b)(1) of this section, those allocations are ratably reduced.

(Authority: 20 U.S.C. 1411(e)(4))

§ 300.710 Allocation for State in which by-pass is implemented for private school children with disabilities.

In determining the allocation under §§ 300.700—300.709 of a State in which the Secretary will implement a by-pass for private school children with disabilities under §§ 300.451—300.487, the Secretary includes in the State's child count—

(a) For the first year of a by-pass, the actual or estimated number of private school children with disabilities (as defined in §§ 300.7(a) and 300.450) in the State, as of the preceding December 1; and

(b) For succeeding years of a by-pass, the number of private school children with disabilities who received special education and related services under the by-pass in the preceding year.

(Authority: 20 U.S.C. 1412(f)(2))

§ 300.711 Subgrants to LEAs.

Each State that receives a grant under section 611 of the Act for any fiscal year shall distribute in accordance with § 300.712 any funds it does not retain under § 300.602 and is not required to distribute under §§ 300.622 and 300.623 to LEAs in the State that have established their eligibility under section 613 of the Act, and to State agencies that received funds under section 614A(a) of the Act for fiscal year 1997, as then in effect, and have established their eligibility under section 613 of the Act, for use in accordance with Part B of the Act.

(Authority: 20 U.S.C. 1411(g)(1))

§ 300.712 Allocations to LEAs.

(a) *Interim procedure.* For each fiscal year for which funds are allocated to States under § 300.703(b) each State shall allocate funds under § 300.711 in accordance with section 611(d) of the Act, as in effect prior to June 4, 1997.

(b) *Permanent procedure.* For each fiscal year for which funds are allocated to States under §§ 300.706–300.709, each State shall allocate funds under § 300.711 as follows:

(1) *Base payments.* The State first shall award each agency described in § 300.711 the amount that agency would have received under this section for the base year, as defined in § 300.706(b)(1), if the State had distributed 75 percent of its grant for that year under section § 300.703(b).

(2) *Allocation of remaining funds.* The State then shall—

(i) Allocate 85 percent of any remaining funds to those agencies on the basis of the relative numbers of children enrolled in public and private elementary and secondary schools within the agency's jurisdiction; and

(ii) Allocate 15 percent of those remaining funds to those agencies in accordance with their relative numbers of children living in poverty, as determined by the SEA.

(Authority: 20 U.S.C. 1411(g)(2))

Note: In distributing funds under paragraph (b)(2)(i) of this section, States should use the best data that are available to them on enrollment in public and private schools. If data on enrollment in private schools are not available, States or LEAs are not expected to initiate new data collections to obtain these data. However, States are encouraged to try to obtain enrollment data from private, nonprofit schools that want their students to participate in the program.

In distributing funds under paragraph (b)(2)(ii) of this section, States have discretion in determining what data to use to allocate funds among LEAs on the basis of children living in poverty. States should use the best data available to them that reflect the distribution of children living in poverty. Examples of options include census poverty data, data on children in families receiving assistance under the State program funded under Part A of title IV of the Social Security Act, data on children participating in the free or reduced-price meals program under the National School Lunch Act, and allocations under title I of the Elementary and Secondary Education Act.

§ 300.713 Former Chapter 1 State agencies.

(a) To the extent necessary, the State—

(1) Shall use funds that are available under § 300.602(a) to ensure that each State agency that received fiscal year 1994 funds under subpart 2 of Part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 (as in effect in fiscal year 1994) receives, from the combination of funds under § 300.602(a) and funds provided under § 300.711, an amount equal to—

(i) The number of children with disabilities, aged 6 through 21, to whom the agency was providing special education and related services on December 1, or, at the State's discretion, the last Friday in October, of the fiscal year for which the funds were appropriated, subject to the limitation in paragraph (b) of this section; multiplied by

(ii) The per-child amount provided under such subpart for fiscal year 1994; and

(2) May use those funds to ensure that each LEA that received fiscal year 1994 funds under that subpart for children who had transferred from a State-operated or State-supported school or program assisted under that subpart receives, from the combination of funds available under § 300.602(a) and funds provided under § 300.711, an amount for each child, aged 3 through 21 to whom the agency was providing special education and related services on December 1, or, at the State's discretion, the last Friday in October, of the fiscal year for which the funds were appropriated, equal to the per-child amount the agency received under that subpart for fiscal year 1994.

(b) The number of children counted under paragraph (a)(1)(i) of this section may not exceed the number of children aged 3 through 21 for whom the agency received fiscal year 1994 funds under subpart 2 of Part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 (as in effect in fiscal year 1994).

(Authority: 20 U.S.C. 1411(g)(3))

§ 300.714 Reallocation of LEA funds.

If a SEA determines that an LEA is adequately providing FAPE to all children with disabilities residing in the area served by that agency with State and local funds, the SEA may reallocate any portion of the funds under Part B of the Act that are not needed by that local agency to provide FAPE to other LEAs in the State that are not adequately providing special education and related services to all children with disabilities residing in the areas they serve.

(Authority: 20 U.S.C. 1411(g)(4))

§ 300.715 Payments to the Secretary of the Interior for the education of Indian children.

(a) *Reserved amounts for Secretary of Interior.* From the amount appropriated for any fiscal year under 611(j) of the Act, the Secretary reserves 1.226 percent to provide assistance to the Secretary of the Interior in accordance with this section.

(b) *Provision of amounts for assistance.* The Secretary provides amounts to the Secretary of the Interior to meet the need for assistance for the education of children with disabilities on reservations aged 5 to 21, inclusive, enrolled in elementary and secondary schools for Indian children operated or funded by the Secretary of the Interior. The amount of the payment for any fiscal year is equal to 80 percent of the amount allotted under paragraph (a) of this section for that fiscal year.

(c) *Calculation of number of children.* In the case of Indian students aged 3 to 5, inclusive, who are enrolled in programs affiliated with the Bureau of Indian Affairs (BIA) schools and that are required by the States in which these schools are located to attain or maintain State accreditation, and which schools have this accreditation prior to the date of enactment of the Individuals with Disabilities Education Act Amendments of 1991, the school may count those children for the purpose of distribution of the funds provided under this section to the Secretary of the Interior.

(d) *Responsibility for meeting the requirements of Part B.* The Secretary of the Interior shall meet all of the requirements of Part B of the Act for the children described in paragraph (b) of this section, in accordance with § 300.260.

(Authority: 20 U.S.C. 1411(c); 1411(i)(1) (A) and (B))

§ 300.716 Payments for education and services for Indian children with disabilities aged 3 through 5.

(a) *General.* With funds appropriated under 611(j) of the Act, the Secretary makes payments to the Secretary of the Interior to be distributed to tribes or tribal organizations (as defined under section 4 of the Indian Self-Determination and Education Assistance Act) or consortia of those tribes or tribal organizations to provide for the coordination of assistance for special education and related services for children with disabilities aged 3 through 5 on reservations served by elementary and secondary schools for Indian children operated or funded by the Department of the Interior. The amount of the payments under paragraph (b) of this section for any fiscal year is equal to 20 percent of the amount allotted under § 300.715(a).

(b) *Distribution of funds.* The Secretary of the Interior shall distribute the total amount of the payment under paragraph (a) of this section by allocating to each tribe or tribal organization an amount based on the number of children with disabilities ages 3 through 5 residing on reservations as reported annually, divided by the total of those children served by all tribes or tribal organizations.

(c) *Submission of information.* To receive a payment under this section, the tribe or tribal organization shall submit the figures to the Secretary of the Interior as required to determine the amounts to be allocated under paragraph (b) of this section. This information must be compiled and submitted to the Secretary.

(d) *Use of funds.* (1) The funds received by a tribe or tribal organization must be used to assist in child find screening and other procedures for the

early identification of children aged 3 through 5, parent training, and the provision of direct services. These activities may be carried out directly or through contracts or cooperative agreements with the BIA, LEAs, and other public or private nonprofit organizations. The tribe or tribal organization is encouraged to involve Indian parents in the development and implementation of these activities.

(2) The entities shall, as appropriate, make referrals to local, State, or Federal entities for the provision of services or further diagnosis.

(e) *Biennial report.* To be eligible to receive a grant pursuant to paragraph (a) of this section, the tribe or tribal organization shall provide to the Secretary of the Interior a biennial report of activities undertaken under this paragraph, including the number of contracts and cooperative agreements entered into, the number of children contacted and receiving services for each year, and the estimated number of children needing services during the two years following the one in which the report is made. The Secretary of the Interior shall include a summary of this information on a biennial basis in the report to the Secretary required under section 611(i). The Secretary may require any additional information from the Secretary of the Interior.

(f) *Prohibitions.* None of the funds allocated under this section may be used by the Secretary of the Interior for administrative purposes, including child count and the provision of technical assistance.

(Authority: 20 U.S.C. 1411(i)(3))

§ 300.717 Outlying areas and freely associated States.

From the amount appropriated for any fiscal year under 611(j) of the Act, the Secretary reserves not more than one percent, which must be used—

(a) To provide assistance to the outlying areas in accordance with their respective populations of individuals aged 3 through 21; and

(b) For fiscal years 1998 through 2001, to carry out the competition described in § 300.719, except that the amount reserved to carry out that competition may not exceed the amount reserved for fiscal year 1996 for the competition under Part B of the Act described under the heading ''SPECIAL EDUCATION'' in Public Law 104–134.

(Authority: 20 U.S.C. 1411(b)(1))

§ 300.718 Outlying area—definition.

As used in this part, the term *outlying area* means the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(Authority: 20 U.S.C. 1402(18))

§ 300.719 Limitation for freely associated States.

(a) *Competitive grants.* The Secretary uses funds described in § 300.717(b) to award grants, on a competitive basis, to Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the freely associated States to carry out the purposes of this part.

(b) *Award basis.* The Secretary awards grants under paragraph (a) of this section on a competitive basis, pursuant to the recommendations of the Pacific Region Educational Laboratory in Honolulu, Hawaii. Those recommendations must be made by experts in the field of special education and related services.

(c) *Assistance requirements.* Any freely associated State that wishes to receive funds under Part B of the Act shall include, in its application for assistance—

(1) Information demonstrating that it will meet all conditions that apply to States under this part;

(2) An assurance that, notwithstanding any other provision of this part, it will use those funds only for the direct provision of special education and related services to children with disabilities and to enhance its capacity to make FAPE available to all children with disabilities;

(3) The identity of the source and amount of funds, in addition to funds under Part B of the Act, that it will make available to ensure that FAPE is available to all children with disabilities within its jurisdiction; and

(4) Such other information and assurances as the Secretary may require.

(d) *Termination of eligibility.* Notwithstanding any other provision of law, the freely associated States may not receive any funds under Part B of the Act for any program year that begins after September 30, 2001.

(e) *Administrative costs.* The Secretary may provide not more than five percent of the amount reserved for grants under this section to pay the administrative costs of the Pacific Region Educational Laboratory under paragraph (b) of this section.

(f) *Eligibility for award.* An outlying area is not eligible for a competitive award under § 300.719 unless it receives assistance under § 300.717(a).

(Authority: 20 U.S.C. 1411(b)(2) and (3))

§ 300.720 Special rule.

The provisions of Public Law 95–134, permitting the consolidation of grants by the outlying areas, do not apply to funds provided to those areas or to the freely associated States under Part B of the Act.

(Authority: 20 U.S.C. 1411(b)(4))

§ 300.721 [Reserved]

§ 300.722 Definition.

As used in this part, the term *freely associated States* means the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.

(Authority: 20 U.S.C. 1411(b)(6))

Reports

§ 300.750 Annual report of children served—report requirement.

(a) The SEA shall report to the Secretary no later than February 1 of each year the number of children with disabilities aged 3 through 21 residing in the State who are receiving special education and related services.

(b) The SEA shall submit the report on forms provided by the Secretary.

(Authority: 20 U.S.C. 1411(d)(2); 1418(a))

Note: It is very important to understand that this report and the requirements that relate to it are solely for allocation purposes. The population of children the State may count for allocation purposes may differ from the population of children to whom the State must make FAPE available. For example, while section 611(a)(5) of the Act prior to the Individuals with Disabilities Education Act Amendments of 1997 limits the number of children who may be counted for allocation purposes to 12 percent of the general school population aged 3 through 17 (in States that serve all children with disabilities aged 3 through 5) or 5 through 17 (in States that do not serve all children with disabilities aged 3 through 5), a State might find that 13 percent (or some other percentage) of its children have disabilities. In that case, the State must make FAPE available to all of those children with disabilities.

§ 300.751 Annual report of children served—information required in the report.

(a) For any year before the total appropriation for section 611 of the Act first exceeds $4,924,672,200, the SEA shall include in its report a table that shows—

(1) The number of children with disabilities receiving special education and related services on December 1, or at the State's discretion on the last Friday in October, of that school year;

(2) The number of children with disabilities aged 3 through 5 who are receiving FAPE;

(3) The number of those children with disabilities aged 6 through 21 within each disability category, as defined in the definition of ''children with disabilities'' in § 300.7; and

(4) The number of those children with disabilities aged 3 through 21 for each year of age (3, 4, 5, etc.).

(b) For the purpose of this part, a child's age is the child's actual age on the date of the child count: December 1, or, at the State's discretion, the last Friday in October.

(c) The SEA may not report a child aged 6 through 21 under more than one disability category.

(d) If a child with a disability aged 6 through 21 has more than one disability, the SEA shall report that child in accordance with the following procedure:

(1) A child with deaf-blindness must be reported under the category ''deaf-blindness.''

(2) A child who has more than one disability (other than deaf-blindness) must be reported under the category ''multiple disabilities.''

(Authority: 20 U.S.C. 1411(d)(2); 1418(a))

§ 300.752 Annual report of children served—certification.

The SEA shall include in its report a certification signed by an authorized official of the agency that the information provided is an accurate and unduplicated count of children with disabilities receiving special education and related services on the dates in question.

(Authority: 20 U.S.C. 1411(d)(2); 1417(b))

§ 300.753 Annual report of children served—criteria for counting children.

(a) The SEA may include in its report children with disabilities who are enrolled in a school or program that is operated or supported by a public agency, and that either—

(1) Provides them with both special education and related services; or

(2) Provides them only with special education if they do not need related services to assist them in benefitting from that special education.

(b) The SEA may not include children with disabilities in its report who—

(1) Are not enrolled in a school or program operated or supported by a public agency;

(2) Are not provided special education that meets State standards;

(3) Are not provided with a related service that they need to assist them in benefitting from special education; or

(4) Are receiving special education funded solely by the Federal Government. However, the State may count children covered under § 300.184(c)(2).

(Authority: 20 U.S.C. 1411(d)(2); 1417(b))

Note 1: Under paragraph (a) of this section, the State may count children with disabilities in a Head Start or other preschool program operated or supported by a public agency if those children are provided special education that meets State standards.

Note 2: Both special education and related services must be at no cost to parents.

There may be some situations, however, where a child receives special education from a public source at no cost, but whose parents pay for the basic or regular education. This child may be counted. The Department expects that there would only be limited situations in which special education would be clearly separate from regular education—generally, if speech services are the only special education required by the child. For example, the child's parents may have enrolled the child in a regular program in a private school, but the child might be receiving speech services in a program funded by the LEA. Allowing these children to be counted will provide incentives (in addition to complying with the legal requirement in section 612(a)(10)(A) of the Act regarding private schools) to public agencies to provide services to children enrolled by their parents in private schools, since funds are generated in part on the basis of the number of children provided special education and related services. Agencies should understand, however, that if a public agency places or refers a child with a disability to a public or private school for educational purposes, special education includes the entire educational program provided to the child. In that case, parents may not be charged for any part of the child's education.

A State may not count Indian children on or near reservations and children on military facilities if it provides them no special education. If an SEA or LEA is responsible for serving these children, and does provide them special education and related services, they may be counted.

§ 300.754 Annual report of children served—other responsibilities of the State education agency.

In addition to meeting the other requirements of §§ 300.750–300.753, the SEA shall—

(a) Establish procedures to be used by LEAs and other educational institutions in counting the number of children with disabilities receiving special education and related services;

(b) Set dates by which those agencies and institutions must report to the SEA to ensure that the State complies with § 300.750(a);

(c) Obtain certification from each agency and institution that an unduplicated and accurate count has been made;

(d) Aggregate the data from the count obtained from each agency and institution, and prepare the reports required under §§ 300.750–300.753; and

(e) Ensure that documentation is maintained that enables the State and the Secretary to audit the accuracy of the count.

(Authority: 20 U.S.C. 1411(d)(2); 1417(b))

Note: States should note that the data required in the annual report of children served are not to be transmitted to the Secretary in personally identifiable form. States are encouraged to collect these data in non-personally identifiable form.

§ 300.755 Disproportionality.

(a) *General.* Each State that receives assistance under Part B of the Act, and the Secretary of the Interior, shall provide for the collection and examination of data to determine if significant disproportionality based on race is occurring in the State or in the schools operated by the Secretary of the Interior with respect to—

(1) The identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in section 602(3) of the Act; and

(2) The placement in particular educational settings of these children.

(b) *Review and revision of policies, practices, and procedures.* In the case of a determination of significant disproportionality with respect to the identification of children as children with disabilities, or the placement in particular educational settings of these children, in accordance with paragraph (a) of this section, the State or the Secretary of the Interior shall provide for the review and, if appropriate revision of the policies, procedures, and practices used in the identification or placement to ensure that the policies, procedures, and practices comply with the requirements of Part B of the Act.

(Authority: 20 U.S.C. 1418(c))

§ 300.756 Acquisition of equipment; construction or alteration of facilities.

(a) *General.* If the Secretary determines that a program authorized under Part B of the Act would be improved by permitting program funds to be used to acquire appropriate equipment, or to construct new facilities or alter existing facilities, the Secretary may allow the use of those funds for those purposes.

(b) *Compliance with certain regulations.* Any construction of new facilities or alteration of existing

facilities paragraph (a) of this section must comply with the requirements of—

(1) Appendix A of part 36 of title 28, Code of Federal Regulations (commonly known as the ''Americans with Disabilities Accessibility Guidelines for Buildings and Facilities''); or

(2) Appendix A of part 101–19.6 of title 41, Code of Federal Regulations (commonly known as the ''Uniform Federal Accessibility Standards'').

(Authority: 20 U.S.C. 1405)

Appendices A and B to Part 300 [Reserved]

2. Part 301 is revised to read as follows:

PART 301—PRESCHOOL GRANTS FOR CHILDREN WITH DISABILITIES

Subpart A—General

Sec.

Authority: 20 U.S.C. 1419, unless otherwise noted.

Subpart A—General

§ 301.1 Purpose of the Preschool Grants for Children With Disabilities Program.

The purpose of the Preschool Grants for Children With Disabilities program (Preschool Grants program) is to provide grants to States to assist them in providing special education and related services—

(a) To children with disabilities aged three through five years; and

(b) At a State's discretion, to two-year-old children with disabilities who will turn three during the school year.

(Authority: 20 U.S.C. 1419(a))

§§ 301.2–301.3 [Reserved]

§ 301.4 Applicable regulations.

The following regulations apply to the Preschool Grants program:

(a) The Education Department General Administrative Regulations (EDGAR) in title 34 of the Code of Federal Regulations—

(1) Part 76 (State-Administered Programs) except §§ 76.125–76.137 and 76.650—76.662;

(2) Part 77 (Definitions that Apply to Department Regulations);

(3) Part 79 (Intergovernmental Review of Department of Education Programs and Activities);

(4) Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments);

(5) Part 81 (General Education Provision Act—Enforcement);

(6) Part 82 (New Restrictions on Lobbying); and

(7) Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for a Drug-Free Workplace (Grants)).

(b) The regulations in this part 301.

(c) The regulations in 34 CFR part 300.

(Authority: 20 U.S.C. 1419)

§ 301.5 Applicable definitions.

(a) *Definitions in the Act.* The following terms used in this part are defined in the Act: Educational service agency Local educational agency State educational agency

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Applicant
Application
Award
EDGAR
Fiscal year
Grant period
Secretary
Subgrant

(c) *Other definitions.* The following definitions also apply to this part:

Act means the Individuals with Disabilities Education Act, as amended.

Part B child count means the child count required by section 611(d)(2) of the Act.

Preschool means the age range of 3 through 5 years.

State means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

(Authority: 20 U.S.C. 1402, 1419)

§ 301.6 Applicability of Part C of the Act to two-year-old children with disabilities.

Part C of the Act does not apply to any child with disabilities receiving a free appropriate public education, in accordance with part B of the Act, with funds received under the Preschool Grants program.

(Authority: 20 U.S.C. 1419(h))

Subpart B—State Eligibility for a Grant

§ 301.10 Eligibility of a State to receive a grant.

A State is eligible to receive a grant if—

(a) The State is eligible under 34 CFR part 300; and

(b) The State demonstrates to the satisfaction of the Secretary that it has in effect policies and procedures that assure the provision of a free appropriate public education—

(1) For all children with disabilities aged three through five years in accordance with the requirements in 34 CFR part 300; and

(2) For any two-year-old children, provided services by the SEA or by an LEA or ESA under section 301.1.

(Authority: 20 U.S.C. 1419 (a), (b))

§ 301.11 [Reserved]

§ 301.12 Sanctions if a State does not make a free appropriate public education available to all preschool children with disabilities.

If a State does not meet the requirements in section 619(b) of the Act—

(a) The State is not eligible for a grant under the Preschool Grant program;

(b) The State is not eligible for funds under 34 CFR part 300 for children with disabilities aged 3 through 5 years; and

(c) No SEA, LEA, ESA, or other public institution or agency within the State is eligible for a grant under Subpart 2 of part D of the Act if the grant relates exclusively to programs, projects, and activities pertaining to children with disabilities aged 3 through 5 years.

(Authority: 20 U.S.C. 1411(d)(2) and (e)(2)(B); 1419(b); 1461(j))

Subpart C—Allocation of Funds to States

§ 301.20 Allocations to States.

After reserving funds for studies and evaluations under section 674(e) of the Act, the Secretary allocates the remaining amount among the States in accordance with §§ 301.21–301.23.

(Authority: 20 U.S.C. 1419(c)(1))

§ 301.21 Increase in funds.

If the amount available for allocation to States under § 301.20 is equal to or greater than the amount allocated to the States under section 619 of the Act for the preceding fiscal year, those allocations are calculated as follows:

(a) Except as provided in § 301.22, the Secretary—

(1) Allocates to each State the amount it received for fiscal year 1997;

(2) Allocates 85 percent of any remaining funds to States on the basis of their relative populations of children aged 3 through 5; and

(3) Allocates 15 percent of those remaining funds to States on the basis of their relative populations of children described in paragraph (a)(2) of this section who are living in poverty.

(b) For the purpose of making grants under this section, the Secretary uses the most recent population data, including data on children living in poverty, that are available and satisfactory to the Secretary.

(Authority: 20 U.S.C. 1419(c)(2)(A))

§ 301.22 Limitation.

(a) Notwithstanding § 301.21, allocations under that section are subject to the following:

(1) No State's allocation may be less than its allocation for the preceding fiscal year.

(2) No State's allocation may be less than the greatest of—

(i) The sum of—

(A) The amount it received for fiscal year 1997; and

(B) One-third of one percent of the amount by which the amount appropriated under section 619(j) of the Act exceeds the amount appropriated under section 619 of the Act for fiscal year 1997;

(ii) The sum of—

(A) The amount it received for the preceding fiscal year; and

(B) That amount multiplied by the percentage by which the increase in the funds appropriated from the preceding fiscal year exceeds 1.5 percent; or

(iii) The sum of—

(A) The amount it received for the preceding fiscal year; and

(B) That amount multiplied by 90 percent of the percentage increase in the amount appropriated from the preceding fiscal year.

(b) Notwithstanding paragraph (a)(2) of this section, no State's allocation under § 301.21 may exceed the sum of—

(1) The amount it received for the preceding fiscal year; and

(2) That amount multiplied by the sum of 1.5 percent and the percentage increase in the amount appropriated.

(c) If the amount available for allocation to States under § 301.21 and paragraphs (a) and (b) of this section is insufficient to pay those allocations in full, the Secretary ratably reduces those allocations, subject to paragraph (a)(1) of this section.

(Authority: 20 U.S.C. 1419(c)(2)(B) and (C))

§ 301.23 Decrease in funds.

If the amount available for allocations to States under § 301.20 is less than the amount allocated to the States under section 619 of the Act for the preceding fiscal year, those allocations are calculated as follows:

(a) If the amount available for allocations is greater than the amount allocated to the States for fiscal year 1997, each State is allocated the sum of—

(1) The amount it received for fiscal year 1997; and

(2) An amount that bears the same relation to any remaining funds as the increase the State received for the preceding fiscal year over fiscal year 1997 bears to the total of those increases for all States.

(b)(1) If the amount available for allocations is equal to the amount allocated to the States for fiscal year 1997, each State is allocated the amount it received for that year.

(2) If the amount available is less than the amount allocated to States for fiscal year 1997, the Secretary allocates amounts equal to the allocations for fiscal year 1997, ratably reduced.

(Authority: 20 U.S.C. 1419(c)(3))

§ 301.24 State-level activities.

(a) Each State may retain not more than the amount described in paragraph (b) of this section for administration and other State-level activities in accordance with §§ 301.25 and 301.26.

(b) For each fiscal year, the Secretary determines and reports to the SEA an amount that is 25 percent of the amount the State received under section 619 of the Act for fiscal year 1997, cumulatively adjusted by the Secretary for each succeeding fiscal year by the lesser of—

(1) The percentage increase, if any, from the preceding fiscal year in the State's allocation under section 619 of the Act; or

(2) The rate of inflation, as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor.

(Authority: 20 U.S.C. 1419 (d))

§ 301.25 Use of funds for State administration.

(a) For the purpose of administering section 619 of the Act (including the coordination of activities under Part B of the Act with, and providing technical assistance to, other programs that provide services to children with disabilities), each State may use not more than twenty percent of the maximum amount it may retain under § 301.24 for any fiscal year.

(b) Funds described in paragraph (a) of this section may also be used for the administration of Part C of the Act, if the SEA is the lead agency for the State under that part.

(Authority: 20 U.S.C. 1419(e))

§ 301.26 Use of State agency allocations.

Each State shall use any funds it retains under § 301.24 and does not use for administration under § 301.25 for any of the following:

(a) Support services (including establishing and implementing the mediation process required by section 615(e) of the Act), which may benefit children with disabilities younger than 3 or older than 5 as long as those services also benefit children with disabilities aged 3 through 5.

(b) Direct services for children eligible for services under section 619 of the Act.

(c) Developing a State improvement plan under subpart 1 of Part D of the Act.

(d) Activities at the State and local levels to meet the performance goals established by the State under section 612(a)(16) of the Act and to support implementation of the State improvement plan under subpart 1 of Part D of the Act if the State receives funds under that subpart.

(e) Supplementing other funds used to develop and implement a Statewide coordinated services system designed to improve results for children and families, including children with disabilities and their families, but not to exceed one percent of the amount received by the State under section 619 of the Act for a fiscal year.

(Authority: 20 U.S.C. 1419(f))

Note: The Individual with Disabilities Education Act Amendments of 1997 made a number of changes to the Act designed to encourage better coordination of services among programs, including flexibility for States to use State administration funds under section 619(e) to coordinate activities with other programs that provide services to children with disabilities and to fund administrative costs related to part C. Consistent with the intent of these provisions, an example of an authorized activity under paragraph (a) would be to plan

and develop a statewide comprehensive delivery system for children with disabilities aged birth through five.

Subpart D—Allocation of funds to local educational agencies.

§ 301.30 Subgrants to local educational agencies.

Each State that receives a grant under section 619 of the Act for any fiscal year shall distribute any funds it does not retain under § 301.24 to local educational agencies in the State that have established their eligibility under section 613 of the Act.

(Authority: 20 U.S.C. 1419(g)(1))

§ 301.31 Allocations to local educational agencies.

(a) *Base payments.* The State shall first award each agency described in § 301.27 the amount that agency would have received under section 619 of the Act for fiscal year 1997 if the State had distributed 75 percent of its grant for that year under section 619(c)(3), as then in effect.

(b) *Allocation of remaining funds.* After making allocations under paragraph (a) of this section, the State shall—

(1) Allocate 85 percent of any remaining funds to those agencies on the basis of the relative numbers of children enrolled in public and private elementary and secondary schools within the agency's jurisdiction; and

(2) Allocate 15 percent of those remaining funds to those agencies in accordance with their relative numbers of children living in poverty, as determined by the SEA.

(Authority: 20 U.S.C. 1419(g)(1))

Note: In distributing funds under paragraph (b)(1) of this section, States should use the best data that is available to them on enrollment in public and private schools. If data on enrollment in private schools is not available, States or LEAs are not expected to initiate new data collections to obtain this data. However, States are encouraged to try to obtain enrollment data from private schools that want their students to participate in the program.

In distributing funds under paragraph (b)(2) of this section, States have discretion in determining what data to use to allocate funds among LEAs on the basis of children living in poverty. States should use the best data available to them that reflect the distribution of children living in poverty. Examples of options include census poverty data, data on children in families receiving assistance under the State program funded under Part A of title IV of the Social Security Act, data on children participating in the free or reduced-price meals program under the National School Lunch Act, and allocations under title I of the Elementary and Secondary Education Act.

§ 301.32 Reallocation of LEA funds.

(a) If a SEA determines that an LEA is adequately providing a free appropriate public education to all children with disabilities aged 3 through 5 residing in the area served by that agency with State and local funds, the SEA may reallocate any portion of the funds under section 619 of the Act that are not needed by that local agency to provide a free appropriate public education to other local educational agencies in the State that are not adequately providing special education and related services to all children with disabilities aged 3 through 5 residing in the areas they serve.

(b) If a State provides services to preschool children with disabilities because some or all LEAs and ESAs are unable or unwilling to provide appropriate programs, the SEA may use payments that would have been available to those LEAs or ESAs to provide special education and related services to children with disabilities aged 3 through 5 years, and to two-year-old children with disabilities receiving services consistent with § 301.1 who are residing in the area served by those LEAs and ESAs.

(Authority 20 U.S.C. 1414(d), 1419(g)(2))

PART 303—EARLY INTERVENTION PROGRAM FOR INFANTS AND TODDLERS WITH DISABILITIES

3. The authority citation for part 303 is revised to read as follows:

Authority: 20 U.S.C. 1431–1445, unless otherwise noted.

4. Section 303.18 is revised to read as follows:

§ 303.18 Parent.

(a) As used in this part, ''parent'' means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with § 303.406. The term does not include the State if the child is a ward of the State.

(b) State law may provide that a foster parent qualifies as a parent under this part if—

(1) The natural parents' authority to make early intervention or educational decisions on the child's behalf has been relinquished under State law;

(2) The foster parent has an ongoing, long-term parental relationship with the child;

(3) The foster parent is willing to participate in making early intervention or educational decisions on the child's behalf; and

(4) The foster parent has no interest that would conflict with the interests of the child.

(Authority: 20 U.S.C. 1436)

Note: The term ''parent'' has been defined to include persons acting in the place of a parent, such as a grandparent or stepparent with whom a child lives, as well as persons who are legally responsible for the child's welfare, and, at the discretion of the State, a foster parent meeting the requirements of paragraph (b) of this section. The definition in this section is identical to the definition used in the regulations under Part B of the Act (34 CFR 300.19).

5. Section 303.403 is amended by removing the word ''and'' at the end of paragraph (b)(2); removing the period at the end of paragraph (b)(3) and adding, in its place, ''; and''; by adding a new paragraph (b)(4); and by revising the citation of authority to read as follows:

§ 303.403 Prior notice; native language.

* * * * *

(b) *Content of notice.* The notice must be in sufficient detail to inform the parents about—

* * * * *

(4) The State complaint procedures under §§ 303.510–512, including a description of how to file a complaint and the timelines under those procedures.

(Authority: 20 U.S.C. 1439(a)(6) and (7))

6. Section 303.510 is amended by revising paragraph (b); redesignating the existing note as Note 1; adding a new Note 2; and revising the citation of authority to read as follows:

§ 303.510 Adopting complaint procedures.

* * * * *

(b) Widely disseminating to parents and other interested individuals, including parent training centers, protection and advocacy agencies, independent living centers, and other appropriate entities, the State's procedures under §§ 303.510 through 303.512.

(Authority: 20 U.S.C. 1435(a)(10))

Note 1: Because of the interagency nature of Part C of the Act, complaints received under these regulations could concern violations by (1) any public agency in the State that receives funds under this part (e.g., the lead agency and the Council), (2) other public agencies that are involved in the State's early intervention program, or (3) private service providers that receive Part C funds on a contract basis from a public agency to carry out a given function or provide a given service required under this part. These complaint procedures are in addition to any other rights under State or Federal law. The lead agency must provide for the filing of a complaint with the lead agency and, at the lead agency's discretion, with a public agency subject to a right of appeal to the lead agency.

Note 2: In resolving a complaint alleging failure to provide services in the IFSP, a lead

agency, pursuant to its general supervisory authority under this part, may award compensatory services as a remedy.

7. Section 303.511 is amended by adding a new paragraph (c) and a note; and revising the citation of authority to read as follows:

§ 303.511 An organization or individual may file a complaint.

* * * * *

(c) The alleged violation must have occurred not more than one year prior to the date that the complaint is received by the public agency unless a longer period is reasonable because the violation is continuing, or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received by the public agency.

(Authority: 20 U.S.C. 1435(a)(10))

Note: The lead agency must resolve any complaint that meets the requirements of this section, even if the complaint is filed by an organization or individual from another State.

8. Section 303.512 is revised by removing paragraph (d), revising the citation of authority, and adding two notes following the revised citation of authority to read as follows:

§ 303.512 Minimum State complaint procedures.

* * * * *

(Authority: 20 U.S.C. 1435(a)(10))

Note 1: If a written complaint is received that is also the subject of a due process hearing under § 303.420, or contains multiple issues, of which one or more may be part of that hearing, the State must set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process action must be resolved within the 60-calendar-day timeline using the complaint procedures described in this section.

Note 2: If an issue is raised in a complaint filed under this section that has previously been decided in a due process hearing involving the same parties, then the hearing decision is binding, and the lead agency would inform the complainant to that effect. A complaint alleging a public agency's failure to implement a due process decision, however, would have to be resolved by the lead agency.

9. Section 303.520 is amended by adding new paragraphs (d) and (e) and three notes; and revising the citation of authority to read as follows:

§ 303.520 Policies related to payment for services.

* * * * *

(d) *Infants and toddlers with disabilities who are covered by private insurance.*

(1) A lead agency may not require parents of infants and toddlers with disabilities, if they would incur a financial cost, to use private insurance proceeds to pay for the services that must be provided to an eligible infant or toddler under this part.

(2) For the purposes of this section, the term ''financial costs'' includes—

(i) An out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim, but not including incidental costs such as the time needed to file an insurance claim or the postage needed to mail the claim;

(ii) A decrease in available lifetime coverage or any other benefit under an insurance policy; and

(iii) An increase in premiums or the discontinuation of the policy.

(e) *Proceeds from public or private insurance.* Proceeds from public or private insurance may not be treated as program income for purposes of 34 CFR 80.25.

(Authority: 20 U.S.C. 1435(a)(10); 1432(4)(B))

Note 1: Under paragraph (d), States are prohibited from requiring that families use private insurance as a condition of receiving services under this part, if that use results in financial cost to the family. The use of parents' insurance proceeds to pay for services in these circumstances must be voluntary. For example, a family could not be required to access private insurance that is required to enable a child to receive Medicaid services, if that insurance use results in financial costs to the family.

Note 2: If the State cannot get parental consent to use private insurance, the State may use funds under this part to pay for the service. In addition, in order to avoid financial cost to parents who would otherwise consent to use of private insurance, the lead agency may use funds under this part to pay the costs of accessing the insurance; e.g., deductible or co-pay amounts.

Note 3: Paragraph (e) clarifies that, if a State receives funds from public or private insurance for services under this part, the State is not required to return those funds to the Department or to dedicate those funds for use in this program, although a State retains the option of using those funds in this program. If a State spends reimbursements from Federal funds (*e.g.*, Medicaid) for services under this part, those funds will not be considered ''State or local'' funds for purposes of the nonsupplanting provision in § 303.124. This is because the expenditure that is reimbursed is considered to be an expenditure of funds from the source that provides the reimbursement.

Appendix C to Part 300—Notice of Interpretation

Authority: Individuals with Disabilities Education Act (20 U.S.C. 1401, *et seq.*), unless otherwise noted.

Interpretation of Individualized Education Program (IEP) Requirements of the Individuals with Disabilities Education Act (IDEA)

The IEP requirements of the IDEA emphasize the importance of each child with a disability's involvement and progress in the general curriculum; of the involvement of parents and students, together with regular and special education personnel in making individualized decisions to support each child's educational success; and of preparing students with disabilities for employment and other post-school experiences. This Appendix provides guidance regarding Part B IEP requirements, especially as they relate to these core concepts, as well as other issues regarding the development and content of IEPs.

I. Involvement and Progress in the General Curriculum

In enacting the IDEA Amendments of 1997, the Congress found that:

* * * research, demonstration, and practice [over the past 20 years] in special education and related disciplines have demonstrated that an effective educational system now and in the future must—(A) maintain high academic standards and clear performance goals for children with disabilities, consistent with the standards and expectations for all students in the educational system, and provide for appropriate and effective strategies and methods to ensure that students who are children with disabilities have maximum opportunities to achieve those standards and goals. [§ 651(a)(6)(A) of the Act.]

Accordingly, the evaluation and IEP provisions of Part B place great emphasis on the involvement and progress of children with disabilities in the general curriculum. While the Act and regulations recognize that IEP teams must make individualized decisions about the special education and related services, and supplementary aids and services, provided to each child with a disability, they are driven by IDEA's strong preference that, to the maximum extent appropriate, children with disabilities be educated in regular classes with their nondisabled peers with appropriate supplementary aids and services.

1. What are the major Part B IEP requirements that govern the involvement and progress of children with disabilities in the general curriculum?

Present Levels of Educational Performance

Section 300.347(a)(1) requires that the IEP for each child with a disability include ''* * * a statement of the child's present levels of educational performance, including—(i) *How the child's disability affects the child's involvement and progress in the general curriculum*; or (ii) *for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities* * * *'' (Italics added.) (''Appropriate activities'' in this context refers to age-relevant developmental abilities or milestones that typically developing children of the same age would be performing or would have achieved.)

Measurable Annual Goals, Including Benchmarks or Short-term Objectives

Measurable annual goals, including benchmarks or short-term objectives, are instrumental to the strategic planning process used to develop and implement the IEP for each child with a disability. Once the IEP team has developed measurable annual goals for a child, the team can (1) develop strategies that will be most effective in realizing those goals and (2) develop measurable, intermediate steps (short-term objectives) or major milestones (benchmarks) that will enable families, students, and educators to monitor progress during the year, and, if appropriate, to revise the IEP consistent with the child's instructional needs.

Part B's strong emphasis on linking the educational program of children with disabilities to the general curriculum is reflected in § 300.347(a)(2), which requires that the IEP include:

a statement of measurable annual goals, including benchmarks or short-term objectives, related to—(i) *meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum;* and (ii) meeting each of the child's other educational needs that result from the child's disability. [Italics added.]

Special Education and Related Services and Supplementary Aids and Services

The requirements regarding services provided to address a child's present levels of educational performance and to make progress toward the identified goals reinforce the emphasis on progress in the general curriculum, as well as maximizing the extent to which children with disabilities are educated with nondisabled children. Section 300.347(a)(3) requires that the IEP include:

a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—(i) To advance appropriately toward attaining the annual goals; (ii) *to be involved and progress in the general curriculum* * * * and to participate in extracurricular and other nonacademic activities; and (iii) *to be educated and participate with other children with disabilities and nondisabled children in [extracurricular and other nonacademic activities]* * * * [Italics added.]

Extent to Which Child Will Participate With Nondisabled Children

Section 300.347(a)(4) requires that each child's IEP include ''* * * an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in [extracurricular and other nonacademic] activities] * * *'' This is consistent with the least restrictive environment provisions at §§ 300.550–300.553, which include requirements that:

(1) Each child with a disability be educated with nondisabled children to the maximum extent appropriate (§ 300.550(b)(1));

(2) Each child with a disability be removed from the regular educational environment only when the nature or severity of the child's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (§ 300.550(b)(1)); and

(3) To the maximum extent appropriate to the child's needs, each child with a disability participate with nondisabled children in nonacademic and extracurricular services and activities (§ 300.553).

Participation in State or Districtwide Assessments of Student Achievement

Consistent with § 300.138(a), which sets forth a presumption that children with disabilities will be included in general State- and district-wide assessment programs, and provided with appropriate accommodations if necessary, § 300.347(a)(5) requires that the IEP for each student with a disability include: (i) A statement of any individual modifications in the administration of State or district-wide assessments of student achievement that are needed in order for the child to participate in the assessment; and (ii) if the IEP Team determines that the child will not participate in a particular State or district-wide assessment of student achievement (or part of an assessment), a statement of—(A) Why that assessment is not appropriate for the child; and (B) How the child will be assessed.

Regular Education Teacher Participation in the Development, Review, and Revision of IEPs

Very often, regular education teachers play a central role in the education of children with disabilities (House Report No. 105–95, p. 103 (1997)) and have important expertise regarding the general curriculum and the general education environment. Further, especially with the emphasis on involvement and progress in the general curriculum added by the IDEA Amendments of 1997, regular education teachers have an increasingly critical role in implementing, together with special education and related services personnel, the program of FAPE for most children with disabilities, as described in their IEPs. Accordingly, the IDEA Amendments of 1997 added a requirement that each child's IEP team must include at least one regular education teacher of the child, if the child is, or may be, participating in the regular education environment (see § 300.344(a)(2)). (See also §§ 300.346(d) on the role of a regular education teacher in the development, review and revision of IEPs.)

2. Must a child's IEP address his or her involvement in the general curriculum, regardless of the nature and severity of the child's disability and the setting in which the child is educated?

Yes. The IEP for all children with disabilities must address how the child will be involved and progress in the general curriculum, as described. The Part B regulations recognize that some children with disabilities will have some educational needs that result from their disabilities that cannot be fully met by involvement and progress in the general curriculum; accordingly, § 300.347(a)(2) requires that each child's IEP include:

a statement of measurable annual goals, including benchmarks or short-term objectives, related to—(i) Meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; *and (ii) meeting each of the child's other educational needs that result from the child's disability.* [Italics added.]

Thus, the IEP team for each child with a disability must make an individualized determination regarding how the child will participate in the general curriculum, and what, if any, educational needs that will not be met through involvement in the general curriculum should be addressed in the IEP. This includes children who are educated in separate classrooms or schools.

3. What must public agencies do to meet the requirements at §§ 300.344(a)(2) and 300.346(d), regarding the participation of a ''regular education teacher'' in the development and review of the IEP, for children aged 3 through 5 who are receiving preschool special education services?

If a public agency provides ''regular education'' preschool services to non-disabled children, then the requirements of §§ 300.344(a)(2) and 300.346(d) apply as they do in the case of older children with disabilities. If a public agency makes kindergarten available to nondisabled children, then a regular education kindergarten teacher could appropriately be the regular education teacher who would participate in an IEP meeting for a kindergarten-aged child who is, or may be, participating in the regular education environment. If a public agency does not provide regular preschool education services to nondisabled children, the agency would designate an individual who, under State standards, is qualified to serve nondisabled children of the same age.

4. Must the measurable annual goals in a child's IEP address all areas of the general curriculum, or only those areas in which the child's involvement and progress are affected by the child's disability?

Section 300.347(a)(2) requires that each child's IEP include a ''.* * * statement of measurable annual goals, including benchmarks or short-term objectives, *related to—(i) Meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum*; and (ii) meeting each of the child's other educational needs that result from the child's disability* * * *'' (Italics added). Thus, a public agency is not required to include in an IEP annuals goals that relate to areas of the general curriculum in which the child's disability does not affect the child's ability to be involved in and progress in the general curriculum.

II. Involvement of Parents and Students

One of the key purposes of the IDEA Amendments of 1997 is to ''Expand and promote opportunities for parents, special education, related services, regular education, and early intervention service providers, and other personnel to work in new partnerships at both the State and local levels (House Report 105–95, p. 82 (1997)). Indeed, the Committee viewed the Amendments as an opportunity to ''[strengthen] the role of parents.'' (House

Report 105–95, p-82 (1997).) Accordingly, the Amendments require that parents have ''an opportunity * * * to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child'' (§ 300.501). Parents must now be part of the teams that determine what additional data are needed as part of an evaluation of their child (§ 300.533(a)(1)); their child's eligibility (§ 300.534(a)(1)); and the educational placement of their child (§ 300.501(c)). Parents' concerns, and information that they provide regarding their children, must be considered in developing and reviewing their children's IEPs (§§ 300.343(c)(iii) and 300.346 (a)(1)(i) and (b)).

As explained, the requirements for keeping parents informed about the educational progress of their children, particularly as it relates to their progress in the general curriculum, have been strengthened (§ 300.347(a)(7)).

The IDEA Amendments of 1997 and the 1990 amendments have both included provisions which greatly strengthen involvement of students with disabilities in decisions regarding their own futures, to facilitate movement from school to post-school activities. The IDEA Amendments of 1990 included provisions regarding transition services, which require: (a) A coordinated set of activities within an outcome-oriented process to facilitate movement from school to post-school activities; (b) that the transition services provided to each student be ''* * * based on the individual student's needs, taking into account the student's preferences and interests'' (§ 300.27(b)), (c) that the public agency invite a student with a disability to any IEP meetings for which a purpose is the consideration of transition services (§ 300.344(b)(1)), and that, if ''* * * the student does not attend, the public agency * * * take other steps to ensure that the student's preferences and interests are considered (§ 300.344(b)(2)). States may now transfer most parent rights under Part B to the student when the student reaches the age of majority under State law (§ 300.517), and beginning at least one year before a student reaches the age of majority under State law, the IEP must include a statement that the student has been informed of any rights that will transfer to him or her upon reaching the age of majority (§ 300.347(c)).

5. What is the role of the parents, including surrogate parents, in decisions regarding the educational program of their children?

The parents of a child with a disability are expected to be equal participants along with school personnel, in developing, reviewing, and revising the IEP for their child. This is an active role in which the parents (1) provide critical information about their child's abilities, interests, performance, and history, (2) participate in the discussion about the child's need for special education and related services and supplementary aids and services, and (2) join with the other participants in deciding how the child will be involved and progress in the general curriculum and participate in State and district-wide assessments, and what services the agency will provide to the child and in what setting.

As noted, Part B specifically provides that parents have the right to:

(a) Participate in meetings about their child's identification, evaluation, educational program (including IEP meetings), and educational placement (§§ 300.344(a)(1) and 300.517);

(b) Be part of the teams that determine what additional data are needed as part of an evaluation of their child (§ 300.533(a)(1)), and determine their child's eligibility (§ 300.534(a)(1)) and educational placement (§ 300.501(c));

(c) Have their concerns and information that they provide regarding their child considered in developing and reviewing their child's IEPs (§§ 300.343(c)(iii) and 300.346 (a)(1)(i) and (b)); and

(d) Be regularly informed (by such means as periodic report cards), as specified in their child's IEP, at least as often as parents are informed of their nondisabled children's progress, of their child's progress toward the annual goals in the IEP and the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year (§ 300.347(a)(7)).

A surrogate parent is a person appointed to represent the interests of a child with a disability in the educational decision-making process when no parent (as defined at § 300.19) is known, the agency, after reasonable efforts, cannot locate the child's parents, or the child is a ward of the State under the laws of the State. A surrogate parent has all of the rights and responsibilities of a parent under Part B. Thus, the surrogate parent is entitled to (1) participate in the child's IEP meeting, (2) examine the child's education records, and (3) receive notice, grant consent, and invoke due process to resolve differences. (See § 300.515, Surrogate parents.)

6. What are the Part B requirements regarding the participation of a child or youth with a disability in an IEP meeting?

If a purpose of an IEP meeting will be the consideration of needed transition services, the public agency must invite the student and, as part of notification to the parent of the IEP meeting, inform the parents that the agency will invite the student to the IEP meeting. If the student does not attend, the public agency must take other steps to ensure that the student's preferences and interests are considered. Section § 300.517 permits States to transfer procedural rights under Part B from the parents to students with disabilities who reach the age of majority under State law, but who have not been determined to be incompetent under State law. If procedural rights under Part B are, consistent with State law and § 300.517, transferred from the parents to the student, the public agency would be required to ensure that the student has the right to participate in IEP meetings set forth for parents in § 300.345. However, at the discretion of the student or the public agency, the parents also could attend IEP meetings as ''individuals who have knowledge or special expertise regarding the child * * *'' (see § 300.344(a)(6)).

In other circumstances, the child may attend ''if appropriate.'' (§ 300.344(a)(7)) Generally, a child with a disability should attend the IEP meeting if the parent decides that it is appropriate for the child to do so. If possible, the agency and parents should discuss the appropriateness of the child's participation before a decision is made, in order to help the parents determine whether or not the child's attendance will be (1) helpful in developing the IEP or (2) directly beneficial to the child or both. The agency should inform the parents before each IEP meeting—as part of notification under § 300.345(a)(1)—that they may invite their child to participate.

7. Must the public agency let the parents know who will be at the IEP meeting?

Yes. In notifying parents about the meeting, the agency ''must indicate the purpose, time, and location of the meeting, and *who will be in attendance.*'' (§ 300.345(b), italics added.) In addition, if a purpose of the IEP meeting is the consideration of transition services for a student, the notice must also inform the parents that the agency is inviting the student, and identify any other agency that will be invited to send a representative. The public agency should also inform the parents of their right to invite to the meeting ''other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate * * *'' (§ 300.344(a)(6)). It is also appropriate for the agency to ask the parents what if any individuals they will to bring to the meeting.

8. Do parents have the right to a copy of their child's IEP?

Yes. Section 300.345(f) states that the public agency shall give the parent, on request, a copy of the IEP. It is recommended that public agencies provide parents with a copy of the IEP within a reasonable time following the IEP meeting, or inform them at the IEP meeting of their right to request and receive a copy.

9. What is a public agency's responsibility if it is not possible to reach consensus on what services should be included in a child's IEP?

The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to make joint, informed decisions regarding the child's needs and appropriate goals, the extent to which the child will be involved in the general curriculum and participate in the regular education environment and State and districtwide assessments, and the services needed to support that involvement and participation and to achieve agreed-upon goals. Parents are to be equal partners with school personnel in making these decisions, and the IEP team must consider parents' concerns and information that they provide regarding their child in developing and reviewing IEPs (§§ 300.343(c)(iii) and 300.346(a)(1) and (b)).

The IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE. If it is not possible to reach consensus in an IEP meeting, the public agency must provide the parents with

prior written notice of the agency's proposals or refusals, or both, regarding the child's educational program and placement, and the parents have the right to seek resolution of any disagreements through mediation or other informal means, or by initiating an impartial due process hearing. Every effort should be made to resolve differences between parents and school staff through voluntary mediation or some other informal step, without resort to a due process hearing. However, mediation or other informal procedures may not be used to deny or delay a parent's right to a due process hearing.

10. Does Part B require that public agencies inform parents regarding the educational progress of their children with disabilities?

Yes, the Part B statute and regulations include a number of provisions to help ensure that parents are involved in decisions regarding, and informed about, their child's educational progress, including the child's progress in the general curriculum. First, the parents will be informed regarding their child's present levels of educational performance through the development of the IEP. Section 300.347(a)(1) requires that each IEP include:

* * * a statement of the child's present levels of educational performance, including—(i) How the child's disability affects the child's involvement and progress in the general curriculum; or (ii) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities * * *

Further, § 300.347(a)(7) sets forth requirements for regularly informing parents about their child's educational progress. That section requires that the IEP include:

* * * a statement of—(i) How the child's progress toward the annual goals * * * will be measured; and (ii) how the child's parents will be regularly informed (by such means as periodic report cards), at least as often as parents of nondisabled children are informed, of—(A) Their child's progress toward the annual goals * * * ; and (B) the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

Finally, the parents will, as part of the IEP team, participate, at least once every 12 months, in a review of their child's educational progress. Part B requires that a public agency initiate and conduct a meeting, at which the IEP team:

* * * (1) Reviews the child's IEP periodically, but not less than annually to determine whether the annual goals for the child are being achieved; and (2) revises the IEP as appropriate to address—(i) Any lack of expected progress toward the annual goals * * * and in the general curriculum, if appropriate; (ii) The results of any reevaluation * * * ; (iii) Information about the child provided to, or by, the parents * * * ; (iv) The child's anticipated needs; or (v) Other matters.

III. Preparing Students With Disabilities for Employment and Other Post-School Experiences

One of the primary purposes of the IDEA is to ''* * * ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living * * *'' (§ 300.1(a)).

Similarly, one of the key purposes of the IDEA Amendments of 1997 was to ''promote improved educational results for children with disabilities through early intervention, preschool, and educational experiences that prepare them for later educational challenges and employment.'' (House Report No. 105–95, p. 82 (1997).) Thus, throughout their preschool, elementary, and secondary education, the IEP for each child with a disability must, to the extent appropriate for the individual child, focus on providing instruction and experiences that enable the child to prepare himself or herself for later educational experiences and for post-school activities, including formal education, if appropriate, employment, and independent living.

Although preparation for adult life is, as explained, a key component of a free appropriate public education throughout a child's educational experiences, Part B sets forth specific requirements for transition from secondary education to post-school activities, which must be implemented no later than age 14 and 16, respectively, which require an intensified focus on that preparation as students with disabilities begin and prepare to complete their secondary education.

11. What must the IEP team do to meet the requirements that the IEP include ''a statement of * * * transition service needs'' beginning at age 14 (§ 300.347(b)(1)(i)),'' and a statement of needed transition services'' no later than age 16 (§ 300.347(b)(1)(ii))?

Section 300.347(b)(1) requires that, beginning no later than age 14, each student's IEP include specific transition-related content, and, beginning no later than age 16, a statement of needed transition services:

Beginning at age 14, each student's IEP must include ''* * * a statement of the transition service needs of the child under the applicable components of the child's IEP that focuses on the child's courses of study (such as participation in advanced-placement courses or a vocational education program)'' (§ 300.347(b)(1)(i)).

No later than age 16 (and younger, if determined appropriate by the IEP Team), each student's IEP must include ''a statement of needed transition services for the child, including, if appropriate, a statement of the interagency responsibilities or any needed linkages * * *'' (§ 300.347(b)(1)(ii)).

The House Report on the IDEA Amendments of 1997 makes clear that the requirement added to the statute in 1997 that beginning at age 14, or younger if appropriate, the IEP include ''a statement of the transition service needs'' is ''* * * designed to augment, and not replace,'' the separate, preexisting requirement that the IEP include, ''* * * beginning at age 16 (or younger, if determined appropriate by the IEP Team), a statement of needed transition services * * *'' (House Report No. 105–95, p. 102 (1997).) As clarified by the Report, ''The purpose of [the requirement in § 300.347(b)(1)(i)] is to focus attention on how the child's educational program can be planned to help the child make a successful transition to his or her goals for life after secondary school.'' (House Report No. 105–95, pp. 101–102 (1997).) The report further explains that ''[F]or example, for a child whose transition goal is a job, a transition service could be teaching the child how to get to the job site on public transportation.'' (House Report No. 105–95, p–102 (1997).) Thus, beginning at age 14, the IEP team, in determining appropriate measurable annual goals (including benchmarks or short-term objectives) and services for a student, must determine what instruction and educational experiences will assist the student to prepare for transition from secondary education to post-secondary life. The statement of transition service needs should relate directly to the student's goals beyond secondary education, and show how planned studies are linked to these goals. For example, a student interested in exploring a career in computer science may have a statement of transition service needs connected to technology course work, while another student's statement of transition needs could describe why public bus transportation training is important for future independence in the community. Though the focus of the transition planning process may shift as the student approaches graduation, the IEP team must discuss specific areas beginning at the age of 14 years and review these areas annually.

This requirement is distinct from the requirement, at § 300.347(b)(1)(ii), that the IEP include:

* * * beginning at age 16 (or younger, if determined appropriate by the IEP Team), a statement of needed transition services for the child, including, if appropriate, a statement of the interagency responsibilities or any needed linkages.

The term ''transition services'' is defined at § 300.27 to mean:

* * * a coordinated set of activities for a student with a disability that—(a) Is designed within an outcome-oriented process, that promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation; (b) Is based on the individual student's needs, taking into account the student's preferences and interests; and (c) Includes—(1) Instruction; (2) Related services; (3) Community experiences; (4) The development of employment and other post-school adult living objectives; and (5) If appropriate, acquisition of daily living skills and functional vocational evaluation. (Section § 300.347(b)(2) provides, however, that, ''If the IEP team determines that services are not needed in one or more of the areas specified in § 300.27((c)(1) through (4), the IEP must include a statement to that effect and the basis upon which the determination was made.)

Thus, while § 300.347(b)(1)(i) requires that the IEP team begin by age 14 to address the

student's need for instruction that will assist the student to *prepare* for transition, § 300.347(b)(2)(ii) requires that by age 16 the IEP include a ''coordinated set of activities * * *, designed within an outcome-oriented process, that promotes movement from school to post-school activities. * * *'' Section 300.344(b)(3) further requires that, in implementing § 300.347(b)(2)(ii), public agencies invite (in addition to required participants for all IEP meetings), must also invite a representative of any other agency that is likely to be responsible for providing or paying for transition services. Thus, § 300.346(a)(7)(ii) requires a broader focus on coordination of services across, and linkages between, agencies beyond the SEA and LEA.

12. Must the IEP for each student with a disability, beginning no later than age 16, include all ''needed transition services,'' as identified by the IEP team and consistent with the definition at § 300.27, even if an agency other than the public agency will provide those services? What is the public agency's responsibility if another agency fails to provide agreed-upon transition services?

Section 300.347(b)(1)(ii) requires that the IEP for each child with a disability, beginning no later than age 16, or younger if determined appropriate by the IEP team, include all ''needed transition services,'' as identified by the IEP team and consistent with the definition at § 300.27, regardless of whether the public agency or some other agency will provide those services. Section 300.346(b)(1)(ii) specifically requires that the statement of needed transition services include, ''* * * if appropriate, a statement of the interagency responsibilities or any needed linkages.''

Further, the need to include in the IEP transition services to be provided by agencies other than the public agency is contemplated by § 300.348(a), which specifies what the public agency must do if another agency participating in the development of the statement of needed transition services fails to provide a needed transition service that it agreed to provide:

If a participating agency fails to provide agreed-upon transition services contained in the IEP of a student with a disability, the public agency responsible for the student's education shall, as soon as possible, initiate a meeting for the purpose of identifying alternative strategies to meet the transition objectives and, if necessary, revising the student's IEP.

This requirement is consistent with the public agency's ultimate responsibility to ensure that FAPE is available to each eligible child with a disability (see § 300.300). That responsibility includes the planning and coordination of transition services through the IEP. This inter-agency planning and coordination may be supported through a variety of mechanisms, including memoranda of understanding, interagency agreements, assignment of a transition coordinator to work with other participating agencies, or the establishment of guidelines to work with other agencies identified as potential service providers. If an agreed-upon service by another agency is not provided, the public agency responsible for the student must exercise alternative strategies to meet the student's needs. This requires that the public agency provide the services, or convene an IEP meeting as soon as possible to identify alternative strategies to meet the needs of the transition services needs of the student, and to revise the IEP accordingly. Alternative strategies might include the identification of another funding source, referral to another agency, the public agency's identification of other district-wide or community resources that it can use to meet the student's identified need appropriately, or a combination of these strategies. As emphasized by § 300.348(b), however:

Nothing in [Part B] relieves any participating agency, including a State vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to students with disabilities who meet the eligibility criteria of that agency.

However, the fact that an agency other than the LEA does not fulfill its responsibility does not relieve the LEA of its responsibility to ensure that FAPE is available to each student with a disability.

Note: See also § 300.142(b)(2), which requires that if an agency other than the LEA fails to provide or pay for a special education or related service (which could include a transition service), the LEA must provide or pay for the service, and may then claim reimbursement from the agency that failed to provide or pay for the service.

13. Under what circumstances must a public agency invite representatives from other agencies to an IEP meeting at which a child's need for transition services will be considered?

Section 300.344(c)(ii) requires that, ''In implementing the requirements of [§ 300.347(b)(1)(ii) requiring a statement of needed transition services], the public agency shall also invite a representative of any other agency that is likely to be responsible for providing or paying for transition services.'' To meet this requirement, the public agency must establish and implement appropriate procedures to ensure that it identifies all agencies that are ''likely to be responsible for providing or paying for transition services'' for each student addressed by § 300.347(b)(1)(ii), and invites each of those agencies to the IEP meeting. If, during the course of an IEP meeting, the team identifies additional agencies that are ''likely to be responsible for providing or paying for transition services'' for the student, the public agency must determine whether it is necessary to invite those agencies to an additional IEP meeting in order to develop an appropriate statement of needed transition services for the student.

IV. Other Questions Regarding the Development and Content of IEPS

14. For a child with a disability receiving special education for the first time, when must an IEP be developed—before placement or after placement?

Section 300.342(b)(1) requires that an IEP be ''*in effect* before special education and related services are provided to a child.'' (Italics added.) The appropriate placement for a particular child with a disability cannot be determined until after decisions have been made about the child's needs and the services that the public agency will provide to meet those needs. These decisions must be made at the IEP meeting, and it would not be permissible first to place the child and then develop the IEP. Therefore, the IEP must be developed before placement. This requirement does not preclude temporarily placing an eligible child with a disability in a program as part of the evaluation process—before the IEP is finalized—to assist a public agency in determining the appropriate placement for the child. It is essential that the temporary placement not become the final placement before the IEP is finalized. In order to ensure that this does not happen, the State might consider requiring LEAs to take the following actions:

a. Develop an *interim* IEP for the child that sets out the specific conditions and timelines for the trial placement. (See paragraph c.)

b. Ensure that the parents agree to the interim placement before it is carried out, and that they are involved throughout the process of developing, reviewing, and revising the child's IEP.

c. Set a specific timeline (e.g., 30 days) for completing the evaluation, finalizing the IEP, and making judgments about the most appropriate placement for the child.

d. Conduct an IEP meeting at the end of the trial period in order to finalize the child's IEP.

15. Who is responsible for ensuring the development of IEPs for children with disabilities served by a public agency other than an LEA?

The answer as to which public agency has direct responsibility for ensuring the development of IEPs for children with disabilities served by a public agency other than an LEA will vary from State to State, depending upon State law, policy, or practice. The SEA is ultimately responsible for ensuring that all Part B requirements, including the IEP requirements, are met for eligible children within the State, including those children served by a public agency other than an LEA. (See § 300.600 regarding the SEA's general supervisory responsibility for all education programs for children with disabilities, with one exception. The Governor (or another individual pursuant to State law) may, consistent with State law, assign to any public agency in the State the responsibility of ensuring that Part B requirements are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons.)

The SEA must ensure that every child with a disability in the State has FAPE available, regardless of which State or local agency is responsible for educating the child. (The only exception to this responsibility is that, as noted, the SEA is not responsible for ensuring that FAPE is made available to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons, if the State has assigned that responsibility to a public agency other than the SEA.) Although the SEA has flexibility in deciding the best means to meet this obligation (e.g., through interagency

agreements), the SEA must ensure that no eligible child with a disability is denied FAPE due to jurisdictional disputes among agencies.

When an LEA is responsible for the education of a child with a disability, the LEA remains responsible for developing the child's IEP, regardless of the public or private school setting into which it places the child.

16. For a child placed out of State by an educational or non-educational State or local agency, is the placing or receiving State responsible for the child's IEP?

Regardless of the reason for the placement, the ''placing'' State is responsible for developing the child's IEP and ensuring that it is implemented. The determination of the specific agency in the placing State that is responsible for the child's IEP would be based on State law, policy, or practice. However, the SEA in the placing State is responsible for ensuring that the child has FAPE available.

17. If a disabled child has been receiving special education from one public agency and transfers to another public agency in the same State, must the new public agency develop an IEP before the child can be placed in a special education program?

If a child with a disability changes school districts in the same State, the State and its public agencies have an ongoing responsibility to ensure that the child receives FAPE, and the new public agency is responsible for ensuring that the child receives special education and related services in conformity with an IEP. The new public agency must ensure that the child has an IEP in effect before the agency can provide special education and related services. The new public agency may meet this responsibility by either adopting the IEP the former public agency developed for the child or by developing a new IEP for the child. Before the child's IEP is finalized, the new public agency may provide interim services agreed upon by both the parents and the new public agency. If the parents and the new public agency are unable to agree on an interim IEP and placement, the new public agency must implement the old IEP to the extent possible until a new IEP is developed and implemented.

In general, while the new public agency must conduct an IEP meeting, it would not be necessary if: (1) A copy of the child's current IEP is available; (2) the parents indicate that they are satisfied with the current IEP; and (3) the new public agency determines that the current IEP is appropriate and can be implemented as written.

If the child's current IEP is not available, or if either the new public agency or the parent believes that it is not appropriate, the new public agency must conduct an IEP meeting within a short time after the child enrolls in the new public agency (normally, within one week).

18. What timelines apply to the development and implementation of an initial IEP for a child with a disability?

Section 300.343(b) requires a public agency to: (1) Ensure that an offer of services in accordance with an IEP is made to parents within a reasonable period of time from the agency's receipt of parent consent to an initial evaluation; and (2) in meeting that timeline, conduct a meeting to develop the IEP within 30-calendar days of a determination that the child needs special education and related services. Section 300.342(b)(2) requires that an IEP be implemented as soon as possible following the meeting in which the IEP is developed.

19. Must a public agency hold separate meetings to determine a child's eligibility for special education and related services, develop the child's IEP, and determine the child's placement, or may the agency meet all of these requirements in a single meeting?

A public agency may, after a child is determined by ''a team of qualified professionals and the parent'' (see § 300.534(a)(1)) to be a child with a disability who needs special education services, continue in the same meeting to develop an IEP for the child and to determine the child's placement. However, the public agency must ensure that it: (1) Meets all of the Part B requirements regarding meetings to develop IEPs, including providing appropriate notification to the parents, consistent with the requirements of § 300.345, and including the required team participants, consistent with the requirements of § 300.344; and (2) the requirements of § 300.533 regarding eligibility decisions.

20. How frequently must a public agency conduct meetings to review, and if appropriate revise, the IEP for each child with a disability?

A public agency must initiate and conduct meetings periodically, but at least once every twelve months, to determine whether the annual goals for the child are being achieved, and to revise the IEP as appropriate to address: (a) Any lack of expected progress toward the annual goals and in the general curriculum, if appropriate; (b) the results of any reevaluation; (c) information about the child provided to, or by, the parents; (d) the child's anticipated needs; or (e) other matters (§ 300.343(c)).

A public agency must also ensure that an IEP is in effect for each child at the beginning of each school year (§ 300.342(a)). It may conduct IEP meetings at any time during the year. However, if the agency conducts the IEP meeting prior to the beginning of the next school year, it must ensure that the IEP contains the necessary special education and related services and supplementary aids and services to ensure that the student's IEP can be appropriately implemented during the next school year. Otherwise, it would be necessary for the public agency to conduct another IEP meeting.

Although the public agency is responsible for determining when it is necessary to conduct an IEP meeting, the parents of a child with a disability have the right to request an IEP meeting at any time. For example, if the parents believe that the child is not progressing satisfactorily or that there is a problem with the child's current IEP, it would be appropriate for the parents to request an IEP meeting. If a child's teachers feels that the child's placement or IEP services are not appropriate to the child, the teachers should follow agency procedures with respect to (1) calling or meeting with the parents or (2) requesting the agency to hold another IEP meeting to review the child's IEP. The legislative history of Public Law 94–142 makes it clear that there should be as many meetings a year as any one child may need (121 Cong. Rec. S20428–29 (Nov. 19, 1975) (remarks of Senator Stafford)).

In general, if either a parent or a public agency believes that a required component of the student's IEP should be changed, the public agency must conduct an IEP meeting if it believes that the question of whether the student's IEP needs to be revised to ensure the provision of FAPE to the student is a matter that must be considered by the IEP team. If a parent requests an IEP meeting because the parent believes that a change in the provision of FAPE to the child or the educational placement of the child, and the agency refuses to convene an IEP meeting to determine whether such a change is needed, the agency must provide written notice to the parents of the refusal, including an explanation of why the agency has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student. Under § 300.506(a), the parents or agency may initiate a due process hearing at any time regarding any proposal or refusal regarding the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child.

21. May IEP meetings be audio or video-tape-recorded?

Part B does not address the use of audio or video recording devices at IEP meetings, and no other Federal statute either authorizes or prohibits the recording of an IEP meeting by either a parent or a school official. Therefore, an SEA or public agency has the option to require, prohibit, limit, or otherwise regulate the use of recording devices at IEP meetings. If a public agency has a policy prohibiting the use of these devices at IEP meetings, that policy must provide for exceptions if they are necessary to ensure that the parent understands the IEP or the IEP process or to implement other parental rights guaranteed under Part B. Any recording of an IEP meeting that is maintained by the public agency is an ''education record,'' within the meaning of the Family Educational Rights and Privacy Act (''FERPA''; 20 U.S.C. 1232g), and would, therefore, be subject to the confidentiality requirements of the regulations under both FERPA (34 CFR Part 99) and Part B (§§ 300.560–300.575).

Parents wishing to use audio or video recording devices at IEP meetings should consult State or local policies for further guidance.

22. Who can serve as the representative of the public agency at an IEP meeting?

The IEP team must include a representative of the local educational agency who: (a) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (b) is knowledgeable about the general curriculum; and (c) is knowledgeable about the availability of resources of the local educational agency (§ 300.344(a)(4)). Each State or local agency may determine which specific staff member will serve as the agency representative in a particular IEP meeting, so long as the individual meets these

requirements. It is, however, important that the agency representative have the authority to commit agency resources and be able to ensure that whatever services are set out in the IEP will actually be provided.

Note: IEP meetings for continuing placements may in some instances be more routine than those for initial placements, and, thus, may not require the participation of a key administrator.

23. For a child with a disability being considered for initial placement in special education, which teacher or teachers should attend the IEP meeting?

A child's IEP team must include at least one of the student's regular education teachers (if the child is, or may be participating in the regular education environment) and at least one special education teacher, or, if appropriate, at least one of the child's special education providers (§ 300.344(a)(2) and (3)). Each IEP must include a statement of present levels of educational performance, including a statement of how the child's disability affects the child's involvement and progress in the general curriculum (§ 300.347(a)(1)). The regular education teacher is a required participant on the IEP team of a child who is, or may be, participating in the regular educational environment, regardless of the extent of that participation.

The child's special education teacher could be either (1) a teacher qualified to provide special education in the child's area of suspected disability, or (2) another special education provider such as a speech pathologist, physical or occupational therapist, etc., if the related service consists of specially designed instruction and is considered special education under the applicable State standard.

Note: Sometimes more than one meeting is necessary in order to finalize a child's IEP. In this process, if the special education teacher who will be working with the child is identified, it would be useful to have that teacher participate in the meeting with the parents and other members of the IEP team in finalizing the IEP. If this is not possible, the agency should ensure that the teacher is given a copy of the child's IEP as soon as possible after the IEP is finalized and before the teacher begins working with the child.

24. If a child with a disability attends several regular classes, must all of the child's regular education teachers attend the IEP meeting?

No. The IEP team need not include more than one regular education teacher of the child. If the participation of more than one regular education teacher is considered by the agency or the parents to be beneficial to the child's success in school (e.g., in terms of enhancing the child's participation in the general curriculum), it would be appropriate for them to attend the meeting.

25. For a child whose primary disability is a speech impairment, may a public agency meet its responsibility under § 300.344(a)(3) to ensure that the IEP team includes ''at least one special education teacher, or, if appropriate, at least one special education provider of the child'' by including a speech-language pathologist in the IEP team?

Yes, if speech is considered special education under State standards. As with other children with disabilities, the IEP team must also include at least one of the child's *regular education* teachers if the child is, or may be, participating in the regular education environment.

26. Do public agencies and parents have the option of bringing any individual of their choice to a student's IEP meeting? Would it be permissible for other individuals to attend IEP meetings at the discretion of the parents or the agency?

The IEP team may, at the discretion of the parent or the agency, include ''other individuals *who have knowledge or special expertise regarding the child* * * *'' (§ 300.344(a)(6), italics added). This is a change from prior law, which had provided, without qualification, that parents or agencies could bring other individuals to IEP meetings at the discretion of the parents or agency. However, the legislative history of Public Law 94–142 made it clear that attendance at IEP meetings should be limited to those who have an intense interest in the child. (121 Cong. Rec. S10974 (June 18, 1975) (remarks of Sen. Randolph).)

Part B does not provide for the participation of individuals such as representatives of teacher organizations or attorneys at IEP meetings. For example, since a representative of a teacher organization would be concerned with the interests of the teacher rather than the interests of the child, and generally would not possess knowledge or expertise regarding the child, it generally would be inappropriate for such an official to attend an IEP meeting. While either the parent or public agency may consider inviting their attorneys to an IEP meeting, parents and public agencies need to ensure that their attorneys possess knowledge and expertise regarding the child to warrant their participation. However, the participation of attorneys at IEP meetings should be discouraged if their participation would have the potential for creating an adversarial atmosphere which would not necessarily be in the best interests of the child. Further, as provided in Section 615(i)(3)(D)(ii) of the Act, ''Attorneys'' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation * * * conducted prior to the [request for a due process hearing].''

27. Must related services personnel attend IEP meetings?

Although Part B does not expressly require that the IEP team include related services personnel as part of the IEP team (§ 300.344(a)), it is appropriate for those persons to be included if a particular related service is to be discussed as part of the IEP meeting. Section 300.344(a)(6) provides that the IEP team also includes ''at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, *including related services personnel as appropriate* * * *.'' (Italics added.)

Further, § 300.344(a)(3) requires that the IEP team for each child with a disability include ''at least one special education teacher, or, if appropriate, at least one special education provider of the child * * *'' This requirement can be met by the participation of either (1) a special education teacher of the child, or (2) another special education provider such as a speech pathologist, physical or occupational therapist, etc., if the related service consists of specially designed instruction and is considered special education under the applicable State standard.

If a child with a disability has an identified need for related services, it would be appropriate for the related services personnel to attend the meeting or otherwise be involved in developing the IEP. As explained in the House Report on the IDEA Amendments of 1997, ''Related services personnel should be included on the team when a particular related service will be discussed at the request of the child's parents or the school.'' (House Report 105–95, p. 103 (1997).) For example, if the child's evaluation indicates the need for a specific related service (e.g., physical therapy, occupational therapy, special transportation services, school social work services, school health services, or counseling), the agency should ensure that a qualified provider of that service either (1) attends the IEP meeting, or (2) provides a written recommendation concerning the nature, frequency, and amount of service to be provided to the child. This written recommendation could be a part of the evaluation report.

28. Must the public agency ensure that all services specified in a child's IEP are provided?

Yes. The public agency must ensure that all services set forth in the child's IEP are provided, consistent with the child's needs as identified in the IEP. It may provide each of those services directly, through its own staff resources; indirectly, by contracting with another public or private agency; or through other arrangements. In providing the services, the agency may use whatever State, local, Federal, and private sources of support are available for those purposes (see § 300.301(a)), but the services must be at no cost to the parents, and the public agency remains responsible for ensuring that the IEP services are provided in a manner that appropriately meets the student's needs as specified in the IEP. The SEA and responsible public agency may not allow the failure of another agency to provide services described in the child's IEP to deny or delay the provision of FAPE to a child.

29. Is it permissible for an agency to have the IEP completed before the IEP meeting begins?

No. Agency staff may come to an IEP meeting prepared with evaluation findings and proposed recommendations regarding IEP content, but the agency must make it clear to the parents at the outset of the meeting that the services proposed by the agency are only recommendations for review and discussion with the parents. Agencies that use this approach must ensure that there is a full discussion with the parents of the child's needs and the services to be provided to meet those needs before the child's IEP is finalized.

30. Must a public agency include transportation in a child's IEP as a related service?

A public agency must provide transportation as a related service if it is required to assist the disabled child to benefit from special education. (This includes transporting a preschool-aged child to the site at which the public agency provides special education and related services to the child, if that site is different from the site at which the child receives other preschool or daycare services.) In determining whether to include transportation in a child's IEP, the IEP team must consider how the child's disability affects the child's need for transportation, including determining whether the child's disability prevents the child from using the same transportation provided to nondisabled children, or from getting to school in the same manner as nondisabled children. The public agency must ensure that any transportation service included in a child's IEP as a related service is provided at public expense and at no cost to the parents, and that the child's IEP describes the transportation arrangement.

Even if a child's IEP team determines that the child does not require transportation as a related service, Section 504 of the Rehabilitation Act of 1973 requires that the child receive the same transportation provided to nondisabled children. If a public agency transports nondisabled children, it must transport disabled children under the same terms and conditions. However, if a child's IEP team determines that a student does not need transportation as a related service, and the public agency transports only those children whose IEPs specify transportation as a related service, and does not transport nondisabled children, the public agency would not be required to provide transportation to a disabled child.

31. Must a public agency provide related services that are required to assist a child with a disability to benefit from special education, whether or not those services are included in the list of related services in § 300.16?

The Note following § 300.16 clarifies that ''[T]he list of related services is not exhaustive and may include other developmental, corrective, or supportive services * * *), if they are required to assist a child with a disability to benefit from special education.'' This could, depending upon the unique needs of a child, include such services as nutritional services or service coordination.

32. Must the IEP specify the amount of services or may it simply list the services to be provided?

The amount of services to be provided must be stated in the IEP, so that the level of the agency's commitment of resources will be clear to parents and other IEP team members. The amount of time to be committed to each of the various services to be provided must be (1) appropriate to the specific service, and (2) stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP.

APPENDIX—DISTRIBUTION TABLE SHOWING EACH CURRENT REGULATORY SECTION AND THE CORRESPONDING PROPOSED REGULATORY SECTION [1]

[**Note:** Appendix will not be codified in the Code of Federal Regulations]

Current regulatory section current section No.	Comparable proposed regulatory section proposed section No.	Subpart and section title
		Subpart A—General
		Purpose Applicability, and Regulations That Apply to This Program
300.1	300.1	Purpose.
300.2	300.2	Applicability to State, local, and private agencies.
300.3	300.3	Regulations that apply.
		Definitions
300.4	300.4	Act.
300.5	300.5	Assistive technology device.
300.6	300.6	Assistive technology service.
300.7	300.7	Children with disabilities. (Retitled ''Child with a disability.'')
300.8	300.11	Free appropriate public education.
300.9	300.13	Include.
300.10	300.9	Intermediate educational unit. (Replaced by new definition from Pub. L. 105–17, entitled, ''Educational service agency.'')
300.11	300.17	Local educational agency.
300.12	300.18	Native language.
300.13	300.19	Parent.
300.14	300.20	Public agency.
300.15	300.21	Qualified.
300.16	300.22	Related service.
300.17	300.24	Special education.
300.18	300.27	Transition services.
		Subpart B—State Plans and [LEA] Applications (Retitled ''State and Local Eligibility'')
		State Plans—General (Retitled ''State Eligibility—General'')
300.110	300.110	Condition of assistance.
300.111		Contents of plans.
		State Plans—Contents (Retitled ''State Eligibility—Specific Conditions'')
300.121	300.121	Right to a free appropriate public education. (Retitled ''Free appropriate public education'' (FAPE).
300.122	300.122	Timelines and ages for free appropriate public education. (Retitled ''Exception to FAPE for certain ages.'')
300.123	300.123	Full educational opportunity goal (FEOG).
300.124		[Reserved].
300.125	300.124	FEOG—Timetable.
300.126		FEOG—Facilities, personnel, and services.
300.127		Priorities.
300.128	300.125	Identification, location, and evaluation of children with disabilities.
300.129	300.127	(Retitled ''child find.'') Confidentiality of personally identifiable information.

APPENDIX—DISTRIBUTION TABLE SHOWING EACH CURRENT REGULATORY SECTION AND THE CORRESPONDING PROPOSED REGULATORY SECTION [1]—Continued

[**Note:** Appendix will not be codified in the Code of Federal Regulations]

Current regulatory section current section No.	Comparable proposed regulatory section proposed section No.	Subpart and section title
300.130	300.128	Individualized education programs.
300.131	300.129	Procedural safeguards.
300.132	300.130	Least restrictive environment.
300.133	300.126	Protection in evaluation procedures. (Retitled ''Procedures for evaluation and determination of eligibility.'')
300.134	300.141	Responsibility of [SEA] for all educational programs. (Retitled ''SEA Responsibility for general supervision.'')
300.135		[Reserved].
300.136	300.143	Implementation procedures—SEA. (Retitled ''SEA implementation of procedural safeguards.'')
300.137	300.148	Procedures for consulation. (Retitled ''Public participation.'')
300.138	300.151	Other Federal programs.
300.139	300.135	Comprehensive system of personnel development.
300.140	300.133	Private schools.
300.141	300.145	Recovery of funds for misclassified children.
300.142–143		[Reserved].
300.144	300.144	Hearing on application. (Retitled ''Hearings relating to LEA eligibility.'')
300.145	300.152	Prohibition of commingling.
300.146	300.137	Annual evaluation. (Replaced by new section from P.L. 105–17, entitled, ''Performance goals and indicators.'')
300.147	300.150	State advisory panel.
300.148	300.155	Policies and procedures for use of Part B funds.
300.149	300.156	Description of use of Part B funds. (Retitled ''Annual description of use of Part B funds.'')
300.150	300.153	State-level nonsupplanting.
300.151	300.147	Additional information if [SEA] provides direct services.
300.152	300.142	Interagency agreements. (Retitled ''Methods of ensuring services.'')
300.153	300.136	Personnel standards.
300.154	300.132	Transition of individuals from Part H to Part B. (Retitled ''Transition of children from Part C to preschool programs.'')
		LEA Applications—General (Retitled ''LEA Eligibility—General'')
300.180	300.180	Submission of application. (Retitled ''Condition of assistance.'')
300.181		[Reserved].
300.182	300.184	The excess cost requirement. (Retitled ''Excess cost requirement.'')
300.183	300.185	Meeting the excess cost requirement.
300.184		Excess costs—computation of minimum amount.
300.185		Computation of excess costs—consolidated application.
300.186		Excess costs—limitation on use of Part B funds.
300.187–189	300.186–189	[Reserved].
300.190	300.190	Consolidated applications. (Retitled ''Joint establishment of eligibility.'')
300.191	300.191	[Reserved].
300.192	300.192	State regulation of consolidated applications. (Retitled ''Requirements for establishing eligibility.'')
300.193	300.197	SEA approval; disapproval. (Retitled ''LEA and State agency compliance.'')
300.194	300.197	Withholding. (Retitled ''LEA and State agency compliance.'')
		LEA Applications—Contents (Retitled ''LEA Eligibility—Specific Conditions'')
300.220	300.220	Child identification. (Incorporated into a new requirement added by P.L. 105–17, entitled, ''Consistency with State policies.'')
300.221	300.220	Confidentiality of personally identifiable information. (Incorporated into a new requirement added by P.L. 105–17, entitled, ''Consistency with State policies.'')
300.222	300.220	Full educational opportunity goal—timetable. (Incorporated into a new requirement added by P.L. 105–17, entitled, ''Consistency with State policies.'')
300.223		Facilities, personnel, and services.
300.224	300.221	Personnel development.
300.225		Priorities.
300.226		Parent involvement.
300.227	300.220	Participation in regular education programs. (Incorporated into a new requirement added by P.L. 105–17, entitled, ''Consistency with State policies.'')
300.228		[Reserved].
300.229	300.230	Excess cost. (Incorporated into a new requirement added by P.L. 105–17, entitled, ''Use of amounts.'')
300.230	300.230	Nonsupplanting. (Amended by P.L. 105–17, and incorporated into a new requirement, entitled, ''Use of amounts.'')
300.231		Comparable services.
300.232–234		[Reserved].
300.235	300.220	[IEPs]. (Incorporated into a new requirement added by P.L. 105–17, entitled, ''Consistency with State policies.'')

APPENDIX—DISTRIBUTION TABLE SHOWING EACH CURRENT REGULATORY SECTION AND THE CORRESPONDING PROPOSED REGULATORY SECTION [1]—Continued

[**Note:** Appendix will not be codified in the Code of Federal Regulations]

Current regulatory section current section No.	Comparable proposed regulatory section proposed section No.	Subpart and section title
300.236		[Reserved].
300.237	300.220	Procedural safeguards. (Incorporated into a new requirement added by P.L. 105–17, entitled, ''Consistency with State policies.'')
300.238		Use of Part B funds.
300.239		[Reserved].
300.240	300.240	Other requirements. (Comparable to a provision added by P.L. 105–17, entitled, ''Information for SEA.'')
		Application From Secretary of the Interior (Retitled ''Secretary of the Interior—Eligibility'')
300.260	300.260	Submission of application; approval. (Retitled, ''Submission of information.'')
300.261	300.261	Public participation.
300.262	300.262	Use of Part B funds.
300.263	300.267	Applicable regulations.
		Public Participation
300.280	300.280	Public hearings before adopting a State plan. (Retitled ''Public hearings before adopting State policies and procedures.'')
300.281	300.281	Notice.
300.282	300.282	Opportunity to participate; comment period.
300.283	300.283	Review of public comments before adopting plan. (Retitled ''Review public comments before adopting policies and procedures.'')
300.284	300.284	Publication and availability of approved plan. (Retitled ''Publication and availability of approved policies and procedures.'')
		Subpart C—Services
		Free Appropriate Public Education
300.300	300.300	Timelines for [FAPE]. (Retitled ''Provision of FAPE.'')
300.301	300.301	FAPE—methods and payments.
300.302	300.302	Residential placement.
300.303	300.303	Proper functioning of hearing aids.
300.304	300.304	Full educational opportunity goal.
300.305	300.305	Program options.
300.306	300.306	Nonacademic services.
300.307	300.307	Physical education.
300.308	300.308	Assistive technology.
		Priorities in the Use of Part B Funds
300.320		Definitions of ''first priority children'' and ''second priority children.''
300.321		Priorities.
300.322		[Reserved].
300.323		Services to other children.
300.324		Application of local educational agency to use funds for the second priority.
		Individualized Education Programs
300.340	300.340	Definitions.
300.341	300.341	State educational agency responsibility.
300.342	300.342	When individualized education programs must be in effect.
300.343	300.343	Meetings.
300.344	300.344	Participants in meetings. (Retitled ''IEP Team.'')
300.345	300.345	Parent participant.
300.346	300.347	Content of individualized education program.
300.347	300.348	Agency responsibilities for transition services.
300.348	300.349	Private school placements by public agencies.
300.349	300.350	Children with disabilities in parochial or other private schools. (Retitled ''Children with disabilities in religious affiliated or other private schools.'')
300.350	300.351	Individualized education program—accountability.
		oi0Direct Service by the Sea
300.360	300.360	Use of [LEA] allocation for direct services.
300.361	300.361	Nature and location of services.
300.370	300.370	Use of State agency allocations.
300.371		State matching.
300.372	300.372	Applicability of nonsupplanting requirement.
		oi0Comprehensive System of Personnel Development
300.380	300.380	General.
300.381	300.381	Adequate supply of qualified personnel.
300.382		Personnel preparation and continuing education.
300.383		Data system on personnel and personnel development.

APPENDIX—DISTRIBUTION TABLE SHOWING EACH CURRENT REGULATORY SECTION AND THE CORRESPONDING PROPOSED REGULATORY SECTION [1]—Continued

[**Note:** Appendix will not be codified in the Code of Federal Regulations]

Current regulatory section current section No.	Comparable proposed regulatory section proposed section No.	Subpart and section title
300.384–387	300.383–387	[Reserved].
		Subpart D—Private Schools
		Children with Disabilities in Private Schools Placed or Referred by Public Agencies
300.400	300.400	Applicability of Secs. 300.400–300.402.
300.401	300.401	Responsibility of State educational agency.
300.402	300.402	Implementation by State educational agency.
300.403	300.403	Placement of children by parents.
		Children With Disabilities Enrolled by Their Parents in Private Schools
300.450	300.450	Definition of ''private school children with disabilities.''
300.451	300.452	[SEA] responsibility. (Retired ''Basic requirement-services'').
300.452	300.453	[LEA] responsibility. (Revised based on P.L. 105–17, and retitled ''Expenditures.'')
		Procedures for By-Pass
300.480	300.480	By-pass—general.
300.481	300.481	Provisions for services under a by-pass.
300.482	300.482	Notice of intent to implement a by-pass.
300.483	300.483	Request to show cause.
300.484	300.484	Show cause hearing.
300.485	300.485	Decision.
300.486	300.486	Filing requirements.
300.487	300.487	Judicial review.
		Subpart E—Procedural Safeguards
		Due Process Procedures for Parents and Children
300.500	3300.500	Definitions of ''consent'', ''evaluation'', and ''personally identifiable''. (Combined §§ 300.500 and 300.501, and retitled ''General responsibility of public agencies; definitions.'')
300.501	300.500	General responsibility of public agencies. (Combined §§ 300.500 and 300.501, and retitled ''General responsibility of public agencies; definitions.'')
300.502	300.501	Opportunity to examine records.
300.503	300.502	Independent educational evaluation.
300.504	300.503	Prior notice; parent consent. (Retitled ''Prior notice by the public agency; content of notice.'')
300.505	300.503	Content of notice. (Retitled ''Prior notice by the public agency; content of notice.'')
300.506	300.507	Impartial due process hearing. (Retitled ''Impartial due process hearing; parent notice; disclosure.'')
300.507	300.508	Impartial hearing officer.
300.508	300.509	Hearing rights.
300.509	300.510	Hearing decision; appeal. (Combined §§ 300.509 and 300.510, and retitled ''Finality of decision; appeal; impartial review.'')
300.510	300.510	Administrative appeal; impartial review. (Combined §§ 300.509 and 300.510, and retitled ''Finality of decision; appeal; impartial review.'')
300.511	300.512	Civil action.
300.512	300.511	Timeless and convenience of hearings and reviews.
300.513	300.514	Child's status during proceedings.
300.514	300.515	Surrogate parents.
300.515	300.513	Attorneys' fees.
		Protection in Evaluation Procedures (Retitled ''Procedures for Evaluation and Determination of Eligibility'')
300.530	300.530	General.
300.531	300.531	Preplacement evaluation. (Retitled ''Initial evaluation.'')
300.532	300.532	Evaluation procedures.
300.533	300.534–35	Placement procedures. (Replaced by § 300.534 (''Determination of eligibility'') and § 300.535 (''Procedures for determining eligibility.'')
300.534	300.536	Reevaluation.
		Additional Procedures for Evaluating Children With Specific Learning Disabilities
300.540	300.540	Additional team members.
300.541	300.541	Criteria for determining the existence of a specific learning disability.
300.542	300.542	Observation.
300.543	300.543	Written report.
		Least Restrictive Environment
300.550	300.550	General.
300.551	300.551	Continuum of alternative placements.
300.552	300.552	Placements.
300.553	300.553	Nonacademic settings.
300.554	300.554	Children in public or private institutions.

APPENDIX—DISTRIBUTION TABLE SHOWING EACH CURRENT REGULATORY SECTION AND THE CORRESPONDING PROPOSED REGULATORY SECTION [1]—Continued

[**Note:** Appendix will not be codified in the Code of Federal Regulations]

Current regulatory section current section No.	Comparable proposed regulatory section proposed section No.	Subpart and section title
300.555	300.555	Technical assistance and training activities.
300.556	300.556	Monitoring activities.
		Confidentially of Information
300.560	300.560	Definitions.
300.561	300.561	Notice to parents.
300.562	300.562	Access rights.
300.563	300.563	Record of access.
300.564	300.564	Records on more than one child.
300.565	300.565	List of types and location of information.
300.566	300.566	Fees.
300.567	300.567	Amendment of records at parent's request.
300.568	300.568	Opportunity for a hearing.
300.569	300.569	Result of hearing.
300.570	300.570	Hearing procedures.
300.571	300.571	Consent.
300.572	300.572	Safeguards.
300.573	300.573	Destruction of information.
300.574	300.574	Children's rights.
300.575	300.575	Enforcement.
300.576	300.577	Department. (Retitled ''Department use of personally identifiable information.'')
		Department Procedures
300.580		[Reserved].
300.581	300.581	Disapproval of a State plan. (Combined §§ 300.581 and 300.582, and retitled ''Notice and hearing before determining that a State is not eligible.'')
300.582	300.581	Content of notice. (Combined §§ 300.581 and 300.582, and retitled ''Notice and hearing before determining that a State is not eligible.'')
300.583	300.582	Hearing Official or Panel.
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300.585	300.584	Initial decision; final decision.
300.586	300.585	Filing requirements.
300.587	300.586	Judicial review.
300.588		[Reserved].
300.589	300.589	Waiver of requirement regarding supplementing and supplanting with Part B funds.
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300.621	300.621	Allowable costs.
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300.701	300.701	State entitlement; formula. (Retitled ''Grants to States.'')
300.702	300.704	[Reserved].
300.703	300.705	[Reserved].
300.704	300.708	Hold harmless provision. (Comparable, in part, to § 300.708 (''Limitations'').
300.705	300.710	Allocation for State in which by-pass is implemented for private school children with disabilities.
300.706	300.703	Within-State distribution: Fiscal Year 1979 and after. (Comparable, in part, to § 300.703 (''Allocations to States.''), which sets out the formula added by Public Law 105–17).
300.707	300.711–712	Local educational agency entitlement; formula. (Retitled ''Subgrants to local educational agencies'') (Retitled ''Allocation to local educational agencies.'')

APPENDIX—DISTRIBUTION TABLE SHOWING EACH CURRENT REGULATORY SECTION AND THE CORRESPONDING PROPOSED REGULATORY SECTION [1]—Continued

[**Note:** Appendix will not be codified in the Code of Federal Regulations]

Current regulatory section current section No.	Comparable proposed regulatory section proposed section No.	Subpart and section title
300.708	300.714	Reallocation of [LEA] funds.
300.709	300.715	Payments to the Secretary of the Interior for the education of Indian children.
300.710	300.716	Payments to the Secretary of the Interior for Indian tribes or tribal organizations. (Retitled ''Payments for education and services for Indian children with disabilities aged 3 through 5.'')
300.711	300.716	Entitlements to jurisdictions. (Replaced by §§ 300.717 (''Outlying areas and freely associated States.'') and 300.718 (''Outlying area—definition.'')
		Reports
300.750	300.750	Annual report of children served—report requirement.
300.751	300.751	Annual report of children served—information required in the report.
300.752	300.752	Annual report of children served—certification.
300.753	300.753	Annual report of children served—criteria for counting children.
300.754	300.754	Annual report of children served—other responsibilities of [SEA].

[1] The purpose of this table is to assist each reader to find where a given section number in the current regulations is located in this NPRM. The table does *not* include (1) any new regulatory provisions that have been added as a result of the IDEA Amendments of 1997, or (2) any other new area on which the Secretary is proposing to regulate.

[FR Doc. 97–28006 Filed 10–22–97; 8:45 am]

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Federal Register

Wednesday
October 22, 1997

Part VI

The President

Presidential Determination No. 98–1—Presidential Determination on the Proposed Agreement for Cooperation Between the Government of the United States of America and the Swiss Federal Council Concerning Peaceful Uses of Nuclear Energy

Federal Register
Vol. 62, No. 204
Wednesday, October 22, 1997

Presidential Documents

Title 3—

The President

Presidential Determination No. 98–1 of October 8, 1997

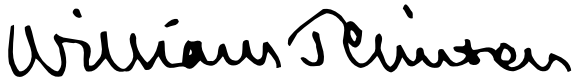
Presidential Determination on the Proposed Agreement for Cooperation Between the Government of the United States of America and the Swiss Federal Council Concerning Peaceful Uses of Nuclear Energy

Memorandum for the Secretary of State [and] the Secretary of Energy

I have considered the proposed Agreement for Cooperation Between the Government of the United States of America and the Swiss Federal Council Concerning Peaceful Uses of Nuclear Energy, along with the views, recommendations, and statements of the interested agencies.

I have determined that the performance of the agreement will promote, and will not constitute an unreasonable risk to, the common defense and security. Pursuant to section 123 b. of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2153(b)), I hereby approve the proposed agreement and authorize you to arrange for its execution.

The Secretary of State is authorized and directed to publish this determination in the **Federal Register**.



THE WHITE HOUSE,
Washington, October 8, 1997.

[FR Doc. 97–28213
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Vol. 62, No. 204

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