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Friday
November 22, 1991

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

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

WHO: The Office of the Federal Register.

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

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

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

WASHINGTON, DC

WHEN: November 25, at 9:00 a.m.
WHERE: Office of the Federal Register, First Floor Conference Room, 1100 L Street NW., Washington, DC.
RESERVATIONS: 202–523–5240.
DIRECTIONS: North on 11th Street from Metro Center to southwest corner of 11th and L Streets

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 981

[FV-91-416FR]

Almonds Grown in California; Salable, Reserve, and Export Percentages for the 1991-92 Crop Year

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule establishes salable, reserve, and export percentages of 90 percent, 10 percent, and 0 percent, respectively, for California almonds received by handlers during the 1991-92 almond crop year, which commenced on July 1, 1991. This action is authorized under the marketing order for almonds grown in California and is intended to promote orderly marketing conditions and avoid unreasonable fluctuations in prices and supplies. This action is based on a recommendation of the Almond Board of California (Board), which is responsible for local administration of the order, comments received in response to a proposed rule on this issue, and other available information.

EFFECTIVE DATE: November 22, 1991.

FOR FURTHER INFORMATION CONTACT: Sonia N. Jimenez, Marketing Order Administration Branch, F&V, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 690-0992.

SUPPLEMENTARY INFORMATION: This final rule is issued under marketing agreement and Order No. 981 [7 CFR part 981], both as amended, hereinafter referred to as the order, regulating the handling of almonds grown in California. The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601-674], hereinafter referred to as the "Act."

This rule has been reviewed by the Department of Agriculture (Department) in accordance with Departmental Regulation 1512-1 and the criteria contained in Executive Order 12291 and has been determined to be a "non-major" rule.

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

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

There are approximately 105 handlers of almonds who are subject to regulation under the marketing order and approximately 7,000 producers in the regulated area. Small agricultural producers have been defined by the Small Business Administration [13 CFR 121.601] as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $3,500,000. The majority of handlers and producers of California almonds may be classified as small entities.

This action will require handlers of California almonds to withhold, as a reserve, from normal domestic and export markets, an amount of almonds equal to 10 percent of the total of all almonds they receive from growers during the 1991-92 crop year. The remaining 90 percent (the salable percentage) of the crop could be sold by handlers in any market at any time. Total 1991 crop production is expected to be 460 million kernelweight pounds. Total 1991-92 crop year supplies (1991 crop marketable production plus marketable production carried in from the 1990-91 crop year) are projected at 687 million kernelweight pounds. Domestic and export trade demand 1991-92 is estimated at 560 million kernelweight pounds.

Reserve almonds could be released to the salable category at a later date if it is found that the salable percentage is insufficient to satisfy 1991-92 trade demand, including desirable carryover requirements for use during the 1992-93 crop year (if it appears that the 1992 crop will be insufficient to meet 1992-93 trade demand needs). Otherwise, reserve almonds could be diverted to secondary outlets that are not competitive with existing normal markets. These outlets would include almond oil, almond butter, animal feed, and other secondary outlets.

While this rule may restrict the amount of almonds which handlers may sell in normal domestic and export markets, the salable and reserve percentages are intended to promote orderly marketing conditions, thus avoiding unreasonable fluctuations in prices and supplies and improving grower returns. Further, this action could help provide market stability during the 1992-93 crop year by reserving almonds for shipment during the 1992-93 season in the event that 1992 production is below trade demand needs.

This action is based on a recommendation of the Board, comments received in response to a proposed rule on this matter, and upon other available information.

A proposed rule was issued on September 11, 1991 [56 FR 46242]. Ten comments were received. Nine comments opposed the establishment of the proposed action. Of the nine comments in opposition to the reserve, five were from handlers or grower handlers, three were from growers, and one was from a manager of an almond orchard. The comment in favor of the proposed rule was from a representative of a cooperative marketing association. Six other comments were received after the October 1 deadline, and therefore were not considered.

The commenters who opposed the reserve indicated that with the small 1991 crop (forecast to be 460 million pounds), a reserve should not be needed. The commenters stated that the 1991-92 crop is less than 50 percent of the 1990-91 crop. They also stated that establishing reserves in short crop years acts counter to the purpose of stabilizing markets and supply.

When the 460 million pound crop forecast was combined with the

estimated carryin of about 250 million pounds, a need for a reserve of 10 percent was indicated. Such a crop would result in a large supply of 687 million pounds, assuming 23 million pounds for losses. This would exceed last year's record high shipments by 29 percent. The order provides for increasing the salable percentage and reducing the reserve percentage if the crop is overestimated or the demand is greater than expected. The salable percentage cannot be reduced during the season if the crop is underestimated. In the last eight years, the crop was underestimated by 9 to 13 percent in three of those years, overestimated by more than 5 percent in three of those years, and estimated with less than 2 percent error in two of those years. If the 1991 crop was underestimated by 9 percent or more, the surplus problem would be more serious than expected but the 10 percent reserve would moderate the effect of the surplus problem. The Board usually meets after enough of the crop has been received by handlers to give a better indication of the size of the crop and reviews its marketing policy. If it appears that the crop was overestimated or demand appears to be stronger than expected, the Board recommends an increase in the salable percentage and a reduction in the reserve percentage. If a reserve is in effect and the next crop is expected to be short, the Board meets in the spring, after indications of the size of the crop are available, to increase the desirable carryout if needed to supplement the new crop and reduce the reserve percentage. Thus, if the crop is overestimated, a correction can be made during the year.

One commenter stated that, while the almond marketing order requires that only six affirmative votes are needed to make a recommendation to the Secretary, except recommendations concerning production research, promotion and advertising (which requires seven votes), the Board made a past commitment to the industry that no action would be recommended to the Secretary unless it passes by seven affirmative votes.

In 1989, the Almond Board voted to change its by-laws by increasing the voting requirements for volume regulation recommendations from the six concurring votes required under the marketing order to seven concurring votes. Although the minimum seven-vote requirement was added to the Almond Board's by-laws, it does not override the marketing order's requirements, i.e., most recommendations to the Secretary are valid if it is passed by six affirmative votes. At the time of the Board action, the Department's California Marketing Field Office (CAMFO) verbally advised the Almond Board that its resolution could not override the almond marketing order's requirement. More recently, as a reminder, the Almond Board manager presented the Department's decision in a written memo to the Almond Board members.

Some commenters indicated that the Board is dominated by the cooperative handler and that the six to four vote in favor of a reserve showed that only the cooperative handler favored the reserve.

The current membership of the Board is: two cooperative handler members, two growers who market their almonds through cooperative handlers, three handlers other than cooperative handlers, and three growers who market their almonds through handlers other than cooperative handlers. The six votes in favor of the 10 percent reserve included four members representing the cooperative, one handler other than the cooperative handler, and one grower who markets almonds through a handler other than a cooperative handler. Thus, the six to four vote in favor of the reserve is fairly representative of the industry.

One commenter alleged that the cooperative could not process the quantity of almonds it would receive this year and therefore could not overload the market. Also, the commenter stated that section 608(b) of the Agricultural Marketing Agreement Act requires that the burdens of surpluses be equitably apportioned among all regulated handlers. The commenter also stated that the proposed rule is contrary to that requirement because the proposed 10 percent reserve does not burden the cooperative handler as much as the smaller handlers because the cooperative handler cannot process its entire crop until the following summer.

This comment fails to take into account the fact that if there were no volume regulation, many small handlers might try to sell their almonds quickly in order to reduce storage or holding costs. Although large handlers traditionally market throughout the crop year, it is reasonable to assume that, without regulation, they also might seek to market more of their almonds early in the crop year. Without a reserve, both large and small handlers would be pressured to more aggressively market their almonds early in the season. Prices likely to be received by handlers in this situation would not be the same as prices with a reserve in place. Without a reserve, prices would be expected to be lower in an oversupplied market. Thus, no particular handler would be able to market its almonds immediately without price concessions which would likely adversely impact growers.

One commenter stated that it is inconsistent for the Board to recommend no reserve in 1989 and recommend a 10 percent reserve this year.

The forecast of the 1989 crop was only 425 million pounds, so the 1988 reserve was released to the salable category and no volume regulation was established. The crop was 490 million pounds, 13 percent more than the forecast. A new record for domestic shipments was established but exports were down about 6 percent, due in part to a record large crop in Spain. One result of there being no volume regulation during the 1989 season was a carryout in excess of 200 million pounds into a year with a near record large crop. Allowing such an action to occur this season would not be consistent with the orderly marketing objectives of the Act.

Another commenter alleged that the 10 percent reserve does not comply with the "Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders" (Guidelines). The guidelines requires that, with respect to market allocation and reserve pool programs, 110 percent of recent years' sales be made available to primary markets each season before the Department will approve a regulation establishing a reserve pool or secondary outlet usage. The estimated salable quantity available with the 10 percent reserve is 643.3 million pounds or 121 percent of the record high 1990 shipments, 122 percent of the 1988 to 1990 average shipments, and 136 percent of the 1986 to 1990 average shipments.

This commenter also contended that the desirable carryout should be deducted from the quantity of almonds available for market. However, this assertion is not valid since the quantity of almonds represented by the desirable carryout is available for shipment at any time. If, during the season, it appears that an adequate carryout will not be available due to an overestimate of the crop or an underestimate of the demand, the Board will recommend a revision in the marketing percentages to make an adequate carryout available.

Two commenters alleged that the reserve disproportionately burdens small handlers. They stated that the reserve will not increase the price of almonds. Also, they objected to the cost involved in storing and handling the 10 percent reserve that the Board has recommended.

The information available indicates that the 1991–92 supply of almonds exceeds the quantity that can be marketed in one year in normal markets. Without a reserve, handlers would tend to cut prices in an effort to sell all of their almonds. Since the market is inelastic, such price cutting would do little to increase sales and could reduce the quantity marketed since buyers would tend to delay buying, expecting to buy cheaper later. The cost to each handler of storing 10 percent of the almonds the handler receives is minor compared to the losses which could result from such price cutting.

If later information shows that the crop was overestimated, part or all of the reserve could be released for salable use to make up for the shortfall. A small crop in 1992 could also result in release of reserve almonds to increase the desirable carryout. If the 1991–92 crop was underestimated, the cost of diverting the reserve to noncompetitive outlets would be minor compared to the losses from price cutting and resulting marketing conditions.

One commenter questioned what other available information the Department used to base their decision for volume regulation.

In addition to the information provided by the Board, the Department relied on marketing field office reports, data reported by the National Agricultural Statistics Service (NASS), Board minutes, the Board's marketing policy which include appendices and attachments, and other Departmental information. On the basis of this evaluation, the Department concluded that the Board's recommended volume regulation should be proposed as a means of balancing the supply of almonds with market demand.

One commenter stated that the proposed rule should have specified how much of the reserve would be released for free use and how much would be diverted to noncompetitive outlets. Since the reserve is based on a forecast of the 1991 crop, this determination cannot be made until the actual size of the 1991 crop is known and/or a better indication of the size of the 1992 crop is available. However, almond reserves have been released or disposed in the year of production or the following year and the releases have not resulted in stockpiles of almonds with little or no market outlet.

Therefore, for the reasons stated, the above comments in opposition to the finalization of the proposed rule are denied.

The commenter in favor of the reserve indicated its support of the reserve as a safety mechanism to prevent a recurrence of the serious supply problem that occurred in the 1989 crop year. The forecast of the 1989 crop was 425 million pounds and no reserve was established. Handlers receipts were 489 million pounds, 15 percent more than the forecast. As a result, over 200 million pounds of almonds were carried over into the 1990 season. The large carryin combined with the large 1990 crop resulted in establishment of a 35 percent reserve. This reserve was reduced as more information on the size of the 1990 crop became available. When it became obvious that the 1991 crop was short, the reserve was reduced to 7 percent to provide a large carryover to supplement the short crop.

Authority to establish salable, reserve, and export percentages is provided in § 981.47 of the order. Pursuant to §§ 981.47 and 981.49 of the order, the Board based its recommendation for salable, reserve, and export percentages of 90 percent, 10 percent, and 0 percent, respectively, on estimates of marketable supply and combined domestic and export trade demand for the 1991–92 crop year. The Board's 1991 marketplace production estimate of 437 million kernelweight pounds is based on a 1991 crop estimate issued by the National Agricultural Statistics Service of 460 million kernelweight pounds, minus an estimated weight loss of 23 million kernelweight pounds resulting from the removal of inedible kernels by handlers and losses during manufacturing.

Trade demand is estimated at 560 million kernelweight pounds—190 million pounds for domestic needs and 370 million pounds for export needs. An inventory adjustment is made to account for supplies of salable almonds carried in from the 1990–91 crop year on July 1, 1991, and for supplies of salable almonds deemed desirable to be carried out on June 30, 1992, for early season shipment during the 1992–93 crop year until the 1992 crop is available for market. After adjusting for inventory, the trade demand is calculated at 393.3 million kernelweight pounds. This is the quantity of almonds from the estimated 1991 marketable production deemed necessary to meet trade demand needs. The salable percentage of 90 percent will meet trade demand needs. The salable percentage of 90 percent will meet those needs.

The remaining 10 percent (44 million kernelweight pounds) of the 1991 crop marketable production will be withheld by handlers to meet their reserve obligations. All or part of these almonds could be released to the salable category if its is found that the supply made available by the salable percentage is insufficient to satisfy 1991–92 trade demand needs, including desirable carryover requirements for use during the 1992–93 crop year. The Board is required to make any recommendations to the Secretary to increase the salable percentage prior to May 15, 1992. Alternatively, all or a portion of reserve almonds will be sold by the Board, or by handlers under agreement with the Board, to governmental agencies or charitable institutions or for diversion into almond oil, almond butter, animal feed, or other outlets which the Board finds are noncompetitive with existing normal markets for almonds.

The order permits the Board to include normal export requirements with domestic requirements in its estimate of trade demand when recommending the establishment of salable, reserve, and export percentages for any crop year. For the 1991–92 crop year, estimated exports are included in the trade demand. Thus, an export percentage of 0 percent is proposed. Therefore, reserve almonds will not be eligible for export to normal export outlets. However, handlers may ship their salable almonds in export markets.

A tabulation of the estimates and calculations used by the Board in arriving at its recommendations follows:

MARKETING POLICY ESTIMATES—1991 CROP

[Kernelweight basis]

	Million pounds	Percent
Estimated production:		
1. 1991 production	460.0	
2. Loss and exempt—4.0%	23.0	
3. Marketable production	437.0	
Estimated trade demand:		
4. Domestic	190.0	
5. Export	370.0	
6. Total	560.0	
Inventory adjustment:		
7. Carryin 7/1/91	250.0	
8. Desirable carryover 6/30/92	83.30	
9. Adjustment (item 8 minus item 7)	(166.7)	
Salable/reserve:		
10. Adjusted trade demand (item 6 plus item 9)	393.3	
11. Reserve (item 3 minus item 10)	43.7	
12. Salable percent (item 10 divided by item 3 x 100)		90
13. Reserve percent (100% minus item 12)		10

The "Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders" (Guidelines) issued by the Department in 1982 specify that 110 percent of recent years' sales be made available to

primary markets each season. This action provides an estimated 643 million kernelweight pounds of California almonds for unrestricted sales (1991 crop salable production plus carryin from the 1990 crop) to meet increasing domestic and world almond consumption demands. This amount exceeds the actual 1990–91 record for delivered sales of California almonds by 20 percent. Thus, the Guidelines' goals are met.

Based on the above, the Administrator of the AMS has determined that the issuance of this final rule will not have a significant economic effect on a substantial number of small entities.

After consideration of all relevant matter presented, the Board's recommendation, the comments received, and other available information, it is found that the issuance of this final rule will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because: (1) Handlers have already begun harvesting their 1991–92 California almonds; (2) this action is based on a marketing policy which was adopted by the Board at open meeting; and (3) this action is needed to establish and maintain orderly marketing conditions, consistent with the declared policy of the Act.

List of Subjects in 7 CFR Part 981

Almonds, Marketing agreements, Nuts, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 981 is revised as follows:

PART 981—ALMONDS GROWN IN CALIFORNIA

1. The authority citation for 7 CFR Part 981 continues to read as follows:

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

Subpart—Salable, Reserve, and Export Percentages.

2. Section 981.238 is added to read as follows:

§ 981.238 Salable, reserve, and export percentages for almonds during the crop year beginning on July 1, 1991.

The salable, reserve, and export percentages during the crop year beginning on July 1, 1991, shall be 90 percent, 10 percent, and 0 percent, respectively.

Dated: November 18, 1991.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 91–28123 Filed 11–22–91; 8:45 am]

BILLING CODE 3410–02–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 2, 154, 157, 284, 375, and 380

[Docket No. RM90–1–001]

Revisions to Regulations Governing Authorizations for Construction of Natural Gas Pipeline Facilities

Issued November 13, 1991.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule; Order granting rehearing for further consideration and postponing effective date of Order No. 555.

SUMMARY: On September 20, 1991, the Federal Energy Regulatory Commission (Commission) issued a final rule in Order No. 555 adopting regulations governing the construction and operation of natural gas pipeline facilities. The rule was published in the **Federal Register** on October 18, 1991 (56 FR 52330), and was scheduled to become effective on November 19, 1991. Forty-two parties filed requests for rehearing. The Commission is issuing an order that: (1) Grants the requests for rehearing solely to afford the Commission additional time to consider the issues raised in those requests; and (2) postpones the effective date of Order No. 555.

EFFECTIVE DATE: The effective date for Order No. 555 published October 18, 1991 (56 FR 52330) is delayed, effective (upon filing). A document will be published in the **Federal Register** establishing the new effective date.

FOR FURTHER INFORMATION CONTACT: Connie Caldwell, Office of the General Counsel, Federal Energy Regulatory Commission, 825 N. Capitol Street NE., Washington, DC 20426, (202) 208–1022.

SUPPLEMENTARY INFORMATION: In addition to this document's being published in the **Federal Register**, all interested persons may inspect or copy its contents during normal business hours in room 3308, 941 North Capitol Street, NE., Washington, DC 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 208–1397. To access CIPS, set your communications software to use 300, 1200, or 2400 band, full duplex, no parity, 8 data bits, and 1 stop bit. The full text of this document will be available on CIPS for 30 days from the date of issuance. The complete text on diskette in WordPerfect format may also be purchased from the Commission's copy contractor, La Dorn Systems Corporation, also located in room 3308, 941 North Capitol Street NE., Washington, DC 20426.

Before Commissioners: Martin L. Allday, Chairman; Charles A. Trabandt, Elizabeth Anne Moler, Jerry J. Langdon and Branko Terzic.

Order Granting Rehearing for Further Consideration and Postponing Effective Date of Order No. 555

On September 20, 1991, the Commission issued a final rule in Order No. 555,[1] adopting new regulations governing the construction and operation of natural gas pipeline facilities. The rule was published in the **Federal Register** on October 18, 1991 (56 FR 52 330), and was scheduled to become effective on November 19, 1991.

Forty parties filed timely requests for rehearing of Order No. 555, and two parties filed late requests. To afford the Commission additional time to consider the issues raised in the requests for rehearing, we are granting rehearing of the September 20 order for the limited purpose of further consideration. Pursuant to 18 CFR 385.713(d) (1991), no answer to the requests for rehearing will be entertained. All parties seeking rehearing are listed in the appendix to this order.

Several parties also have filed motions to stay Order No. 555 or otherwise have requested that the effectiveness of the final rule be delayed beyond November 19, 1991.[2] Because of the rule's broad and potentially significant impact on the natural gas industry, we will postpone its effective date.

The Commission orders:

(A) Rehearing of Order No. 555 is granted solely for the purpose of affording the Commission additional time to consider the requests for rehearing.

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[1] Revisions to Regulations Governing Authorizations for Construction of Natural Gas Pipeline Facilities, III FERC Stats & Regs. ¶ 30,928 (1991).

[2] They are identified in the appendix to this order by an asterisk placed beside their names.

(B) The effective date for Order No. 555 published October 18, 1991 (56 FR 52330) is delayed, effective (upon filing). A document will be published in the **Federal Register** establishing the new effective date.

By the Commission.

Lois D. Cashell,

Secretary.

Appendix

The following parties filed requests for rehearing of Order No. 555. Those with an asterisk beside their names also requested that Order No. 555 be stayed or its effectiveness postponed.

1. American Gas Association
2. ANR Pipeline Company, ANR Storage Company, and Colorado Interstate Gas Company*
3. Arkla Pipeline Group
4. Associated Gas Distributors
5. Clearfield Energy Inc.
6. Columbia Gas Transmission Corporation and Columbia Gulf Transmission Company*
7. Consolidated Edison Company of New York, Inc.
8. Council on Environmental Quality
9. El Paso Natural Gas Company
10. Enron Gas Pipeline Group*
11. Exxon Corporation, Shell Oil Company, and Chevron U.S.A. Inc.
12. Great Lakes Gas Transmission Limited Partnership
13. Independent Petroleum Association of America
14. Interstate Natural Gas Association of America*
15. Kern River Gas Transmission Company
16. K N Energy, Inc.*
17. Leviathan Gas Pipeline Company
18. National Fuel Gas Supply Corporation
19. National Trust for Historic Preservation in the United States and Miami Valley Council for Native Americans
20. Natural Gas Pipeline Company of America
21. Natural Gas Supply Association and the Indicated Producers
22. New York State Pipeline Task Force
23. Northern Illinois Gas Company
24. Northwest Pipeline Corporation
25. Pacific Gas Transmission Company
26. Peoples Natural Gas Company
27. Public Service Commission of the State of New York
28. Questar Pipeline Company
29. Southern California Edison Company
30. Southern Natural Gas Company
31. State of Louisiana
32. Stingray Pipeline Company
33. Tennessee Gas Pipeline Company
34. Texaco Inc.
35. Texas Eastern Transmission Corporation, Panhandle Eastern Pipeline Company, Trunkline Gas Company, and Algonquin Gas Transmission Company*
36. The Peoples Gas Light and Coke Company, and North Shore Gas Company
37. TransColorado Gas Transmission Company
38. Transcontinental Gas Pipe Line Corporation*
39. United Distribution Companies
40. United Gas Pipe Line Company
41. United States Department of the Interior
42. Williston Basin Interstate Pipeline Company.

[FR Doc. 91-27970 Filed 11-19-91; 12:44 pm]

BILLING CODE 6717-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Part 404

[Regulations No. 4]

RIN 0960—AD28

Elimination of Eligibility for Retroactive Benefits for Certain Individuals Eligible for Reduced Benefits

AGENCY: Social Security Administration, HHS.

ACTION: Final rule.

SUMMARY: This final rule amends our current regulations on the effective filing period of applications for benefits to reflect the provisions of section 5116 of the Omnibus Budget Reconciliation Act of 1990, Public Law 101-508, which amended section 202(j)(4), of the Social Security Act. Section 5116 repealed the statutory provision which permitted a person to elect retroactive reduced benefits in order to charge any excess earnings under the retirement earnings test that he or she may have had in the year of filing to months prior to the month of his or her application. Section 5116 also repealed a provision of the Act which allowed retroactive reduced benefits in cases where one or more persons would be entitled to benefits as a dependent on the number holder's earnings record for past months and these benefits are not subject to reduction. These two statutory changes were effective with respect to applications for benefits filed on or after January 1, 1991.

EFFECTIVE DATE: This rule is effective on November 22, 1991.

FOR FURTHER INFORMATION CONTACT: Henry D. Lerner, Legal Assistant, Office of Regulations, Social Security Administration, 6401 Security Blvd., Baltimore, MD 21235, (301) 965-1762.

SUPPLEMENTARY INFORMATION: Present law and regulations provide that if a person files an application for old-age benefits, widow's or widower's benefits not based on disability, wife's, husband's, or child's benefits based on the earnings record of a person not entitled to disability benefits, or mother's, father's or parent's benefits, such benefits can be paid for up to 6 months prior to the month the application is filed if the applicant was otherwise eligible for benefits during that period. Widow's or widower's benefits based on disability or wife's, husband's or child's benefits based on the earnings record of a person entitled to disability benefits can be paid for up to 12 months prior to the month the application is filed if the applicant was otherwise eligible for benefits during this period.

In general, if the payment of benefits for a month before the month an application is filed would cause an actuarial reduction in monthly benefits because of the age of the applicant, the applicant would not be entitled to benefits before the month the application is filed. For example, if an application for old-age benefits were given retroactive effect and caused a beneficiary's initial entitlement month to fall before the individual reached age 65, no retroactive benefits could be paid for the months prior to age 65. Section 5116 eliminated two of the four exceptions to this rule which permitted the payment of retroactive benefits even though it would cause an actuarial reduction in benefits.

Specifically, section 5116 eliminated eligibility for retroactive benefits for two categories of individuals eligible for actuarially reduced benefits:

(1) Individuals who have dependents who would be entitled to unreduced benefits during the retroactive period (e.g., a beneficiary under age 65 who has a spouse age 65 or over who is eligible for benefits on the account); and

(2) Individuals who have earnings in the year in which the application is filed which are over the amount allowed under the Social Security retirement test and which could be charged against benefits for the months before the month of application, thus permitting the beneficiary to receive benefits earlier in the year in which the application was filed.

To reflect these two statutory changes, we are amending 20 CFR 404.621 of our regulations to remove the two exceptions to the general rule regarding retroactive benefits that have been repealed.

Justification for Final Rules

The Department, even when not required by statute, as a matter of policy, generally follows the Administrative Procedure Act (APA) Notice of Proposed Rulemaking and public comment procedures specified by 5 U.S.C. 553 in the development of its regulations. The APA provides

exceptions to its notice and public comment procedures when an agency finds there is good cause for dispensing with such procedures on the basis that they are impracticable, unnecessary, or contrary to the public interest. We have determined that, under 5 U.S.C. 553(b)(B), good cause exists for waiver of Notice of Proposed Rulemaking and public comment procedures on this regulation since opportunity for public comment is unnecessary in that the rule simply reflects self-executing statutory provisions involving no discretionary policy making.

Executive Order 12291

The Secretary has determined that this is not a major rule under Executive Order 12291 because this regulation does not meet any of the threshold criteria for a major rule. Therefore, a regulatory impact analysis is not required.

Regulatory Flexibility Act

We certify that this regulation will not have a significant economic impact on a substantial number of small entities because it only reflects a self-executing statutory provision. Therefore, a regulatory flexibility analysis as provided in Public Law 96–345, the Regulatory Flexibility Act, is not required.

Paperwork Reduction Act

This regulation imposes no reporting/recordkeeping requirements requiring Office of Management and Budget clearance.

(Catalog of Federal Domestic Assistance Program Nos. 93.803, Social Security—Retirement Insurance; 93.805, Social Security—Survivors Insurance)

List of Subjects in 20 CFR Part 404

Administrative practice and procedure, Death benefits, Disability benefits, Old-Age, Survivors and Disability Insurance.

Dated: July 11, 1991.

Gwendolyn S. King,

Commissioner of Social Security.

Approved: September 12, 1991.

Louis W. Sullivan,

Secretary of Health and Human Services.

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

For the reasons set out in the preamble, part 404, subpart G, chapter III of title 20 Code of Federal Regulations is amended as set forth below.

20 CFR part 404, subpart G is amended as follows:

1. The authority citation for subpart G continues to read as follows:

Authority: Secs. 202 (i), (j), (o), (p), and (r), 205(a), 216(i)(2), 223(b), 228(a), and 1102 of the Social Security Act; 42 U.S.C. 402 (i), (j), (o), (p), and (r), 405(a), 416(i)(2), 423(b), 428(a), and 1302.

§ 404.621 [Amended]

2. Section 404.621 is amended by removing paragraphs (a)(2) (i) and (ii) and redesignating subparagraphs (a)(2) (iii) and (iv) as (a)(2) (i) and (ii).

[FR Doc. 91–28119 Filed 11–21–91; 8:45 am]
BILLING CODE 4190–29–M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 944

Utah Permanent Regulatory Program

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

ACTION: Final rule.

SUMMARY: OSM is approving in part and not approving in part a proposed amendment to the Utah permanent regulatory program (the Utah program) under the Surface Mining Control and Reclamation Act of 1977. In conjunction with these actions, OSM is requiring Utah to revise its program.

The proposed amendment consists of revised definitions of "road" and "public road" in the Utah administrative rules and of a policy statement for determining which of the access and haul roads used by surface coal mining and reclamation operations in the State are subject to the requirement for a permit.

Utah submitted the proposed amendment on its own initiative with the intent of improving the operational efficiency of the Utah program.

EFFECTIVE DATE: November 22, 1991.

FOR FURTHER INFORMATION CONTACT: Robert H. Hagen, Director, Albuquerque Field Office, Office of Surface Mining Reclamation and Enforcement, 625 Silver Avenue, SW., suite 310, Albuquerque, NM 87102; Telephone (505) 766–1486.

SUPPLEMENTARY INFORMATION:

I. Background on the Utah Program

On January 21, 1981, the Secretary of the Interior conditionally approved the Utah State program for the regulation of coal exploration and coal mining and reclamation operations on non-Federal and non-Indian lands (the Utah program). General background information on the Utah program, including the Secretary's findings, the disposition of comments, and an explanation of the conditions of approval, appears in the January 21, 1981, **Federal Register** (46 FR 5899). Actions taken subsequent to approval of the Utah program are codified at 30 CFR 944.15, 944.16, and 944.30.

II. Submission of Amendment

By a letter dated March 1, 1991 (administrative record No. UT–610), pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201–1328, and the Federal regulations at 30 CFR chapter VII (the Federal regulations), Utah submitted a proposed amendment to the Utah program. Utah submitted the proposed amendment on its own initiative with the intent of improving the operational efficiency of the Utah program.

The proposed amendment includes revisions to the definitions of "public road" and "road" at Utah Administrative Rule (Utah Admin. R.) 614–100–200. In addition, it includes a policy statement titled "Division of Oil, Gas and Mining [(DOGM)] Policy for the Implementation of Site Specific Determinations of the Public Status of Roads Under R614–100–200" and dated February 25, 1991 (hereinafter, the policy statement). The policy statement would be used by DOGM in determining which of the access and haul roads used by surface coal mining and reclamation operations in the State are subject to the requirement for a permit under the Utah program.

OSM announced receipt of the proposed amendment in the March 27, 1991, **Federal Register** (56 FR 12692), and in the same notice opened the public comment period and offered to hold a public hearing on the substantive adequacy of the proposed amendment (administrative record No. UT–621). At the request of the Southern Utah Wilderness Alliance, the Sierra Club, and the Utah Wilderness Society, OSM held a public hearing in Salt Lake City, Utah, on April 22, 1991. OSM entered a transcript of the public hearing into the administrative record (administrative record No. UT–642). The public comment period closed on April 26, 1991.

III. Director's Findings

As discussed below, in accordance with SMCRA and 30 CFR 732.15 and 732.17, the Director finds that only a part of the proposed amendment submitted by Utah on March 1, 1991, is no less stringent than SMCRA and no less effective than the Federal regulations at 30 CFR chapter VII. Thus, the Director is approving the amendment in part and not approving the amendment in part.

A. Utah Admin. R. 614–100–200, Definition of "Road" and Supplemental Policy Statement

1. Description of Amendment

a. *Definition of "Road".* Utah proposed to amend its definition of "road" at Utah Admin. R. 614–100–200 as follows, with the bracketed language to be removed and the italicized language to be added:

"Road" means a surface right-of-way for purposes of travel by land vehicles used in coal exploration or coal mining and reclamation operations. A road consists of the entire area within the right-of-way including the roadbed, shoulders, parking and side areas, approaches, structures, ditches, and surface. The term includes access and haul roads constructed, used, reconstructed, improved, or maintained for use in coal exploration, or within the affected area of coal mining and reclamation operations, including use by coal hauling vehicles leading to transfer, processing, or storage areas. The term does not include [public roads when an evaluation of the extent of the mining related uses of the road to the public uses of the road has been made by the Division or] roads within the immediate mining-pit area *and may not include public roads as determined on a site specific basis.*

Previously, on July 3, 1990, Utah had submitted to OSM in another program amendment an identical proposed revision of this definition of "road" (administrative record No. UT–570). Before the Director made a decision on whether or not to approve the proposed definition, Utah on its own initiative submitted the amendment that is the subject of this notice. Subsequently, the Director published a decision on the July 3, 1990, proposed amendment (56 FR 41795, August 23, 1991). He approved the deletion of the phrase "public roads when an evaluation of the extent of the mining related uses of the road to the public uses of the road has been made by the Division or" and deferred decision on the addition of the phrase "and may not include public roads as determined on a site specific basis" (56 FR 41795, 41796). Because the Director has already approved the deletion of the phrase from the definition of "road," it is not discussed further in this preamble. The remainder of this finding addresses the proposed addition of the phrase to the definition of "road," for which the Director previously deferred decision.

b. *Supplemental policy statement.* As a supplement to the definition of the term "road," Utah also proposed to implement the policy statement. Utah proposed to use the policy statement in interpreting the term "public roads" as it appears in the above definition of "road." In Utah's words, the purpose of the policy statement:

is to provide direction for Division staff in determining if an "access and/or haulage road" is a "public road" in the context of coal mining and reclamation operations under the Utah Coal Regulatory Program * * *. *If such a road is determined to be a "public road," it will not be subject to permitting under the Program*

(policy statement, page 1; emphasis added).

Under the policy statement, DOGM would evaluate roads associated with existing and proposed surface coal mining and reclamation plans on a case-by-case basis. In this process, DOGM would follow five procedural steps:

1. Identify all roads located within the boundary of the permit area and providing access to the permit area, which would be used in conjunction with operations under the Mining and Reclamation Plan. (Roads which are presumptively subject to permitting.)

2. Consider the status or use of the road with respect to the following criteria:

a. Whether the road is designated as a public road pursuant to the laws of the jurisdiction in which it is located;

b. Whether the road is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction;

c. Whether the road meets road construction standards for roads of the same classification in the local jurisdiction; and

d. Whether the permittee has authority to deny access.

3. Consider the other relevant state statutes or case law on the subject of public roads.

4. Consider other relevant facts and circumstances regarding the particular road, including existing performance standards made a part of a land use permit.

5. Prepare a written finding as to whether the road is or is not a public road and therefore does or does not need to be permitted. Include rationale and documentation which form the basis for the decision.

(policy statement, pages 1–2).

2. Federal Requirements

Section 506(a) of SMCRA provides in part that "* * * no person shall engage in or carry out on lands within a State any *surface coal mining operations* unless such person has first obtained a permit * * *" (30 U.S.C. 1256(a); emphasis added). The Federal regulations at 30 CFR 773.11(a) contain the same requirement.

Thus, under SMCRA and the corresponding Federal regulations a permit is required before a person may engage in or carry out "surface coal mining operations." Among other things, such "operations" include certain roads. Specifically, under section 701(28)(B) of SMCRA, "surface coal mining operations" include "all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities [as are specified in paragraph (A) of this section] and for haulage" (30 U.S.C. 1291(28)(B)). The Federal regulations at 30 CFR 700.5, in paragraph (b) of the definition of "surface coal mining operations," contain the same requirement.

In the development of the Federal regulations, a significant issue has been the extent to which the term "roads" in the definition of "surface coal mining operations" applies to public roads. In paragraph (c) of the Federal definition of "affected area" at 30 CFR 701.5, OSM previously interpreted the term "affected area" as not applying to roads for which "there is substantial (more than incidental) public use" (48 FR 14814, 14819, 14822; April 5, 1983). However, that interpretation was successfully challenged in *In re Permanent Surface Mining Regulation Litigation (In re Permanent)*, 620 F. Supp. 1519, 1581–82 (D.D.C. 1985), *modified sub nom., National Wildlife Federation* v. *Hodel*, 839 F.2d 694 (D.C. Cir. 1988).

Pursuant to court order in *In re Permanent*, OSM modified its interpretation of the extent to which SMCRA applied to public roads. Specifically, OSM suspended the regulatory definition of "affected area" "to the extent that it excludes public roads which are included in the definition of 'surface coal mining operations' " (51 FR 41952, 41953; November 20, 1986). OSM said that "[t]he suspension will have the effect of including in the 'affected area' *all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of the regulated activities or for haulage"* (51 FR 41953; emphasis added).

In the preamble to the final rule establishing performance standards for roads associated with surface coal mining operations (the November 8, 1988, roads rule), OSM expressed concern "that roads constructed to serve mining operations not avoid compliance with the performance standards by being deeded to public entities" (53 FR 45190, 45193; November 8, 1988). In that preamble, OSM also said that SMCRA jurisdiction over mine roads is best determined on a case-by-case basis and did not adopt a comment that "public roads be excluded from applicability of the performance standards" (*Id.* at 45192). Thus, in determining which mining-related roads are subject to regulation, OSM currently relies on the applicable language of the Federal definitions of "surface coal mining operations" at section 701(28) of SMCRA and the Federal regulations at 30 CFR 700.5. This may require, in appropriate circumstances, that OSM and State regulatory authorities issue, and surface coal mine operators obtain, permits for certain public roads.

3. Specific Findings

For the following reasons, the Director finds that Utah's proposed amendment to the definition of "road" at Utah Admin. R. 614–100–200 is not in accordance with SMCRA and is not consistent with the Federal regulations at 30 CFR chapter VII.

The Director finds that to the extent Utah's proposed amendment to the definition of "road" at Utah Admin. R. 614–100–200 includes the phrase "and may not include public roads as determined on a site specific basis" and is supplemented by Utah's policy statement, the proposed amendment is less stringent than SMCRA and less effective than the Federal regulations at 30 CFR chapter VII.

a. *Total exemption of public roads.* Utah submitted its proposed definition of "road" and policy statement as an integrated amendment of the Utah program. Therefore, the Director must interpret the definition and policy statement as supplemental to, rather than as independent from, one another. When read in conjunction with the policy statement, Utah's proposed definition of "road" under no circumstances would result in the permitting of a public road, as required by SMCRA and the Federal regulations. This is because the policy statement explicitly exempts public roads from the requirement for a permit.

The proposed definition of "road" at Utah Admin. R. 614–100–200 states that the term "road" "may not include public roads as determined on a site specific basis." This implies that the definition, under certain circumstances, includes public roads. The policy statement, however, which has as its express purpose "Site Specific Determinations of the Public Status of Roads Under R614–100–200," explicitly states that "[i]f * * * a road is determined to be a 'public road,' *it will not be subject to permitting under the [Utah] Program*" (policy statement, page 1; emphasis added). Reaffirming this exemption of public roads, the fifth procedural step of the policy statement requires "a written finding as to whether the road is or is not a public road *and therefore does or does not need to be permitted*" (policy statement, page 2; emphasis added).

Thus, while the definition of "road" ostensibly may include public roads under its coverage, the policy statement explicitly exempts them from the requirement for a permit. This makes the proposed phrase and supplemental policy statement less stringent than SMCRA and less effective than the Federal regulations at 30 CFR chapter VII, which, in appropriate circumstances, require the permitting of public roads.

Not only does the policy statement explicitly exempt public roads from the requirement for a permit, but also it does not consider the extent and effect of mining-related use as factors in determining whether a road is subject to the requirement for a permit. This lack of consideration of mining-related use is contrary to the Director's previous guidance concerning a Utah proposal to amend its definition of "affected area" with respect to public roads (50 FR 49542; December 3, 1985). In that context, the Director said:

> Section 701(28)(B) [of SMCRA] defines "surface coal mining operations" to include lands *affected by*, among other things, the use of existing roads. Therefore, the court [in *In re Permanent*] accepted the Secretary's premise that not every road when used to some degree for coal haulage or mine access falls within the definition of "surface coal mining operations". The court then noted that, presumably, when hauling or access are among many uses made of a road, such as an interstate highway, the effect from the mining use is relatively minor, and thus the road need not be included as part of the surface coal mining operation. However, the court held that the Federal [definition of "affected area"] goes beyond what is called for in section 701(28) in exempting essentially all public roads *without regard to the degree of effect that mining use has on the road.* Consequently, OSM is approving only those portions of the definition that do not conflict with the court's decision. Specifically, *the provision of the State's rule which exempts public roads without regard to the effect of mining use on the road is in conflict with the court's decision and is not being approved*

(50 FR 49542, 49543; December 3, 1985; emphasis added).

Likewise, in previously disapproving a proposed Utah definition of "road" at Utah Admin. R. 614–100–200, the Director said:

> The court [in *In re Permanent*] ruled that roads experiencing substantial public use may also need to be included in the affected area *on a case-by-case basis, based on the extent of mining-related use.*
>
> Under Utah's proposed definition of "road," public roads could be excluded from the affected area even when the extent of their mining-related use is substantial or when their main use is for mining. Utah's proposed exclusion is based on whether an evaluation occurred, not on the findings of the evaluation. Therefore, the Director finds that Utah's proposed definition of "road" at R614–100–200 is less effective than the Federal definitions of "road" and "affected area" at 30 CFR 701.5, as modified by the court's decision, to the extent that it could be interpreted as excluding roads which would be included in the definition of "surface coal mining operations."

(55 FR 13773, 13775; April 12, 1990; emphasis added). Thus, to the extent Utah's proposed definition of "road" and supplemental policy statement fail to consider the extent and effect of mining-related use as a factor in determining the requirement for a permit, they are not in accordance with SMCRA and not consistent with the Federal regulations.

Utah's proposed policy statement is not a case-by-case determination of the applicability of permitting requirements to public roads. Rather, the policy statement attempts to categorize certain roads as public (and exempt from regulation), including roads that may be part of a surface coal mining operation, both retrospectively and prospectively, based on several criteria that have no basis in SMCRA or the Federal regulations. While public status can be a major factor, it cannot be the absolute factor because of the potential for deeding roads to a public entity to avoid jurisdiction. Utah's proposed policy provides a categorical exclusion from permitting requirements for all public roads, rather then a determination of the jurisdictional reach of SMCRA into the public road system as contemplated by the Federal regulations.

The clear intent of the Federal regulations is for the regulatory authority to rely upon the plain language of SMCRA rather than the definition of "affected area" in making case-by-case determinations on the regulation of roads (53 FR 45190, 45193). For the Utah program to be no less stringent than SMCRA and the Federal regulations, Utah must also rely on its statutory

definition of "surface coal mining operations" at Utah Code Annotated (U.S.A.) 40–10–3(18) in determining jurisdiction over public roads.

b. *Other* deficiencies in policy statement. In addition to overriding the definition of "road" as it applies to public roads and to not considering mining-related use, the policy statement, and particularly the first procedural step, is deficient in other respects that render the proposed amendment less stringent than SMCRA and less effective than the Federal regulations.

The first procedural step includes identifying "all roads, located within the boundary of the permit area and providing access to the permit area, which will be used in conjunction with operations under the Mining and Reclamation Plan" (policy statement, page 1). This step is deficient in four ways.

First, the first step incorrectly presumes that the boundaries of the permit area are known in advance. However, because the boundary of the permit area depends on which roads, if any, are included in the permit area, it is not possible to specify that boundary in advance.

Second, the first step inherently places all access roads outside the boundary of the permit area. This appears to result from an incorrect interpretation by Utah of the definition of "surface coal mining operations."

Like the Federal definitions of "surface coal mining operations" at section 701(28) of SMCRA and 30 CFR 700.5, the Utah definition of that term is divided into two paragraphs that respectively cover "[a]ctivities" and "the areas upon which the activities occur or where the activities disturb the natural land surface" (U.C.A. 40–10–3(18)). With respect to roads, the paragraph concerning "areas" covers, among other things, "all lands affected by the *construction* of new roads or the *improvement* or use of existing roads *to gain access to the site of the regulated activities or for haulage*" (U.C.A. 40–10–3(18)(b); emphasis added). The first step incorrectly replaces the phrase "access to the site of the regulated activities," which refers to the activities set out in the preceding paragraph of the definition, with the non-equivalent phrase "access to the permit area." This leads to the unacceptable result that all access roads necessarily are outside the permit area.

Third, the first step is directed only at road use. It fails to account for road *construction* and *improvement*, which clearly are encompassed by the applicable portions of the SMCRA and Federal regulatory definitions of "surface coal mining operations."

Fourth, the first step is directed only at those roads "providing access to the permit area," whereas the SMCRA and Federal regulatory definitions of "surface coal mining operations" encompass roads used both for access and for haulage. Even though the first paragraph of the policy statement says that it is concerned with roads used for "access and/or haulage," the policy statement makes no provision for consideration of haul roads.

In another area of concern, both Utah's previously approved definition of "road" and this proposed amendment apply not only to "coal mining and reclamation operations" but also to "coal exploration." The policy statement, however, applies only "in the context of coal mining and reclamation operations" (policy statement, page 1), which do not by definition include coal exploration. This results in an unexplained ambiguity in Utah's proposed amendment.

4. Conclusion

The Director finds that Utah's proposed definition of "road" at Utah Admin. R. 614–100–200, which includes the phrase "and may not include public roads as determined on a site specific basis" and is supplemented by Utah's February 25, 1991, policy statement, is not in accordance with SMCRA and is not consistent with the Federal regulations. For this reason, the director (1) is not approving Utah's proposed definition of "road" at Utah Admin. R. 614–100–200 to the extent it includes the phrase and is supplemented by the policy statement and (2) is requiring Utah to delete the phrase from the definition and to either withdraw the policy statement from the Utah program or modify it to be consistent with SMCRA and the Federal regulations. The Director notes that, in the absence of the policy statement, the phrase "and may not include public roads as determined on a site specific basis" in the proposed definition would not in itself be incompatible with SMCRA and the Federal regulations. However, the Director is constrained to consider the phrase and policy statement together, in the manner proposed by Utah.

The Director deferred decision on the phrase "and may not include public roads as determined on a site specific basis," which was included verbatim in another amendment. (See the discussion concerning the Director's August 23, 1991, deferral decision (56 FR 41795, 41796) in this preamble in section III.A.1.a) With the decision on the phrase that is discussed above, the Director has completed all actions necessitated by his previous deferral decision.

B. Utah Admin. R. 614–100–200, Definition of "Public road"

1. Description of Amendment

Utah proposed to amend its definition of "public road" at Utah Admin. R. 614–100–200 as follows, with the bracketed language to be removed and the italicized language to be added:

"Public Road" means a road (a) which has been designated as a public road pursuant to the laws of the jurisdiction in which it is located, (b) which is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction, [(c) for which there is substantial (more than incidental) public use], and [(d)] *(c)* which meets road construction standards for other public roads of the same classification in the local jurisdiction.

This would delete from Utah's definition of "public road" criterion (c), concerning substantial (more than incidental) public use. Under Utah's proposal, the public status of a road would be determined using only the three remaining criteria.

2. Federal Requirements

Utah's existing definition of "public road" at Utah Admin. R. 614–100–200; which Utah proposed to amend, is substantively identical to the Federal definition of "public road." The Federal definition is located in 30 CFR part 761 (Areas Designated by Act of Congress), subchapter F (Areas Designated Unsuitable for Mining). As stated by the introductory language of § 761.5, the definitions in that section are only "[f]or the purposes of this part."

Accordingly, the Federal definition of "public road" applies only in the limited context of areas designated by Act of Congress as unsuitable for surface coal mining operations.

3. Specific Findings

For the following reasons, the Director finds that Utah s proposed amendment to the definition of "public road" at Utah Admin. R. 614–100–200 is no less effective than the corresponding definition of "public road" at 30 CFR 761.5. However, the director is requiring Utah to further amend the definition to clarify the limited context in which it applies.

Utah proposed to revise its existing definitions of "public road" by deleting one of the four criteria that determine whether a road is public, namely criterion "(c) for which there is substantial (more than incidental) public use." Therefore, Utah's proposed definition of "public road" could result

in more roads being designated as public roads than would occur under the corresponding Federal definition. This would result in increased protection of the public. In this limited context, Utah's proposed definition of "public road" at Utah Admin. R. 614–100–200 is no less effective than the corresponding Federal definition of "public road" at 30 CFR 761.5.

However, the Director is concerned about Utah's potential application of the definition of "public road" outside its approved context. In previously approving a complete revision of Utah's rules, including the definition of "public road," the Director said that although they were:

> Very different in organization, the revised State rules generally include provisions substantively identical to the corresponding Federal regulations * * *.

The Director also stated that:

> [O]nly those provisions of particular interest are discussed [in the preamble that follows]. Provisions not specifically discussed either (1) *contained language that is the same as or similar to the corresponding sections of SMCRA or the Federal regulations and is not substantively different from them*, or (2) add specificity without adversely affecting other aspects of the program

(55 FR 13773; April 12, 1990; emphasis added).

Utah's definition of "public road" was not specifically discussed in the preamble that followed this statement, so this definition was approved only to the extent it was the same as or similar to the corresponding sections of SMCRA or the Federal regulations and not substantively different from them.

As discussed previously in this preamble in section III.B.2., the Federal definition of "public road" at 30 CFR 761.5 applies only in the limited context of determining areas where mining is prohibited or limited under 30 CFR part 761, and particularly under § 761.11(d). Accordingly, the Director approved Utah's substantially identical definition of "public road" only for use in the corresponding context of Utah Admin. R. 614–103, which concerns the designation of lands as unsuitable for mining and prohibits, subject to valid existing rights and waivers, surface coal mining operations within 100 feet of the outside right-of-way line of a public road.

Utah, however, also has used the term "public road" in its proposed definition of the term "road" at Utah Admin. R. 614–100–200. Due to Utah's use of the term "public road" outside the lands-unsuitable context, the Director is concerned that Utah may misinterpret the definition of "public road" as applying outside that context. This concern is reinforced by Utah's proposal to amend its definition of "public road" in a manner that mirrors the court's unrelated interpretation of the definition of "affected area" in *In re Permanent*. For these reasons, the Director is requiring Utah to amend its program to clarify that its definition of "public road" applies only in the limited context of Utah Admin. R. 614–103.

4. Conclusion

In its applicable context of the unsuitability rules at Utah Admin. R. 614–103, Utah's proposed definition of "public road" could prohibit surface coal mining operations within 100 feet of a road in more cases than currently occurs under Utah's existing rules. On this basis, the Director finds that Utah's proposed definition of "public road" at Utah Admin. R. 614–100–200 is no less effective than the corresponding definition of "public road" at 30 CFR 761.5.

Although the Director is approving the proposed definition of "public road," he is requiring Utah to amend the definition to make it applicable only in the limited context of the rules for designating lands unsuitable for mining at Utah Admin. R. 614–103. The Director is making this a required amendment of Utah's program because the term "public road" has no meaning in the approved Utah program apart from the lands unsuitable rules at Utah Admin. R. 614–103.

The Director notes that when Utah proposes to amend the definition of "public road" in response to this required amendment, it could, if desired, also propose to reinsert the deleted criterion (c) into this definition.

IV. Summary and Disposition of Comments

Following are summaries (1) of all substantive oral and written comments on the proposed amendment that were received by OSM and (2) the Director's responses to them. Where similar comments were received from more than one commenter, only one response is provided.

A. Public Comments

1. General Exclusion of Public Roads

Several commenters said that Utah's proposed amendment was inconsistent with the definition of "surface coal mining operations" at section 701(28) of SMCRA, the Federal regulations at 30 CFR 700.5, and the approved State program because it would exclude roads that qualify for permitting under these statutes and regulations.

The Director agrees. As discussed previously in this preamble in section III.A., the Director finds that to the extent Utah's proposed definition of "road" at Utah Admin. R. 614–100–200 includes the phrase "and may not include public roads as determined on a site specific basis" and is supplemented by Utah's proposed February 25, 1991, policy statement, it is not in accordance with SMCRA and not consistent with the Federal regulations.

2. Extent of Roads Not Covered

One commenter said that Utah's proposed definition of "road" indicated only that some roads might not be included within the definition of "affected area." Thus, the commenter concluded, it was difficult to see how OSM could deny approval of the proposed amendment.

The Director disagrees. As discussed previously in this preamble in section III.A.3.a., the proposed definition of "road" at Utah Admin. R. 614–100–200 does state that the term "road" "may not include public roads as determined on a site specific basis." However, Utah's proposed policy statement explicitly states that "[i]f * * * a road is determined to be a 'public road,' *it will not be subject to permitting under the [Utah] Program*" (policy statement, page 1 emphasis added). Thus, while the definition of "road" includes public roads under its coverage, the policy statement explicitly exempts them from the requirements for a permit.

3. Definition of "Public Road"

One commenter said that Utah's proposal to delete from its definition of "public road" the criterion "for which there is substantial (more than incidental) public use" is clearly within the guidelines set out in *In re Permanent*.

As discussed previously in this preamble in section III.B., the Director is approving Utah's deletion of the criterion. As discussed below, the "substantial (more than incidental) public use" criterion in the Federal definition of "affected area" was challenged in *In re Permanent*. However, the "substantial (more than incidental) public use criterion in the Federal definition of "pubic road" was not challenged in *In re Permanent*. Therefore, the district court's ruling in that case has no bearing on the Director's decision to approve the deletion in the proposed definition of "public road."

Like the Federal and Utah definitions of "public road," the Federal definition of "affected area" at 30 CFR 701.5 also

contains a "public use" criterion. In paragraph (c) of the definition of "affected area," OSM previously had excluded from the affected area roads for which "there is substantial (more than incidental) public use" (48 FR 14814, 14819, 14822; April 5, 1983). Consequently, such roads were not regulated under SMCRA. However, the Federal definition of "affected area" "was challenged insofar as it imposed the 'more than incidental' public use test in determining whether a public road is part of the 'affected area' " (51 FR 41952, 41953; November 20, 1986). (See discussions in this preamble in sections III.A.2. and IV. concerning *In re Permanent.)* Pursuant to court order, OSM suspended the definition of "affected area" "to the extent that it excludes public roads which are included in the definition of 'surface coal operations' " (51 FR 41953, 41960).

Thus, the "substantial (more than incidental) public use" criterion in the Federal definition of "affected area" was challenged and its interpretation modified in the context of the SMCRA permitting process. However, the Federal definition of "public road" has not been challenged, and the "substantial (more than incidental) public use" criterion in that definition remains in force in the context of lands unsuitable for surface coal mining.

4. Interpretation of *In re Permanent*

One commenter, relying on the district court's decision in *In re Permanent*, said that, with respect to regulating public roads, Utah's proposed amendment was far less effective than the Federal standards. The commenter said that the responsibility to include roads within a surface coal mining operation cannot be dependent upon public designations or public funding, as they would be under the proposed amendment. Rather, the commenter said, the regulation of roads as part of a surface coal mining operation is solely dependent upon the use of the road. If such use is more than *de minimus* or is not a relatively minor part of the road's traffic, the commenter said, then the road is part of the surface coal mining operation.

The Director partially agrees with this comment. As discussed previously in this preamble in section III.A., the Director finds that Utah's proposed definition of "road" at Utah Admin. R. 614–100–200 and the supplemental policy statement is less effective than the Federal regulations.

The Director disagrees, however, that the regulation of public roads as part of a surface coal mining operation is solely dependent upon the use of the road. In the preamble to the November 8, 1988, roads rule, OSM discussed the history of the definition of "affected area" and concluded that "[s]ince the definition of affected area as partially suspended no longer provides additional guidance as to which roads are included in the definition of 'surface coal mining operations,' no reference to affected area is included in the definition of road" (53 FR 45190, 45193; November 8, 1988). That preamble further states that "it is not OSMRE's [OSM's] intention automatically to extend jurisdiction over roads to the existing public road network. Jurisdiction under the Act [SMCRA] and applicability of the performance standards are best determined on a case-by-case basis by the regulatory authority" (*Id.* at 45193). For example, such factors as the purpose and time of its construction may be major considerations in determining whether a road is subject to regulation under SMCRA.

5. Disagreement with *In re Permanent*

One commenter said that the *In re Permanent* remand of the Federal definition of "affected area" at 30 CFR 701.5 "clearly goes against the intent of Congress when it puts at odds the rights of coal mining companies to use public roads without additional costs and burdens."

The Director appreciates the commenter's concern over the costs and burdens of complying with the requirements of SMCRA for mine access and haul roads that also receive other public use. Nevertheless, SMCRA requires OSM and State regulatory authorities to regulate roads that are surface coal mining operations, including those which may be public.

6. Reference to a "Middle Ground"

One commenter noted a conversation that took place before the Board of Oil, Gas and Mining during Utah's March 28, 1991, public hearing to adopt the proposed amendment. The commenter quoted legal counsel for DOGM as saying that *In re Permanent* envisions "a middle ground" between regulating all public roads associated with surface coal mining operations and regulating none of them. The commenter agreed with DOGM's counsel. However, the commenter noted that Utah's proposed amendment did not occupy that middle ground and that instead it led the Utah State program in a direction contrary to *In re Permanent.*

Another commenter said that absent Utah's proposed amendment, SMCRA would require a regulatory authority to permit every road used to gain access to a coal mine or for haulage.

The Director agrees in part with the former commenter and disagrees with the latter commenter. The district court in *In re Permanent* clearly accepted the proposition that not every public road is subject to regulation under SMCRA. However, the district court in *In re Permanent* said that while a regulatory authority such as Utah need not permit all public roads, it cannot *per se* exempt public roads, and even existing public roads, from the requirement for a permit. To the extent Utah's proposed amendment would exempt all public roads from the requirement for a permit, it is contrary to this judicial interpretation of SMCRA.

7. Harman Mining Corp. v. OSM

Several commenters said that Utah's reliance on the district court decision in *Harman Mining Corp.* v. *OSM*, 659 F. Supp. 806 (W.D. Va. 1987), and the related Interior Board of Land Appeals (IBLA) decision in *Harman Mining Corp.* v. *OSM*, 110 IBLA 98 (1989), was misplaced. One said that the district court's analysis in *Harman* was fatally flawed. Another commenter said that the district court in *Harman*:

> Erroneously assumed that the Flannery decision [in *In re Permanent*] and the 1986 suspension notice [51 FR 11952; November 20, 1986] had left no law to apply other than the language of the statute itself. Thus, Judge Williams based his decision on his own interpretation of the language of the statute. This was plainly outside the scope of his authority. * * * Had Judge Williams considered [the applicable] law, he would have been hard pressed to reach the conclusion that he did.

(administrative record No. UT–633, page 2).

The Director agrees that these two court cases do not justify the proposed amendment. The *Harman* decisions concluded that two existing roads in Virginia were not subject to regulation under the Virginia State program. Utah's proposed amendment is based on an interpretation of these decisions as exempting all public roads from SMCRA regulation. This interpretation does not acknowledge and is inconsistent with the district court's decision in *In re Permanent*, which (1) predated the *Harman* decisions; (2) interpreted not a specific State program, but the overriding Federal statute and regulations; and (3) concerned not a specific factual context, but the applicability of SMCRA regulation to public roads in general.

Although the IBLA followed the court's direction in *Harman* and concluded that the roads in question were "public roads which are exempt

from the permitting requirements of Virginia's permanent regulatory program" (*Harman*, 110 IBLA at 111), this decision does not support the general exclusion of all public roads from regulation under SMCRA. Previously, in *Rapoca Energy Co.* v. *OSM* (89 IBLA 195 (1985)), the IBLA concluded that, under less stringent State regulations than applied in *Harman*, another Virginia public road was subject to regulation under SMCRA. The IBLA decision in *Harman* neither cited nor overruled the decision in *Rapoca*. Therefore, together these two IBLA cases merely stand for the proposition that in different factual and legal setting different public roads either may or may not be subject to regulation under SMCRA.

8. Failure to Adequately Consider Mining-Related Use and Impacts

Several commenters said that Utah's proposed amendment improperly relied solely on jurisdictional criteria for determining the regulatory status of a road, while avoiding consideration of mining-related use and impacts. One commenter said that Utah's policy statement improperly focused on whether or not a road should be considered public, not whether or not it should be subject to permitting even if determined to be public. The same commenter said that, in addition to public use or status, in determining whether a road is subject to regulation under SMCRA a regulatory authority should consider the extent to which the road is directly part of a surface coal mining operation, the degree to which it is altered to accommodate mining operations, and the impact of mining operations on the road and its surrounding environment.

The Director agrees that these are worthwhile considerations. To the extent Utah's proposed definition of "road" and associated policy statement would exclude all public roads regardless of such considerations, they are inconsistent with SMCRA and the Federal regulations.

The Director notes, however, that under the definition of "surface coal mining operations" a road may be subject to regulation under SMCRA notwithstanding the lack of demonstrable impacts associated with its mining-related construction, maintenance, and use. Even in the absence of any such evidence, it may be appropriate to regulate a road in order to ensure, through the SMCRA permitting, inspection, and enforcement processes, that the purposes of SMCRA are achieved.

9. Effect of Utah Policy Statement

One commenter said that OSM should approve or disapprove Utah's proposed amendment solely on the basis of Utah law and regulations, without consideration of the policy statement that Utah has adopted to interpret those regulations. This commenter said that the policy statement does not have the stature of either law or regulation and does not change the effectiveness of existing Utah law and regulations. Guidance such as the policy statement, the commenter said, "need not be word perfect to be utilized as a tool to implement Utah's law and regulations."

The Director disagrees. As stated previously in this preamble in section III.A.3.b., Utah submitted its proposed definition of "road" and related policy statement as an integrated amendment of the Utah program. Therefore, the Director must interpret the definition and policy statement as supplemental to, rather than as independent from, one another.

The Federal regulation at 30 CFR 732.17 governs State and OSM actions on State program amendments. Under paragraph (a) of that section (30 CFR 732.17(a)), a State program amendment includes "any alteration of an approved State program." Under paragraph (b) of that section (30 CFR 732.17(b)), a State is required to notify OSM:

> Of any significant events or proposed changes which affect the implementation, administration or enforcement of the approved State program. At a minimum, notification shall be required for—
>
> (1) Changes in the provisions, scope or objectives of the State program * * *

Utah's formally-adopted policy statement on the regulation of public roads would affect the implementation, administration, and enforcement of the approved State program and change the scope and objectives of the program. It thus falls within the purview of § 732.17 as a State program amendment. Accordingly, in making a decision to approve or not approve Utah's proposed amendment, the Director cannot lawfully ignore Utah's policy statement. While, as the commenter suggests, the policy statement "need not be word perfect," it must at a minimum provide for the regulation of public roads in a manner no less stringent than SMCRA and no less effective than the Federal regulations.

10. Predetermination of Affected Area

One commenter said that, contrary to the procedures set out in Utah's policy statement, a determination of the extent of the affected area should follow, rather than precede, the determination of which roads are included in that area.

The Director agrees. As discussed previously in this preamble in section III.A.3.b., because the boundary of the permit area depends on which roads, if any, are included in the permit area, it is not possible to specify that boundary in advance, as would be done under the policy statement.

11. Failure To Cover Haul Roads

One commenter said that Utah's proposed amendment covered only access roads and improperly failed to consider haul roads. Another commenter interpreted the policy statement as applying to both access and haul roads. The latter commenter said:

> It is obvious that the State will identify all roads located within the boundary of the permit area. In addition, the State will also identify all roads providing access to the permit area. It is difficult to imagine a situation in which haulage could occur from the permit area without the road used for such haulage having some location within the boundary of the permit area.

(administrative record No. UT–642, page 40).

The Director agrees with the former commenter that Utah's proposed amendment must cover haul roads, which clearly fall within the definition of "surface coal mining operations." For additional discussion of this issue, see preceding section III.A.3.b. of this preamble.

The Director disagrees with the latter commenter. The Director declines to follow the commenter's suggestion and, by inference and implication, read into the policy statement coverage of haul roads that is not explicitly there.

Moreover, the commenter has highlighted a broader deficiency in the policy statement, namely that it artificially and arbitrarily draws the boundary of the permit area prior to the determination of which roads are included. The corollary to the commenter's conclusion that some part of a haul road must lie within the permit area is that another part may then lie outside the permit area. The policy statement makes no provision for considering that part of any road which is outside this preconceived boundary. Thus, the policy statement is not consistent with SMCRA and the Federal regulations.

12. Regulatory Duplication and Conflicts

One commenter said he did not believe Congress intended that DOGM should regulate Utah public roads. Several commenters said that, if the proposed amendment were not adopted,

there would be additional, burdensome, and duplicative regulation at public expense. A number of commenters said that jurisdictional conflicts would arise if Utah included State, county, city, Bureau of Land Management, and U.S. Forest Service roads within surface coal mining permit areas.

One commenter said that OSM's position on the regulation of public roads under SMCRA did not reflect a clear understanding of the reality a coal operator must deal with, or recognize the legal framework that DOGM was bound to follow because of existing State statutes. This commenter cited a number of Utah statutes that allocated jurisdiction over Utah roads among various regulatory agencies other than DOGM.

A multi-county planning agency said that when a road is determined by Utah to be the property of a county or city government, OSM may not preempt the county's or city's authority through regulatory primacy, and that to do so would constitute an unconstitutional taking of property without due process. The same agency and a county commissioner said that in enacting SMCRA Congress did not intend to usurp or exclude local authority over the maintenance, construction, and supervision of roads. The commenters said that public thoroughfares are the property of the people of the jurisdiction that built them, and as such are exempt from OSM regulation.

The Director disagrees that the regulation of public roads as "surface coal mining operations" under SMCRA improperly conflicts with any other law or regulation or in any way constitutes a taking of property. Section 702 of SMCRA, 30 U.S.C. 1292, provides for the coexistence of SMCRA with other Federal laws and regulations. Likewise, section 505 of SMCRA, 30 U.S.C. 1255, provides for the coexistence of SMCRA with other consistent State laws and regulations, including more stringent land use and environmental controls of surface coal mining and reclamation operations. Moreover, it is a purpose of SMCRA to:

> Whenever necessary, exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations.

(section 102 (m) of SMCRA, 30 U.S.C. 1202(m)).

The Federal regulations explicitly recognize that agencies other than a State regulatory authority may have jurisdiction over activities and areas that are subject to the requirement for a permit under SMCRA. A State that wishes to regulate surface coal mining operations is required to submit to OSM, as part of its proposed State program, a description of how it will implement, administer, and enforce the program, including procedures for "[c]oordinating issuance of permits under the Act [SMCRA] and [30 CFR chapter VII] with other State, Federal and local agencies" (30 CFR 731.14(g)(9)).

Thus, Congress, in enacting SMCRA, and OSM, in promulgating the Federal regulations, recognized and expressly provided for overlapping jurisdiction in a State's regulation of surface coal mining operations, including applicable public roads. Under section 505(a) of SMCRA, 30 U.S.C. 1255, SMCRA supersedes any inconsistent State law or regulation. To the extent any of its existing laws or regulations are now construed by Utah as inconsistent with the regulation of surface coal mining operations, including public roads, under SMCRA, Utah must notify OSM in accordance with 30 CFR 732.17 and then amend its program as the Director may require to correct any deficiency.

13. Inappropriate Delegation of Authority

One commenter said that, in relying primarily on the determination of a road's public status by jurisdictions other than the SMCRA regulatory authority, the proposed amendment constituted an inappropriate delegation of authority. The commenter said that these other jurisdictions may base their determinations of a road's public status on considerations that are disparate from and incompatible with the intent of SMCRA.

The Director agrees to the extent that such determinations are used to establish or preclude jurisdiction under SMCRA. To the extent the proposed amendment would exempt any road from the requirement for regulation under SMCRA solely on the basis of a determination of the road's public status by an agency other than the Utah regulatory authority, it is not in accordance with SMCRA or consistent with the Federal regulations.

14. Operator's Lack of Authority To Comply

Several commenters representing the same mining company said that serious legal, constitutional, and liability issues would be raised if Utah were required to permit all public roads providing access to coal mines. The commenters said that mining companies do not have any authority to modify, change, improve, post signs on, or reclaim public roads.

The Director has two concerns with this comment. First, the commenters overstate the requirement for permitting public roads. As previously discussed in this preamble and in the preamble to the November 8, 1988, roads rule (53 FR 45190, 45193), it is not OSM's intent to automatically extend jurisdiction into the existing public road network, but only to those roads covered by Utah's definition of "surface coal mining operations" as determined on a case-by-case basis.

Second, an operator cannot lawfully rely on lack of authority over a road as the basis for failing to comply with SMCRA or the Utah State program. Section 506(a) of SMCRA prohibits the conduct of surface coal mining and reclamation operations without a permit. Nothing in SMCRA or the Utah program conditions this requirement on the ability of an operator to obtain any other requisite authority from any other applicable jurisdiction.

Section 507(b)(9) of SMCRA requires that an application for a surface coal mining and reclamation permit include, among other things, "a statement of those documents upon which the applicant bases his legal right to enter and commence surface mining operations on the *area affected*" (30 U.S.C. 1257(B)(9); emphasis added). A corresponding requirement appears in the Federal regulations at 30 CFR 778.15(a). Under section 503(a) of SMCRA, 30 U.S.C. 1253(a), and 30 CFR 732.15(a), the Utah program must include State laws and regulations that are in accordance with and consistent with these Federal right-of-entry requirements. Thus, an applicant for a Utah surface coal mining permit who proposes to use a public road covered by the definition of "surface coal mining operations" must first demonstrate the right to enter that road in compliance with the Utah program, including authority, as necessary, to modify, change, improve, post signs on, or reclaim the road.

15. Operator's Lack of Control Over Public Access

An industry representative said that his company uses public roads for hauling coal from two major underground mines. The roads, he said, are constructed, maintained, and regulated by the appropriate regional transportation agency with public funds. He said that his company does not control these roads and cannot restrict public access to them.

The Director is aware that an operator may not be able to control or restrict access to a public road that falls within the SMCRA definition of "surface coal mining operations." However, this does

not relieve the operator from the requirement to permit the road in accordance with the applicable regulatory program.

The definition of "surface coal mining operations" at section 701(28)(B) of SMCRA covers:

> All lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of [certain previously recited] activities and for haulage.

(30 U.S.C. 1291(28)(B)). This definition explicitly covers the improvement or use of existing roads. It is obvious, and thus Congress surely was aware, that a mine operator who chooses to improve or use an existing road may have to share that road with other equally legitimate users and be unable to control, or restrict access to, the road. Since Congress clearly intended to regulate existing roads under such circumstances, it is reasonable to conclude that an operator's ability to control or restrict access to any road is not relevant in determining the requirement for a SMCRA permit.

In the preamble to the final rule promulgating the definition of "road" at 30 CFR 701.5, OSM said that a

> commenter suggested that the definition of *road* be modified to specifically exclude "public roads." The commenter argued that roads maintained by public funds and located on properties dedicated to public entities are not roads as defined by § 701.5 and, even if the permittee so desired, could not be permitted *since ownership is not controlled*

(53 FR 45190, 45192; November 8, 1988; emphasis added). Notwithstanding this alleged lack of control, and consistent with the Director's decision here concerning Utah's proposed amendment, OSM "did not accept the commenter's suggestion" (*Id.* at 45192).

16. RS 2477 Rights-of-Way

One commenter said that where a county holds valid RS 2477 (30 U.S.C. 932) rights to a road, there is no authority under SMCRA to review or approve use of the road for surface coal mining operations. In support of this conclusion, the commenter cited "Instruction Memorandum No. 90–589, United States Department of the Interior, Bureau of Land Management [BLM], 'BLM's Responsibilities Relative to Proposed Activities Within RS 2477 Rights-of-Way' " (August 17, 1990).

The Director disagrees. The cited BLM instruction memorandum does not apply to OSM. Nevertheless, under the heading, "Departmental Policy on RS 2477," it states:

> Reasonable activities within the highway R/W [right-of-way] are within the jurisdiction of the holder. The holder of the R/W has no requirement to inform the BLM of its activities on or within the R/W. As such, the Department has no authority under RS 2477 to review and/or approve such reasonable activities. *The project proposal may, however, be subject to review and approval by an appropriate official, depending upon the applicability of other Federal, State or local laws to the proposed project.*

(*Id.* at 2; emphasis added). Thus, the BLM instruction memorandum recognizes that activities on RS 2477 rights-of-way may be subject to review and approval under appropriate provisions, such as SMCRA and the Utah program.

17. Use of Private Funds for "Public" Maintenance

A Utah transportation department representative commented that certain Utah county roads:

> Have been primarily funded to private sources by Utah State Legislation; that legislation then again has, in turn, reverted back and has been reimbursed by public funds. Those public funds then made the road a "public road" and we commingled with traffic and maintain it with public funds. And there's also company owned or private funds that match the public funds in some maintenance because some of the impacts of these road systems are just more than the taxpayer can endure in some isolated areas.

(administrative record No. UT–642, pages 45–46). OSM agrees that the impacts associated with using a public road as a "surface coal mining operation" can exceed the resources available for normal maintenance. One reason that it is important to regulate such roads under SMCRA is to ensure that surface coal mine operators are held accountable for such impacts in the absence of adequate maintenance by other responsible agencies.

With respect to the described practice of transferring ownership of roads to the public sector while continuing to maintain them with private funds, the Director notes that in the preamble to the November 8, 1988, final roads rule (53 FR 45190, 45193) OSM expressed concern that roads constructed to serve mining operations not be deeded to public entities to avoid compliance with the performance standards. It is this type of practice that OSM consistently has sought to prevent or remedy with respect to the regulation of roads under SMCRA. As Utah's proposed amendment would not forestall or modify this practice, it is less stringent than SMCRA and less effective than the Federal regulations.

18. Applicability to a Specific Utah Road

A Utah county transportation official said that a specific road, which is maintained by the county in his district, should be considered a public road. This comment presupposes that designation as a public road is the dispositive factor over whether or not a road is regulated. Whether or not a particular road would be classified as a public road under the proposed amendment cannot form the sole basis for determining whether or not it is part of a surface coal mining operation (53 FR 45190, 45193; November 8, 1988).

19. Previous OSM Conclusion

One commenter quoted a January 29, 1985, letter in which an OSM official had concluded that "no increase in environmental protection" would be gained by regulating a specific Utah public road under SMCRA. He said that if OSM did not approve Utah's proposed amendment this previous OSM conclusion would be reversed.

The referenced January 29, 1985, OSM letter predated the district court's July 15, 1985, decision *In re Permanent* and OSM's November 20, 1986 (51 FR 41952, 41953, 41960), notice suspending the definition of "affected area." To the extent OSM's conclusion in the letter is inconsistent with *In re Permanent* and the suspension notice, it already has been superseded by these two intervening developments.

20. Alleged Lack of Federal Criteria

One commenter said that, in the 6 years since *In re Permanent* was decided, no one has been able to clearly define the extent to which a valid exemption exists for public roads and that Utah, in submitting the proposed amendment, finally took the initiative to define at least certain roads that could be considered for exemption.

The Director disagrees. In the preamble to the rule suspending the regulatory definition of "affected area" "to the extent that it excludes public roads which are included in the definition of 'surface coal mining operations,' " OSM said that "[t]he suspension will have the effect of including in the 'affected area' all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of the regulated activities or for haulage" (51 FR 41952, 41953; November 20, 1986; emphasis added).

OSM subsequently has said that:

> State laws vary widely in their road classification systems. OSMRE [OSM] is concerned that roads constructed to serve mining operations not avoid compliance with the performance standards by being deeded to public entities. However, it is not OSMRE's [OSM's] intention automatically to extend

jurisdiction over roads into the existing public road network. Jurisdiction under the Act [SMCRA] and applicability of the performance standards are best determined on a case-by-case basis by the regulatory authority

(53 FR 45190, 45193; November 8, 1988).

The Director continues to find that a case-by-case approach is necessary in determining the applicability of SMCRA to public roads. Utah's proposed amendment provides no basis to modify this previous determination. Thus, the Director concludes that SMCRA and the existing Federal regulations, when interpreted in a manner consistent with the District Court's decision in *In re Permanent*, provide ample guidance on which public roads are subject to the requirement for a permit.

21. Adoption of Amendment Prior to OSM Approval

Several commenters expressed concern over Utah's use of emergency rulemaking procedures to make the proposed amendment effective immediately, notwithstanding the absence of prior OSM approval. One commenter was concerned that Utah might exempt roads from permitting during its 120-day emergency rulemaking.

The Director shares these concerns. Under 30 CFR 732.17(g):

> [W]henever changes to laws or regulations that make up the approved State program are proposed by the State, the State shall immediately submit the proposed changes to the Director as an amendment. No such change to laws or regulations shall take effect for purposes of a State program until approved as an amendment.

On March 12, 1991, OSM notified Utah that, pursuant to § 732.17(g), State regulations may not be enforced until approved by OSM (administrative record No. UT–614). Through ongoing oversight of the Utah program, the Director will ensure that Utah enforces only its approved State program.

22. Additional Regulatory Criteria

One commenter suggested three additional criteria for incorporation into the Utah program. These criteria would be used in determining which roads to include in the affected area and permit. The criteria are:

> Number one: Any and all new roads constructed for access and haulage to the mine site and support facilities will be subject to permitting. Right-of-ways granted for new road construction will be nontransferable and subject to reclamation requirements as defined by SMCRA and relevant Federal and State regulations. Jurisdiction over a new road construction for the purpose of access and haulage to a mine site and support facilities cannot be assumed by an outside entity for the purpose of evading reclamation requirements.
>
> Number two: Any upgrade of a road, whether it is deemed public or not, required to accommodate access or haulage to or from a mine site and support facilities will be subject to SMCRA reclamation requirements to the extent of the upgrade.
>
> Number three: If the use of a public road for access and haulage to or from a mine site and support facilities would adversely impact the road and surrounding environment or change the character of the road through use such as widening or rutting these impacts will be subject to SMCRA reclamation requirements as to the extent of the impacts. If unanticipated adverse impacts from coal mine operations occur on a road which was initially excluded from permitting, the effect of these impacts would subject the road to the same reclamation standards as a permitted road to the extent of the impacts.

(administrative record No. UT–642, pages 26–27).

The Director is not requiring Utah to incorporate these additional criteria into its program. To the extent they are consistent with SMCRA and the Federal regulations, Utah could take these criteria into consideration in any future proposed amendment.

23. Notice of Required Amendment

One commenter said that should Utah fail to adopt rules that are consistent with the district court's decision on the definition of "affected area" in *In re Permanent*, then the Director should notify Utah (and other non-complying states) under 30 CFR 732.17(d) that a State program amendment is required.

As previously discussed in this preamble in sections III.A.4. and III.B., the Director is requiring Utah to (1) delete the phrase "and may not include public roads as determined on a site specific basis" in the definition of "road" at Utah Admin. R. 614–100–200; (2) withdraw from the Utah program the February 25, 1991, policy statement or modify it to be consistent with SMCRA and the Federal regulations; and (3) make the definition of "public road" at Utah Admin. R. 614–100–200 applicable only to the Utah rules for designating lands unsuitable for mining at Utah Admin. R. 614–103.

Although the Director is not approving Utah's proposed amendment in part, the Utah program already makes adequate provision for determining whether a particular road must be permitted as a surface coal mining operation. Such determinations must be made by Utah on a cast-by-case basis, relying on the plan language of the Utah program counterpart to the definition of "surface coal mining operations" at section 701(28) of SMCRA. The applicable portion of the Utah counterpart is identical to the SMCRA definition and covers "all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of the activities and for haulage" (U.C.A. 40–10–3(18)).

24. Alleged Procedural Deficiencies

One commenter said that the Utah procedures underlying the proposed amendment generally were deficient. The commenter said that the amendment:

> Overlay[s] in the determination process other relevant criteria using laws, regulations and jurisdiction that are not at the Federal level of concern and do not represent the public interest to the level that the federal laws, regulations and jurisdiction might.

(administrative record No. UT—642, page 55). Also, the commenter said, the Utah Board of Oil, Gas and Mining:

> Is charged with furthering coal mining activity within a State framework that does not consider the same stringent level of conflict of interest, does not have the environmental protection statutes on the books as the federal laws do, nor does it require the public participation and review that is provided for under federal statute.

(*Id.* at 56).

The Director disagrees. Section 503(a) of SMCRA provides for State primacy in the regulation of surface coal mining operations under "a State program which demonstrates that [the] State has the capability of carrying out the provisions of this Act [SMCRA]" (30 U.S.C. 1253). In conditionally approving the Utah State program on January 21, 1981 (46 FR 5899), the Secretary, under section 503(b)(4) of SMCRA, 30 U.S.C. 1253(b)(4), necessarily "found that the State has the legal authority and qualified personnel necessary for enforcement of the environmental protection standards" the Director reaffirmed this finding with respect to a complete revision of the Utah rules.

State primacy under SMCRA is based on the finding of Congress that:

> Because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act [SMCRA] should rest with the States.

(SMCRA 101(f); 30 U.S.C. 1201(f)). Consistent with this finding of diversity, and as long as the Utah program otherwise meets the requirements of SMCRA and complies with 30 CFR, chapter VII, subchapter C, Utah may tailor its program as necessary to meet State legal, regulatory, or jurisdictional

requirements that differ from those at the Federal level.

B. Federal Agency Comments

Pursuant to 30 CFR 732.17(h)(11)(i), the Director solicited comments on the proposed amendment from the Administrator of the U.S. Environmental Protection Agency (EPA), the Secretary of the U.S. Department of Agriculture, and the heads of other Federal agencies with an actual or potential interest in the Utah program.

1. Environmental Protection Agency

The U.S. Environmental Protection Agency did not respond to the Director's request for comments on the proposed amendment (see No. 6 below for EPA concurrence).

2. Fish and Wildlife Service

By letter dated April 1, 1991, the U.S. Fish and Wildlife Service said that it had no comments on the proposed amendment.

3. Bureau of Mines

By letter dated April 4, 1991, the U.S. Bureau of Mines said that it had no comments on the proposed amendment.

4. Corps of Engineers

By letter dated April 8, 1991, the U.S. Army Corps of Engineers said that the proposed amendment was satisfactory.

5. Forest Service

By letter dated April 19, 1991, the U.S. Forest Service (USFS) said the proposed amendment was consistent with USFS needs in regard to jurisdiction and management of forest development roads. USFS agreed with the proposed amendment, which it said would exclude forest development roads from the coal mine permitting process. In addition, USFS had the following comments.

USFS said that under various laws and regulations, it has the responsibility and authority to manage the transportation system on National Forest System lands. In those cases where a mining company was using a road for mine access and hauling and there was a need for other types of National Forest access, USFS said the road must remain under its jurisdiction. For roads which were constructed for or managed exclusively for purposes of mine access and/or coal hauling, however, USFS had no objection to the road being permitted under SMCRA.

USFS said that Utah's proposed amendment and USFS road permitting authority do not conflict with SMCRA, but that SMCRA has caused conflicts with USFS management of roads. USFS cited section 702(b) of SMCRA, 30 U.S.C. 1292(b), as evidence that the permitting of mining operations under SMCRA was not intended to conflict with the responsibility and authority of a land managing agency such as the USFS. It said that where a road used by a mine operator and other users was included in a SMCRA permit area, conflicts could occur when improvements or maintenance operations were performed by the other users.

OSM agrees that SMCRA and its implementing regulations do not supersede USFS responsibility and authority over forest development roads. OSM disagrees, however, that overlapping USFS jurisdiction limits the responsibility or authority of a regulatory authority such as Utah to regulate the effects of surface coal mining operations under SMCRA.

As USFS pointed out, section 702(b) of SMCRA provides that:

> [N]othing in this Act [SMCRA] shall affect in any way the authority of * * * the heads of other Federal agencies under other provisions of law to include in any lease, license, permit, contract, or other instrument such conditions as may be appropriate to regulate surface coal mining and reclamation operations on land under their jurisdiction.

(30 U.S.C. 1292(b)). However, the following paragraph of that section provides that:

> [T]o the greatest extent practicable each Federal agency shall cooperate with the Secretary and the States in carrying out the provisions of this Act [SMCRA].

(30 U.S.C. 1292(C)). Thus, SMCRA itself requires each Federal agency, which otherwise regulates a road that is found to be part of a surface coal mining operation, to cooperate with OSM and the State in securing effective regulation of that road.

To facilitate this cooperation, the Federal regulations at 30 CFR 883.13(a)(3) require a SMCRA regulatory authority to provide notice of an administratively complete permit application to agencies, such as USFS, having an interest in or the authority to issue permits covering the operations proposed in the application. Any such agency may submit written comments on and objections to the application (30 CFR 773.13(b)) and request an informal conference on the application (30 CFR 7873.13(c)). In making its decision on the application, the regulatory authority must take into account any such comments or objections and the results of any informal conference (30 CFR 773.15(a)(1)).

Through this permitting process, any conflicts concerning whether or not a particular road is a surface coal mining operation can be worked out in advance by USFS and a regulatory authority. Any subsequently developing conflicts that involve compliance with SMCRA or the regulatory program can be worked out through the permit review process (30 CFR 774.11) and the issuance of a permit order (30 CFR 774.11(b)). In any event, the regulatory authority is responsible for ensuring compliance with SMCRA, notwithstanding USFS jurisdiction or any actual or potential conflicts with the objectives of other users of the affected public lands.

In the preamble to the final rule promulgating the definition of "road" at 30 CFR 701.5, OSM responded to comments on a similar issue as follows:

> One commenter suggested revisions to the definitions of *affected area* and *permit area* in 30 CFR 701.5. The commenter wanted existing or proposed roads under the jurisdiction of a Federal land management agency to be excluded from these definitions. * * * [OSM] believes that a revision to either of these definitions is not necessary. * * * On the specific concern relative to Federal lands roads, neither this definition [of *road*] nor the definition of *affected area* as partially suspended (51 FR 41952, November 20, 1986) is intended to expand *or limit* the jurisdictional reach of the definition of "surface coal mining operations" contained in section 701(28)(B) of the Act [SMCRA], relative to roads. That jurisdictional reach must be determined on a case-by-case basis by the regulatory authority.
>
> One commenter suggested that OSMRE [OSM] retain the "within the affected area" phrase in the definition of road to ensure that jurisdiction over existing roads under the control of a Federal land management agency is not transferred to the Secretary or to a State regulatory authority.
>
> As noted above, OSMRE [OSM] does not agree that adding the phrase "within the affected area" will affect jurisdiction over existing roads.

(53 FR 45190, 45192; last emphasis added).

USFS said that its policy is to permit and bond the use of forest development roads for commercial purposes, including coal mining. It concluded that the Federal definition of "permit area" excludes such USFS-permitted and bonded roads from the SMCRA permit requirement.

The Director disagrees. The Federal definition of "permit area" at 30 CFR 701.5 does state that "areas adequately bonded under *another valid permit* may be excluded from the permit area" (emphasis added). However, the term "another valid permit" in this definition refers to a SMCRA "permit," as defined in section 701(15) of SMCRA (30 U.S.C. 1291(15)) and 30 CFR 701.5, not to a permit issued by another agency, such as USFS, under different legal authority.

As stated by OSM in the preamble to the final rule promulgating the Federal definition of "permit area," the purpose of the language relied on by USFS is:

> To indicate that overlapping permit areas for more than one operation are not required. * * * * *
>
> [T]he permit area means the area required to be covered by the operator's performance bond under [the OSM bonding regulations at 30 CFR] subchapter J. * * * This Provision is considered appropriate since each bond must be adequate to cover the anticipated costs of reclamation of the area involved, and therefore, duplicative bonding is unnecessary.

(48 FR 14814, 14820; April 5, 1983). Clearly, this discussion refers only to the SMCRA permit area and SMCRA performance bond and not to any other permit or bond issued or required by another agency, such as USFS, under different legal authority. In promulgating this provision, OSM had no way of knowing in advance whether another agency's permit would adequately regulate the impacts of surface coal mining or whether another agency's bond would adequately cover the anticipated costs of mining-related reclamation.Thus, it would be unreasonable to interpret this provision as deferring OSM's regulatory responsibility to another agency, such as USFS.

USFS said that on National Forest System lands a coal company does not have the authority to close a road to public access, but this authority remains with the USFS. The Director agrees that in the permitting process the surface management agency makes the decision to close a road or keep it open.

6. U.S. Environmental Protection Agency (EPA) Concurrence

Pursuant to 30 CFR 732.17(h)(11)(ii), the Director is required to obtain the written concurrence of the Administrator of EPA with respect to those aspects of a State 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.*) and the Clean Air Act, as amended, (42 U.S.C. 7401 *et seq.*). EPA gave its written concurrence with the proposed amendment by letter dated June 13, 1991 (administrative record No. UT–649).

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

Pursuant to 30 CFR 732.17(h)(4), OSM solicited comments from the Utah SHPO and the ACHP. Neither the SHPO nor the ACHP commented on the proposed amendment.

V. Director's Decision

Based on the above findings, the Director is both approving in part and not approving in part Utah's March 1, 1991, proposed amendment to the Utah program. In addition, OSM is requiring Utah to amend certain parts of the Utah program.

As discussed in finding No. III.A., the Director is not approving (1) Utah's proposed definition of "road" at Utah Admin. R. 614–100–200 to the extent that it includes the phrase "and may not include public roads as determined on a site specific basis" and (2) the February 25, 1991, policy statement titled "Division of Oil, Gas and Mining Policy for the Implementation of Site Specific Determinations of the Public Status of Roads under Utah Admin. R. 614–100–200," which supplements the proposed definition of "road." The Director is requiring Utah (1) to delete the phrase from the definition and (2) to either withdraw the policy statement from the Utah program or modify it to be consistent with SMCRA and the Federal regulations. This decision completes the Director's action on the phrase. The Director previously deferred decision on the phrase, which was included verbatim in another amendment.

As discussed in finding No. III.B, the Director is approving Utah's proposed definition of "public road" but is requiring Utah to amend its program to provide that this definition applies only in the context of the rules for designating lands unsuitable for mining at Utah Admin. R. 614–103.

The Federal regulations at 30 CFR part 944, which codify decisions concerning the Utah 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.

Effect of Director's Decision. Under section 503 of SMCRA, 30 U.S.C. 1253, a State may not exercise jurisdiction over surface coal mining and reclamation operations unless it has a State program approved by the Secretary. Similarly, 30 CFR 732.17 requires a State to submit any alteration of an approved State program to OSM for approval. The Federal regulation at 30 CFR 732.17(g) provides that no change in the laws or regulations that make up a State program shall take effect for purposes of a State program until approved by OSM as an amendment.

This prohibits a State from making any unilateral change in its approved State program. Any change in a State program is not enforceable by the State until approved by OSM. In oversight of the Utah program, the Director will recognize only the statutes, regulations, and other materials approved by OSM, together with any consistent implementing policies, directives, and other materials, and will require that Utah enforce only such provisions.

VI. Procedural Determinations

A. National Environmental Policy Act

Pursuant to section 702(d) of SMCRA, 30 U.S.C. 1292(d), an environmental impact statement is not required for this rulemaking.

B. Executive Order No. 12291 and the Regulatory Flexibility Act

On July 12, 1984, the Office of Management and Budget (OMB) granted OSM an exemption from sections 3, 4, 7, and 8 of Executive Order 12291 for actions directly related to approval or conditional approval of State regulatory programs. Accordingly, for this action OSM is exempt from the requirement to prepare a regulatory impact analysis, and this action does not require regulatory review by OMB. The Department of the Interior has determined that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule will not impose any new requirements; rather, it will ensure that existing requirements established by SMCRA and the Federal rules will be met by the State.

C. Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under 44 U.S.C. 3507.

List of Subjects in 30 CFR 944

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 18, 1991.

Raymond L. Lowrie,

Assistant Director, Western Support Center.

For the reasons set out in the preamble, title 30, chapter VII, subchapter T, of the Code of Federal Regulations is amended as set forth below.

PART 944—UTAH

1. The authority citation for part 944 continues to read as follows:

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

2. Section 944.15 is amended by adding a new paragraph (r) to read as follows:

§ 944.15 Approval of amendments to State regulatory program.

* * * * *

(r) With the exceptions of the definition of "road" at Utah Administrative Rule (Admin. R.) 614–100–200 to the extent that it includes the phrase "and may not include public roads as determined on a site specific basis" and Utah's February 25, 1991, policy statement titled "Division of Oil, Gas and Mining Policy for the Implementation of Site Specific Determinations of the Public Status of Roads under R614–100–200," which supplements this definition, the following amendment of the Utah permanent regulatory program rules, as submitted to OSM on March 1, 1991, is approved effective November 22, 1991: Utah Admin. R. 614–100–200, definition of "public road."

3. Section 944.16 is amended by adding new paragraphs (n) and (o) to read as follows:

§ 944.16 Required program amendments.

* * * * *

(n) By January 21, 1992, Utah shall submit a proposed amendment:

(1) Deleting from the definition of "road" at Utah Admin. R. 614–100–200 the phrase "and may not include public roads as determined on a site specific basis" and

(2) Withdrawing from the Utah program the February 25, 1991, policy statement titled "Division of Oil, Gas and Mining Policy for the Implementation of Site Specific Determinations of the Public Status of Roads under Utah Admin. R. 614–100–200," or modifying it to be consistent with SMCRA and the Federal regulations.

(o) By January 21, 1992, Utah shall submit a proposed amendment making the definition of "public road" at Utah Admin. R. 614–100–200 applicable only to the Utah rules for designating lands unsuitable for mining at Utah Admin. R. 614–103.

[FR Doc. 91–28137 Filed 11–21–91; 8:45 am]
BILLING CODE 4310–05–M

POSTAL SERVICE

39 CFR Parts 111 and 602

Amendment of Policy for the Acquisition and Management of Intellectual Property Other Than Patent and Technical Data Rights

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: These regulations revise Postal Service policy for the acquisition and management of intellectual property other than patents. They transfer the role of the Postal Service Intellectual Property Rights Board to the Postal Service Office of Licensing, Philatelic and Retail Services Department. These regulations also describe the procedure by which requests for the use of intellectual property are processed. The information in this notice is provided to inform potential licensees and the general public of these revised policies and procedures.

EFFECTIVE DATE: December 15, 1991.

FOR FURTHER INFORMATION CONTACT: Director, Office of Licensing, Philatelic and Retail Services Department, (202) 268–6868.

SUPPLEMENTARY INFORMATION: Since 1978, the U.S. Postal Service has granted nonexclusive licenses to reproduce postage stamp designs and other intellectual properties. The principal objective of the licensing program has been to ensure that postal intellectual properties are not infringed or used inappropriately. Although royalty fees have been charged for commercial uses of these properties, revenue generation has been a secondary objective of the program. The Postal Service Intellectual Property Rights Board was established in 1978 to manage the intellectual property rights licensing program.

Recent market research and sales experience, however, have demonstrated a large consumer market for merchandise licensed by the Postal Service. Desiring to reach this market, the Postal Service has refined its objectives for the licensing program. New objectives include increasing royalty income by licensing products targeted to various consumer market segments and making these products available through traditional channels of distribution. These expanded licensing objectives should enhance the public's perception of the Postal Service and promote the hobby of stamp collecting.

The Postal Service will, therefore, seek experienced licensees able to design, manufacture, distribute, and promote merchandise nationwide to the consumer market.

Design must be imaginative, of high quality, and appealing to the intended market. Manufacture must also be of high quality and reasonable value. Distribution must be through traditional retail locations (department stores, specialty stores, boutiques, etc.) or through mail order catalogs. Because distribution for resale through post offices will not be a priority consideration, promotion must be to the trade to ultimate consumers.

The Postal Service has determined that its licensing program should have many of the characteristics of highly successful licensing programs in the private sector. Accordingly, it will consider the use of exclusive licensing agreements within product categories and distribution channels, using particular licensed designs, and establishing minimum guaranteed royalties. The Postal Service, however, will continue to grant nonexclusive licenses to small businesses serving local or regional markets.

To accommodate these additional objectives, the Postal Service Intellectual Property Rights Board is being dissolved. Its former responsibility for the Postal Service's licensing program for postage stamp designs, service marks, and trademarks has been invested in the Office of Licensing, Philatelic and Retail Services Department. However, Postal Service contracting officers will continue to be responsible for patents and intellectual property rights pertaining to contracts, with oversight by the Procurement Policy Committee's subcommittee on Patents, Intellectual Property, Data and Software Rights. The Office of Licensing has retained the services of a professional licensing advisor as a liaison to existing and potential licensees. This advisor will negotiate licensing agreements for consideration by the Postal Service, and will generally administer the licensing effort for the Postal Service, but will not have the authority to execute licenses. The Postal Service retains the sole right of executing license agreements. This rule incorporates these changes into the Code of Federal Regulations and the Domestic Mail Manual. Because this rule relates to agency procedures and does not meaningfully affect conduct, activity, or an interest that is the subject of agency regulation, or the standards for eligibility for government programs, no useful purpose appears to be served by delaying adoption of the rule for public comment.

Accordingly, parts 111 and 602 of 39 CFR are amended as follows:

List of Subjects in 39 CFR Parts 111 and 602

Administrative Practice and Procedure, Postal Service.

PART 111—GENERAL INFORMATION ON POSTAL SERVICE

1. The authority citation for part 111 continues to read as follows:

Authority: 5 U S.C. 552(a), 39 U.S.C. 101 401 403, 404, 3001–3011 3201–3219, 3403–3406, 3621 5001

In addition, the Postal Service adopts the following amendments to parts 119 and 166 of the Domestic Mail Manual, which is incorporated by reference in the Code of Federal Regulations. See 39 CFR 111.1

2. Revise the Domestic Mail Manual as follows

PART 119—TRADEMARKS, SERVICE MARKS, AND COPYRIGHTS

a Revise 119.31 as follows.

119.31 Inquiries concerning Postal Service copyrights or the use of Postal Service trademarks and service marks, copyright materials, and intellectual property other than patents and technical data rights in Postal Service contracts must be sent to: Office of Licensing, Philatelic and Retail Services Department, US Postal Service, 475 L'Enfant Plaza SW., Washington, DC 20260–6700.

b Revise 119.32 as follows.

119.32 Inquiries concerning licenses to publish or reproduce ZIP Code information must be sent to: Office of Licensing, Philatelic and Retail Services Department, US Postal Service, 475 L'Enfant Plaza SW., Washington, DC 20260–6700.

PART 166—COPYRIGHT OF PHILATELIC DESIGN

c. Revise 166.4 as follows.

166.4 Requests for Licenses. The U.S. Postal Service may grant licenses for the use of illustrations of its copyright designs outside the scope of the above permission. Requests for such licenses must be sent to: Office of Licensing, Philatelic and Retail Services Department, US Postal Service, 475 L'Enfant Plaza SW., Washington, DC 20260–6700.

PART 602—INTELLECTUAL PROPERTY RIGHTS OTHER THAN PATENTS

3. The authority citation for part 602 continues to read as follows.

Authority: 39 U S.C. 401(5).

4. Revise the heading of § 602.2 to read as follows:

§ 602.2 Office of Licensing, Philatelic and Retail Services Department.

5. Revise §§ 602.2 and 602.3 to read as follows.

§ 602.2 Office of Licensing, Philatelic and Retail Services Department.

In accordance with the foregoing policy, the Postal Service Office of Licensing, Philatelic and Retail Services Department, formulates the program for the management of the Postal Service's rights in intellectual property (except patents and technical data rights in Postal Service contracts, which is the responsibility of Postal Service contracting officers). The Office of Licensing and the contracting officers identify intellectual properties in which the Postal Service should secure its rights. It receives and makes recommendations for the disposition of applications for use of Postal Service intellectual property. It periodically reviews the intellectual property rights portfolio to determine the extent of the utilization of protected properties and to recommend relinquishment of ownership when it considers ownership no longer desirable. It is advised by the Office of Procurement of performance under license agreements and makes recommendations for corrective measures when necessary. In consultation with the Law Department, it recommends appropriate action against unauthorized use of intellectual property.

§ 602.3 Requests for use.

(a) Inquiries concerning licenses to use Postal Service trademarks or service marks, copyright materials and intellectual property other than patents and technical data rights in Postal Service contracts must be sent to: Office of Licensing, Philatelic and Retail Services Department, US Postal Service, 475 L'Enfant Plaza SW., Washington, DC 20260–6700.

(b) Requests for the use of intellectual property should be submitted on the form provided by the Office of Licensing to the licensing advisor designated by that Office. Each request is considered in a timely fashion in accordance with the policy established in this section. Requests favorably considered are forwarded to the Office of Licensing for approval.

(c) Approved requests contemplating a permissive (no fee) use of the intellectual property are evidenced by a letter of permission furnished to the requester.

(d) Approved requests contemplating a contractual (fee) use of the intellectual property are forwarded to the Office of Licensing for the negotiation of a satisfactory license agreement.

(e) Each license agreement is subject to legal review.

(f) Requesters are promptly advised of unapproved requests.

A transmittal letter effecting the above changes to the Domestic Mail Manual will be published and transmitted automatically to subscribers Notice of issuance of the transmittal letter will be published in the **Federal Register** as provided by 39 CFR 111.3.

Stanley F. Mires,

Assistant General Counsel Legislative Division.

[FR Doc. 91–28107 Filed 11–21–91; 8:45 am]

BILLING CODE 7710–12–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 372

[OPTS–400059; FRL–3944–3]

Chromium (III) Compounds; Toxic Chemical Release Reporting; Community Right-To-Know

AGENCY: Environmental Protection Agency (EPA).

ACTION: Denial of petition.

SUMMARY: EPA is denying a petition to delete chromium (III) oxide from the list of toxic chemicals subject to section 313 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA). Specifically, EPA is denying this petition because chromium (III) can, under certain conditions, be oxidized to chromium (VI), which is a human carcinogen. Oxidation of chromium (III) to chromium (VI) can occur in soils and in water treatment processes that use chlorine.

FOR FURTHER INFORMATION CONTACT: Maria J Doa, Petitions Coordinator, Emergency Planning and Community Right-to-Know Information Hotline, Environmental Protection Agency, Mail Stop OS–120, 401 M St., SW., Washington, DC 20460, Toll free: 800–535–0202, Toll number: 703–920–9877.

SUPPLEMENTARY INFORMATION:

I. Introduction

A. Statutory Authority

This Notice is issued under sections 313(d) and (e)(1) of the Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986 (Pub. L. 99–499). EPCRA is also referred to as Title III of the Superfund Amendments and Reauthorization Act of 1986.

B. Background

Section 313 of EPCRA requires certain facilities manufacturing, processing or otherwise using toxic chemicals to report their environmental releases of such chemicals annually. Beginning with the 1991 reporting year, such facilities also must report pollution prevention and recycling data for such chemicals, pursuant to section 7 of the Pollution Prevention Act (section 6607 of the

Omnibus Budget Reconciliation Act of 1990, Pub. L. 101–508). Section 313 establishes an initial list of toxic chemicals that is comprised of more than 300 chemicals and 20 chemical categories. Any person may petition EPA to add chemicals to or delete chemicals from the list.

EPA issued a statement of petition policy and guidance in the **Federal Register** of February 4, 1987 (52 FR 3479), to provide guidance regarding the recommended content and format for petitions. EPA must respond to petitions within 180 days either by initiating a rulemaking or by publishing an explanation of why the petition is denied. On May 23, 1991 (56 FR 23703), EPA published guidance regarding the recommended content of petitions to delete individual members of the section 313 metal compound categories.

II. Description of Petition

On May 21, 1991, EPA received a petition from California Products Corporation to exclude chromium (III) compounds from section 313 of EPCRA. Specifically, the petition requests that chromium (III) oxide (Chemical Abstracts Service (CAS) registry number 1308–38–9) be removed from the list of EPCRA section 313 chemicals subject to annual release reporting requirements. The petitioner contends that chromium (III) compounds should be deleted from the list because chromium (III) wastes that contain virtually no chromium (VI) which are typically and frequently managed in nonoxidizing environments are considered nonhazardous wastes under the Resource Conservation and Recovery Act (RCRA), under 40 CFR 261.4.

III. Regulatory Status of Chromium

Due to concerns regarding the oxidation of chromium (III) to chromium (VI), which is a human carcinogen, the Agency regulates total chromium (total chromium includes all forms of chromium, including chromium (III)) under the RCRA Toxicity Characteristic rule (55 FR 11798, March 29, 1990). Oxidation of chromium (III) to chromium (VI) can occur in soils and in water treatment processes that use chlorine. Based on these concerns, the Agency is considering proposing the deletion of the exemption for specific chromium wastes that contain virtually no chromium (VI) (55 FR 11812, March 29, 1990).

Total chromium, including trivalent chromium (chromium (III)), is on the list of toxic pollutants of 40 CFR 401.15 designated pursuant to section 307(a)(1) of the Clean Water Act (CWA). Total chromium, including trivalent chromium, is regulated under the Safe Drinking Water Act (SDWA), 40 CFR 141.11, 141.51, and 141.62. Chromium compounds are listed as Hazardous Air Pollutants under Title III of the Clean Air Act (CAA), as amended in 1990. Chromium is also on the Toxicity Characteristics list and is further regulated under the Resource Conservation and Recovery Act (RCRA), 40 CFR 261.24.

This is the second petition that EPA has received to delete a chromium (III) compound. On June 27, 1989, EPA received a petition to exempt Chromium Antimony Titanium Buff Rutile (CATBR) from the EPCRA section 313 list of toxic chemicals. This petition was denied based on the Agency's determination that CATBR is a potential carcinogen. EPA concluded that CATBR can reasonably be anticipated to cause cancer in humans via inhalation (55 FR 650, January 8, 1990). The support for this denial was based on evidence of the carcinogenicity of chromium and certain chromium compounds.

IV. EPA's Technical Review of Chromium (III) Oxide

The technical review of the petition to delete chromium (III) oxide included an analysis of the chemistry, health effects, and environmental fate known for this substance.

A. Chemistry

Chromium (III) oxide (Cr_2O_3; CAS registry number 1308–38–9), also known as chromic oxide or chromium oxide, is a trivalent form of chromium having a light to dark green appearance, and is poorly soluble in water. Chromium (III) oxide, in either its anhydrous or hydrous form, is chiefly used as a pigment. Other uses include manufacture of chromium metal and aluminum-chromium alloys and, to a lesser extent, as a catalyst and chemical intermediate.

B. Toxicological Evaluation

Information on the health and environmental effects of chromium compounds, and specifically, chromium (III) oxide, was obtained from the following sources: a 1984 EPA document entitled *Health Assessment Document for Chromium* (Ref. 15), a 1990 EPA document entitled *Noncarcinogenic Effects of Chromium-Update to Health Assessment Document* (Ref. 16), *Fifth Annual Report on Carcinogens-Summary (1989)* (Ref. 14), *International Agency for Research on Cancer (IARC) Monographs* (Refs. 7, 8, and 9), and studies found in the literature. Data on chromium (III) oxide were reviewed for environmental fate and evidence indicating acute and chronic toxicity, and carcinogenicity.

1. *Carcinogenicity*. When administered orally to rats at dietary levels of 1, 2, and 5 percent 5 times weekly for 2 years, chromium (III) oxide induced slightly increased incidences of mammary fibroadenomas at each dose level: mammary fibroadenomas were found in 3 rats given 1 percent; in 1 given 2 percent; and in 3 given 5 percent. One mammary carcinoma and two fibroadenomas were detected in control animals. The investigators concluded that there was no significant difference in the occurrence of tumors between the test and control groups (Ref. 10). In rats, administration of chromium (III) oxide through intratracheal application or a single intraperitoneal injection in a gelatin-saline solution induced increased incidence of sarcomas, tumors, and reticulum cell sarcomas of the lung. The use of control animals was not reported in these studies and, therefore, the results are not sufficiently conclusive (Ref. 9).

Human epidemiology studies of workers exposed to chromium (VI) and chromium (III) compounds provide adequate evidence to indicate that, in some form, chromium is a respiratory tract carcinogen (Refs. 7 and 9). Increased incidence of respiratory cancers have also been found in some studies of chrome pigment workers at 11 plants in 4 countries. These studies and related studies are summarized in EPA's *Health Assessment Document for Chromium* (Ref. 15) and IARC (Ref. 9), and it was concluded that there is sufficient evidence in animals and humans for the carcinogenicity of chromium (VI) compounds, while evidence for the carcinogenicity of chromium (III) compounds in humans and animals is largely non-positive and is viewed as inadequate to develop clearer conclusions.

It is important to note that while hexavalent chromate ion (chromium (VI)) is readily transported across cell membranes, the trivalent form (chromium (III)) is not. Once inside the cell, however, conversion of hexavalent to trivalent chromium ion seems to be necessary for formation of ligands with macromolecules such as DNA (Ref. 14). Thus, chromium (III) is believed to be the ultimate carcinogenic form of chromium (VI) after its entry into target cells and subsequent intracellular metabolic reduction. Based on evidence of other chromium (III) compounds, it is possible that chromium (III) oxide may be taken up by lung cells via phagocytosis (Refs. 8 and 9). Therefore, the effect of relative cell impermeability

attributed to chromium (III) compounds, as it pertains to the mechanism for carcinogenic response, does not negate the possibility for chromium (III) oxide carcinogenic potential via inhalation in the absence of more definitive information.

2. *Acute toxicity.* Chromium (III) compounds, including chromium (III) oxide, have a low order of acute toxicity when administered orally, which is believed to be due to the relative insolubility and poor intestinal absorption of these compounds (Ref. 15). Chromium (VI) compounds are more acutely toxic than chromium (III) compounds. For example, the oral LD_{50} of sodium dichromate (a chromium (VI) compound) in humans has been reported as 50 mg/kg (Ref. 12).

3. *Chronic toxicity.* In a 90–day feeding study, groups of rats (both sexes, 12 to 19 rats/group) were fed chromium (III) oxide in bread at dietary concentrations of 2 or 5 percent 5 days per week (Ref. 10). The only effects observed were reductions (12 to 37 percent) in the absolute weights of the livers and spleens of animals in the high-dose group when compared to control animals. No hematological or histopathological changes were reported. Based on these results and results from similar studies, EPA has low concern for chronic toxicity from chromium (III) oxide (Ref. 15).

C. Environmental Fate

Extensive literature now exists on the environmental fate of chromium (III) oxide and other chromium compounds (Refs. 1, 2, 3, 4, 5, 6, 11, 13, and 16). It is clear that essentially all chromium (III) compounds, including chromium (III) oxide, are oxidizable to chromium (VI) in soils (Refs. 3 and 4). Bartlett (Ref. 1) has reported that an important factor determining the oxidation of chromium (III) compounds to chromium (VI) compounds is the availability of fresh manganese oxide (a normal soil and sediment constituent), which becomes reduced as the chromium (III) is oxidized. The freshness of the manganese oxide is related to quantities of oxidizable organic substances, soil temperature, moisture, aeration and drying. Organic forms of chromium (III) compounds are more easily oxidized than insoluble oxides. When in soil, chromium (III) oxide typically exists in its slightly more soluble, hydrated form (Bartlett, unpublished results) and readily oxidizes to chromium (VI) oxide (Refs. 1 and 3). Chelation of chromium (III) oxide by organic acids in soils facilitates oxidation to chromium (VI) oxide (Ref. 11). Chromium (VI) compounds can reduce to chromium (III) if the soil pH is low and an organic energy source is available. Reduction of chromium (VI) compounds and oxidation of chromium (III) compounds in soils may occur simultaneously.

It has been shown that water treatment involving chlorination will effectively transform chromium (III) to chromium (VI). The normal presence of residual oxidizing capacity in treated water is capable of maintaining dissolved chromium in the higher valence (VI) state (50 FR 46966, November 13, 1985). Thus if trivalent chromium is present in high concentrations in well water, chlorination can result in correspondingly high concentrations of hexavalent chromium at the point of exposure (i.e., at the tap).

Subtitle C of RCRA, as amended, establishes a federal program for the comprehensive regulation of hazardous waste. Section 1004(5) of RCRA defines hazardous waste, among other things, as solid waste that may "... pose a substantial present or potential hazard to human health and the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." Under RCRA section 3001, EPA is charged with defining which solid wastes are hazardous. A solid waste is hazardous if it is listed at 40 CFR part 261 Subpart D, or if it exhibits a hazardous waste characteristic (corrosivity, ignitability, reactivity, or toxicity). These two mechanisms for identifying hazardous wastes are distinct and fundamentally different.

The hazardous waste characteristics promulgated by EPA designate broad classes of wastes which are hazardous by virtue of an inherent property. In the May 19, 1980 final rule (45 FR 33084), that instituted EPA's general framework for identifying hazardous waste, the Agency established two basic criteria for identifying hazardous wastes characteristics: (1) The characteristic should be capable of being defined in terms of physical, chemical, or other properties which cause the waste to meet the statutory definition of hazardous waste; and (2) the properties defining the characteristic must be measurable by standardized and available testing protocols or reasonably detected by generators through their knowledge of the waste (40 CFR 261.10).

In the final Toxicity Characteristic rule (55 FR 11812, March 29, 1990) EPA discusses its concerns regarding the potential for trivalent chromium to be converted to hexavalent chromium. It should be noted that because of this, the Agency is considering proposing the deletion of the exclusion (40 CFR 261.4(b)(6)(i)) for specific chromium wastes that contain virtually no hexavalent chromium. Therefore, based on the known carcinogenicity of chromium (VI), and the evidence for the transformation of chromium (III) compounds to chromium (VI) compounds discussed above, EPA will not delete chromium (III) oxide from the EPCRA section 313 list of toxic chemicals.

D. Technical Summary

Chromium (III) compounds, including chromium (III) oxide, are oxidized to chromium (VI) compounds in soils and in water treatment involving chlorination. Chromium (VI) compounds are known human carcinogens.

Based on evidence of other chromium (III) compounds, it is possible that chromium (III) oxide may be retained in the lung and as such, it is a potential carcinogen via inhalation.

V. Rationale for Denial

EPA is denying the petition to delete chromium (III) compounds, and specifically, chromium (III) oxide from the section 313 list of toxic chemicals. The denial is based on the Agency's determination that conversion of chromium (III) to chromium (VI), which is a known human carcinogen, has been demonstrated to occur in soils and in water treatment processes that use chlorine. Thus, in accordance with EPCRA section 313(d)(2), EPA has determined that chromium (III) should not be deleted from the section 313 list of toxic chemicals.

VI. References

(1) Bartlett, R. J., "Chromium Oxidation in Soils and Water: Measurements and Mechanisms," In: Serrone, D. M., ed. Proceedings, Chromium Symposium May, 1986: An Update. Pittsburgh, PA: Industrial Health Foundation, Inc., (1986), pp. 310–330.

(2) Bartlett, R. J., "Manganese Redox Reactions and Organic Interactions in Soils," In: Graham, R. D., Hannam, R. J., Uren, N. C. eds., Manganese in Soils and Plants; Proceedings of the International Symposium on Manganese in Soils and Plants. Netherlands: Kluwer Academic, (1988b), pp. 59–73.

(3) Bartlett, R., James, B., "Behavior of Chromium in Soils: III. Oxidation," Journal of Environmental Quality, 8, (1979), pp. 31–35.

(4) Bartlett, R. J., James, B. R., "Mobility and Bioavailability of Chromium in Soils," Advanced

Environmental Science and Technology, 20, (1988a), pp. 267–304.

(5) Bartlett, R. J., Kimble, J. M., "Behavior of Chromium in Soils: I. Trivalent Forms," Journal of Environmental Quality, 5, (1976a), pp. 379–383.

(6) Bartlett, R. J., Kimble, J. M. (1976b) "Behavior of Chromium in Soils: II. Hexavalent Forms," Journal of Environmental Quality, 5, (1976b), pp. 383–386.

(7) International Agency for Research on Cancer (IARC) (1980) IARC Monographs on the Evaluation of the Carcinogenic Risk of Chemicals to Humans: Some Metals and Metallic Compounds. Lyon, France: World Health Organization, 23, pp. 205–323.

(8) International Agency for Research on Cancer (IARC) (1987) IARC Monographs on the Evaluation of Carcinogenic Risks to Humans, Overall Evaluations of Carcinogenicity: An Updating of IARC Monographs Volumes 1 to 42. Lyon, France: World Health Organization, Suppl. 7, pp. 165–168.

(9) International Agency for Research on Cancer (IARC) (1990) IARC Monographs on the Evaluation of Carcinogenic Risks to Humans, Chromium Nickel and Welding. Lyon, France: World Health Organization, 49, pp. 49–256.

(10) Ivankovic, S., Preussmann, R., "Absence of Toxic and Carcinogenic Effects After Administration of High Doses of Chromic Oxide Pigment in Sub-Acute and Long-Term Feeding Experiments in Rats," Food and Cosmetics Toxicology, 13, (1975), pp. 347–351.

(11) James, B. R., Bartlett, R. J., "Behavior of Chromium in Soils: VI. Interactions Between Oxidation Reduction and Organic Complexation," Journal of Environmental Quality, 12, (1983b), pp. 173–176.

(12) National Institute for Occupational Safety and Health, Registry of Toxic Effects of Substances (1979).

(13) Ross, D. S., Bartlett, R. J., "Evidence for Nonmicrobial Oxidation of Manganese in Soil," Soil Science, 132, (1981), pp. 153–160.

(14) U. S. Department of Health and Human Services, National Toxicology Program, Fifth Annual Report On Carcinogens, Summary, (1989).

(15) U. S. Environmental Protection Agency, Health Assessment Document for Chromium, Environmental Criteria and Assessment Office, Research Triangle Park, NC, EPA 600/8-83014F, (1984).

(16) U. S. Environmental Protection Agency, Noncarcinogenic Effects of Chromium-Update to Health Assessment Document, Office of Research and Development, Washington, DC, EPA 600/8-87/048F, (1990).

VII. Administrative Record

The record for this decision is contained in docket control number OPTS-400059. All documents, including an index of the docket, are available to the public in the TSCA Public Docket Office from 8 a.m. to noon and 1 p.m. to 4 p.m., Monday through Friday, excluding legal holidays. The TSCA Public Docket Office is located at EPA Headquarters, Rm. NE–G004, 401 M St., SW., Washington, DC 20460.

List of Subjects in 40 CFR Part 372

Chemicals, Community-right-to-know, Environmental protection, Reporting and recordkeeping requirements, Toxic chemicals.

Dated: November 14, 1991.

Victor J. Kimm,

Acting Assistant Administrator for Pesticides and Toxic Substances.

[FR Doc. 91–28139 Filed 11–21–91; 8:45 am]

BILLING CODE 6560–50–F

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 91–108; RM–7690]

Radio Broadcasting Services; Superior, NE

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Superior Broadcasting Incorporated, substitutes Channel 280C3 for Channel 280A at Superior, Nebraska, and modifies its license for Station KRFS–FM to specify operation on the higher class channel. Channel 280C3 can be allotted to Superior in compliance with the Commission's minimum distance separation requirements and can be used at Station KRFS–FM's licensed transmitter site. The coordinates for Channel 280C3 at Superior are North Latitude 40–01–30 and West Longitude 98–04–38. With this action, this proceeding is terminated.

EFFECTIVE DATE: December 30, 1991.

FOR FURTHER INFORMATION CONTACT: Leslie K Shapiro, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 91–108, adopted October 30, 1991, and released November 15, 1991. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Downtown Copy Center, (202) 452–1422, 1714 21st Street, NW., Washington, DC 20036.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

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

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

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Nebraska, is amended by removing Channel 280A and adding Channel 280C3 at Superior.

Federal Communications Commission.

Michael C. Ruger,

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

[FR Doc. 91–28077 Filed 11–21–91; 8:45 am]

BILLING CODE 6712–01–M

Proposed Rules

Federal Register
Vol. 56, No. 226
Friday, November 22, 1991

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

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Chapter 1

[ET Docket No. 91-313; FCC 91-329]

Conformance of FCC Regulations with International Standards for Industrial, Scientific, and Medical (ISM) Equipment

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; notice of inquiry.

SUMMARY: The Federal Communications Commission is initiating an inquiry to solicit information from interested parties to assist the Commission in shaping its position on international standards to control radio noise generated by Industrial, Scientific, and Medical (ISM) equipment. The Commission also seeks information about the desirability and feasibility of harmonizing part 18 of the FCC Rules (47 CFR PART 18) with the international standards for ISM equipment. International developments on standards to control interference from ISM equipment make it appropriate at this time to examine potential ramifications and possible future courses of action for the United States.

DATES: Comments must be submitted by March 13, 1992. Reply comments must be submitted by April 13, 1992.

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

FOR FURTHER INFORMATION CONTACT: Richard B. Engelman, Office of Engineering and Technology, 202–653–6288.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Inquiry in ET Docket No. 91–313, FCC 91–329, adopted October 22, 1991 and released November 6, 1991. The full text of this decision is available for inspection and copying during normal business hours in the FCC Dockets Reference Room. The complete text of this decision also may be purchased from the Commission's duplicating contractor, Downtown Copy Center, 1114 21st Street, NW., Washington, DC 20036, 202–452–1422.

Summary of the Notice of Inquiry

1. ISM equipment is defined by the Commission as equipment or appliances designed to generate and use radio frequency (RF) energy to perform some work, other than telecommunications. Examples of such equipment include: Dielectric heaters used for plastic sealing in the manufacture of commercial goods and for wood gluing; induction heaters used for welding pipes; medical diathermy and electrosurgical equipment; industrial microwave heaters used for commercial food processing and for manufacture of fiber opic cables; demostic microwave ovens; ultrasonic cleaning equipment; and, medical disgnostic equipment. Part 18 of the FCC Rules contains requirements designed to control potential interference to radio communications from ISM equipment. Briefly, the rules provide eleven frequency bands where ISM equipment may operate without any restriction on emissions. These are known as the ISM bands. While certain radio services share the ISM bands, they must operate on a secondary basis to ISM equipment. ISM equipment may also operate outside the ISM bands, subject to limits on the levels of emissions. In addition, any harmful interference caused by ISM equipment to radio services outside the ISM bands must be corrected.

2. In 1979, the World Administrative Radio Conference adopted Resolution 63, which, *inter alia*, directed the International Radio Consultative Committee (CCIR) to produce recommendations, in conjunction with the International Special Committee on Radio Interference (CISPR), for controlling RF emissions from ISM equipment both within and outside the designated ISM bands. These recommendations could ultimately be incorporated into the international Radio Regulations and could be made mandatory through treaty agreements. Since 1980, the CCIR and the CISPR have been working together to develop recommendations. The first major step in the process was achieved in September, 1990, with the release of the Second Edition of CISPR Publication 11, which establishes recommended limits and measurement methods for ISM equipment on frequencies outside the ISM bands. Although not presently accepted by the CCIR, the Commission anticipates that the standards in CISPR Publication 11 will be considered for adoption as a CCIR recommendation in the near future and subsequently considered for incorporation in the International Radio Regulations. The Commission also anticipates that the European Community, and perhaps other foreign administrations will implement the CISPR Publication 11 standards.

3. International development on standards to control interference from ISM equipment make it appropriate at this time to examine potential ramifications and possible future courses of action for the United States. The Commission has two principal objectives in initiating this proceeding. First, the Commission seeks information that will be useful in establishing positions with regard to the CCIR and CISPR activities. Second, the Commission seeks information that would help if formulate changes to the Part 18 regulations for ISM equipment in order to conform them to international standards, if it should appear that this is an appropriate course to follow.

4. Listed in the Notice of Inquiry are a number of items and issues where the Commission believes information would be particularly useful. In responding to many of the questions, a careful study of CISPR Publication 11 will be required. Accordingly, a copy of this document has been placed in the Docket record, which is available for pulic inspection during regular business hours in the Dockets Reference Room. This document may also be purchased from the International Electrotechnical Commission, 3 rue de Varambe, Case Postale 131, CH–1211, Geneve 20, Switzerland or, in the U.S.A. from the Sales Department, American National Standards Institute, 11 W. 42nd Street, New York, NY 10036, telephone 212–642–4900. In order to assist prospective respondents, a comparison of FCC Part 18 and CISPR Publication 11 provisions has been attached as an Appendix to the Notice of Inquiry.

5. The Notice of Inquiry is issued pursuant to authority contained in sections 4(i), 303 and 403 of the Communications Act of 1934, as

amended (Title 47 U.S.C.). Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, 47 CFR 1.415 and 1.419, interested parties may file comments on or before March 13, 1992, and reply comments on or before April 13, 1992. All relevant and timely comments will be considered by the Commission before taking further action in this proceeding. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies.

Federal Communications Commission.

Donna R. Searcy,

Secretary

[FR Doc. 91-28101 Filed 11-21-81 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 91-336, RM-7757]

Radio Broadcasting Services; Leesburg and Unadilla, GA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition by Rowland Albany Radio, Inc., permittee of Station WIKX(FM), Channel 279A, Leesburg, Georgia, seeking the substitution of Channel 278C3 for Channel 279A at Leesburg, and modification of its construction permit (BPH-870820MG) to specify the higher class channel. This proposal also requires the substitution of Channel 260A for vacant but applied for Channel 278A at Unadilla, Georgia, with a site restriction of 3.3 kilometers (2.1 miles) northwest of the community. The coordinates for Channel 278C3 at Leesburg, Georgia, are North Latitude 31-39-09 and West Longitude 84-05-20. The coordinates for Channel 260A at Unadilla, Georgia, are North Latitude 32-17-13 and West Longitude 83-45-13.

DATES: Comments must be filed on or before January 6, 1992, and reply comments on or before January 21, 1992.

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. Gary S. Smithwick, Smithwick & Belendiuk, P.C., 2033 M Street, NW., suite 207, Washington, DC 20036 (Counsel for Rowland Albany Radio, Inc.).

FOR FURTHER INFORMATION CONTACT: Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 91-336, adopted November 1, 1991, and released November 15, 1991 The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, Downtown Copy Center, (202) 452-1422, 1714 21st 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.

Michael C. Ruger,

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

[FR Doc. 91-28078 Filed 11-21-91 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 91-323, RM-7850]

Radio Broadcasting Services; Clarksville, VA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule

SUMMARY: The Commission requests comments on a petition by Clarksville Broadcasting Company, Inc., licensee of Station WLCQ-FM, Channel 252A, Clarksville, Virginia, seeking the substitution of Channel 252C3 for Channel 252A at Clarksville and the modification of Station WLCQ-FM's license to specify operation on the higher powered channel. Channel 252C3 can be allotted to Clarksville in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.3 kilometers (11.4 miles) northwest to accommodate Clarksville Broadcasting s desired site. The coordinates for Channel 252C3 at Clarksville are 36-42-30 and 78-44-00. In accordance with § 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 252C3 at Clarksville or require Clarksville Broadcasting to demonstrate the availability of an additional equivalent class channel for use by such parties.

DATES: Comments must be filed on or before January 6, 1992, and reply comments on or before January 21, 1992.

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. Robert R. Boyd, Clarksville Broadcasting Company, Inc., 6307 Barrister Place, Olde Belhaven Towne, Alexandria, Virginia 22307 (Petitioner).

FOR FURTHER INFORMATION CONTACT: Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 91-232, adopted October 30, 1991, and released November 15, 1991 The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Downtown Copy Center, (202) 452-1422, 1714 21st 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.

Michael C. Ruger,

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

[FR Doc. 91-28079 Filed 11-21-91; 8:45 am]

BILLING CODE 6712-01-M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1804 and 1870

Change to NASA FAR Supplement Concerning Treatment of Proposal Risk and Past Performance in Source Selection

AGENCY: Office of Procurement, Procurement Policy Division, National Aeronautics and Space Administration (NASA).

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice amends the NASA Federal Acquisition Regulation Supplement (NFS), Chapter 18 of the Federal Acquisition Regulation System in title 48 of the Code of Federal Regulations. This rule requires that Source Evaluation Boards (SEB) specifically consider proposal risk in their deliberations. In addition, this rule establishes a Contractor Performance Summary to report contractor performance on award fee contracts to support SEB evaluations of past performance.

DATES: Comments must be received on or before December 23, 1991.

ADDRESSES: Submit comments to Assistant Administrator for Procurement, NASA, Code, HS, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas L. Deback, Procurement Analyst, Competition and Program Operations Division (Code HS), Office of Procurement, NASA Headquarters, Washington, DC 20546, Telephone: (202) 453-2192.

SUPPLEMENTARY INFORMATION:

Background

NASA has recently re-evaluated its treatment of proposal risk in Source Evaluation Board procedures and has determined that it should be emphasized and strengthened. Further, the treatment of Relevant Experience and Past Performance should be strengthened by requiring that the Mission Suitability subfactors be specifically enumerated and evaluated under Relevant Experience and Past Performance.

Impact

The Director, Office of Management and Budget (OMB), by memorandum dated December 14, 1984, exempted certain agency procurement regulations from Executive Order 12291. This proposed regulation falls in this category. NASA certifies that this regulation will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule does not impose any reporting or record keeping requirements subject to the Paperwork Reduction Act.

List of Subjects in 48 CFR Parts 1804 and 1870

Government procurement.

Darleen A. Druyun,

Assistant Administrator for Procurement.

1. The authority citation for 48 CFR parts 1804 and 1870 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1).

2. In subpart 1804.6, sections 1804.677 and 1804.677-1 are added to read as follows:

1804.677 Contractor Performance Summary (CPS) Reporting System and its report, NASA Form XXX.

(a) The sole purpose of the CPS System is to provide the basis for an agency-wide performance data base for use in source selections. The CPSs will be used as an aid in evaluating contractor's past performance and awarding contracts to contractors that provide quality products or services that conform to requirements within contract schedule and cost. The CPS is used to effectively communicate contractor strengthens and weaknesses based on actual performance.

(b) The CPS summarizes a contractor's performance on a contract during a specific period of time. Each assessment must accurately reflect the evaluation performed by the most recent Performance Evaluation Board.

(c) The contracting officer is responsible for completing the CPS and ensuring that a copy is provided to the center CPS focal point.

(d) The CPS must be completed once annually for award fee contracts in excess of $25M face value for which at least one award fee period has been completed during the year prior to January 1 of the year in which the report is due. The CPS is to be provided to the center CPS focal point by February 28. The CPS focal point is to distribute all CPS's for the center to the other center CPS focal points by March 31. Center CPS focal points shall be responsible for tracking and suspensing CPSs.

(e) Each center CPS focal point will maintain a file of CPSs by contractor. Each contractor file will contain separate files for divisions and subsidiaries. Each CPS will be retained for 5 years. The CPS focal points for the centers are as follows:

Ames Research Center:

Johnson Space Center:

Kennedy Space Center:

Langley Research Center:

Lewis Research Center:

Marshall Space Flight Center:

Stennis Space Center:

Headquarters Acquisition Division:

(f) Distribution of CPSs within the agency will only be made from one center focal point to another. SEB members must contact their local CPS focal point for all appropriate CPSs.

(g) HQ HK is the agency focal point for processing CPS requests from government activities outside the agency. All such requests are to be forwarded to HK for action.

(h) CPS Markings and Protection. The contracting officer is responsible for ensuring that CPSs are appropriately marked. All CPS forms, attachments and working papers must be marked "Source Selection Sensitive." CPSs have the unique characteristic of always being predecisional in nature. They will always be source selection information because they will be in constant use to support ongoing source selections. This predecisional nature of the CPSs is a basis for requiring that the CPS data base be protected from unauthorized disclosure to personnel or entities outside the source selection process. Based on the nature of the CPS system, the following guidance applies to protection both internal and external to the government.

(1) *Internal Government Protection.* CPSs must be treated as source selection information at all times. The flow of CPSs throughout the agency in support of source selections will be controlled by the CPS focal points and transmitted only from one CPS focal point to another. Outside of use in a source selection, information contained on the CPSs must be protected in the same manner as information contained in completed source selection files. Information contained on the CPS shall not be used to support preaward surveys, debarment proceedings or other internal government reviews.

(2) *External Government Protection.* Disclosure of CPS data to contractors or others outside the government is not authorized. This information is considered pre-decisional pursuant to 5 U.S.C. 552(b)(5) of the Freedom of Information Act (FOIA). On those occasions when a FOIA request is

received for CPS release, process the request through FOIA channels.

1804.677-1 Instructions for completing NASA Form XXX, Contractor Performance Summary Report—CPS

(a) Type all information on the form. No handwritten CPSs will be accepted by the CPS focal points for inclusion into the CPS library. Reduced or condensed print is not acceptable; standard 10 or 12 pitch type only is allowed.

(b) Item 1, Name/Address of Contractor. State the name and address of the division or subsidiary of the contractor performing the contract. Identify the parent corporation.

(c) Item 2, Location of Contract Performance. Indicated the primary place of contract performance if different from Item 1.

(d) Item 3, Initial, Intermediate, Final Report. Indicate whether is an initial, intermediate, or final report.

(e) Item 4, Reporting Period. State what period is covered by the report. Except at the beginning and end of the contract, this will be a calendar year.

(f) Item 5, Contract Number. Self-explanatory.

(g) Item 6, Center. Self-explanatory.

(h) Item 7, Contract Period of Performance. State current contract period of performance including any authorized extensions, such as exercised options.

(i) Item 8, Contract Percent Complete. State the current percent of the contract that is complete.

(j) Item 9, Current Contract Dollar Value. State the current face value of contract.

(k) Item 10, Competitive/ Noncompetitive. Self explanatory.

(l) Item 11. Program Title. Provide a short descriptive narrative of the program. Spell out all abbreviations. Identify program please, if applicable.

(m) Item 12, Program Description. Provide a short description of the contract effort that identifies key technologies, components, subsystems, and requirements. This section is of critical importance to SEBs to allow them to determine the relevancy of the contract being reviewed to their source selection. It is important to address the complexity of the contract effort and the overall technical risk associated with accomplishing the effort. For intermediate CPSs, a brief description of key milestone events that occurred in the review period may be beneficial (e.g., Preliminary Design Review, Critical Design Review).

(n) Item 13, Evaluate the Following Areas.

(1) Each area assessment must accurately reflect the Performance Evaluation Board evaluation during the most recently completed aware fee determination.

(2) Each applicable evaluation area will be evaluated as Superior, Excellent, Good, Fair, Poor, or Unsatisfactory, based upon the award fee evaluation for the most recent award fee period. If the grading system used by the PEB differs from this rating system, the contracting officer shall provide a best estimate of what the grade would have been under the above system.

(3) The areas which are to be summarized on the form are as follows: Understanding Requirements/Technical Approach, Management, Excellence of Proposed Design, Corporate or Company Resources, Contract/Business Management, Subcontract Management, Small Disadvantaged Business Program, Key Personnel, Cost Performance, Adherence to Schedule, Reliability and Maintainability, Quality Assurance, and Other. The contracting officer may use the "Other" row to summarize a critical area not included in Item 13. Specify the area being summarized. If the areas evaluated by the Performance Evaluation Board do not correlate with the areas listed on the form, the Contracting Officer shall provide a best estimate of the rating of each area based upon the PEB evaluation. "N/A" will be indicated for any area clearly not evaluated by the PEB.

(4) If any area is rated "Good" or lower, the Contracting Officer will provide a brief explanation of each such area limited to the space provided in Item 16. In addition, the completed form will be provided to the contractor. The contractor will be given the opportunity to concur in the summary or provide any mitigating information deemed appropriate. The mitigating information will be limited to the space permitted in Item 17 of the form. This opportunity to respond is not to be considered an opportunity to re-open the PEB evaluation.

(o) Item 15, Technical Point of Contact: Self-explanatory.

(p) Item 15, Contracting Point of Contact; Self-explanatory.

(q) Item 16, Contracting Officer Comments: The contracting officer shall briefly discuss the causes and rationale for any ratings in Item 13 below "Excellent". The comments will be limited to the Item 15 block [approximately one-half typewritten page].

(r) Item 17, Contractor Comments: The contractor may briefly discuss any ratings in Item 13 below "Excellent". The comments will be limited to the Item 17 block [approximately one-half typewritten page].

(s) Item 18, Typed name and Signature of Contractor Representative: Self-explanatory.

(t) Item 19, Contracting Officer Certification: The form is to be signed and dated by the current contractor officer.

1853.204-70 [Amended]

3. In subpart 1853.2, section 1853.204-70, paragraph (o) is added to read as follows:

* * * * *

(o) NASA Form XXX. Contractor Performance Summary. NASA Form XXX, prescribed at 1804.677, shall be used for reporting a summary of contractor performance on award fee contracts.

In subpart 1870.3, appendix I, the following changes are made:

a. In chapter 3, section 301, paragraphs 1f. and 1g. are redesignated 1g. and 1h., respectively; and new paragraph 1f. is added to read as follows:

301 Mission Suitability

1. Evaluation Subfactors.

* * * * *

f. (1) Proposal risk must be carefully considered in evaluating proposals. The proposal risks which must be assessed are those associated with cost, schedule, and performance or technical aspects of the program. These risks will be considered in the Mission Suitability subfactors and the Cost factor evaluation. Risks may be inherent in a program by virtue of the program objectives relative to the state of the art. Risks may occur as a result of a particular technical approach, manufacturing plan, the selection of certain materials processes, equipment, etc., or as a result of the cost, schedule and economic impacts associated with these approaches. Risk may also occur from the impact that these will have on the offeror's ability to perform.

(2) Identification and assessment of the performance risks associated with each proposal is essential. The SEB should prepare an independent assessment of potential risks before the receipt of proposals.

(3) As part of their proposal, offerors should be required to submit a risk analysis which identifies risk areas and the recommended approaches to minimize the impact of those risks on the overall success of the program.

(4) In evaluating risks, the evaluators must consider the SEB's prior assessment, the offeror's assessment, and make an independent judgement of the probability of success, the impact of failure, and the alternatives available to meet the requirements.

(5) Risk assessments shall be discussed in evaluation narratives and be reflected in the

overall numerical and adjectival ratings and the strengths and weaknesses.

(6) It is the responsibility of the evaluation teams to inform the cost team of identified risk areas and the potential for cost impact.

* * * * *

b. In Chapter 3, section 303, paragraph 1 is revised to read as follows.

303 Relevant Experience and Past Performance

1 Relevant Experience and Past Performance. This factor indicates the relevant quantitative and qualitative aspects of each offeror's record of performing services or delivering products similar in size, content, and complexity to the requirements of the instant procurement. Subfactors under Relevant Experience and Past Performance must include the same subfactors as Mission Suitability.

(a) The performance risks which must be assessed are those associated with cost, schedule, and performance or technical aspects of the program. These risks are those which arise as a result of the offeror's past or current experience with similar types of experience

(b) Data on the offeror's performance (including that of major subcontractors or teaming contractors) will be obtained from a variety of sources. Information on programs and contracts is available from the Contractor Performance Summary (CPS) report system from the center CPS focal point. Information on programs and contracts outside the CPS system and information on contractors not within the CPS data base may be obtained from questionnaires or interviews, or other past performance assessment systems established by contracting activities outside the agency. Questionnaires or interviews should be tailored to focus on information that demonstrates performance related to each evaluation factor or subfactor.

(c) Performance data collection is not limited solely to the proposing prime contractor division. Corporate-wide data should be reviewed to determine if any corporate-wide trends are relevant to the source selection. If other divisions, corporate management, critical subcontractors, or teaming contractors perform a critical element or significantly influence the proposed effort, their performance record should be evaluated and the risk relative to the appropriate evaluation factor or subfactor should be assessed. All performance risk assessments that include such diverse data must separately identify and document the data

(d) Evaluate performance data so that any necessary clarifications can be obtained during discussions. Clarification requests should be prepared for any performance data that is contradictory or unclear If it is unclear from the offeror s proposal that they are aware of performance data that results in a rating below "Very Good", the performance data must be discussed with the offeror

(e) Each performance evaluation and risk assessment will consider the number and severity of problems, the effectiveness of corrective actions taken, and the overall work record. The assessment of performance risk is not intended to be a simple arithmetic function of an offeror's performance on a list of contracts; but rather the information deemed most relevant and significant will receive the greatest consideration. In the Cost factor, the SEB should give more consideration to efforts for similar end items, efforts during a similar phase of the acquisition cycle, and to efforts with similar contract types.

* * * * *

c. In chapter 4, section 402, paragraph 1., insert the following sentence between the first and second sentences.

402 Evaluation Plan

1. * * * The plan will also set forth the technical, cost, and schedule performance risks developed by the SEB. * * *

* * * * *

d. In chapter 4, section 404, paragraph 2.e. is revised to read as follows.

404 Request for Proposals (RFP's)—Review and Approval

* * * * *

2. * * *

e. (1) The Relevant Experience and Past Performance factor shall be described. Each offeror shall be requested to submit a past performance volume with their proposal. Offerors should be cautioned that the Government will use data provided by each offeror in this volume and data obtained from other sources in the development of performance risks assessments.

(2) Each offeror should be requested to submit information on contracts considered relevant in demonstrating ability to perform the proposed effort. This information may include data on efforts performed by other divisions, corporate management, critical subcontractors, or teaming contractors, if such resources will be brought to bear or significantly influence the performance of the proposed effort. For all present or past contracts deemed relevant, offerors should be requested to provide the following information.

(a) Company/Division Name
(b) Program Title
(c) Contracting Agency
(d) Contract Number
(e) A brief description of the contract effort, indicating whether it was R&D, development, production, or services.
(f) Type of contract
(g) Period of performance
(h) Original contract dollar value and current contract dollar value
(i) Original completion date and current completion date
(j) Name, address, and telephone number of current (or last, if contract is completed) Government project manager, administrative contracting officer (ACO), and contracting officer (CO).

(3) Offerors should be required to explain what aspects of the contracts are deemed relevant to the proposed effort. Categorize the relevance determination into the specific evaluation areas used to evaluate the proposal: (List factors and subfactors). Offerors should also be permitted but not required, to submit information on significant achievements or explain past problems they consider relevant to the proposed effort

(4) Responses should be limited to two pages per contract and a maximum should be established for the entire volume

* * * * *

Appendix I—Contractor Performance Summary

(Note: This appendix will not be codified in the Code of Federal Regulations)

Source Selection Sensitive (When Filled In)

NASA Form XXX, Contractor Performance Summary (CPS)

1 Name/Address of contractor (division):
2. Location of contract performance:
3. Initial, Intermediate, Final report
4. Reporting period
5. Contract number
6. Center
7. Contract period of performance:
8. Contract percent complete:
9. Contract face value:
10. Competitive, noncompetitive:
11 Program title:
12. Program description.
13. Evaluate the following areas:

	Sup	Exc	Good	Fair	Poor	Unsat
Understanding requirements/Technical approach						
Management						
Excellance of proposed design						
Corporate or company resources						
Contract/Business Management						
Subcontract Management						
Small disadvantaged business program						
Key personnel						
Cost performance						
Adherence to schedule						
Reliability and maintainability						
Quality assurance						
Other (specify)						

14. Technical Point of Contact (Name, Title Phone No):
15. Contracting point of contact (Name, Title, Phone No.):
16. Contracting officer comments:
17. Contractor comments:
18. Contractor signature
19. Contracting officer certification. As the contracting officer on this contract, I certify that the above information is an accurate reflection of the latest award fee determination:

Name _____
(Signature)

[FR Doc. 91-27915 Filed 11-21-91; 8:45 am]

BILLING CODE 7510-01-M

INTERSTATE COMMERCE COMMISSION

49 CFR Part 1152

[Ex Parte No. 274 (Sub 12C)]

Rail Abandonments—Public Use Conditions—Revision

AGENCY: Interstate Commerce Commission.

ACTION: Proposed rule.

SUMMARY: The Commission proposes to modify its regulations concerning the imposition of public use conditions in abandonments by imposing deadlines for the filing of requests for such conditions, clarifying that public use conditions may be sought in all abandonment proceedings, and clarifying the date when our jurisdiction to impose such conditions expires. The specific proposal is set forth below. The Commission requests comments on the proposal.

DATES: Comments must be received by December 23, 1991.

ADDRESSES: An original and 15 copies of comments (and any replies) should be sent to: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 275–7245. [TDD for hearing impaired: (202) 275–1721.]

SUPPLEMENTARY INFORMATION: In actual practice, the Commission considers requests for public use conditions under 49 U.S.C. 10906 in all abandonment proceedings: (1) Formal abandonment applications under 49 U.S.C. 10903 *et seq.*; (2) individual exemption proceedings under 49 U.S.C. 10505; and (3) 2-year out-of-service class exemptions under the class exemption at 49 CFR 1152.28. Our published regulations,[1] however, could be read as making public use conditions applicable only to proceedings involving formal abandonment applications.[2] We propose to modify our regulations to clarify that requests for public use conditions may be submitted in all abandonment proceedings.[3]

Moreover, our rules currently do not provide explicit filing deadlines for requests for public use conditions, except for the 20-day deadline applicable to our 2-year out-of-service class exemption in 49 CFR 1152.50(d)(3). In formal abandonment applications, 49 CFR 1152.25(a)(2)(iv) allows parties to submit evidence pertaining to public use; and, under 49 CFR 1152.25(c)(1), this and other evidence from parties commenting on an abandonment is due within 30 days of the filing of the application with the Commission. In individual exemption proceedings, we have been requiring public use requests to be filed within 10 dats of the **Federal Register** publication announcing the exemption. We propose to establish: (1) An explicit 30-day deadline for the submission of public use conditions in formal application proceedings, and (2) a uniform 20-day deadline for the submission of public use requests for out-of-service class exemptions and individual exemption proceedings.

Finally, section 10906 provides that jurisdiction to impose public use conditions expires after 180 days from the effective date of the decision authorizing the abandonment or discontinuance. We propose to add an explicit statement of this jurisdictional limitation to our regulations in order to deter the filing of public use requests where we have lost jurisdiction to hear them.

Environmental and Energy Considerations

We conclude that the proposed action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Regulatory Flexibility Analysis

Pursuant to 5 U.S.C. 603, the Commission is required to examine specifically the impact of the proposed action on small business and small organizations. We conclude that this decision will not have a significant impact on a substantial number of small entities.

List of Subjects in 49 CFR Part 1152

Administrative practice and procedure, Railroads.

Decided: November 8, 1991.

By the Commission, Chairman Philbin, Vice Chairman Emmett, Commissioners Simmons, Phillips, and McDonald.

Sidney L. Strickland, Jr.,

Secretary.

For reasons set forth in the preamble, Title 49, Chapter X, Part 1152 of the Code of Federal Regulations is proposed to be amended as follows:

PART 1152—ABANDONMENT AND DISCONTINUANCE OF RAIL LINES AND RAIL TRANSPORTATION UNDER 49 U.S.C. 10903

1. The authority citation for Part 1152 continues to read as follows:

Authority: 5 U.S.C. 553, 559, and 704; 11 U.S.C. 1170; 16 U.S.C. 1247(d), and 1248; and 49 U.S.C. 10321, 10362, 10505, 10903, 10904, 10905, 10906, 11161, and 11163.

2. Section 1152.28 is proposed to be amended by adding a new paragraph (a)(3) and by adding a sentence to the end of paragraph (b) as follows:

§ 1152.28 Public Use Procedures.

(a) * * * (3) For applications filed under Part 1152, Subpart C, a request for a public use condition must be filed not more than 30 days from the date of filing of the application. For abandonment exemptions under Part 1152, Subpart F or exemptions granted on the basis of an individual petition filed under 49 U.S.C. 10505, a request for a public use condition must be filed not more than 20 days from the date of publication of the notice of exemption in the **Federal Register.**

(b) * * * Jurisdiction to impose such conditions expires after 180 days from the effective date of the decision authorizing the abandonment or discontinuance.

§ 1152.50 [Amended]

4. In § 1152.50, paragraph (a)(2) is amended by adding the words "and § 1152.28" immediately following the word "§ 1152.27".

[FR Doc. 91–28113 Filed 11–21–91; 8:45 am]

BILLING CODE 7035–01–M

[1] See 49 CFR 1152.28.

[2] But see 49 CFR 1152.50(d)(3).

[3] We can apply section 10906 to exempted abandonments even though the literal wording of that section seems to require findings "under section 10903," which are not made in exemption proceedings under section 10505. Our rationale is the same as the rationale used to support application of section 10905 even though the literal wording of that section would also seem to require findings under section 10903—a contrary conclusion would elevate form over substance. See: Exemption Of Out Of Service Rail Line, 2 I.C.C.2d 146, 155 n.18 (1986); and Ex Parte No. 274 (Sub-No. 16), Exemption Of Rail Line Abandonments Or Discontinuances—Offers Of Financial Assistance (not printed), served March 11, 1987, Slip Op. at p. 1.

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-ABA2

Endangered and Threatened Wildlife and Plants; Reopening of Comment Period on Proposed Endangered Status for Six Plants and Myrtle's Silverspot Butterfly From Coastal Dunes in Northern and Central California

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; notice of reopening of comment period.

SUMMARY: The U.S. Fish and Wildlife Service (Service) gives notice that the comment period on the proposed determination of endangered status for six plants and Myrtle's silverspot butterfly (56 FR 12318 March 22, 1991) is reopened. The six plants included in this proposed rule are *Chorizanthe howellii* (Howell's spineflower), *Chorizanthe valida* (Sonoma spineflower), *Erysimum menziesii* (Menzies' wallflower), *Gilia tenuiflora* ssp. *arenaria (Monterey gilia), Layia carnosa* (beach layia), *Lupinus tidestromii* (clover lupine), and Myrtle's silverspot butterfly *(Speyeria zerene myrtleae*). Reopening of the comment period will allow additional written comments on this proposal to be submitted from all interested parties.

DATES: Comments on the proposal will now be received until December 6, 1991.

ADDRESSES: Written comments and materials should be sent to the Field Supervisor, Sacramento Field Office, 2800 Cottage Way Room E–1823, Sacramento, California 95825. The proposed rule, comments, and materials will be available for public inspection during normal business hours, by appointment at the above address.

FOR FURTHER INFORMATION CONTACT: Mr. Chris Nagano, at the above address (916/978–4866 or FTS 460–4866).

SUPPLEMENTARY INFORMATION:

Background

The seven species included in this proposed rule are *Chorizanthe howellii (Howell's spineflower), Chorizanthe valida* (Sonoma spineflower), *Erysimum menziesii* (Menzies' wallflower), *Gilia tenuiflora* ssp. *arenaria (Monterey gilia), Layia carnosa* (beach layia) *Lupinus tidestromii* (clover lupine), and Myrtle's silverspot butterfly *(Speyeria zerene myrtleae*). These species are restricted to northern and central California within the foredunes and dune scrub communities and adjacent sandy habitats occupied by coastal scrub or coastal prairie. The six plant taxa, the butterfly and its larval food plant are threatened by one or more of the following: commercial and residential development, competition from alien plants, off-road vehicle use, equestrian use, trampling by hikers, livestock, and sand mining, disposal of dredged material, and perhaps stochastic (i.e., random) extinction by virtue of the small, isolated nature of the remaining populations.

On March 22, 1991, the Service published in the **Federal Register** (56 FR 12318) a proposal to list the six plants and Myrtle's silverspot butterfly as endangered. The comment period on the proposal originally closed on May 21, 1991. A public hearing was held in San Rafael, California on July 10, 1991, and the comment period was extended to July 22, 1991. The Service is aware of information developed since that time. Reopening the comment period will allow the Service to consider this and any other information in determining whether or not a final designation of endangered or threatened status is warranted for these six plants and Myrtle's silverspot butterfly. Additional information and comments may now be submitted until December 6, 1991, to the Service office in the **ADDRESSES** section.

Author

The primary author of this notice is Mr. Chris Nagano, Sacramento Field Office, at the above address.

Authority

The authority for this section is the Endangered Species Act of 1973, as amended (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).

List of Subjects in 50 CFR Part 17

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

Dated: November 14, 1991.

William E. Martin,

Acting Regional Director, Region 1, U.S. Fish and Wildlife Service.

[FR Doc. 91–28100 Filed 11–21–91; 8:45 am]

BILLING CODE 4310–55–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 222

[Docket No. 911009–1252]

Endangered Fish and Wildlife; Gray Whale

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

ACTION: Proposed rule.

SUMMARY: Under the Endangered Species Act, NMFS issued a proposed determination that the eastern North Pacific (California) stock of gray whale should be removed from the List of Endangered and Threatened Wildlife. This proposed change is based on evidence that this stock has recovered to near its estimated original population size and is neither in danger of extinction throughout all or a significant portion of its range, nor likely to again become endangered within the foreseeable future throughout all or a significant portion of its range. NMFS believes that the western Pacific gray whale stock, which is geographically isolated from the eastern stock, has not recovered and should remain listed as endangered.

DATES: Comments on the proposed rule must be received by January 21, 1992. Any request for a public hearing must be received by January 6, 1992.

ADDRESSES: Comments should be mailed to the Director, Office of Protected Resources, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, MD 20910. A copy of the 1991 Status Review Report is available upon request.

FOR FURTHER INFORMATION CONTACT: Dr. Charles Karnella, NMFS, at (301) 427–2322.

SUPPLEMENTARY INFORMATION:

Background

The Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*) is administered jointly by the U.S. Fish and Wildlife Service (FWS), Department of the Interior, and NMFS. NMFS has jurisdiction over most marine species and makes determinations under section 4(a) of the ESA as to whether the species should be listed as endangered or threatened. The FWS maintains and publishes the List of Endangered and Threatened Wildlife (the List) in 50 CFR part 17 for all species determined by NMFS or FWS to be endangered or threatened. A list of threatened and endangered species under the jurisdiction of NMFS is contained also in 50 CFR 227.4 and § 222.23(a), respectively.

Section 4(c)(2) of the ESA requires, at least once every 5 years, a review of the species on the List be conducted to determine whether any species should be (1) removed from the List, (2) changed in status from an endangered

species to a threatened species or (3) changed in status from a threatened species to an endangered species. NMFS completed its first 5-year review on the status of endangered whales in 1984 (Breiwich and Braham, 1984). Based upon that status review, NMFS concluded that although no longer in danger of extinction, because of limited calving grounds and coastal habitat which is being subjected to increasing development, the eastern Pacific gray whale (*Eschrichtius Robustus*) stock should not be delisted but should be upgraded to threatened (49 FR 44774, November 8, 1984). No further action was taken, however.

On January 3, 1990 (55 FR 164), NMFS announced that it was conducting status reviews on certain listed species (including the gray whale) under its jurisdiction, and solicited comments and biological information. That status review has now been completed and is available to the general public (see **ADDRESSES**).

These two status reviews provide an overview of the available information, along with pertinent references concerning the distribution, migration, stock identity, population abundance and management concerns for the gray whale. The information in this proposed rule is derived mainly from these reports.

Summary of Status Review

The gray whale is confined to the North Pacific Ocean. Two stocks occur in the North Pacific: The eastern North Pacific or "California" stock which breeds along the west coast of North America, and the western Pacific or "Korean" stock which apparently breeds off the coast of eastern Asia (Rice, 1981). Because it uses coastal habitats extensively, the gray whale was especially vulnerable to shore-based whaling operations and both stocks were severely depleted by the early 1900s. Under legal protection, the eastern North Pacific stock has recovered to its estimated original, pre-commercial exploitation population size. The estimated present stock size (21,113+/−688; Breiwick *et al.*, 1989) is above Henderson's (1972, 1984) estimated initial (1846) stock size of 15,000–20,000 but below Reilly's (1981) estimate for carrying capacity of 24,000 gray whales. Between 1967 and 1988, the stock increased at a rate of 3.2 percent (+/−0.5 percent) per year (International Whaling Commission, 1990; and see Reilly *et al.*, 1983 and Reilly, 1987, for analysis of the 1967–1980 data; Rugh *et al.*, 1990, for the 1985–1986 data; Breiwick *et al.*, 1989, for the 1988 population estimate) Using Reilly's (1981) estimate with Breiwick *et al.*'s (1989) estimate of population size, it is likely that the gray whale population is within its optimum sustainable population (OSP) size or at about 88 percent of its carrying capacity (21,113/24,000=88 percent). However, more recently Reilly (in press) believes it is not entirely clear where the population is in relation to its currently carrying capacity. The stock has increased in spite of increased human use of the coastal habitat (*i.e.*, nearshore migration route where mating and calving occur), and a subsistence catch of 167 (+/−3.5) whales per year by the Soviet Union during the past 30 years (calculated from data in Ivashin, in press).

Most of the eastern North Pacific stock spends the summer feeding in the northern Bering and southern Chukchi Seas. An unknown number of individuals summer along the west coast of North America in apparently isolated locations as far south as Baja California, Mexico. Beginning in November, this stock leaves the Bering Sea and migrates down the North American coast to winter mainly along the west coast of Baja California. The pregnant females assemble in certain shallow, nearly landlocked lagoons and bays where the calves are born from early January to mid-February. The majority of gray whales in Baja California (including some cows with calves) spend the winter outside the major calving lagoons along the outer coast apparently from Bahia de Sebastian Vizcaino to Boca de las Animas. The northbound migration begins in mid-February and continues through May. By April, the early migrating whales begin showing up in the southern Bering Sea, which they enter through Unimak Pass.

The western Pacific stock formerly occupied the northern Sea of Okhotsk in the summer, and migrated along the coast of eastern Asia to winter calving grounds which probably lie along the coast of southern China in Gwangxi and Gwangdong provinces, and around Hainan Island. Until the turn of this century, another migration route led down the eastern side of Japan to winter grounds in the Seto Inland Sea, Japan. The status of the western Pacific stock of gray whales is uncertain (Brownell and Chun, 1977). Sightings of 24 animals in the Okhotsk Sea and nine off the tip of Kamchatka in 1983 (Blokhin *et al.*, 1985; Votrogov and Bogoslovskaya, 1986), and 34 in 1989 in the Okhotsk Sea (Berzin, in press) suggest that the stock in small. There is no evidence that it has reoccupied its entire former range (Omura, 1984) and initial stock size may have been only a few thousand (Omura, 1988). It is likely that the stock is below a critical population size sufficient for recovery and may be almost extinct (Rice *et al.*, 1984).

The gray whale formerly occurred in the North Atlantic, but has been extinct there for several centuries.

Consideration as a Species Under the ESA

The ESA defines "species" to include any subspecies of fish, wildlife, or plants, and any distinct population segment of any species or vertebrate fish or wildlife which interbreeds when mature.

Two stocks of gray whales remain extant, both in the North Pacific Ocean: The western stock, which migrates between feeding grounds in the Sea of Okhotsk and calving grounds along the South China Coast; and (2) the eastern stock, which migrates between calving grounds along the West Coast of Mexico and feeding grounds in the Bering and Chukchi Seas (Rice and Wolman, 1971). These stocks appear to be significantly isolated both geographically and reproductively from each other. Recent strandings of gray whales on the Commander Islands are believed to be from the eastern stock while gray whales reported along the Kamchatka coast are believed to be from the Okhotsk-South China population (IWC, 1990). Alternatively, all strandings may be from the Korean stock (Rice, 1981; IWC 1986). Since gray whales mate during their autumnal southward migration, rare vagrants would make interbreeding between the California and western Pacific population possible However, that possibility would be greatly reduced if, as Rice (1981) believes likely, most vagrants are immature animals. The absence of sightings between the Okhotsk Sea and the Commander Islands suggests the stocks are separate. In addition, an absence of aboriginal whale hunting records along the Pacific coast of the Kamchatka Peninsula suggests a lack of abundance of gray whales in the area and a hiatus in distribution between eastern and western stocks (Mitchell, 1990). After reviewing the data available to it, the International Whaling Commission (IWC) Scientific Committee on the Assessment of Gray Whales (IWC, 1990) agreed that the eastern and western populations of gray whales

probably represent geographically isolated stocks, although recognizing that the existing data are not conclusive.

Based on the above discussion, NMFS believes that the eastern North Pacific gray whale stock should be considered a distinct population and hence a species under the ESA.

Summary of Factors Affecting the Species

Section 4(a)(1) of the ESA and the NMFS' listing regulations (50 CFR part 424) set forth procedures for listing, reclassifying or removing species. The Secretary of either the Interior or Commerce depending upon the species involved, must determine through the regulatory process if any species is endangered or threatened based upon any one or a combination of the following factors: (1) The present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; or (5) other natural or man-made factors affecting its continued existence. Under section 4(a)(2) of the ESA, if the Secretary of Commerce determines that a species under his jurisdiction should be removed from the List or changed in status from endangered to threatened, the Secretary then recommends such action to the Secretary of the Interior. If the Secretary of the Interior concurs with the action, he must implement the action by amending the List. However, if a species is removed from the List, the Secretary of (Commerce or the Interior depending upon the species involved) under section 4(g) of the ESA, must implement a system in cooperation with the states to monitor effectively for a period not less than 5 years the status of the species and must use the emergency authority provisions under paragraph (b)(7) of section 4 to prevent a significant risk to the well-being of any recovered species.

(1) The Present or Threatened Destruction, Modification or Curtailment of Its Habitat or Range

Two potential threats to the eastern North Pacific gray whole population may be increasing vessel traffic, including whale watching activities, and industrial development, including oil and gas exploration and development, in the calving lagoons, feeding grounds, and along the migration route.

Commercial cruise boats and small pleasure craft may result in harassment, especially in the calving lagoons and along its migration route off California. As whale watching activities increase rapidly in southern California and on the Baja Peninsula, harassment occurrences are increasing proportionally. Whale watching by recreational and commercial craft may negatively impact migrating gray whales by interrupting swimming patterns and thereby increasing energy consumption (IWC, 1990). Vessels in the calving lagoons may cause short-term flight reactions by gray whales when the vessel is moving at high speeds or erratically, but will show little response to slow moving or anchored vessels. Gray whales have been reported to avoid vessels at ranges of roughly 0.5 km. and less, with no documented responses at further distances (IWC, 1990). However, Jones and Swartz (1984) in a study of gray whales in Bahia San Ignacio found that data suggest that gray whales possess sufficient resiliency to tolerate the physical presence and activities of whale watching vessels and skiffs and the noise produced by this level of activity without major disruption. They believe a key factor responsible for maintaining a stable population within their study lagoon was the establishment of the gray whale refuge which provided an area free of all vessel activity to which whales could retreat and the behavior of commercial whale watch operators to minimize disturbance.

Under the Marine Mammal Protection Act (MMPA), gray whale harassment is considered a "take" and is prohibited thereunder. NMFS has established guidelines for whale watching in order to avoid harassment of gray whales on their migration path in U.S. waters and will propose regulations to govern whale-watching activities later this year. These regulations, which will be effective within waters under U.S. jurisdiction but not in waters under jurisdiction of the governments of Canada and Mexico, will esablish minimum approach distances for large cetaceans and will require procedures to avoid disrupting the normal movement or behavior of a marine mammal. It is anticipated that these regulations will strengthen protective measures for gray whales principally during migratory periods.

The main gray whale calving grounds in Mexico are Laguna Ojo de Liebre (Scammon's Lagoon with 53 percent of calves), Laguna Guerro Negro (9 percent), Laguna San Ignacio (11 percent) and Estero Soledad (12 percent) in Mexico (Rice *et al.*, 1984). Minor calving areas, each with less than 6 percent of the calves, are San Juanico Bight, Bahia Magdalena, Bahia Almejas, and Bahia Santa Marina (Rice *et al.* 1981, 1984). Between 1972 and 1979, the Mexican Government designated three (Laguna Ojo de Liebre, Laguna Guerro Negro, and Laguna San Ignacio) of the four major calving lagoons in Baja California as gray whale refuges. These are the lagoons that most of the U.S. tour boats and private tourists visit. The number of vessels allowed in the lagoons at any one time is limited by permit, and entry into certain areas is forbidden. To provide additional protection of gray whales within Mexican waters, the Government of Mexico is in the process of implementing its own standards for governing whale watching activities.

A second potential threat to the eastern North Pacific gray whale stock is oil and gas exploration and related activities along its migration route. Oil and gas exploration is contemplated or under way on the outer continental shelf (OCS) from California to the Beaufort Sea, throughout the migration range of this species. (In addition, other types of mineral resource development (*e.g.*, gold mining) are under consideration within possible gray whale feeding areas in the Bering Sea.) Annually, the gray whale population migrates by or through at least eight oil lease areas within U.S. waters (Rice *et al.*, 1984).

On the winter calving grounds, exploratory areas include sites within and adjacent to present calving and rearing areas, such as the offshore waters of Sebastian Vizcaino Bay, where seismic exploration for gas deposits took place during 1981.

Potential impacts from oil and gas exploration and development include noise disturbance, contact with spilled oil, habitat degradation and possible loss or destruction of benthic prey populations upon which gray whales depend. Noise disturbance to gray whales has been studied during their migrations along the California coast (Malme *et al.*, 1983 and 1984) and on their calving grounds in Baja California Sur, Mexico (Dahlheim 1983, 1984; Dahlheim *et al.*, 1984). Reactions of gray whales to recordings of industrial noise and to a seismic airgun source during migration have shown that avoidance behavior occurs only at relatively close ranges at decibels greater than 120 dB for continuous noise and 160–170 dB for pulsed sounds such as from airguns (Tyack, 1988). Malme *et al.*, (1984) for example, found a 50 percent probability of an avoidance response of 2.5 km. off central California for a seismic array, but only 40 m. for drillship noises. However, because noise from oil and gas activities occurs at frequencies which overlap gray whale calling (and assumed) hearing frequencies, they may

also influence other behavior causing, for example, interference with socialization, reproductive behavior and communication.

Reactions of gray whales studied in their calving grounds to industrial noises were more pronounced than those found off central California, including vacating the study area during the projection of drilling sounds, as well as changes in the acoustical and observed surface behavior and distribution (Dahlheim, 1988).

Gray whales may also be sensitive to noise disturbance on their feeding grounds and might abandon productive feeding areas if excessively disturbed. Reliance on less productive areas could leave the animals with insufficient body reserves for their successful migration and reproduction. However, because of its abundance and range, the present gray whale population could likely tolerate without significant effects, the short-term and non-recurring local impacts brought on by seismic exploration (NMFS Biological Opinion for Lease Sale 100, dated December 21, 1984).

A third potential threat to the gray whale is the possibility of a major oil spill that would affect a large portion of the population. Assuming an oil spill were to occur and contact gray whales, the worst adverse impacts to whales from contact would include death or illness caused by ingestion or inhalation of oil, irritation of skin and eyes, fouling of feeding mechanisms, and reduction of food supplies through contamination or losses of food organisms. Although no data exist at this time, likely direct adverse impacts include (1) conjunctivitis and corneal eye inflammation leading to reduced vision and possible blindness, (2) development of skin ulcerations from existing eroded areas on the skin surface with subsequent possibility of infection, (3) compromising of tactile hairs as sensory structures, and (4) development of bronchitis or pneumonia as a result of inhaled irritants (Albert, 1981). In general, however, the results of Geraci and St. Aubin (1982, 1985; Geraci, 1990) indicate that whales are likely to suffer only minor impacts if they contact oil spills, and that they are likely to recover from these effects.

Because the probable effects on whales from contacting oil include temporary fouling of baleen, and toxic effects from ingestion of oil, oil spills may pose a greater problem for the gray whale on its feeding grounds than during its migration. In a laboratory study on bowhead whales (*Balaena mysticetus*), baleen plates fouled by oil had decreased filtering efficiency for at least 30 days, but 85 percent of the efficiency was restored within 8 hours (Braithwaite *et al.*, 1983). However, the toxic effects of ingesting oil remain unknown. A recent computer model simulating an oil spill, projected a 6.3 percent chance that at least one gray whale would encounter oil in the Bering Sea during the 30- to 40-year lifespan of an individual oil field (Neff, 1990).

Oil spills, the chemicals used to break up and sink surface oil, and other anthropogenic materials could also harm gray whales by reducing or contaminating their food resource. Gray whales are opportunistic feeders on benthic ampeliscid amphipods, and other bottom dwelling organisms (Nerini, 1984). Most feeding takes place between May and September in the northern waters, with little food consumption during migration and on the calving grounds (Nerini, 1984). The effects of pollutants on the benthic organisms on which these whales feed are generally unknown. Preliminary results from a study by NMFS on contaminants found in gray whales stranded near Puget Sound indicate that heavy metal levels appear to be too low to cause any deleterious effects. In addition, the concentrations of PCBs and DDT where very low compared to other whale levels and are below levels known to cause impairment (NMFS unpublished data). According to Brownell and O'Shea (1990), levels of organochlorine pollutants that may cause reproductive problems in other mammals are higher than those reported in baleen whales. In addition, gray whales feed mostly in colder waters that have been less exposed to organochlorine pollutants (IWC, 1990).

Coastal and offshore industrial activities may also result in some impacts. For example, in the calving lagoon of Guerrero Negro, daily dredging and vessel traffic between 1957 and 1967 reportedly caused the whales to abandon the area. Six years after the dredging and barge activity ceased, gray whales began to return to the lagoon (Gard, 1974; Bryant and Lafferty, 1980). Exploitation of phosphorus near the calving lagoon of Bahia Magdalena may be cause for concern (Cordoba, 1981). Because of the scarcity of suitable isolated calving and nursery areas for gray whales, and the whales' specialized feeding habits, future coastal or shallow-water development should be monitored to determine the effects on any critical stages of the gray whale's life cycle.

As the recovery of the gray whale population has occurred concurrent with extensive OCS geophysical exploration and other activities throughout its range, NMFS concludes that current and near-future levels of human activities do not pose a threat to the species' continued existence, but does not rule out the possibility that parts or all of this stock and certain components of its habitat have been and/or are being stressed or that the effects will not be manifested over time as changes in productivity, mortality or distribution.

(2) Overutilization for Commercial, Recreational, Scientific or Educational Purposes

As a result of commercial whaling operations, the gray whale was severely depleted by the early 1900's. After 1946, commercial whaling on gray whales was banned by the International Convention for the Regulation of Whaling. Between 1959 and 1969, 316 gray whales were killed under Special Scientific Permits off California.

Eskimos living on the shores of the northern Bering Sea and the Chukchi Sea have hunted whales for perhaps several thousand years. In Alaska, the catch is mostly bowhead whales with very few gray whales taken. However, on the Chukotka coast of the U.S.S.R., the catch has been almost entirely gray whales. Since 1969, gray whales have been taken by the Soviet Government for the Chukchi Eskimos using one modern catcher boat. The total aboriginal catch has averaged about 165 gray whales per year since 1967. The current catch limit set by the IWC is 169 per year. This authorized subsistence catch of gray whales in the Arctic is believed to be within the maximum sustainable yield for the species (Reilly, 1984).

(3) Disease or Predation

The natural mortality rate of the gray whale is low, approximately 0.056 for adults and 0.132 for juveniles (Reilly, 1981). There is no information indicating that disease or predation constitutes a threat to the continued welfare of the species.

The killer whale (*Orcinus orca*) appears to be the only non-human predator on gray whales. Evidence from the necropsy of 39 gray whales that stranded on St. Lawrence Island indicated that 16 had been killed by killer whales (Fay *et al.*, 1978). The mortality rate from killer whale attacks is unknown. However, the frequency of tooth scars on gray whale carcasses indicates that killer whale attacks are often not fatal.

Moderate numbers of gray whale calves strand in and near the nursery lagoons (Swartz and Jones, 1983). In addition, a few adults strand every year

throughout their range, but the numbers appear low compared with the size of the population (Rice *et al.*, 1984). In 1989, 29 (3 possible recounts) gray whales were reported stranded in Alaska from the area from Prince William Sound to the Alaskan Peninsula and into Bristol Bay around the time of the EXXON VALDEZ oil spill; nine (2 possible recounts) of those animals were reported stranded near the southern end of Kodiak Island, southwest and down-current of the oil spill area. In 1990, 26 gray whales were counted off the southern end of Kodiak Island. Surveys of the other areas were not conducted that year. Although some gray whales were reported in 1989 to have oil on their baleen, apparently none had oil in the digestive tract (Moore and Clark as reported in IWC, 1990). The relationship of these strandings to the oil spill remain conjectural at this time.

Recent strandings reported along the Washington/Oregon coast have also been higher than the mean for the past 2 years, but not higher than historic records (NWAFC stranding data). The majority of these animals apparently died outside Puget Sound and were carried by currents to the outer coast of Washington and the Straits of Juan de Fuca.

(4) Inadequacy of Existing Regulatory Mechanisms

Existing laws and regulations are considered adequate for the conservation of the gray whale. Under legal protection, the eastern North Pacific gray whale stock has recovered to near or above its estimated pre-commercial exploitation population size. Most of the protective measures for the gray whale would remain even without listing under the ESA. The gray whale is protected in the United States under the MMPA and the Whaling Convention Act, internationally under the International Convention for the Regulation of Whaling as well as under national legislation in Canada, Mexico, and the U.S.S.R., although the effectiveness of this legislation is not known. Mexico has particularly detailed legislation protecting the calving lagoons from disturbance (Klinowska, 1991).

Additional protection is afforded internationally under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). CITES was created to prevent species becoming threatened through international trade (Wells and Barzdo, 1991) and prohibits commercial trade in seriously threatened species, which are listed in CITES appendix I. Trade in appendix I species, such as the gray whale, may be authorized only in exceptional circumstances (*e.g.*, scientific research), and provided the import is not for commercial purposes. All international shipments must be covered by an export permit and an import permit from the country of destination.

In the United States, irrespective of the outcome of this proposal, activities that incidentally take marine mammals are either limited under an MMPA small take exemption or prohibited. Oil and gas exploration activities, for example, are eligible to apply for a small take exemption under section 101(a)(5) of the MMPA. Under both implementing regulations and Letter of Authorization, NMFS requires the oil and gas industry to take appropriate measures to avoid impacts to gray whales and to plan leasing and exploration activities in such a way as to reduce the likelihood of adversely affecting the gray whale. The Letters of Authorization also include requirements for monitoring and reporting. For the 1991/92 exploration season, NMFS has issued five Letters of Authorization (50 FR 47742, Sept. 20, 1991).

(5) Other Natural or Man-made Factors Affecting Its Continued Existence

The narrow, nearshore corridor in which gray whales migrate results in a high probability that they will encounter and perhaps become entangled in gear from several commercial fisheries. Norris and Prescott (1961) document entanglement in gillnets since the late 1950s. Data from the NMFS-administered stranding networks document that commercial gillnet fisheries take gray whales incidental to fishing. NMFS's Southwest Region has maintained records of reported gray whale entanglements in California gillnet fisheries since the 1984/85 migration. The number of entanglements has varied from a low of 7 entanglements and no mortality during the 1985/86 migration to a high of 15 entanglements and 3 mortalities during the 1986/87 migration. The number of entanglements and deaths declined during the 1987/88 migration to 7 entanglements and 1 mortality. This reduction in entanglements may have been due to regulations implemented by the State of California in the fall of 1987 that require fishermen to construct their nets so that whales can break through them and that prohibit fishing near major whale concentrations. However, no study was in place to quantify the effectiveness of these regulations and the decline in entanglment could be due to natural variation.

The California Department of Fish and Game (CDF&G) observed one entangled balaenopterid (probably a minke whale) during 177 observer days spent monitoring the shark and swordfish drift net fishery in 1980. CDF&G's southern California set net monitoring program monitored about 5 percent of the fishing effort during from 1983 through 1986 and observed no gray whale entanglements (Collins et al. 1984, 1985, 1986; Vojkovich et al. 1987). Likewise, CDF&G set net observers in northern California reported no gray whales entanglements during monitoring of about 1 percent of the fishing effort from 1984 through 1987 (Wild, 1985, 1986).

In the Pacific Northwest, gray whales have been observed entangled in salmon set nets off northern Washington and in crab pot lines off Oregon. These entanglements are infrequent, occurring once every 1 to 3 years in the set net fishery and once every 3 to 5 years in the crab fishery. (NMFS, 1991).

Heyning and Dahlheim (1990) reported on strandings and incidental takes of gray whales from Alaska to Mexico for the years 1975–1988. Gray whale strandings were examined carefully to document whether the animal had been entangled in fishing gear. Some known fishery kills of gray whales bore no evidence of entanglement after stranding despite thorough examination (Heyning and Lewis, 1990). Data from the Heyning and Lewis study suggested that (1) sexually immature animals represented 90 percent of all strandings, and (2) gray whale mortality related to fisheries interactions is likely insignificant relative to the present population size.

Minimal estimates of fisheries-related mortality for stranded animals ranged from 8.7 to 25.8 percent (Heyning and Dahlheim, 1990). None of the 20 animals documented in that report from Alaskan feeding grounds had indications of entanglement in fishing gear. In the Gulf of Alaska and Alaskan Peninsula area, 4 animals out of 29 (13.8 percent) were involved in fishing gear. Baird *et al.* (1990) reviewed the available information for British Columbia and found 4 animals out of 39 strandings (11.1 percent) were involved in fishing gear. They noted that if they included only the 15 strandings that were carefully examined, then 26.7 percent of mortalities were fisheries related.

The fisheries related mortality for Washington, Oregon and northern California are 8 out of 50 (16 percent), 2 out of 23 (8.7 percent), and 6 out of 47 (12.8 percent), respectively. In southern California, more carcasses have been examined thoroughly and 25 out of 92

(25.8 percent) were mortalities related to fishing operations. Heyning and Lewis (1990) have reviewed baleen whale entanglements in this region and found that the majority of gray whale entanglements involved immature animals but not calves. Almost two-thirds of these entanglements occurred during the northbound migration.

Consultations Under Section 7 of the ESA

Between January 20, 1983, and December 21, 1984, NMFS issued five site specific Section 7 biological opinions concerning gray whales that contained findings that certain OCS activities could jeopardize the continued existence of the species.[1] These opinions were for OCS Lease Sale 57, Norton Sound, 1/20/83; OCS Lease Sale 70, St. George Basin, 3/9/83; OCS Lease Sale 89, St. George Basin, 3/21/84; OCS Lease Sale 92, North Aleutian Basin, 3/21/84; and OCS Lease Sale 100, Norton Sound, 12/21/84. In general, these biological opinions noted that, other than for geophysical seismic surveys, impacts from drilling noise and support activities associated with OCS oil and gas exploration were not likely to jeopardize the continued existece of gray whales. These opinions noted that geophysical seismic activities could affect gray whale migrations and were likely to jeopardize the continued existence of these species. Similarly, these opinions noted that an uncontrolled blowout or major oil spill in the sale area when gray whales were present was likely to jeopardize the continued existence of this species. It was noted also that there was insufficient information to determine whether or not the cumulative impacts from oil and gas development could jeopardize the continued existence of the gray whale. Lease sales 100 and 89 were cancelled in April and May of 1986, respectively Lease sales 57 and 70, which were held in March and April, 1983, have not been activated.

Since the issuance of these five biological opinions in 1983 and 1984, a number of studies have been completed on the possible effects of OCS activities on gray whales. This research was discussed in some detail above. In general, research results indicate that (1) the size of the gray whale stock is large and increasing; (2) reactions of gray whales to recordings of industrial noise and more particularly to a seismic airgun source during migration have shown that avoidance behavior occurs only at relatively close ranges; (3) there is a low probability of an oil spill resulting from a blowout during exploratory drilling (Minerals Management Service, 1987a, 1987b); (4) there is a low probability of any spilled oil intercepting whales (Neff, 1990); and (5) there is evidence (Kent *et al.* 1982; Geraci, 1990; Geraci and St. Aubin, 1982; St. Aubin *et al.*, 1984) indicating that whales may be able to avoid contact with spilled oil, are likely to suffer only minor impacts if they contact or ingest spilled oil, and are likely to recover from those effects. Based upon these results, NMFS now believes that while the cumulative impacts from oil and gas activities may have the potential to adversely affect the eastern North Pacific gray whale stock, these impacts are not likely to jeopardize its continued existence.

More recently, biological opinions concerning gray whales have contained no jeopardy determinations. These include biological opinions for the Beaufort/Chukchi Sea (Lease sales 71 and 87 Beaufort Sea (Diapir Field) 5/19/82 and 12/19/83; Lease sale 87 and 97, Beaufort Sea 12/19/83 and 5/20/87; Lease Sale 109, Chukchi Sea 9/1/87; and Arctic Region 11/23/88), the Bering Sea (Norton Sound OCS mining program; 5/5/88) and northern and southern California (Lease Sale 91, northern California 4/28/88; Lease Sale 73, Santa Maria Basin 8/9/83; Lease Sale 80, southern California 10/4/83).

No new lease sales are proposed for Washington, Oregon, or central and northern California before 1997 In southern California no lease sales are contemplated until at least 1996 when 86 blocks in the Santa Maria Basin and Santa Barbara Channel will be considered (Minerals Management Service, 1991). In Alaska, two lease sales in the Beaufort Sea (1993 and 1996), two for the Chuckchi Sea (1994 and 1997) and one each in Cook Inlet (1994) and Gulf of Alaska (1995) are proposed, and several additional sales are possible (Minerals Management Service, 1991).

Discussion

An endangered species is any species that is in danger of extinction throughout all or a significant portion of its range; a threatened species is any species that is likely to become an endangered species within the foreseeable future. The ESA requires that a determination to list (or delist) a species as endangered or threatened be made solely on the basis of the best available scientific and commercial information concerning that species relative to the factors discussed above.

The eastern North Pacific stock of the gray whale has recovered to near or above its estimated pre-commercial exploitation population size. It is at approximately 88 percent of its estimated carrying capacity and is probably still increasing. NMFS therefore believes that this stock is not currently in danger of extinction throughout all or a significant portion of its range. Moreover, even though the eastern Pacific gray whale stock inhabits coastal waters that are increasingly impacted by human activities, the stock continues to increase and, therefore, is not likely to become an endangered species again within the foreseeable future throughout all or a significant portion of its range. Based upon the assessments discussed above, NMFS believes that individual and cumulative impacts, while they may have the potential to adversely affect the eastern North Pacific gray whale stock, are not likely to jeopardize its continued existence. Therefore, NMFS believes the eastern North Pacific stock of the gray whale should be removed from the list of Endangered and Threatened Species under the Endangered Species under the ESA. However, because the gray whale is exposed frequently to human activities, and cumulative impacts may result in some indirect effects, long-term monitoring of the health of the gray whale stock should be conducted.

Removing the eastern North Pacific gray whale stock from the List would not result in a major reduction in protection. While the protections and prohibitions of the ESA, including the consultation requirements of section 7, would cease to apply, the gray whale would remain subject to prohibitions against taking under the MMPA. In addition, because the species also remains protected under the U.S. Whaling Convention Act and International Convention for the Regulation of Whaling, the number of gray whales authorized to be taken for subsistence purposes would continue to be limited by the IWC.

NMFS also believes that the western Pacific gray whale stock, which is geographically isolated from the eastern stock, has not recovered and should remain listed as endangered.

[1] On January 22, 1982, NMFS issued a regional Biological Opinion for proposed OCS leasing and exploration in four planning areas of the Bering Sea (i.e., Norton Sound, St. George Basin, Northern Aleutian Shelf and Navarin Basin). NMFS concluded that there was insufficient information concerning oil and gas exploration activities in the Bering Sea to allow a determination whether such activities are likely to jeopardize the continued existence of endangered whales found there.

Monitoring

Section 4(g) of the ESA requires that whenever a species is removed from the List, the Secretary implement a system, in cooperation with the states, to monitor effectively the status of any species that has recovered to the point where the protective measures provided under the ESA are no longer necessary. This monitoring program will continue for at least 5 years and, if at any time during that period the Secretary finds that the species' well-being is under a significant risk, the ESA (section 4(b)(7)) provides that emergency protective regulations shall be issued to ensure the conservation of any recovered species.

As part of its monitoring program, NMFS intends to create a Task Group responsible for monitoring activities potentially impacting gray whales. This Task Group will consist of marine mammal scientists familiar with either gray whale biology or related subject matter and will be expected to coordinate internal research on gray whales, encourage independent research in areas not currently funded or invetigated by NMFS, and serve as a quick response advisory team in the event of any catastrophic event impacting gray whales. The Task Group will also recommend to the Assistant Administrator for Fisheries, NOAA (Assistant Administrator) appropriate steps necessary to mitigate any catastrophic event including the reimposition of emergency protective measures. Finally, within 6 months following the conclusion of the first 5-year monitoring program, the Task Group will conduct a comprehensive "status review" of the gray whale which will be forwarded to the Assistant Administrator for approval and release to the general public for review and comment. Included in that report will be a recommendation on whether (1) to continue the monitoring program for an additional 5 years, (2) terminate the monitoring program or (3) reconsider the status of the gray whale.

NMFS encourages the Minerals Management Service (MMS) and other Federal agencies to continue studies on gray whale distribution, abundance, and habitat use in the Bering, Chukchi, and Beaufort seas and on the impacts of seismic exploration, offshore drilling activities, oil spills, and vessel traffic. In addition to research on gray whales conducted in the United States through independently funded sources and in Mexico by the government of Mexico, NMFS plans to conduct the following as part of its monitoring program:

(1) Monitor the status of the gray whale and habitats esential to its survival;

(a) Conduct a biennial population assessment to include:

(i) A census of the southbound migration for comparison with historical research;

(ii) Carry out research as needed to determine any potential biases in the estimation of procedures (*e.g.*, offshore distribution, tails of the migration, night-time migration rates);

(iii) Estimate population productivity using data obtained from (i) and (ii) above, and from life history studies, as may be appropriate, such as calf production; and

(iv) A determination of the shape of the productin curve of the population—that is, the "point" or series of estimates which suggest that the population has reached its carrying capacity.

(2) To the extent possible, encourage MMS to continue studies to determine the impacts of oil spills; vessel traffic, including noise; seismic exploration; and offshore drilling activities on gray whales.

(3) Continue monitoring the level of gray whale mortality through small take and commercial fishery exemptions, stranding programs and other activities.

(4) Implement whale watching regulations for U.S. citizens and others within the U.S. EEZ and promote with Mexico and Canada the use of similar standards for whale watching within their waters.

(5) Continue and promote increased cooperative studies with Mexico to monitor habitat use and the impacts of whale watching on the Mexican calving grounds; encourage the enforcement of gray whale sanctuary regulations in Mexico, and for operators of U.S. whale watch vessels to observe Mexican sanctuary regulations.

Public Comments Requested

NMFS is soliciting information and comments on this proposed action. Specifically, NMFS is requesting information on the status of the gray whale, potential threats to the population, and the effects of activities on the species. In making a final determination concerning the status of the gray whale under the ESA, NMFS will take into account the data, views, and comments received during the comment period. In accordance with section 4(a)(2) of the ESA, NMFS is requesting the concurrence of the FWS on this proposal.

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Wild, P.A. 1986. Progress report: Central California gill and trammel net investigations (northern area), 1985. California Department of Fish and Game, Marine Resources Branch, Monterey, California 93940.

Classification

The 1982 amendments to the ESA (Pub. L. 97–304) in section 4(b)(1)(A), restricted the information that may be considered when assessing species for listing. Based on this limitation of criteria for a listing decision and the opinion in *Pacific Legal Foundation* v. *Andrus*, 657 F.2d 829 (6th Cir., 1981), NMFS has categorically excluded all endangered species listings from environmental assessment requirements of the National Environmental Policy Act (48 FR 4413, February 6, 1984).

The Conference Report on the 1982 amendments to the ESA, notes that economic consideration have no relevance to determinations regarding status of species, and that Executive Order (E.O.) 12291 economic analysis requirements, the Regulatory Flexibility Act and the Paperwork Reduction Act are not applicable to the listing process. Similarly, listing actions are not subject to the requirements of E.O. 12612.

List of Subjects in 50 CFR Part 222

Administrative practice and procedure; Endangered and threatened wildlife; Exports; Fish; Imports; Marine mammals; Reporting and recordkeeping requirements.

Dated: November 18, 1991.

William W. Fox, Jr.,

Assistant Administrator for Fisheries.

For the reasons set forth in the preamole, 50 CFR part 222 is proposed to be amended as follows:

PART 222—ENDANGERED FISH OR WILDLIFE

1. The authority citation for part 222 continues to read as follows:

Authority: 16 U.S.C. 1531–1543.

§ 223.23 [Amended]

2. In § 222.23(a), paragraph (a) is amended by removing the words "Gray whale (*Eschrichtius robustus* (*glaucus, gibbosus*))" in the second sentence and adding in their place the words: "Western Pacific (Korean) Gray whale (*Eschrichtius robustus*)."

[FR Doc. 91–28081 Filed 11–21–91; 8:45 am]

BILLING CODE 3510-22-M

Notices

Federal Register
Vol. 56, No. 226
Friday, November 22, 1991

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

COMMISSION ON CIVIL RIGHTS

New Hampshire State Advisory Committee; Agenda and Notice of Public Meeting

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that a meeting of the New Hampshire State Advisory Committee to the Commission will convene at 2 p.m. and adjourn at 5:30 p.m. on Wednesday, December 11, 1991. The purpose of the meeting is to receive a report from its planning subcommittee for a community forum on "Racial Tension as Affected by Demographic Changes and Community Actions in Southern New Hampshire Cities" and decide on forum plans.

Persons desiring additional information, or planning a presentation to the Committee, should contact John I. Binkley, Director, Eastern Regional Division at (202) 523–5264, TDD (202) 376–8117. Hearing impaired persons who will attend the meeting and require the services of a sign language interpreter, should contact the Regional Division at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, November 19, 1991.

Carol-Lee Hurley,

Chief, Regional Programs Coordination Unit.

[FR Doc. 91–28157 Filed 11–21–91; 8:45 am]

BILLING CODE 6335–01–M

DEPARTMENT OF COMMERCE

Agency Form Under Review by the Office of Management and Budget (OMB)

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: International Trade Administration.

Title: Export Qualifier Program.

Form Numbers: Agency—ITA—OMB.

Type of Request: New collection.

Burden: 3,325 Respondents; 1,663 hours.

Average Hours Per Response: 30 minutes.

Needs and Uses: The most effective and productive use of the International Trade Administration's United States and Foreign Commercial Service Domestic Operations resources is to provide assistance to infrequent exporters. Program emphasis is placed on specialized counseling adapted to the needs of the clients. Each district office will use this program to ascertain the capabilities of the client, and to determine the level of services needed. This information will enable the trade specialist to counsel clients about their exporting potential, or to refer clients to other appropriate sources or assistance.

Affected Public: Businesses or other for profit; small businesses or organizations.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Gary Waxman, 395–7340.

Copies of the above information collection proposal can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 377–3271, Department of Commerce, room 5327, 14the and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Gary Waxman, OMB Desk Officer, Room 3208 New Executive Office Building, Washington, D.C. 20503.

Dated: November 18, 1991.

Edward Michals,

Department Clearance Officer, Office of Management and Organization.

[FR Doc. 91–28147 Filed 11–21–91; 8:45 am]

BILLING CODE 3510–CW–M

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of initiation of antidumping and countervailing duty administration reviews.

SUMMARY: The Department of Commerce has received requests to conduct administrative reviews of various antidumping and countervailing duty orders and findings with October anniversary dates. In accordance with the Commerce Regulations, we are initiating those administrative reviews.

EFFECTIVE DATE: November 22, 1991.

FOR FURTHER INFORMATION CONTACT: Roland L. MacDonald, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230, telephone (202) 377–2104.

SUPPLEMENTARY INFORMATION:

Background

The Department of Commerce ("the Department") has received timely requests, in accordance with § 353.22(a)(1) of the Department's regulations, for administrative reviews of various antidumping and countervailing duty orders and findings.

Initiation of reviews

In accordance with §§ 353.22(c) and 355.22(c) of the Department's regulations, we are initiating administrative reviews of the following antidumping and countervailing duty orders and findings. We intend to issue the final results of these reviews not later than October 31, 1992.

Antidumping duty proceedings and firms	Periods to be reviewed
Japan:	
Tapered Roller Bearings, 4 Inches or Less, A–588–054	
Koyo Seiko Company, Ltd., NSK Ltd., Nachi Fujikoshi	8/1/90–9/30/91
Tapered Roller Bearings, Over 4 Inches, A–588–604	
Koyo Seiko Company, Ltd., NSK, Ltd., NTN Corporation, Nachi Fujikoshi	10/1/90–9/30/91

Antidumping duty proceedings and firms	Periods to be reviewed
People's Republic of China:	
Shop Towels of Cotton, A-570-003	
Chinatex, CNART, Tianjin Arts and Crfts Import and Export Corporation	10/1/90-9/30/91
Countervailing Duty Proceedings	
Brazil:	
Certain Agricultural Tillage Tools, C-351-406	1/1/90-12/31/90
India:	
Certain Iron Metal Construction Castings, C-533-063	1/1/90-12/31/90
Iran:	
Roasted In-Shell Pistachios, C-507-601	1/1/90-12/31/90

Interested parties must submit applications for administrative protective orders in accordance with §§ 353.34(b) and 355.34(b) of the Department's regulations.

These initiations and this notice are in accordance with section 751(a) of the Tariff Act of 1930 (19 U.S.C. 1675(a)) and 19 CFR 353.22(c) and 355.22(c) (1989).

Dated: November 15, 1991.

Joseph A. Spetrini,

Deputy Assistant Secretary for Compliance.

[FR Doc. 91-28148 Filed 11-21-91; 8:45 am]

BILLING CODE 3510-DS-M

[C-351-504]

Certain Heavy Iron Construction Castings From Brazil; Preliminary Results of Countervailing Duty Administrative Review

AGENCY: International Trade Administration/Import Administration Department of Commerce.

ACTION: Notice of preliminary results of countervailing duty administrative review.

SUMMARY: The Department of Commerce has conducted an administrative review of the countervailing duty order on certain heavy iron construction castings from Brazil. We preliminarily determine the net subsidy to be 0.33 percent *ad valorem* for all firms for the period January 1, 1990 through December 31, 1990. In accordance with 19 CFR 355.7, any rate less than 0.50 percent *ad valorem* is *de minimis*. We invite interested parties to comment on these preliminary results.

EFFECTIVE DATE: November 22, 1991.

FOR FURTHER INFORMATION CONTACT: Elizabeth Levy or Michael Rollin, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; Telephone: (202) 377-2786.

SUPPLEMENTARY INFORMATION:

Background

On May 21, 1991, the Department of Commerce (the Department) published in the **Federal Register** a notice of "Opportunity to Request Administrative Review" (56 FR 23271) of the countervailing duty order on certain heavy iron construction castings from Brazil (51 FR 17786; May 15, 1986) for the period January 1, 1990 through December 31, 1990. On may 31, 1991, the Government of Brazil requested an administrative review of the order. We initiated the review covering the period January 1, 1990 through December 31, 1990, on June 18, 1991 (56 FR 27943). The Department has now conducted this review in accordance with section 751 of the Tariff Act of 1930, as amended (the Tariff Act).

Scope of Review

Imports covered by this review are shipments of certain heavy iron construction castings from Brazil, which are defined for purposes of this proceeding as manhole covers, rings and frames; catch basin grates and frames; and cleanout covers and frames. Such castings are used for drainage or access purposes for public utility, water and sanitary systems. During the review period, such merchandise was classifiable under item number 7325.10.00 of the Harmonized Tariff Schedule (HTS). The HTS item number is provided for convenience and Customs purposes. The written description remains dispositive.

The review covers the period January 1, 1990 through December 31, 1990, and six programs. Three companies produced and exported the subject merchandise to the United States during the reveiw period.

Hyperinflationary Economies

According to statistics published by the Brazilian government, the annual inflation in Brazil during the review period was 1,285 percent. Under such circumstances, the clustering of nominal countervailable benefits either at the beginning or at the end of the review period would tend to distort the real value of the benefit bestowed on the firm. In this review, benefits from the Income Tax Reduction for Export Earnings program were received at the beginning of the review period. Therefore, we have made a downward adjustment to the nominal values of annual exports used to calculate the benefit from this program. This adjustment is based on the price deflator index used by the Brazilian government during the period of review, the Bonus do Tesouro Nacional (BTN). For further explanation of this methodology see Final Negative Countervailing Duty Determination: Silicon Metal From Brazil (56 FR 26988, June 12, 1991).

Calculation Methodology for Assessment and Cash Deposit Purposes

In calculating the benefits received during the review period, we followed the methodology described in the preamble to 19 CFR 355.20(d) (53 FR 52325; December 27, 1988). First, we calculated a country-wide rate, and then weight-averaged the benefits received by the three companies subject to review to determine the overall subsidy from all countervailable programs benefitting exports of the subject merchandise to the United States. Because the country-wide rate was *de minimis*, as defined by 19 CFR 355.7, we determine the rate for all companies, regardless of the level of benefits to each company, to be zero. See, e.g., Final Results of Countervailing Duty Administrative Review; Ceramic Tile From Mexico (56 FR 27496; June 14, 1991).

Analysis of Programs

(1) Income Tax Reduction for Export Earnings

This program was previously named Income Tax Exemption for Export Earnings. Under this program, exporters of certain heavy iron construction castings are eligible for a reduction from income tax on the portion of their profits attributable to exports. The exporter calculates the tax-reduction portion of profit based on the ratio of export revenue to total revenue. Because this program provides tax reductions that are limited to exporters, we preliminarily determine that it is countervailable.

The nominal corporate tax rate in Brazil in 1990 was 30 percent, while under this program, profits from export sales were taxed at a rate of three percent. Furthermore, Brazilian tax law permits all companies to reduce their income taxes by investing up to 24 percent of their tax liability in specified companies and funds. One heavy iron construction castings exporter claimed this income tax reduction for export earnings on its tax returns filed in 1990 and invested in the specified companies and funds, which lowered its effective tax rate below the nominal 30 percent rate during the period of review.

We calculated the effective tax rate for the firm by dividing the net tax liability by net taxable income. In order to adjust for hyperinflation, the subsequent figures were converted into BTN using the same BTN rate used in the tax returns. We determined the export profit by multiplying the exports to sales ratio by adjusted operating profits. We went on to determine the tax reduction by multiplying the export profit by the difference between the effective tax rate and the preferential tax rate of three percent. We allocated the tax benefit over the firm's total exports. The firm's total exports in New Cruzados for 1990 were deflated using the average BTN rate for 1990. We then weight-averaged the benefit by the firm's share of exports of the subject merchandise to the United States. On this basis, we preliminarily determine the benefit from this program to be 0.33 percent *ad valorem* for Industria de Ferro e Aco Planeta Ltda., and zero for all other firms for the period January 1, 1990 through December 31, 1990.

Decree Law 8034 of April 12, 1990 eliminated this tax reduction and established a prevailing tax rate of 30 percent for domestic and export earnings for tax year 1990 (the 1990 tax returns would be filed in 1991). See, e.g., Final Negative Countervailing Duty Determination: Silicon Metal From Brazil (56 FR 26988, June 12, 1991). We consider this elimination to be a program-wide change. Because it occurred prior to the issuance of these preliminary results and there are no residual benefits to the producers/exporters of certain heavy iron construction castings, we have taken this program-wide change into account in setting our cash deposit rate. Therefore, for the purposes of the cash deposit of estimated countervailing duties, we preliminarily determine the benefit from this program to be zero for all firms. See Countervailing Duties; Notice of Proposed Rulemaking and Request for Public Comment (54 FR 23366, May 31, 1989) Section 355.50(a)(1) and (2) at page 23385.

(2) Programs Not Used and Eliminated

We also examined the following programs and preliminarily determine that the respondents did not use them during the period of review and they have been terminated by the Government of Brazil:

A. CACEX Preferential Working Capital Financing for Exports.

This program was terminated effective August 30, 1990, by Central Bank Resolution 1744.

B. Preferential Export Financing Under CIC–OPCRE 6–2–6 (formerly CIC–CREGE 14–11) of the Banco do Brasil.

As of September 20, 1988, interest rates applicable to these loans have been equal to those of market rate loans.

C. Financing for the Storage of Merchandise Destined for Export (Resolution 330 of the Central Bank of Brazil).

This program was terminated by Resolution 1744 on August 30, 1990.

D. Exemption of IPI and Customs Duties on Imported Equipment (CDI)

The Brazilian Ministry of Finance published "Portaria no. 176" on September 12, 1984, eliminating these credit premiums effective May 1, 1985.

See, e.g., Final Negative Countervailing Duty Determination: Silicon Metal From Brazil (56 FR 26988, June 12, 1991) and Final Affirmative Countervailing Duty Determination; Steel Wheels from Brazil (54 FR 15523; April 18, 1989).

Therefore, for purposes of the cash deposit of estimated countervailing duties, we preliminarily determine the benefits from these programs to be zero for all firms. See Countervailing Duties; Notice of Proposed Rulemaking and Request for Public Comment (54 FR 23366, May 31, 1989) Section 355.50(a) (1) and (2) at page 23385.

(3) Other Program

We also examined the FINEX Export Financing Provided by the Fundo de Financiamento a Exportacao program and preliminarily determine that the respondents did not use this during the review period.

Preliminary Results of Review

As a result of our review, we preliminarily determine the net subsidy to be 0.33 percent *ad valorem* for all firms for the period January 1, 1990 through December 31, 1990. In accordance with 19 CFR 355.7, any rate less than 0.5 percent *ad valorem* is *de minimis*.

Therefore, the Department intends to instruct the Customs Service to liquidate, without regard to countervailing duties, shipments of this merchandise from Brazil for all firms exported on or after January 1, 1990 and on or before December 31, 1990.

The Department also intends to instruct the Customs Service to waive cash deposits of estimated countervailing duties, as provided by section 751(a)(1) of the Tariff Act, on all shipments of subject merchandise from Brazil entered, or withdrawn from the warehouse, for consumption on or after the date of publication of the final results of this administrative review.

Parties to the proceeding may request disclosure of the calculation methodology and interested parties may request a hearing not later than 10 days after the date of publication of this notice. Interested parties may submit written arguments in case briefs on these preliminary results within 30 days of the date of publication. Rebuttal briefs, limited to arguments raised in case briefs, may be submitted seven days after the time limit for filing the case brief. Any hearing, if requested, will be held within seven days after the scheduled date for submission of rebuttal briefs. Copies of case briefs and rebuttal briefs must be served on interested parties in accordance with 19 CFR 355.38(e).

Representatives of parties to the proceeding may request disclosure of proprietary information under administrative protective order no later than 10 days after the representative's client or employer becomes a party to the proceeding, but in no event later than the date the case briefs, under section 355.38(c), are due.

The Department will publish the final results of this administrative review including the results of its analysis of issues raised in any case or rebuttal brief or at a hearing.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 355.22.

Dated: November 15, 1991.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 91–28149 Filed 11–21–91; 8:45 am]

BILLING CODE 3510-DS-M

President's Export Council; Meeting

AGENCY: International Trade Administration, Commerce.

ACTION: Notice of an open meeting.

SUMMARY: The Export Promotion Resources, Communications and Marketing Subcommittee of the the President's Export Council is holding a meeting to discuss U.S. export policy, export financing issues, and local and federal export promotion programs. The President's Export Council was established on December 20, 1973, and reconstituted May 4, 1979, to advise the

President on matters relating to U.S. export trade.

DATES: December 16, 1991, from 2 p.m. to 4 p.m.

ADDRESSES: Main Commerce Building, room 4830, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Seating is limited and will be on a first come, first serve basis.

FOR FURTHER INFORMATION CONTACT: Ms. Sylvia Lino Prosak, President's Export Council, room 3215, Washington, DC 20230.

Dated: November 18, 1991.

Wendy H. Smith,

Staff Director and Executive Secretary, President's Export Council.

[FR Doc. 91-28097 Filed 11-21-91; 8:45 am]

BILLING CODE 3510-DR-M

President's Export Council: Meeting

AGENCY: International Trade Administration, Commerce.

ACTION: Notice of a partially closed meeting.

SUMMARY: The Foreign Market Development Subcommittee is holding a partially closed meeting. The closed session will include briefings and discussion on relations with our trading partners and other sensitive matters properly classified under Executive Order 12356. The briefings and discussion in the open session will cover ways to promote the development of trade promotion programs in various world markets and issues of trade cooperation throughout the Americas.

The President's Export Council was established on December 20, 1973, and reconstituted May 4, 1979, to advise the President on matters relating to U.S. export trade.

DATES: December 9, 1991. Open Session from 10 a.m. to 11 a.m. Closed Session from 11 a.m. to noon.

ADDRESSES: Main Commerce Building, room 4830, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Ms. Annette Richard, President's Export Council, room 3215, Washington, DC 20230.

Dated: December 18, 1991.

Wendy H. Smith,

Staff Director and Executive Secretary, President's Export Council.

[FR Doc. 91-28096 Filed 11-21-91; 8:45 am]

BILLING CODE 3510-DR-M

Western Michigan Institute, et al.; 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 p.m. in room 4204, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

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: 91-110. *Applicant:* Western Michigan Institute, Kalamazoo, MI 49008. *Instrument:* Mass Spectrometer, Model S/001. *Manufacturer:* VG Instruments, United Kingdom. *Intended Use:* See notice at 56 FR 41120, August 19, 1991. *Reasons:* The foreign instrument provides: a universal Faraday triple collector with a separate H/D analyzer and an internal precision of 0.03 per mil for 3 bar/ul samples of CO_2.

Docket Number: 91-125. *Applicant:* Massachusetts Institute of Technology, Cambridge, MA 02139. *Instrument:* Metallorganic Epitaxial Reactor. *Manufacturer:* Thomas Swan and Company Ltd., United Kingdom. *Intended Use:* See notice at 56 FR 46497, September 13, 1991. *Reasons:* The foreign instrument provides a small reaction vessel allowing operation with input flow as low as 5.0 liters per second at atmospheric pressure and manual control capability to optimize instructional use.

The capability of each of the foreign instruments described above is pertinent to each applicant's intended purposes. We know of no instrument or apparatus being manufactured in the United States which is of equivalent scientific value to either of the foreign instruments.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 91-28150 Filed 11-21-91; 8:45 am]

BILLING CODE 3510-DS-M

National Oceanic and Atmospheric Administration

Caribbean Fishery Management Council; Public Fact-Finding Meetings

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

The Caribbean Fishery Management Council (Council) will hold six separate fact-finding meetings during November and December 1991 to obtain information from the public regarding the taking of corals and other associated organisms that may result in damage to the reef environment. These meetings will provide an opportunity for the public to provide information to the Council about the aquarium-trade fishery in Puerto Rico and the U.S. Virgin Islands, and possible management measures to be included into a fishery management plan.

The Council will be seeking information from the public on the need to protect the coral environment from the taking of live-rock and other associated organisms that may result in damage to the coral reef ecosystem. Two of the relevant questions to be addressed are: (1) What management measures can be implemented to protect the reef ecosystem? and (2) What measures can be taken to protect the aquarium trade fishery from over-exploitation?

The six meetings will be held from 7 p.m. to 10 p.m., as follows:

November 21

Conference Room, Legislature Building, St. Thomas, U.S. Virgin Islands.

November 22

Conference Room, Legislature Building, St. Croix, U.S. Virgin Islands.

November 25

Conference Room, Parador Villa Parguera, Lajas, Puerto Rico.

November 26

Theater, Colegio de Ingenieros y Agrimensores, Nin and Skerret Streets, Hato Rey, Puerto Rico.

December 4

Municipal Gymnasium, Culebra, Puerto Rico.

December 5

Centro de Usos Multiples, Vieques, Puerto Rico.

For more information contact Miguel A. Rolon, Executive Director, Caribbean Fishery Management Council, Banco de Ponce Building, suite 1108, Hato Rey, Puerto Rico 00918-2577; telephone: (809) 766-5926.

Dated: November 18, 1991.

David S. Crestin,

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

[FR Doc. 91-28082 Filed 11-21-91; 8:45 am]

BILLING CODE 3510-22-M

COMMITTEE FOR PURCHASE FROM THE BLIND AND OTHER SEVERELY HANDICAPPED

Procurement List Additions

AGENCY: Committee for Purchase from the Blind and Other Severely Handicapped.

ACTION: Additions to Procurement List.

SUMMARY: This action adds to the Procurement List commodities and a service to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

EFFECTIVE DATE: December 23, 1991.

ADDRESSES: Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202–3509.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 557–1145.

SUPPLEMENTARY INFORMATION: On August 30, September 6 and October 4, 1991, the Committee for Purchase from the Blind and Other Severely Handicapped published notices (56 FR 42985, 44077 and 50316) of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to produce the commodities and provide the service at a fair market price and impact of the addition on the current or most recent contractors, the Committee has determined that the commodities and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

I certify that the following actions will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

a. The actions will not result in any additional reporting, recordkeeping or other compliance requirements.

b. The actions will not have a serious economic impact on any contractors for the commodities and service listed.

c. The actions will result in authorizing small entities to produce the commodities and provide the service procured by the Government.

Accordingly, the following commodities and service are hereby added to the Procurement List:

Commodities

Link, Quick Release
5340–00–NSH–0008
(Requirements of the Navy Ships Parts Control Center)
Loop, Kevlar
5340–00–NSH–0009
(Requirements of the Navy Ships Parts Control Center)
Binder, Pilot's
7510–00–NSH–0010
(Requirements of Wright-Patterson Air Force Base, Ohio)

Service

Janitorial/Custodial, U.S. Army Reserve Center, Building 200, Arlington Heights, Illinois.

This action does not affect contracts awarded prior to the effective date of this addition or options exercised under those contracts.

Beverly L. Milkman,

Executive Director.

[FR Doc. 91–28110 Filed 11–21–91; 8:45 am]

BILLING CODE 6820–33–M

Procurement List Proposed Additions and Deletions

AGENCY: Committee for Purchase from the Blind and Other Severely Handicapped.

ACTION: Proposed Additions to and Deletions from Procurement List.

SUMMARY: The Committee has received proposals to add to the Procurement List a commodity and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and delete military resale commodities previously furnished by such agencies.

COMMENTS MUST BE RECEIVED ON OR BEFORE: December 23, 1991.

ADDRESSES: Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202–3509.

FOR FURTHER INFORMATION CONTACT: Berverly Milkman (703) 557–1145.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

Additions

If the Committee approves the proposed additions, all entities of the Federal Government (except as otherwise indicated) will be required to procure the commodity and services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

It is proposed to add the following commodity and services to the Procurement List:

Commodity

Oil, Lubricating
9150–00–836–8641

Services

Grounds Maintenance, North and South Duplexes, Naval Weapons Center, China Lake, California
Janitorial/Custodial, Federal Building and U.S. Courthouse, 515 West First Street, Duluth, Minnesota
Operation of Tool Crib, Kelly Air Force Base, Texas

Deletions

It is proposed to delete the following military resale commodities from the Procurement List:

Item No. and Name

060 Roller Ball Pen, Red
061 Roller Ball Pen, Blue
568 Board, Ironing, Table Top
581 Flatware, Assorted
583 Flatware, Forks
584 Flatware, Spoons
620 Vest, Safety, Joggers, Small
662 Web, Cargo, Large Car Top
663 Web, Cargo, Small Car Top
664 Web, Cargo, Large Truck
665 Web, Cargo, Small Truck
912 Brush, Lint, Plastic Filament
935 Christmas Textiles
993 Pens, Stick, Air Force
994 Pens, Stick, Army

Beverly L. Milkman,

Executive Director.

[FR Doc. 91–28111 Filed 11–21–91; 8:45 am]

BILLING CODE 6820–33–M

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Notice of proposed information collection requests.

SUMMARY: The Director, Office of Information Resources Management, invites comments on proposed information collection requests as required by the Paperwork Reduction Act of 1980.

DATES: An expedited review has been requested in accordance with the Act, since allowing for the normal review period would adversely affect the public interest. Approval by the Office of Management and Budget (OMB) has been requested by December 22, 1991.

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, 726 Jackson Place, NW., room 3208, New Executive Office Building, Washington, DC 20503. Request for copies of the proposed

information collection request should be addressed to Mary P. Liggett, Department of Education, 400 Maryland Avenue, SW., room 5624, Regional Office Building 3, Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: Mary P. Liggett, (202) 708–5174.

SUPPLEMENTARY INFORMATION: Section 3517 of the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 3517) requires that the Director of OMB provide interested Federal agencies and persons 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 Director, Office of Information Resources Management, publishes this notice with the attached proposed information collection request prior to submission of this request to OMB. This notice contains the following information: (1) Type of review requested, e.g., expedited; (2) Title; (3) Abstract; (4) Additional Information; (5) Frequency of collection; (6) Affected public; and (7) Reporting and/or Recordkeeping burden. Because an expedited review is requested, a description of the information to be collected is also included as an attachment to this notice.

Dated: November 18, 1991.

Mary P. Liggett,

Acting Director, Office of Information Resources Management.

Office of Intergovernmental and Interagency Affairs

Type of Review: Expedited.

Title: Presidential Academic Fitness Award (PAFA) School Participation Order Form.

Abstract: This form will be used by public and private schools interested in participating in the Presidential Academic Fitness Awards Program. The Department will use this information to determine the number of award certificates required by each participant.

Additional Information: An expedited review is requested in order to process the Presidential Academic Fitness Awards in a timely fashion. Failure to collect this information would interfere with program needs since awards could not be made.

Frequency: Annually.

Affected Public: Individuals or households; State or local governments; non-profit institutions.

Reported Burden

Responses: 52,000.

Recordkeeping Burden

Recordkeepers: 0.

Burden Hours: 17,333.

Burden Hours: 0.

BILLING CODE 4000–1–M

U.S. Department of Education
Presidential ACADEMIC Fitness Awards Program

GENERAL INFORMATION

- Orders should be mailed by April 4 to insure adequate time for delivery.
- Orders will be accepted until June 30 from individual schools ONLY.
- If you do not receive your awards ten days prior to your ceremony, call the PAFA hotline 1-800-438-7232.
- There is no charge to order PAFA certificates.

* Certificates are given ONLY at the exit grade of Elementary, Middle or Junior High, and Senior High School. Those schools having multi-levels (e.g K-8, 7-12, K-12) may order more than one level of awards.

Please note the sample completed Order Form below. The number of Extraordinary Effort Awards is computed automatically based upon 10% of the number of academic achievement certificates ordered.

SAMPLE

	Award Level 1 Elementary 4,5,6,7,8	Award Level 2 Middle/Jr. High 7,8,9	Award Level 3 Senior High 12
1. Circle Highest Grade in School			
2. Total Number of Students in This Grade	188		
3. Number of Certificates Needed	10		
4. Circle Yes or No for Extraordinary Effort Award	(Yes) No	Yes No	Yes No
5. Date of Award Ceremony			

U.S. DEPARTMENT OF EDUCATION
PRESIDENTIAL ACADEMIC FITNESS AWARD
SCHOOL AWARD ORDER FORM FOR CERTIFICATES

	Award Level 1 Elementary	Award Level 2 Middle/Jr. High	Award Level 3 Senior High
1. Circle Highest Grade in School	4,5,6,7,8	7,8,9	12
2. Total Number of Students in This Grade			
3. Number of Certificates Needed			
4. Circle Yes or No for Extraordinary Effort Award	Yes No	Yes No	Yes No

5. Date of Award Ceremony _____

6. CORRECT ANY ERRORS ON ADDRESS LABEL AND CHECK BOX IF CHANGE IS REQUIRED.

7. AFFIRMATION: I affirm that our school has used national PAFA criteria to select students for this award.

_____
Signature of Principal Date

_____
Name (Print) Telephone

Place Stamp Here

Presidential ACADEMIC Fitness Awards Program
U.S. Department of Education
Washington, D.C. 20202-3720

PRESIDENTIAL ACADEMIC FITNESS AWARD (PAFA)

Awards are given at three levels to students who are graduating from elementary school, middle or junior high school, and high school. Students who fulfill all criteria listed below qualify for the Presidential ACADEMIC Fitness Award. These national PAFA criteria are not to be modified.

GRADE POINT AVERAGE	TEST SCORES	CORE COURSES (High School Seniors Only)	EXTRAORDINARY EFFORT AWARD
B+ AVERAGE: The overall B+ average is composed of all years at that level including the fall semester of the graduating grade. It is equivalent to a 3.3 on a 4 point scale or 85 on a 100 point scale. Elementary schools should not include grades K-3 in the average.	STANDARDIZED ACHIEVEMENT TEST BATTERY SCORE AT 80TH PERCENTILE: The battery should be from that level (elementary school, middle or junior high school, and high school) and should include both verbal and mathematical skills. Nationally standardized college admissions examinations, such as the SAT or ACT, may be used for the high school award. If state developed tests are utilized, the student's score should rank in the upper 20 percent.	TWELVE CREDITS IN FOUR OF THE FOLLOWING SUBJECT AREAS: The senior must complete by graduation at least 12 high school, carnegie units, or higher level course units distributed among English, mathematics, science, history, and geography.	These awards are optional and given at the principal's discretion to a limited number of students who do not meet all the academic criteria, but whom the principal wishes to recognize for extraordinary effort. These special awards may be presented to no more than 10 percent of the number of students who meet all of the academic criteria.

[FR Doc. 91-28086 Filed 11-21-91; 8:45 am]
BILLING CODE 4000-1-C

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Notice of Proposed Information Collection Requests.

SUMMARY: The Director, Office of Information Resources Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1980.

DATES: Interested persons are invited to submit comments on or before December 23, 1991.

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, 726 Jackson Place, NW., room 3208, New Executive Office Building, Washington, DC 20503. Requests for copies of the proposed information collection requests should be addressed to Mary P. Liggett, Department of Education, 400 Maryland Avenue, SW., room 5624, Regional Office Building 3, Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: Mary P. Liggett, (202) 708–5174.

SUPPLEMENTARY INFORMATION: Section 3517 of the Paperwork Reduction Act of 1980 (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 Acting Director, Office of Information Resources Management, 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) Frequency of collection; (4) The affected public; (5) Reporting burden; and/or (6) Recordkeeping burden; and (7) Abstract. OMB invites public comment at the address specified above. Copies of the requests are available from Mary P. Liggett at the address specified above.

Dated: November 18, 1991.

Mary P. Liggett,

Acting Director, Office of Information Resources Management.

Office of Postsecondary Education

Type of Review: Revision.
Title: Application for Institutional Eligibility and Certification
Frequency: On Occasion.
Affected Public: Businesses or other for-profit; Non-profit institutions.

Reporting Burden

Responses: 4,210.
Burden Hours: 12,630.

Recordkeeping Burden

Recordkeepers: 0.
Burden Hours: 0.
Abstract: This form will be used by State Educational Agencies to apply for funding under the Higher Education Act Programs. The Department uses the information to make grant awards.

Office of Postsecondary Education

Type of Review: Extension.
Title: Application for Grants under the Student Literacy Corps Program.
Frequency: Annually.
Affected Public: Non-profit institutions.

Reporting Burden

Responses: 71.
Burden Hours: 284

Recordkeeping Burden

Recordkeepers: 0.
Burden Hours: 0
Abstract: This form will be used by State Educational Agencies to apply for funding under the Student Literacy Corps Program. The Department uses the information to make awards.

Office of Planning, Budget and Evaluation

Type of Review: New.
Title: Descriptive Study of Services for Limited English Proficient Students.
Frequency: On time.
Affected Public: State or local governments.

Reporting Burden:

Responses: 6,571.
Burden Hours: 3,548.

Recordkeeping Burden

Recordkeepers: 0.
Burden Hours: 0.
Abstract: This study will collect information on the types of special educational services provided, administrative procedures associated with these services, the numbers, types, and qualifications of staff, and the costs of these special services. The Department will use the information to address the extent to which the services provided by local educational agencies contribute to these students achieving national education goals and the related issues of parent involvement, teacher quality and program accountability.

Office of Educational Research and Improvement

Type of Review: New.
Title: Omnibus Surveys for the National Assessment of Vocational Education—Spring 1992
Frequency: On time.
Affected Public: State or local governments

Reporting Burden

Responses: 4,936.
Burden Hours: 13,399.

Recordkeeping Burden

Recordkeepers: 0.
Burden Hours: 0.
Abstract: These surveys will assess secondary and postsecondary vocational education, such as the allocation of funds, quality of vocational education programs and vocational employment. The Department will use the data to initiate change in the vocational education system, improve the quality of vocational programs, and the establishment of performance standards.

[FR Doc. 91–28087 Filed 11–21–91; 8:45 am]
BILLING CODE 4000–1–M

DEPARTMENT OF ENERGY

Conduct of Employees

In the matter of Waiver Pursuant to section 602(c) of the Department of Energy Organization Act (Pub. L. No. 95–91).

Section 602(a) of the Department of Energy Organization Act (Pub. L. No. 95–91, hereinafter referred to as the "Act") prohibits a "supervisory employee" (defined in section 601(a) of the Act) of the Department from knowingly receiving compensation from, holding any official relation with, or having any pecuniary interest in any "energy concern" (defined in section 601(b) of the Act).

Section 602(c) of the Act authorizes the Secretary of Energy to waive the requirements of section 602(a) in cases of exceptional hardship or where the interest is a pension, insurance, or other similarly vested interest.

Dr. David A. Smith is under consideration for the position of Director of the Health Effects and Life Sciences

Research Division in the Office of Energy Research of the Department of Energy. Dr. Smith has a vested pension interest in the University of California Retirement System as a result of his previous employment.

It has been established to my satisfaction that Dr. Smith's vested interest in the University of California Retirement System is a vested program interest within the meaning of section 602(c) of the Act. Accordingly, I have granted Dr. Smith a waiver of the divestiture requirement of section 602(a) of the Act for the duration of his employment with the Department with respect to that interest.

Dr. Smith has received a waiver of the participation prohibitions of section 208(a), title 18, United States Code, with respect to his participation in program planning and funding decisions concerning research projects conducted and proposals submitted by the University of California in the areas of human health effects research, molecular biology and genetics.

Dated: November 15, 1991.

James D. Watkins,

Admiral, U.S. Navy (Retired) Secretary of Energy.

[FR Doc. 91-28151 Filed 11-21-91; 8:45 am]

BILLING CODE 6450-01-M

Energy Information Administration

Agency Information Collections Under Review by the Office of Management and Budget

AGENCY: Energy Information Administration, Energy.

ACTION: Notice of request submitted for review by the Office of Management and Budget.

SUMMARY: The Energy Information Administration (EIA) has submitted the energy information collection(s) listed at the end of this notice to the Office of Management and Budget (OMB) for review under provisions of the Paperwork Reduction Act (Pub. L. No. 96-511, 44 U.S.C. 3501 et seq.). The listing does not include collections of information contained in new or revised regulations which are to be submitted under section 3504(h) of the Paperwork Reduction Act, nor management and procurement assistance requirements collected by the Department of Energy (DOE).

Each entry contains the following information: (1) The sponsor of the collection (the DOE component or Federal Energy Regulatory Commission (FERC)); (2) Collection number(s); (3) Current OMB docket number (if applicable); (4) Collection title; (5) Type of request, e.g., new, revision, extension, or reinstatement; (6) Frequency of collection; (7) Response obligation, i.e., mandatory, voluntary, or required to obtain or retain benefit; (8) Affected public; (9) An estimate of the number of respondents per report period; (10) An estimate of the number of responses per respondent annually; (11) An estimate of the average hours per response; (12) The estimated total annual respondent burden; and (13) A brief abstract describing the proposed collection and the respondents.

DATES: Comments must be filed on or before December 23, 1991. If you anticipate that you will be submitting comments but find it difficult to do so within the time allowed by this notice, you should advise the OMB DOE Desk Officer listed below of your intention to do so as soon as possible. The Desk Officer may be telephoned at (202) 395-3084. (Also, please notify the EIA contact listed below.)

ADDRESSES: Address comments to the Department of Energy Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, 726 Jackson Place NW., Washington, DC 20503. (Comments should also be addressed to the Office of Statistical Standards at the address below.)

FOR FURTHER INFORMATION AND COPIES OF RELEVANT MATERIALS CONTACT: Jay Casselberry, Office of Statistical Standards, (EI-73), Forrestal Building, U.S. Department of Energy, Washington, DC 20585. Mr. Casselberry may be telephoned at (202) 254-5348.

SUPPLEMENTARY INFORMATION:

The energy information collection submitted to OMB for review was:

1. Energy Information Administration
2. EIA-254, 851 and 858
3. 1905-0160
4. Nuclear and Uranium Data Program Package
5. Revision
6. Monthly, Quarterly, Semi-annually, and Annually
7. Mandatory
8. State or local governments, Businesses or other for-profit, and Small businesses or organizations
9. 176 respondents
10. 2.06 responses
11. 13.45 hours per response
12. 4868 hours
13. Forms EIA-254, 851 and 858 collect data on the costs of nuclear power plants under construction, domestic uranium production, and certain aspects of uranium marketing, exploration and finance. Data are used in determining the viability of the domestic uranium industry. Respondents are firms in the uranium business and electric utilities.

Statutory Authority: Sec. 5(a), 5(b), 13(b), and 52, Pub. L. No. 93-275, Federal Energy Administration Act of 1974, 15 U.S.C. § 764(a), 764(b), 772(b), and 790a.

Issued in Washington, DC November 14, 1991.

Yvonne M. Bishop,

Director, Statistical Standards, Energy Information Administration.

[FR Doc. 91-28154 Filed 11-21-91; 8:45 am]

BILLING CODE 6450-01-M

Federal Energy Regulatory Commission

[Docket Nos. ES92-11-000, et al.]

UtiliCorp United Inc., et al.; Electric Rate, Small Power Production, and Interlocking Directorate Filings

Take notice that the following filings have been made with the Commission:

1. UtiliCorp United Inc.

[Docket No. ES92-11-000]

November 14, 1991.

Take notice that on November 12, 1991, UtiliCorp United Inc. filed an application with the Federal Energy Regulatory Commission pursuant to § 204 of the Federal Power Act seeking authorization to issue $200 million of Debt Securities over a two-year period and seeking exemption from the Commission's competitive bidding regulations.

Comment date: December 11, 1991, in accordance with Standard Paragraph E at the end of this notice.

2. Exxon Co., U.S.A. (a Division of Exxon Corporation)

[Docket No. QF91-183-000]

November 14, 1991.

On November 1, 1991, Exxon Company, U.S.A., a division of Exxon Corporation, tendered for filing an amendment to its filing in this docket.

The amendment provides additional information pertaining primarily to thermal energy uses and the ownership structure of the cogeneration facility.

Comment date: December 4, 1991 in accordance with Standard Paragraph E at the end of this notice.

3. Union Electric Co.

[Docket No. FA90-46-001]

November 15, 1991.

Take notice that on October 28, 1991, Union Electric Company tendered for filing its refund report in the above-referenced docket.

Comment date: November 29, 1991, in accordance with Standard Paragraph E at the end of this notice.

4. Northeast Utilities Service Co.

[Docket No. ER92-179-000]

November 15, 1991.

Take notice that on November 6, 1991, Northeast Utilities Service Company ("NUSCO") on behalf of The Connecticut Light and Power Company ("CL&P") tendered for filing two Capacity Purchase Agreements for the purchase by Consolidated Edison Company of New York, Inc. ("Con Edison") of system capacity and energy from CL&P.

NUSCO requests that the Commission waive its standard notice periods and filing regulations to the extent necessary to permit the rate schedule change to become effective November 1, 1991.

NUSCO states that copies of this rate schedule have been mailed or delivered to each of the parties and to the New York Public Service Commission.

Comment date: November 29, 1991, in accordance with Standard Paragraph E at the end of this notice.

5. Louisiana Public Service Commission v. Entergy Services, Inc.

[Docket No. EL90-45-001]

November 15, 1991.

Take notice that on October 31, 1991, Louisiana Public Service Commission tendered for filing its refund report in compliance with the Commission's letter order issued on September 16, 1991.

Comment date: November 29, 1991, in accordance with Standard Paragraph E end of this notice.

6. Northeast Utilities Service Co.

[Docket No. ER92-152-000]

November 15, 1991.

Take notice that on November 1, 1991, Northeast Utilities Service Company ("NUSCO"), as agent for The Connecticut Light and Power Company and Holyoke Water Power Company (collectively referred to as the "NU Companies"), tendered for filing two Agreements dated November 1, 1991 to provide non-firm transmission service for six months to Montaup Electric Company ("Montaup") and South Hadley Electric Light Department ("South Hadley").

NUSCO requests that the Commission waive its standard notice and filing requirements to the extent necessary to permit the Agreements to become effective November 1, 1991.

NUSCO states that a copy of the rate schedule has been mailed to Montaup and South Hadley.

Comment date: November 29, 1991, in accordance with Standard Paragraph E end of this notice.

7. Ocean State Power II

[Docket No. ER91-576-000]

November 15, 1991.

Take notice that Ocean State Power II ("OSP II") on November 7, 1991, tendered for filing Responses to a deficiency letter issued by the Commission on October 7, 1991. The deficiency letter stated that OSP II's submittal for filing of rate schedule supplements and supporting documentation was deficient with respect to part 35 of the Commission's Regulations, and the Commission directed OSP II to provide additional information concerning OSP II's rate of return on equity.

Copies of the filing were served upon Boston Edison Company, New England Power Company, Montaup Electric Company, Newport Electric Corporation, the Massachusetts department of Public Utilities, the Massachusetts Attorney General, the Rhode Island Public Utilities Commission, the Rhode Island Attorney General, TransCanada PipeLines Limited, and all other persons currently on the Commission's official service list for this docket.

Comment date: November 29, 1991, in accordance with Standard Paragraph E end of this notice.

8. Duke Power Co.

[Docket No. ER90-315-002]

November 15, 1991.

Take notice that on November 7, 1991, Duke Power Company tendered for filing its compliance report in the above-referenced docket.

Comment date: November 29, 1991, in accordance with Standard Paragraph E end of this notice.

9. Blue Ridge Power Agency, Central Virginia Electric Cooperative, Inc., and Craig-Botetourt Electric Cooperative, Inc.

[Docket No. EL89-53-002; Docket Nos. ER90-132-001, ER90-132-000 and ER90-133-000]

November 15, 1991.

Take notice that on November 8, 1991, Appalachian Power Company (APCo) tendered for filing its compliance filing in the above-referenced dockets, in compliance with the Commission's October 24, 1991 Opinion and Order on Rehearing, which modified, in part, the Decision's June 28, 1991 Opinion and Order on Initial Decision.

Copies of the filing were served upon APCo's jurisdictional customers, the Virginia State Corporation Commission, the Public Service Commission of West Virginia, and all parties of record.

Comment date: November 29, 1991, in accordance with Standard Paragraph E end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. 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 part must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 91-28090 Filed 11-21-91; 8:45 am]

BILLING CODE 6717-01-M

[Project Nos. 2145-021, et al.]

Hydroelectric Applications (P. U. D. No. 1 of Chelan Co., Washington, et al.); Applications

Take notice that the following hydroelectric applications have been filed with the Commission and are available for public inspection:

1. a. *Type of Application:* Amendment of License.

b. *Project No.:* 2145-021.

c. *Date Filed:* September 19, 1991.

d. *Applicant:* Public Utility District No. 1 of Chelan County, Washington.

e. *Name of Project:* Rocky Reach Hydroelectric Project.

f. *Loation:* On the Columbia River, in Chelan and Douglas Counties, Washington.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Mr. Roger L. Purdom, Public Utility District No. 1 of Chelan County, Washington, P.O. Box 1231, 327 North Wenatchee Avenue, Wenatchee, WA 98807, (509) 663-8121.

i. *FERC Contact:* Ms. Regina Saizan, (202) 219-2673.

j. *Comment Date:* December 9, 1991.

k. *Description of the Request:* The licensee requests that its license be amended to increase the maximum normal pool elevation of the Rocky

Reach Reservoir (also known as Lake Entiat) from the presently authorized 707 feet above sea level to 710 feet above sea level. Among other things, the 3-foot pool elevation increase will increase the project's authorized installed capacity from 1,213,150 kW to 1,246,850 kW, increase Lake Entiat's surface area from 8,235 acres to 8,575 acres and increase its total volume from 387,500 acre-feet to 415,300 acre-feet. The proposed pool raise will decrease the capacity of the Public Utility District No. 1 of Douglas County's (Douglas County) licensed Wells Hydro-Electric Project, FERC No. 2149, by an estimated 18,900 kW to 755,350 kW and the capacity of the licensee's Lake Chelan Hydroelectric Project, FERC No. 637, by an estimated 900 kW to 47,100 kW. Douglas County has no objection to the proposal if the impacts of encroachment on the Wells Hydroelectric Project are mitigated and Douglas County is compensated for the loss of energy. The proposal does not affect the project boundary or the acreage of Federal land occupied by the project, however, the licensee intends to acquire additional private property rights at Rivermile 492 downstream of the Lake Entiat Estates Subdivision on the Douglas County side of the Lake to provide for a permanent pool elevation of 710 feet above sea level.

1. This notice also consists of the following standard paragraphs: B, C, and D2.

2. A. *Type of Application:* Water Delivery System Pursuant to the Requirements of Article 45 of the License.

b. *Project No:* 2179–010.

c. *Date Filed:* April 25, 1990 and supplemented with filings dated August 25, 1990, December 31, 1990, January 8, 1991, and February 20, 1991.

d. *Applicant:* Merced Irrigation District.

e. *Name of Project:* New Exchequer Hydroelectric Project.

f. *Location:* Merced River, Mariposa and Merced Counties, California.

g. *Filed Pursuant to:* Section 23 (b) of the Federal Power Act, 16 U.S.C. 817(b).

h. *Applicant Contact:* Mr. E.C. "Ted" Selb III, Merced Irrigation District, 2423 Canal Street, Merced, CA 95344–0288, (209) 722–5761.

i. *FERC Contact:* Mr. Patrick Murphy, (202) 219–2659.

j. *Comment Date:* December 9, 1991.

k. *Description of Project:* Article 45 of the license for the New Exchequer Hydroelectric Project requires the Merced Irrigation District (licensee) to deliver 15,000 acre-feet of water to the Merced National Wildlife Refuge (Refuge). The licensee has considered four options for delivery of the water to the Refuge.

The licensee proposes to implement Option 1, which consists of cleaning and enlarging the existing Benedict Lateral Canal to pass 45 cubic feet per second (cfs) of water; connecting Benedict Lateral to Deadman Creek at the end of Benedict Lateral; and cleaning and making modifications of existing privately owned dams along Deadman Creek to accommodate the 45 cfs water flow. Under Option 1, water would be delivered down Benedict Lateral to Deadman Creek to the midpoint of the northern boundary of the Refuge at the intersection of Deadman Creek and Sandy Mush Road.

The Commission's staff is evaluating the licensee's proposed Option 1, and the three additional options considered by the licensee. Option 2 includes modifying and extending Casebeer Lateral Canal for a distance of approximately ¾ mile to Deadman Creek, and cleaning and modifying Deadman Creek as described under Option 1. Water would be delivered to the Refuge at the same point as Option 1.

Option 3 requires a 3-½-mile extension of Casebeer lateral south along Gurr Road to Sandy Mush Road, and then continuing west along Sandy Mush Road to the northeast corner of the Refuge.

Option 4 calls for installation of a lift station in Deadman Creek, and construction of a ½-mile channel from Deadman Creek to the northeast corner of the Refuge. This option would also require similar cleaning and modifications of Deadman Creek as for Options 1 and 2.

1. This notice also consists of the following standard paragraphs: B, C, and D2.

3. a. *Type of Application:* New Major License.

b. *Project No.:* 2212–001.

c. *Date Filed:* July 29, 1991.

d. *Applicant:* Weyerhaeuser Company.

e. *Name of Project:* Rothschild Hydro Project.

f. *Location:* On the Wisconsin River in Marathon County, Wisconsin.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. §§ 791(a)—825(r).

h. *Applicant Contact:* Mr. William V. Dohr, Weyerhaeuser Company, 200 Grand Avenue, Rothschild, WI 54475, (715) 359–3101.

i. *FERC Contact:* Ed Lee (202) 219–2809.

j. *Deadline Date:* December 26, 1991.

k. *Status of Environmental Analysis:* This application is not ready for environmental analysis at this time—see attached paragraph E.

l. *Description of Project:* The project as licensed consists of the following: (1) A 631-foot-long concrete and timber crib dam having, from west to east, (a) a 276-foot-long timber crib dam with 17 stoplog bays, timber crib apron located immediately downstream, and a concrete retaining wall extending 180 feet downstream, which adjoins a short segment of an earth embankment section tied into the natural ground; (b) a 100-foot-long concrete overflow spillway section with concrete and timber crib aprons located immediately downstream; (c) a 255-foot-long concrete sluice section with ten 20-foot-wide bays controlled by 13.75-foot-high taintor gates, and concrete and timber crib aprons located immediately downstream; (d) a 32-foot-wide fish ladder and trash sluice section, where the fish ladder is sealed with concrete; (e) a 6-foot-wide section of a retaining wall, training wall, piling cells and timber crib wall, which separates the fish ladder and trash sluice section from the powerhouse and from the tail race, extends about 650 feet downstream; (2) a 167-foot-long powerhouse, located contiguous to the east bank of the river, with seven flumes equipped with rack bars and head gates, which houses seven turbine-generators with total installed capacity of 4,660 kw; and (3) appurtenant facilities.

The Applicant is not proposing any changes to the existing project works as licensed. The Applicant estimates the average annual generation would be 24.4 GWh and owns all existing project facilities.

The existing project would also be subject to Federal takeover under Sections 14 and 15 of the Federal Power Act. Based on the license expiration of July 31, 1991, the Applicant's estimated net investment in the project would amount fo $1,200,000.

m. *Purpose of Project:* All project energy generated would be utilized by the Applicant for sale to its customers.

n. This notice also consists of the following standard paragraphs: B2 and E.

o. *Available Locations of Application:* A copy of the application, as amended and supplemented, is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at 941 North Capitol Street, NE., room 3104, Washington, DC 20426, or by calling (202) 208–1371. A copy is also available for inspection and reproduction at Weyerhaeuser Company, 200 Grand

Avenue, Rothschild, WI 54475, (715) 359–3101.

4. a. *Type of Application:* New Major License.

b. *Project No.:* 2255–003.

c. *Date Filed:* July 29, 1991.

d. *Applicant:* Nekoosa Papers Inc.

e. *Name of Project:* Centralia.

f. *Location:* On the Wisconsin River, Wood County, Wisconsin.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Richard J. Grund, Nekoosa Papers Inc., 100 Wisconsin River Drive, Port Edwards, WI 54469, (715) 887–5481.

i. *FERC Contact:* Michael Dees (202) 219–2807.

j. *Deadline Date:* December 19, 1991.

k. *Status of Environmental Analysis:* This application is not ready for environmental analysis at this time—see attached standard paragraph E.

l. *Description of Project:* The project as licensed consists of the following: (1) A 1,325.5-foot-long dam containing (a) a 340-foot-long cast-in-place gated spillway containing 13 steel tainter gates: 3 gates, 16 feet wide by 11 feet 9 inches high and 10 gates, 18 feet wide by 11 feet 8 inches high; (b) a 530-foot-long emergency overflow spillway with collapsible wooden flashboards approximately 3.5 feet high; (2) a reservoir with a surface area of 250 acres; (3) a 216 feet-3 inches wide and 78 feet-7 inches tall powerhouse (4) a 3,200 kilowatt Allis Chalmers generator-turbine set; (5) an existing 2.4/14.4-kilovolt (kV) step-up transformer and a 2.5 mile 14.4-kV three phase over-head transmission line connecting to Port Edwards Mill Substation which ties to Wisconsin Power & Light Company's transmission line; and (6) appurtenant facilities.

The Applicant is not proposing any changes to the existing project works as licensed. The Applicant estimates the average annual generation would be 25.2 GWh and owns all existing project facilities.

The existing project would also be subject to Federal takeover under Sections 14 and 15 of the Federal Power Act.

m. *Purpose of Project:* The purpose of the project is to generate electric power for industrial use by the applicant.

n. This notice also consists of the following standard paragraphs: B2 and E

o. *Available Location of Application:* A copy of the application, as amended and supplemented, is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at 941 North Capitol Street, NE., room 3104, Washington, DC 20426, or by calling (202) 208–1371. A copy is also available for inspection and reproduction at Nekoosa Papers Inc., 100 Wisconsin River Drive, Port Edwards, WI, 54469, (715) 887–5481.

5. a. *Type of Application:* Transfer of License.

b. *Project No.:* 3156–010.

c. *Date Filed:* July 26, 1991, as supplemented September 26, 1991.

d. *Applicant:* Miller & Miller (Licensee) and Cox Hydroelectric (Transferee).

e. *Name of Project:* Worthville Dam.

f. *Location:* On Deep River in Randolph County, North Carolina.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:*

Mr. Ernest W. Miller, 1401 Sunset Drive, Greensboro, NC 27408, (919) 273–0084.

Mr. H. Bruce Cox, Route 1, Box 167, Ramseur, NC 27316.

i. *FERC Contact:* Ms. Julie Bernt, (202) 219–2814.

j. *Comment Date:* December 6, 1991.

k. *Description of Project:* On October 28, 1982, a minor license was issued to John M. Jordan to construct, operate and maintain the Worthville Dam Project No. 3156. The licensed project capacity is 280 kW. On June 25, 1986, the license was transferred to Miller & Miller. It is proposed to transfer the license to Cox Hydroelectric. The purpose of this proposed license transfer is to facilitate financing for project development.

The licensee certifies that it has fully complied with the terms and conditions of its license and obligates itself to pay all annual charges accrued under the license to the date of transfer. The transferee accepts all the terms and conditions of the license and agrees to be bound thereby to the same extent as though it were the original licensee.

1. This notice also consists of the following standard paragraphs: B and C.

6. a. *Type of Application:* Transfer of License.

b. *Project No.:* 7887–008.

c. *Date Filed:* October 4, 1991.

d. *Applicant:* Marlborough Hydro Corp. Marlborough Hydro Associates.

e. *Name of Project:* Minnewawa Hydroelectric Project.

f. *Location:* On the Minnewawa Brook in Cheshire County, New Hampshire.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)—825(r).

h. *Applicant Contact:* Marlborough Hydro Associates, ATTN: John N. Webster, P.O. Box 1073, Dover, NH 03820, 207–384–5334.

i. *FERC Contact:* Mary C. Golato (202) 219–2804.

j. *Comment Date:* December 9, 1991.

k. *Description of Project:* Marlborough Hydro Corp. proposes to transfer the license for the Minnewawa Hydroelectric Project No. 7887 to Marlborough Hydro Associates. Transfer of the project would facilitate the financing and the development of the project.

1. This notice also consists of the following standard paragraphs: B, C, & D2.

7. a. *Type of Application:* Transfer of License.

b. *Project No.:* 7962–007.

c. *Date filed:* October 4, 1991.

d. *Applicant:* Robert W. Shaw (Transferor) and Baldwin Hydroelectric Corporation.

e. *Name of Project:* Baldwin Project.

f. *Location:* On the Connecticut River, in Coos County, New Hampshire.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791 (a)–825(r).

h. *Applicant Contact:* John Webster, Baldwin Hydroelectric Corporation, P.O. Box 1073, Dover, NH 03820.

i. *FERC Contact:* Ed Lee (dmt) (202) 219–2809.

j. *Comment Date:* December 5, 1991.

k. *Description of Proposed Action:* On January 8, 1988, a license was issued for the construction, operation, and maintenance of the Baldwin Project. It is proposed to transfer the license because the project is to be sold to Baldwin Hydroelectric Corporation (Transferee). The proposed transfer will not result in any changes to the proposed development. The Transferor has certfity it has fully complied with the terms and conditions of the license and the transferee agrees to be bound thereby to the same extent as though it were the original licensee.

1. This notice also consists of the following standard paragraphs: B, C, and D2.

8. a. *Type of Application:* Transfer of License.

b. *Project No.:* 9541–010.

c. *Date filed:* September 30, 1991.

d. *Applicant:* Geoffrey Shadroui.

e. *Name of Project:* Fair Haven Hydroelectric Project.

f. *Location:* On the Castleton River, in Rutland County, Vermont.

g. *Filed Pursuant to:* Federal Power Actm 16 U.S.C. 791 (a)–825(r).

h. *Applicant Contact:* Geoffrey Shadroui, 121 Maple Avenue, Barre, VT 05641, (802) 476–4062.

i. *FERC Contact:* Mary C. Golato (tag) (202) 219–2804.

j. *Comment Date:* December 6, 1991.

k. *Description of Project:* Geoffrey Shadroui proposes to transfer the Fair Haven Hydroelectric Project to Champlain Spinners Power Company,

Inc. Transfer of the license would facilitate the financing and development of the project.

1. This notice also consists of the following standard paragraphs: B, C, and D2.

9. a. *Type of Application:* Major License.

b. *Project No.:* 10808–000.

c. *Date filed:* July 24, 1989.

d. *Applicant:* Wolverine Hydroelectric Corporation.

e. *Name of Project:* Edenville.

f. *Location:* On the Tittabawassee and Tobacco Rivers in Tobacco and Edenville Townships, Gladwin and Midland Counties, Michigan.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. §§ 791(a)—825(r).

h. *Applicant Contact:* Mr. John D. Kuhns, 6000 South M–30, P.O. Box 147, Edenville, Michigan 48620, (517) 689–3161.

i. *FERC Contact:* Charles T. Raabe (202) 219–2811.

j. *Comment Date:* December 12, 1991.

k. *Status of Environmental Analysis:* This application is not ready for environmental analysis at this time—see attached paragraph E.

l. *Description of Project:* The existing, operating project consists of: (1) A reinforced concrete multiple arch spillway and integral powerhouse dam with an overall length of about 118 feet, a base width of about 52 feet, and a crest height of about 42 feet; (2) three tainter gates at the crest, each about 20 feet wide by 10 feet high, and two low-level sluiceway gates, each about 8 feet square, in the dam; (3) three lengths of earth embankments, consisting of a central section about 3,840 feet long and 55 feet in maximum height, a right section about 2,040 feet long and 60 feet in maximum height, and a left section about 850 feet long and 55 feet in maximum height; (4) a reinforced concrete multiple arch spillway dam 72 feet long, with a base width of about 70 feet and a crest height of abut 45 feet, located between the right and the central earth embankment sections; (5) three steel tainter gates surmounting the spillway dam, each 20 feet wide and 10 feet high; (6) a reservoir named Wixom Lake, with a surface area of 2,600 acres and gross storage of about 40,000 acre-feet; (7) an integral reinforced concrete and brick powerhouse, about 80 feet long, 51 feet wide, and 60 feet high, equipped with two Francis vertical axis turbine-generator units rated at 2,400 kW each; (8) certain transmission equipment; and (9) appurtenant facilities.

The project generates an estimated annual output of 16.8 GWh.

m. Purpose of Project: Power generated would be sold to Consumers Power Company.

n. This notice also consists of the following standard paragraphs: A2, A9, B2, and E.

o. Available Location of Application: A copy of the application, as amended and supplemented, is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at 941 North Capitol Street, NE., room 3104, Washington, DC 20426, or by calling (202) 208–1371.

10. a. *Type of Application:* Minor License.

b. *Project No.:* 10809–000.

c. *Date filed:* July 24, 1989.

d. *Applicant:* Wolverine Hydroelectric Corporation.

e. *Name of Project:* Secord.

f. *Location:* On the Tittabawassee River in Secord Township, Gladwin County, Michigan.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. §§ 791(a)–825(r).

h. *Applicant Contact:* Mr. John D. Kuhns, P.O. Box 147, 6000 South M–30, Edenville, Michigan 48620, (517) 689–3161.

i. *FERC Contact:* Charles T. Raabe (202) 219–2811.

j. *Comment Date:* December 12, 1991.

k. *Status of Environmental Analysis:* This application is not ready for environmental analysis at this time—see attached paragraph E.

l. *Description of Project:* The existing, operating project consists of: (1) A reinforced concrete multiple arch spillway and integral powerhouse dam with an overall length of about 71 feet, a base width of about 85 feet, and a crest height of about 42 feet; (2) two tainter gates at the dam crest, each about 22 feet wide by 10 feet high; (3) a right side earth embankment about 400 feet long by 57 feet high maximum; (4) a reservoir named Secord Lake, with a surface area of about 1,100 acres and gross storage of about 15,000 acre-feet; (5) an integral reinforced concrete and brick powerhouse, about 64 feet long, 25 feet wide, and 57 feet high, equipped with one Francis vertical axis turbine-generator unit rated at 1,200 kilowatts (kW); (6) certain transmission equipment; and (7) appurtenant facilities.

The project has an estimated annual output of 4.0 GWh.

m. *Purpose of Project:* Power generated would be sold to Consumers Power Company.

n. This notice also consists of the following standard paragraphs: A2, A9, B2, and E.

o. Available Location of Application: A copy of the application, as amended and supplemented, is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at 941 North Capitol Street, NE., room 3104, Washington, DC 20426, or by calling (202) 208–1371.

11 a. *Type of Application:* Minor License.

b. *Project No.:* 10810–000.

c. *Date filed:* July 24, 1989.

d. *Applicant:* Wolverine Hydroelectric Corporation.

e. *Name of Project:* Smallwood.

f. *Location:* On the Tittabawassee River in Hay Township, Gladwin County, Michigan.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)—825(r).

h. *Applicant Contact:* Mr. John D. Kuhns, P.O. Box 147, 6000 South M–30, Edenville, Michigan 48620, (517) 689–3161.

i. *FERC Contact:* Charles T. Raabe (202) 219–2811.

j. *Comment Date:* December 12, 1991.

k. *Status of Environmental Analysis:* This application is not ready for environmental analysis at this time—see attached paragraph E.

l. *Description of Project:* The existing, operating project consists of: (1) A reinforced concrete hollow gravity spillway dam about 52 feet long, 25 feet high, and 50 feet wide at the base, surmounted by two steel tainter gates, each 25.3 feet wide and 10 feet high; (2) a right side earth embankment about 100 feet long by 40 feet high maximum, and a left side earth embankment about 550 feet long by 40 feet high maximum; (3) a reservoir named Smallwood Lake, with a surface area of about 500 acres; (4) a reinforced concrete powerhouse, integral with the spillway, about 55 feet long, 27 feet wide, and 65 feet high; (5) powerhouse equipment consisting of one vertical axis, open flume turbine-generator unit rated at 1,200 kilowatts (kW); (6) certain transmission equipment; and (7) appurtenant facilities.

The project would have an estimated annual output of 2.65 GWh.

m. *Purpose of Project:* Power generated would be sold to Consumers Power Company.

n. This notice also consists of the following standard paragraphs: A2, A9, B2, and E.

o. *Available Location of Application:* A copy of the application, as amended and supplemented, is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at

941 North Capitol Street, NE., room 3104, Washington, DC 20426, or by calling (202) 208–1371.

12 a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 11165–000.

c. *Date filed:* July 9, 1991.

d. *Applicant:* Walter Musa, Jr.

e. *Name of Project:* Canyon Creek Hydroelectric Project.

f. *Location:* On Canyon Creek in Clark County, Washington. T5N, R4E in section 5; T6N, R4E in section 32.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. § 791(a)–825(r).

h. *Applicant Contact:* Mr. Walter Musa, Jr., P.O. Box 137, Amboy, Washington 98601, (206) 892–0514.

i. *FERC Contact:* Mr. Michael Strzelecki, (202) 219–2827.

j. *Comment Date:* December 27, 1991.

k. *Description of Project:* The proposed run-of-river project would consist of: (1) A reinforced concrete drop-inlet structure in Canyon Creek; (2) a 60-inch-diameter, 4,000-foot-long steel penstock; (3) a powerhouse containing one 2.2–MW generating unit; (4) a 1-mile-long transmission line interconnecting with an existing Pacific Power & Light substation at the Yale Dam switchyard; and (5) appurtenant facilities.

A 4000-foot-long, single lane pioneer road would be constructed along portions of the proposed penstock alignment to provide access for geotechnical investigations. The approximate cost of the studies under this permit would be $91,000.

1. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

13 a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 11171–000.

c. *Date filed:* July 26, 1991.

d. *Applicant:* Mokelumne River Water and Power Authority.

e. *Name of Project:* Middle Bar.

f. *Location:* Partially on lands administered by the Bureau of Land Management, on the Mokelumne River, in Amador and Calaveras Counties, California. Township 5 N, Range 11 E, and Section 16.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. David B. Ward, Counsel, Flood & Ward, 1000 Potomac Street NW., Suite 402, Washington DC 20007, (202) 298–6910.

i. *FERC Contact:* Michael Spencer at (202) 219–2846.

j. *Comment Date:* December 19, 1991.

k. *Description of Project:* The project would utilize the upper reach of Pardee Reservoir for the Lower Mokelumne Project No. 2716 and consist of: (1) A 190-foot-high concrete gravity dam; (2) a reservoir with a storage capacity of 40,000 acre-feet; (3) a powerhouse containing a generating unit with a capacity of 31 MW and an average annual generation of 80 GWh; and (4) a 3-mile-long transmission line. The project would also occupy 142 acres within the boundary of Project No. 137.

No new access road will be needed to conduct the studies. The applicant estimates that the cost of the studies to be conducted under the preliminary permit would be $2,060,000.

l. *Purpose of Project:* Project power would be sold.

m. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

14 a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 11175–000.

c. *Date Filed:* August 5, 1991.

d. *Applicant:* Crown Hydro.

e. *Name of Project:* Crown Mill Hydroelectric Project.

f. *Location:* On the Mississippi River, near Minneapolis, Hennepin County, Minnesota.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Glen Olsen, 5416 Tenth Avenue South, Minneapolis, MN 55417, (612) 823–3055.

i. *FERC Contact:* Michael Dees (202) 219–2807.

j. *Comment Date:* December 19, 1991.

k. *Description of Project:* The proposed project would utilize excess capacity not used by the St. Anthony Falls Project No. 2056 at the existing Corps of Engineers' St. Anthony Falls Dam and reservoir and would consist of: (1) A reconstructed canal and intake structure; (2) a new underground horizontal conduit; (3) a proposed powerhouse room, to be constructed on the lower level of Crown Mill, containing two or three hydropower units with a total capacity of 3.4 MW; (4) an existing tailrace tunnel; (5) a new tailrace channel; (6) a proposed underground transmission line; and (7) appurtenant facilities. The estimated annual energy production is 19 GWh. Project power would be sold to Northern States Power Company. Applicant estimates that the cost of the work to be performed under the preliminary permit would be $20,000.

1. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

15 a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 11178–000.

c. *Date filed:* August 19, 1991.

d. *Applicant:* City of Tucson, Arizona.

e. *Name of Project:* City of Tucson Hydroelectric Project.

f. *Location:* At eleven locations within the City of Tucson's water distribution system, which gets its water from an existing U.S. Bureau of Reclamation aqueduct located west of the city, in Pima County, Arizona.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Thomas Mundinger, City of Tucson, Arizona, Tucson Water, P.O. Box 27210, Tucson, Arizona 85725–7210, (602) 791–2685.

i. *FERC Contact:* Mr. Michael Strzelecki, (202) 219–2827.

j. *Comment Date:* December 19, 1991.

k. *Description of Project:* The proposed project would consist of: (1) The existing enclosed Clearwell Reservoir; (2) approximately 28 miles of existing water distribution pipeline with diameters ranging from 24 inches to 96 inches; (3) 11 powerhouses whose corresponding generating units having installed capacities ranging from 18 kW to 1,006 kW, and a cumulative capacity of 3,482 kW; (4) 11 transmission lines ranging in length from 50 feet to 300 feet, ten interconnecting with existing Tucson Electric Power transmission lines and one interconnecting with an existing Trico Electric Cooperative, Inc transmission line; and, (5) appurtenant facilities.

No new access roads will be required to conduct the studies under the permit. The approximate cost of the studies would be $212,000.

l. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

16 a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 11182–000.

c. *Date filed:* August 30, 1991.

d. *Applicant:* Cowlitz Basin 1 Limited Partnership.

e. *Name of Project:* Summit/ Carlton Creek.

f. *Location:* In Gifford Pinchot National Forest, on Summit and Carlton Creeks, in Lewis County, Washington. Township 14 N, Range 10 E, and Sections 10, 11, 14, 15, 16, 17 and 20.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Michael S. Wright, Permit/Engineering, Inc., 1300—114th Avenue SE Suite 220, Bellevue, WA 98004, (206) 451–7371.

i. *FERC Contact:* Michael Spencer at (202) 219–2846.

j. *Comment Date:* December 16, 1991.

k. *Description of Project:* The project would consist of: (1) A 13-foot-high concrete diversion dam on Summit

Creek; (2) a 10-foot-high diversion dam on Carlton Creek; (3) 10-foot-diameter, 2,500-foot-long tunnel between the diversions; (4) a 10-foot-diameter, 14,000-foot-long tunnel to the powerhouse; (5) a powerhouse containing a generating unit with a capacity of 19 MW and an average annual generation of 72.3 GWh; (6) a 10-mile-long transmission line; and (7) three access roads, one 1,500 feet long to the powerhouse, one 1,000 feet long to the Summit Creek diversion, and one 1,200 feet long to the Carlton Creek diversion.

No new access road will be needed to conduct the studies. The applicant estimates that the cost of the studies to be conducted under the preliminary permit would be $350,000.

l. *Purpose of Project:* Project power would be sold.

m. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

17 a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 11183–000.

c. *Date filed:* August 30, 1991.

d. *Applicant:* Cowlitz Basin 2 Limited Partnership.

e. *Name of Project:* Clear Fork.

f. *Location:* In Gifford Pinchot National Forest, on Clear Fork Cowlitz River, Cortright Creek, and Dam Creek, in Lewis County, Washington. Township 14 N, Range 10 E, and Sections 22, 26, 27, 28, and 29.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Michael S. Wright, Permit/Engineering, Inc., 1300—114th Avenue SE Suite 220, Bellevue, WA 98004, (206) 451–7371.

i. *FERC Contact:* Michael Spencer at (202) 219–2846.

j. *Comment Date:* December 19, 1991.

k. *Description of Project:* The project would consist of: (1) A 13-foot-high concrete diversion dam on Clear Fork Cowlitz River; (2) a 10-foot-high diversion dam on Cortright Creek; (3) a 10-foot-high diversion dam on Dam Creek; (4) 10-foot-diameter, 6,500-foot-long tunnel between the diversions on Cortright and Dam Creeks; (5) a 10-foot-diameter, 17,000-foot-long main tunnel to the powerhouse; (5) a powerhouse containing a generating unit with a capacity of 30.5 MW and an average annual generation of 128.5 GWh; (6) a 7-mile-long transmission line; and (7) four access roads, one 1,000 feet long to the powerhouse, one 3,000 feet long on the main stem, one 1,810 feet long to the Cortright Creek diversion, and one 400 feet long to the Dam Creek diversion.

No new access road will be needed to conduct the studies. The applicant estimates that the cost of the studies to be conducted under the preliminary permit would be $350,000.

l. *Purpose of Project:* Project power would be sold.

m. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

18 a. *Type of Application:* Preliminary Permit.

b. *Project No.: 11184–000*

c. *Date filed:* August 30, 1991.

d. *Applicant:* Cowlitz Basin 3 Limited Partnership.

e. Name of Project: Coal Creek.

f. *Location:* In Gifford Pinchot National Forest, on Coal Creek and Lost Creek, in Lewis County, Washington. Township 13 N, Range 10 E, and Sections 6, 7, 8, 9, and 16.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Michael S. Wright Permit/Engineering, Inc., 1300–114th Avenue SE Suite 220, Bellevue, WA 98004, (206) 451–7371.

i. *FERC Contact:* Micheal Spencer at (202) 219–2846.

j. *Comment Date:* December 16, 1991.

k. *Description of Project:* The project would consist of: (1) A 10-foot-high diversion dam on Coal Creek; (2) a 5-foot-high diversion dam on Lost Creek; (3) 38-inch-diameter, 1,000-foot-long penstock between the diversions; (4) a 38-inch-diameter, 16,000-foot-long penstock to the powerhouse; (5) a powerhouse containing a generating unit with a capacity of 5.5 MW and an average annual generation of 21.2 GWh; (6) a 5-mile-long transmission line; and (7) two access roads, one 1,000 feet long to the powerhouse, and one along the penstock route.

No new access road will be needed to conduct the studies. The applicant estimates that the cost of the studies to be conducted under the preliminary permit would be $350,000.

1. *Purpose of Project:* Project power would be sold.

m. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

19 a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 11185–000

c. *Date filed:* August 30, 1991.

d. *Applicant:* Cowlitz Basin 4 Limited Partnership.

e. Name of Project: Coal Creek.

f. *Location:* In Gifford Pinchot National Forest, on Johnson Creek and Smith Creek, in Lewis County, Washington. Township 13 N, Range 9 E, and Sections 32 and 33, and Township 12 N, Range 9 E Section 4, 9, 10, 11, and 12.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Michael S. Wright Permit/Engineering, Inc., 1300–114th Avenue SE Suite 220, Bellevue, WA 98004, (206) 451–7371.

i. *FERC Contact:* Michael Spencer at (202) 219–2846.

j. *Comment Date:* December 16, 1991.

k. *Description of Project:* The project would consist of: (1) A 13-foot-high diversion dam on Johnson Creek; (2) a 10-foot-high diversion dam on Smith Creek; (3) 10-foot-diameter, 21,500-foot-long tunnel will connect the diversions to the powerhouse; (4) a powerhouse containing a generating unit with a capacity of 23.2 MW and an average annual generation of 85.2 GWh; (5) a 3-mile-long transmission line; and (6) two access roads, one 5,030 feet long to the Smith Creek diversion, and one 500 feet long to the Johnson Creek diversion.

No new access road will be needed to conduct the studies. The applicant estimates that the cost of the studies to be conducted under the preliminary permit would be $350,000.

1. *Purpose of Project:* Project power would be sold.

m. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

20. a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 11186–000.

c. *Date filed:* August 30, 1991.

d. *Applicant:* Cowlitz Basin 5 Limited Partnership.

e. *Name of Project:* Butter Creek.

f. *Location:* In Gifford Pinchot National Forest, on Butter Creek in Lewis County, Washington. Township 14 N, Range 9 E, Sections 28 and 33, and Township 13 N, Range 9 E Sections 3, 4, 9, and 10.

9. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Michael S. Wright, Permit/Engineering, Inc., 1300–114th Avenue SE Suite 220, Bellevue, WA 98004, (206) 451–7371.

i. *FERC Contact:* Michael Spencer at (202) 219–2846.

j. *Comment Date:* December 16, 1991.

k. *Description of Project:* The project would consist of: (1) A 13-foot-high diversion dam on Butter Creek; (2) 4.5-foot-diameter, 14,000-foot-long penstock; (3) a powerhouse containing a generating unit with a capacity of 7.2 MW and an average annual generation of 28.4 GWh; (5) a 2.5-mile-long transmission line; and (6) two access roads, one 2,210 feet long to the powerhouse, and one 2,100 feet long to the Butter Creek diversion.

No new access road will be needed to conduct the studies. The applicant estimates that the cost of the studies to be conducted under the preliminary permit would be $350,000.

l. *Purpose of Project:* Project power would be sold.

m. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

21. a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 111876–000.

c. *Date filed:* August 30, 1991.

d. *Applicant:* Cowlitz Basin 65 Limited Partnership.

e. *Name of Project:* Williame Creek.

f. *Location:* In Gifford Pinchot National Forest, on Williame Creek in Lewis County, Washington. Township 13 N, Range 8 E, Sections 13 and 25, and Township 13 N, Range 9 E Sections 18, 19, 30, and 31.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Michael S. Wright, Permit/Engineering, Inc., 1300–114th Avenue SE Suite 220, Bellevue, WA 98004, (206) 451–7371.

i. *FERC Contact:* Michael Spencer at (202) 219–2846.

j. *Comment Date:* December 16, 1991.

k. *Description of Project:* The project would consist of two developments. The upper development will consist of: (1) A 10-foot-high diversion dam on upper Williame Creek; (2) 3.5-foot-diameter, 5,000-foot-long penstock; (3) a powerhouse containing a generating unit with a capacity of 2.9 MW; and (4) two access roads, one 1,700 feet long to the powerhouse, and one 3,000 feet long to the upper diversion.

The lower development will consist of: 91) A 12-foot-high diversion dam on the main stem; (2) a 10-foot-high diversion dam on the South Fork Williame Creek; (3) a 4-foot-diameter, 8,600-foot-long penstock from the main diversion to a confluence; (4) a 2.5-foot-diameter, 4,400-foot-long penstock from the South Fork diversion to a confluence; (5) a 4.75-foot-diameter, 5,400-foot-long penstock from the confluence to the powerhouse; (6) a powerhouse containing a generating unit with a capacity of 5.8 MW; and (7) three access roads, one 1,000 feet long to the powerhouse, one 1,200 feet long to the South diversion, and one 2,915 feet long to the main stem diversion.

The estimated average annual generation for the project is 34.3 MWh. The transmission line for the project will follow existing roads and be 10 miles long.

No new access road will be needed to conduct the studies. The applicant estimates that the cost of the studies to be conducted under the preliminary permit would be $350,000.

l. *Purpose of Project:* Project power would be sold.

m. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

22 a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 11188–000.

c. *Date filed:* August 30, 1991.

d. *Applicant:* Cowlitz Basin 7 Limited Partnership.

e. *Name of Project:* Silver Creek.

f. *Location:* In Gifford Pinchot National Forest on Silver Creek, Lynx Creek and Lake Creek, in Lewis County, Washington. Township 13 N, Range 7 E, and Sections 21, 22, 27, 28, 33, and 34, and Township 12 N, Range 7 E and Sections 3 and 10.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Michael S. Wright, Permit/Engineering, Inc., 1300–114th Avenue SE Suite 220, Bellevue, WA 98004, (206) 451–7371.

i. *FERC Contact:* Michael Spencer at (202) 219–2846.

j. *Comment Date:* December 16, 1991.

k. *Description of Project:* The project would consist of: (1) A 13-foot-high concrete diversion dam on Silver Creek; (2) a 13-foot-high diversion dam on Lynx Creek; (3) a 10-foot-high diversion dam on Lake Creek; (4) 10-foot-diameter, 18,000-foot-long tunnel from Lynx Creek to a confluence; (5) a 10-foot-diameter, 5,300-foot-long tunnel from Silver Creek and Lake Creek to the confluence; (5) a 7.5-foot-diameter, 1,600-foot-long tunnel from the confluence to the powerhouse; (6) a powerhouse containing a generating unit with a capacity of 16 MW and an average annual generation of 59.3 GWh; (7) a 2-mile-long transmission line; and (8) three access roads, one 2,900 feet long to the Lake Creek diversion, one 2,910 feet long to the Lynx Creek diversion, and one 2,515 feet long to the Silver Creek diversion.

No new access road will be needed to conduct the studies. The applicant estimates that the cost of the studies to be conducted under the preliminary permit would be $350,000.

l. *Purpose of Project:* Project power would be sold.

m. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

23 a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 11189–000.

c. *Date filed:* August 30, 1991.

d. *Applicant:* Cowlitz Basin 8 Limited Partnership.

e. *Name of Project:* Yellow Jacket Creek.

f. *Location:* In Gifford Pinchot National Forest, on Yellow Jacket Creek in Lewis County, Washington. Township 11 N, Range 8 E, Sections 20, 28, 29 and 33.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Michael S. Wright, Permit/Engineering, Inc., 1300–114th Avenue SE Suite 220, Bellevue, WA 98004, (206) 451–7371.

i. *FERC Contact:* Michael Spencer at (202) 219–2846.

j. *Comment Date:* December 16, 1991.

k. *Description of Project:* The project would consist of: (1) A 15-foot-high diversion dam on Yellow Jacket Creek; (2) 10-foot-diameter, 11,900-foot-long tunnel; (3) a powerhouse containing a generating unit with a capacity of 10.1 MW and an average annual generation of 37.5 GWh; (5) a 10-mile-long transmission line; and (6) two access roads, one 1,910 feet long to the powerhouse, and one 7,340 feet long to the Yellow Jacket Creek diversion.

No new access road will be needed to conduct the studies. The applicant estimates that the cost of the studies to be conducted under the preliminary permit would be $350,000.

l. *Purpose of Project:* Project power would be sold.

m. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

24 a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 11190–000.

c. *Date filed:* August 30, 1991.

d. *Applicant:* Cowlitz Basin 9 Limited Partnership.

e. *Name of Project:* Greenhorn Creek.

f. *Location:* In Gifford Pinchot National Forest, on Greenhorn Jacket Creek in Lewis County, Washington. Township 11 N, Range 7 E, Sections 14, 15, 23, 26, and 27.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Michael S. Wright, Permit/Engineering, Inc., 1300–114th Avenue SE Suite 220, Bellevue, WA 98004, (206) 451–7371.

i. *FERC Contact:* Michael Spencer at (202) 219–2846.

j. *Comment Date:* December 16, 1991.

k. *Description of Project:* The project would consist of: (1) A 13-foot-high diversion dam on Greenhorn Creek; (2) 38-inch-diameter, 13,400-foot-long penstock; (3) a powerhouse containing a generating unit with a capacity of 5.1 MW and an average annual generation of 19.7 GWh; (5) a 12-mile-long transmission line; and (6) two access

roads, one 600 feet long to the powerhouse, and one 5,280 feet long to accommodate the penstock.

No new access road will be needed to conduct the studies. The applicant estimates that the cost of the studies to be conducted under the preliminary permit would be $350,000.

1. *Purpose of Project:* Project power would be sold.

m. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

25 a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 11191–000.

c. *Date filed:* August 30, 1991.

d. *Applicant:* Cowlitz Basin 10 Limited Partnership.

e. *Name of Project:* Iron Creek.

f. *Location:* In Gifford Pinchot National Forest, on Iron Creek in Lewis County, Washington. Township 11 N, Range 7 E, Sections 19, 30, and 31. Township 10 N, Range 7 E, Sections 6, 7, and 8.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Michael S. Wright, Permit/Engineering, Inc., 1300–114th Avenue SE, Suite 220, Bellevue, WA 98004, (206) 451–7371.

i. *FERC Contact:* Michael Spencer at (202) 219–2846.

j. *Comment Date:* December 16, 1991.

k. *Description of Project:* The project would consist of: (1) a 13-foot-high diversion dam on Iron Creek; (2) 5.25-foot-diameter, 22,000-foot-long penstock; (3) a powerhouse containing a generating unit with a capacity of 14.1 MW and an average annual generation of 54.4 GWh; (5) a 8-mile-long transmission line; and (6) one access road 600 feet long to the powerhouse.

No new access road will be needed to conduct the studies. The applicant estimates that the cost of the studies to be conducted under the preliminary permit would be $350,000.

l. *Purpose of Project:* Project power would be sold.

m. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

26 a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 11195–000.

c. *Date filed:* October 1, 1991.

d. *Applicant:* Sunset Falls Limited Partnership.

e. *Name of Project:* Sunset Falls Water Power Project.

f. *Location:* Partially within the Mt. Baker-Snoqualmie National Forest, on the Skykomish River South Fork in Snohomish County, Washington. T27N, R10E in sections 27, 28, and 29.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Ward Sanders, P.E., General Manager, Sunset Falls Limited Partnership, 8 North Main Street #123, West Hartford, Connecticut 06107, (203) 521–1918.

i. *FERC Contact:* Mr. Michael Strzelecki, (202) 219–2827.

j. *Comment Date:* December 19, 1991.

k. *Description of Project:* The proposed project would consist of: (1) A 15-foot-high diversion structure on the Skykomish River South Fork; (2) an 18.5-foot-diameter, 9,000-foot-long tunnel; (3) a powerhouse containing two generating units with a combined installed capacity of 45.3 MW; (4) a 2,000-foot-long access road; and (5) a 115-kV, 1,000-foot-long transmission line interconnecting with an existing Puget Sound Power and Light transmission line.

No new access roads will be required to conduct the studies under the permit. The approximate cost of the studies would be $450,000.

1. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

27 a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 11196–000.

c. *Date filed:* October 7, 1991.

d. *Applicant:* The Farmers Co-operative Irrigation Co., Ltd. (FCIC).

e. *Name of Project:* Farmers Co-operative Irrigation Hydropower Project.

f. *Location:* At the head of the FCIC canal and on the Payette River near the town of Emmett in Gem County, Idaho.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Carl L. Myers, P.E., Myers Engineering Company, P.A., 750 Warm Springs Avenue, Boise, Idaho 83712, (208) 336–1425.

i. *FERC Contact:* Mr. Michael Strzelecki, (202) 219–2827.

j. *Comment Date:* December 27, 1991.

k. *Description of Project:* The proposed run-of-river project would be located at a bifurcation of the Payette River around an island and would consist of: (1) The applicant's existing 4-foot-high rubble diversion structure on the Payette River to the north of the island; (2) the applicant's existing concrete and wood diversion structure on the Payette River to the south of the island which will be raised from 5 feet to 8 feet; (3) a 75-foot-long spillway adjacent to the latter diversion structure; (4) a 300-foot-long section of the applicant's existing canal which will be widened from 18 feet to 35 feet; (5) a powerhouse containing four generating units with a total installed capacity of 615 kW; (6) a 600-foot-long rip-rap tailrace returning water from the canal back to the Payette River; (7) a 600-foot-long transmission line interconnecting with an existing 69-kV Idaho Power Company transmission line; and (8) appurtenant facilities.

No new access roads will be required to conduct the studies under the permit. The approximate cost of the studies would be $100,000.

1. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

28 a. *Type of Application:* Declaration of Intention.

b. *Docket No:* EL92–4.

c. *Date Filed:* October 8, 1991.

d. *Applicant:* Raymond W. Tuckwiller.

e. *Name of Project:* Blue Grass Farms.

f. *Location:* A spring near Milligan Creek Blue Grass Farms, Lewisburg, West Virginia.

g. *Filed Pursuant to:* Section 23(b) of the Federal Power Act, 16 U.S.C. 817(b).

h. *Applicant Contact:* Blue Grass Farms, c/o Raymond W. Tuckwiller, Rt. 2, Box 322, Lewisburg, WV 24901, (304) 645–2622.

i. *FERC Contact:* Diane M. Scire, (202) 219–2682.

j. *Comment Date:* December 5, 1991.

k. *Description of Project:* The proposed project will consist of: (1) A spring; (2) a turbine filled with twin cups and multiple nozzles to harness the flow from the spring; (3) a generator with an installed capacity of 12.5 kW; and (4) appurtenant facilities.

When a Declaration of Intention is filed with the Federal Energy Regulatory Commission, the Federal Power Act requires the Commission to investigate and determine if the interests of interstate or foreign commerce would be affected by the project. The Commission also determines whether or not the project: (1) Would be located on a navigable waterway; (2) would occupy or affect public lands or reservations of the United States; (3) would utilize surplus water or water power from a government dam; or (4) if applicable, has involved or would involve any construction subsequent to 1935 that may have increased or would increase the project's head or generating capacity, or have otherwise significantly modified the project's pre-2935 design or operation.

1. *Purpose of Project:* The energy will be used to charge batteries. The batteries will be used in the owner's battery-powered truck, automobile, and an agricultural tractor. Surplus energy will be stored in the batteries and will be put through a 120 volt DC/120 volt AC invertor. The inverted energy will be

used in the owner's shop and barns for lighting.

m. This notice also consists of the following standard paragraphs: B, C, and D2.

Standard Paragraphs

A2. *Development Application*—Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified deadline date for the particular application, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified deadline date for the particular application. Applications for preliminary permits will not be accepted in response to this notice.

A5. *Preliminary Permit*—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30 (b)(1) and (9) and 4.36.

A7. *Preliminary Permit*—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before the specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30 (b)(1) and (9) and 4.36.

A9. *Notice of Intent*—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, include an unequivocal statement of intent to submit, if such an application may be filed, either (1) a preliminary permit application or (2) a development application (specify which type of application), and be served on the applicant(s) named in this public notice.

A10. *Proposed Scope of Studies Under Permit*—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

B. *Comments, Protests, or Motions to Intervene*—Anyone may submitcomments, a protest, or a motion to intervene in accordance with the requirements of the Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

B1. and B2. *Protests or Motions to Intervene*—Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

C. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PROTEST", "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426. An additional copy must be sent to Dean Shumway, Director, Division of Project Review, Federal Energy Regulatory Commission, room 1027 (810 1st), at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

D2. *Agency Comments*—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtain by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

E. *Filing and Service of Responsive Documents*—The application is not ready for environmental analysis at this time; therefore, the Commission is not now requesting comments, recommendations, terms and conditions, or prescriptions.

When the application is ready for environmental analysis, the Commission will issue a public notice requesting comments, recommendations, terms and conditions, or prescriptions.

All filings must (1) bear in all capital letters the title "PROTEST" or "MOTION TO INTERVENE;" (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, Room 1027, at the above address. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application.

Dated: October 30, 1991, Washington, DC.

Lois D. Cashell,

Secretary.

[FR Doc. 91-28092 Filed 11-21-91; 8:45 am]

BILLING CODE 6717-01-M

[Project Nos. 2085-004, et al.]

Hydroelectric Applications (Southern California Edison Co. et al.); Applications

Take notice that the following hydroelectric applications have been filed with the Commission and are available for public inspection:

1 a. *Type of Application*: Amendment of License.

b. *Project No*: 2085–004.

c. *Date Filed*: July 3, 1990.

d. *Applicant*: Southern California Edison Company.

e. *Name of Project*: Mammoth Pool Project.

f. *Location*: The project is located on the San Joaquin River, Rock Creek and Ross Creek, in Fresno and Madera Counties, California. The project affects navigable waters and lands of the United States within the Sierra National Forest.

g. *Filed Pursuant to*: Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact*: Mr. E. Martinez, Manager of Hydro Generation, Southern California Edison Company, P.O. Box 800, 2244 Walnut Grove Avenue, Rosemead, CA 91770. (818) 302–1564.

i. *FERC Contact*: Kenneth Fearon, (202) 219–2657.

j. *Comment Date*: December 23, 1991.

k. *Description of Amendment:* The licensee requests approval of an as-built revised exhibit M. The as-built exhibit M describes a 943-kW turbine/generator installed in the 30-inch-diameter penstock at the downstream portal of the converted diversion tunnel for the Mammoth Pool Dam. The exhibit also describes an increase in the total installed capacity of the two generating units, located in the Mammoth Pool Powerhouse, from the authorized 129,360-kW to 190,000-kW. The increase in installed capacity is due to modifications made to the generating units during the early 1980's and 1990. The total installed capacity of the as-built project is 190,943-RW.

l. This notice also consists of the following standard paragraphs: B, C, and D2.

2 a. *Type of Filing*: Major New License.

b. *Project No.*: 2221–005.

c. *Date Filed*: August 26, 1991.

d. *Applicant*: The Empire District Electric Company.

e. *Name of Project*: Ozark Beach Project.

f. *Location*: On the White River, in Taney County, Missouri.

g. *Filed pursuant*: Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contacts*: R.L. Lamb, President, The Empire District Electric Company, P.O. Box 127, Joplin, MO 64802, (417) 623–4700.

i. *FERC Contact*: Héctor M. Pérez, (202) 219–2843.

j. *Comment Date*: January 3, 1992.

k. *Status of Environmental Analysis*: This application is ready for environmental analysis at this time—see attached paragraph D2.

1. The existing project consists of: (1) A reservoir (Lake Taneycomo) with a storage capacity of 28,000 acre-feet and a surface area of 2,200 acres at normal pool elevation of 701.1 feet mean sea level (msl); (2) the 63-foot-high and 1,300-foot-long Ozark Beach Dam composed of a 593-foot-long reinforced concrete Ambursen-type spillway with a crest elevation of 697.1 feet msl, a 12-foot-thick concrete wall at the right (west) of the spillway, and a earthen embankment with a continuous reinforced concrete core wall at the left of the spillway; (3) a 485-foot-long section of 4-foot-high flashboards on the spillway; (4) a 108-foot-long section of controllable gates on the spillway; (5) an intake structure and concrete powerhouse on the concrete wall section containing four 4–MW turbine-generator units; (6) a 200-foot-long, 5-kV transmission line; and (7) other appurtenances.

m. *Purpose of this Project*: The energy generated by the project is used by the Applicant in its system. The Applicant is a public utility serving portions of the states of Missouri, Kansas, Arkansas, and Oklahoma by the generation, transmission, and distribution of electric power.

n. This notice also consists standard paragraphs B1 and D2.

o. *Available Locations of Application*: A copy of the application is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at 941 North Capitol Street, NE., room 3104, Washington, DC 20426, or by calling (202) 208–1371. A copy is also available for inspection and reproduction at The Empire District Electric Company, 602 Joplin Street Joplin, Missouri, (417) 623–4700.

3. a. *Type of Filing*: Transfer of License for Transmission Lines.

b. *Project Nos.*: 2904–041 and 11197–000.

c. *Date Filed*: September 30, 1991.

d. *Applicants*: Calaveras County Water District (CCWD) and Northern California Power Agency (NCPA).

e. *Name of Project*: North Fork Stanislaus River.

f. *Location*: On the North Fork Stanislaus River, partially on lands of the United States managed by the Bureau of Land Management, in Calaveras County, California.

g. *Filed Pursuant to*: Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contacts*:

CCWD: Mr. Steve Felte, Calaveras County Water District, 427 E. St. Charles St., San Andreas, CA 95249, (209) 754–1069;

Christopher D. Williams, Esq., McLeod, Watkinson & Miller, One Massachusetts Ave., NW., suite 800, Washington, DC 20001, (202) 842–2345;

NCPA: Mr. Hari Modi, Northern California Power Agency, 180 Cirby Way, Roseville, CA 95678, (916) 781–3636;

Frances E. Francis, Esq., Spiegil & McDiarmid, 1350 New York Ave., NW., suite 1100, Washington, DC 20006, (202) 879–4000.

i. *Commission Contact*: Mr. James Hunter, (202) 219–2839.

j. *Comment Date:* December 21, 1991.

k. *Description of Proposed Action*: On February 8, 1982, a license was issued to CCWD for the construction, operation, and maintenance of the North Fork Stanislaus River Project. CCWD proposes to transfer its interests and obligations under the license, with respect to the Collierville Transmission Line and Spicer Meadow Transmission Facilities, to NCPA. The purpose of the proposed transfer is to effectuate the provisions of the power purchase contract entered into between CCWD and NCPA. No change in present operation of the project will result from this transfer.

CCWD certifies that it has fully complied with the terms and conditions of the license. NCPA accepts all the terms and conditions of the license, with respect to the transmission line and facilities, and agrees to be bound thereby to the same extent as though it were the original licensee.

l. This notice also consists of the following standard paragraphs: B and C.

4. a. *Type of Application:* Transfer of License.

b. *Project No.:* 8404–003.

c. *Date Filed:* September 13, 1991.

d. *Applicant:* Windsor Locks Canal Company and Windsor Locks Hydroelectric Associates, L.P.

e. *Name of Project:* Windsor Locks Project.

f. *Location:* On the Connecticut River in Hartford County, Connecticut.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* William J. Madden, Jr., Winston and Strawn, 1400

L. Street, NW., Washington, DC 20005–3502, (202) 371–5215.

i. *FERC Contact:* Robert Bell (tag) (202) 219–2806.

j. *Comment Date:* December 12, 1991.

K. *Description of Project:* On December 27, 1989, a license was issued to Windsor Locks Canal Company and Windsor Locks Hydroelectric Associates, L.P., (licensees) to construct, operate, and maintain the Windsor Locks Project 8404. The licensees intend to transfer the license to Windsor Locks Canal Company (transferee), because Windsor Locks Hydroelectric Associates, L.P. no longer wants to be a co-licensee. The transferee intends to purchase the entire project and agrees to accept the terms and conditions as if it were the original licensee.

1. This notice also consists of the following standard paragraphs: B and C.

5 a. *Type of Application:* Amendment of License.

b. *Project No:* 8936–008.

c. *Date Filed:* September 13, 1991.

d. *Applicant:* BES Hydro, Inc.

e. *Name of Project:* Power Canal Project.

f. *Location:* The project is located in the tailrace canal of Pacific Gas and Electric Company's (PG&E) licensed Potter Valley Project, FERC No. 77, located on the Eel and East Fork Russian Rivers in Lake and Mendocino Counties, California.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Frank Shaw Bacik, Rawles, Hinkle, Carter, Behnke, & Oglesby, 169 Mason Street, Suite 300, Ukiah, CA 95482, (707) 462–6694.

i. *FERC Contact:* Kenneth Fearon, (202) 219–2657.

j. *Comment Date:* December 23, 1991.

k. *Description of Amendment:* The licensee proposes to install a hydraulically operated, automatically controlled slide gate at the existing diversion dam to increase the authorized water surface elevation of 976.7 feet USGS to 977.53 feet USGS. Additionally, the licensee proposes to install an analogue chart recorder to monitor the water surface elevation at the diversion dam.

l. This notice also consists of the following standard paragraphs: B, C, and D2.

6 a. *Type of Applications:* Amendment of License.

b. *Project No:* 11006–002.

c. *Date Filed:* October 1, 1991.

d. *Applicant:* City of Lewiston.

e. *Name of Project:* Upper Androscogging.

f. *Location:* On the Upper Canal of the Lewiston Canal System in the City of Lewiston Maine.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Christopher C. Branch, P.E., Public Works Director/City Engineer, City of Lewiston, 103 Willow Street, Lewiston, ME 04240, (207) 784–2951.

i. *FERC Contact:* Paul Shannon, (202) 219–2866.

j. *Comment Date:* December 13, 1991.

k. *Description of Amendment:* The Amendment of License proposes to add Unit No. 1 with a generating capacity of 700 kW and a hydraulic capacity of 310 cfs to the Upper Androscoggin Project. In the Order Approving Partial Transfer of License, Amendment of License, and Redesignation of Project Works, 54 FERC ¶ 62,123, issued February 26, 1991, the Commission approved the retirement of Unit No. 1 from the project works. The project is presently licensed for two units—Nos. 2 and 3. Unit No. 2 has a generating capacity of 515 kW and a hydraulic capacity of 205 cfs. Unit No. 3 has a generating capacity of 480 kW and a hydraulic capacity of 190 cfs.

l. This notice also consists of the following standard paragraphs: B, C, and D2.

7 a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 11176–000.

c. *Date filed:* August 16, 1991.

d. *Applicant:* Dominguez Hydroelectric Associates.

e. *Name of Project:* Dominguez.

f. *Location:* Partially of lands administered by the Bureau of Land Management, on the Gunnison River, in Mesa and Delta Counties, Colorado. Township 12 S, Range 99 W, and Section 33.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. James M. Pike, Western States Water & Power, Tower III, Suite 220, 1515 Arapahoe Street, Denver, CO 80202, (303) 820–4286.

i. *FERC Contact:* Michael Spencer at (202) 219–2846.

j. *Comment Date:* January 10, 1992.

k. *Description of Project:* The project would consist of: (1) A 250-foot-high roller compacted concrete lower dam; (2) a reservoir with a surface area of 8,400 acres and a storage capacity of 750,000 acre-feet; (3) a powerhouse at this dam with a capacity of 18 MW; (4) a 230-foot-high upper dam; (5) an upper reservoir with a surface area of 150 acres, and a storage capacity of 10,000 acre-feet; (6) a 20-foot-diameter, 950-foot-long tunnel; (7) a powerhouse/pump station with a capacity of 2,500 MW; and (8) a 1-mile-long transmission line. The project would have an estimated average annual generation of 1,314,000 MWh.

No new access road will be needed to conduct the studies. The applicant estimates that the cost of the studies to be conducted under the preliminary permit would be $4,700,000.

l. *Purpose of Project:* Project power would be sold.

m. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

8 a. *Type of Application:* Conduit Exemption.

b. *Project No.:* 11192–000.

c. *Date filed:* August 26, 1990.

d. *Applicant:* Catherin Gillihan.

e. *Name of Project:* Gillihan Hydroelectric.

f. *Location:* On an existing water supply system fed by water from No Name Creek, a small tributary to the Big Creek, in Valley County, Idaho; T21N, R9E, in section 35, B. M.

g. *Filed Pursuant to:* Section 30 of the Federal Power Act, 16 U.S.C. 823(a).

h. *Applicant Contact:* Mr. Richard K. Linville, 316 E. Main Street, P.O. Box 6721, Emmett, ID 83617, (208) 365–2106.

i. *FERC Contact:* Mr. Surender M. Yepuri, P.E., (202) 219–2847.

j. *Comment Date:* December 16, 1991.

k. *Description of Project:* The existing project consists of: (1) A 10-inch-diameter, 250-foot-long conduit pipe, reducing to a 4-inch-diameter conduit pipe, off a 10-inch-diameter pipe of the water supply system, (2) a small power house containing a generating unit with a rated capacity of 5kW and producing an average annual output of 5.4 MWh, and (3) a short wooden flume returning the water to Big Creek.

l. *Purpose of the Project:* The project power is used on site by the applicant.

m. *Waiver:* Applicant has filed a petition for waiver of Section 4.30(b)(26)(v) pursuant to 18 CFR 4.92(a)(1) and 385.207.

n. This notice also consists of the following standard paragraphs: B, C, and D3b.

9 a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 11194–000.

c. *Date filed:* September 30, 1991.

d. *Applicant:* Mr. Michael L. Keiser.

e. *Name of Project:* Cascade Ranch Water Power Project.

f. *Location:* Partially on lands administered by the U.S. Bureau of Land Management on Cascade Ranch near the town of Lakecreek in Jackson County, Oregon. T36S, R1E in sections 6, 7, 17, 18, 20, 29, 30, and 31.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Michael L. Keiser, 3636 N. Broadway, Chicago, Illinois 60613–4488, (312) 348–6410.

i. *FERC Contact:* Mr. Michael Strzelecki, (202) 219–2827.

j. *Comment Date:* January 10, 1992.

k. *Description of Project:* The proposed project would include two developments. The first development would consist of: (1) A side-channel intake on Lost River; (2) the applicant's existing 5-mile-long irrigation canal; (3) a 3-foot-high structure diverting water from the canal into a penstock; (4) a 2,420-foot-long penstock; (5) a powerhouse containing two 250-kW generating units; (6) a tailrace returning water to the applicant's existing 40-acre Lake Flats Reservoir; (7) a 3-mile-long, 12.5-kV transmission line interconnecting with an existing Pacific Corporation transmission line; and (8) appurtenant facilities. The second development would be located north of the first development and would include: (1) the applicant's existing Lake Flats Reservoir and 20-foot-high earthen dam; (2) a 4,940-foot-long penstock; (3) a powerhouse containing two 250-kW generating units; (4) a tailrace returning water to the Cascade Ranch irrigation system; (5) a 100-foot-long transmission line interconnecting with the proposed transmission line from the first development; and (6) appurtenant facilities.

No new access roads will be needed to conduct the studies. The approximate cost of the studies would be $75,000.

l. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

10. a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 11198–000.

c. *Date filed:* October 15, 1991.

d. *Applicant:* Portland General Electric Company.

e. *Name of Project:* Three Lynx Creek Hydroelectric Project.

f. *Location:* Partially within the Mount Hood National Forest on Three Lynx Creek, a tributary to the Clackamas River, in Clackamas county, Oregon. T5S, R6E in sections 15 and 22.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Gary W. Hackett, Manager, Hydro Production Support, Portland General Electric Company, 121 S.W. Salmon Street, Portland, Oregon 97204, (503) 464–8005.

i. *FERC Contact:* Mr. Michael Strzelecki, (202) 219–2827.

j. *Comment Date:* January 6, 1992.

k. *Description of Project:* The proposed project would be an addition to the existing Oak Grove Project No. 135 and would consist of: (1) A 10-foot-high diversion structure on Three Lynx Creek; and (2) a 24-inch-diameter, 3,600-foot-long penstock interconnecting with an existing Oak Grove Project penstock. No new generating facilities or transmission lines are proposed. This project would add about 6.3 GWh of generation to the Oak Grove Project.

No new access roads will be needed to conduct the studies. the approximate cost of the studies would be $200,000.

1. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

Standard Paragraphs

A5. *Preliminary Permit*—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) (1) and (9) and 4.36.

A7. *Preliminary Permit*—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before the specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) (1) and (9) and 4.36.

A9. *Notice of Intent*—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, include an unequivocal statement of intent to submit, if such an application may be filed, either (1) a preliminary permit application or (2) a development application (specify which type of application), and be served on the applicant(s) named in this public notice.

A10. *Proposed Scope of Studies under Permit*—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

B. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of the Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

B1. *Protests or Motions to Intervene*—Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

C. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PROTEST", "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426. An additional copy must be sent to Dean Shumway, Director, Division of Project Review, Federal Energy Regulatory Commission, Room 1027 (810 1st), at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

D2. *Agency Comments*—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application

may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

D3b. *Agency Comments*—The Commission requests that the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the State Fish and Game agenc(ies), for the purposes set forth in Section 408 of the Energy Security Act of 1980, file within 45 days from the date of issuance of this notice appropriate terms and conditions to protect any fish and wildlife resources or to otherwise carry out the provisions of the Fish and Wildlife Coordination Act. General comments concerning the project and its resources are requested; however, specific terms and conditions to be included as a condition of exemption must be clearly identified in the agency letter. If an agency does not file terms and conditions within this time period, that agency will be presumed to have none. Other Federal, state and local agencies are requested to provide any comments they may have in accordance with their duties and responsibilities. No other formal requests for comments will be made. Comments should be confined to substantive issues relevant to the granting of an exemption. If an agency does not file comments within 45 days from the date of issuance of this notice, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Dated: November 15, 1991, Washington, DC.

Lois D. Cashell,

Secretary.

[FR Doc. 91-28091 Filed 11-21-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP92-171-000, et al.]

Texas Gas Transmission Corp. et al.; Natural Gas Certificate Filings

November 15, 1991.

Take notice that the following filings have been made with the Commission:

1. Texas Gas Transmission Corporation

[Docket No. CP92-171-000]

Take notice that on November 12, 1991, Texas Gas Transmission Corporation (Texas Gas), P.O. Box 1160, Owensboro, Kentucky 42302, filed in Docket No. CP91-171-000 an application pursuant to section 7(c) of the Natural Gas Act for authorization to increase the daily contract demands of two existing customers, Citizens Gas and Coke Utility (Citizens) and Community Natural Gas Co., Inc. (Community Natural), all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Texas Gas states that Citizens has requested an increase in sales contract demand of 24,875 MMBtu/day for a total sales contract demand of 147,000 MMBtu/day. Texas Gas states further that Community Natural has requested an increase of 500 MMBtu/day for a total sales contract demand of 4,000 MMBtu/day.

It is said that the proposed increases are necessary because of growth in the customers' service areas, current and anticipated. It is further said that sufficient capacity exists due to various contract demand reductions on the Texas Gas system to serve the total increase in sales contract demand of 25,375 MMBtu/day for the two customers without the construction of any additional facilities, or detriment to any other customers.

The proposed increases, it is said, are requested to be effective November 1, 1992.

Comment date: December 6, 1991, in accordance with Standard Paragraph F at the end of the notice.

2. Northwest Pipeline Corp.

[Docket No. CP92-158-000]

Take notice that on November 8, 1991, Northwest Pipeline Corporation (Northwest), 295 Chipeta Way, Salt Lake City, Utah 84158, filed in Docket No. CP92-158-000, a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to partially abandon the existing facilities at the Dallesport delivery point in Klickitat County, Washington and construct and operate upgraded facilities at the existing Dallesport delivery point to accommodate existing firm service obligations to Northwest Natural Gas Company (Northwest Natural) under its blanket certificate issued in Docket No. CP82-433-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

Northwest states that the existing Dallesport delivery point has a design capacity of approximately 888 Dth's per day at a delivery pressure of 150 psig, while Northwest's current authorized maximum delivery obligation for firm sales and transportation to Northwest Natural at the Dallesport delivery point is 2,100 Dth per day.

Northwest indicates that it proposes to upgrade the existing inadequate facilities at the Dallesport delivery point by replacing the existing 1-inch regulator and 1-inch relief valve with a new 1-inch higher capacity regulator and a new 2-inch relief valve. Northwest further indicates that this upgrading of this facility would result in a maximum station design capacity of 3,300 Dth's per day at 150 psig, sufficient to handle the existing maximum delivery obligations. Northwest states that the total cost of upgrading the Dallesport delivery point is estimated to be approximately $10,200 including the $1,000 cost of removing the old facilities. Northwest further states that since this upgrade is required to replace inadequate equipment and to enable it to deliver its current contract obligations to Northwest Natural, Northwest would not require any construction cost reimbursement from Northwest Natural.

Comment date: December 30, 1991, in accordance with Standard Paragraph G at the end of this notice.

3. Delmarva Power and Light Co.

[Docket No. CP92-153-000]

Take notice that on November 7, 1991, Delmarva Power and Light Company (Delmarva), 800 King Street, Wilmington, Delaware 19899, filed in Docket No. CP92-153-000 an application pursuant to section 7(c) of the Natural Gas Act for authorization to construct and operate certain pipeline facilities, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Specifically, Delmarva requests authorization to construct and operate approximately 4.2 miles of 16-inch pipeline extending from an interconnection with Texas Eastern Transmission Corporation's (Texas Eastern) Line 1-A-1 in Delaware County, Pennsylvania to Delmarva's existing facilities near Claymont, New Castle County, Delaware.

Delmarva states that the proposed facilities would enable it to receive up to 100,000 Dth of natural gas per day of transportation service from Texas Eastern.

Delmarva further states that the proposed facilities would enable it to directly interconnect with another interstate pipeline which would increase the availability to Delmarva of new supplies of natural gas and Delmarva's flexibility to acquire such supplies. Delmarva would utilize the additional

natural gas supplies for electric generating, it is stated.

Delmarva further requests that Commission jurisdiction be limited to the facilities proposed herein.

Delmarva estimates the cost of the proposed facilities to be $5,951,000 which would be financed out of working capital.

Comment date: December 6, 1991, in accordance with Standard Paragraph F at the end of this notice.

4. Williams Natural Gas Co.

[Docket No. CP92–157–000]

Take notice that on November 8, 1991, Williams Natural Gas Company (WNG), P.O. Box 3288, Tulsa, Oklahoma 74101, filed in Docket No. CP92–157–000 a request pursuant to §§ 157.205 and 157.216(b) of the Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to abandon the transportation of natural gas for direct sale of Honorbuilt Industries, Inc. (Honorbuilt) and the sale of gas for resale to Yale Gas Company Inc. (Yale), under its blanket certificate in Docket No. CP82–479–000, all as more fully set forth in the request on file with the Commission and open to public inspection.

WNG states that Honorbuilt and Yale have requested the sales abandonments. The facilities will remain in place to enable both Honorbuilt and Yale to access transportation gas if desired.

Comment date: December 30, 1991, in accordance with Standard Paragraph G at the end of this notice.

5. Northwest Pipeline Corp.

[Docket No. CP92–159–000]

Take notice that on November 8, 1991, Northwest Pipeline Corporation (Northwest), 295 Chipeta Way, Salt Lake City, Utah 84158, filed in Docket No. CP92–159–000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to construct and operate additional metering facilities at an existing metering station which serves Washington Natural Gas Company (Washington Natural) under Northwest's blanket certificate issued in Docket No. CP82–433–000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Specifically, Northwest proposes to construct and operate an additional 4-inch meter and related facilities at its Duvall/Cottage Lake Meter Station in King County, Washington, to provide a design delivery capacity of approximately 11,500 Dth of natural gas per day at a delivery pressure of 150 psig. Northwest states that the proposed facilities would by-pass the existing facilities and would be used only when gas flows exceed the capacity of the existing facilities.

Northwest further states that existing capacity of the meter station is 9,696 Dth per day of natural gas at a delivery pressure of 150 psig, whereas its firm delivery obligation to Washington Natural is 10,654 Dth per day. Northwest asserts that the proposed facilities are required since the existing facilities are inadequate to reliably serve its present delivery obligation.

Northwest states that its tariff does not prohibit expansion of delivery point facilities and that its proposal will have no significant impact on its system peak day deliveries.

Comment date: December 30, 1991, in accordance with Standard Paragraph G at the end of this notice.

Standard Paragraphs

F. Any person desiring to be heard or make any protest with reference to said filing should on or before the comment date file with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., 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 385.211 and 385.214) 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 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 filing 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 the applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 91–28093 Filed 11–21–91; 8:45 am]

BILLING CODE 6717–01–M

Office of Fossil Energy

[FE Docket No. 91–41–NG]

Tennessee Gas Pipeline Co.; Order Granting Blanket Authorization to Import "Special Purchase Gas" From Canada

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Notice of an Order Extending Blanket Authorization to Import "Special Purchase Gas" from Canada.

SUMMARY: The Office of Fossil Energy of the Department of Energy gives notice that it has issued an order to Tennessee Gas Pipeline Company (Tennessee) granting its blanket authorization to import up to 75,000 Mcf per day of "special purchase gas" from its Canadian supplier, ProGas Limited, over a two-year period beginning on the date of first import after December 12, 1991.

A copy of this order is available for inspection and copying in the Office of Fuels Programs Docket Room, 3F–056, Forrestal Building, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–

9478. The docket room is open between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, November 18, 1991.

Clifford P. Tomaszewski,

Acting Deputy Assistant Secretary for Fuels Programs, Office of Fossil Energy.

[FR Doc. 91-28152 Filed 11-21-91; 8:45 am]

BILLING CODE 6450-01-M

[FE Docket No. 91-85-LNG]

Texaco Gas Marketing, Inc.; Application To Import Liquefied Natural Gas

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Notice of application for blanket authorization to import liquefied natural gas.

SUMMARY: The Office of Fossil Energy of the Department of Energy (DOE) gives notice of receipt on October 15, 1991, of an application filed by Texaco Gas Marketing, Inc. (TGMI) requesting blanket authorization to import on a short-term or spot basis up to 150 billion cubic feet (Bcf) of liquefied natural gas (LNG) over a two-year period beginning with the date of first delivery. TGMI intends to use existing U.S. receiving facilities and to import LNG from a variety of international sources. TGMI states that it will submit quarterly reports detailing each transaction.

The application was filed under section 3 of the Natural Gas Act and DOE Delegation Order Nos. 0204-111 and 0204-127. Protests, motions to intervene, notices of intervention and written comments are invited.

DATES: Protests, motions to intervene, or notices of intervention, as applicable, requests for additional procedures and written comments are to be filed at the address listed below no later than 4:30 p.m., eastern time, December 23, 1991.

ADDRESSES: Office of Fuels Programs, Fossil Energy, U.S. Department of Energy, Forrestal Building, Room 3F-056, FE-50, 1000 Independence Avenue, SW., Washington, DC 20585.

FOR FURTHER INFORMATION:

Charles Blackburn, Office of Fuels Programs, Fossil Energy, U.S. Department of Energy, Forrestal Building, Room 3F-094, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-7751.

Diane Stubbs, Office of Assistant General Counsel for Fossil Energy, U.S. Department of Energy, Forrestal Building, Room 6E-042, GC-14, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-6667.

SUPPLEMENTARY INFORMATION: TGMI, a Delaware corporation with its principal place of business in Houston, Texas, purchases, sells and transports natural gas. TGMI is a wholly-owned subsidiary of Texaco Exploration and Production Inc., which is a wholly-owned subsidiary of Texaco, Inc. TGMI intends to import the LNG for its own account or for the account for others.

TGMI asserts that the import authorization would provide it the flexibility to negotiate numerous transactions, involving various international sources with which trade in natural gas has not been prohibited, under a single license. TGMI proposes to make its imported gas available to purchasers under contract terms that will be market-competitive throughout the contract period.

The decision on this import application will be made consistent with DOE's gas import policy guidelines, under which the competitiveness of an import arrangement in the markets served is the primary consideration in determining whether it is in the public interest (49 FR 6684, February 22, 1984). Parties, especially those that may oppose this application, should comment on the issue of competitiveness as set forth in the policy guidelines regarding the requested import authority. The applicant asserts that imports made under the proposed arrangement will be competitive. Parties opposing this arrangement bear the burden of overcoming this assertion.

NEPA Compliance. The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, requires DOE to give appropriate consideration to the environmental effects of its proposed actions. No final decision will be issued in this proceeding until DOE has met its NEPA responsibilities.

Public Comment Procedures. In response to this notice, any person may file a protest, motion to intervene or notice of intervention, as applicable, and written comments. Any person wishing to become a party to the proceeding and to have their comments considered as the basis for any decision on the application must, however, file a motion to intervene or notice of intervention, as applicable. The filing of a protest with respect to this application will not serve to make the protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the application. All protests, motions to intervene, notices of intervention, and written comments must meet the requirements that are specified by the regulations in 10 CFR part 590. Protests, motions to intervene, notices of intervention, requests for additional procedures, and written comments should be filed with the Office of Fuels Programs at the address listed above.

It is intended that a decisional record on the application will be developed through responses to this notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. A party seeking intervention may request that additional procedures be provided, such as additional written comments, an oral presentation, a conference, or trial-type hearing. Any request to file additional written comments should explain why they are necessary. Any request for an oral presentation should identify the substantial question of fact, law, or policy at issue, show that it is material and relevant to a decision in the proceeding, and demonstrate why an oral presentation is needed. Any request for a conference should demonstrate why the conference would materially advance the proceeding. Any request for a trial-type hearing must show that there are factual issues genuinely in dispute that are relevant and material to a decision and that a trial-type hearing is necessary for a full and true disclosure of the facts.

If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final opinion and order may be issued based on the official record, including the application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

A copy of TGMI's application is available for inspection and copying in the Office of Fuels Programs Docket Room, room 3f-056 at the above address. The docket room is open between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC on November 18, 1991.

Clifford P. Tomaszewski,

Acting Deputy Assistant Secretary for Fuels Programs, Office of Fossil Energy.

[FR Doc. 91-28153 Filed 11-21-91; 8:45 am]

BILLING CODE 6450-01-M

ENVIRONMENTAL PROTECTION AGENCY

[FRL 4033-5]

Agency Information Collection Activities Under OMB Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected cost and burden; where appropriate, it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 23, 1991.

FOR FURTHER INFORMATION CONTACT: Sandy Farmer at EPA, (202) 260-2740.

SUPPLEMENTARY INFORMATION:

Office of Solid Waste and Emergency Response

Title: Applications for "Preauthorization of a CERCLA Response Action" and "Claim for CERCLA Response Action," EPA ICR #1304.03. This ICR requests reinstatement of a previously approved collection (OMB #2050-0106) for which approval has expired.

Abstract: The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), and as amended in 1986, establishes broad Federal authority to undertake removal and remedial actions in response to releases or threats of releases of hazardous substances and certain pollutants and contaminants into the environment. One of the uses of the Hazardous Substance Superfund (the Fund), which is authorized under CERCLA, is the payment of claims for necessary response costs.

Under section 111(a)(2) of CERCLA, claimants are authorized to be reimbursed from the Fund for necessary response costs incurred as a result of carrying out the National Oil and Hazardous Substances Pollution Contingency Plan. In addition, section 122(b)(1) of CERCLA delegates to EPA the authority to enter into agreements with potentially responsible parties (PRPs), to allow the PRPs to perform a preauthorized phase of a response action in return for reimbursement of an agreed-on portion of response costs from the Fund. Section 112(b)(1) of CERCLA authorizes EPA to prescribe the appropriate forms and procedures for the filing of response claims against the Fund. All proposed response actions must be approved in advance by EPA through the preauthorization process in order for a subsequent claim to be awarded.

The information required by the application and claim forms is essential for EPA to adequately review and evaluate the merits and validity of a response claim, and to make a decision on whether to award that claim from the Fund. The information and data submitted by applicants under the nine sections of the application for preauthorization will be used by the Agency to make a determination on whether to approve in advance a proposed response action under the preauthorization process. The subsequent information submitted to EPA on the claim form will be used to determine whether or not to award the claim. In its role as manager of the Fund, this information allows EPA to ensure appropriate uses of Fund resources, meet cost control and budget requirements, protect against potential waste and fraud, and ensure that the proposed response actions themselves do not create environmental hazards.

Burden Statement: The estimated annual public reporting burden for this collection of information under EPA Form 2075-3, "Application for Preauthorization of a CERCLA Response Action," is estimated to average 258 hours per response. These burden estimates include time for reviewing instructions, searching existing data sources, gathering and maintaining needed data, and completing and reviewing the collection of information.

Public reporting burden for the collection of information under EPA Form 2075-4, "Claim for CERCLA Response Action," is estimated to average 42 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining needed data, and completing and reviewing the collection of information. In addition, claimants awarded money from the Fund will be required to maintain their records for a 10-year period. It is estimated that it will require those claimants an average of 15 workhours per year to maintain their records.

Respondents: Preauthorization requests and response claims may be submitted by individuals, private entities, foreign entities, or PRPs (including States or local governments).

Estimated No. of Respondents: 103 (38 preauthorization requests, and 65 claim submitters).

Estimated Total Annual Burden on Respondents: 13,314 hours (9,804 hours for preauthorization requests, 2,730 for the claim submitters, and 780 hours for recordkeeping by claimants receiving awards).

Frequency of Collection: On occasion—only when an applicant/claimant seeks reimbursement for response costs from the fund.

Send comments regarding the burden estimate, or any other aspect of this information collection, including suggestions for reducing the burden, to:

Sandy Farmer, U.S. Environmental Protection Agency, Information Policy Branch (PM-223Y), 401 M Street, SW., Washington, DC 20460

and

Tim Hunt, Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th Street, NW., Washington, DC 20530.

Dated: November 15, 1991.

Paul Lapsley,

Director, Regulatory Management Division.

[FR Doc. 91-28134 Filed 11-21-91; 8:45 am]

BILLING CODE 6560-50-M

[ER-FRL-4033-3]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared November 4, 1991 through November 8, 1991 pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 260-5076.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 5, 1991 (56 FR 14096).

Draft EISs

ERP No. D-AFS-K61120-AZ Rating EC2, Mt. Lemmon Ski Valley Area, Development and Management, Special Use Permit, Santa Catalina District, Coronado National Forest, Pima County, AZ.

Summary

EPA expressed environmental concerns regarding potential impacts to water quality, wetlands, and air quality and requested more information concerning cumulative impacts from other proposed or planned projects in the area.

ERP No. D–AFS–L65153–WA Rating EC2, Calypso Planning Area (commonly called Bourbon Roadless Area) Timber Sales, Implementation, Wind River Ranger District, Gifford Pinchot National Park, Skamania County, WA.

Summary

EPA expressed concerns regarding the effect of the action alternatives on water quality, fisheries, and air quality. EPA also has requested additional information on air quality effects and monitoring.

ERP No. D–AFS–L65154–WA Rating EC2, Lafferty Timber Sale and Road Construction, Implementation, Wenatchee National Forest, First Creek Area, Chelan Ranger District, Chelan County, WA.

Summary

EPA has environmental concerns regarding the effect of the action alternatives on water quality, fisheries and air quality. Additional information is needed on watershed monitoring, water quality and fishery effects, air quality effects, and noise effects.

ERP No. D–AFS–L67029–OR Rating EC2, White King and Lucky Lass Uranium Mine Cleanup and Rehabilitation, Section 404, NPDES Permit and Special Use Permit, Licenses Approval, Fremont National Forest, Lakeview Ranger District, Lake County, OR.

Summary

EPA believes additional data is needed to make a ranking determination on this site for the National Priorities List and to allow comparison of predicted health effects among the alternatives. Information regarding fisheries mitigation, National Pollutant Discharge Elimination System requirements, and wetlands are also needed.

ERP No. D–FHW–E40737–FL Rating EC2, Tampa South Crosstown Expressway Extension, I–75 to SR 60 east of the Brandon Area, Improvement, Funding, Right-of-Way and Section 404 Permit, Hillsborough, FL.

Summary

EPA expressed concerns about environmental impacts associated with wetlands, noise and hazardous waste. EPA believes that the information is insufficient to fully assess the impacts, and recommends that additional information be provided on mitigation for wetland impacts and hazardous waste.

ERP No. D–FHW–E40738–NC Rating EC2, US–220 Connecting the Star/Bisco/Candor Bypass, Improvement, Funding, Right-of-Way, Possible COE Permit, Montgomery and Richmond County, NC.

Summary

EPA believes that the information in this document is insufficient to assess the potential environmental impacts associated with the project. EPA believes that the East Alternative appears to have the least impact to the natural environment.

ERP No. D–MMS–A02234–00 Rating EC2, Mid 1992 thru Mid 1997 Outer Continental Shelf (OCS) Comprehensive Gas and Oil Resources Management Program, Schedule of Sales Adoption, Leasing, Offshore Coastal Counties of AL, AK, CA, DE, FL, GA, LA, MD, NJ, NY, NC, OR, RI, SC, TX, VA and WA.

Summary

EPA believes the current program represents an improvement over past operation. However, EPA still is concerned about several aspects of this program. These concerns include: (1) That protective stipulations described in site-specific EISs have not been adopted; (2) the air quality information presented; (3) cumulative impact methodology; and (4) adoption of preferred alternatives.

ERP No. D–UAG–C11018–NJ Rating EC2, Boeing Michigan Aeronautical Research Center (BOMARC) Missile Site, Radioactive Contamination Clean-Up Evaluation, McGuire Air Force Base, Plumsted Township, Ocean County, NJ.

Summary

EPA has environmental concerns about the proposed project because a preferred alternative is not identified; it is not evident that an appropriate cleanup level for the radioactive material has been established; and implementation of the EIS alternatives may impact air and water quality. EPA requests additional information in the final EIS to address these issues.

ERP No. DS–APH–A82120–00 Rating E02, National Boll Weevil Cooperative Control Program, Implementation and Funding, AL, AZ, AR, CA, FL, GA, KS, LA, MS, MO, NM, NC, OK, SC, TN, TX, VA.

Summary

EPA has environmental objections to the proposed project. The major objection is that the eradication program relies heavily on the use of pesticides to control the boll weevil. Several issues and errors were identified that should be addressed in the final EIS.

Final EISs

ERP No. F–COE–C36066–PR, Upper Rio Grande De Loiza Basin Flood Control Plan, Implementation, PR.

Summary

EPA continues to have environmental concerns because of potential adverse impacts to surface and ground water quality. EPA requested additional information be presented prior to the issuance of the record of decision.

ERP No. F–AAA–A83017–00, Terminal Doppler Weather Radar (TDWR) Site Determination Program, Implementation and Funding.

Summary

Review of the final EIS has been completed and the project found to be satisfactory. No formal letter was sent to the agency.

Regulations

ERP No. R–NRC–A06173–00, 10 CFR parts 2, 40, 50, 51, 70, 110, 140, 150, and 170; Uranium Enrichment Regulations (56 FR 46739).

Summary

EPA has no comments to the proposed rule.

Dated: November 19, 1991.

William D. Dickerson,

Deputy Director, Office of Federal Activities.

[FR Doc. 91–28146 Filed 11–21–91; 8:45 am]

BILLING CODE 6560–50–M

[ER–FRL–4033–2]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 260–5073 or (202) 260–5075.

Availability of Environmental Impact Statements Filed November 11, 1991 Through November 15, 1991 Pursuant to 40 CFR 1506.9.

EIS No. 910407, Draft Supplement, COE, KY, IL, Lower Ohio River Navigation Study Area Improvements, Locks and Dams 52 & 53 (Olmsted Locks and Dams) Replacement and Additional Modifications, Cumberland River to Mississippi River, Several Counties, Kentucky and Illinois, Due: January 06, 1992, Contact: Michael Turner (502) 582–6015.

EIS No. 910408, Final Supplement, COE, IA, Coralville Lake Flood Control, Downstream Area of Influence to Columbus Junction, Additional

Operation and Maintenance Changes, Rock Island District, Johnson, Iowa, Louisa and Washington Counties, IA. Due: December 23, 1991, Contact: Roger Less (309) 788-6361.

EIS No. 910409, Final EIS, BLM, NM, Albuquerque District Resource Management Plan (RMP) Amendment, Oil and Gas Leasing and Development, Farmington, Rio Puerco and Taos Resource Areas, Implementation, Several Counties, NM, Due: December 23, 1991, Contact: Robert Dale (505) 761-8712.

EIS No. 910410, Draft EIS, FHW, WI, WI-TH-29 (Ringle-Shawano) Corridor Project Improvement, Linking I-94 and Minneapolis/St. Paul to Green Bay/Fox River Valley, Land Acquisition and Section 404 Permit, Marathon and Shawano Counties, WI, Due: January 06, 1992, Contact: Robert W. Cooper (608) 264-5940.

EIS No. 910411, Final EIS, EPA, TX, Brazos Island Harbor (BIH) Entrance Channel 42 Foot Project, Ocean Dredged Material Disposal Site (ODMDS) Designation, Brownville, TX, Due: December 23, 1991, Contact: Norm Thomas (214) 255-2260.

EIS No. 910412, Final Supplement, AFS, CA, Plumas National Forest Prototype Project, Augmenting Snow Pack by Cloud Seeding Using Ground Based Dispensers, Additional Information, Implementation, Upper Feather River Basin, Plumas and Sierra Counties, CA, Due: December 23, 1991, Contact: R.C. Bennett (916) 283-2050.

EIS No. 910413, Third Draft Supplement, NOA, AK, Groundfish Fishery of the Bering Sea and Aleutian Islands, Fishery Management Plant, Updated Information, Amendment 18/23 Inshore/Offshore Allocation Alternative Approval and Implementation, AK, Due: January 06, 1992, Contact: William W. Fox, Jr. (301) 437-2239.

Amended Notices

EIS No. 910400, Draft EIS, GSA, GA, Internal Revenue Service, Service Center Annex Consolidation, Construction, Chamblee, GA, Due: January 06, 1992, Contact: Alice Coneybeer (404) 331-1831.

Published FR 11-15-91—Review period reestablished.

Dated: November 19, 1991.

William D. Dickerson,

Deputy Director, Office of Federal Activities.

[FR Doc. 91-28145 Filed 11-21-91; 8:45 am]

BILLING CODE 6560-50-M

[FRL 4033-4]

Class II Underground Injection Control Program Advisory Committee Meetings

AGENCY: Environmental Protection Agency (EPA).

ACTION: Advisory committee meeting.

SUMMARY: As required by section 9(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), we are giving notice of the next meeting of the Advisory Committee on EPA's Class II (oil and gas related) Underground Injection Control Program.

The purpose of the meeting is to further discuss the issues surrounding the construction and areas of review requirements for Class II Underground Injection Wells.

DATES: On Tuesday, December 17, the meeting will begin at 9 a.m. and end at 5 p.m. On Wednesday, December 18, the meeting will begin at 8:30 a.m. and end at 3:30 p.m.

ADDRESSES: The meeting will take place at the Fairmont Hotel, 1717 N. Akard Street, Dallas, Texas 75201, (214) 720-2020.

FOR FURTHER INFORMATION CONTACT: For information on substantive issues, contact Jeffrey Smith, EPA Water Office, (202) 260-5586. On administrative matters, contact Angela Suber, EPA, Regulatory Development Branch, (202) 260-7205, or John Lingelbach, Committee Co-Chair, (202) 887-1037.

Dated: November 18, 1991.

Chris Kirtz,

UIC Advisory Committee Designated Federal Official.

[FR Doc. 91-28135 Filed 11-21-91; 8:45 am]

BILLING CODE 6560-50-M

[OPTS-51776; FRL 4033-6]

Certain Chemicals; Premanufacture Notices

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5(a)(1) of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture or import a new chemical substance to submit a premanufacture notice (PMN) to EPA at least 90 days before manufacture or import commences. Statutory requirements for section 5(a)(1) premanufacture notices are discussed in the final rule published in the Federal Register of May 13, 1983 (48 FR 21722). This notice announces receipt of 21 such PMNs and provides a summary of each.

DATES: Close of review periods:

P 91-1364, January 28, 1992.

P 92-156, 92-157, 92-158, 92-159, 92-160, 92-161, 92-162, 92-163, 92-164, 92-165, January 25, 1992.

P 92-166, 92-167, 92-168, 92-169, January 26, 1992.

P 92-170, January 28, 1992.

P 92-171, 92-172, 92-173, 92-174, 92-175, January 27, 1992.

Written comments by:

P 91-1364, December 29, 1991.

P 92-156, 92-157, 92-158, 92-159, 92-160, 92-161, 92-162, 92-163, 92-164, 92-165, December 26, 1991.

P 92-166, 92-167, 92-168, 92-169, December 27, 1991.

P 92-170, December 29, 1991.

P 92-171, 92-172, 92-173, 92-174, 92-175, December 28, 1991.

ADDRESSES: Written comments, identified by the document control number "(OPTS-51776)" and the specific PMN number should be sent to: Document Processing Center (TS-790), Office of Toxic Substances, EnvironmentalProtection Agency, 401 M St., SW., rm. L-100, Washington, DC, 20460, (202) 260-3532.

FOR FURTHER INFORMATION CONTACT: David Kling, Acting Director, Environmental Assistance Division (TS-799), Office of Toxic Substances, Environmental Protection Agency, rm. E-545, 401 M St., SW., Washington, DC 20460 (202) 554-1404, TDD (202) 554-0551.

SUPPLEMENTARY INFORMATION: The following notice contains information extracted from the nonconfidential version of the submission provided by the manufacturer on the PMNs received by EPA. The complete nonconfidential document is available in the TSCA Public Docket Office NE-G004 at the above address between 8 a.m. and noon and 1 p.m. and 4 p.m., Monday through Friday, excluding legal holidays.

P 91-1364

Manufacturer. Oxid Incorporation.

Chemical. (G) Ethanol,2-(hexylamino)-; 2-ethanol.

Use/Production. (S) Corrosion inhibitor in metal working fluids. Prod. range: 162,000-270,000 kg/yr.

Toxicity Data. Acute oral toxicity: LD50 978 mg/kg species (rat). Acute dermal toxicity: LD50 > 2,020 mg/kg species (rabbit). Skin irritation: strong species (rabbit). Skin sensitization: positive species (guinea pig).

P 92-156

Manufacturer. RRM Alox Corporation.

Chemical. (G) Triethanolamine salts of fatty acid.

Use/Production. (S) Corrosion inhibitor. Prod. range: Confidential.

P 92-157

Manufacturer. RRM Alox Corporation.

Chemical. (G) Triethanolamine salts of fatty acid.

Use/Production. (S) Corrosion inhibitor. Prod. range: Confidential.

P 92-158

Manufacturer. RRM Alox Corporation.

Chemical. (G) Triethanolamine salts of fatty acid.

Use/Production. (S) Corrosion inhibitor. Prod. range: Confidential.

P 92-159

Manufacturer. RRM Alox Corporation.

Chemical. (G) Trimethanolamine salts of fatty acid.

Use/Production. (S) Corrosion inhibitor. Prod. range: Confidential.

P 92-160

Manufacturer. Confidential.

Chemical. (G) Polyurethane polyurea dispersion.

Use/Production. (G) Component of dispersively applied adhesive. Prod. range: 112,000–339,000 kg/yr.

P 92-161

Manufacturer. Confidential.

Chemical. (G) Polyurethane polyurea dispersion.

Use/Production. (G) Component of dispersively applied adhesive. Prod. range: 112,000–339,000 kg/yr.

P 92-162

Manufacturer. Confidential.

Chemical. (G) Polyurethane polyurea dispersion.

Use/Production. (G) Component of dispersively applied adhesive. Prod. range. 112,000–339,000 kg/yr.

P 92-163

Manufacturer. Confidential.

Chemical. (G) Polyurethane polyurea dispersion.

Use/Production. (G) Component of dispersively applied adhesive. Prod. range: 112,000–339,000 kg/yr.

P 92-164

Manufacturer. Confidential.

Chemical. (G) Polyurethane polyurea dispersion.

Use/Production. (G) Component of dispersively applied adhesive. Prod. range: 112,000–339,000 kg/yr.

P 92-165

Manufacturer. Confidential.

Chemical. (G) Polyurethane polyurea dispersion.

Use/Production. (G) Component of dispersively applied adhesive. Prod. range: 112,000–339,000 kg/yr.

P 92-166

Manufacturer. Bedoukian Research, Inc.

Chemical. (S) 5-Decen-ol, acetate,(2)-.

Use/Production. (S) Chemical intermediate. Prod. range: Confidential.

P 92-167

Importer. Asahi Chemical Industries America, Inc.

Chemical. (S) 3-Amino-4,5,6,7-tetrachloro-1-imino-1*H*-isoindole.

Use/Import. (S) Dye preserver for thermal paper. Import range: 100–1000 kg/yr.

Toxicity Data. Acute oral toxicity: LD50 > 5,000 mg/kg species (rat). Eye irritation: none species (rabbit). Skin irritation: none species (rabbit). Mutagenicity: negative. Skin sensitization: negative species (guinea pig).

P 92-168

Importer. Asahi Chemical Industries America, Inc.

Chemical. (S) 4,4',4'-Triisocyanato-2,5-dimethoxytriphenylamine.

Use/Import. (S) Dye preserver for thermal paper. Import range: 100–1000 kg/yr.

Toxicity Data. Acute oral toxicity: LD50 > 5,000 mg/kg species (rat). Eye irritation: none species (rabbit). Skin irritation: none species (rabbit). Mutagenicity: negative. Skin sensitization: negative species (guinea pig).

P 92-169

Importer. Confidential.

Chemical. (G) Substituted triazole.

Use/Import. (G) Chemical synthesis intermediate. Import range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 > 2 g/kg species (rat). Eye irritation: none species (rabbit). Skin irritation: none species (rabbit). Skin sensitization: negative species (guinea pig).

P 92-170

Manufacturer. Bedoukian Research, Inc.

Chemical. (S) 5-Decen-1-ol,(2)-.

Use/Production. (S) Agricultural pheromone. Prod. range: Confidential.

P 92-171

Manufacturer. 3M.

Chemical. (G) Substituted TDI adduct.

Use/Production. (S) Chemical intermediate. Prod. range: Confidential.

P 92-172

Importer. Confidential.

Chemical. (G) Substituted resorcinol.

Use/Import. (S) Component. Import range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 > 5,000 mg/kg species (rat). Eye irritation: none species (rabbit). Skin irritation: none species (rabbit).

P 92-173

Manufacturer. Huls America Inc.

Chemical. (G) Dibasic acid glycol polyester.

Use/Production. (G) Open, nondispersive. Prod. range: Confidential.

P 92-174

Importer. Ausimont USA., Inc.

Chemical. (G) Peroxide curable fluoroelastomer of vinylidene fluoride and tetrafluoroethylene.

Use/Import. (S) Thermoset elastomer. Import range: Confidential.

P 92-175

Importer. Confidential.

Chemical. (G) Rosin modified phenolic resin.

Use/Import. (G) Open, nondispersive. Import range: 500,000–700,000 kg/yr.

Dated: November 18, 1991.

Douglas W. Sellers,

Acting Director, Information Management Division, Office of Toxic Substances.

[FR Doc. 91-28140 Filed 11-21-91; 8:45 am]

BILLING CODE 6560-50-F

[OPTS-51777; FRL 4005-3]

Certain Chemicals; Premanufacture Notices

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5(a)(1) of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture or import a new chemical substance to submit a premanufacture notice (PMN) to EPA at least 90 days before manufacture or import commences. Statutory requirements for section 5(a)(1) premanufacture notices are discussed in the final rule published in the **Federal Register** of May 13, 1983 (48 FR 21722). This notice announces receipt of 18 such PMNs and provides a summary of each.

DATES: Close of review periods:

P 92-176, 92-177, 92-178, January 29, 1992.

P 92–179, 92–180, 92–181, 92–182, 92–183, 92–184, 92–185, February 1, 1992.
P 92–186, 92–187, February 2, 1992.
P 92–188, February 1, 1992.
P 92–189, 92–190, 92–191, February 2, 1992.
P 92–192, 92–192, February 3, 1992.

Written comments by:

P 92–176, 92–177, 92–178, December 30, 1991.
P 92–179, 92–180, 92–181, 92–182, 92–183, 92–184, 92–185, January 2, 1992.
P 92–186, 92–187, January 3, 1992.
P 92–188, January 2, 1992.
P 92–189, 92–190, 92–191, January 3, 1992.
P 92–192, 92–193, January 4, 1992.

ADDRESSES: Written comments, identified by the document control number "(OPTS–51777)" and the specific PMN number should be sent to: Document Processing Center (TS–790), Office of Toxic Substances, Environmental Protection Agency, 401 M St., SW., Rm. L–100, Washington, DC, 20460, (202) 260–3532.

FOR FURTHER INFORMATION CONTACT: David Kling, Acting Director, Environmental Assistance Division (TS–799), Office of Toxic Substances, Environmental Protection Agency, Rm. E–545, 401 M St., SW., Washington, DC 20460 (202) 554–1404, TDD (202) 554–0551.

SUPPLEMENTARY INFORMATION: The following notice contains information extracted from the nonconfidential version of the submission provided by the manufacturer on the PMNs received by EPA. The complete nonconfidential document is available in the TSCA Public Docket Office NE 09G004 at the above address between 8 a.m. and noon and 1 p.m. and 4 p.m., Monday through Friday, excluding legal holidays.

P 92–176

Importer. Austin Chemical Company, Inc.
Chemical. (S) 2,6-Difluorobenzonitrile.
Use/Import. (S) Chemical intermediate. Import range: 150,000–200,000 kg/yr.
Toxicity Data. Acute oral toxicity: LD50 584 mg/kg species (rat). Inhalation toxicity: LC50 > 2640 mg/m3 4H species (rat). Eye irritation: none species (rabbit). Skin irritation: negligible species (rabbit).

P 92–177

Manufacturer. Confidential.
Chemical. (G) Mixed alkylmetallic mercapoester sulfides.
Use/Production. (G) Stabilizer for plastics. Prod. range: Confidential.
Toxicity Data. Acute oral toxicity: LD50 4.3 ml/kg species (rat). Eye irritation: none species (rabbit). Skin irritation: slight species (rabbit).

P 92–178

Importer. Confidential.
Chemical. (G) Carboxy substituted polyamide.
Use/Import. (G) Electronic device coating. Import range: Confidential.
Toxicity Data. Acute oral toxicity: LD50 4.58 mg/kg species (rat). Mutagenicity: negative.

P 92–179

Manufacturer. Confidential.
Chemical. (G) Polyethyleneglycol ester.
Use/Production. (G) Elastronic device coating. Prod. range: 850–3,500 kg/yr.
Toxicity Data. Eye irritation: none species (rabbit). Skin irritation: negligible species (rabbit). Skin sensitization: negative species (guinea pig).

P 92–180

Manufacturer. Confidential.
Chemical. (G) Substituted amino polyethyleneglycol.
Use/Production. (G) Chemical intermediate. Prod. range: 700–3,000 kg/yr.
Toxicity Data. Acute oral toxicity: LD50 > 2,000 mg/kg species (rat). Acute dermal toxicity: LD50 > 2,000 mg/kg species (rabbit). Eye irritation: slight species (rabbit). Skin irritation: negligible species (rabbit). Skin sensitization: negative species (guinea pig).

P 92–181

Manufacturer. Confidential.
Chemical. (G) Polyethyleneglycol substituted amine salt.
Use/Production. (G) Contained use. Prod. range: 400–750 kg/yr.
Toxicity Data. Acute oral toxicity: LD50 > 2,000 mg/kg species (rat). Acute dermal toxicity: LD50 > 2,000 mg/kg species (rabbit). Skin irritation: negligible species (rabbit). Skin sensitization: negative species (guinea pig).

P 92–182

Manufacturer. Eastman Kodak Company.
Chemical. (S) 1-(4-Methylphenyl)-5-phenyl)-1,4-pentadien-3-one.
Use/Production. (G) Chemical intermediate. Prod. range: 300–2,000 kg/yr.
Toxicity Data. Acute oral toxicity: LD50 > 5,000 mg/kg species (rat). Skin irritation: none species (rabbit).

P 92–183

Manufacturer. Eastman Kodak Company.
Chemical. (S) 2-(4-Methylphenyl)-6-phenyl-2,3,5,6-tetrahydro-4*H*-thiopyran-4-one.
Use/Production. (S) Chemical intermediate. Prod. range: 200–1,300 kg/yr.
Toxicity Data. Acute oral toxicity: LD50 > 5,000 mg/kg species (rat). Skin irritation: negligible species (rabbit).

P 92–184

Manufacturer. Eastman Kodak Company.
Chemical. (S) 2-(4-methylphenyl)-6-phenyl-4*H*-thiopyran-4-one 1,1-dioxide.
Use/Production. (S) Chemical intermediate. Prod. range: 150–1,000 kg/yr.
Toxicity Data. Acute oral toxicity: LD50 > 5,000 mg/kg species (rat). Acute dermal toxicity: LD50 > 2,000 mg/kg species (rabbit). Eye irritation: moderate species (rabbit). Skin irritation: negligible species (rabbit). Skin sensitization: positive species (guinea pig).

P 92–185

Manufacturer. Eastman kodak Company.
Chemical. (S) (2-(4-Methylphenyl)-6-phenyl-4*H*-thiopyran-4-ylidine)-propanedinitrile 1,1-dioxide.
Use/Production. (S) Charge control agent. Prod. range: 160–900 kg/yr.
Toxicity Data. Acute oral toxicity: LD50 > 5,000 mg/kg species (rat). Acute dermal toxicity: LD50 > 2,000 mg/kg species (rabbit). Eye irritation: moderate species (rabbit). Skin irritation: negligible species (rabbit). Skin sensitization: positive species (guinea pig).

P 92–186

Manufacturer. Confidential.
Chemical. (G) Vinyl urethane.
Use/Production. (G) Resin. Prod. range: Confidential.

P 92–187

Manufacturer. The Dow Chemical Company.
Chemical. (G) Ion containing polymer.
Use/Production. (G) Elaetrochemical cell separator. Prod. range: Confidential.
Toxicity Data. Acute oral toxicity: LD50 > 2,000 mg/kg species (rat). Skin irritation: negligible species (rabbit).

P 92–188

Importer. Sercol, Inc.
Chemical. (G) Propoxlated urethane acrylate.
Use/Import. (S) Component of screen printing ink. Import range: Confidential.

P 92–189

Manufacturer. Confidential.

Chemical. (G) Urethane acrylic latex.
Use/Production. (G) Component of dispersively applied coating. Prod. range: 1,600–2,500 kg/yr.

P 92–190

Manufacturer. Confidential.
Chemical. (G) Urethane acrylic latex.
Use/Production. (G) Component of dispersively applied coating. Prod. range: 1,600–2,500 kg/yr.

P 92–191

Manufacturer. Confidential.
Chemical. (G) Urethane acrylic latex.
Use/Production. (G) Component of dispersively applied coating. Prod. range: 1,600–2,500 kg/yr.

P 92–192

Manufacturer. Confidential.
Chemical. (G) Alkylaluminoxane.
Use/Production. (G) Contained use. Prod. range: Confidential.

P 92–193

Manufacturer. Confidential.
Chemical. (G) Alkylaluminoxane compound.
Use/Production. (G) Urethane foam additive. Prod. range: 225,000–500,000 kg/yr.

Dated: November 18, 1991.

Douglas W. Sellers,

Acting Director, Information Management Division, Office of Toxic Substances.

[FR Doc. 91–28141 Filed 11–21–91; 8:45 am]
BILLING CODE 6560–50–F

FEDERAL COMMUNICATIONS COMMISSION

Travel Reimbursement Program; July 1, 1991—September 30, 1991 Summary Report

Total Number of Sponsored Events: 12
Total Number of Sponsoring Organizations: 12
Toatl Number of Different Commissioners/Employees Attending: 12
Total Amount of Reimbursement Expected:

Transportation	$5,194.34
Subsistence	2,937.90
Other Expenses	894.39
Total	9,026.63

Individual Event Report

Sponsoring Organization: New England Cable Television Association, 100 Grandview Road, suite 201, Braintree, Massachusetts 02184.
Date of the Event: July 7–10, 1991.
Description of the Event: NECTA Annual Convention, Newport, Rhode Island.
Commissioners Attending: Commissioner Sherrie P. Marshall.
Other Employees Attending: Stevenson S. Kaminer, Advisor to Commissioner Marshall.
Amount of Reimbursement:

Transportation	$560.00
Subsistence	487.96
Other Expenses	146.80
Total	1,194.76

Sponsoring Organization: The Economist, 25 St. James's Street, London, SWIA 1 HG.
Date of the Event: Sept. 16–20, 1991.
Description of the Event: Third Telecommunications Conference, Portman Inter-Continental Hotel, London.
Commissioners Attending: Chairman Alfred C. Sikes.
Other Employees Attending: None.
Amount of Reimbursement:

Transportation	$652.00
Subsistence	689.55
Other Expenses	68.82
Total	1,410.37

Sponsoring Organization: Michigan Association of Broadcasters, 819 North Washington Avenue, Lansing, Michigan 48906.
Date of the Event: August 8–10, 1991.
Description of the Event: Annual Summer Convention, Gaylord, Michigan.
Commissioners Attending: Commissioner James H. Quello.
Other Employees Attending: None.
Amount of Reimbursement:

Transportation	$156.34
Subsistence	140.00
Other Expenses	266.29
Total	562.63

Sponsoring Organization: Providence Journal Broadcasting Corporation, 75 Fountain Street, Providence, Rhode Island 02902.
Date of the Event: August 6–7, 1991.
Description of the Event: Annual Broadcasting Conference, Newport, Rhode Island.
Commissioners Attending: None.
Other Employees Attending: Terry L. Haines, Chief of Staff, Office of the Chairman.
Amount of Reimbursement:

Transportation	$308.00
Subsistence	356.90
Other Expenses	22.79
Total	687.69

Sponsoring Organization: Organization Creavent, C.A., 17th Street and Constitution Ave., NW., Washington, DC 20006.
Date of the Event: July 2–3, 1991.
Description of the Event: International Conference on Regulation in Telecommunications, Caracas, Venezuela.
Commissioners Attending: None.
Other Employees Attending: Diane J. Cornell, Advisor to Commissioner Marshall.
Amount of Reimbursement:

Transportation	$416.00
Subsistence	0.00
Other Expenses	31.00
Total	447.00

Sponsoring Organization: Wiley, Rein and Fielding, 1776 K Street, NW., Washington, DC 20006.
Date of the Event: August 13, 1991.
Description of the Event: ABA Annual Meeting, Atlanta, Georgia.
Commissioners Attending: None.
Other Employees Attending: Linda L. Oliver, Advisor to Commissioner Duggan.
Amount of Reimbursement:

Transportation	$284.00
Subsistence	25.50
Other Expenses	52.00
Total	361.50

Sponsoring Organization: National Association of Broadcasters, 1771 N Street, NW., Washington, DC 20036.
Date of the Event: September 11–14, 1991.
Description of the Event: NAB's Radio '91 Convention, San Francisco, California.
Commissioners Attending: None.
Other Employees Attending: Roy J. Stewart, Chief, Mass Media Bureau.
Amount of Reimbursement:

Transportation	$456.00
Subsistence	377.25
Other Expenses	44.60
Total	877.85

Sponsoring Organization: Association of American Railroads, 50 F Street, NW., Washington, DC 20001.
Date of the Event: August 26–28, 1991.

Description of the Event: Annual Technical Conference, Nashville, Tennessee.

Commissioners Attending: None.

Other Employees Attending: Richard J. Shiben, Chief, Land Mobile and Microwave Division.

Amount of Reimbursement:

Transportation	$424.00
Subsistence	198.09
Other Expenses	37.68
Total	659.77

Sponsoring Organization: DATAQUEST, 1290 Ridder Park Drive, San Jose, California 95131.

Date of the Event: August 12–13, 1991.

Description of the Event: Wireless and Personal Communications, Monterey, California.

Commissioners Attending: None.

Other Employees Attending: Thomas P. Stanley, Chief, Office of Engineering and Technology.

Amount of Reimbursement:

Transportation	$456.00
Subsistence	0.00
Other Expenses	71.06
Total	527.06

Sponsoring Organization: Special Industrial Radio Service Association, 1110 North Glebe Road, suite 500, Arlington, Virginia 22201.

Date of the Event: September 26–29, 1991.

Description of the Event: SIRSA'S 1991 Annual Convention, Lake Tahoe, Nevada.

Commissioners Attending: None.

Other Employees Attending: Cheryl A. Tritt, Legal Advisor, Chairman Sikes.

Amount of Reimbursement:

Transportation	$698.00
Subsistence	211.65
Other Expenses	3.50
Total	913.15

Sponsoring Organization: The Missouri Cable Television Association, 705 NW. 44th Street, Kansas City, Missouri 64116.

Date of the Event: August 28–Sept. 2, 1991.

Description of the Event: Annual Show and Meeting, Lake of Ozarks, Missouri.

Commissioners Attending: None.

Other Employees Attending: Lauren J. Belvin, Advisor, Chairman Sikes.

Amount of Reimbursement:

Transportation	$646.00
Subsistence	169.00
Other Expenses	75.85
Total	890.85

Sponsoring Organization: New York State Broadcasters Association, 90 State Street, suite 828, Albany, New York 12207.

Date of the Event: July 21–24, 1991.

Description of the Event: 30th Annual Executive Conference, Saratoga Springs, New York.

Commissioners Attending: Chairman Alfred C. Sikes.

Other Employees Attending: None.

Amount of Reimbursement:

Transportation	$138.00
Subsistence	282.00
Other Expenses	74.00
Total	494.00

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 91–28102 Filed 11–21–91; 8:45 am]

BILLING CODE 6712-01-M

FEDERAL RESERVE SYSTEM

Melvin T. & Laura L. Bowler; Change in Bank Control Notice

Acquisition of Shares of Banks or Bank Holding Companies

The notificant listed below has applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notice is available for immediate inspection at the Federal Reserve Bank indicated. Once the notice has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for the notice or to the offices of the Board of Governors. Comments must be received not later than December 13, 1991.

A. Federal Reserve Bank of San Francisco (Kenneth R. Binning, Director, Bank Holding Company) 101 Market Street, San Francisco, California 94105:

1. Melvin T. & Laura L. Bowler, St. George, Utah; to retain 10.23 percent of the voting shares of First Bankshares, Inc., St. George, Utah, and thereby indirectly acquire Dixie State Bank, St. George, Utah.

Board of Governors of the Federal Reserve System, November 18, 1991.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 91-28106 Filed 11-21-91; 8:45 am]

BILLING CODE 6210-01-F

First Commercial Bancshares, Inc., et al.; Notice of Applications to Engage de novo in Permissible Nonbanking Activities

The companies listed in this notice have filed an application under § 225.23(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to commence or to engage *de novo*, either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 13, 1991.

A. Federal Reserve Bank of Atlanta (Robert E. Heck, Vice President) 104 Marietta Street, NW., Atlanta, Georgia 30303:

1. First Commercial Bancshares, Inc., Jasper, Alabama; to engage *de novo* and on a joint venture basis through its subsidiary, Canterbury Trust Co., Inc., Birmingham, Alabama, in trust company activities pursuant to § 225.25(b)(3) of the Board's Regulation Y.

2. Southland Bancorporation, Clayton, Alabama; to engage *de novo* through its subsidiary, Mortgage Company, Dothan, Alabama, in acquiring and selling loans originated by its subsidiary bank, Southland Bank, Dothan, Alabama, pursuant to § 225.25(b)(1) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, November 18, 1991.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 91-28105 Filed 11-21-91; 8:45 am]

BILLING CODE 6210-01-F

Dale E. and Cynthia S. Hoosier, et al.; Change in Bank Control Notices: Acquisitions of Shares of Banks or Bank Holding Companies; Correction

This notice corrects a previous Federal Register notice (FR Doc. 91-27063) published at page 57524 of the issue for Tuesday, November 12, 1991.

Under the Federal Reserve Bank of Kansas City, the entry for is amended to read as follows:

A. Federal Reserve Bank of Kansas City (John E. Yorke, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. Dale E. and Cynthia S. Hoosier, WaKeeney, Kansas, to acquire up to 42.87 percent; Douglas A. and Laura Malsam, Hill City, Kansas, to acquire up to 25.29 percent; Roger A. Flax, WaKeeney, Kansas, to acquire up to 13.73 percent; Larry L. Dietz, WaKeeney, Kansas, to acquire up to 6.93 percent; David J. and Nancy J. Harding, WaKeeney, Kansas, to acquire up to 6.18 percent; K.D. Mollenkamp, Arnold, Kansas, to acquire up to 6.18 percent; Dale Newcomer, WaKeeney, Kansas, to acquire up to 7.72 percent; and Gregory A. Trogstad, WaKeeney, Kansas, to acquire up to 6.18 percent of the voting shares of First WaKeeney Agency, Inc., Britton, South Dakota, and thereby indirectly acquire The First Bank of WaKeeney, WaKeeney, Kansas.

Board of Governors of the Federal Reserve System, November 18, 1991.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 91-28104 Filed 11-21-91; 8:45 am]

BILLING CODE 6210-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Assistant Secretary for Management and Budget; Delegation of Authority to Certify True Copies and Affix the Department Seal

Under the authority vested in the Assistant Secretary for Management and Budget by the Secretary on November 2, 1978 as published at 43 FR 58870–71 12/18/1978:

1. I hereby redelegate to the following officials the authority to certify true copies of any books, records, papers, or other documents on file within the Department, or extracts from such, to certify that true copies are true copies of the entire file of the Department, to certify the complete original record, or to certify the nonexistence of records on file within the Department, and to cause the Seal of the Department to be affixed to such certifications.

These same officials are authorized to cause the Seal to be affixed to agreements, awards, citations, diplomas, and similar documents. This authority may be redelegated.

To whom delegated	Areas of authority
General Counsel	Department.
Deputy Assistant Secretary for Management and Acquisition.	Office of the Secretary.
Administrator, Health Care Financing Administration.	Health Care Financing Administration.
Commissioner, Social Security Administration.	Social Security Administration.
Assistant Secretary for Health.	Public Health Service.
Assistant Secretary for Children and Families.	Administration for Children and Families.
Director, Office of Child Support Enforcement.	Office of Child Support, Support Enforcement.
Commissioner, Administration on Aging.	Administration on Aging.

2. I also redelegate to the Civil Rights Hearing Clerk, Office of the Assistant Secretary for Personnel Administration, the authority as official custodian of the files in all matters pertaining to compliance proceedings under title VI of the Civil Rights Act and as such custodian the authority to certify true copies of any books, records, papers or other documents of the Department pertaining to such matters and to certify extracts from any such books, records, papers, or other documents on file within the Department as true extracts and to certify that true copies are true copies of the entire file of the Department in any such matters, and to cause the Seal of the Department to be affixed to such certifications. This authority may not be redelegated.

3. This redelegation supersedes the redelegations of authorities contained in the **Federal Register** notice published at FR 1473, dated 1/5/79 and signed by the Assistant Secretary for Management and Budget on December 9, 1978. Further redelegations made under the aforementioned redelegation of authority shall remain in effect until appropriate new redelegations are made.

Dated: November 14, 1991.

Kevin E. Moley,

Assistant Secretary for Management and Budget.

[FR Doc. 91-28083 Filed 11-21-91; 8:45 am]

BILLING CODE 4150-04-M

Food and Drug Administration

[Docket No. 91N-0354]

New Monographs and Revisions of Certain Food Chemicals Codex Monographs; Opportunity for Public Comment

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on pending changes to certain Food Chemicals Codex, 3d ed., monographs and is soliciting specification information on proposed new monographs. For certain substances used as food ingredients, revised materials consisting of new monographs, additions, changes, and corrections in several current monographs are being prepared by the National Academy of Sciences/Institute of Medicine (NAS/IOM) Committee on Food Chemicals Codex. These revised materials will be published in a fourth edition of the Food Chemicals Codex.

DATES: Written comments by January 21, 1991. (The NAS/IOM Committee on Food Chemicals Codex advises that comments not received by this date cannot be considered for the fourth edition but will be considered for later supplements.)

ADDRESSES: Written comments to the NAS/IOM Committee on Food Chemicals Codex, National Academy of Sciences, 2101 Constitution Ave. NW., Washington, DC 20418.

FOR FURTHER INFORMATION CONTACT:

Sheila Mylet, Committee on Food Chemicals Codex, Food and Nutrition

Board, National Academy of Sciences, 2101 Constitution Ave. NW., Washington, DC 20418, 202–334–2580, or
Paul M. Kuznesof, Center for Food Safety and Applied Nutrition (HFF–415), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–472–5680.

SUPPLEMENTARY INFORMATION: FDA provides research contracts to the NAS/IOM Committee on Food Chemicals Codex to support preparation of the Food Chemicals Codex, a compilation of specifications for substances used as food ingredients. In the **Federal Register** of January 11, 1991 (56 FR 1198), and May 17, 1991 (56 FR 22872), FDA announced that the NAS/IOM Committee on Food Chemicals Codex was considering new monographs and monograph revisions for inclusion in the third supplement to the Food Chemicals Codex, 3d ed., which is scheduled to be published in 1991. In the **Federal Register** of January 26, 1984 (29 FR 3271), FDA announced that the NAS/National Research Council Committee on Food Chemicals Codex was considering new monographs and monograph revisions for inclusion in the second supplement to the Food Chemicals Codex, 3d ed., which has since been published. The public was invited to comment and to make suggestions for consideration and inclusion in these publications.

FDA now gives notice that the NAS/IOM Committee on Food Chemicals Codex is soliciting comments and information on proposed new monographs and proposed changes to certain current monographs. Information received in response to the notice will be used to develop these new monographs and to determine the necessity of making the contemplated changes to the current monographs. These changes and new monographs will be published in the fourth edition of the Food Chemicals Codex. Copies of the proposed changes to current monographs may be obtained from NAS at the above address.

FDA emphasizes, however, that it will not consider adopting new monographs and monograph revisions for incorporation in the Code of Federal Regulations until the public has had ample opportunity to comment on the changes to existing monographs and on the new monographs. Such opportunity for public comment will be announced in a notice published in the **Federal Register**.

The NAS/IOM Committee on Food Chemicals Codex invites comments and suggestions by all interested parties on the proposed new monographs and proposed revision of current monographs, which follow.

I. Proposed New Monographs

Allyl isovalerate
Ammoniated glycyrrhizin
Cocoa butter substitute
Enzyme-modified fat
Ethyl 10-undecenoate
Gelatin
Lactose
Linoleic acid
Malt syrup
2-Mercaptopropionic acid
Methyl 3-methylthiopropionate
Monoammonium glycyrrhizinate
Morpholine
Mustard oil
Myristyl alcohol
Nickel
Nisin
Sodium metasilicate
Sucralose
δ-Undecanoate
Wheat gluten

II. Current Monographs in Which NSA/IOM is Proposing to Make Revisions

N-Acetyl-L-methionine (specific rotation limit and test)
Allyl isothiocyanate (assay method)
Anisyl alcohol (refractive index)
Annatto extracts (identification test/color intensity)
L-Arginine (specific rotation limit)
Benzaldehyde glyceryl acetal (specific gravity)
Cinnamic acid (synonym)
Cottonseed oil (free fatty acid limit)
1-Decanol (name/synonym)
Ethyl methylphenylglycidate (refractive index/specific gravity)
Ethyl 3-methylthiopropionate (description)
L-Glutamic acid (specific rotation limit and test)
Glyceryl monostearate (identification test)
Invert sugar (assay range and method)
Linalool (angular rotation)
Locust bean gum (acid-insoluble ash/protein content/loss on drying)
L-Lysine monohydrochloride (specific rotation iimit and test)
1-Octanol (name/synonym)
Paraffin, synthetic (assay method)
Peanut oil (linolenic acid limit)
Potassium sorbate (identification test)
Polyvinylpyrrolidone (ash limit/aldehydes test/nitrogen test/relative viscosity test/hydrazine specification)
Spice oleoresins (description)
Terpinyl propionate (specific gravity/refractive index)
Triethyl citrate (refractive index)

Two copies of written comments regarding the monographs listed in this notice are to be submitted to NAS (address above). Comments may be submitted electronically to the bulletin board as well (202–334–1738). Each submission should include the statement that it is in response to the **Federal Register** notice. NAS will forward a copy of each comment, submitted either electronically or in writing, to the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857, to be placed under Docket No. 91N–0354 for public review.

Dated: November 13, 1991.

Fred R. Shank,

Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 91–28160 Filed 11–21–91; 8:45 am]
BILLING CODE 4160–01–M

Advisory Committees; Notice of Meetings

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: This notice announces forthcoming meetings of public advisory committees of the Food and Drug Administration (FDA). This notice also summarizes the procedures for the meetings and methods by which interested persons may participate in open public hearings before FDA's advisory committees.

MEETINGS: The following advisory committee meetings are announced:

Blood Products Advisory Committee

Date, time, and place. December 12 and 13, 1991, 8:30 a.m., Conference Rms. D and E, Parklawn Bldg., 5600 Fishers Lane, Rockville, MD 20857.

Type of meeting and contact person. Open public hearing, December 12, 1991, 8:30 a.m. to 9:30 a.m., unless public participation does not last that long; open committee discussion, 9:30 a.m. to 2:30 p.m.; closed committee deliberations, 2:30 p.m. to 3:30 p.m.; open committee discussion, 3:30 p.m. to 4:30 p.m.; open committee discussion, December 13, 1991, 8:30 a.m. to 10:30 a.m.; closed committee deliberations, 10:30 a.m. to 11:30 a.m.; Linda A. Smallwood, Division of Transfusion Science (HFB–900), Center for Biologics Evaluation and Research, Food and Drug Administration, 8800 Rockville Pike, Bethesda, MD 20892, 301–496–4396.

General function of the committee. The committee reviews and evaluates data on the safety, effectiveness, and appropriate use of blood products intended for use in the diagnosis, prevention, or treatment of human diseases.

Agenda—Open public hearing. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Those desiring to make formal presentations should notify the contact person on or before December 5, 1991, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time required to make their comments.

Open committee discussion. On December 12, 1991, the committee will review and discuss applications for licensure for recombinant factor VIII submitted by Miles, Inc., and Baxter Healthcare Corp./Genetics Institute, respectively. On December 13, 1991, the committee will hear and discuss the reports of the scientific site visits of the Laboratory of Retrovirology, Division of Transfusion Science, and the Laboratory of Cellular Hematology, Division of Hematology, Office of Biological Research, Center for Biologics Evaluation and Research.

Closed committee diliberations. The committee will discuss trade secret and/or confidential commercial information relevant to: (1) the recombinant factor VIII applications; and (2) the scientific site visit reports. These portions of the meeting will be closed to permit discussion of this information (5 U.S.C. 552b(c)(4) and (c)(6).

Anesthetic and Life Support Drugs Advisory Committee

Date, time, and place. December 16 and 17, 1991, 8:30 a.m., Conference Rms. D and E, Parklawn Bldg. 5600 Fishers Lane, Rockville, MD 20857.

Type of meeting and contact person. Open public hearing, December 16, 1991, 8:30 a.m. to 9:30 a.m., unless public participation does not last that long; open committee discussion, 9:30 a.m. to 5 p.m.; closed committee deliberations, December 17, 1991, 8:30 a.m. to 2 p.m.; Khairy W. Malek, Center for Drug Evaluation and Research (HFD–7), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 310–443–3741.

General function of the committee. The committee reviews and evaluates data on the safety and effectiveness of marketed and investigational human drugs for use in the field of anesthesiology and surgery.

Agenda—Open public hearing. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Those desiring to make formal presentations should notify the contact person on or before December 6, 1991, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time required to make their comments.

One committee discussion. The committee will discuss new drug application (NDA) 20–098 Mivacron (mivacurim chloride) injection.

Closed committee deliberations. The committee will review and discuss trade secret and/or confidential commercial information relevant to the above NDA. This portion of the meeting will be closed to permit discussion of this information (5 U.S.C. 552b(c)(4)).

Each public advisory committee meeting listed above may have as many as four separable portions: (1) An open public hearing, (2) an open committee discussion, (3) a closed presentation of data, and (4) a closed committee deliberation. Every advisory committee meeting shall have an open public hearing portion. Whether or not it also includes any of the other three portions will depend upon the specific meeting involved. The dates and times reserved for the separate portions of each committee meeting are listed above.

The open public hearing portion of each meeting shall be at least 1 hour long unless public participation does not last that long. It is emphasized, however, that the 1 hour time limit for an open public hearing represents a minimum rather than a maximum time for public participation, and an open public hearing may last for whatever longer period the committee chairperson determines will facilitate the committee's work.

Public hearings are subject to FDA's guideline (subpart C of 21 CFR part 10) concerning the policy and procedures for electronic media coverage of FDA's public administrative proceedings, including hearings before public advisory committees under 21 CFR part 14. Under 21 CFR 10.205, representatives of the electronic media may be permitted, subject to certain limitations, to videotape, film, or otherwise record FDA's public administrative proceedings, including presentations by participants.

Meetings of advisory committees shall be conducted, insofar as is practical, in accordance with the agenda published in this **Federal Register** notice. Changes in the agenda will be announced at the beginning of the open portion of a meeting.

Any interested person who wishes to be assured of the right to make an oral presentation at the open public hearing portion of a meeting shall inform the contact person listed above, either orally or in writing, prior to the meeting. Any person attending the hearing who does not in advance of the meeting request an opportunity to speak will be allowed to make an oral presentation at the hearing's conclusion, if time permits, at the chairperson's discretion.

The agenda, the questions to be addressed by the committee, and a current list of committee members will be available at the meeting location on the day of the meeting.

Transcripts of the open portion of the meeting will be available from the Freedom of Information Office (HFI–35), Food and Drug Administration, rm. 12A–56, 5600 Fishers Lane, Rockville, MD 20857, approximately 15 working days after the meeting, at a cost of 10 cents per page. The transcript may be viewed at the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857, approximately 15 working days after the meeting, between the hours of 9 a.m. and 4 p.m., Monday through Friday. Summary minutes of the open portion of the meeting will be available from the Freedom of Information Office (address above) beginning approximately 90 days after the meeting.

The Commissioner, with the concurrence of the Chief Counsel, has determined for the reasons stated that those portions of the advisory committee meetings so designated in this notice shall be closed. The Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2, 10(d)), permits such closed advisory committee meetings in certain circumstances. Those portions of a meeting designated as closed, however, shall be closed for the shortest possible time, consistent with the intent of the cited statutes.

The FACA, as amended, provides that a portion of a meeting may be closed where the matter for discussion involves a trade secret; commercial or financial information that is privileged or confidential; information of a personal nature, disclosure of which would be a clearly unwarranted invasion of personal privacy; investigatory files compiled for law enforcement purposes; information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action; and information in certain other instances not generally relevant to FDA matters.

Examples of portions of FDA advisory committee meetings that ordinarily may be closed, where necessary and in accordance with FACA criteria, include

the review, discussion, and evaluation of drafts of regulations or guidelines or similar preexisting internal agency documents, but only if their premature disclosure is likely to significantly frustrate implementation of proposed agency action; review of trade secrets and confidential commercial or financial information submitted to the agency; consideration of matters involving investigatory files compiled for law enforcement purposes; and review of matters, such as personnel records or individual patient records, where disclosure would constitute a clearly unwarranted invasion of personal privacy.

Examples of portions of FDA advisory committee meetings that ordinarily shall not be closed include the review, discussion, and evaluation of general preclinical and clinical test protocols and procedures for a class of drugs or devices; consideration of labeling requirements for a class of marketed drugs or devices; review of data and information on specific investigational or marketed drugs and devices that have previously been made public; presentation of any other data or information that is not exempt from public disclosure pursuant to the FACA, as amended; and, notably deliberative session to formulate advice and recommendations to the agency on matters that do not independently justify closing.

This notice is issued under section 10(a)(1) and (2) of the Federal Advisory Committee Act (5 U.S.C. App. 2), and FDA's regulations (21 CFR part 14) on advisory committees.

Dated: November 18, 1991.

David A. Kessler,

Commissioner of Food and Drugs.

[FR Doc. 91-28103 Filed 11-21-91; 8:45 am]

BILLING CODE 4160-01-M

Health Care Financing Administration

[OIS-014-N]

Medicare Program; Quarterly Listing of Program Issuances and Coverage Decisions

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: General notice.

SUMMARY: This notice lists HCFA manual instructions, substantive and interpretative regulations and other **Federal Register** notices, and statements of policy that were published during April, May, and June 1991 that relate to the Medicare program. Section 1871(c) of the Social Security Act requires that we publish a list of our Medicare issuances in the **Federal Register** at least every three months.

We also are providing the content of the revisions of the Medicare Coverage Issues Manual published during this quarter. On August 21, 1989 (54 FR 34555), we published the content of the Manual and indicated that we will publish quarterly any updates. Adding the Medicare Coverage Issues Manual changes to this listing allows us to fulfill this requirement in a manner that facilitates identification of coverage and other changes in our manuals.

FOR FURTHER INFORMATION CONTACT:

Allen Savadkin, (301) 966-5265. (For Instruction Information)

Sam Shekar, (301) 966-5316. (For Coverage Information)

Margaret Teeters, (301) 966-4678. (For All Other Information)

SUPPLEMENTARY INFORMATION:

I. Program Issuances

The Health Care Financing Administration (HCFA) is responsible for administering the Medicare program, a program that pays for health care and related services for 34 million Medicare beneficiaries. Administration of the program involves (1) providing information to beneficiaries, health care providers, and the public; and (2) effective communications with regional offices, State governments, various providers of health care, fiscal intermediaries and carriers who process claims and pay bills, and others. To implement the various statutes on which the program is based, we issue regulations under authority granted the Secretary under sections 1102 and 1871 and related provisions of the Social Security Act (the Act) and also issue various manuals, memoranda, and statements necessary to administer the program efficiently.

Section 1871(c)(1) of the Act requires that we publish in the **Federal Register** no less frequently than every three months a list of all Medicare manual instructions, interpretative rules, statements of policy, and guidelines of general applicability not issued as regulations. We published our first notice June 9, 1988 (53 FR 21730). As in prior notices, although both substantive and interpretative regulations published in the **Federal Register** in accordance with section 1871(a) of the Act are not subject to the publication requirement of section 1871(c), for the sake of completeness of the listing of operational and policy statements, we are including those regulations (proposed and final) published.

II. Coverage Issues

We receive numerous inquiries from the general public about whether specific items or services are covered under Medicare. Providers, carriers and intermediaries have copies of the Medicare Coverage Issues Manual, which identifies those medical items, services, technologies, or treatment procedures that can be paid for under Medicare. On August 21, 1989, we published a notice in the **Federal Register** (54 FR 34555) that contained all the Medicare coverage decisions issued in that manual.

In that notice, we indicated that revisions to the Coverage Issues Manual will be published at least quarterly in the **Federal Register**. We also sometimes issue proposed of final national coverage decision changes in separate **Federal Register** notices. Table IV of this notice contains the text of revisions of the Coverage Issues Manual published between April 1 and June 30, 1991. Readers should find this an easy way to identify both issuance changes to all our manuals and the text of changes to the Coverage Issues Manual.

Revisions to the Coverage Issues Manual are not published on a regular basis but on an as needed basis. We publish revisions as a result of technological changes, medical practice changes, responses to inquiries we receive seeking clarifications, or the resolution of coverage issues under Medicare. If no Coverage Issues Manual revisions were published during a particular quarter, our listing will reflect that fact.

Not all revisions to the Coverage Issues Manual contain major changes. As with any instruction, sometimes minor clarifications or revisions are made within the text. We have reprinted manual revisions as transmitted to manual holders. The new text is shown in italics. We will not reprint the table of contents, since the table of contents serves primarily as a finding aid for the user of the manual and does not identify items as covered or not.

We issued our first update that included the text of changes to the Coverage Issues Manual on March 20, 1990 (55 FR 10290), our second on February 6, 1991 (56 FR 4830), and our third on July 5, 1991 (56 FR 30752). The issuance update found in table IV of this notice, when added to material from the manual published on August 21, 1989, and the updates published on March 20, 1990, February 6, 1991, and July 5, 1991 constitute a complete manual as of June 30, 1991. Parties interested in obtaining a copy of the manual and revisions should

follow the instructions in section IV of this notice.

III. How to Use the Listing

This notice is organized so that a reader may review the subjects of all manual issuances, memoranda, substantive and interpretative regulations, or coverage decisions published during this timeframe to determine whether any are of particular interest. We expect it to be used in concert with previously published notices. Most notably, those unfamiliar with a description of our manuals may wish to review table I of our first three notices (53 FR 21730, 53 FR 36891, and 53 FR 50577); those desiring information on the Medicare Coverage Issues Manual may wish to review the August 21, 1989 publication; and those seeking information on the location of regional depository libraries may wish to review table IV of our first notice. We have divided this current listing into four tables.

Table I describes where interested individuals can get a description of all previously published HCFA manuals and memoranda.

Table II of this notice lists, for each of our manuals or Program Memoranda, a transmittal number unique to that instruction and its subject matter. A transmittal may consist of a single instruction or many. Often it is necessary to use information in a transmittal in conjunction with information currently in the manuals.

Table III lists all substantive and interpretative Medicare regulations and general notices published in the **Federal Register** during this period. For each item, we list the date published, the title of the regulation, and the Parts of the Code of Federal Regulations (CFR) which have changed.

Table IV sets forth the revision to the Medicare Coverage Issues Manual that was published during this quarter. For the revision, we give a brief synopsis of the revision as it appears on the transmittal sheet, the manual section number, and the title of the section. We present a complete copy of the revised material, no matter how minor the revision, and identify the revision by printing in italics the text that was changed. If the transmittal includes material unrelated to the revised sections, for example, when the addition of revised material causes other sections to be repaginated, we do not reprint the unrelated material.

IV. How to Obtain Listed Material

A. Manuals

An individual or organization interested in routinely receiving any manual and revisions to it may purchase a subscription to that manual. Those wishing to subscribe should contact either the Government Printing Office (GPO) or the National Technical Information Service (NTIS) at the following addresses: Superintendent of Documents, Government Printing Office, Washington, DC 20402, Telephone (202) 783–3238; National Technical Information Service, Department of Commerce, 5825 Port Royal Road, Springfield, VA 22161, Telephone (703) 487–4630.

In addition, individual manual transmittals and Program Memoranda listed in this notice can be purchased from NTIS. Interested parties should identify the transmittal(s) they want. GPO or NTIS will give complete details on how to obtain the publications they sell.

B. Regulations and Notices

Regulations and notices are published in the daily **Federal Register**. Interested individuals may purchase individual copies or subscribe to the **Federal Register** by contacting the Government Printing Office at the same address indicated above for manual issuances. When ordering individual copies, it is necessary to cite either the date of publication or the volume number and page number.

C. Rulings

Rulings are published on an infrequent basis by HCFA. Interested individuals can obtain copies from the nearest HCFA Regional Office or review them at the nearest regional depository library. We also sometimes publish Rulings in the **Federal Register.**

V. How to Review Listed Material

Transmittals or Program Memoranda can be reviewed at a local Federal Depository Library (FDL). Under the Federal Depository Library Program, government publications are sent to approximately 1400 designated libraries throughout the United States. Interested parties may examine the documents at any one of the FDLs. Some may have arrangements to transfer material to a local library not designated as an FDL. To locate the nearest FDL, individuals should contact any library.

In addition, individuals may contact regional depository libraries, which receive and retain at least one copy of nearly every Federal Government publication, either in printed or microfilm form, for use by the general public. These libraries provide reference services and interlibrary loans; however, they are not sales outlets. Individuals may obtain information about the location of the nearest regional depository library from any library.

Superintendent of Documents numbers for each HCFA publication are shown in table II, along with the HCFA publication and transmittal numbers. To help FDLs locate the instruction, use the Superintendent of Documents number, plus the HCFA transmittal number. For example, to find the Intermediary Manual, part 3, Claims Process (HCFA-Pub. 13–3) transmittal entitled "Medical Review of Claims Referred by Common Working File Edits," use the Superintendent of Documents No. HE 22.8/6 and the HCFA transmittal number 1517.

VI. General Information

It is possible that an interested party may have a specific information need and not be able to determine from the listed information whether the issuance or regulation would fulfill that need. Consequently, we are providing information contact persons to answer general questions concerning these items. Copies are not available through the contact persons. Individuals are expected to purchase copies or arrange to review them as noted above.

Questions concerning items in tables I or II may be addressed to Allen Savadkin, Office of Issuances, Health Care Financing Administration, room 688 East High Rise, 6325 Security Blvd., Baltimore, MD 21207, Telephone (301) 966–5265.

Questions concerning items in table IV may be addressed to Sam Shekar, Office of Coverage and Eligibility Policy, Health Care Financing Administration, room 445, East High Rise, 6325 Security Blvd., Baltimore, MD 21207, Telephone (301) 966–5316.

Questions concerning all other information may be addressed to Margaret Teeters, Regulations Staff, Health Care Financing Administration, room 132, East High Rise, 6325 Security Blvd., Baltimore, MD 21207, Telephone (301) 966–4678.

Table I—Description of Manuals, Memoranda and HCFA Rulings

An extensive descriptive listing of manuals and memoranda was previously published at 53 FR 21730 and supplemented at 53 FR 36891 and 53 FR 50577. Also, for a complete description of the Medicare Coverage Issues Manual, please review 54 FR 34555.

Table II—Medicare Manual Instructions—April–June 1991

Trans. No.	Manual/Subject/Publication Number
	Intermediary Manual
	Part 1—Fiscal Administration (HCFA-Pub. 13-1) (Superintendent of Documents No. HE 22.8/6-3)
120	● Small Business and Small Disadvantaged Business Subcontract Plan.
	HCFA/Small Business and Small Disadvantaged Business Subcontracting Plan—Instructions for Completing SADBUS.
	Intermediary Manual
	Part 2—Audits, Reimbursement Program Administration (HCFA-Pub. 13-2) (Superintendent of Documents No. HE 22.8/6-2)
383	● Maximum Payment Per Visit for Independent Rural Health Clinics.
384	● Timely Deposit of Overpayment Refund Checks.
	Intermediary Manual
	Part 3—Claims Process (HCFA-Pub. 13-3) (Superintendent of Documents No. HE 22.8/6)
1517	● Medical Review of Claims Referred by Common Working File Edits.
1518	● Billing for Alcohol and Drug Related Services.
	Coding Structure.
1519	● Medical Review of Outpatient Hospital Claims.
	Medical Review Guidelines for Outpatient Hospital Claims.
	Outpatient Hospital Medical Review Selection Criteria.
	Medical Review of Ambulance Services.
1520	● Mammography Screening.
	Coding Structure.
1521	● Guidelines for Review of Claims for Epoetin.
1522	● Review of CORF Claims.
	Mental Health Services Limitation.
1523	● Review of Form HCFA-1450 for Inpatient and Outpatient Bills.
	Coding Structures.
1524	● Heart Transplants.
	Monthly Intermediary Workload Report—Body of Report.
1525	● Form HCFA-1450 Consistency Edits.
1526	● Medicare Notice Sent to the Beneficiary.
	Intermediary Preparation of the Medicare Benefit Notice.
	Amended Medicare Benefit Notices, HCFA-1533.
	Other Medicare Notices.
1527	● Billing for Durable Medical Equipment and Orthotic/Prosthetic Devices.
1528	● Medical Review Part B, Intermediary Outpatient Speech-Language Pathology Bills.
1529	● Medical Review of Hospital-Based and Nonhospital-Based SNF Claims.
1530	● Charges Imposed by Immediate Relatives of Patient or Members of Household.
1531	● Reduction in Payment Due to Public Law 99-177.
1532	● Processing of No-Payment Bills.
	Billing for No-Payment Days to Report a Change in the Level of Care.
1533	● PPS Pricer Program.
	Provider Specific Data Record Layout and Description.
	Carriers Manual
	Part 1—Fiscal Administration (HCFA-Pub. 14-1) (Superintendent of Documents No. HE 22.8/7-2)
115	● Small Business and Small Disadvantaged Business Subcontract Plan.
	HCFA/Small Business and Small Disadvantaged Business Subcontracting Plan—Instructions for Completing SADBUS Plan.
	Carriers Manual
	Part 3—Claims Process (HCFA-Pub. 14-3) (Superintendent of Documents No. HE 22.8/7)
1385	● Prosthetic Devices.
	Treatment of End Stage Renal Disease.
	Monthly Capitation Payments for Physicians' Services to Maintenance Dialysis Patients.
	Payments for Physicians' Services Furnished to Dialysis Inpatients.
	Initial Method for Patients' Services to Maintenance Dialysis Patients.
	Services Included and Excluded from the Monthly Citation Payment.
	Payment for Dialysis Furnished to Patients Who are Travelling.
1386	● Annual Cash Deductible.
	Example of Application of the Part B Blood Deductible.
1387	● Customary Charge Screens for New Physicians and Customary Charge/Fee Schedule Screens for Nonphysician Practitioners and Suppliers.
	Fee Schedules for Radiologist Services by New Radiologists and Other New Physicians.
1388	● Determining Reasonable Charges for the Services of Assistants at Surgery.
	Procedure Codes Subject to Assistants at Surgery Payment Restriction.
1389	● Physician's Expense for Surgery, Childbirth, and Treatment for Infertility.
1390	● Place of Service.
	Type of Service.
1391	● Prosthetic Devices.
	Screening Mammography Examinations.
	Identifying a Screening Mammography Claim.
	Adjudicating the Claim.
	EOMB Messages.
1392	● Timely Deposit of Overpayment Refund Checks.
1393	● Claims for Cochlear Implants and Defibrillators.
1394	● Payments Under Fee Schedules for Radiologist Services.
1395	● Methodologies for Calculating Fee Schedules (Reduction in Fee Schedule Amounts for Seat-Lift Chairs and TENS).
	Covered Item Update.
	General.
	Capped Rental Items.
	Capped Rental Fee Schedule Updates.
	Purchase Fee Schedule For Electric Wheelchairs.
	Purchase Option Fee Schedule.
	Replacement.
	Subsequent Year Updates of Portable Oxygen Equipment Fee Schedule.
	Fee Schedules Using Gap-Filling Techniques.
	Purchase of Capped Rental Items on or After June 1, 1989.
	Fifteen-Month Ceiling.
	Purchase Options For Capped Rental Items.
	Inclusion of Sales Taxes in Reasonable Charges.
1396	● Updating Customary and Prevailing Charges.
	Economic Index Data for Physician Services and Maximum Allowances for Renal Transplantations.
	Floors for Primary Care Services.
	Determining Reasonable Charges for Nurse Practitioners and Clinical Nurse Specialists.
	Limiting Charge for Nonparticipating Physicians.
1397	● Clinical Psychologist Services.
	Medical and Other Health Services Furnished to Inpatients of Hospitals and Skilled Nursing Facilities.
	Inpatient Services Not Directly Delivered or Arranged for by the Hospital.
	Program Memorandum Intermediaries (HCFA-Pub. 60A) (Superintendent of Documents No. HE 22.8/6-5)
A-91-3	● Moratorium on Recoupment of Overpayments Attributable to Nursing and Allied Health Education Costs.
A-91-4	● Intermediary Medical Review Reminder.
	Program Memorandum Carriers (HCFA-Pub. 60B) (Superintendent of Documents No. HE 22.8/6-5)
B-91-5	● Counting Physicians, Limited License Practitioners, and Suppliers Who Have Elected to Participate in the Medicare Program Effective January 1, 1991.
B-91-6	● Unique Physician Identification Number Directory.
	Program Memorandum Intermediaries/Carriers (HCFA-Pub. 60A/B) (Superintendent of Documents No. HE 22.8/6-5)
AB-91-2	● 1991 HCPCS Update and Corresponding Payment Instructions.
AB-91-3	● Timely Effectuation of ALJ Hearing Decisions.
AB-91-4	● HCPCS Modifiers for Distinguishing Among the Rent/Purchase Options for Durable Medical Equipment.
AB-91-5	● Section 206(c) Requires Changes in Adverse Notices to Claimants.
	State Operations Manual Provider Certification (HCFA-Pub. 7) (Superintendent of Documents No. HE 22.8/12)
247	● Rural Health Clinics—Citations and Description.
	Conditions to be Assessed Prior to Scheduling a RHC Survey.
	Preparing for the RHC Survey.
	Interpretive Guidelines for RHCs.
	Regional Office Manual
	Part 2—Medicare (HCFA-Pub. 23-2) (Superintendent of Documents No. HE 22.8/8)
313	● Enforcement of Medicare Skilled Nursing Facility Demand Billing Requirement.
314	● Regional Office Monitoring.
	Regional Office Manual
	Standards and Certification (HCFA-Pub. 23-4) (Superintendent of Documents No. HE 22.8/8-3)
51	● Rural Health Clinics.
	Hospital Manual (HCFA-Pub. 10) (Superintendent of Documents No. HE 22.8/2)
611	● Health Care Associated with Pregnancy.
612	● Billing for Mammography Screening.
	Coding Structure.

Trans. No.	Manual/Subject/Publication Number
613	● Outpatient Registration Procedures. Completion of Form HCFA-1450 for Inpatient and/or Outpatient Billing. Coding Structures.
614	● Heart Transplants.
615	● Billing for Durable Medical Equipment and Orthotic/Prosthetic Devices.
616	● Charges Imposed by Immediate Relatives of Patient or Members of Household.
617	● Reduction in Payment Due to Public Law 99-177.
	Christian Science Sanatorium Hospital Manual Supplement (HCFA-Pub. 32) (Superintendent of Documents No. HE 22.8/2-2)
28	● Reduction in Payment Due to Public Law 99-177.
	Home Health Agency Manual (HCFA-Pub. 11) (Superintendent of Documents No. HE 22.8/5)
243	● Billing for Durable Medical Equipment and Orthotic/Prosthetic Devices.
244	● Charges Imposed by Immediate Relatives of Patient or Members of Household. Billing Form as Request for Payment.
245	● Reduction in Payment Due to Public Law 99-177.
	Skilled Nursing Facility Manual (HCFA-Pub. 12) (Superintendent of Documents No. HE 22.8/3)
300	● Billing for Mammography Screening. Coding Structure.
301	● Billing for Durable Medical Equipment and Orthotic/Prosthetic Devices.
302	● Charges Imposed by Immediate Relatives of Patient or Members of Household.
303	● Reduction in Payment Due to Public Law 99-177.
	Rural Health Clinic Manual (HCFA-Pub. 27) (Superintendent of Documents No. 22.8/19:985)
42	● Maximum Payment Per Visit for Independent Rural Health Clinics.
43	● Reduction in Payment Due to Public Law 99-177.
	Renal Dialysis Facility Manual (Non-Hospital Operated) (HCFA-Pub. 29) (Superintendent of Documents No. HE 22.8/13)
50	● Reduction in Payment Due to Public Law 99-177.
	Carrier Quality Assurance Handbook (HCFA-Pub. 25) (Superintendent of Documents No. HE 22.8:C 23/982)
44	● Claims Review Procedure. Error Determinations.
	Coverage Issues Manual (HCFA-Pub. 6) (Superintendent of Documents No. HE 22.8/14)
46	● Extracorporeal Immunoadsorption Using Protein A Columns for the Treatment of Patients with Idiopathis Thrombocytopenia Purpura Failing Other Treatments.
47	● Extracranial-Intracranial Arterial Bypass Surgery.
48	● Blood Platelet Transfusions and Bone Marrow Transplantation. Implantation of Automatic Defibrillators.
	Outpatient Physical Therapy and Comprehensive Outpatient Rehabilitation Facility Manual (HCFA-Pub. 9) (Superintendent of Documents No. HE 22.8/9)
102	● Reduction in Payment Due to Public Law 99-177.
	Provider Reimbursement Manual Part 1—(HCFA-Pub. 15-1) (Superintendent of Documents No. HE 22.8/4)
359	● Methodology for Determining Per Diem Prospective Payment Rates Effective for Cost Reporting Periods Beginning on or After October 1, 1989 and Before October 1, 1990.

Table III—Regulations and Notices Published—April-June 1991

Publication date/cite	42 CFR Part	Title
		Final Rules
06/04/91 (56 FR 25458).	412	Medicare Program; Medicare Geographic Classification Review Board—Procedures and Criteria.
06/12/91 (56 FR 26916).	418	Medicare Program; Payment for Hospice Care.
		Proposed Rules
04/02/91 (56 FR 13430).	493	Medicare and Laboratory Certification Programs; Enforcement Procedures for Laboratories.
06/03/91 (56 FR 25178).	412, 413	Medicare Program; Changes to the Inpatient Hospital Prospective Payment System and Fiscal Year 1992 Rates.
06/05/91 (56 FR 25792).	405, 415	Medicare Program; Fee Schedule for Physicians' Services.
06/20/91 (56 FR 28353).	405, 473	Medicare Program; Aggregation of Medicare Claims and Administrative Appeals and Judicial Review.
06/21/91 (56 FR 28513).	405, 482, 485	Medicare Program; Conditions of Coverage for Organ Procurement Organizations.
06/28/91 (56 FR 29609).	424	Medicare Program; Allowing Certifications and Recertifications by Nurse Practitioners and Clinical Nurse Specialists for Certain Services.

Publication date/cite	Title
	Notices
04/01/91 (56 FR 13317).	Medicare Program; Schedule of Limits for Skilled Nursing Facility Inpatient Routine Service Costs (Correction Notice Published 05/13/91 (56 FR 22053)).
04/09/91 (56 FR 14424).	Medicare Program; Schedule of Limits on Home Health Agency Costs Per Visit for Cost Reporting Periods on or After July 1, 1989 (Correction Notice for the Final Notice Published 03/28/91 (56 FR 12934)).
04/12/91 (56 FR 15006).	Medicare Program; Criteria for Medicare Coverage of Adult Liver Transplants.
04/15/91 (56 FR 15060).	Medicare Program; Prospective Payment System for Inpatient Hospital Capital-Related Costs—Optional Computation Sheet and Computer Program.
04/15/91 (56 FR 15083).	Medicare Program; Quarterly Listing of Program Issuances (Correction Notice Published 05/22/91 (56 FR 23619)).
04/25/91 (56 FR 19071).	Medicare Program; Prospective Payment System for Inpatient Hospital Capital-Related Costs—Extension of Comment Period.
04/26/91 (56 FR 19335).	Medicare Program; Prospective Payment System for Inpatient Hospital Capital-Related Costs (Correction Notice for Proposed Rule Published 02/28/91 (56 FR 8476)).
04/30/91 (56 FR 19874).	Medicare Program; Withdrawal of Coverage of Certain Investigational Intraocular Lenses.
05/14/91 (56 FR 22177).	Medicare Program; Criteria and Standards for Evaluating Common Working File Hosts.
05/20/91 (56 FR 23021).	Medicare Program; OBRA '87 Conforming Amendments (Correction for Final Rule Published 03/01/91 (56 FR 8832)).

Publication date/cite	Title
05/31/91 (56 FR 24823).	Medicare Program; Geographic Designation for Home Health Agency Branch Offices.
06/06/91 (56 FR 26120).	Medicare and Medicaid Programs; Health Care Financing Research and Demonstration Cooperative Agreements and Grants for Fiscal Year 1991.
06/26/91 (56 FR 29248).	Medicare Program; HMO Qualification Determinations and Compliance Actions.

Table IV—Medicare Coverage Issues Manual

(For the reader's convenience, new material and changes to previously published material are in italics. If any part of a sentence in the manual instruction has changed, the entire line is shown in italics. The transmittal includes material unrelated to revised sections. We are not reprinting the unrelated material.)

(Transmittal No. 46; section 35–90, Extracorporeal Immunoadsorption (ECI) Using Protein A Columns for the Treatment of Patients with Idiopathic Thrombocytopentia Purpura (ITP) Failing Other Treatments. New Implementing Instruction—Effective Date: Services performed on or after 05/06/91. This section has been added to provide for coverage of the use of protein A columns.)

35–90 Extracorporeal Immunoadsorption (ECI) Using Protein A Columns for the Treatment of Patients with Idiopathic Thrombocytopenia Purpura (ITP) Failing Other Treatments (Effective for services performed on and after 5/6/91)

Extracorporeal immunoadsorption (ECI), using Protein A columns, has been developed for the purpose of selectively removing circulating immune complexes (CIC) and immunoglobulins (IgG) from patients in whom these substances are associated with their diseases. The technique involves pumping the patient's anticoagulated venous blood through a cell separator from which 1–3 liters of plasma are collected and perfused over adsorbent columns, after which the plasma rejoins the separated, unprocessed cells and is retransfused to the patient.

The use of protein A columns is covered by Medicare only for the treatment of ITP failing other treatments. Other uses of these columns are currently considered to be investigational and, therefore, not reasonable and necessary under the Medicare law (section 1862(a)(1)(A) of the Act).

Until a national code is issued, use the following Q code (temporary code):

Q0068 Extracorporeal plasmapheresis; immunoadsorption with staphylococcal protein A columns

This code will facilitate data keeping in order to help evaluate this new technology.

(Transmittal No. 47, section 35–37, Extracranial-Intracranial (EC–IC) Arterial Bypass Surgery.

Changed implementing instructions—effective date: Services performed on or after March 29, 1991. The text of the Manual instruction set out below corrects the effective date of this instruction, which is March 29, 1991, in accordance with the February 27, 1991 **Federal Register** notice (56 FR 8206) announcing the coverage decision. This section has been renamed to reflect current terminology for the procedure and revised to provide that Medicare coverage no longer is allowed when EC–IC surgery (CPT 61711 and ICD–9–CM 39.29) is performed to treat ischemic cerebrovascular disease of the carotid or middle cerebral arteries, which includes treatment or prevention of strokes. This national coverage decision was based upon an assessment conducted by the Office of Health Technology Assessment.)

35–37 Extracranial-Intracranial (EC–IC) Arterial Bypass Surgery

(Effective for services performed on or after March 29, 1991)

Extracranial-Intracranial (EC–IC) arterial bypass surgery is not a covered procedure when it is performed as a treatment for ischemic cerebrovascular disease of the carotid or middle cerebral arteries, which includes the treatment or prevention of strokes. The premise that this procedure which bypasses narrowed arterial segments improves the blood supply to the brain and reduces the risk of having a stroke has not been demonstrated to be any more effective than no surgical intervention. Accordingly, EC–IC arterial bypass surgery is not considered reasonable and necessary within the meaning of § 1862(a)(1) of the Act when it is performed as a treatment for ischemic cerebrovascular disease of the carotid or middle cerebral arteries.

(Transmittal No. 48, section 35–30, Blood Platelet Transfusions and Bone Marrow Transplantation. Clarification—Effective Date: Not applicable. This section has been revised to add the following ICD–9–CM codes (which were omitted from the list of ICD–9–CM codes which describe non-Hodgkin's lymphomas): 200.00–200.08, 200.10–200.18, 200.20–200.28, 200.80–200.88, 202.00–202.08, and 202.90–202.98. The previous code range of 202.80–202.68 was incomplete.)

35–30 Blood Platelet Transfusions and Bone Marrow Transplantation

C. Autologous Bone Marrow Transplantation (Effective For Services Performed on or After 04/28/89).—Autologous bone marrow transplantation is a technique for restoring bone marrow stem cells using the patient's own previously stored marrow.

1. Covered Conditions.—*Autologous bone marrow transplantation (ICD–9–CM code 41.01, CPT–4 code 38240) is considered reasonable and necessary under § 1862(a)(1)(A) of the Act for the following conditions and is covered under Medicare for patients with:*

- *Acute leukemia in remission (ICD–9–CM code NEC V 10.60) who have a high probability of relapse and who have no human leucocyte antigens (HLA)-matched donor (codes lymphoid V10.61, myeloid V10.62, monocytic V10.63, NEC V10.69);*
- *Resistant non-Hodgkin's lymphomas (ICD–9–CM code 200.00–200.08, 200.10–200.18, 200.20–200.28, 200.80–200.88, 202.00–202.08, 202.80–202.88, and 202.90–202.98) or those presenting with poor prognostic features following an initial response;*
- Recurrent or refractory neuroblastoma (see ICD–9–CM Neoplasm by site, malignant); or
- Advanced Hodgkin's disease (ICD–9–CM code 201) who have failed conventional therapy and have no HLA-matched donor.

2. Noncovered Conditions.—Insufficient data exist to establish definite conclusions regarding the efficacy of autologous bone marrow transplantation for the following conditions:

- Acute leukemia in relapse (ICD–9–CM codes 204.0, 205.0, 206.0, and 208.0);
- Chronic granulocytic leukemia (ICD–9–CM code 205.1); or
- Solid tumors (other than neuroblastoma) (ICD–9–CM codes 140–199).

In these cases, autologous bone marrow transplantation is not considered reasonable and necessary within the meaning of section 1862(a)(1)(A) of the Act and is not covered under Medicare.

(Transmittal No. 48, section 35–85, Implantation of Automatic Defibrillators.

Changed Implementing Instructions—Effective Date: For services performed on or after 07–08–91. This section is revised to amend current patient selection criteria used for determining the suitability for implantation of an automatic defibrillator. It is no longer required that patients have an inducible tachyarrhythmia prior to implantation or that this technology be used as a treatment of last resort. This revision also includes the appropriate International Classification of Diseases, Ninth Revision, Clinical Modification (ICD–9–CM) codes and the HCFA Common Procedure Coding System (HCPCS) codes.)

35–85 Implantation of Automatic Defibrillators

The implantable automatic defibrillator is an electronic device designed to detect and treat lifethreatening tachyarrhythmias. The device consists of a pulse generator and electrodes for sensing and defibrillating. *Effective for services performed on or after January 24, 1986 through 07–07–91, the implantation of an automatic defibrillator (ICD–9–CM codes 37.94–37.96 or CPT code 33246) is a covered service only when used as a treatment of last resort* for patients who have had a documented episode of lifethreatening ventricular tachyarrhythmia or cardiac arrest not associated with myocardial infarction. Patients must also be found, by electrophysiologic testing, to have an inducible tachyarrhythmia that proves unresponsive to medication or surgical therapy (or be considered unsuitable candidates for surgical therapy). It must be emphasized that unless all of the above described conditions and stipulations are met in a particular case, including the inducibility of tachyarrhythmia, etc., implantation of an automatic defibrillator may not be covered.

Effective for services performed on or after 07–08–91, the implantation of an automatic defibrillator is a covered service for patients who have had a documented episode of lifethreatening ventricular tachyarrhythmia or cardiac arrest not associated with myocardial infarction.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: November 14, 1991.

Gail R. Wilensky,

Administrator, Health Care Financing Administration.

[FR Doc. 91–28121 Filed 11–21–91; 8:45 am]

BILLING CODE 4120–01–M

Health Resources and Services Administration

Program Announcement for Nurse Anesthetist Faculty Fellowship Grants

The Health Resources and Services Administration (HRSA) announces that applications for fiscal year (FY) 1992 Nurse Anesthetist Faculty Fellowship Grants will be accepted under the authority of section 831(b) of the Public Health Service (PHS) Act as amended by the Health Professions Reauthorization Act of 1988, title VI of Public Law 100–607. This authority expired on September 30, 1991.

This program announcement is subject to the reauthorization of legislative authority and to the appropriation of funds. The Administration's budget request for FY 1992 does not include funding for this program. Applicants are advised that this program announcement is a contingency action being taken to assure that should funds become available for this purpose, they can be awarded in a timely fashion consistent with the needs of the program as well as provide for even distribution of funds throughout the fiscal year. This notice regarding applications does not reflect any change in policy.

Purpose

Section 831(b) of the Public Health Service Act includes authority for grants for the purpose of providing financial assistance and support (fellowships) to certified registered nurse anesthetists (CRNA) who are faculty members of accredited programs to enable such nurse anesthetists to obtain advanced education relevant to their teaching functions.

National Health Objectives for the Year 2000

The Public Health Service (PHS) urges applicants to submit work plans that address specific objectives of Healthy People 2000. Potential applicants may obtain a copy of Healthy People 2000 (Full Report; Stock No. 017–001–00474–0) or Healthy People 2000 (Summary Report; Stock No. 017–001–00473–1) through the Superintendent of Documents, Government Printing Office, Washington, DC 20402–9325 (telephone (202) 783–3238).

Education and Service Linkage

As part of its long-range planning, HRSA will be targeting its efforts to strengthening linkages between U.S. Public Health Service education programs and programs which provide comprehensive primary care services to the underserved.

Applicants

Public or private nonprofit institutions for the education of nurse anesthetists, which are accredited by an entity or entities designated by the Secretary of Education, may apply for grants to cover the costs of tuition and fees and certain stipends for currently employed CRNA faculty who qualify for a fellowship.

The initial period of Federal support will not exceed 1 year.

The following Criteria for Fellows, Policy on Payment of Stipends, Funding Preferences and Review Criteria were established in fiscal year 1990 after public comment and are being extended in fiscal year 1992.

Criteria for Fellows

Potential fellows must:

1. Be a CRNA employed by or affiliated with the applicant institution as a faculty member during the period of the awarded fellowship.

2. Be enrolled or accepted for enrollment in a master's degree program or in a doctoral degree program to obtain advanced education relevant to the faculty member's teaching functions.

Policy on Payment of Stipends

A faculty member may be paid a stipend for living costs if attending an educational institution as a full-time student; no stipend would be available for a faculty member who is enrolled in part-time study or who is employed on a full-time basis. This policy is designed to target stipend assistance to the individuals who are most in need of such aid.

Funding Preferences

A funding preference will be given first to faculty who complete degree requirements before or by the end of the funded budget year, second to faculty who are full-time students, and third to faculty who are part-time students.

Review Criteria

Applications will be reviewed and award amounts calculated by staff in the Division of Nursing and in the Grants Management Branch of the Bureau of Health Professions, taking into consideration:

1. The eligibility of applicants;

2. The eligibility of faculty; and

3. The extent to which an applicant meets the funding preferences.

Application Deadline

One review cycle will be held annually for Grants for Nurse

Anesthetist Faculty Fellowships. The deadline date for receipt of applications for fiscal year 1992 is February 3, 1992.

Applications shall be considered as meeting the deadline if they are either:

(1) Received on or before the deadline, or

(2) Postmarked on or before the deadline date, and received in time for submission for review. A legibly dated receipt from a commercial carrier or U.S. Postal Service will be accepted in lieu of a postmark. Private metered postmarks shall not be acceptable as proof of timely mailing.

Lake applications not accepted for processing will be returned to the applicant.

The standard application form PHS 6025–1, HRSA Competing Training Grant Application, General Instructions and supplement for this program have been approved by the Office of Management and Budget under the Paperwork Reduction Act. The OMB clearance number is 0915–0060.

Requests for application materials, questions regarding grants policy and business management aspects should be directed to: Ms. Sandra Bryant (A–22), Grants Management Specialist, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 8C–26, 5600 Fishers Lane, Rockville, Maryland 20857, telephone: (301) 443–6915.

Completed applications should be returned to the Grants Management Office at the above address.

For technical assistance and other information regarding this program, contact: Mary S. Hill, R.N., Ph.D., Chief, Nursing Education Practice Resources Branch, Division of Nursing, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 5C–26, 5600 Fishers Lane, Rockville, Maryland 20857, telephone: (301) 443–6193.

This program is listed at 93.907 in the Catalog of Federal Domestic Assistance. This program is not subject to the provisions of Executive Order 12372, Intergovernmental Review of Federal Programs (as implemented through 45 CFR part 100).

Dated: September 17, 1991.

Robert G. Harmon,

Administrator.

[FR Doc. 91–28162 Filed 11–21–91; 8:45 am]

BILLING CODE 4160–15–M

Program Announcement for Nurse-Anesthetist Traineeship Grants

The Health Resources and Services Administration (HRSA) announces that applications for fiscal year (FY) 1992 Nurse Anesthetist Traineeship Grants will be accepted under the authority of section 831(a), title VIII of the Public Health Service (PHS) Act, as amended by the Health Professions Reauthorization Act of 1988, title VI of Public Law 100–607. This authority expired on September 30, 1991.

This program announcement is subject to reauthorization of this legislative authority and to the appropriation of funds. The Administration's budget request for FY 1992 does not include funding for this program. Applicants are advised that this program announcement is a contingency action being taken to assure that should funds become available for this purpose, they can be awarded in a timely fashion consistent with the needs of the program as well as provide for even distribution of funds throughout the fiscal year. This notice regarding applications does not reflect any change in policy.

Section 831(a) of the Public Health Service Act, as amended, authorizes grants for traineeships to prepare licensed, registered nurses to become nurse anesthetists and for projects to develop and operate programs for the education of nurse anesthetists.

This announcement under section 831(a) is limited to traineeship assistance.

To be eligible to receive support, an applicant must be a public or private nonprofit institution located in a state which provides registered nurses with full-time nurse anesthetist training. The training program must be accredited by the Council on Accreditation of Nurse Anesthesia Educational programs which is currently designated by the Secretary of Education for this purpose, and must currently have full-time students who are registered nurses enrolled beyond the 12th month of study in the nurse anesthetist training program.

The 1992 period of Federal support will not exceed 1 year.

National Health Objectives for the Year 2000

The Public Health Service (PHS) urges applicants to submit work plans that address specific objectives of Healthy People 2000. Potential applicants may obtain a copy of Healthy People 2000 (Full Report; Stock No. 017–001–00474–0) or Healthy People 2000 (Summary Report; Stock No. 017–001–00473–1) through the Superintendent of Documents, Government Printing office, Washington, DC 20402–9325 (telephone (202) 783–3238).

Education and Service Linkage

As part of its long-range planning, HRSA will be targeting its effort to strengthening linkages between U.S. Public Health Service education programs and programs which provide comprehensive primary care services to the underserved.

Review Criteria

To receive support, applicants must meet the requirements of final regulations in 42 CFR part 57, subpart F as specified below. The review of applications will take into consideration the following criteria:

(a) The qualifications of the Program Director;

(b) The number of full-time registered nurse students enrolled in the program who have completed 12 months of study, and

(c) The level of student support for nurse anesthetist training provided by the applicant.

In determining the amount of the grant award, the Department will use the formula specified in section 57.506 of the governing regulations for this program. These regulations are included in the grant application kit.

The application deadline date is January 21, 1992. Applications shall be considered as meeting the deadline if they are either:

1. Received on or before the deadline date, or

2. Postmarked on or before the deadline and received in time for submission for review. A legibly dated receipt from a commercial carrier or U.S. Postal Service will be accepted in lieu of a postmark. Private metered postmarks shall not be acceptable as proof of timely mailing.

Late applications not accepted for processing will be returned to the applicant.

For specific guidelines and information regarding this program contact: Mary S. Hill, R.N., Ph.D., Chief, Nursing Education Practice Resources Branch, Division of Nursing, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 5C–26, 5600 Fishers Lane, Rockville, Maryland 20857, telephone: (301) 443–6193.

Requests for application materials, questions regarding grants policy and business management aspects should be directed to: Ms. Sandra Bryant (A–22), Grants Management Specialist, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 8C–26, 5600 Fishers

Lane, Rockville, Maryland 20857, telephone: (301) 443–6915.

Completed applications should be returned to the Grants Management Office at the above address.

The standard application form PHS 6025–1, HRSA Competing Training Grant Application, General Instructions and supplement for this program have been approved by the Office of Management and Budget under the Paperwork Reduction Act. The OMB clearance number is 0915–0060.

This program is listed at 93.124 in the Catalog of Federal Domestic Assistance and is not subject to the provisions of Executive Order 12372, Intergovernmental Review of Federal Programs (as implemented through 45 CFR part 100).

Dated: September 17, 1991.

Robert G. Harmon,

Administrator.

[FR Doc. 91–28161 Filed 11–21–91; 8:45 am]

BILLING CODE 4160–15–M

Program Announcement for Grants for Two-Year Programs of Schools of Medicine or Osteopathic Medicine

The Health Resources and Services Administration (HRSA) announces that applications for fiscal year 1992 Grants for Two-Year Programs of Schools of Medicine or Osteopathic Medicine are now being accepted under the authority of section 788(a), title VII, of the Public Health Service (PHS) Act and section 631 of the Health Professions Reauthorization Act of 1988, Public Law 100–607, title VI. This authority expired on September 30, 1991.

This program announcement is subject to reauthorization of this legislative authority and to the appropriation of funds. Applicants are advised that this program announcement is a contingency action being taken to assure that should funds become available for this purpose, they can be awarded in a timely fashion consistent with the needs of the program as well as provide for even distribution of funds throughout the fiscal year. This notice regarding applications does not reflect any change in policy.

Section 788(a) authorizes the award of grants to maintain and improve schools which provide the first or last 2 years of education leading to the degree of doctor of medicine or osteopathic medicine. Grants provided under this authority to schools that were in existence on September 30, 1985, may also request support for construction and purchase of equipment.

To be eligible for a grant under this authority, the applicant must be a public or nonprofit private school providing the first or last 2 years of education leading to the degree of doctor of medicine or osteopathic medicine, and be accredited or be operated jointly with a school that is accredited by a recognized body or bodies approved for such purpose by the Secretary of Education.

The initial period of Federal support should not exceed 1 year.

National Health Objectives for the Year 2000

The Public Health Service (PHS) urges applicants to submit work plans that address specific objectives of Healthy People 2000. Potential applicants may obtain a copy of Healthy People 2000 (Full Report; Stock No. 017–001–00474–0) or Healthy People 2000 (Summary Report; Stock No. 017–001–00473–1) through the Superintendent of Documents, Government Printing Office, Washington, DC 20402–9325 (telephone (202) 783–3238).

Education and Service Linkage

As part of its long-range planning, HRSA will be targeting its efforts to strengthening linkages between U.S. Public Health Service education and service programs which provide comprehensive primary care services to the underserved.

Review Criteria

Approval of all applications will be based on an analysis of the following factors:

(1) The extent to which the project meets the intent of section 788(a) legislation;

(2) The administrative and management ability of the applicant to carry out grant supported objectives in a cost effective manner;

(3) The adequacy of the qualifications and experience of the staff and faculty;

(4) The relative effectiveness of the proposed project in improving the quality of and/or access to medical education; and

(5) The extent to which the project is effective in its recruitment and retention of disadvantaged students.

Requests for application materials, questions regarding grants policy and business management aspects should be directed to: Mrs. Judy Bowen (D–31), Grants Management Specialist, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 8C–26, 5600 Fishers Lane, Rockville, Maryland 20857, telephone: (301) 443–6960.

Completed applications should be returned to the Grants Management office at the above address.

Should additional programmatic information be required, please contact: Mr. Don Buysse, Chief, Primary Care Medical Education Branch, Division of Medicine, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 4C–04, 5600 Fishers Lane, Rockville, Maryland 20857, telephone: (301) 443–3614.

The standard application form PHS 6025–1, HRSA Competing Training Grant Application, General Instructions and supplement for this program have been approved by the Office of Management and Budget under the Paperwork Reduction Act. The OMB clearance number is 0915–0060.

The application deadline is January 8, 1991. Applications shall be considered as meeting the deadline if they are either:

1. Received on or before the deadline date, or

2. Postmarked on or before the deadline and received in time for submission to the independent review group. A legibly dated receipt from a commercial carrier or the U.S. Postal Service will be accepted in lieu of a postmark. Private metered postmarks shall not be acceptable as proof of timely mailing.

Late applications not accepted for processing will be returned to the applicant.

This program is listed at 93.149 in the Catalog of Federal Domestic Assistance. Applications submitted in response to this announcement that request construction assistance are subject to the Intergovernmental Review under provisions of Executive Order 12372, as supplemented by 45 CFR part 100, Intergovernmental Review of Federal Programs. Executive Order 12372 sets up a system for State and local government review of proposed Federal assistance applications. Applications submitted for program support only are not subject to Intergovernmental review under these provisions.

Dated: November 18, 1991.

Robert G. Harmon,

Administrator.

[FR Doc. 91–28164 Filed 11–21–91; 8:45 am]

BILLING CODE 4160–15–M

Public Health Service

Agency Forms Submitted to the Office of Management and Budget for Clearance

Each Friday the Public Health Service

(PHS) publishes a list of information collection requests it has submitted to the Office of Management and Budget (OMB) for clearance in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). The following requests have been submitted to OMB since the list was last published on October 25, 1991.

(Call PHS Reports Clearance Officer on 202–245–2100 for copies of request)

1. *AIDS Education and Training Centers Program*—National Program Service Record—New—Information will be obtained from AIDS Education and Training Centers (ETCs) to determine compliance with terms of cooperative agreements and specific project requirements. The National Program Service Record will be used by ETCs to provide standardized reporting of project activities for Federal program monitoring. Respondent: Non-profit institutions. Number of Respondents: 17; Number of Responses Per Respondent: 4; Average Burden Per Response: 12 hours; Total Annual Burden: 816 hours

2. *Mammography Facilities Survey*—New—Nationally representative data on characteristics of facilities offering screening mammography examinations are needed. The data will be used by researchers and federal, state and local health officials in evaluating and formulating policies designed to optimize the benefits of screening mammography to reduce morbidity and mortality from breast cancer. The affected public are operators of mammography facilities and referring physicians. Respondents: Businesses or other for-profit; Non-profit institutions; Small businesses or organizations. Number of Respondents: 1,529; Number of Responses per Respondent: 1; Average Burden per Response: 1.61 hours; Estimated Annual Burden: 2,467 hours.

3. *Medical Device and Laboratory Product Problem Reporting Program (PRP)*—0910–0143—This program provides information needed to monitor the safety and effectiveness of Medical Devices and Radiological Products regulated by CDRH. Data is voluntarily submitted by health care professionals and other individuals and is used to protect the public health through education, regulatory, administrative, and voluntary corrective action. Respondents: Individuals or households; State or local governments; Businesses or other-for-profit; Federal agencies or employees; Non-profit institutions. Number of Respondents: 2,000; Number of Responses per Respondent: 1; Average Burden per Response: .25 hours; Estimated Annual Burden: 500 hours.

4. *Survey of Beneficiaries of Title VIII Nurse Education Programs*—New—Information will be collected from grantees and graduates of Title VIII nurse education programs to assess the effects of these programs on recruitment and retention of nurses, and on the availability and delivery of nursing services. A report of the results of this evaluation is due in Congress in January 1993. Respondents: Individuals or households; Non-profit institutions.

	No. of respondents	No. of responses per respondent	No. of hours per response
Grantee survey.	110	1	.5 hour.
Graduate survey.	2,640	1	.4167 hour.
Estimated annual burden.			1,155 hours.

OMB Desk Officer: Shannah Koss-McCallum.

Written comments and recommendations for the proposed information collections should be sent within 30 days of this notice directly to the OMB Desk Officer designated above at the following address:

Human Resources and Housing Branch, New Executive Office Building, room 3002, Washington, DC 20503

Dated: November 18, 1991.

Phyllis Zucker,

Acting Deputy Assistant Secretary for Public Health Policy.

[FR Doc. 91–28120 Filed 11–21–91; 8:45 am]

BILLING CODE 4160–17–M

Social Security Administration

Agency Forms Submitted to the Office of Management and Budget for Clearance

Each Friday the Social Security Administration publishes a list of information collection packages that have been submitted to the Office of Management and Budget (OMB) for clearance in compliance with Public Law 96–511, The Paperwork Reduction Act. The following clearance packages have been submitted to OMB since the last list was published in the **Federal Register** on November 1, 1991.

(Call Reports Clearance Officer on (301) 965–4149 for copies of package).

1. Certification of Responsibility For Welfare And Care Of Child Not In Applicant's Custody—0960–0019. The information collected on the form SSA–781 is used to determine whether the, "In Care," entitlement factor is met. The respondents are applicants for benefits whose entitlement depends upon having an entitled child of the wage earner in their care.

Number of Respondents: 14,000.

Frequency of Response: 1.

Average Burden Per Response: 10 minutes.

Estimated Annual Burden: 2,333 hours.

2. Physician's/Medical Officer's Statement Of Patient's Capability To Manage Benefits—0960–0024. The information collected on the form SSA–787 is used to determine whether an individual is capable of handling his/her benefits. The respondents are physicians of beneficiaries or medical officers of institutions where beneficiaries reside.

Number of Respondents: 120,000.

Frequency of Response: 1.

Average Burden Per Response: 5 minutes.

Estimated Annual Burden: 10,000 hours.

3. Notice Regarding Substitution Of Party Upon Death Of Claimant—00960–0288. The information collected on the form HA–539 is used to select a qualified individual to pursue the pending claim of a deceased claimant. The respondents are persons desiring to pursue claims on behalf of deceased claimants.

Number of Respondents: 32,000.

Frequency of Response: 1.

Average Burden Per Response: 5 minutes.

Estimated Annual Burden: 2,666 hours.

OMB Desk Officer: Laura Oliven.

Written comments and recommendations regarding these information collections should be sent directly to the appropriate OMB Desk Officer designated above at the following address: OMB Reports Management Branch, New Executive Office Building, room 3208 Washington, DC 20503.

Date: November 7, 1991.

Ron Compston,

Social Security Administration, Reports Clearance Officer.

[FR Doc. 91–27560 Filed 11–21–91; 8:45 am]

BILLING CODE 4190–11–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Community Planning and Development

[Docket No. N-91-1917; FR-2934-N-53]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

ADDRESSES: For further information, contact James N. Forsberg, room 7262, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; telephone (202) 708-4300; TDD number for the hearing- and speech-impaired (202) 708-2565 (these telephone numbers are not toll-free), or call the toll-free title V information line at 1-800-927-7588.

SUPPLEMENTARY INFORMATION: In accordance with 24 CFR Part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88-2503-OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or make available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this notice. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Judy Breitman, Division of Health Facilities Planning, U.S. Public Health Service, HHS, room 17A-10, 5600 Fishers Lane, Rockville, MD 20857; (301) 443-2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 56 FR 23789 (May 24, 1991).

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1800-927-7588 for detailed instructions or write a letter to James N. Forsberg at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (*i.e.*, acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: *U.S. Navy:* John J. Kane, Deputy Division Director, Dept. of Navy, Real Estate Operations, Naval Facilities Engineering Command, 200 Stovall Street, Alexandria, VA 22332-2300; (202) 325-0474; *Dept. of Transportation:* Ronald D. Keefer, Director, Administrator Services & Property Management, DOT, 400 Seventh St. SW, room 10319, Washington, DC 20590; (202) 366-4246; *Dept. of Interior:* Lola D. Knight, Property Management Specialist, Dept. of Interior, 1849 C St. NW, Mailstop 5512-MIB, Washington, DC 20240; (202) 208-4080; *Dept. of Energy:* Tom Knox, Realty Specialist, AD223.1, 1000 Independence Ave. SW, Washington, DC 20585; (202) 586-1191. (These are not toll-free numbers.)

Correction: Property numbers 319120004-319120006 should not have been listed in the **Federal Register** published on November 8, 1991.

Dated: November 15, 1991.

Paul Roitman Bardack,

Deputy Assistant Secretary for Economic Development.

Title V, Federal Surplus Property Program Federal Register Report for 11/22/91

Suitable/Available Properties

Buildings (by State)

California

Yunker House (07-108),
Redwood National Park,
Hiouchi, Co: Del Norte, CA 95531-
Landholding Agency: Interior
Property Number: 619140004
Status: Unutilized
Comment: 900 sq. ft., 1 story frame residence, off-site use only.

Colorado

Otis Repeater Building
Otis Co: Washington, CO 80743-
Landholding Agency: Energy
Property Number: 419130001
Status: Excess
Comment: 144 sq. ft., one story metal structure, most recent use—communication equipment storage, off-site use only.
Limon Repeater Station
Limon Co: Lincoln, CO 80828-
Landholding Agency: Energy
Property Number: 419130002
Status: Excess
Comment: 144 sq. ft., one story metal structure, most recent use—communication equipment storage, off-site use only.

Idaho

Storage and Training Facility
INEL DOE-ID
Idaho Falls Co: Bonneville, ID
Landholding Agency: Energy,
Property Number: 419040001
Status: Excess
Comment: 2072 sq. ft., 1 story wood frame, needs major rehab, off-site use only.

Maine

Naval Air Station
Transmitter Site
Old Bath Road
Brunswick Co: Cumberland, ME 04053-
Landholding Agency: Navy
Property Number: 779010110
Status: Underutilized

Comment: 7,270 sq. ft., 1 story bldg, most recent use—storage, structural deficiencies.

North Carolina

Dwelling 1
USCG Coinjock Housing
Coinjock Co: Currituck, NC 27923–
Landholding Agency: DOT
Property Number: 879120083
Status: Unutilized
Comment: One story wood residence, periodic flooding in garage and utility room occurs in heavy rainfall.
Dwelling 2
USCG Coinjock Housing
Coinjock Co: Currituck, NC 27923–
Landholding Agency: DOT
Property Number: 879120084
Status: Unutilized
Comment: One story wood residence, periodic flooding in garage and utility room occurs in heavy rainfall.
Dwelling 3
USCG Coinjock Housing
Coinjock Co: Currituck, NC 27923–
Landholding Agency: DOT
Property Number: 879120085
Status: Unutilized
Comment: One story wood residence, periodic flooding in garage and utility room occurs in heavy rainfall.
USCG Station—Building
Oregon Inlet Coast Guard Station
Rodanthe Co: Dare, NC 27968–
Landholding Agency: DOT
Property Number: 879120086
Status: Unutilized
Comment: 1207 sq. ft., two story wood frame, most recent use—office, storage, shops, communications, dining, etc.
USCG Station—Building
Oregon Inlet Coast Guard Station
Rodanthe Co: Dare, NC 27968–
Landholding Agency: DOT
Property Number: 879120088
Status: Unutilized
Comment: 1521 sq. ft., two story lightweight steel frame, most recent use—office, shops, communications, storage, berthing, dining, etc.
USCG Station—Garage
Oregon Inlet Coast Guard Station
Rodanthe Co: Dare, NC 27968–
Landholding Agency: DOT
Property Number: 879120089
Status: Unutilized
Comment: 1920 sq. ft., one story steel frame, most recent use—garage/storage.
USCG Station—Building
Oregon Inlet Coast Guard Station
Rodanthe Co: Dare, NC 27968–
Landholding Agency: DOT
Property Number: 879120090
Status: Unutilized
Comment: 320 sq. ft., one story wood frame, most recent use—storage

New Mexico

Old Helium Plant
Gallup Co: McKinley, NW 87301–
Location: ¼ mile north of Gallup, adjacent to Old US Highway 666.
Landholding Agency: Interior
Property Number: 619010002
Status: Excess
Comment: 7653 sq. ft., 1 story office and warehouse space, possible asbestos, on 4.65 acres, secured area with alternate access.

New York

Bldg. 178
36 Brookhaven Avenue
Upton Co: Suffolk, NY 11973–
Landholding Agency: Energy
Property Number: 419130003
Status: Excess
Comment: One story wood frame structure, needs major rehab, most recent use—storage, presence of asbestos, off-site use only.

Bldg. 424
12 Brookhaven Avenue
Upton Co: Suffolk NY 11973–
Landholding Agency: Energy
Property Number: 419130004
Status: Excess
Comment: One story block frame, needs major rehab, presence of asbestos, most recent use—storage, off-site use only.

Oregon

Bldg. #3 (Ranger Residence)
1900 caves Highway
Cave Junction Co: Josephine, OR 97523–
Landholding Agency: Interior
Property Number: 619130004
Status: Excess
Comment: 732 sq. ft., one story cabin, off-site use only.

Puerto Rico

Mona Island
Punta Este Co: Mona Island, PR
Landholding Agency: DOT
Property Number: 879010004
Status: Excess
Comment: Light house on 2.09 acres

Texas

Administration Bldg.
Guadalupe Mountains National Park
Pine Springs Co: Culberson, TX 79847–
Landholding Agency: Interior
Property Number: 619130005
Status: Excess
Comment: 2016 sq. ft., one story frame structure, most recent use—office, off-site use only.

Virginia

Housing
Rt. 637—Gwynnville Road
Gwynn Island Co: Mathews, VA 23066–
Landholding Agency: DOT
Property Number: 879120082
Status: Unutilized
Comment: 929 sq. ft., one story residence.
Washington
Thompson Main Residence
Lake Crescent Ranger Station
HC 62, Box 10
Port Angeles, WA 98362–
Landholding Agency: Interior
Property Number: 619030001
Status: Unutilized
Comment: 2 story residence, no utilities, needs rehab, off-site use only.
Thompson Older Residence
Lake Crescent Ranger Station
HC 62, Box 10
Port Angeles, WA 98362–
Landholding Agency: Interior
Property Number: 619030002
Status: Unutilized
Comment: 888 sq. ft., 1 story residence, no utilities, needs rehab, off-site use only.
Thompson garage
Lake Crescent Ranger Station
HC 62, Box 10
Port Angeles, WA 98362–
Landholding Agency: Interior
Property Number: 619030003
Status: Unutilized
Comment: 240 sq., 1 story garage, no utilities, needs rehab, off-site use only.
Thompson Shop
Lake Crescent Ranger Station
HC 62, Box 10
Port Angeles, WA 98362–
Landholding Agency: Interior
Property Number: 619030009
Status: Unutilized
Comment: 300 sq. ft., 1 story shop, no utilities, needs rehab, off-site use only
Thompson Powerhouse
Lake Crescent Ranger Station
HC 62, Box 10
Port Angeles, WA 98362–
Landholding Agency: Interior
Property Number: 619030010
Status: Unutilized
Comment:
160 sq. ft., 1 story powerhouse, no utilities, needs rehab, off-site use only.
Spracklen Utility Shed
Quinault Ranger Station
Route 2, Box 76
Amanda Park, WA 98526–
Landholding Agency: Interior
Property Number: 619030012
Status: Unutilized
Comment: 150 sq. ft., frame utility shed, limited utilities, off-site use only
Dahinden Storage Building
Quinault Ranger Station
Route 2, Box 76
Amanda Park, WA 98526–
Landholding Agency: Interior
Property Number: 619030013
Status: Unutilized
Comment: 240 sq. ft., frame storage building, no utilities, needs rehab, off-site use only.
Bldg. 1185
Lake Crescent Ranger Station HC 62, Box 10
Carter Storage Building
Port Angeles, WA 98362–
Landholding Agency: Interior
Property Number: 619030016
Status: Unutilized
Comment: 92 sq. ft., 1 story storage building, no utilities, off-site use only.
Haas Shed
% Quinault Ranger Station
Route 2, Box 76
Amanda Park, Co.: Grays Harbor, WA 98526–
Landholding Agency: Interior
Property Number: 619040002
Status: Excess
Comment: 480 sq. ft., wood frame shed, poor condition, off-site use only.
Haas Shed
% Quinault Ranger Station
Route 2, Box 76
Amanda Park, Co.: Grays Harbor, WA 98526–
Landholding Agency: Interior
Property Number: 619040003

Status: Excess
Comment: 64 sq. ft., wood frame shed, poor condition, off-site use only.

Haas Residence
% Quinault Ranger Station
Route 2, Box 76
Amanda Park, Co.: Grays Harbor, WA 98526–
Landholding Agency: Interior
Property Number: 619040006
Status: Excess
Comment: 624 sq. ft., 1 story wood frame residence, potential utilities, poor condition, off-site use only.

Wyoming

Administration Bldg.
Fontenelle Camp
Fontenelle Co: Lincoln, WY
Location: Approximately 24 miles southeast of Labarge, off State Road 372 and on County Road 316.
Landholding Agency: Interior
Property Number: 619030017
Status: Excess
Comment: 4464 sq. ft., 2 story brick structure with a 2880 sq. ft. wood frame addition, needs rehab, possible asbestos, off-site use only.

Residential House
Fontenelle Camp
Fontenelle Co: Lincoln, WY
Location: Approximately 24 miles southeast of Labarage, off State Road 372 and on County Road 316.
Landholding Agency: Interior
Property Number: 619030018
Status: Excess
Comment: 1200 sq. ft., 1 story with basement, needs rehab, possible asbestos, off-site use only.

LAND (by State)

Alaska

Wrangell Narrows Reservation
Wrangell Co: Wrangell, AK
Location: Approximately 6 miles south of Petersburgh, Alaska along Mitkof highway.
Landholding Agency: DOT
Property Number: 879010008
Status: Excess
Comment: 42.15 acres

California

Remote Transmitter
Section 35
Red Bluff Co: Tehema, CA 96080–
Landholding Agency: DOT
Property Number: 879010010
Status: Unutilized
Comment: 4 acres, paved road, current use—storage.

Georgia

Naval Submarine Base
Grid R–2 to R–3 to V–4 to V–1
Kings Bay Co: Camden, GA 31547–
Landholding Agency: Navy
Property Number: 779010229
Status: Underutilized
Comment: 111.57 acres; areas may be environmentally protected; secured area with alternate access.

Maine

Naval Air Station
Transmitter Site
Old Bath Road
Brunswick Co: Cumberland, ME 04053–
Landholding Agency: Navy
Property Number: 779010111
Status: Underutilized
Comment: 66.13 acres, most recent use-transmitter station.

North Carolina

USCG Station—Land
Oregon Inlet Coast Guard Station
Rodanthe Co: Dare, NC 27968
Landholding Agency: DOT
Property Number: 879120087
Status: Unutilized
Comment: 10 acres, potential utilities.

Oregon

Port Orford Radio Station
Port Orford Co: Curry, OR 97465–
Landholding Agency: DOT
Property Number: 879010007
Status: Excess
Comment: 5.17 acres, radio station.

Texas

Peary Point #2
Naval Air Station
Corpus Christi Co: Nueces, TX 78419–5000
Landholding Agency: Navy
Property Number: 779030001
Status: Excess
Comment: 43.48 acres; 60% of land under lease until 8/93. GSA Number: 7–N–TX–402–V.

Wyoming

Wind Site A
Medicine Bow Co: Carbon, WY 82329–
Location: 3 miles south and 2 miles west of Medicine Bow
Landholding Agency: Energy
Property Number: 419030010
Status: Excess
Comment: 46.75 acres, limitation—easement restrictions.

Suitable/Unavailable Properties

BUILDINGS (by State)

California

Bldg. 8, Coast Guard Island
USCG Support Center, Alameda
Alameda Co: Alameda, CA 94501–
Landholding Agency: DOT
Property Number: 879130005
Status: Underutilized
Comment: 16900 sq. ft., 2 story wood frame, most recent use—barracks, needs major rehab, presence of asbestos, off-site use only.

Bldg. 9, Coast Guard Island
USCG Support Center, Alameda
Alameda Co: Alameda, CA 94501–
Landholding Agency: DOT
Property Number: 879130006
Status: Unutilized
Comment: 29440 sq. ft., 2 story wood frame, most recent use—office, presence of asbestos, needs major rehab, off-site use only.

New York

Naval Reserve Center
112 Hanse Avenue
Freeport Co: Nassau, NY 11550–
Landholding Agency: Navy
Property Number: 779010041
Status: Excess
Comment: 4000 sq. ft., 1 floor; most recent use—offices; needs rehab.

Texas

66 Bldgs.
Laguna Housing Area
NAS Corpus Christi
Corpus Christi Co: Nueces, TX 78419–
Landholding Agency: Navy
Property Number: 779010161–779010227
Status: Underutilized
Comment: Various sq. ft., 1 story residences.

Brownsville Urban System
(Grantee)
700 South Iowa Avenue
Brownsville Co: Cameron, TX 78520–
Landholding Agency: DOT
Property Number: 879010003
Status: Unutilized
Comment: 3500 sq. ft., 1 story concrete block, (2nd floor of Admin. Bldg.) on 10750 sq. ft. land, contains underground diesel fuel tanks.

Virginia

Naval Medical Clinic
6500 Hampton Blvd.
Norfolk Co: Norfolk, VA 23508–
Landholding Agency: Navy
Property Number: 779010109
Status: Unutilized
Comment: 3665 sq. ft., 1 story, possible asbestos, most recent use—laundry.

Washington

Haas Barn
c/o Quinault Ranger Station
Route, 2, Box 76
Amanda Park Co: Grays Harbor, WA 98526–
Landholding Agency: Interior
Property Number: 619040001
Status: Excess
Comment: 1408 sq. ft., 1 story wood frame barn, potential utilities, poor condition, off-site use only.

Bldg. 1323
Jensen Barn
c/o Quinault Ranger Station, Route 2, Box 76
Amanda Park Co: Grays Harbor, WA 98526–
Landholding Agency: Interior
Property Number: 619040007
Status: Excess
Comment: 4200 sq. ft., wood frame barn, most recent use—storage, no utilities, off-site use only.

Naval Station Puget Sound
7500 Sand Point Way, NE
Seattle Co: King, WA 98115–
Landholding Agency: Navy
Property Number: 779120002
Status: Excess
Base closure
Comment: 144 sq. ft. ammunition bunker, most recent use—storage, secured area with alternate access.

West Virginia

Naval & Marine Corps Res. Ctr.
N. 13th St & Ohio River
Wheeling Co: Ohio, WV 26003–
Landholding Agency: Navy
Property Number: 779010077

Status: Excess
Comment: 32000 sq. ft.; 1 floor; most recent use—offices; 15% of total space occupied; needs rehab; land leased form city—expires September 1990.

LAND (by State)

Arizona

Liberty Substation
Buckeye Co: Maricopa, AZ 85326–
Location: 3 miles south of Interstate 10 on Tuthill Road
Landholding Agency: Energy
Property Number: 419030001
Status: Underutilized
Comment: 15 acres, buffer area for substation.

Florida

Naval Public Works Center
Naval Air Station
Pensacola Co: Escambia, FL 32508–
Location: Southeast corner of Corey station—next to family housing.
Landholding Agency: Navy
Property Number: 779010157
Status: Unutilized
Comment: 22 acres.

Parcel A & B
U.S. Coast Guard Light Station
Lots 1, 8 & 11, Section 31
Jupiter Inlet Co: Plam Beach, FL 33420–
Location: Township 40 south, range 43 east.
Landholding Agency: DOT
Property Number: 879010009
Status: Unutilized
Comment: 56.61 acres, area is uncleared, vegetation growth is heavy, no utilities.

Georgia

Naval Submarine Base
Grid AA–1 to AA–4 to EE–7 to FF–2
Kings Bay Co: Camden, GA 31547–
Landholding Agency: Navy
Property Number: 779010255
Status: Underutilized
Comment: 495 acres; 86 acre portion located in floodway; secured area with alternate access.

Iowa

Sioux City Substation
Hinton Co: Plymouth, IA 51024–
Location: 1 mile south of Hinton Iowa on Highway 75.
Landholding Agency: Energy
Property Number: 419030003
Status: Underutilized
Comment: 34 acres, limitation—easement restrictions, most recent use—transmission line corridor and buffer area.

Montana

Miles City Substation
Miles City Co: Custer, MT 59301–
Location: 1 mile east of Miles City
Landholding Agency: Energy
Property Number: 419030004
Status: Underutilized
Comment: 59 acres, limitation—easement restrictions subject to grazing lease, most recent use—buffer area for substation.

Custer Substation
Custer Co: Yellowstone, MT 59024–
Location: 2 miles east of the town of Custer—east of Highway 47
Landholding Agency: Energy
Property Number: 419030006
Status: Underutilized
Comment: 18 acres, buffer area for substation.

North Dakota

Fargo Substation
Fargo Co: Cass, ND 58102–
Landholding Agency: Energy
Property Number: 419030005
Status: Underutilized
Comment: 25 acres, most recent use—transmission line corridor and buffer.

Nebraska

Grand Island Substation
Phillips Co: Merrick, NE 68865–
Location: 5 miles east of Grand Island and 4 miles west of Phillips.
Landholding Agency: Energy
Property Number: 419030002
Status: Underutilized
Comment: 11 acres, buffer area for substation, right-of-way for transmission lines for Nebraska Public Power District.

Virginia

Naval Base
Norfolk Co: Norfolk, VA 23508–
Location: Northeast corner of base, near Willoughby housing area.
Landholding Agency: Navy
Property Number: 779010156
Status: Unutilized
Comment: 60 acres; most recent use—sandpit; secured area with alternate access.

Washington

Raver Substation
(See County) Co: King, WA
Location: Approximately 16 miles east of Kent.
Landholding Agency: Energy
Property Number: 419030012
Status: unutilized
Comment: 10+ acres, potential utilities, heavily treed.

Suitable/To Be Excess

Buildings (by State)

California

Bldg. 100
Naval Facilities Point Sur
CVB Detachment
Monterey Co: Monterey, CA 93940–
Landholding Agency: Navy
Property Number: 779010259
Status: Unutilized
Comment: 2628 sq. ft.; 1 story permanent bldg; possible asbestos; secure facility with alternate access; use—office space.

Bldg. 102
Naval Facilities Point Sur
CVB Detachment
Monterey Co: Monterey, CA 93940–
Landholding Agency: Navy
Property Number: 779010260
Status: Unutilized
Comment: 580 sq. ft.; 1 story permanent bldg; possible asbestos; secure facility with alternate access; most recent use—office.

Bldg. 103
Naval Facilities Point Sur
CVB Detachment
Monterey Co: Monterey, CA 93940–
Landholding Agency: Navy
Property Number: 779010261
Status: Unutilized
Comment: 3675 sq. ft.; 1 story permanent bldg; possible asbestos; secure facility with alternate access; most recent use—dining hall.

Bldg. 109
Naval Facilities Point Sur
CVB Detachment
Monterey Co: Monterey, CA 93940–
Landholding Agency: Navy
Property Number: 779010262
Status: Unutilized
Comment: 1045 sq. ft.; 2 story permanent bldg; possible asbestos; secure facility with alternate access; most recent use—barracks.

Bldg. 110
Naval Facilities Point Sur
CVB Detachment
Monterey Co: Monterey, CA 93940–
Landholding Agency: Navy
Property Number: 779010263
Status: Unutilized
Comment: 4439 sq. ft.; 1 story permanent bldg; possible asbestos; secure facility with alternate access; most recent use—shop.

Bldg. 113
Naval Facilities Point Sur
CVB Detachment
Monterey Co: Monterey, CA 93940–
Landholding Agency: Navy
Property Number: 779010264
Status: Unutilized
Comment: 100 sq. ft.; 1 story permanent bldg; secured facilities with alternate access; most recent use—storage.

Bldg. 138
Naval Facilities Point Sur
CVB Detachment
Monterey Co: Monterey, CA 93940–
Landholding Agency: Navy
Property Number: 779010265
Status: Unutilized
Comment: 110 sq. ft.; 1 story permanent bldg; possible asbestos; secure facility with alternate access; most recent use—filling station.

Bldg. 144
Naval Facilities Point Sur
CVB Detachment
Monterey Co: Monterey, CA 93940–
Landholding Agency: Navy
Property Number: 779010266
Status: Unutilized
Comment: 4320 sq. ft.; 1 story semi-permanent bldg; possible asbestos; secure facility with alternate access; most recent use—bowling alley.

Bldg. 145
Naval Facilities Point Sur
CVB Detachment
Monterey Co: Monterey, CA 93940–
Landholding Agency: Navy
Property Number: 779010267
Status: Unutilized
Comment: 4000 sq. ft.; 1 story semi-permanent bldg; possible asbestos; secure facility with alternate access; most recent use—recreation building.

South Carolina

Bldg. #1 U.S. Coast Guard
Folly Island Loran Station
Folly Island Co: Charleston, SC 29401–
Landholding Agency: DOT
Property Number: 879120096
Status: Unutilized
Comment: 2340 sq. ft.; 1 story concrete block, most recent use—communications station.

Bldg. #2 U.S. Coast Guard
Folly Island Loran Station
Folly Island Co: Charleston, SC 29401–
Landholding Agency: DOT
Property Number: 879120097
Status: Unutilized
Comment: 2050 sq. ft.; 1 story concrete block, most recent use—communications station.

Land (by State)

Illinois

Libertyville Training Site
Libertyville Co: Luke, IL 60048—
Landholding Agency: Navy
Property Number: 7790010073
Status: Excess
Comment: 114 acres; possible radiation hazard; existing FAA use license.

Michigan

U.S. Coast Guard—Air Station
Traverse City Co: Grand Traverse, MI 49684—
Landholding Agency: DOT
Property Number: 879120099
Status: Underutilized
Comment: 21.7 acres, most recent use—helo landings.

South Carolina

Land—U.S. Coast Guard
Folly Island Loran Station
Folly Island Co: Charleston, SC 29401–
Landholding Agency: DOT
Property Number: 879120098
Status: Unutilized
Comment: 55 acres (88 acres submerged) tidal marshland, potential utilities.

Unsuitable Properties

Buildings (by State)

Alaska

Baler Bldg., Map Grid 55N14
Naval Air Station
Adak Co: Adak, AK 98791–
Landholding Agency: Navy
Property Number: 779120003
Status: Unutilized
Reason: Secured area.

Sand Shed, Map Grid 45024
Naval Air Station
Adak Co: Adak, AK 98791–
Landholding Agency: Navy
Property Number: 779120004
Status: Unutilized
Reason: Secured area.

Pier #9, Map Grid 55Y1
Naval Air Station
Adak Co: Adak, AK 98791–
Landholding Agency: Navy
Property Number: 779120005
Status: Unutilized
Reason: Secured area.

LORAN Station, Map Grid 09L11
Naval Air Station
Adak Co: Adak, AK 98791–
Landholding Agency: Navy
Property Number: 779120006
Status: Unutilized
Reason: Secured area.

Bldg. No. 10, Firehouse
Jct. of 5th St. & Ave. B
Kodiak Co: Kodiak Island, AK 99619–
Landholding Agency: DOT
Property Number: 879120100
Status: Unutilized
Reason: Other
Comment: Extensive deterioration.

Bldg. 22
USCG Support Center, Kodiak
Jct. of 5th Street and C Avenue
Kodiak Co: Kodiak Island, AK 99619–
Landholding Agency: DOT
Property Number: 879130003
Status: Unutilized
Reason: Other
Comment: Extensive deterioration.

USCG MSD Office (2 buildings)
2958 Tongass Avenue
Ketchikan Co: Ketchikan, AK 99901–
Landholding Agency: DOT
Property Number: 879130004
Status: Unutilized
Reason: Other
Comment: Extensive deterioration.

Alabama

Dwelling A
USCG Mobile Pt. Station
Ft. Morgan
Gulfshores Co: Baldwin, AL 36542–
Landholding Agency: DOT
Property Number: 879120001
Status: Excess
Reason: Floodway.

Dwelling B
USCG Mobile Pt. Station
Ft. Morgan
Gulfshores Co: Baldwin, AL 36542–
Landholding Agency: DOT
Property Number: 879120002
Status: Excess
Reason: Floodway.

Oil House
USCG Mobile Pt. Station
Ft. Morgan
Gulfshores Co: Baldwin, AL 36542–
Landholding Agency: DOT
Property Number: 879120003
Status: Excess
Reason: Floodway.

Garage
USCG Mobile Pt. Station
Ft. Morgan
Gulfshores Co: Baldwin, AL 36542–
Landholding Agency: DOT
Property Number: 879120004
Status: Excess
Reason: Floodway.

Shop Building
USCG Mobile Pt. Station
Ft. Morgan
Gulfshores Co: Baldwin, AL 36542–
Landholding Agency: DOT
Property Number: 879120005
Status: Excess
Reason: Floodway.

California

Olson House
Redwood National Park
Highway 199
Hiouchi Co: Del Norte, CA 95531–
Landholding Agency: Interior
Property Number: 619140001
Status: Unutilized
Reason: Other
Comment: Extensive deterioration.

Wilsonia Lodge
Kings Canyon National Park
Grant Grove Co: Tulare CA 93633–
Landholding Agency: Interior
Property Number: 619140002
Status: Unutilized
Reason: Other
Comment: Extensive deterioration.

Wilsonia Lodge Family Unit
Kings Canyon National Park Co: Tulare, CA 93633–
Landholding Agency: Interior
Property Number: 619140003
Status: Unutilized
Reason: Other
Comment: Extensive deterioration.

Bldg. 105
Naval FPS, CVB Detachment
Monterey Co: Monterey CA 93940–
Landholding Agency: Navy
Property Number: 779010159
Status: Unutilized
Reason: Within 2000 ft. of flammable or explosive material.

Bldg. 165
Naval FPS, CVB Detachment
Monterey Co: Monterey, CA 93940–
Landholding Agency: Navy
Property Number: 779010160
Status: Unutilized
Reason: Within 2000 ft. of flammable or explosive material.

Bldg. 146
Naval Facilities Point Sur
CVB Detachment
Monterey Co: Monterey, CA 93940–
Landholding Agency: Navy
Property Number: 779010268
Status: unutilized
Reason: Other
Comment: Sewer treatment facility.

Bldg. 17
Coast Guard Island
USCG Support Center, Alameda
Alameda Co: Alameda, CA 94501–
Landholding Agency: DOT
Property Number: 879130002
Status: Unutilized
Reason: Other
Comment: Structural deficiencies.

Colorado

Alemeda Facility
350 S. Santa Fe Drive
Denver Co: Denver CO 80223–
Landholding Agency: DOT
Property Number: 879010014
Status: Unutilized
Reason: Other environmental
Comment: Contamination.

Florida

East Martello Bunker #1
Naval Air Station
Key West Co: Monroe, FL 33040–
Landholding Agency: Navy

Property Number: 779010101
Status: Excess
Reason: Within airport runway clear zone.

Georgia

Naval Submarine Base-Kings Bay
1011 USS Daniel Boone Avenue
Kings Bay Co: Camden, GA 31547–
Landholding Agency: Navy
Property Number: 779010107
Status: Unutilized
Reason: Secured area.

Illinois

Bldg. 928
Naval Training Center
Great Lakes
Great Lakes Co: Lake, IL 60088–
Landholding Agency: Navy
Property Number: 779010120
Status: Unutilized
Reason: Secured area.

Bldg. 28
Naval Training Center
Great Lakes
Great Lakes Co: Lake, IL 60088–
Landholding agency: Navy
Property Number: 779010123
Status: Unutilized
Reason: Secured area.

Bldg. 25
Naval Training Center
Great Lakes
Great Lakes Co: Lake, IL 60088–
Landholding Agency: Navy
Property Number: 779010126
Status: Unutilized
Reason: Secured area.

Bldg. 2
Naval Training Center
Great Lakes
Great Lakes Co: Lake, IL 60088–
Landholding Agency: Navy
Property Number: 779010128
Status: Underutilized
Reason: Secured area.

South Wing—Building No. 62
Great Lakes Co: Lake, IL 60088–5000
Landholding Agency: Navy
Property Number: 779110001
Status: Underutilized
Reason: Secured area.

New Jersey

Bldg. 120
USCG Training Center Cape May
North Side of Munro Ave.
Cape May Co: Cape May, NJ 08204–
Location: Opposite GSK Bldg. 204
Landholding Agency: DOT
Property Number: 879120007
Status: Unutilized
Reason: Secured area.

New Mexico

Farmington Office and Yard
900 La Plata Highway
Farmington Co: San Juan, NM 87499–
Landholding Agency: Interior
Property Number: 619010001
Status: Unutilized
Reason: Within airport runway clear zone.

New York

Bldg. 204
Naval Underwater Systems Center
Fisher's Island Annex Detachment
Fisher's Island Co: Suffolk, NY 06390–
Landholding Agency: Navy
Property Number: 779010270
Status: Excess
Reason: Secured area.

Bldg. 255
Naval Underwater Systems Center
Fisher's Island Annex Detachment
Fisher's Island Co: Suffolk, NY 06390–
Landholding Agency: Navy
Property Number: 779010271
Status: Excess
Reason: Secured area.

Bldg. T–370
Naval Underwater Systems Center
Fisher's Island Annex Detachment
Fisher's Island Co: Suffolk, NY 06390–
Landholding Agency: Navy
Property Number: 779010272
Status: Excess
Reason: Secured area.

Oregon

Eugene District Office Site
751 South Danebo
Eugene Co: Lane, OR 97402–
Landholding Agency: Interior
Property Number: 619010003
Status: Underutilized
Reason: Within 2000 ft. of flammable or explosive material.

Pennsylvania

Bldg. 62
Philadelphia Naval Shipyard
Philadelphia Co: Philadelphia, PA 19112–
Landholding Agency: Navy
Property Number: 779010112
Status: Unutilized
Reason: Within 2000 ft. of flammable or explosive material.
Secured area.

Rhode Island

91 Bldgs.
Naval Construction Battalion Center
Davisville Co: Washington, RI 02854–
Landholding Agency: Navy
Property Number: 779010001–779010023, 779010025, 779010027–779010040, 779010042–779010061, 779010063–779010065, 779010067, 779010069–779010072, 779010074, 779010076, 779010078–779010079, 779010232–779010240, 779010242–779010253
Status: Excess
Reason: Within 2000 ft. of flammable or explosive material.
Secured area.

Bldg. 32
Naval Underwater Systems Center
Gould Island Annex
Middletown Co: Newport, RI 02840–
Landholding Agency: Navy
Property Number: 779010273
Status: Excess
Reason: Secured area.

Bldg. A–63
Naval Construction Battalion Center
Davisville Co: Washington, RI 02854–
Landholding Agency: Navy
Property Number: 779010277
Status: Excess
Reason: Secured area.

Texas

20 Bldgs.
Laguna Shores Housing Area
Corpus Christi Co: Nueces, TX 78419–
Landholding Agency: Navy
Property Number: 779010279–779010298
Status: Underutilized
Reason: Floodway.

Washington

Dahinden Chicken Coop
Quinault Ranger Station
Route 2, Box 76
Amanda Park, WA 98526–
Landholding Agency: Interior
Property Number: 619030014
Status: Unutilized
Reason: Other
Comment: Chicken Coop.

Dahinden Outhouse
Quinault Ranger Station
Route 2, Box 76
Amanda Park, WA 98526–
Landholding Agency: Interior
Property Number: 619030015
Status: Unutilized
Reason: Other
Comment: Detached latrine.

Haas Chicken Coop
C/o Quinault Ranger Station
Route 2, Box 76
Amanda Park Co: Grays Harbor, WA 98526–
Landholding Agency: Interior
Property Number: 619040004
Status: Excess
Reason: Other
Comment: Chicken Coop.

Haas Lean-to
C/o Quinault Ranger Station
Route 2, Box 76
Amanda Park Co: Grays Harbor, WA 98526–
Landholding Agency: Interior
Property Number: 619040005
Status: Excess
Reason: Other
Comment: Lean-to

Bldg. #36—Stehekin District
Company Creek Road
Stehekin Co: Chelan WA 98852–
Landholding Agency: Interior
Property Number: 619130001
Status: Unutilized
Reason: Other
Comment: extensive deterioration.

Bldg. 689—Comfort Station
Olympic Hot Springs Wilderness Backcountry
Port Angeles Co: Clallam, WA 98362–6798
Landholding Agency: Interior
Property Number: 619130002
Status: Excess
Reason: Other
Comment: Extensive deterioration.

Bldg. 252—Storage Shed
Olympic Hot Springs Wilderness Backcountry
Port Angeles Co: Clallam, WA 98362–6798
Landholding Agency: Interior
Property Number: 619130003
Status: Excess
Reason: Other
Comment: Extensive deterioration.

Bldg. L–103
Mount Rainier National Park

Longmire Maintenance Complex
Longmire Co: Pierce, WA 98397–
Landholding Agency: Interior
Property Number: 619130007
Status: Excess
Reason: Other
Comment: Extensive deterioration.

Bldg. L–234
Mount Rainier National Park
Longmire Maintenance Complex
Longmire Co: Pierce, WA 98397–
Landholding Agency: Interior
Property Number: 619130008
Status: Excess
Reason: Other
Comment: Extensive deterioration.

Bldg. 57
Naval Supply Center Puget Sound
Manchester Co: Kitsap, WA 98353–
Landholding Agency: Navy
Property Number: 779010091
Status: Unutilized
Reason: Within 2000 ft. of flammable or explosive material.
Secured area.

Bldg. 47 (Report 1)
Naval Supply Center Puget Sound
Manchester Co: Kitsap, WA 98353–
Landholding Agency: Navy
Property Number: 779010230
Status: Unutilized
Reason: Secured area.

Land (by State)

Alaska

Sanak Harbor Daybeacon
Sanak Island
Sanak Co: Aleutian, AK
Landholding Agency: DOT
Property Number: 879010012
Status: Unutilized
Reason: Other
Comment: Isolated area on Arctic Coast.

Arizona

Elliott Homes—Canal
West of 77th Ave. and South of Cholla Street
Peoria Co: Maricopa, AZ 85345–
Landholding Agency: Interior
Property Number: 619130006
Status: Surplus
Reason: Other
Comment: Lateral canal.

California

Elverta Substation
736 W. Elverta Road
Elverta Co: Sacramento, CA 95626–
Landholding Agency: Energy
Property Number: 419030008
Status: Underutilized
Reason: Secured area.

Salton Sea Test Range
ElCentro Co: Imperial, CA 93555–
Landholding Agency: Navy
Property Number: 779010068
Status: Excess
Reason: Secured area.

Colorado

Curecanti Substation
Cimarron Co: Montrose, CO 81220–
Location: 2 miles east of Cimarron on Highway 50
Landholding Agency: Energy
Property Number: 419030009
Status: Excess
Reason: Floodway.

Florida

Boca Chica Field
Naval Air Station
Key West Co: Monroe, FL 23040–
Landholding Agency: Navy
Property Number: 779010097
Status: Unutilized
Reason: Floodway.

East Martello Battery #2
Naval Air Station
Key West Co: Monroe, FL 33040–
Landholding Agency: Navy
Property Number: 779010275
Status: Excess
Reason: Within airport runway clear zone.

Georgia

Naval Submarine Base
Grid G–5 to G–10 to Q–6 to P–2
Kings Bay Co: Camden, GA 31547–
Landholding Agency: Navy
Property Number: 779010228
Status: Underutilized
Reason: Secured area.

Michigan

Middle Marker Facility
Yipsilanti Co: Washtenaw, MI 48198–
Location: 549 ft. north of intersection of Coolidge and Bradley Ave. on East side of street
Landholding Agency: DOT
Property Number: 879120006
Status: Unutilized
Reason: Within airport runway clear zone.

Montana

Dawson County substation
Glendive Co: Dawson, MT 59330
Location: 3 miles east of Glendive, MT on highway 20
Landholding Agency: Energy
Property Number: 419030011
Status: Underutilized
Reason: Secured area.

Anaconda Substation
Co: Deer Lodge, MT
Location: 4 miles southeast of Anaconda
Landholding Agency: Energy
Property Number: 419030013
Status: Unutilized
Reason: Other environmental
Comment: Contamination.

Washington

Snoqualmie Substation
(See County) Co: King, WA
Location: 12 miles southwest of North Bend.
Landholding Agency: Energy
Property Number: 419030007
Status: Unutilized
Reason: Secured area.

Land (Report 2). 234 acres
Naval Supply Center, Puget Sound
Manchester Co: Kitsap, WA 98353–
Landholding Agency: Navy
Property Number: 779010231
Status: Unutilized
Reason: Secured area.

Land
Puffin Island Light House Res.
San Juan Co: San Juan, WA
Landholding Agency: DOT
Property Number: 879010013
Status: Excess
Reason: Other
Comment: Island.

[FR Doc. 81–27965 Filed 11–21–91; 8:45 am]
BILLING CODE 4210–29–M

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Gulf of Mexico Region; Availability of the Final Environmental Impact Statement for Proposed Central and Western Gulf of Mexico Sales 139 and 141

The Minerals Management Service has prepared a final Environmental Impact Statement (EIS) relating to the proposed 1992 Outer Continental Shelf (OCS) oil and gas lease sales in the Central and Western Gulf of Mexico. The proposed Central Gulf Sale 139 will offer for lease approximately 27.6 million acres, and the Western Gulf Sale 141 will offer approximately 23.6 million acres. Single copies of the final EIS can be obtained from the Minerals Management Service, Gulf of Mexico OCS Region, Attention: Public Information Office, 1201 Elmwood Park Boulevard, room 114, New Orleans, Louisiana 70123.

Copies of the final EIS will also be available for review by the public in the following libraries:

Texas

Austin Public Library, 402 West Ninth Street, Austin
Houston Public Library, 500 McKinney Street, Houston
Dallas Public Library, 1513 Young Street, Dallas
Brazoria County Library, 410 Brazoport Boulevard, Freeport
LaRatama Library, 505 Mesquite Street, Corpus Christi
Texas Southmost College Library, 1825 May Street, Brownsville
Rosenberg Library, 2310 Sealy Street, Galveston
Texas State Library, 1200 Brazos Street, Austin
Texas A&M University, Evans Library, Spence and Lubbock Streets, College Station
University of Texas, Lyndon B. Johnson School of Public Affairs Library, 2313 Red River Street, Austin
The University of Texas at Dallas Library, 2601 North Floyd Road, Richardson
Lamar University, Gray Library, Virginia Avenue, Beaumont
East Texas State University Library, 2600 Neal Street, Commerce

Stephen F. Austin State University, Steen Library, Wilson Drive, Nacogdoches
Univeristy of Texas, 21st and Speedway Streets, Austin
University of Texas Law School, Tarlton Law Library, 727 East 26th Street, Austin
Baylor University Library, 13125 Third Street, Waco
University of Texas at Arlington, 701 South Cooper Street, Arlington
University of Houston—University Park, 4800 Calhoun Boulevard, Houston
University of Texas at El Paso, Wiggins Road and University Avenue, El Paso
Abilene Christian University, Margaret and Herman Brown Library, 1600 Campus Court, Ablene
Texas Tech University Library, 18th and Boston Streets, Lubbock
University of Texas at San Antonio, John Peace Boulevard, San Antonio.

Louisiana

Tulane University, Howard Tilton Memorial Library, 7001 Freret Street, New Orleans
Louisiana Tech University, Prescott Memorial Library, Everet Street, Ruston
New Orleans Public Library, 219 Loyola Avenue, New Orleans
University of New Orleans Library, Lakeshore Drive, New Orleans
Louisiana State Library, 760 Riverside Road, Baton Rouge
Lafayette Public Library, 301 W. Congress, Street, Lafayette
Calcasieu Parish Library, 411 Pujo Street, Lake Charles
McNeese State University, Luther E. Frazar Memorial Library, Ryan Street, Lake Charles
Nicholls State University, Nicholls State Library, Leighton Drive, Thibodaux
University of Southwestern Louisiana, Dupre Library, 302 East St. Mary Boulevard, Lafayette
LUMCOM, Library, Star Route 541, Chauvin

Mississippi

Harrison County Library, 14th and 21st Avenues, Gulfport
Gulf Coast Research Lab., Gunter Library, 703 East Beach Drive, Ocean Springs

Alabama

Auburn University at Montgomery, Library, Taylor Road, Montgomery
University of Alabama Libraries, 809 University Boulevard East, Tuscaloosa
Mobile Public Library, 701 Government Street, Mobile
Montgomery Public Library, 445 South Lawrence Street, Montgomery
Gulf Shores Public Library, Municipal Complex, Route 3, Gulf Shores
Dauphin Island Sea Lab, Marine Environmental Science Consortium, Library, Bienville Boulevard, Dauphin Island
University of South Alabama, University Boulevard, Mobile

Florida

University of Florida Libraries, University Avenue, Gainesville
Florida A&M University, Coleman Memorial Library, Martin Luther King Boulevard, Tallahassee
Florida State University, Strozier Library, Call Street and Copeland Avenue, Tallahassee
Florida Atlantic University, Library, 20th Street, Boca Raton
University of Miami Library, 4600 Rickenbacker Causeway, Miami
University of Florida, Holland Law Center Library, Southwest 25th Street and 2nd Avenue, Gainesville
St. Petersburg Public Library, 3745 Ninth Avenue North, St. Petersburg
West Florida Regional Library, 200 West Gregory Street, Pensacola
Florida Northwest Regional Library System, 25 West Government Street, Panama City
Leon County Public Library, 127 North Monroe Street, Tallahassee
Lee County Library, 3355 Fowler Street, Fort Myers
Charlotte-Glades Regional Library System, 2280 NW Aaron Street, Port Charlotte
Tampa-Hillsborough County Public Library System, 800 North Ashley Street, Tampa
Key Largo Public Library, 99551 No. 3 Overseas Highway, Key Largo
Selby Public Library, 1001 Boulevard of the Arts, Sarasota
Collier County Public Library, 650 Central Avenue, Naples
Marathon Public Library, 3152 Overseas Highway, Marathon
Monroe County Public Library, 700 Fleming Street, Key West

Dated: November 18, 1991.

Thomas Gernhofer,

Associate Director for Offshore Minerals Management.

Jonathan P. Deason,

Director, Office of Environmental Affairs.

[FR Doc. 91-28080 Filed 11-21-91; 8:45 am]

BILLING CODE 4320-MR-M

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Business Research Advisory Committee; Meeting and Agenda

The regular Fall meeting of the Committee on Occupational Safety and Health Statistics of the Business Research Advisory Council will be held on December 3, 1991. The Business Research Advisory Council advises the Bureau of Labor Statistics with respect to technical matters associated with the Bureau's programs. Membership consists of technical officers from American business and industry.

The schedule and agenda for the meeting is as follows:

Tuesday, December 3, 1991

1 p.m.—Committee on Occupational Safety and Health Statistics, Room 2437, General Accounting Office Building, 441 G Street, NW., Washington, DC.

1. 1990 annual survey
2. FY 1991/92 program budget
3. Program redesign
   a. Redesign of the occupational safety and health statistical survey
   b. Census of Fatal Occupational Injuries
4. Other business

The meeting is open to the public. It is suggested that persons planning to attend the meeting as observers contact Constance B. DiCesare, Liaison, Business Research Advisory Council on Area Code (202) 523-1090.

Due to scheduling difficulties by certain participants in this meeting, we are unable to provide the full 15 days advance notice of this meeting.

Signed at Washington, DC the 19th day of November 1991.

Janet L. Norwood,

Commissioner of Labor Statistics.

[FR Doc. 91-28142 Filed 11-21-91; 8:45 am]

BILLING CODE 4510-24-M

Employment Standards Administration, Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They

specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR part 1, appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedeas decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register** or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts," shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., room S-3014, Washington, DC 20210.

Withdrawn General Wage Determination Decision

This is to advise all interested parties that the Department of Labor is withdrawing, from the date of this notice General Wage Determinations Nos. OH91-12, OH91-14, OH91-15, OH91-20, OH91-23, OH91-25, OH91-26, OH91-27 and OH91-31. See General Wage Determination Numbers OH91-0009 and OH91-0018, as modified.

This is to advise all interested parties that the Department of Labor is withdrawing, from the date of this transmittal, counties in Ohio from the following General Wage Determination Numbers: Ashland County from OH91-0011; Ashtabula County for residential construction from OH91-0001; Champaign and Logan Counties from OH91-0007; Crawford County from OH91-0018; Defiance, Henry and Williams Counties from OH91-0016; Gallia County from OH91-0021; Harrison County from OH91-0008; Monroe and Noble Counties from OH91-0013; and Preble County from OH91-0022. See General Wage Determination Numbers OH91-0009, OH91-0017 and OH91-0018, as modified. The following counties have been added to General Wage Determination Number OH91-0009: Columbia, Hocking, Huron, Marion, Perry and Tuscarawas. The following counties have been added to General Wage Determination Number OH91-0018: Ottawa and Sandusky.

Agencies with construction projects pending to which this wage decision would have been applicable should utilize the project determination procedure by submitting a SF-308. (See Regulations, 29 CFR part 1, § 1.5.) Contracts for which bids have been opened shall not be affected by this notice. Also, consistent with 29 CFR 1.6(c)(2)(i)(A), when the opening of bids is within ten (10) days of this notice, the contract specifications need not be affected.

New General Wage Determination Decisions

The number of the decisions added to the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts" are listed by Volume, State, and page number(s).

Volume I

Connecticut:
CT91-4 (Nov. 22, 1991)..... p. 78g, pp. 78h-78n.

Modifications to General Wage Determination Decisons

The numbers of the decisions listed in the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts" being modified are listed by Volume, State and page number(s). Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I

Georgia:
GA91-3 (Feb. 22, 1991)..... p. 223, pp. 224-227.
GA91-22 (Feb. 22, 1991)..... 267, p. 268.
GA91-32 (Feb. 22, 1991)..... 289, p. 290.
New Hampshire:
NH91-4 (Feb. 22, 1991)..... p. All.
Virginia:
VA91-3 (Feb. 22, 1991)..... p. All.
VA91-8 (Feb. 22, 1991)..... p. All.
VA91-17 (Feb. 22, 1991)..... p. All.
VA91-31 (Feb. 22, 1991)..... p. All.
VA91-35 (Feb. 22, 1991)..... p. All.
VA91-41 (Feb. 22, 1991)..... p. All.
VA91-56 (Feb. 22, 1991)..... p. All.

Volume II

Illinois:
IL91-1 (Feb. 22, 1991)..... p. 69, p. 72.
Michigan:
MI91-7 (Feb. 22, 1991)..... p. 515, p. 516.
Nebraska:
NE91-3 (Feb. 22, 1991)..... p. All.
NE91-10 (Feb. 22, 1991)..... p. All.
NE91-11 (Feb. 22, 1991)..... p. All.
Ohio:
OH91-7 (Feb. 22, 1991)..... p. All.
OH91-8 (Feb. 22, 1991)..... p. All.
OH91-9 (Feb. 22, 1991)..... p. All.
OH91-10 (Feb. 22, 1991)..... p. All.
OH91-11 (Feb. 22, 1991)..... p. All.
OH91-13 (Feb. 22, 1991)..... p. All.
OH91-16 (Feb. 22, 1991)..... p. All.
OH91-17 (Feb. 22, 1991)..... p. All.
OH91-18 (Feb. 22, 1991)..... p. All.
OH91-21 (Feb. 22, 1991)..... p. All.
OH91-22 (Feb. 22, 1991)..... p. All.

Volume III

California:
CA91-1 (Feb. 22, 1991)..... p. All.

CA91-2 (Feb. 22, 1991)	p. 45, pp46-50.
CA91-4 (Feb. 22, 1991)	p.75, pp. 80, 83-86, pp. 89-91.
Colorado:	
CO91-1 (Feb. 22, 1991)	p. 151, p. 152.
CO91-2 (Feb. 22, 1991)	p. 151, p. 259, p. 160.
CO91-5 (Feb. 22, 1991)	p. 151, p. 175, p. 176.
Nevada:	
NV91-1 (Feb. 22, 1991)	p. 299, pp. 300-302.
NV91-5(Feb. 22, 1991)	p. 345, pp. 346-348.

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis—Bacon And Related Acts". This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country. Subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 783-3238.

When ordering subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the three separate volumes, arranged by State. Subscriptions include an annual edition (issued on or about January 1) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, DC this 15th day of November, 1991.

Alan L. Moss,

Director, Division of Wage Determinations.

[FR Doc. 91-27950 Filed 11-21-91; 8:45 am]

BILLING CODE 4510-27-M

NATIONAL COMMISSION ON ACQUIRED IMMUNE DEFICIENCY SYNDROME

Notice of Meeting

AGENCY: National Commission on Acquired Immune Deficiency Syndrome.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92-463 as amended, the National Commission on Acquired Immune Deficiency Syndrome announces a forthcoming meeting of the Commission.

DATES AND TIMES: Monday, December 9, 1991—8:30 a.m. to 5:30 p.m.; Tuesday, December 10, 1991—8:30 a.m. to 5:30 p.m.

PLACE: Embassy Suites Hotel, 1250 22nd Street, NW., Washington, DC.

TYPE OF MEETING: Open.

FOR FURTHER INFORMATION CONTACT: Jeff Stryker, Interim Executive Director, The National Commission on Acquired Immune Deficiency Syndrome, 1730 K Street, NW, Suite 815, Washington, DC 20006, (202) 254-5125. Records shall be kept of all Commission proceedings and shall be available for public inspection at this address.

AGENDA: The tentative agenda for the Commission meeting includes an examination of the impact and ramifications of the CDC's proposed revised classification system for HIV infection and expanded AIDS surveillance case definition for adolescents and adults. A Commission business session and a public comment period are also scheduled. This agenda is subject to change. Inquires regarding the agenda should be addressed to the Commission. Written comments on the issue as identified are welcome from interested individuals or organizations.

Interpreting services are available for deaf people. Please call our TDD number (202) 254-3816 to request services no later than December 3, 1991.

Dated: November 19, 1991.

Jeff Stryker,

Interim Executive Director.

[FR Doc. 91-28099 Filed 11-21-91; 8:45 am]

BILLING CODE 6820-CN-M

NATIONAL SCIENCE FOUNDATION

Special Emphasis Panel in Social and Economic Science; Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92-463, as amended), the National Science Foundation announces the following meeting:

Name: Special Emphasis Panel in Social and Economic Science.

Date and Time: December 6, 1991; 8:30 a.m. to 5 p.m.

Place: Room 540-B, National Science Foundation, 1800 G Street NW., Washington, DC 20550.

Type of Meeting: Closed.

Contact Person: Dr. Thomas J. Baerwald, Coordinator, Human Dimensions of Global Change Initiative, Division of Social and Economic Science, National Science Foundation, room 336, Washington, DC 20550. Telephone: (202) 357-7966.

Purpose of Meeting: To provide advice and recommendations concerning research proposals on the Human Dimensions of Global Change.

Agenda: To review and evaluate research proposals as part of the selection process for awards.

Reason for Closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are within exemptions 4 and 6 of 5 U.S.C. 552 b. (c) (4) and (6) the Government in the Sunshine Act.

Dated: November 19, 1991.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 91-28155 Filed 11-21-91; 8:45 am]

BILLING CODE 7555-01-M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-322]

Long Island Lighting Co.; Shoreham Nuclear Power Station; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC or the Commission) is considering issuance of an exemption from the requirements of 10 CFR 50.75(e)(iii) (A), (B), and (C) to the Long Island Lighting Company (the licensee or LILCO) for the Shoreham Nuclear Power Station, Unit 1 (the facility) located in Suffolk County, New York.

Environmental Assessment

Identification of Proposed Action

The proposed action would grant an exemption from the conditional requirements of using a surety method as financial assurance for decommissioning as specified in 10 CFR 50.75(e)(iii) (A), (B), and (C). Namely, the conditional requirements are (1) that the surety method be open ended or automatically renewed; (2) the surety method be payable to a decommissioning trust; and (3) the surety method be in effect until termination of the license.

The Need for the Proposed Action

The decommissioning funding requirements of 10 CFR 50.75(e) were designed to provide reasonable assurance that at the time of permanent end of operations, sufficient funds are available to decommission the facility in

a manner which protects the public health and safety.

The staff believed that requiring prematurely shut down plants (ones after July 27, 1988) to comply fully with the 10 CFR 50.75(e) regulations might impose a severe financial burden on these plants since they have not operated long enough to have accumulated sufficient funds for decommissioning. Therefore, based on this concern, the staff was instructed by the Commission to determine the appropriate accumulated period for decommissioning funds on a "case-by-case" basis for those plants which prematurely shut down after July 27, 1988.

The licensee's proposed financial assurance plan, which includes a $300 million line of credit (LOC), meets the intent of the option described in 10 CFR 50.75(e)(iii) for using a surety method. Their available line of credit, however, does not meet all the conditional requirements of the regulations as described above. The licensee's financial assurance plan more than adequately compensates for this non-compliance. In addition to the $300 million LOC, their financial assurance plan includes (1) $10 million external account to cover unexpected decommissioning complications, (2) a commitment to deposit into an external account, decommissioning funds projected for the third following month of decommissioning, and (3) a commitment to fund the Shoreham decommissioning, unconditionally.

Environmental Impacts of the Proposed Action

The proposed exemption does not adversely impact the ability of LILCO to provide adequate assurance that funds will be available to decommission the Shoreham facility. The licensee's remaining financial assurance plan provides adequate assurances that funds will be available to decommission Shoreham while protecting the public health and safety. Therefore, the Commission concludes that there are no measurable environmental impacts associated with the proposed exemption.

Since the Commission has concluded that there are no measurable environmental impacts associated with the proposed exemption, any alternative will have either no environmental impact or a greater environmental impact. The principal alternative to the exemption would be to require full compliance with the decommissioning funding regulations. Such action would not enhance the protection of the environment and would result in unnecessary expenditures of licensee funds.

Alternate Use of Resources

This action does not involve the use of resources not considered previously in the Final Environmental Statement for the Shroeham Nuclear Power Station.

Agencies and Persons Consulted

The NRC staff reviewed the licensee's request and did not consult other agencies or persons.

Finding of no Significant Impact

On the basis of the environmental assessment, the NRC staff concludes that the proposed action will not have a significant effect on the quality of the human environment. Therefore, the Commission has determined not to prepare an environmental impact statement for the proposed exemption.

For further details with respect to this action, see the licensee's letter dated June 11, 1990, and supplemented on April 11, 1991, which are available for public inspection at the Commission's Public Document Room, The Gelman Building, 2120 L Street, NW., Washington, DC 20555, and at the Shoreham-Wading River Public Library, Route 25A, Shoreham, New York, 11786–9697.

Dated at Rockville, Maryland this 18th day of November 1991.

For the Nuclear Regulatory Commission.

Richard F. Dudley, Jr.,

Acting Director, Non-Power Reactors, Decommissioning and Environmental Projects Directorate, Division of Advanced Reactors, and Special Projects, Office of Nuclear Reactor Regulation.

[FR Doc. 91–28115 Filed 11–21–91; 8:45 am]

BILLING CODE 7590–01–M

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

Policy Letter on Use of Letters of Credit

AGENCY: Executive Office of the President, Office of Management and Budget, Office of Federal Procurement Policy.

ACTION: The Office of Federal Procurement Policy (OFPP) is issuing a Policy Letter allowing use of Irrevocable Letters of Credit in lieu of surety bonds for Federal construction contracts.

SUMMARY: This OFPP Policy Letter establishes a Government-wide policy for the use of irrevocable letters of credit in lieu of sureties to improve access to procurement of Federal construction contracts for small businesses, to increase competition among bidders by having more bidders respond as a result of improved access, and to remove an artificial constraint to competition in the private sector.

This policy letter is published pursuant to the authority of section 6.(a) of the Office of Federal Procurement Policy Act, as amended (41 U.S.C. 405), which authorizes the Administrator, OFPP, to prescribe Government-wide procurement policies.

SUPPLEMENTARY INFORMATION: A proposed Policy Letter and request for comments was published in the September 14, 1990 **Federal Register** (55 FR 37,990). OFPP received 67 responses to the **Federal Register** notice. Of the responses, 13 were from Government agencies and the remainder from the private sector. Significant comments received and OFPP responses to the comments are below.

1. How will the financial health of the issuing institution be assessed. Several commenters suggested that a government agency keep a list of acceptable banks, similar to the Department of Treasury list of approved insurance companies. It is OFPP's intent to accept banks as financially healthy, and, therefore, to accept letter of credit issued by those banks, if the bank has at least an investment grade rating from one of the major commercial financial rating companies. The contractor will be required to submit proof of the bank's acceptable rating at the same time the letter of credit is tendered to the government.

2. The function of a surety cannot be supplanted by a letter of credit. Several commenters stated that the functions performed by a surety, such as pre-qualifying bidders, the ability to step in and finish the job, and brokering claims by suppliers and subcontractors, cannot be supplanted by a letter of credit and, therefore, a letter of credit should not be used. OFPP recognizes that some of the functions performed by a surety are not normally performed by an issuer of a letter of credit. But the main function of both a surety bond a letter of credit is to reduce the risk of nonperformance, whether it be payment nonperformance or construction nonperformance. We believe the added benefits of improved access to the procurement process, potential cost savings to the contractor, improved competition, and removal of artificial constraints in commercial practices, support the use of letters of credit.

3. *The contracting officer should have to state in writing that the contract is in default before drawing on the letter of credit.* Several commenters suggested that the contracting officer should have to state in writing that that contract is in default before drawing on the letter of credit, and that the written statement should be presented to the issuing bank. It is OFPP's belief that the Federal Acquisition Regulation (FAR 49.102) requirement that the contracting officer use written notification when terminating a contract for convenience or default will serve to notify the contractor. It is conceivable that the contracting officer would want to draw on the letter of credit, to protect the Government's interest, without formally terminating the contract for default. One example of the necessity for that type of action would be if the letter of credit were approaching expiration and the contractor had not provided a new letter of credit as required, or if the bank's financial health rating had changed and the contractor had not provided a substitute letter of credit as required. It is our intention to notify the contractor in writing when drawing on a letter of credit if written notification has not already been provided through other procedures. A requirement to present the contracting officer's statement to the bank only increases the administrative burden on the government without providing any protection to the contractor, because letter of credit law is quite clear that the underlying transaction is not at issue and does not affect a bank's responsibility to pay.

4. *Delete the sunset provision; if it must be retained change the time period from three to five years.* Many commenters felt the sunset provision was unnecessary in that use of letters of credit are a well recognized commercial transaction, but that if a sunset provision was going to be imposed, then a five-year rather than a three-year period was preferable; and that the provision should only appear in the Policy Letter not in the FAR. OFPP has determined that a five-year period is acceptable, and that the provision will only appear in the Policy Letter.

5. *The need to require a separate letter of credit for performance and payment obligations.* Several commenters suggested there was a need to require separate letters of credit in lieu of the performance and payment bond. OFPP agrees with this, and will explicitly state that a separate letter of credit is required for payment and performance obligations. Even if OFPP did not require separate letters of credit, the banks would probably issue separate letters of credit because they have different capital requirements for performance and financial letters of credit.

6. *The issue of whether the Uniform Commercial Code (UCC) or the Uniform Customs and Practices (UCP) controls in event of a conflict.* Several commenters stated that the UCP should prevail in the event of a conflict with the UCC, inasmuch as the commercial banking norm is the UCP, the UCP is more detailed, and the UCP is more favorable to the beneficiary in the area of issuer estopple. Based on these considerations, OFPP has determined that in the event of a conflict the UCP, as contained in Publication No. 400 should prevail.

7. *Only banks with operational expertise with letters of credit should be allowed to issue letters of credit acceptable to the United States.* One commenter suggested that only banks with operational expertise in issuing letters of credit be acceptable. Although OFPP understands the reasoning behind this suggestion, in that letter of credit law is quite arcane and unfamiliarity on a small bank's part with its operation is likely to result in more burden being placed on the Federal Government, OFPP rejects this approach. It is our stated purpose to increase access to the procurement process by allowing small businesses to us banks to issue letters of credit. Because the banks with the largest volume of letter of credit business, and, therefore, the most operational expertise, are largely big city banks, restriction to only these banks unfarily restricts access by small businesses which are not located in large cities. Therefore, we have chosen not to impose an operational expertise restriction. However we will closely monitor this issue during program implementation.

8. Recommends that letters of credit be used only up to a certain limit; one suggested cap was $500 thousand, another suggested cap was $2 million. Some commenters believed that letters of credit should be capped at a certain limit. OFPP sees no justification for artificially capping the amount of the letter of credit. Over $170 billion of dollars of standby letter of credit business was done by American banks last year. However, because of the concern mentioned above about operational expertise, OFPP believes it may be beneficial to require banks with little letter of credit experience to have a bank with more experience "confirm" their letter of credit, if it is about a stated amount.

9. *What amount of protection would be required by the letter of credit, the same as for a bond?* Some commenters wanted to know what amount of protection would be required. OFPP intends to require the same level of protection as for bonds, and will explicitly so state in the final Policy Letter.

10. *The expiration period should be tied to the statutory period for bringing suit under the bonds.* Some commenters suggested that the expiration period should be tied to the statutory period for bringing suit under the bonds. OFPP agrees that the expiration period for a payment letter of credit should track the statutory period for brining suit under a bond. Similarly, a performance letter of credit will be necessary for the warranty period.

11. *Does a letter of credit have sufficient flexibility to assure coverage if a project's scope increases? One commenter was concerned that a letter of credit did not have sufficient flexibility to assure coverage if a project's scope increased due to change orders. It is OFPP's believe that this issue applies equally to surety bonds and letters of credit. A surety bond and a letter of credit are written on the contract's face amount or a percentage thereof. Any incresse in the face amount of the contract may require an adjustment. The Federal Acquisition Regulation provides for this adjustment in part 28.102–2. However, since change orders frequently occur after a percentage of the work has already been completed, without a concomitant reduction in the bond amount or the letter of credit, this rediction could "absorb" a change order of equivalent scope without the need for an adjustment.*

DATES: The Policy Letter is effective 30 day from the date of issuance. It directs that Government-wide regulations be promulgated to implement the policies contained therein in the first Federal Acquisition Circular issued after 180 days after the Policy Letter's effective date.

FOR FURTHER INFORMATION CONTACT: Carol Dennis, Deputy Associate Administrator, Office of Federal Procurement Policy, 725 17th Street, NW., Washington, DC 20503

Allan V. Burman,

Administrator.

November 8, 1991.

Policy Letter No. 91–4

To the Heads of Executive Departments and Establishments

Subject: Use of Irrevocable Letters of Credit

1. *Purpose.* This Policy Letter establishes Government-wide policies for use of irrevocable letters of credit (LOC) in lieu of sureties for Federal construction contracts

requiring Miller Act bonds (40 U.S.C. 270a *et seq.*).

2. *Discussion.* The Miller Act requires the use of performance and payment bonds for Federal construction contracts in excess of $25,000. The Federal Procurement Regulations (FPR), which were canceled upon issuance of the Federal Acquisition Regulation (FAR) in 1984, permitted the use of irrevocable letters of credit for Miller Act purposes. Specifically, Sec. 1–10.204–2 of the FPR stated:

Any person required to furnish a bond has the option, in lieu of furnishing surety or sureties thereon, of depositing an . . . irrevocable letter of credit, in an amount equal to the penal sum of the bond.

The FAR did not retain the FPR language and, as a result, LOC have not been used for Miller Act purposes for several years.

During the past year, this Office has reexamined surety bond issues to improve access to Federal procurement for small businesses, while protecting the Government's interests.

As a result of that review, it has been concluded that: (1) Irrevocable letters of credit serve much of the same function and provide the same redeemable value as bonds, postal orders and certified checks, (2) Federal agencies are authorized to accept such letters, and (3) their usage in lieu of sureties should help to achieve greater access by small and small disadvantaged businesses to Federal construction contracts. For these reasons, the previous policy—as reflected in the FPR—is being reinstated.

3. *Policy.* It is the policy of the Federal Government to permit the use of irrevocable letters of credit, in lieu of sureties, on Federal construction contracts subject to the requirements of 40 U.S.C. §§ 270a *et seq.*

4. *Requirements.* In implementing this policy, the following requirements will be met:

a. The contracting officer is responsible for assuring that letters of credit are adequate to protect the interests of the United States as well as the legitimate interests of affected subcontractors and suppliers.

b. The contracting officer is responsible for exercising full discretion in accepting or rejecting letters of credit. Only Federally insured financial institutions that have investment grade or higher ratings from a recognized commercial rating service will be acceptable to the U.S. Government as an issuing or confirming institution for a letter of credit.

c. It is the bidder's responsibility to provide to the contracting officer a letter of credit from an acceptable institution, and to provide a commercial rating service credit rating that indicates the institution has an investment grade or higher credit rating.

d. It is intended that irrevocable letters of credit may be employed to guarantee performance, payment, or both. Letters of credit to guarantee performance and payment will be in the same amounts as required by 40 U.S.C. 270 for bonds. It is anticipated that separate letters of credit may be necessary, one for performance and one for payment. Letter of credit coverage (although it is anticipated that the amount of coverage would be reduced) shall extend through the warranty period for performance guarantees, and through the period for bringing lawsuits for payment guarantees. Since letters of credit usually have a stated expiration date, and since it is difficult to determine with certainty when a construction contract will be completed, sequential letters of credit may be required for projects in excess of a year. If sequential letters of credit are required, it is the contractor's responsibility to replace the expiring letter of credit with another letter of credit at least 30 days prior to the expiration date of the expiring letter of credit. Failure by the contractor to replace the expiring letter of credit may result in the contracting officer drawing on the letter of credit.

e. Letters of credit must be issued or confirmed by Federally-insured financial institutions, in favor of the contracting agency as beneficiary, and in the format of the sample letter of credit which is attached. A sample form for the sight draft is also attached.

f. Letters of credit in excess of $5 million dollars must be confirmed by another bank, with an acceptable rating, that has letter of credit business in the past year of at least $25 million.

5. Responsibilities.

a. The Federal Acquisition Regulatory Council shall ensure that Government-wide regulations to conform to the policies established herein are promulgated in the first Federal Acquisition Circular issued 180 days after the effective date of this Policy Letter

b. The heads of departments and agencies shall implement the policies contained herein, and initiate any necessary staff training.

6. *Information Contact.* Information about this Policy Letter may be obtained by contacting Carol R. Dennis, Deputy Associate Administrator, Office of Federal Procurement Policy, 725 17th Street, NW, Washington, DC 20503. Telephone (202) 395–3501.

7. *Effective Date.* This Policy Letter is effective 30 days after the date of issuance.

8. *Sunset Date.* This Policy Letter will expire five years from date of issuance.

Allan V. Burman,

Administrator.

Attachments

[Issuing Bank's Letterhead]

Sample Performance or Payment Letter of Credit Form

Issue Date _____
Irrevocable Letter of Credit No. _____
Account party's name _____
Account party's address _____
For contract no._____ (for reference only)_____
TO: Beneficiary (U.S. Government agency), Beneficiary's address

We hereby establish this irrevocable and transferable Letter of Credit in your favor for drawings up to United States $_____. This Letter of Credit is payable at [our] [confirming bank's] office at _____ [issuing bank's address] [confirming bank's address] _____ and expires with [our] [confirming bank's] close of business on _____, 19____.

We hereby undertake to honor your or transferee's sight draft(s) drawn on [us] [confirming bank], for all or part of this Credit if presented at the office specified in the above paragraph on or before the expiry date or any automatically extended expiry date.

It is a condition of this Letter of Credit that it is deemed to be automatically extended without amendment for one year from the expiry date hereof, or any future expiration date, unless at least 60 days, prior to any expiration date we notify you or the transferee by registered mail, or other receipted means of delivery, that we elect not to consider this Letter of Credit renewed for any such additional period. At the time we notify you we also agree to notify the account party [and confirming bank] by the same means of delivery.

This Letter of Credit is transferable. Transfers and assignments of proceeds are to be effected without charge to either the beneficiary, or the transferee/assignee of proceeds.

This Letter of Credit is subject to the Uniform Customs and Practice (UCP) for Documentary Credits, 1983 Revision, International Chamber of Commerce Publication No. 400, and to the extent not inconsistent therewith, the laws of the ____ [state of the confirming bank if any, otherwise state of the issuing bank] ____. If this Credit expires during an interruption of business as described in Article 19 of said Publication No. 400, the bank hereby specifically agrees to effect payment if this Credit is drawn against within 30 days after the resumption of business.

Very truly yours,

_____

[Issuing bank]

Exhibit A—Sight Draft

_____

[City, State]

_____, 19____

Pay to the order of _____ (Beneficiary Agency) _____ the sum of United States $_____. This draft is drawn under Irrevocable Letter of Credit No. _____.

[Beneficiary agency]

By: _____

To: Name and Address of Confirming Bank, otherwise Name and Address of Issuing Bank

[Confirming Bank's Letterhead]

_____, 19____

Our letter of credit Advice Number _____
Beneficiary: _____
Issuing Bank: _____
Issuing Bank's LC No._____

Gentlemen: We hereby confirm the above indicated letter of credit, the original of which is attached, issued by _____ [Name of issuing bank] _____ for drawings of up to United States Dollars _____ U.S./$_____ and expiring with our close of business on _____ (the expiration date), or any automatically extended expiration date.

It is a condition of this confirmation that it be deemed automatically extended without amendment for one year from the expiration date hereof, or any automatically extended expiration date, unless:

(A) At least sixty (60) days prior to any such expiration date we shall notify you or the transferee and the issuing bank, by registered mail or other receipted means of delivery, that we elect not to consider this confirmation extended for any such additional period; or

(B) The issuing bank shall have exercised its right to notify you or the transferee, the account party, and ourselves, of its election not to extend the expiration date of the letter of credit.

Draft(s) drawn under the letter of credit and this confirmation are payable at our office located at _____.

We hereby undertake to honor draft(s) drawn under the letter of credit and this confirmation if presented at our offices as specified herein.

This confirmation is subject to the Uniform Customs and Practice for Documentary Credits (1983 Revision), International Chamber of Commerce Publication No. 400 (the "UCP"), and to the extent not inconsistent therewith, the laws of the _____ [state of the confirming bank] _____

If this confirmation expires during an interruption of business of this bank as described in Article 19 of the UCP, we hereby specifically agree to effect payment if drawn against under our confirmation within thirty (30) days after the resumption of our business.

Very truly yours,

[Confirming Bank]

[FR Doc. 91-28089 Filed 11-21-91; 8:45 am]

BILLING CODE 3110-01-M

Proposed Revision to OMB Circular A-45, "Policy Governing Charges for Rental Quarters and Related Facilities;" Invitation for Public Comment

AGENCY: Office of Management and Budget, Office of Federal Procurement Policy.

ACTION: The Office of Management and Budget (OMB) is requesting comments on a proposed revision of its Circular A-45, dealing with the manner in which rents are set for Government rental quarters and related facilities

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SUMMARY: This revision of OMB Circular A-45 has been undertaken pursuant to the requirement in the existing circular that its policies and procedures be periodically reviewed. The circular was first published in 1951, and revised in 1952, 1964, and 1984.

OMB gave notice of its proposed timetable for completion of this review in the **Federal Register** and convened a meeting of a number of housing officials from agencies affected by the policies of Circular A-45 on August 21, 1988. This working group met to discuss problems in interpreting or administering the rental quarters program and to discuss a number of unsolicited agency and Federal employee comments that were received. Several changes to the circular are proposed. Those changes are described below and comments on the changes are solicited.

DATES: Comments must be received on or before December 23, 1991.

ADDRESSES: Comments should be submitted to the Office of Management and Budget, Office of Federal Procurement Policy, room 9025, New Executive Office Building, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Richard A. Ong, Deputy Associate Administrator, Office of Federal Procurement Policy, 725 17th Street, NW., Washington, DC 20503. Telephone (202) 395-3300.

SUPPLEMENTARY INFORMATION: The following is a summary of the changes proposed in today's draft revision of OMB Circular A-45:

1. *Isolation adjustment.* The proposed revision provides that the annual adjustments for isolation should be done each year, rather than each October. This gives agencies flexibility in implementing adjustments.

OMB is also considering altering the formula by which the isolation adjustment is to be calculated and solicits comments on the following proposed change. If adopted, the proposed changes to the calculation of the isolation adjustment in the draft revision of Circular A-45 would do two major things:

1. Reduce the current 30-mile cutoff point (beyond which eligibility for the isolation adjustment is established) to 20 miles; and

2. Alter the current formula that rewards the person with 31 one-way points with an isolation adjustment of $59.00 and denies any adjustment to the person with 30 one-way points.

The current method provides an advantage to those employees who are entitled to 31 one-way travel points but no adjustment at all to those entitled to less than 31 one-way points. OMB is considering reducing the threshold to 20 one-way points. In addition, 20 points would be deducted from total one-way points. This both makes more employees eligible for the adjustment (those with from 21 to 30 one-way points) and reduces the previous "all or nothing" aspect of the adjustment at the 30/31 point line. Thus, under the proposed change, an employee with 20 points would receive no adjustment for isolation and his or her neighbor with 21 points would get a deduction of $2.00. An employee with 30 points would get $20.00 under the proposed revision, and his or her neighbor, with 31 points, $22.00, rather than $0.00 and $62.00 respectively under the existing version of Circular A-45.

Although the purpose of the proposed revision is to make the formula fairer in its application, one effect of the proposed revision would be a predicted increase in rents collected by the agencies of approximately $3,356,544 ($3,547,038 in reduced adjustments for those with 31 or more oneway points minus $190,494 in increased adjustments for those with between 21 and 30 points), taking into account the effect of existing administrative adjustments, the operation of the 60% limitation on adjustments, and the possible reduced and increased isolation adjustments for affected employees.

Thus, the proposed change would reduce the value of the isolation adjustment in some cases but enlarge the numbers of employees entitled to an adjustment. It would gradually increase the amount of the deduction, eliminating the previous inequity between employees on either side of any dividing line, wherever it might be established.

2. *Nearest established community—population criterion only.* OMB also proposes to change the definition of "nearest established community" to delete the requirement that the community have minimum essential medical facilities. This leaves only year-round population as the criterion of the nearest established community.

This change eliminates questions about whether medical services are provided on a full-time basis and makes calculations of the isolation adjustment easier. We believe that communities of the size of the defined "nearest established communities" are likely to support a mixture of services, stores, Government facilities, and cultural resources, including medical services, and that size is therefore an adequate predictor of the presence or absence of adequate services and cultural and other resources.

In short, OMB believes it is the exceptional community (of the specified size) that will not have a satisfactory level of medical services, and that it is unnecessary to require agencies to inquire into this one aspect of community services. This is consistent with the evolution of the treatment of established communities in Circular A-45. The 1964 version of the circular listed some 12 specific features of an acceptable established community. In general, the 1984 circular added the criterion of year-round population, and eliminated all other criteria but

"minimum essential medical facilities (i.e., at least one physician and one dentist)."

3. *Other changes.* OMB proposes to make numerous other relatively minor changes in the following areas: adjustments for utilities and periodic/cycle year (¶¶ 7d(4) and (5)), police protection (subparagraph 7c(2)(d)), insurance (subparagraph 7c(2)(e)), agency adjustments (subparagraph 7a(1)(a)), appraisers' use of alternate established communities (subparagraph 7a(1)(b)) and lack of adjustment for unusual market conditions (subparagraph 7a(1)(a)), appraisers' duty to adjust only for location (subparagraph 7a(1)(b)), regional surveys and nearest established communities (¶ 7a(2)), utilities (¶ 7b(1)), recalculation of cap on administrative adjustments (subsection 7c) of the circular, agency charges for furnishings (subsection 8(b)), reliability and adequacy of telephone service (subparagraph 7c(2)(g)), loss of privacy (7c(3)(a)), and reference to OMB Circular A–18 (¶ 7c(5)) (elimination). Numerous editorial changes are proposed.

5. *Public comments.* Comments are solicited on all the changes proposed in today's draft, as well with respect to any other matters relating to the circular. Note that the changes discussed are only proposed changes at this point in the review process.

Dated: November 14, 1991.

Allan V. Burman,

Administrator.

Circular A–45; Policy Governing Charges for Rental Quarters and Related Facilities

To the Heads of Executive Departments and Establishments

Subject: Policy Governing Charges for Rental Quarters and Related Facilities

1. Purpose. This circular sets forth policies and administrative guidance to be used by executive agencies in establishing and administering rental rates and other charges for Government rental quarters and related facilities.

2. Rescission. This rescinds OMB Circular No. A–45, dated March 28, 1984, as amended.

3. Authority. This circular is issued by virtue of the authority vested in the President by 5 U.S.C. 5911(f), and delegated to the Director of the Office of Management and Budget by section 9 of Executive Order 11609 of July 22, 1971.

4. Coverage. The provisions of this circular apply to all Government rental quarters located within the fifty states, the District of Columbia, and the territories and possessions of the United States.

5. Policy.

a. Reliance on private housing market. It is the policy of the Federal Government to rely on the private housing market to provide housing for its civilian employees. Government housing is to be provided only when private housing is not reasonably available.

b. Determination of rents. Agencies of the Federal Government must adhere to the following in determining rental rates for Government rental quarters:

(1) Reasonable value to employee. Rental rates and charges for Government quarters and related facilities will be based upon their "reasonable value * * * to the employee * * * in the circumstances under which the quarters and facilities are provided, occupied or made available." 5 U.S.C. 5911. As intended by the Congress, reasonable value to the employee or other occupant is determined by the rule of equivalence; namely, that charges for rent and related facilities should be set at levels equal to those prevailing for comparable private housing located in the same area, when practicable; and

(2) Subsidies, inducements prohibited. Federal employees whose pay and allowances are fixed by statute or regulation may not receive additional pay and allowances for any service or duty unless specifically authorized by law. 5 U.S.C. 5536. Consequently, rents and other charges may not be set so as to provide a housing subsidy, serve as an inducement in the recruitment or retention of employees, or encourage occupancy of existing Government housing.

(3) Fairness, consistency. When properly determined in accordance with the provisions of this circular, rental rates will be fair to both the Government and the employee (or other authorized occupant), be set so as to maintain fairness between the employee in Government quarters and the employee who lives in private sector

rental housing, and not serve as an obstacle in recruiting or retaining employees. Such rental rates, moreover, should reflect a consistent local pattern for all Federal quarters in a given location.

6. Definitions.

a. Agency. As defined in Public Law 88–459, 78 Stat. 557 (1964), the term "agency" means (1) each executive department of the Government; (2) each agency or independent establishment in the Executive Branch of the Government; (3) each corporation owned or controlled by the Government, except the Tennessee Valley Authority; and (4) the General Accounting Office.

b. Base rental rate. The base rental rate is the rental value of the quarters, established in accordance with the provisions of this circular, before applying any administrative adjustments or charges for related facilities.

c. Comparable housing. Comparable housing is housing in the private sector that is generally equivalent in size to the rental quarters, with the same number of bedrooms, and with generally equivalent amenities and related facilities. Such housing is housing available on a landlord-tenant basis, with rental rates reflecting the fair market value of the accommodations. This is distinguished from housing rented on an "employer-employee" basis or between friends and relatives, for which other considerations may have influenced the rental rates. In addition, other Government rental housing (Federal, State or local) and housing provided by churches or religious societies are excluded from this definition of comparable housing.

d. Established community. An established community is ordinarily the nearest population center (Metropolitan Statistical Area or an incorporated or unincorporated city or town) having a year-round population of 1,500 or more (5,000 or more in Alaska). Population determinations will be based upon the most recently published decennial census of the United States.

e. Reasonable value. Reasonable value for rental quarters is to be measured by the test of equivalence, i.e., what the employee would pay for comparable housing in the open market. Rental rates, including charges for related facilities when appropriate, will be based upon prevailing rates for comparable private housing located in the same general area, after taking into account those factors that reduce or increase the value of the housing to the tenant.

f. Related facilities. Related facilities are equipment supplies and services made available in connection with the occupancy of quarters including, but not limited to, household furniture and equipment, garage space, utilities, subsistence, and trash and laundry services.

g. Rental quarters. Except as specifically excluded herein or by statute, the term "rental quarters," includes all furnished and unfurnished quarters supplied under specific government authority to Government employees, contractors, contractor employees, and all other persons to whom housing is provided as an incidental service in support of Government programs. It includes, but is not limited to, Government-owned or -leased dwellings, apartments, bunkhouses, dormitories, trailer pads, cabins, guard stations and lookouts, mobile homes, house trainers, permanent and semi-permanent tents, and housekeeping as well as nonhousekeeping units. The term excludes "public quarters" designated for occupancy by members of the uniformed services with loss of allowances, but it includes quarters occupied by such personnel on a rental basis under 37 U.S.C. 403(e), 42 U.S.C. 1594a(f) and 1594b, and other authorities.

7. Procedures.

a. Charges for quarters. The determination of reasonable value of Government rental quarters will be based upon an impartial study of comparable private rental housing. There are two methods that may be employed to determine the base rental rate. The first, an appraisal, involves direct comparison with individual private rental housing units. The second, the regional survey, creates a series of economic models based upon a survey of comparable private rental housing throughout the region. While both methods are accurate, agencies are encouraged to utilize the survey method, whenever possible, due to the costs and administrative burdens associated with conducting individual appraisals. Both methods are subject to the conditions and limitations set forth below.

(1) Appraisals.

(a) *Urban and suburban locations.* If Government quarters are located in or within five miles of an established community, in an urban or suburban location, the base rental rate may be determined by either a staff or contract appraiser, applying recognized real estate valuation principles.

None of the administrative adjustments provided in subsection 7c will be made for isolation, site amenities, space devoted to official use, or excessive heating or cooling costs when an appraisal is made in an urban or suburban location. These factors, if appropriate, will already have been considered by the appraiser in the appraisal process. Adjustments, suitably documented, may be made by agencies when an appraiser has not considered or incorrectly calculated the effect of these factors.

(b) *Rural areas.* When the appraisal method is used to determine the reasonable value of quarters that are not located in, or within five miles of, an established community, it will be subject to the following limitation: To ensure a uniform approach to valuation when conducting an appraisal in such areas, the staff or contract appraiser will be limited to comparing the Government rental quarters with housing in the nearest established community. (If the nearest established community does not contain sufficient comparables or is unduly affected by severe economic conditions, the appraiser may select comparable rental units from the next closest established community that does have sufficient comparables or does not have a severely deflated or inflated housing market.) Such comparison will be limited to adjustments for the physical differences in the housing. The appraiser in such circumstances will not make adjustments for location (isolation) or for the absence of site amenities. These adjustments, if applicable, will be made administratively in the same manner as authorized for regional surveys in ¶¶ 7c(1) and 7c(2).

(2) Regional surveys. Regional surveys may be used in all locations where Government quarters are located. If the regional survey method is used, the base rental rates will be set by means of a series of economic models that utilize typical rental rates for comparable private rental housing in the nearest established communities nearest to the sites in which the Government quarters are located. (If the nearest established community does not contain sufficient comparables or is unduly affected by severe economic conditions, the appraiser may select comparable rental units from the next closest established community that does have sufficient comparables or does not have a severely deflated or inflated housing market. The actual analysis of rental data for the establishment of base rental rates may be accomplished using appropriate statistical techniques, such as step-wise multiple regression.

To avoid duplication and inconsistent rates, all agencies with quarters in a given location should coordinate their survey plans and conduct a single

survey applicable to all. The area selected for survey should be large enough to permit an adequate sampling of comparable rental properties in several established communities and may encompass one or more states. Ideally, the survey would establish the rental rates for a large number of Government quarters and thereby reduce the cost per unit surveyed. The methods of analysis must be capable of recognizing both the physical characteristics and the differences in economic conditions, and reflecting such differences in the base rental rates. Private rental housing samples reflecting extremely high or low rental rates should be excluded from the data base subjected to final analysis. Appropriate adjustments may be made to the base rental rates established for quarters in accordance with the provisions of subsection 7c.

(3) Agency review. Regardless of the method used, results of surveys and appraisals will be reviewed by the agency prior to implementation to assure that they are fair and reasonable, and that they were developed in accordance with the provisions of this circular. In those communities where the rental rates are extremely high or low, the rental housing market should be reviewed periodically between surveys to determine whether changes in the private rental housing market warrant revision of the base rental rates for the quarters located near those communities.

b. Charges for related facilities.

(1) Utilities. It is Government policy to minimize energy consumption. Consumption has been found to decrease when occupants of Government rental quarters are required to pay for the actual cost of utilities used (such as electricity, oil, natural gas, propane, coal, telephone, cable television, water and sewer). Utilities should be furnished by a private company and billed directly to the occupant, wherever possible.

When Government furnished utilities are provided, they should be metered or measured, where practicable. The rate for utilities furnished by the Government will be the same as the residential rate for these utilities in the nearest established community (when the appraisal method is used) or survey area (when the survey method is used) used in determining the base rental rate. The consumed amount of Government furnished utilities that are individually metered or measured will be determined by actual readings.

When Government furnished utilities are not individually metered or measured, consumption will be determined on the basis of an analysis of the average amounts of utilities used in comparable private rental housing in the nearest established community (when the appraisal method is used) or survey area (when the survey method is used). (Such estimates are usually available from local utility companies.) Alternatively, consumption may be determined using engineering tables (such as design heat loss tables from the American Society of Heating and Refrigeration Engineers) and meteorological records. Normally, utility charges will be clearly shown and separated from rent charges. Utility charges may be combined, however, in one charge for nonhousekeeping rooms. Where it is impractical to shut off heat to unused rooms and the employee is otherwise entitled to the reduction in ¶ 7c(5) for quarters of excessive size, a reduction in the utility charges based on the area of the unused quarters may be made.

(2) Furnishings. If there is an inadequate market of comparably furnished housing for purposes of comparison with furnished Government quarters, the rents on otherwise comparable unfurnished private units may be used as the base and adjusted by a reasonable charge for furnishings. This adjustment should be based on actual replacement costs allocated over the useful life of the furnishings.

(3) Other services. Charges for other services provided by the Government including, but not limited to, laundry, trash and garbage removal, lawn care and snow removal will be based upon prevailing rates for such services in the nearest established community (when the appraisal method is used) or survey area (when the survey method is used).

(4) Adjustments to obtain base rental rate. Where the rental charge for comparable housing includes the values of utilities, furnishings, or other services, downward adjustments to obtain the base rental rate will be based on the prevailing rates for such utilities, furnishings, and other services in the nearest established community (when the appraisal method is used) or the survey area (when the survey method is used). The value of furnishings and other services may be based upon national average costs where such data are available.

c. Administrative adjustments. Additional adjustments in the form of deductions from, the base rental rate are appropriate in the specific situations described below. The total amount deducted for all reasons must not be excessive, resulting in a rental rate to the occupant that is less than the reasonable value of the quarters, since this would constitute a supplementation of salary in contravention of law. The rental rate, after all adjustments, must not be less than 50 percent of the base rental rate, unless an adjustment for isolation has been made. In such instances, the rental rate may be set at not less than 40 percent of the base rental rate.

(1) Isolated locations. In some cases, the Government supplies quarters in locations where minimal community services are available but only at some distance from the quarters. In addition, travel conditions or mode of transportation may serve further to isolate some employees from minimal community services. In such situations, the agency shall grant a reasonable adjustment to ameliorate the direct economic effects of the isolation, utilizing the procedure described below and in the appendix.

The nearest established community will be used as the community for calculating the deduction, even though that community may not serve as the location of the comparable private rental housing used in establishing the base rental rates. The mileage used in computing the adjustment will be the shortest route usually traveled from the rental quarters to the nearest established community. If that route is closed seasonally, a weighted average adjustment will be used for the entire year, based upon the number of months each route would ordinarily be used.

The adjustment is designed to recognize different categories of highways and modes of transportation. Because of the range of possible travel conditions and modes of transportation, point values have been assigned to each category of transportation. These point values represent differences in time, cost, or both, associated with each mile of each category of transportation from the quarters to the nearest established community.

The point values are multiplied by the number of one-way miles from the quarters to the nearest established community, to produce one-way points. When travel from the quarters to the nearest established community involves more than one category of transportation, the one-way miles are distributed accordingly. When the category of travel is category 4 or 5 on the Isolation Adjustment Computation form in the appendix, 29 and 27 points are added, respectively, to the product of columns A and B. The one-way points, in each category are then added to produce total one-way points, which must exceed 30, or there is no adjustment. Finally, the total adjusted

points for all modes of transport are multiplied by an Isolation Adjustment Factor (based on the automobile mileage allowance determined by the General Services Administration) to produce the monthly dollar adjustment.

(2) Site amenities. Living conditions at the locations of some Government housing are not always the same as those found in or immediately adjacent to the survey or appraisal communities. In such communities, the amenities listed below are generally present and their contributory value included in the base rent. The lack of availability of any of these items at the quarters location represents a generally less desirable condition that should be reflected as a negative percentage adjustment to the base rental rate, as shown below.

(a) *Reliability and adequacy of water supply.* The system should provide potable water (free of significant discoloration or odor) at adequate pressure at usual outlets. (-3 percent.)

(b) *Reliability and adequacy of electric service.* Service must equal or exceed a 100-ampere power system capable of providing 24-hour service under normal conditions. (Occasional temporary outages are considered normal.) If an adequate backup generator is available, the amenity will be rated as present regardless of the reliability of the primary power source. (−3 percent.)

(c) *Reliability and adequacy of fuel for heating, cooling and cooking.* There should be sufficient fuel storage capacity to meet prevailing weather conditions and cooking needs. Where electricity is used to heat, cool, or cook, this adjustment is to be made only when the deduction in (b), above, applies. (-3 percent.)

(d) *Reliability and adequacy of police protection.* Law enforcement personnel, including Government employees with law enforcement authority, should be available on a 24-hour basis. Availability is defined as the ability to respond to emergencies as quickly as any officer in the nearest established community. Part-time officers are not necessarily unable to meet this test of availability. Gaps in availability due to temporary illness or injury, or use of annual leave, do not render law enforcement personnel "unavailable" at the Government quarters. (−3 percent.)

(e) *Reliability and adequacy of fire protection.* Fire insurance should be available with the premium charge based upon a rating equal to the rating available to comparable housing located in our adjacent to the nearest established community, or, in the alternative, adequate equipment, adequate water (or fire retardant chemical) supply, and trained personnel should be available on a 24-hour basis to meet foreseeable emergencies. If either element is present, i.e., adequate insurance or an adequate fire fighting capability, no adjustment may be made. (−3 percent.)

(f) *Reliability and adequacy of sanitation service.* An adequately functioning sewage disposal system and a solid waste disposal system, whether community or individually provided, should be available. Individual sewage disposal systems (septic, cesspool, or other) will be considered adequate even though they may require periodic maintenance, as long as they are usable during periods of occupancy. (−3 percent.)

(g) *Reliability and adequacy of telephone service.* Twenty-four-hour accessibility to commercial telephone facilities should be available. A deduction of a 3 percent is authorized if telephone service is unavailable both within the employee's quarters and in the vicinity of the quarters. A deduction of 2 percent is authorized if there is no telephone service within the employee's quarters, but telephone service (either private or party line) is available in the vicinity of the quarters. A deduction of 1 percent is authorized if telephone service is available in the employee's quarters, but is not private line service and/or is not accessible on a 24-hour per day basis.

(h) *Noise and odors.* There should be an absence of significant, frequent disturbing noises or offensive odors. (−3 percent.)

(i) *Miscellaneous improvements.* One or more of the following improvements should be present: paved roads, sidewalks, or street lights. (No more than a −1 percent adjustment can be made for this category.)

(3) Impositions on privacy or living space. Administrative adjustments in the base rental rate are allowed if the living space or privacy of the occupant is restricted. In each such case, the agency will make a special determination of the specific conditions making certain that the conditions have not already been reflected in establishing the base rental rate.

(a) *Loss of privacy.* If occupants are subject to loss of privacy during nonduty hours by virtue of repeated public visits (i.e., occurring several times daily) or inhibited from enjoying the full range of activities normally associated with rental occupancies due to restrictions imposed by Federal agencies, a deduction not to exceed 10 percent of the base rental rate is allowable. Proportional deductions will be made in situations of less frequency or seriousness in their impact or to reflect seasonal variations. Agencies should distinguish between a loss of privacy that occurs irrespective of an employee's official duties and a loss of privacy that is directly related to the employee's duties. Adjustments for the latter kind of loss of privacy are discouraged. Agencies may nonetheless permit adjustments in unusual cases.

(b) *Space devoted to official use.* When the agency determines that the use of a portion of the quarters is required for official business (i.e., office, storage, etc.), loss of living space should be reflected by an adjustment to the base rental rate, based on the square footage occupied.

(4) Transient and temporary use of quarters for other than temporary duty assignments.

(a) *Transient quarters.* Charges for quarters occupied on a transient basis, that is, normally for 90 days or less, will be assessed at rates equivalent to private transient housing of comparable type of quality. These rates may be set on a nightly or weekly basis, or both. If comparable private transient housing does not exist in the area, the rental may be established by determining the reasonable monthly rental rate for the quarters through application of the other provisions of this circular, and adding to the monthly rate an additional charge of at least 20 percent to cover necessary additional administrative and service charges. The total will be divided by 30 days for the nightly rate or 4⅓ weeks for the weekly rate.

(b) *Temporary quarters.* This adjustment will apply when an employee occupies quarters for the convenience of the Government on a temporary basis (normally more than 60 days) and does not receive per diem. Under these circumstances, if the employee maintains two households, the agency is authorized to adjust the rental rate on the quarters unit so that the combined rent or rent and mortgage payment paid during the period of occupancy is not excessively burdensome. The adjustment may not exceed 20 percent of the base rental rate of the quarters unit, unless the agency determines that the circumstances fully justify a greater deduction.

(5) Quarters of excessive or inadequate size or quality. If there is a lack of housing of appropriate size or quality, an employee may be provided Government quarters of a size or quality either excessive of inadequate to that which the prudent employee would have selected in the private community. In these exceptional circumstances, the base rental rate will be reduced by up to

10 percent in direct proportion to the degree of the excess of deficiency. This reduction will not continue beyond one month after the availability of either appropriate Government rental quarters or private rental housing, except when the agency determines that the reassignment of quarters will not benefit the Government.

(6) Excessive heating and cooling costs. A deduction from the base rental rate is permissible if quarters require an unreasonable additional expense to the employee for heating or cooling because of poor design, the lack of all-weather construction, or other related factors. The amount of the deduction will be determined as follows: If the rental quarters in question require expenses to the occupant in excess of 25 percent for the heating or cooling season over the average of heating or cooling for comparable housing in the same area and climate zone as determined by a suitable survey or appraisal, the agency may determine that the excessive costs (i.e., those in excess of 25 percent over the average) may be deducted from the annual rental rates.

(7) Changes in administrative adjustments. For specific quarter rental rates, agencies should implement new administrative adjustments to reflect changes in any of the factors contained in subsection 7c as soon as possible after learning of those changes, normally within 30 days.

d. Cyclical and annual adjustments; newly acquired quarters. Charges for rental quarters and related facilities shall be adjusted periodically in accordance with the following:

(1) Adjustment based on surveys or appraisals. Base rental rates established for rental quarters shall be affirmed or adjusted by a survey or appraisal of the private rental market, as follows:

(a) At least every fifth year or when the base rental rate for the quarters has been increased by 40 percent through application of the rent series of the U.S. City Average Revised Consumer Price Index for Urban Wage Earners and Clerical Workers, Rent Series, whichever occurs first, or

(b) Any year when changes in the private rental market in the nearby established community indicate a need to adjust base rental rates on the basis of a survey or appraisal of the rental market.

(2) Adjustments based on changes in the CPI. Annual adjustments in the base rental rate shall be made by applying the percent change in the CPI Rent Series from the month and year that the last regional survey or reappraisal of the private rental market was conducted. The new rates shall be effective at the beginning of the first pay period that starts on or after March 1 of each year. Though effective in March, the adjustment shall be based on the preceding September CPI data to provide the required lead time.

(3) Annual adjustments for isolation. The Isolation Adjustment Factor (currently 2.0) will be recomputed each year to reflect the Government mileage allowance for automobiles published by the General Services Administration as of the last day of September each year. The new isolation adjustment factor will be used to compute the monthly isolation adjustment applicable to rents being charged starting with the first full pay period in March of each year. This is done to coincide with the implementation of rental rates adjusted by the CPI Rent Series each year, as required in ¶ 7d(2) of this circular.

(4) Annual adjustments of utilities. To ensure that rates for Government furnished utilities keep pace with current costs, they shall be adjusted annually. Where appraisals are used, the rate will be the average residential rate for the utility in the nearest established community as of the last day of September. Where surveys are used, utility costs will be adjusted by amounts coinciding with the changes in the appropriate components of the September Consumer Price Index for Urban Wage Earners and Clerical Workers: Nonfood Expenditure Categories, Seasonally Adjusted, U.S. City Average. The new changes will be effective at the beginning of the first pay period that starts on or after March 1 of each year.

(5) Periodic/cycle year adjustment. The cycle year (and survey or appraisal month within the cycle year) occurs at different times for different employee quarters within an agency. Therefore, since annual CPI adjustments effective in March are based on the preceding September CPI data, cycle year adjustments for any particular quarters or facility shall be made as follows:

(a) When the private rental market survey or appraisal is made during the months of September through February, no CPI adjustment will be made on March 1 of the following year, but will be deferred until the start of the first pay period that begins after March 1 of the following year. Rental adjustments based on the survey or appraisal will be put into effect in the usual manner.

Example: If the survey month is October 1989, no CPI adjustment will be made in March 1990, but will be deferred until March 1991. Such CPI adjustments will be based on the changes in the CPI from the actual date of the survey through September 1990.

(b) When the private rental market survey or appraisal is made during the months of March through August, no CPI adjustments will be made in March of that year, but will be deferred until the start of the first pay period that begins after March 1 of the following year. Rental adjustments based on the survey will be put into effect in the usual manner.

Example: If the survey month is April 1989, no CPI adjustment will be made in March 1989, but will be deferred until March 1, 1990. Such CPI adjustment will be based on the changes in the CPI from the actual date of the survey through September 1989.

(6) Newly acquired quarters. Rates for newly acquired quarters shall be the same as those prevailing for similar Government rental quarters in the area. If there are no established rates, an initial survey or appraisal to establish valid and realistic comparability with private rental housing shall be made upon acceptance of newly acquired quarters, and the corresponding rental rates shall be made effective upon occupancy. The initial CPI adjustment in rental rates shall be made as follows:

(a) When the initial survey or appraisal of the private rental market is made during the months of March through August, the initial CPI adjustment will be made at the start of the first pay period that begins after March 1 of the following year.

(b) When the initial survey or appraisal of the private rental market is made during the months September through February, the initial CPI adjustment will be made in accordance with the procedure set forth in subparagraph (5)(a), above.

(7) Incremental adjustments. If new appraisals, surveys or CPI adjustments result in increases in rental rates of 50 percent or more above the current rental rate, such increases may be imposed incrementally over a period not to exceed one year, on the condition that they be applied in equal increments on at least a quarterly basis.

e. Qualifications and extensions. The principle of comparability with private rental practice may be modified under the conditions described below:

(1) Extension of comparability. For lack of available alternative quarters, employees must sometimes occupy space for use as quarters that is generally unsuitable for that purpose. Such space may be unsuitable, for example, because it was originally built for seasonal occupancy only, or because it was not originally built for use as quarters. In other instances, quarters may be suitable only for particular types of occupancy, such as rooming houses,

bunkhouses, bachelor quarters, residence hotel-type structures, barracks-type structures, or guard stations and lookouts.

In all such cases, if no comparable rental data can be obtained or professional appraisals are not made, rental rates will be determined by the square footage occupied, at a rate equivalent to one-half the base rental rate per square foot charged for the nearest adequate rental quarters of the same or any other Federal agency. This rate will apply only to the shelter rental, with additions thereto for all other related facilities at rates comparable to those in the area. Rental and other charges will be based upon desired capacity and, when so determined, will remain in effect for each occupant without regard to fluctuations in the number of occupants from time to time either above or below designed capacity.

In buildings where space is assigned for occupancy of several persons or families, common-use space in the building will be distributed to all occupants in proportion to the space assigned for the sole occupancy of each, to determine the number of square feet chargeable to each. Common-use space includes, for example, washrooms, stairs, hallways, and storage, lobby, and lounge areas.

(2) Quarters for uniformed service personnel. Rental rates and other charges incident to the occupancy of quarters on a rental basis by members of the uniformed services will be established in accordance with the provisions of this circular.

Those quarters that have been designated inadequate public quarters or substandard pursuant to law and regulations of the Surgeon General of the Public Health Service and the Secretaries of Defense and Transportation require special treatment in one respect. The total of the rental rate, plus charges for furniture and utilities (except telephone), will be adjusted, if required, so as not to exceed 75 percent of the member's basic allowance for quarters. The rental rate, as used in the preceding sentence, is the rate obtained after the additions or deductions required or authorized elsewhere in this circular have been applied to the base rental rate, including that requirement contained in subsection 7c, that the rental rate, after adjustments, will not be less than 50 percent of the base rental rate.

(3) Instances of hardship. In certain hardship cases where continued occupancy of public quarters by former uniformed service members and dependents or by dependents of deceased service members is permitted, an amount equivalent to the member's full basic allowance for quarters and other housing allowances (i.e., Variable Housing Allowance, etc.) may be charged for such periods of time as may be properly allowed in each particular case. Occupancy of quarters in such instances will normally not exceed 60 days.

Similarly, former Federal employees (or other occupants) and dependents or dependents of deceased Federal employees (or other occupants) may continue to occupy Government rental quarters for a period normally not to exceed 60 days. Such occupants will continue to pay the established rental rate for those quarters.

(4) Alternative requirements. The provisions of this circular will not apply in the following instances:

(a) When employees attend training programs at Federal or private facilities and the cost of housing is factored into the program cost to the agency or through other means, the valuation rules of this circular need not be applied, so long as the per diem rate (or actual per diem expense rates) paid the employee is set to reflect the fact that the housing is provided at no cost to the employee. In other than training situations when employees are receiving per diem (or actual per diem expense rates) and occupying Government housing, the per diem paid the employees is set to reflect the fact that the housing is provided at no cost to the employee.

(b) When employees are receiving a remote worksite commuting allowance, in accordance with 5 U.S.C. § 5942, and housing is provided at no cost to the employees, the allowance paid will consist of factors other than the housing cost portion of the allowance.

(5) Exceptions. Efforts have been made in the preparation of this circular to allow for unusual circumstances that may exist with respect to rental quarters. Exceptions to the requirements included in this circular will be permitted; therefore, only upon written request and in those very unusual circumstances when it is demonstrated to the Office of Management and Budget that the application of the provisions of this circular will not result in a rental rate equivalent to the reasonable value of the quarters to the occupant. If an exception is granted by the Director of the Office of Management and Budget, the agency concerned will be notified in writing.

8. Agency Regulations. The following guidelines must also be observed in establishing charges for rental quarters and related facilities and in developing agency regulations and procedures implementing this circular:

a. Conflicts of interest. To avoid potential conflicts of interest, agencies will not assign employee occupants of quarters or their subordinates to perform appraisals or serve as members of regional survey teams used to recommend rents and other charges.

b. Consistent local patterns; Interagency Committees. Where several different Federal agencies provide rental quarters in the same area, those agencies will take necessary steps to ensure a consistent local pattern in rents and utility rates. In particular, such agencies are urged to establish interagency committees to coordinate and oversee the establishment of consistent and uniform rental rates.

c. Agency records regarding recommendations and adjustments. A full record of the findings and recommendations of the appraiser or survey team, as well as documentation to justify administrative adjustments, will be kept by the agency concerned.

d. Agency central records and supervision. Sufficient information will be maintained centrally by the agency to allow agency management to be informed of, and to monitor, the status of administration of the requirements of this circular.

e. Reconsideration, procedures for. Agencies will provide a procedure for dealing with requests for reconsideration of rental determinations and other changes.

f. Leave status, charges during. Employees on leave will continue to be charged for quarters and related facilities, unless the quarters are vacated and made available for reassignment.

g. Landlord-tenant relationship. To aid all agency administrative officials and employees in understanding how the circular is to be applied, agencies will make clear that they assume the customary responsibilities of the landlord and that those who occupy rental quarters assume the customary responsibilities of tenants.

h. Required occupancy. Agency regulations will specify the conditions under which the agency head, or his or her designee, will require occupancy of Government rental quarters, in accordance with the limitations cited in 5 U.S.C. 5911(e).

i. Safe and sanitary quarters. Agency heads will ensure that Government rental quarters are safe and sanitary. Although adjustments to the Basic rental rate are permitted for such circumstances as excessive heating and cooling cost, poor condition, and lack of

potable water, such conditions should not be permitted to continue any longer than absolutely necessary.

j. Agency housing officers. Each Federal agency that provides rental quarters shall appoint a principal housing officer with responsibility to supervise the agency's implementation of the policies of this circular.

9. Inquiries. For information concerning this circular, contact the Office of Management and Budget, Office of Federal Procurement Policy, 725 17th Street, NW., Washington, DC 20503, telephone (202) 395–6810.

Richard G. Darman,

Director.

Appendix

Isolation Adjustment Computation

The monthly adjustment for isolation, as described in ¶ 7c(1), is computed as follows:

- *Step 1.* Determine the one-way distance in miles (from the quarters to the nearest established community) for each affected category of transportation listed in Figure 1. Enter mileage(s) in the appropriate block(s) under column B.
- *Step 2.* Multiply mileage figures entered in Column B by point values listed in Column A for each affected category of transportation to produce one-way points for each category. Add 29 points to the category 4 subtotal and 27 points to the category 5 subtotal to reflect relative differences in cost or time by use of these modes of travel.
- *Step 3.* Add all categories of one-way points in Column C to produce total one-way points. (The total must exeed 30 points or there is no ajustment for isolation.)

Figure 1

Category of travel	Column A point value	Column B one-way miles	Column C one-way points
(1) Paved road or rail.	1.0	× _____	_____
(2) Unpaved but improved road.	1.5	× _____	_____
(3) Unimproved road.	2.0	× _____	_____
(4) Water, snowmobile, pack animal, foot or other pecial purpose conveyance.	2.5	× _____ = _____ + 29 =	_____
(5) Air	4.0	× _____ = _____ + 27 =	_____

Figure 1—Continued

Category of travel	Column A point value	Column B one-way miles	Column C one-way points
Total one-way points = .	.....		_____

- *Step 4.* Calculate the Isolation Adjustment Factor (IAF) using the following formula: Multiply 2 (to reflect round-trip points) by 4 (to reflect number of trips per month) and then multiply by $x.xxx (GSA's current automobile mileage allowance). For example, the GSA mileage allowance, as of the date of this circular, is $0,25 per mile, resulting in a IAF of 2.0 (rounded to the nearest tenth).

IAF = 2.0

- *Step 5.* Multiply total adjusted points by the Isolation Adjustment Factor to produce the monthly adjustment for isolation (rounded to the nearest whole dollar).

Monthly Adjustment = _____

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OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. 301-87]

Corrected Notice of Initiation of Section 302 Investigation, Determinations and Expeditious Action: Canadian Exports of Softwood Lumber

AGENCY: Office of the United States Trade Representative.

ACTION: Issuance of corrected notice of initiation of investigation under section 302(b)(1)(A) of the Trade Act of 1974, as amended (19 U.S.C. 2412(b)(1)(A)), notice of determinations and expeditious action.

SUMMARY: On October 4, 1991, the United States Trade Representative (the "USTR") announced the initiation of an investigation under section 302(b)(1)(A) of the Trade Act of 1974, as amended ("the Trade Act"), with respect to certain acts, policies and practices of the Government of Canada affecting exports to the United States of softwood lumber; and determined pursuant to section 304 of the Trade Act, that certain Canadian Government acts, policies and practices are unreasonable and burden or restrict United States commerce, and that expeditious action in this matter was required. Notice of these actions was published in the **Federal Register** on October 8, 1991 (56 FR 50738) (the "prior notice").

The purpose of this notice is to provide certain technical corrections to the prior notice, consistent with the stated purpose of the actions described in that notice, namely to restore and maintain the *status quo ante*. The Annex to this notice contains a complete text of the amended notice. The effective date of the amended notice is October 4, 1991.

ADDRESSES: Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Donald M. Phillips, Assistant United States Trade Representative for Industry, (202) 395-5656; or Timothy Reif, Associate General Counsel, (202) 395-6800 (for legal issues).

SUPPLEMENTARY INFORMATION: The following changes to the "Summary" section of the prior notice will be made:

(1) Amend the last sentence of the paragraph that begins "Accordingly, the USTR determined that * * *", to read as follows: "The withholding or extension of liquidation and the bonding requirements will apply to entries filed prior to the effective date of the suspension of liquidation, if any, under the preliminary subsidy determination."

The following changes to the "Supplementary Information" section of the prior notice will be made:

(1) Amend the paragraph that begins "This action shall apply to all entries * * *", to read as follows: "This action shall apply to all entries of softwood lumber originating in listed provinces entered from Canada on or after October 4, 1991, and before the effective date of the suspension of liquidation, if any, under the preliminary subsidy determination of the Department of Commerce."

(2) The following sentence will be added to the end of that paragraph: "This action will not apply to any shipments of softwood lumber exported to the United States prior to October 4, 1991, but entered into the United States after October 4, 1991, if an export certificate for the shipment demonstrating that the shipment was exported prior to October 4, 1991, is provided."

(3) A new paragraph immediately after the next to last paragraph will be added, that reads: "Although the Provinces of Prince Edward Island, Nova Scotia, New Brunswick and Newfoundland are exempt from the bonding requirements and potential duty liability, this exemption shall not apply to certain softwood lumber products produced from Crown timber harvested in any other Province."

(4) In addition, in the prior notice, the USTR announced that that determination "may be amended, *inter alia*, to provide for possible adjustments to bonding requirements or duty liability applying to remanufactured products or lumber produced from U.S. origin logs." In that regard, the following language will be substituted for that paragraph: "In the December 16, 1987 amendment to the MOU, a provision was included that exempted from the export charge each year up to 365 million board feet of lumber produced in Canada from U.S.-origin logs. The Government of Canada is responsible for allocating this exemption to individual companies.

For entries of softwood lumber produced from U.S.-origin logs made during the period from October 4, 1991 until the effective date of the suspension of liquidation, if any, under the preliminary subsidy determination of the Department of Commerce (hereinafter the "interim period"), a single entry bond in the amount specified in this (and in the prior) notice for each province of origin will be required. The Secretary shall determine, at the time such entries are liquidated, whether entries qualify for the remainder of the annual exemption provided for under the MOU for imports of lumber produced from U.S.-origin logs. No duties will be assessed on entries made during the interim period if the entry is determined by the Secretary to be covered by the exemption. The Secretary will not grant any exemptions without information provided by the Government of Canada regarding the amount of the allocation used and the amount remaining for each company.

For the remanufactured products listed in appendices 3 and 4, the MOU stated that the export charge would be assessed on the value of the softwood lumber used in the manufacture of the products, not the value added by the remanufacturing process. Canadian exporters were required by the MOU to provide details regarding the input material on the export notices submitted to U.S. Customs with each lumber shipment.

For entries of remanufactured softwood lumber products listed in appendices 3 and 4 entered during the interim period, the Secretary will require

a single entry bond in the amount specified in this (and in the prior) notice for the province of origin based on the value of the softwood lumber used in the manufacture of the merchandise. The Secretary shall require adequate documentation of the nature and value of such material. Any duties imposed on such entries made during the interim period will be based on this value.

Appendix 3

REMANUFACTURED PRODUCTS

Number	Product
101	Finish.
102	Finish Paneling and Ceiling (Cedar).
103	Casing and Base.
104	Flooring.
105	Ceiling and Siding (Except Cedar).
106	Bevel Siding (Cedar).
107	Bevel Siding (Except Cedar).
109	V.G. Stepping, K.D.
110	Paneling (Except Cedar).
111	Paneling (Cedar).
112	Gutter.
113	Battens, K.D.
116	Lath.
156	Door Stock.
157	Window Sash Cuttings, Door Cuttings.
161	Moulding Stock.
163	Ladder and Pole Stock.
164	Ladder Rails.
167	Tank Stock.
178	Mast, Spar and Boat Lumber.

Note: The number and product description refer to the Standard Grading Rules for West Coast Lumber.

Appendix 4

Additional Remanufactured Products

1. Certain Specialty Remanufactured Cut Stock

Remanufactured lumber products which are cut to customer specification not exceeding 90 inches in length. This category covers lumber produced in a secondary manufacturing facility commonly for industrial type applications. The cut stock is lumber cut to size in dimensions specified by customers to suit the particular end use when further manufactured.

The valuation methodology for remanufactured cut stock meeting the above definition shall only apply to the following products if they are classified by the Secretary as softwood products in Harmonized Tariff Schedule Codes 4407.1000, 4409.1010, 4409.1020 and 4409.1090:

- Pallet stock. (Pallet stock consists of remanufactured stock supplied to pallet manufactures for further manufacture into pallets.)
- Box spring mattress frame components. (Pre-cut bed frame components are supplied to manufacturers of box spring mattresses which use the components for side rails, end rails, slats, etc. in box spring mattress frames. Such components are supplied to customer specifications.)
- Crating stock.
- Box stock.
- Cleat stock and blanks therefor.
- Turning squares.
- Furniture stock.
- Toy blanks.
- Slat blocks and louvres.
- Short blocks up to and including 48 inches in length which are used for subsequent finger jointing into, for example, window sash and frame parts, door jambs, and stock for porch columns.
- Finger jointed cut stock; and stock for finger jointing possessing machined ends, i.e., finger joints, but not yet glued.
- Kiln sticks used to separate lumber in kilns.
- Vegetable stakes.

2. Softwood Lumber Pressure Treated With Preservative or Fire Retardant Chemicals

Pressure treating means impregnation with preservative or fire retardant chemicals under pressure. Pressure treated lumber shall adhere to American Wood Preservers Associated Book of Standards or the equivalent Canadian Standards Association (CSA) product standard. In accordance with these standards, treated lumber should have a chemical retention of at least .25 lbs. per cubic foot and should also meet the chemical penetration requirement of at least $\frac{1}{10}$ of an inch.

Preservative chemical means any suitable substance that is toxic to fungi, insects and other wood destroying organisms.

Fire retardant chemical means any suitable substance that reacts under combustion to form an insulating char on the wood surface.

In trade parlance, the products are usually described with names such as: Pressure treated wood, treated wood, fire retardant treated wood, FRTW, pressure treated dimension lumber, treated boards, FRTW decking.

Only the costs associated with the treating process will be exempt from the charge.

3. Furring Strips and Roofing Strips

These products are usually used across structural members of walls and ceilings to serve as a base for the attachment of wall, ceiling and roof materials. This category is limited to dimensions of 1 x 2 inches, 1 x 3 inches, $\frac{3}{4}$ x 3 inches, 1 x 4 inches and 2 x 2 inches. This category covers furring strips and roofing strips produced in a secondary milling operations, i.e., an operation in which the initial input in softwood lumber which has "touched the ground" between its primary and secondary milling. This secondary milling provision regarding this product category does not prejudice the questions of the provision's applicability to other products subject to this valuation methodology.

4. Tongue and Groove Roof and Floor Decking

Tongue and groove decking is laid on its wide face to provide a structural deck (i.e., floors and roofs). Tongue and groove decking is available in two grades—select and commercial. It is commonly available in three thicknesses 38 mm, 64 mm and 89 mm. The two thicker sizes are double tongue and grooved. It is usually purchased in random lengths. Such products should conform to National Lumber Grades Authority (NLGA) standards. This category covers tongue and groove roof and floor decking produced in a secondary milling operation, i.e., an operation in which the initial input in softwood lumber which has "touched the ground" between its primary and secondary milling. This secondary milling provision regarding this product category does not prejudice the question of the provision's applicability to other products subject to this valuation methodology.

5. Edge-Glued Panels and Lumber

Produced from lumber which is cut into smaller pieces of various lengths and widths which are then edge-glued, surfaced and finished to specific dimensions according to customer specification. They are used in the manufcture of products such as garage doors, furniture, shelving and decorative panels. Edge-gluing yields wide pieces with a high degree of stability with the added advantage of removing undesirable characteristics. End-gluing is not covered in this category.

6. Finger Jointed Lumber

End-glued lumber used to make, for example, door jambs, headers, window stock, panelling and other products including those used in structural applications. Conforms to NLGA Special Product Standards for finger jointed lumber, as applicable."

Joshua B. Bolten,

General Counsel.

Annex

SUMMARY: On October 4, 1991, the United States Trade Representative (the

"USTR") initiated an investigation under section 302(b)(1)(A) of the Trade Act of 1974 as amended ("the Trade Act"), with respect to certain acts, policies and practices of the Government of Canada affecting exports to the United States of softwood lumber. Subsequently, at the direction of the President, the USTR determined pursuant to section 304 of the Trade Act, that certain Canadian Government acts, policies and practices are unreasonable and burden or restrict United States commerce, and that expeditious action in this matter is required.

Accordingly, the USTR determined that the appropriate action at this time is to withhold or extend liquidation of entries of imports of softwood lumber products originating in certain provinces and territories of Canada, until the completion of a countervailing duty investigation of softwood lumber imports that the Department of Commerce intends to self-initiate. To that end, the USTR further determined that imports of softwood lumber products originating in certain provinces and territories of Canada will be subject to duties of up to 15 percent *ad valorem*. The imposition of such duties will be contingent upon affirmative final subsidy and injury determinations in the countervailing duty investigation, and will apply with respect to entries filed on or after October 4,1991. The withholding or extension of liquidation and the bonding requirements will apply to entries filed prior to the effective date of the suspension of liquidation, if any, under the preliminary subsidy determination.

USTR invites comments from the public on the matters being investigated and on these determinations. Because expeditious action is required, the USTR has made these determinations prior to receiving public comment in accordance with section 304(b)(1).

SUPPLEMENTARY INFORMATION: On June 5, 1986, the Department of Commerce ("the Department") initiated a countervailing duty investigation as a result of an industry petition regarding softwood lumber products from Canada. On October 22, 1986, following a preliminary determination of injury by the U.S. International Trade Commission ("ITC"), the Department published a preliminary determination estimating that subsidies of 15 percent *ad valorem* were being provided to Canadian producers of certain softwood lumber products.

On December 30, 1986, the United States and Canada signed a Memorandum of Understanding on Trade in Softwood lumber ("MOU"). Under the MOU, the Government of Canada agreed to impose a 15 percent export charge on certain softwood lumber products; such charge could be reduced or eliminated for lumber from provinces that instituted replacement measures increasing stumpage or other charges on the harvest of timber. In return, the U.S. lumber industry withdrew its petition and the Department terminated its investigation.

On the same date, the President took action under section 301 of the Trade Act of 1974 to ensure that the objectives and commitments of the MOU were fulfilled. 52 FR 231, 233 (January 5, 1987). In particular, the President determined that the inability of the Government of Canada during an interim period following the signing of the MOU to collect export charges constituted a burden and restriction on U.S. commerce. As a result, the President proclaimed a temporary increase in rates of duty on softwood lumber products from Canada.

On September 3, 1991, the Government of Canada announced that it would terminate the MOU in 30 days. Beginning on October 4, 1991, Canada will no longer collect export charges on softwood lumber products as agreed under the MOU.

As a consequence, the United States, which in December 1986 terminated its countervailing duty investigation in reliance upon Canada's undertakings in the MOU, will be denied the offset that had been provided by Canadian export charges against possible injurious Canadian subsidies. Due to the limited notice provided by Canada in terminating the agreement and the amount of time required for the Department once again to make a preliminary subsidy determination, the Department is unable in the short period leading up to that determination to impost interim protective measures.

Accordingly, action by the United States is required during this interim period in order to restore and maintain the *status quo ante*. Since the Government of Canada has refused to collect export charges to offset possible subsidies during this period, the United States is compelled to exercise its rights and to take enforcement measures arising out of the MOU by imposing temporary measures to safeguard against an influx of possible injurious subsidized Canadian softwood lumber.

Section 302(b)(1)(A) of the Trade Act authorizes the USTR to initiate an investigation under chapter 1 of title III of the Trade Act (commonly referred to as "section 301") with respect to any matter in order to determine whether the matter is actionable under section 301. Matters actionable under section 301 include, *inter alia*, acts, policies, and practices of a foreign country that are unreasonable and burden or restrict U.S. commerce.

On October 4, 1991, the USTR, having consulted pursuant to section 302(b)(1)(B) of the Trade Act, determined that an investigation should be initiated with respect to certain acts, policies, and practices by the Government of Canada affecting exports to the United States of certain softwood lumber products. The USTR further determined that expeditious action is required in this matter, because Canada has terminated the MOU and because consultations with the Government of Canada have failed to result in a mutually satisfactory solution. Accordingly, the USTR, at the specific direction of the President, has made the following determinations pursuant to section 304 of the Trade Act.

Determinations

(a) That acts, policies, and practices of the Government of Canada regarding the exportation of softwood lumber to the United States, specifically the failure of the Government of Canada to ensure the continued collection of the export charges of softwood lumber envisioned by the MOU, are unreasonable and burden or restrict U.S. commerce; and

(b) That expeditious action is required and that the appropriate action at this time is to impose contingent, temporary increased duties on the articles identified in appendix 1 ("softwood lumber" or "such products") that originate in those provinces and territories listed in appendix 2 ("listed provinces").

In accordance with the above determinations, the following action shall be taken under section 301:

This action shall apply to all entries of softwood lumber originating in listed provinces entered from Canada on or after October 4, 1991, and before the effective date of the suspension of liquidation, if any, under the preliminary subsidy determination of the Department of Commerce. This action will not apply to any shipments of softwood lumber exported to the United States prior to October 4, 1991, but entered into the United States after October 4, 1991, if an export certificate for the shipment demonstrating that the shipment was exported prior to October 4, 1991, is provided.

The Secretary of the Treasury (the "Secretary") shall impose bonding requirements as follows: For softwood lumber originating in the province of

Quebec, a single entry bond in the amount of 6.2 percent of the entered value for entries filed before November 1, 1991, and 3.1 percent of the entered value for entries filed on or after November 1, 1991; and for such products originating in other listed provinces, except British Columbia, a single entry bond in the amount of 15 percent of the entered value.

The Secretary shall require adequate documentation of the province of origin of softwood lumber, including, at his discretion, certification by the importer of record as to province of origin of such products. If the required documentation is not provided, the entries shall be subject to a single entry bond, and potential liability, in the amount of 15 percent of the entered value.

The Secretary of Commerce shall monitor the application of replacement measures in British Columbia and Quebec. In conducting such monitoring, the Secretary of Commerce shall obtain relevant information and assistance from other federal agencies, as appropriate. If the Secretary of Commerce considers that any such replacement measures have been altered so as to reduce their effect in replacing in whole or in part the 15 percent export charge required by the MOU, he shall so advise the USTR. In such case, the USTR will direct the Secretary of the Treasury to revise the bonding requirements or impose an increased, contingent rate of duty, not to exceed 15 percent *ad valorem*, on the entry of softwood lumber originating in the relevant province.

The Secretary of the Treasury shall withhold or extend, as appropriate, liquidation of all entries of softwood lumber from the listed provinces until the imposition of duties, it any. Imposition of a duty shall be contingent upon an affirmative final subsidy determination by the Department of Commerce and an affirmative final injury determination by the ITC in the countervailing duty investigation to be initiated by the Department. Unless the USTR has directed the Secretary to revise the bonding requirements or duty liability, the rate of duty shall be determined as follows:

(1) For softwood lumber originating in the province of Quebec, 6.2 percent *ad valorem* for entries filed before November 1, 1991, 3.1 percent *ad valorem* for entries filed on or after November 1, 1991, or, if it is lower, the rate of subsidy, if any, found in the final Department of Commerce determination;

(2) For such products originating in the province of British Columbia, zero rate of duty;

(3) For such products originating in other listed provinces, the lesser of 15 percent *ad valorem* or the rate of subsidy, if any, found in the final Department of Commerce determination;

(4) For such products for which the required origin documentation is not provided, the lesser of 15 percent *ad valorem* or the rate of subsidy, if any, found in the final Department of Commerce determination.

In the event of a negative preliminary or final injury determination, or in the event of a negative final subsidy determination, no duty shall be imposed.

Although the Provinces of Prince Edward Island, Nova Scotia, New Brunswick and Newfoundland are exempt from the bonding requirements and potential duty liability, this exemption shall not apply to certain softwood lumber products produced from Crown timber harvested in any other Province.

In the December 16, 1987 amendment to the MOU, a provision was included that exempted from the export charge each year up to 365 million board feet of lumber produced in Canada from U.S.-origin logs. The Government of Canada is responsible for allocating this exemption to individual companies.

For entries of softwood lumber produced from U.S.-origin logs made during the period from October 4, 1991 until the effective date of the suspension of liquidation, if any, under the preliminary subsidy determination of the Department of Commerce (hereinafter the "interim period"), a single entry bond in the amount specified in this (and in the prior) notice for each province of origin will be required. The Secretary shall determine, at the time such entries are liquidated, whether entries qualify for the remainder of the annual exemption provided for under the MOU for imports of lumber produced from U.S.-origin logs. No duties will be assessed on entries made during the interim period if the entry is determined by the Secretary to be covered by the exemption. The Secretary will not grant any exemptions without information provided by the Government of Canada regarding the amount of the allocation used and the amount remaining for each company

For the remanufactured products listed in appendices 3 and 4, the MOU states that the export charge would be assessed on the value of the softwood lumber used in the manufacture of the products, not the value added by the remanufacturing process. Canadian exporters were required by the MOU to provide details regarding the input material on the export notices submitted to U.S. Customs with each lumber shipment.

For entries of remanufactured softwood lumber products listed in appendices 3 and 4 entered during the interim period, the Secretary will require a single entry bond in the amount specified in this (and in the prior) notice for the province of origin based on the value of the softwood lumber used in the manufacture of the merchandise. The Secretary shall require adequate documentation of the nature and value of such material. Any duties imposed on such entries made during the interim period will be based on this value.

Appendix 1

Products imported in subheadings 4407.1000 of the Harmonized Tariff Schedule (HTS) of the United States: Coniferous wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding 6 mm; and

Products imported in subheading 4409.1010 and 4409.1090 of the HTS: coniferous wood siding (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbitted, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed; and other coniferous wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbitted, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed; and

Products imported in subheading 4409.1020 of the HTS: coniferous wood flooring (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbitted, chamfered, V jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed.

Appendix 2

Alberta
British Columbia
Manitoba
Ontario
Quebec
Saskatchewan
Northwest Territories
Yukon Territories

Appendix 3

Remanufactured Products

Number	Product
101	Finish.
102	Finish Paneling and Ceiling (Cedar).
103	Casing and Base.
104	Flooring.
105	Ceiling and Siding (Except Cedar).
106	Bevel Siding (Cedar).
107	Bevel Siding (Except Cedar).
109	V.G. Stepping, K.D.
110	Paneling (Except Cedar).
111	Paneling (Cedar).
112	Gutter.
113	Battens, K.D.
116	Lath.
156	Door Stock.
157	Window Sash Cuttings, Door Cuttings.
161	Moulding Stock.
163	Ladder and Pole Stock.
164	Ladder Rails.
167	Tank Stock.
178	Mast, Spar and Boat Lumber.

Note: The number and product description refer to the Standard Grading Rules for West Coast Lumber.

Appendix 4

Additional Remanufactured Products

1. Certain Specialty Remanufactured Cut Stock

Remanufactured lumber products which are cut to customer specification not exceeding 90 inches in length. This category covers lumber produced in a secondary manufacturing facility commonly for industrial type applications. The cut stock is lumber cut to size in dimensions specified by customers to suit the particular end use when further manufactured.

The valuation methodology for remanufactured cut stock meeting the above definition shall only apply to the following products if they are classified by the Secretary as softwood products in Harmonized Tariff Schedule Codes 4407.1000, 4409.1010, 4409.1020 and 4409.1090:

- Pallet stock. (Pallet stock consists of remanufactured stock supplied to pallet manufacturers for further manufacture into pallets).
- Box spring mattress frame components. (Pre-cut bed frame components are supplied to manufacturers of box spring mattresses which use the components for side rails, end rails, slats, etc. in box spring mattress frames. Such components are supplied to customer specifications.)
- Crating stock.
- Box stock.
- Cleat stock and blanks therefor.
- Turning squares.
- Furniture stock.
- Toy blanks.
- Slat blocks and louvres.
- Short blocks up to and including 48 inches in length which are used for subsequent finger jointing into, for example, window sash and frame parts, door jambs, and stock for porch columns.
- Finger jointed cut stock; and stock for finger jointing possessing machined ends, i.e., finger joints, but not yet glued.
- Kiln sticks used to separate lumber in kilns.
- Vegetable stakes.

2. Softwood Lumber Pressure Treated With Preservative or Fire Retardant Chemicals

Pressure treating means impregnation with preservative or fire retardant chemicals under pressure. Pressure treated lumber shall adhere to American Wood Preservers Associated Book of Standards or the equivalent Canadian Standards Association (CSA) product standard. In accordance with these standards, treated lumber should have a chemical retention of at least .25 lbs. per cubic foot and should also meet the chemical penetration requirement of at least 4/10 of an inch.

Preservative chemical means any suitable substance that is toxic to fungi, insects and other wood destroying organisms.

Fire retardant chemical means any suitable substance that reacts under combustion to form an insulating char on the wood surface.

In trade parlance, the products are usually described with names such as: Pressure treated wood, treated wood, fire retardant treated wood, FRTW, pressure treated dimension lumber, treated boards, FRTW decking.

Only the costs associated with the treating process will be exempt from the charge.

3. Furring Strips and Roofing Strips

These products are usually used across structural members of walls and ceilings to serve as a base for the attachment of wall, ceiling and roof materials. This category is limited to dimensions of 1 x 2 inches, 1 x 3 inches, 5/4 x 3 inches 1 x 4 inches, and 2 x 2 inches. This category covers furring strips and roofing strips produced in a secondary milling operations, i.e., an operation in which the initial input in softwood lumber which has "touched the ground" between its primary and secondary milling. This secondary milling provision regarding this product category does not prejudice the question of the provision's applicability to other products subject to this valuation methodology.

4. Tongue and Groove Roof and Floor Decking

Tongue and groove decking is laid on its wide face to provide a structural deck (i.e., floors and roofs). Tongue and groove decking is available in two grades—select and commercial. It is commonly available in three thicknesses 38 mm, 64 mm and 89 mm. The two thicker sizes are double tongue and grooved. It is usually purchased in random lengths. Such products should conform to National Lumber Grades Authority (NLGA) standards. This category covers tongue and groove roof and floor decking produced in a secondary milling operation, i.e., an operation in which the initial input in softwood lumber which has "touched the ground" between its primary and secondary milling. This secondary milling provision regarding this product category does not prejudice the question of the provision's applicability to other products subject to this valuation methodology.

5. Edge-Glued Panels and Lumber

Produced from lumber which is cut into smaller pieces of various lengths and widths which are then edge-glued, surfaced and finished to specific dimensions according to customer specification. They are used in the manufacture of products such as garage doors, furniture, shelving and decorative panels. Edge-gluing yields wide pieces with a high degree of stability with the added advantage of removing undesirable characteristics. End-gluing is not covered in this category.

6. Finger Jointed Lumber

End-glued lumber used to make, for example, door jambs, headers, window stock, panelling and other products including those used in structural applications. Conforms to NLGA Special Product Standards for finger jointed lumber, as applicable.

[FR Doc. 91-28156 Filed 11-21-91; 8:45 am]
BILLING CODE 3190-01-M

PEACE CORPS

Notice of Submission of Public Use Form Review Request to the Office of Management and Budget

SUMMARY: Pursuant to the Paperwork Reduction Act of 1981 (44 U.S.C. chapter 35), the Peace Corps of the United States has submitted to the Office of Management and Budget a request to approve an extension to use the Hotline Employer Follow-up Questionnaire through September 30, 1994. This form is completed voluntarily by employers who have placed announcements in the Hotline job bulletin and provides information on the number of returned Peace Corps Volunteers who applied, were interviewed and/or were hired. The information is necessary for Peace Corps to determine the effectiveness of Hotline. Two revisions have been made. Peace Corps now clarifies the use of the information by stating that the information may be used for release as general program information, but will maintain confidentiality of personal information of respondent and organization.

Information About the Questionnaire

Agency Address: Peace Corps, 1990 K Street, NW., Washington, DC 20526.

Title and Agency Number: Hotline Employer Follow-up Questionnaire, Form #PC–1510.

Type of Request: Form extension approval.

Frequency of Collection: Occasional.

General Description of Respondents: Employers who have placed announcements in HOTLINE.

Estimated Number of Respondents: 1,200 annually.

Estimated Hours for Respondents to Furnish Information: 0.10 hours each.

Respondents Obligation to Reply: Voluntary.

Comments: Comments on this form should be directed to Lin Liu, Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20523. A copy of this form may be obtained from Susan Musich, Returned Volunteer Services, Peace Corps, telephone: (202) 606–3126. This notice is issued in Washington, DC, on November 5, 1991.

Collins Reynolds,

Associate Director for Management.

[FR Doc. 91–28124 Filed 11–21–91; 8:45 am]

BILLING CODE 6051–01–M

SECURITIES AND EXCHANGE COMMISSION

Self-Regulatory Organizations; Filing and Order Granting Accelerated Approval of Proposed Rule Change of the Midwest Stock Exchange, Incorporated Requesting a Six-Month Extension of the SuperMAX Pilot Program

[Release No. 34–29949; File No. SR–MSE–91–15]

November 18, 1991.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on November 13, 1991, the Midwest Stock Exchange, Incorporated filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and simultaneously publishing an order granting accelerated approval of the proposed rule change.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Midwest Stock Exchange, Incorporated ("MSE") proposes to extend its pilot program, whereby the guaranteed execution price of small agency market orders received over the Midwest Automated Execution System (MAX) are automatically improved from the consolidated best bid or offer according to certain pre-defined criteria (SuperMAX) until May 14, 1992. The Commission first approved SuperMAX on a six month pilot basis on May 14, 1990.[1] The current six-month extension of the pilot program expired on November 14, 1991.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, The Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B) and (C) below, of the most significant aspects of such statements.

[1] See Securities Exchange Act Release No. 28014, May 14, 1990, order approving SR–MSE–90–05.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the proposed Rule Change

On November 14, 1990, the Commission approved the extension of SuperMAX on a pilot basis.[2] The MSE proposes to extend the pilot program for another six-month period. SuperMAX allows for small agency market orders to be guaranteed an execution at a price that is better than the consolidated best bid or offer according to certain pre-defined criteria. The six month extension of the pilot period will allow the Exchange to analyze the effectiveness of SuperMAX in conjunction with an Enhanced version of SuperMAX, which proposed rule filing is pending with the Commission.

The proposed rule change is consistent with Section 6 of the Securities Exchange Act of 1934 ("Act") in that it will promote just and equitable principles of trade and will help to perfect the mechanism of a free and open market and a national market system and will foster competition among markets.

(B) Self-Regulatory Organization's Statement on Burden on Competition

Midwest Stock Exchange Incorporated, does not believe that any burdens will be placed on competition as a result of the proposed rule change.

(C) Self-Regulatory Organization's Statement of Comments on the Proposed Rule Change Received From Members, Participants or Others

Comments on SuperMAX were informally received from Members and were unanimously favorable.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The MSE requests that the Commission find good cause for approving the proposed rule change extending its pilot program until May 14, 1992, prior to the thirtieth day after publication of the notice in the **Federal Register**. The proposed rule change implementing the pilot program has been published for comment in the **Federal Register** [3] previously, and there have been no adverse comments on it. The MSE believes it appropriate to approve the extension of the pilot program so that the Exchange may have

[2] See Securities Exchange Act Release No. 28617 November 14, 1990, order partially approving MSE 90–17.

[3] See Securities Exchange Act Release No. 28014 (May 14, 1990) 55 FR 20880.

additional time to analyze the effectiveness of SuperMAX without any break in operation.

The Commission finds that the proposed rule change extending the pilot program is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the MSE and, in particular, the requirements of section 6, and the rules and regulations thereunder.

The Commission finds good cause for extending the pilot program prior to the thirtieth day after the date of publication of the notice of filing thereof, in that accelerated approval is appropriate to extend the pilot program until May 14, 1992, without interruption.

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 submissions, 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 offices of the above-referenced self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by December 13, 1991.

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the proposed rule change extending the pilot program until May 14, 1992, be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91-28144 Filed 11-21-91; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-18409; 812-7714]

Liquid Institutional Reserves, et al.; Notice of Application

November 15, 1991.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for exemption under the Investment Company Act of 1940 ("Act").

APPLICANTS: Liquid Institutional Reserves (the "Trust"); Kidder Peabody Asset Management, Inc.; and Kidder, Peabody & Co. Incorporated.

RELEVANT ACT SECTIONS: Application pursuant to section 6(c) of the Act for an order exempting applicants from sections 18(f), 18(g), and 18(i) of the Act.

SUMMARY OF APPLICATION: Applicants seek a conditional order to permit the various series of the Trust to issue and sell two classes of securities that would be identical in all respects except for differences related to shareholder services plan expenses, voting rights, exchange privileges, and class designation.

FILING DATE: The initial application was filed on April 19, 1991. Amended and restated applications were filed on November 7, 1991 and November 15, 1991.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 9, 1991, and should be accompanied by proof of service on the applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street NW., Washington, DC 20549. Applicants, c/o Kidder, Peabody & Co. Incorporated, 10 Hanover Square, New York, New York 10005-3592, Attn: Lawrence H. Kaplan, Esquire.

FOR FURTHER INFORMATION CONTACT: Barry A. Mendelson, Staff Attorney, at (202) 504-2284, or Barry D. Miller, Branch Chief, at (202) 272-3018 (Division of Investment Management, Office of Investment Company Regulations).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicants' Representations

1. The Trust was organized as a Massachusetts business trust on February 14, 1991. On February 15, 1991, the Trust registered under the Act as an open-end management investment company and filed a registration statement on Form N-1A, which was declared effective on May 23, 1991. The Trust currently is composed of three series—the Treasury Securities Fund, the Government Securities Fund, and the Money Market Fund (the "Funds").[1]

2. Kidder, Peabody & Co. Incorporated (the "Distributor") is the distributor of the Trust's shares. Kidder Peabody Asset Management, Inc. (the "Adviser"), a wholly owned subsidiary of the Distributor, serves as investment adviser and administrator of the Trust.

3. Applicants seek relief that would permit the Funds to issue two classes of shares, "Institutional Shares" and "Financial Intermediary Shares." The Institutional Shares are available for purchase currently. The Financial Intermediary Shares will be available for purchase upon the issuance of the order requested hereby. Applicants' proposal will permit investors holding shares of a particular class in one Fund to exchange those shares for shares of the same class in another Fund.

4. The Funds do not impose, and do not propose to impose, any sales loads, redemption charges, or rule 12b-1 fees. The minimum initial investment in the Funds is $250,000, with no subsequent investment minimum.

5. The Funds are designed primarily for institutions as an economical and convenient means for the investment of short term funds that they hold for their own account (the Institutional Shares) or hold or manage for others (the Financial Intermediary Shares). These institutions include banks, corporations, trust companies, insurance companies, brokers, pension funds, employee benefit plans, trusts, estates, and educational, religious, and charitable organizations. The Financial Intermediary Shares will be offered only to or through such institutions and will not be available for purchase by individuals directly from the Trust or the Distributor.

6. If the requested order is granted, the Trust's board of trustees will adopt a Shareholder Services Plan ("Plan"). The

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[1] The term "Fund" as used in the application and in this notice also relates to any future series of the Trust and to any other registered open-end management investment company or series thereof (a) for which Kidder Peabody Asset Management, Inc., or a company under common control therewith, is the sponsor and serves as the investment adviser, investment manager, and/or administrator, and for which Kidder, Peabody & Co. Incorporated, or a company under common control therewith, serves as distributor, and (b) whose shares are divided into two classes that may be issued and sold on a basis identical in all material respects to that described in the application.

Plan will be adopted and operated pursuant to procedures affording the major protections to investors provided by rule 12b–1, except that shareholders will not enjoy the voting rights specified in the rule.

7. Pursuant to the Plan, the Trust will enter into a shareholder services agreement ("Service Agreement") with each institution that purchases Financial Intermediary Shares of the Funds requiring the institution to provide support services to its customers ("Customers") who are the benefit owners of such shares. Such services will include, but not be limited to: aggregating and processing purchase and redemption requests from Customers and placing net purchase and redemption orders with the Trust's Distributor; providing Customers with a service that invests the assets of their accounts in Financial Intermediary Shares; processing dividend payments on behalf of Customers; providing information periodically to Customers showing their positions in each Fund; arranging for bank wires; responding to Customer inquiries relating to the services performed by the institution; providing sub-accounting with respect to shares beneficially owned by Customers or the information to the Trust necessary for sub-accounting; and forwarding shareholder communications from a Fund to Customers, if required by law.

8. In consideration for providing the foregoing services, an institution will receive .30%, on an annualized basis, of the average daily net asset value of the Financial Intermediary Shares held by the institution for its Customers (the "Service Payment"). The amount of the Service Payment may be increased in the future, but only after appropriate disclosure to affected shareholders. Under the terms of the Service Agreements, institutions will be required to provide to their Customers a schedule of any additional fees that they may charge Customers in connection with their investments in Financial Intermediary Shares.

9. Investors purchasing the Financial Intermediary Shares and receiving the services provided under the Plan will bear the costs associated with those services, but would also enjoy exclusive shareholder voting rights with respect to the Trust's arrangements with institutions.

10. By creating and offering the Financial Intermediary Shares in connection with the Plan, as described above, and by also offering the Institutional Shares independently of the Plan, the Trust believes that the Funds may be able to achieve added flexibility in meeting the service and investment needs of shareholders and future investors. Applicants believe it is appropriate for the expense of the Service Payments to be borne by the Customers who benefit from such services and not by the holders of Institutional Shares. Applicants acknowledge that this objective could be achieved by organizing a separate investment portfolio for each class of Financial Intermediary Shares to be created, but believe that this alternative would be inefficient, and in some instances economically or operationally unfeasible. Applicants assert that organizing and operating additional investment portfolios would cause the Trust to incur unnecessary accounting and bookkeeping costs.

11. Except for differences relating to class designation, the allocation of Service Payment expenses, exchange privileges, and voting rights, as described above and in condition 1 below, the Financial Intermediary Shares will be identical in all respects to the Institutional Shares. Each Institutional Share and Financial Intermediary Share of a Fund will represent an equal, proportionate interest in the assets belonging to that Fund. Thus, in the event of liquidation, shareholders will be entitled to share *pro rata* in the net assets of the applicable Fund available for distribution to shareholders.

12. The net asset value of all outstanding shares in a Fund will be computed on the same days and at the same times by adding the value of all portfolio securities and other assets belonging to the Fund, subtracting the liabilities charged to the Fund, and dividing the result by the number of total shares outstanding.

13. The gross income of each Fund will be allocated on a *pro rata* basis to the outstanding shares of the Fund regardless of class. Similarly, all expenses incurred by a Fund, except for the expense of Service Payments, will be borne on a *pro rata* basis by the outstanding shares of the Fund regardless of class. The net income of both classes of shares will be delcared daily and paid monthly to shareholders.

14. Because of the Service Payments that will be borne by the Financial Intermediary Shares, the net income per share of that class of a Fund will be lower than the net income per share of the Institutional Shares of the same Fund. To ensure that the net asset value per share of all shares of a Fund remains the same regardless of variations in net income per share from day to day, institutions entitled to receive Service Payments may be required to waive some or all of any Service Payment. See condition 16 below.

Applicants' Legal Analysis

1. Applicants request an exemptive order pursuant to section 6(c) of the Act to the extent that the proposed implementation of the Plan with regard to the Trust's Financial Intermediary Shares and the allocation of certain fees to shareholders of the Financial Intermediary Shares might be deemed: (a) To result in a "senior security" within the meaning of section 18(g) of the Act and therefore to be prohibited by section 18(f)(1) of the Act; and (b) to violate the equal voting provisions of section 18(i) of the Act. The implementation of the Plan and the allocation of Service Payments expenses solely to Financial Intermediary Shares may result in one class of shares having "priority" over another as to payment of dividends and of the two classes of shares having unequal voting rights, in contravention of the aforementioned provisions of the Act.

2. In support of the requested order, applicants assert that the proposed allocation of expenses and voting rights is equitable and will not discriminate against any group of shareholders. Investors purchasing Financial Intermediary Shares and receiving the services provided under the Plan will bear the costs associated with those services and will enjoy exclusive shareholder voting rights with respect to the Trust's arrangements with financial intermediaries. Applicants also assert that implementation of their proposal will save the organizational costs and other continuing costs that would be incurred if the Trust were required to establish separate investment portfolios. In addition, to the extent that the Funds are able through the proposed arrangement to expand their shareholder base to a greater degree than they would otherwise, all shareholders irrespective of class will benefit since the Funds' fixed costs will be spread over a greater number of shareholders. Finally, applicants assert that the proposed arrangement will not lead to any of the abuses that section 18 was designed to eliminate.

Applicants' Conditions

Applicants agree that the following conditions may be imposed in any order granting the requested relief:

1. Each class of shares will represent interests in the same portfolio of investments of a Fund, and be identical in all respects, except as set forth below. The only differences between each class of shares representing interests in the

same portfolio will relate solely to: (a) The impact of the Service Payments made by the Funds under the Plan relating to the Financial Intermediary Shares and any other incremental expenses subsequently identified that should be properly allocated to one class which shall be approved by the SEC pursuant to an amended order; (b) voting rights on matters that pertain to the Trust's arrangements with financial intermediaries; (c) the designation of each class of shares of a Fund; and (d) differing exchange privileges, insofar as each class of shares in a Fund is exchangeable only for shares of the same class in another Fund.

2. The Trustees of the Trust, including a majority of the independent Trustees, will approve the arrangements relating to the Financial Intermediary Shares. The minutes of the meetings of the Trustees regarding the deliberations of the Trustees with respect to the approvals necessary to implement the arrangements relating to the Financial Intermediary Shares will reflect in detail the reasons for the Trustees' determination that the proposed arrangements are in the best interest of both the Trust and its shareholders.

3. On an ongoing basis, the Board of Trustees of the Trust, pursuant to their fiduciary responsibilities under the Act and otherwise, will monitor each Fund for the existence of any material conflicts between the interests of the Financial Intermediary Shares and the Institutional Shares. The Board of Trustees, including a majority of the independent Trustees, shall take such action as is reasonably necessary to eliminate any such conflicts that may develop. The Adviser and the Distributor will be responsible for reporting any potential or existing conflicts to the Board of Trustees. If a conflict arises, the Adviser and the Distributor at their own cost will remedy such conflict up to and including establishing a new registered management investment company.

4. The Plan will be adopted and operated in accordance with the procedures set forth in paragraphs (b) through (f) of Rule 12b–1 as if the expenditures made thereunder were subject to Rule 12b–1, except that shareholders will not enjoy the voting rights specified in Rule 12b–1. In evaluating the Plan, the Board of Trustees will specifically consider whether (a) the Plan is in the best interest of the Financial Intermediary Shares and their respective shareholders, (b) the services to be performed pursuant to the Plan are required for the operation of the Financial Intermediary Shares, (c) the financial intermediaries can provide services at least equal, in nature and quality, to those provided by others, including the Trust, providing similar services, and (d) the fees for those services are fair and reasonable in light of the usual and customary charges made by other entities, especially non-affiliated entities, for services of the same nature and quality.

5. Each Service Agreement entered into pursuant to the Plan will contain a representation by the financial intermediary that any compensation payable to the financial intermediary in connection with the investment of its Customers' assets in a Fund (a) will be disclosed by it to its Customers, (b) will be authorized by its Customers, and (c) will not result in an excessive fee to the financial intermediary.

6. Each Service Agreement entered into pursuant to the Plan will provide that, in the event an issue pertaining to the Plan is submitted for shareholder approval, the financial intermediary will vote any shares held for its own account in the same proportion as the vote of those shares held for its Customers' accounts.

7. The Board of Trustees will receive quarterly and annual statements concerning shareholder servicing expenditures complying with paragraph (b)(3)(ii) of Rule 12b–1, as it may be amended from time to time. In the statements, only expenditures properly attributable to the servicing of Financial Intermediary Shares will be used to justify any Service Payments charged to that class. Expenditures not related to the servicing of a particular class will not be presented to the Board of Trustees to justify any fee attributable to that class. The statements, including the allocations upon which they are based, will be subject to the review and approval of the independent Trustees in the exercise of their fiduciary duties.

8. Dividends paid by each Fund with respect to each class of its shares, to the extent any dividends are paid, will be calculated in the same manner, at the same time, on the same day, and will be in the same amount, except that the Service Payments relating to the Financial Intermediary Shares will be borne exclusively by that class.

9. The methodology and procedures for calculating the net asset value and dividends and distributions of the Financial Intermediary Shares and the Institutional Shares and the proper allocation of expenses between the Financial Intermediary Shares and the Institutional Shares have been reviewed by an expert (the "Expert") who has rendered a report to the applicants, which has been provided to the staff of the SEC, that such methodology and procedures are adequate to ensure that such calculations and allocations will be made in an appropriate manner. On an ongoing basis, the Expert, or an appropriate substitute Expert, will monitor the manner in which the calculations and allocations are being made and, based upon this review, will render at least annually a report to applicants that the calculations and allocations are being made properly. The reports of the Expert shall be filed as part of the periodic reports filed with the SEC pursuant to sections 30(a) and 30(b)(1) of the Act. The work papers of the Expert with respect to these reports, following a request by applicants (which applicants agree to provide), will be available for inspection by the SEC staff upon the written request to applicants for these work papers by a senior member of the Division of Investment Management, limited to the Director, an Associate Director, the Chief Accountant, the Chief Financial Analyst, an Assistant Director, and any Regional Administrators or Associate and Assistant Administrators. The initial report of the Expert is a "Special Purpose" report on the "Design of a System" and the ongoing reports will be "Special Purpose" reports on the "Design of a System and Certain Compliance Tests" as defined and described in Statement of Auditing Standards No. 44 of the American Institute of Certified Public Accountants ("AICPA"), as it may be amended from time to time, or in similar auditing standards as may be adopted by the AICPA from time to time.

10. Applicants have adequate facilities in place to ensure implementation of the methodology and procedures for calculating the net asset value and dividends and distributions of the Financial Intermediary Shares and the Institutional Shares and the proper allocation of expenses between the Financial Intermediary Shares and the Institutional Shares and this representation will be concurred with by the Expert in the initial report referred to in condition 9 above and will be concurred with by the Expert, or an appropriate substitute Expert, on an ongoing basis at least annually in the ongoing reports referred to in condition 9 above. Applicants will take immediate corrective measures if this representation is not concurred in by the Expert or appropriate substitute Expert.

11. If a salesperson and any other person entitled to received compensation for selling or servicing

shares may receive different compensation with respect to one particular class of shares over another in a Fund, the prospectus of the Trust will contain a statement to this effect.

12. The Distributor will adopt compliance standards as to when the Financial Intermediary Shares may be sold to particular investors. Applicants will require all persons selling shares of the Funds to agree to conform to these standards.

13. The conditions pursuant to which the exemptive order is granted and the duties and responsibilities of the Board of Trustees with respect to the Plan will be set forth in guidelines that will be furnished to the Board of Trustees.

14. The Trust will disclose the respective expenses, performance data, distribution arrangements, services, fees, sales loads, and exchange privileges applicable to each class of shares in every prospectus, regardless of whether all classes of shares are offered through each prospectus. The Trust will disclose the respective expenses and performance data applicable to all classes of shares in every shareholder report. To the extent any advertisement or sales literature describes the expenses or performance data applicable to any class of shares, it will also disclose the respective expenses and/or performance data applicable to all classes of shares. The information provided by applicants for publication in any newspaper or similar listing of the Funds' net asset values and public offering prices will present each class of shares separately.

15. Applicants acknowledge that the grant of the exemptive order requested by this application will not imply SEC approval, authorization, or acquiescence in any particular level of payments that a Fund may make pursuant to the Plan in reliance on the exemptive order.

16. Each Fund will have more than one class of shares outstanding only when and for so long as it declares it dividends on a daily basis, accrues its payments, including Service Payments, daily, and has received undertakings from the persons that are entitled to receive payments under the Plan waiving the portion of any payments to the extend necessary to assure that payments (if any) required to be accrued by any class of shares on any day do not exceed the income to be accrued to that class on that day. In this manner, the net asset value per share for all shares in each such Fund will remain the same.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91-28094 Filed 11-21-91; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 35-25410]

Filings Under the Public Utility Holding Company Act of 1935 ("Act")

November 15, 1991.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated thereunder. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendments thereto is/are available for public inspection through the Commission's Office of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by December 9, 1991 to the Secretary, Securities and Exchange Commission, Washington, DC 20549, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in case of an attorney at law, by certificate) should be filed with the request. Any request for hearing shall identify specifically the issues of fact or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After said date, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

Consolidated Natural Gas Company (70-7095)

Consolidated Natural Gas Company ("CNG"), CNG Tower, Pittsburgh, PA 15222, a registered holding company, has filed an application-declaration under sections 9(a), 10, and 12(c) of the Act and Rule 42 thereunder.

By orders dated June 21, 1985 and April 7, 1986 (HCAR Nos. 23738 and 24062, respectively), the Commission authorized CNG to issue up to four million shares of its common stock, $2.75 par value ("Common Stock"), pursuant to CNG's Long-Term Incentive Plan ("Plan") for key eligible employees. Under the Plan, the participant's stock award is evidenced by four certificates ("Tranche Certificates"), each for an approximate equal number of shares of Common Stock.

CNG has amended the Plan to allow participants with restricted stock awards to elect to have their shares of Common Stock withheld ("Withheld Shares") upon termination of restrictions on such awards. This election will enable the participant to satisfy mandatory tax withholding obligations. The right to make the election will be subject to the rules and regulations specified by the Compensation and Benefits Committee administering the Plan. Shares withheld or surrendered will be valued at their fair market value as of the date on which a participant's receipt of shares of Common Stock under the Plan first becomes subject to taxation for federal income tax purposes.

The acquisition by CNG of the Withheld Shares will be effected by the cancellation of the Tranche Certificate and issuance to the participant of a new certificate representing the number of shares of Common Stock net the shares used to provide for the tax withholding. The Common Stock deducted from the Tranche Certificate will be recorded by CNG as an acquisition of treasury shares.

The Kansas Power and Light Company (70-7791)

The Kansas Power and Light Company ("KPL"), 818 Kansas Avenue, Topeka, Kansas 66612, a Kansas electric and gas public-utility company, has filed an amended application under sections 3(a)(2), 9(a)(2) and 10 of the Act.[1]

KPL proposes to acquire all of the outstanding capital stock of Kansas Gas and Electric Company ("KG&E"), a Kansas electric-utility company and a holding company exempt from registration under section 3(a)(2) of the Act pursuant to rule 2. The acquisition would be effected through the merger of KG&E into KCA Corporation ("KCA"), a wholly owned Kansas subsidiary of KPL formed for the purpose of the merger ("Merger"). Through such acquisition, KPL would indirectly acquire KG&E's 47% interest in the Wolf Creek Nuclear Operating Corporation ("WCNOC"), a Kansas electric-utility company.

Following the Merger, KPL would be a public-utility holding company as defined in section 2(a)(7) of the Act. KPL has also requested an order of exemption under section 3(a)(2) from all

[1] The Commission issued a notice of the original application on March 18, 1991 (Holding Co. Act Release No. 25276).

provisions of the Act except section 9(a)(2).

KPL engages in the generation, transmission, distribution and sale of electric power in central and eastern Kansas. KPL currently provides retail electric service to approximately 295,000 industrial, commercial and residential customers in 323 Kansas communities. KPL provides wholesale electric generation and transmission services to numerous municipal customers and electric cooperatives in Kansas, and, through interchange agreements, to surrounding integrated systems. KPL also distributes natural gas to approximately 1,042,000 retail customers in Kansas, western Missouri and northeastern Oklahoma.

As of September 30, 1991, the outstanding capital stock of KPL consisted of 34,566,170 shares of common stock, $5.00 par value ("KPL Common Stock"), 61,000 shares of 8.70% Preference Stock, no par value, 138,576 shares of 4½% Series Preferred Stock, $100 par value, 60,000 shares of 4¼% Series Preferred Stock, $100 par value, and 50,000 shares of 5% Series Preferred Stock, $100 par value.

KG&E generates, transmits, distributes and sells electricity in the southeastern quarter of Kansas. KG&E sells electricity at retail to approximately 228,000 residential customers, more than 22,000 commercial customers and more than 4,000 industrial customers. KG&E provides wholesale electric generation and transmission services to several municipal customers and electric cooperatives in Kansas and, through interchange agreements, to surrounding integrated systems.

As of September 30, 1991, the outstanding capital stock of KG&E consisted of 31,001,319 shares of common stock, no par value ("KG&E Common Stock"), 82,011 shares of 4½% Preferred Stock, $100 par value; 60,000 shares of Serial Preferred Stock, $100 par value, 4.32% Series; and 45,000 shares of Serial Preferred Stock, $100 par value, 4.28% Series.

Pursuant to an agreement and plan of merger, KPL proposes to acquire all of KG&E's capital stock for cash and/or KPL stock. Each share of KG&E Common Stock will be converted into either $32 in cash or shares of KPL Common Stock, having a market value of approximately $32, subject to certain limitations. KPL will pay the following amounts for other classes of KG&E stock: $110.00 per share for all shares of 4½% Preferred Stock, $100 par value; $101.64 per share for all shares of Serial Preferred Stock, $100 par value, 4.32% Series; and $101.00 per share for all shares of Serial Preferred Stock, $100 par value, 4.28% Series. In the case of KG&E preferred stock, KPL will also pay an amount equal to unpaid accumulated dividends to the effective date of the merger, without interest from the effective date of the merger.

KG&E will be merged into KCA, with KCA as the surviving corporation. Because the surviving corporation, to be renamed the Kansas Gas and Electric Company, will retain KG&E's 47% interest in WCNOC, it will be a holding company as defined in section 2(a)(7) of the Act and will claim an exemption from registration under section 3(a)(2) of the Act pursuant to rule 2.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91-28095 Filed 11-21-91; 8:45 am]

BILLING CODE 8010-01-M

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster Loan Area #2532]

Maine; Declaration of Disaster Loan Area

As a result of the President's major disaster declaration on November 7, 1991, I find that York County in the State of Maine constitutes a disaster area as a result of damages caused by a major coastal storm which occurred October 30 through November 2, 1991. Applications for loans for physical damage may be filed until the close of business on January 6, 1992, and for loans for economic injury until the close of business on August 7, 1992, at the address listed below:

U.S. Small Business Administration, Disaster Area 1 Office, 360 Rainbow Blvd., South, 3rd Fl., Occidental Chemical Center, Niagara Falls, NY 14302.

or other locally announced locations. In addition, applications for economic injury loans from small businesses located in the contiguous counties of Cumberland and Oxford in the State of Maine and Carroll and Strafford Counties in the State of New Hampshire may be filed until the specified date at the above location.

Any county contiguous to the above-named primary county and not listed herein has previously been named as a contiguous or primary county in another declaration for the same occurrence.

The interest rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	8.000
Homeowners Without Credit Available Elsewhere	4.000
Businesses with Credit Available Elsewhere	8.000
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000
Others (Including Non-Profit Organizations) with Credit Available Elsewhere	8.500
For Economic Injury:	
Businesses and Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 253211 and for economic injury the numbers are 746100 for Maine and 746000 for New Hampshire.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: November 8, 1991.

Alfred E. Judd,

Acting Assistant Administrator for Disaster Assistance.

[FR Doc. 91-28125 Filed 11-21-91; 8:45 am]

BILLING CODE 8025-01-M

[Declaration of Disaster Loan Area #2531]

Massachusetts; Declaration of Disaster Loan Area

As a result of the President's major disaster declaration on November 4, 1991, I find that the counties of Barnstable, Dukes, Essex, Nantucket, Plymouth, and Suffolk in the State of Massachusetts constitute a disaster area as a result of damages caused by a major coastal storm which occurred on October 30, 1991 and continuing. Applications for loans for physical damage may be filed until the close of business on January 3, 1992, and for loans for economic injury until the close of business on August 4, 1992, at the address listed below:

U.S. Small Business Administration, Disaster Area 1 Office, 360 Rainbor Blvd., South, 3rd Fl. Occidental Chemical Center, Niagara Falls, NY 14302.

or other locally announced locations. In addition, applications for economic injury loans from small businesses located in the contiguous counties of Bristol, Middlesex, and Norfolk in the State of Massachusetts and Hillsborough and Rockingham Counties in the State of New Hampshire may be

filed until the specified date at the above location.

The interest rates are:

	Percent
For Physical Damage:	
Homeowners with credit available elsewhere	8.000
Homeowners without credit available elsewhere	4.000
Business with credit available elsewhere	8.000
Business and non-profit organizations without credit available elsewhere	4.000
Others (including non-profit organizations) with credit available elsewhere	8.500
For Economic Injury:	
Businesses and small agricultural cooperatives without credit available elsewhere	4.000

The number assigned to this disaster for physical damage is 253111 and for economic injury the numbers are 745900 for Massachusetts and 746000 for New Hampshire.

(Catalog of Federal Domestic Assistant Program Nos. 59002 and 59008)

Dated: November 5, 1991.

Alfred E. Judd,

Acting Assistant Administrator for Disaster Assistance.

[FR Doc. 91-28130 Filed 11-21-91; 8:45 am]

BILLING CODE 8025-01-M

[Declaration of Disaster Loan Area #2533]

New Hampshire; Declaration of Disaster Loan Area

As a result of the President's major disaster declaration on November 13, 1991, I find that Rockingham County in the State of New Hampshire constitutes a disaster area as a result of damages caused by a major coastal storm which occurred October 30 through October 31, 1991. Applications for loans for physical damage may be filed until the close of business on January 13, 1992, and for loans for economic injury until the close of business on August 13, 1992, at the address listed below:

U.S. Small Business Administration, Disaster Area 1 Office, 360 Rainbow Blvd., South, 3rd Fl., Occidental Chemical Center, Niagara Falls, NY 14302

or other locally announced locations. In addition, applications for economic injury loans from small businesses located in the contiguous counties of Hillsborough and Merrimack in the State of New Hampshire may be filed until the specified date at the above location.

Any county contiguous to the above-named primary county and not listed herein has previously been named as a contiguous or primary county in another declaration for the same occurrence.

The interest rates are:

	Percent
For Physical Damage:	
Homeowners with credit available elsewhere	8.000
Homeowners without credit available elsewhere	4.000
Business with credit available elsewhere	8.000
Business and non-profit organizations without credit available elsewhere	4.000
Others (including non-profit organizations) with credit available elsewhere	8.500
For Economic Injury:	
Businesses and small agricultural cooperatives without credit available elsewhere	4.000

The number assigned to this disaster for physical damage is 253311 and for economic injury the number is 746000.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: November 13, 1991.

Michael E. Deegan,

Acting Assistance Administrator for Disaster Assistance.

[FR Doc. 91-28128 Filed 11-21-91; 8:45 am]

BILLING CODE 8025-01-M

[Declaration of Economic Injury Disaster Loan Area #7464]

North Carolina; Declaration of Disaster Loan Area

Dare County and the contiguous counties of Currituck, Hyde, and Tyrrell in the State of North Carolina constitute an Economic Injury Disaster Loan Area due to damages caused by a major coastal storm which occurred on October 30, 1991. Eligible small businesses without credit available elsewhere and small agricultural cooperatives without credit available elsewhere may file applications for economic injury assistance until the close of business on Aug. 12, 1992 at the address listed below:

U.S. Small Business Administration, Disaster Area 2 Office, One Baltimore Place, suite 300, Atlanta, Georgia 30308.

or other locally announced locations. The interest rate for eligible small businesses and small agricultural cooperatives is 4 percent.

(Catalog of Federal Domestic Assistance Program No. 59002).

Dated: November 12, 1991.

Patricia Saiki,

Administrator.

[FR Doc. 91-28129 Filed 11-21-91; 8:45 am]

BILLING CODE 8025-01-M

[Declaration of Disaster Loan Area #2534]

Washington; Declaration of Disaster Loan Area

As a result of the President's major disaster declaration on November 13, 1991, I find that the counties of Lincoln, Pend Oreille, Spokane, and Stevens in the State of Washington constitute a disaster area as a result of damages caused by fires beginning on October 15 and continuing through October 24, 1991. Applications for loans for physical damage may be filed until the close of business on January 13, 1992, and for loans for economic injury until the close of business on August 13, 1992, at the address listed below:

U.S. Small Business Administration, Disaster Area 4 Office, P.O. Box 13795, Sacramento California 95853-4795.

or other locally announced locations. In addition, applications for economic injury loans from small businesses located in the contiguous counties of Adams, Ferry, Grant, Okanogan, and Whitman in the State of Washington, and Benewah, Bonner, Boundary, and Kootenai counties in the State of Idaho may be filed until the specified date at the above location.

The interest rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	8.000
Homeowners Without Credit Available Elsewhere	4.000
Businesses With Credit Available Elsewhere	8.000
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000
Others (Including Non-Profit organizations) With Credit Available Elsewhere	8.500
For Economic Injury:	
Businesses and Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 253405 and for economic injury the numbers are 746600 for Washington and 746700 for Idaho.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008).

Dated: November 14, 1991.

Alfred E. Judd,

Acting Assistant Administrator for Disaster Assistance.

[FR Doc. 91-28126 Filed 11-21-91; 8:45 am]

BILLING CODE 8025-01-M

[License No. 04/04-5215]

Tuskegee Capital Corp.; Surrender of License

Notice is hereby given that Tuskegee Capital Corporation (TCC) 4249 Lomac Street, suite E, Montgomery, AL 36106 has surrendered its License to operate as a small business investment company under section 301(c) of the Small Business Act of 1958, as amended (the Act). TCC was licensed by the Small Business Administration on February 9, 1983.

Under the authority vested by the Act and pursuant to the Regulations promulgated thereunder, the surrender of the License was accepted on October 9, 1991, and accordingly, all rights, privileges, and franchises derived therefrom have been terminated.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Dated: October 28, 1991.

Wayne S. Foren,

Associate Administrator for Investment.

[FR Doc. 91-28133 Filed 11-21-91; 8:45 am]

BILLING CODE 8025-01-M

[License No. 06/06-0305]

HCT Capital Corp.; Issuance of a Small Business Investment Company License

On September 20, 1991, a notice was published in the **Federal Register** (Vol. 56, No. 183, pages 47825 and 47826) stating that an application has been filed by HCT Capital Corp., Fort Worth, Texas, with the Small Business Administration (SBA) pursuant to the Regulations governing small business investment companies (13 CFR 107.102) (1991) for a license as a small business investment company.

Interested parties were given until close of business October 21, 1991, to submit comments to SBA. No comments were received.

Notice is hereby given that, pursuant to section 301(c) of the Small Business Investment Act of 1958, as amended, after having considered the application and all other pertinent information, SBA issued License No. 06/06-0305 on November 1, 1991, to HCT Capital Corp. to operate as a small business investment company.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Dated: November 8, 1991.

Wayne S. Foren,

Associate Administrator for Investment.

[FR Doc. 91-28132 Filed 11-21-91; 8:45 am]

BILLING CODE 8025-01-M

[Application Number: 05/05-0217]

White Pines Capital Corp.; Application for a License to Operate as a Small Business Investment Company

An application for a license to operate as a small business investment company under the provisions of section 301(c) of the Small Business Investment Act of 1958, as amended (the Act) (15 U.S.C. 661, et seq.) has been filed by White Pines Capital Corporation, 2929 Plymouth Road, suite 210, Ann Arbor, Michigan 48105 (Applicant), with the Small Business Administration (SBA) pursuant to 13 CFR 107.103 (1991).

The Management and Ownership of the Applicant, a Michigan Corporation are as follows:

Name	Title or relationship	Percent of equity
White Pines Limited Partnership (WPLP), 2929 Plymouth Road, Suite 210, Ann Arbor, MI 48105.	.....	100
Ian R.N. Bund, 3215 W. Dobson Place, Ann Arbor, MI 48105.	President/Director/ Manager of Applicant General/ Limited Partner of WPLP (99.9999% ownership).	
Morton E. Weldy, 1185 Glendale, Saginaw, MI 48603.	Limited Partner of WPLP (0.0001% ownership).	
Frederick L. Yocum, 4622 Wyndwood Drive, Toledo, Ohio 43623.	Director	
Lois F Marler, 443 Village Green, #207 Ann Arbor, MI 48105.	Vice President/ Secretary/Director of Applicant.	
White Pines Corp., 2929 Plymouth Road, Suite 210, Ann Arbor, MI 48105.	Investment Advisor of Applicant.	

White Pines Limited Partnership (WPLP) wholly owns the Applicant and Mr. Ian R.N. Bund the President, Director and Manager of the Applicant owns 99.9999% of WPLP. The Investment Advisor of the Applicant is White Pines Corporation which is wholly owned by Ian R.N. Bund.

The Applicant will begin operations with private capital of $1 million. The Applicant will conduct its activities principally within the states of Michigan, Ohio, Illinois, Indiana and Wisconsin.

Matters involved in SBA's consideration of the application include the general business reputation and character of the proposed owner and management, and the probability of successful operations of the Applicant under his management including adequate profitability and financial soundness, in accordance with the Small Business Investment Act of 1958, as amended, and the SBA Rules and Regulations.

Notice is further given that any person may, no later than 30 days from the date of publication of this Notice, submit written comments on the proposed Applicant. Any such communication shall be addressed to the Associate Administrator for Investment, Small Business Administration, 409 3rd Street, SW., Washington, DC 20416.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Dated: November 7, 1991.

Wayne S. Foren,

Associate Administrator for Investment.

[FR Doc. 91-28127 Filed 11-21-91; 8:45 am]

BILLING CODE 8025-01-M

DEPARTMENT OF TRANSPORTATION

Preliminary Order of Investigation in Employee Protection Cases

AGENCY: Department of Transportation, Office of the Secretary.

ACTION: Request for comments on procedural and substantive issues. Order 91-11-16. Dockets 38418, 38570, 38720, 45234, 38883, 41072, 44397, 38184, 38571 and 41061.

SUMMARY: Applications have been filed by former employees of Airlift International, American Airlines, Continental Airlines, Frontier Airlines, Pan American World Airways, Republic Airlines, Transamerica Airlines, Trans World Airlines, United Airlines and Western Airlines for determinations of qualifying dislocations to enable them to obtain benefits under the Employee Protection Program (EPP) of the Airline Deregulation Act of 1978.

The Department, which is responsible for making determinations of qualifying dislocations had deferred action on these cases pending completion of four lead EPP cases. The Department issued

its final decisions in the four lead cases by Order 91–9–20, September 11, 1991.

The Department is now resuming its processing of the docketed EPP cases by requesting interested persons to file comments on the procedures and substantive issues and initial positions in the remaining docketed cases. After considering any comments filed, the Department intends to issue an order establishing procedures and detailing information to be reviewed in the investigations.

DATES: Comments are due December 23, 1991, answers shall be due January 2, 1992.

ADDRESSES: Comments and answers should be filed in Docket 48318, 38570, 38720, 45234, 38883, 41072, 44397, 38184, 38571 and/or 41061, addressed to the Documentary Services Division, U.S. Department of Transportation, 400 Seventh Street, SW., room 4107, Washington, DC 20590. The particular docket to be addressed should be identified on the filing.

CONTACT: Betsy Wolf, Office of Aviation Enforcement and Proceedings, (Tele. 202–366–9356) or William Boyd, Special Programs, (Tele. 202–366–4870).

Dated: November 15, 1991.

Jeffrey N. Shane,

Assistant Secretary for Policy and International Affairs.

[FR Doc. 91–28109 Filed 11–21–91; 8:45 am]

BILLING CODE 4910–62–M

Federal Highway Administration

Environmental Impact Statement: New Castle County, DE

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an Environmental Impact Statement (EIS) will be prepared for a proposed highway project in New Castle County, Delaware.

FOR FURTHER INFORMATION CONTACT: Robert Kleinburd, Environmental Specialist, Federal Highway Administration, Delaware Division, 300 S. New Street, room 2101, Dover, Delaware 19901. Telephone: (301) 734–5323. Ms. Diane Bernardo, Project Manager, Delaware Department of Transportation, P.O. Box 778, Dover, DE 19903, Telephone (302) 739–4341.

SUPPLEMENTARY INFORMATION: The Federal Highway Administration (FHWA), in cooperation with the Delaware Department of Transportation (DelDOT) will prepare an Environmental Impact Statement (EIS) on a proposal to widen the Delaware Turnpike in New Castle County. The widening along the Turnpike will serve to improve traffic flow on I–95 from the Maryland/Delaware state line to the I–95/I–495/I–295 interchange. The study will include development and testing of highway improvement alternatives in conjunction with traffic demand management options. The alternatives to be considered will include (1) taking no action (no-build), (2) improvements along the existing roadway, and (3) any improvements on new alignments which develop as part of the study. The study will also include examination of the interchanges at Delaware Routes 896, 273, 7 and 141, as well as the intersection of Delaware Route 7 and Churchmans Road.

A program of public involvement and coordination with Federal, State and Local agencies will be initiated. It is envisioned that involvement with the public and other agencies will continue throughout the development of the project, with a series of Public Scoping Meetings.

To insure that the full range of issues related to this proposed action are addressed and that all significant issues are identified, comments or questions concerning this action and the EIS should be addressed to the FHWA or DelDOT at the addresses provided above.

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research Planning and Construction. The State intergovernmental review contacts established under executive order 12372 (former A–95 processes) regarding State and local clearinghouse review of Federal and Federally assisted programs and projects apply to this program.

Issued on: November 14, 1991.

John J. Gilbert,

Division Administrator, Dover, Delaware.

[FR Doc. 91–28108 Filed 11–21–91; 8:45 am]

BILLING CODE 4910–22–M

National Highway Traffic Safety Administration

Announcement of Eighth Meeting of the Heavy Truck Subcommittee of the Motor Vehicle Safety Research Advisory Committee

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Meeting announcement.

SUMMARY: This notice announces the eighth meeting of the Heavy Truck Subcommittee of the Motor Vehicle Safety Research Advisory Committee (MVSRAC). The MVSRAC established this subcommittee at the February 1988 meeting to examine research questions regarding crashworthiness and crash avoidance for vehicles over 10,000 pounds GVWR.

DATES AND TIMES: The meeting is scheduled for Thursday, December 12, 1991, from 1 p.m until 4 p.m.

ADDRESSES: The meeting will be held in room 4436 of the U.S. Department of Transportation Building, which is located at 400 Seventh Street, SW., Washington, DC.

SUPPLEMENTARY INFORMATION: In May 1987, the Motor Vehicle Safety Research Advisory Committee was established. The purpose of the Committee is to provide an independent source of ideas for safety research. The MVRSAC will provide information, advice, and recommendations to NHTSA on matters relating to motor vehicle safety research and provide a forum for the development, consideration, and communication of motor vehicle safety research, as set forth in the MVSRAC Charter.

At the fourth meeting of the subcommittee, an Antilock Test Procedures Task Force was established to assist the subcommittee in its discussion of alternative test procedures. Since that time, the Task Force has met five times and has carried out three round robin test programs involving ten different proving grounds. The Task Force has developed a test procedure for evaluating the braking, stability, and control performance of air braked truck tractors. The Task Force also developed a document explaining the use of the procedure. The Antilock Test Procedures Task Force will present their proposal to the subcommittee along with the supporting data.

The Tire Task Force, established at the third meeting of the subcommittee, held six meetings and developed a proposal for a cooperative government-industry research program. Phase I would focus on the development of a standardized test procedure for characterizing pertinent tire properties. Phase II would utilize the developed test procedure in a full-scale test program to establish a data base of pertinent tire characteristics that could serve as input to vehicle dynamics models and as benchmarks for vehicle component design. The Task Force presented its recommendations to the subcommittee at its September 12, 1990, meeting. After a series of clarification questions, the subcommittee voted to transmit the Task Force proposal for a cooperative

research program to the Motor Vehicle Safety Research Advisory Committee (MCRSAC) at their next meeting. The Chairman of the Heavy Truck Subcommittee presented the research proposal to the MVRSAC at their November 15, 1990, meeting. The proposal was approved by the MVSRAC. The Tire Task Force will provide the subcommittee a status report on their progress in implementing this cooperative government-industry research program.

The meeting is open to the public, and participation by the public will be determined by the Subcommittee Chairman.

A public reference file (Number 88–01—Heavy Truck Subcommittee) has been established to contain the products of the subcommittee and will be open to the public during the hours of 8 a.m. to 4 p.m. at the National Highway Traffic Safety Administration's Technical Reference Division in room 5108 at 400 Seventh Street, SW., Washington, DC 20590, telephone: (202) 366–2768.

FOR FURTHER INFORMATION CONTACT: William A. Leasure, Jr., Chairman, Heavy Truck Subcommittee, Office of Research and Development, 400 Seventh Street, SW., room 6220, Washington, DC 20590, telephone: (202) 366–5662.

Dated: November 15, 1991.

George L. Parker,

Chairman, Motor Vehicle Safety Research Advisory Committee.

[FR Doc. 91–28136 Filed 11–21–91; 8:45 am]

BILLING CODE 4910–59–M

Urban Mass Transportation Administration

Transit Technology Program; Intent To Establish an Advisory Committee; Meeting

AGENCY: Urban Mass Transportation Administration, Department of Transportation.

ACTION: Notice of intent to establish a Federal Advisory Committee; Notice of meeting.

SUMMARY: This notice announces the intent to establish a Transit Industry Technology Development Advisory Committee to aid the Urban Mass Transportation Administration (UMTA) in guiding the development of a transit technology program. The advisory committee will assist UMTA in establishing guidelines for and implementing a technology development program.

DATES: *Comment Due Date:* Any comments on this notice should be submitted by December 9, 1991.

Meeting Date: The first meeting of the Transit Industry Technology Development Advisory Committee Committee will take place on the 10th day of December, 1991.

ADDRESSES: Comments should be sent to the Office of Chief Counsel, Urban Mass Transportation Administration, room 9316, 400 Seventh Street, SW., Washington, DC 20590. The December 10 Federal Advisory Committee meeting will be held at the Sheraton Washington Hotel, 2660 Woodley Road, NW., Washington, DC 20008.

FOR FURTHER INFORMATION CONTACT: Jeffrey G. Mora, Urban Mass Transportation Administration, Office of Technical Assistance and Safety, 400 Seventh Street, SW., room 6423, Washington, DC 20590, (202) 366–0215; or Linda L. Watkins, Urban Mass Transportation Administration, Office of Chief Counsel, 400 Seventh Street, SW., Room 9316, Washington, DC 20590, (202) 366–1936.

SUPPLEMENTARY INFORMATION:

Background

Both the Senate and House highway and mass transit authorization bills now before the Senate Conference Committee contain a provision requiring the Secretary of Transportation to establish an Industry Technical Panel. Since the Senate and House provisions are substantially similar, it is likely that this requirement will be signed into law. An advisory committee for transit technology would fulfill the Senate and House requirement for an industry technical panel.

From the perspective of UMTA, which administers the Federal transit assistance program, there is a need to leverage the limited Federal capital and research and development (R&D) funds, and encourage cost effectiveness through technology innovation. From the perspective of transit operators, there is a need for system productivity and performance, and a need for more competition in the marketplace. From the viewpoint of the suppliers, there is a need to perform increased research and development R&D and product improvement, and expand export opportunities. An UMTA/industry cooperative technology development program facilitates the development of products that are competitive in the national and international marketplace. Thus, the U.S. balance of trade and balance of payments will benefit from increased exports. Finally, the transit riding public is the ultimate beneficiary of more efficient and reliable service.

For these reasons, UMTA finds that it is in the public interest to establish a Federal Advisory Committee. Consequently, UMTA intends to establish an Industry Technology Advisory Committee, consistent with the Federal Advisory Committee Act (FACA), 5 U.S.C. app. I, Public Law 100–641, to assist in identifying priority technology development areas and developing guidelines for project development, cost sharing, and project execution. The charter, which explains the scope and objectives of the Committee, is appended to this Preamble.

Members of the Advisory Committee

The Senate and House bills require that a majority of the Committee be transit industry "suppliers." In addition to suppliers, the Committee membership will include transit operators, consultants, academic institutions, and others who have transit expertise and will provide a balance of interests. A list of these members is set forth below:

Suppliers

1. AEG Westinghouse Transportation Systems, Inc., Pittsburgh, PA
2. American Telephone & Telegraph Co., Bell Laboratories, Homedale, N.J.
3. The Boeing Company, Seattle, WA
4. Brooklyn Union Gas, New York, N.Y.
5. Chance Coach, Inc., Wichita, KS
6. Detroit Diesel Corporation, Detroit, MI
7. Ebonex, Inc., Binghamton, NY
8. The Flxible Corporation, Delaware, OH
9. General Electric Company, Fairfield, CT
10. GFI—General Farebox, Elk Grove Village, IL
11. Luminator, Plano, TX
12. Morrison-Knudsen Corporation, Rail Systems Group, Boise, ID
13. Motorola Communications and Electronics, Inc., Semiconductor Products Sector, Phoenix, AR
14. Railway Progress Institute, Alexandria, VA
15. The Transportation Group, Inc., Orlando, FL
16. Transportation Manufacturing Corporation, Roswell, NM
17. Union Switch & Signal Inc., Pittsburgh, PA
18. Westinghouse Electric Corporation, Electronic Systems Group, Baltimore, MD

Mass Transit Authorities

19. Birmingham-Jefferson County Transit Authority, Birmingham, AL
20. Burlington Northern Railroad Co. (provides service) Aurora, IL
21. Metro-Dade Transit Agency, Miami, FL
22. New Jersey Transit Corporation, Newark, NJ
23. Port Authority of Allegheny County, Pittsburgh, PA
24. San Francisco Bay Area Rapid Transit District, Oakland, CA
25. Southern California Rapid Transit District, Los Angeles, CA

Consultants

26. Argonne National Laboratory, Center for Transportation Research, (Government Owned Contractor Operated Laboratory), Argonne, IL
27. De Leuw, Cather & Company, Washington, DC
28. Delon Hampton & Associates, Washington, DC

Academic Institutions

29. Carnegie-Mellon University, High Speed Ground Transportation Center, Pittsburgh, PA
30. University of Nevada, Transportation Research Center, Reno, NV

Environmental Organization

31. South Coast Air Quality Management District, El Monte, CA

Trade Associations

32. American Association of State Highway and Transportation Officials, Washington, DC
33. American Public Transit Association (APTA)—Associate Members/Suppliers, Washington, DC
34. Electric Power Research Institute, Palo Alto, CA

Consumer Group

35. National Association of Counties, Mass Transportation Committee, Los Angeles, CA

Major Issues

The committee will consider the priorities of the selected technology development areas; provide advice on establishing guidelines for project development, project cost sharing, and project execution; and serve as a forum for discussing key issues relating to new technology deployment and overcoming traditional barriers to innovation. As time permits, UMTA may bring additional issues before the committee.

Procedures

Under the FACA, a designated federal official must call the meetings, review the agendas, and terminate the meetings of the advisory committee, and this will be an UMTA employee appointed by the Administrator of UMTA. The meetings will be chaired by a person also appointed by the UMTA Administrator. UMTA will ensure that interpreters and assertive listening devices are available for the hearing impaired, and that written materials and meeting transcripts are available in accessible formats.

All meetings of the Transit Industry Technology Development Advisory Committee will be open to the public.

Schedule

As noted earlier in this document, the first meeting of the Transit Industry Technology Development Advisory Committee will be December 10, 1991. We anticipate that two meetings will be held annually. A separate notice announcing these meetings will be published in the **Federal Register.**

Request for Comments

UMTA requests comments on the proposed members of the Federal Advisory Committee, the Committee's proposed missions, as well as the likely issues and mission identified in this document.

Appendix—Transit Industry Technology Development Federal Advisory Committee Charter

I. Purpose

This character establishes a Federal Advisory Committee for the Secretary of the Department of Transportation (DOT) and the Administrator of the Urban Mass Transportation Administration (UMTA) to seek advice on the development of transit technology. The guidelines for the Committee's operations are set in accordance with the Federal Advisory Committee Act, 5 U.S.C. app. I, and DOT regulations on Federal Advisory Committees, 49 CFR part 95.

II. Sponsor and Office Providing Support Services

UMTA will be the sponsor. Support services will be provided by the UMTA Office of Technical Assistance and Safety and Office of the Chief Counsel.

III. Scope and Objectives

(a) The primary goal of the UMTA Technology Development Program will be to introduce new technology into the transit industry, and thereby assist in making the transit industry more cost effective.

(b) The secondary goal is to increase the competitiveness of the domestic manufacturing industry in the U.S. and abroad.

(c) The Committee will advise the Secretary of DOT and the Administrator of UMTA on appropriate areas for technology development, including the testing and demonstration of such innovations. This advise will be developed in cooperation with transit suppliers, manufacturers, and operators, as well as academic and consumer representatives with an interest in transit.

(d) In addition, the Committee will recommend guidelines for selecting technologies and for developing cost sharing strategies with the private sector consistent with available or projected UMTA program funding levels for transit research, development, and demonstration projects.

(e) This advice will be used by UMTA and DOT in formulating their overall technical assistance and technology program plans and strategies for advancing technology, and reducing or stabilizing the costs of initiating, modernizing or operating transit service.

(f) The Committee shall act solely in an advisory capacity to UMTA and DOT, and shall neither exercise any program management responsibility nor make decisions directly affecting the matters on which it provides advice.

IV. Duties

Consistent with the scope and objectives described in Section III of this Charter, the Committee is authorized to:

(a) Assist UMTA and DOT in identifying priority technology development areas;

(b) Assist UMTA and DOT in establishing guidelines for project development, project cost sharing, and project execution;

(c) Review relevant legislation for potential applicability in assisting UMTA in determining future technology activities; and

(d) Provide a forum for discussion of key issues relating to new technology deployment and overcoming traditional barriers to innovation.

V. Membership

(a) The Committee will consist of thirty to thirty-five organizations designated by the Administrator of UMTA after consultation with the Secretary, including bus and rail system suppliers and manufacturers, bus and rail operators, academic institutions, trade associations, and a consumer representative.

(b) The prospective legislation requires that a majority of the Committee be suppliers. However, other major segments of the transit industry will be represented, i.e., transit operators, academic institutions, etc.

VI. Chairperson

The Chairperson will be appointed by the UMTA Administrator.

VII. Meetings

(a) The Committee, and any subcommittee(s), will meet and terminate at the call of the UMTA Administrator. UMTA will prepare the meeting agenda.

(b) Each committee and subcommittee meeting will be open to the public. A notice of each meeting will be published in the **Federal Register** at least fifteen days in advance of the meeting. Shorter notice is permissible in cases of emergency, but the reason for the emergency must be reported in the notice.

(c) Detailed minutes of each meeting will be kept and their accuracy certified to by the Committee Chairperson. The minutes will include the time and place of the meeting, a record of the persons

present, a complete summary of matters discussed and conclusions reached, if any, by the Committee or any subcommittee.

VIII. Compensation for Non-Government Members

Non-Federal government members serve without compensation, but may be reimbursed for expenses.

IX. Estimated Annual Cost to the Government

Some cost to the government is anticipated. However, should costs be incurred, in no event will those costs exceed $50,000 and one quarter person years of government staff time, which is the ceiling for this Committee. No Federal staff positions are being allocated to the Committee on a full-time basis.

X. Public Interest

The formation and use of the Committee is determined to be in the public interest in connection with the performance of duties imposed on DOT by law.

XI. Effective Date

This charter is effective fifteen days after publication in the **Federal Register**, and terminates two years after this date, unless, before such time, it is either terminated or extended in accordance with the FACA and other applicable regulations.

Issued on: November 18, 1991.

Brian W. Clymer,

Administrator.

[FR Doc. 91-28143 Filed 11-21-91; 8:45 am]

BILLING CODE 4910-57-M

UNITED STATES INFORMATION AGENCY

Culturally Significant Objects Imported for Exhibition; Determination

Notice is hereby given of the following determination: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978 (43 FR 13359, March 29, 1978), and Delegation Order No. 85-5 of June 27, 1985 (50 FR 27393, July 2, 1985), I hereby determine that the objects to be included in the exhibit, "Gerard David's Saint Anne Altarpiece" (see list [1]), imported from abroad for the temporary exhibition without profit within the United States, are of cultural significance. These objects are imported pursuant to a loan agreement with the foreign lenders. I also determine that the temporary exhibition or display of the listed exhibit objects at the National Gallery of Art, Washington, DC, from January 26, 1992, to on or about May 10, 1992, is in the national interest.

Public notice of this determination is ordered to be published in the **Federal Register**.

Dated: November 19, 1991.

Alberto J. Mora,

General Counsel.

[FR Doc. 91-28159 Filed 11-21-91; 8:45 am]

BILLING CODE 8230-01-M

[1] A copy of this list may be obtained by contacting Mr. R. Wallace Stuart of the Office of the General Counsel of USIA. The telephone number is 202/619-5078, and the address is room 700, U.S. Information Agency, 301 Fourth Street, SW., Washington, DC 20547.

United States-German Secondary School Linkages; Request for Proposals

AGENCY: United States Information Agency.

ACTION: Notice—Request for Proposals.

SUMMARY: USIA plans to award one grant of up to $100,000 to a single organization or consortium to support the exchange of groups of students and teachers between partnered secondary schools in the U.S. and Germany. Grant funds are exclusively designated to subsidize the travel of Germans to the U.S. Support for the travel of Americans to Germany is a matter for discussion between the grantee organization and the Government of Germany.

DATES: Deadline for proposals: All copies must be received at the U.S. Information Agency by 5 p.m. e.s.t. on December 23. Faxed documents will not be accepted, nor will documents postmarked on December 23 but received at a later date. It is the responsibility of each grant applicant to ensure that proposals are received by the above deadline. Grant activities should begin no earlier than April 15, 1992.

ADDRESSES: The original and 12 copies of the completed application, including required forms, should be submitted by the deadline to: U.S. Information Agency, Ref.: US-German Secondary School Linkages, Office of the Executive Director, E/X, Room 336, 301 4th St., SW., Washington, DC 20547.

FOR FURTHER INFORMATION CONTACT: Interested organizations/institutions should contact Bettye Stennis at the U.S. Information Agency, 301 4th St. SW., Youth Programs Division (E/VY), room 357, (202) 619-6299, to request detailed application packets, which include award criteria additional to this announcement, all necessary forms, and guidelines for preparing proposals, including specific budget preparation information.

SUPPLEMENTARY INFORMATION: Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social and cultural life.

Overview—The purpose of the grant is to promote linkages between American secondary schools that teach German and schools in the Federal Republic of Germany. The objective is to facilitate exchanges of persons between these partnered schools to promote mutual understanding of American and German societies, educational systems, values, language and culture. The applicant should describe its goals and objectives and how these relate to the USIA objectives. The travel subsidies are intended to enable as many students as possible, despite, what may be limited financial circumstances, to participate in the program of exchanges.

Eligibility—Non-profit private or public educational or exchange organizations with no less than four years experience in the field of secondary school exchanges with Germany are eligible for this competition.

Guidelines—The grant is designed to support through subsidies the travel of German students and teachers to the U.S. as part of a regular program of exchanges between partnered schools. The grantee organization must be one that already has an established US-German school linkage program. This grant is not designed to assist organizations in starting up a linkage or partnership program. The exchanges may be of up to one academic year and no less than three weeks duration and are intended to enable the participants attend school and to experience life in the host school and community and to learn about the history, culture and the political, economic and social life of the country.

Other than the requirement for minimum duration of stay, USIA does not dictate specifics on how the exchanges are to be conducted, their frequency, timing, overall financing, etc. These are the purview of the grantee organization, its German counterpart, and the participating schools. Nevertheless, the proposal should describe the organization or the linkage program, including how schools are recruited and selected, how matches are made, and what the linkage is designed

to accomplish in addition to the exchange of persons. Also provide details on the model or models for exchanges, guidelines and rules incumbent on participating schools and individuals, orientation programming, monitoring arrangements, statistics collection and reporting, and evaluation mechanisms. Applicants should provide detailed information on their counterpart organizations in Germany and statistics on the last three years of exchanges, with special attention to the number and types of schools involved, their location in the U.S. and Germany, and annual exchange numbers. Include short profiles on sample exchanges that exemplify typical programs and standard variations.

The proposal should discuss current linkages and/or future plans for expanding exchanges with the five new eastern states of Germany, including any statistics on schools currently in those states involved in the program.

The proposal should specify the process for disbursing grant funds, including guidelines that are provided to participating schools in applying for grant funds. If your organization applies a needs standard to the selection of participants for financial assistance, please describe this standard.

Proposed budget—Grant funding is limited to international and domestic travel expenses.

Applicants should submit budgets detailing overall program finances, including the sources of all revenue and anticipated expenses, so that USIA can see clearly how its contribution relates to the total program budget. If fees are charged to individuals or schools, the organization should submit a detailed break down of how these fees are used by the organization.

Review Process

USIA will acknowledge receipt of all proposals and will review them for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines established herein and in the application packet. Eligible proposals will be forwarded to panels of USIA officers for advisory review. All eligible proposals will also be reviewed by the Agency's Office of General Counsel, the European Area Office, and the budget and contracts offices. Funding decisions are at the discretion of the Associate Director for Educational and Cultural Affairs. Final technical authority for grant awards resides with USIA's contracting officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the following criteria:

1. Quality of program plan and adherence of the proposed activity to the criteria and conditions described above.

2. Reasonable, feasible and flexible objectives. Proposals should clearly demonstrate how the institution will meet the program's objectives and plan.

3. Multiplier effect/impact. Proposed programs should strengthen long-term mutual understanding, to include maximum sharing of information and establishment of long-term institutional and individual linkages.

4. Value to U.S.-German relations. Assessments by USIA's Office of European Affairs and USIS Bonn of the potential impact and significance on Germany.

5. Adherence to the budget restrictions and guidelines.

6. Institutional capacity. Proposed personnel and institutional resources should be adequate and appropriate to achieve the program's goals.

7. Proposals should demonstrate potential for program excellence and/or the track record of the applicant institution. The Agency will consider past performance of prior grantees and the demonstrated potential of new applicants.

8. Evaluation plan. Proposals should provide a plan for evaluation by the grantee institution.

Notice

The terms and conditions published in this RFP are binding and may not be modified by any USIA representative. Explanatory information provided by the Agency that contradicts published language will not be binding. Issuance of the RFP does not constitute an award commitment on the part of the Government. Final award cannot be made until the funds have been fully appropriated by Congress, allocated and committed through internal USIA procedures.

Notification

All applicants will be notified of the results of the review process on or about March 1, 1992. Awarded grants will be subject to periodic reporting and evaluation requirements.

Dated: November 18, 1991.

William P. Glade,

Associate Director, Bureau of Education and Cultural Affairs.

[FR Doc. 91-28158 Filed 11-21-91; 8:45 am]

BILLING CODE 8230-01-M

Sunshine Act Meetings

Federal Register
Vol. 56, No. 226
Friday, November 22, 1991

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DATE AND TIME: 2:00 p.m. (Eastern Time) Tuesday, December 3, 1991.

PLACE: Conference Room on the Ninth Floor of the EEOC Office Building, 1801 "L" Street, NW., Washington, DC 20507.

STATUS: Part of the Meeting will be Open to the Public and Part will be Closed to the Public.

MATTERS TO BE CONSIDERED:

Open Session

1. Announcement of Notation Vote(s).

Closed Session

1. Litigation Authorization: General Counsel Recommendations.

Note: Any matter not discussed or concluded may be carried over to a later meeting. (In addition to publishing notices on EEOC Commission meetings in the **Federal Register**, the Commission also provides a recorded announcement a full week in advance on future Commission sessions. Please telephone (202) 663-7100 (voice) and (202) 663-4494 (TTD) at any time for information on these meetings.) **"CONTACT PERSON FOR MORE INFORMATION:"** Frances M. Hart, Executive Officer on (202) 663-7100.

Dated: November 19, 1991.

Frances M. Hart,

Executive Officer, Executive Secretariat.

[FR Doc. 91-28196 Filed 11-19-91; 4:36 pm]

BILLING CODE 6750-06-M

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 10:33 a.m. on Tuesday, November 19, 1991, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider the following:

Matters relating to the probable failure of a certain insured bank.

Recommendations concerning administrative enforcement proceedings.

Recommendation regarding the liquidation of depository institutions' assets acquired by the Corporation in its capacity as receiver, liquidator, or liquidating agency of those assets:

Case No. 47,765—Various Banks, O'Hare Consolidated Office

Applications of Lake Community Bank, Lakeport, California, for consent to acquire certain assets and assume the liability to pay deposits of the Lakeport Branch of Citizens Federal Bank, A Federal Savings Bank, Miami, Florida; and for consent to convert deposits from the Savings Association Insurance Fund to the Bank Insurance Fund as contemplated by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

Application for brokered deposit waiver.

Matters relating to a certain financial institution.

Matters relating to the Corporation's liquidation activities.

Personnel Matters.

In calling the meeting, the Board determined, on motion of Director C.C. Hope, Jr. (Appointive), seconded by Vice Chairman Andrew C. Hove, Jr., concurred in by Chairman William Taylor, Director T. Timothy Ryan, Jr. (Office of Thrift Supervision), and Steven Steinbrink, acting in the place and stead of Director Robert L. Clarke (Comptroller of the Currency), that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B) and (c)(10)).

The meeting was held in the Board Room of the FDIC Building located at 550—17th Street, NW., Washington, DC.

Dated: November 20, 1991.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Deputy Executive Secretary.

[FR Doc. 91-28235 Filed 11-20-91; 2:06 pm]

BILLING CODE 6714-01-M

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS

Notice of a Meeting

The Board of Governors of the United States Postal Service, pursuant to its Bylaws (39 C.F.R. Section 7.5) and the Government in the Sunshine Act (5 U.S.C. Section 552b), hereby gives notice that it intends to hold a meeting at 2 p.m. on Monday, December 2, 1991, and at 9:30 a.m. on Tuesday, December 3, 1991, in San Diego, California. By telephone vote, November 18-20, 1991, a majority of the members contacted and voting, the Board of Governors voted to close to public observation its meeting schedule for December 2, which will involve consideration of funding for delivery bar code sorters. The Board determined that pursuant to section 552b(c)(9)(B) of title 5, United States Code, and section 7.3(i) of the Code of Federal Regulations, discussion of this matter is exempt from the open meeting requirement of the Government in the Sunshine Act (5 U.S.C. 552b(b)) because it is likely to disclose information, the premature disclosure of which would significantly frustrate implementation of the proposed procurement action.

The December 3 meeting is open to the public and will be held at the San Diego Division Main Post Office, 2535 Midway Drive, San Diego, in Conference Room 306. The Board expects to discuss the matters stated in the agenda which is set forth below. Requests for information about the meeting should be addressed to the Secretary of the Board, David F. Harris, at (202) 268-4800.

Agenda

Monday Session

December 2—2 p.m. (Closed)

1. Delivery Bar Code Sorters. (William J. Dowling, Assistant Postmaster General, Engineering and Technical Support Department).

Tuesday Session

December 3—8:30 a.m. (Open)—Room 306, San Diego Division

1. Minutes of Previous Meeting, November 4-5, 1991.
2. Remarks of the Postmaster General. (Anthony M. Frank).
3. Officers' Compensation. (Vice Chairman Griesemer).
4. Capital Investments. (Stanley W. Smith, Assistant Postmaster General, Facilities Department).
   a. Santa Ana, California, North County Annex, Advance Site Acquisition.
   b. St. Louis, Missouri, Postal Data Center Relocation.
   c. Westchester, New York, GMF and VMF, Advance Site Acquisition.
   d. Chicago, Illinois, Main Post Office, Additional Funding.
5. Consumer Protection Amendments Report. (Charles R. Clauson, Chief Postal Inspector).

6. FY 1993 Customer Reimbursement Subsidy (Revenue Forgone). (Comer S. Coppie, Senior Assistant Postmaster General, Finance Group).

7. FY 1991 Financial Results. (Mr. Coppie).

8. Comprehensive Statement to Congress. (Edward E. Horgan, Jr., Associate Postmaster General).

9. Report on the Western Region. (Joseph R. Caraveo, Regional Postmaster General).

10. Report on the San Diego Division. (Margaret L. Sellers, Field Division General Manager/Postmaster).

11. Briefing on Environmental Programs. (Mitchell H. Gordon, Senior Assistant Postmaster General, Administrative Services Group).

12. Los Angeles Basin Environmental Management. (Scott Ross, Regional Environmental Unit Manager).

13. Tentative Agenda for the January 6–7, 1992, meeting in Washington, D.C.

David F. Harris,

Secretary.

[FR Doc. 91–28299 Filed 11–20–91; 3:03 pm]

BILLING CODE 7710–12–M

RESOLUTION TRUST CORPORATION

Notice of Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 2:27 p.m. on Tuesday, November 19, 1991, the Board of Directors of the Resolution Trust Corporation met in closed session to consider: (1) Sale of assets; (2) Quarterly Report of Actions Taken Under Delegated Authority by the Committee on Management and Disposition of Assets, April 1, 1991–June 30, 1991; and 93) a proposed settlement of litigation. In addition, the Board was briefed on proposed delegations of authority to the Inspector General to disclose information in accordance with the Privacy Act of 1974, to promulgate policies, procedures and regulations, and to redelegate authority within the OIG related to requests for such information in OIG files.

In calling the meeting, the Board determined, on motion of Director C.C. Hope, Jr. (Appointive), and seconded by Vice Chairman Andrew C. Hove, Jr., and concurred in by Chairman William Taylor, and Director T. Timothy Ryan, Jr., (Director of the Office of Thrift Supervision), that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(4), (c)(9)(B), and (c)(10) of the "Government in the Sunshine Act" (5 U.S.C. 552b).

The meeting was held in the Board Room of the Federal Deposit Insurance Corporation Building located at 550—17th Street, NW., Washington, DC.

Dated: November 20, 1991.

Resolution Trust Corporation.

John M. Buckley, Jr.,

Executive Secretary.

[FR Doc. 91–28233 Filed 11–20–91; 2:05 pm]

BILLING CODE 6714–01–M

RESOLUTION TRUST CORPORATION

Notice of Change in Subject Matter of Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 2:09 p.m. on Tuesday, November 19, 1991, the Board of Directors of the Resolution Trust Corporation met in open session.

In calling the meeting, the Board determined, on motion of Chairman William Taylor, and seconded by Director T. Timothy Ryan, Jr. (Director of the Office of Thrift Supervision), concurred in by Vice Chairman Andrew C. Hove, Jr., and Director C.C. Hope, Jr. (Appointive), that Corporation business required the withdrawal from the agenda for consideration at the meeting, on less than seven days' notice to the public, the following matter:

Memorandum re: Proposed delegations of authority to the Inspector General to disclose information in accordance with the Privacy Act of 1974, to promulgate policies, procedures and regulations, and to redelegate authority within the OIG related to requests for such information in OIG files.

By the same majority vote, the Board further determined that no earlier notice of this change in the subject matter of the meeting was practicable.

The meeting was held in the Board Room of the FDIC Building located at 550–17th Street, NW., Washington, DC

Dated: November 20, 1991.

Resolution Trust Corporation.

John M. Buckley, Jr.,

Executive Secretary.

[FR Doc. 91–28316 Filed 11–20–91; 3:54 pm]

BILLING CODE 6714–01–M

SECURITIES AND EXCHANGE COMMISSION

Agency 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 November 25, 1991.

A closed meeting will be held on Tuesday, November 26, 1991, at 3:30 p.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 designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(4), (8), (9)(A) and (10) and 17 CFR 200.402(a)(4), (8), (9)(i) and (10), permit consideration of the scheduled matters at a closed meeting.

Commissioner Roberts, 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, November 26, 1991, at 3:30 p.m., will be:

Institution of injunctive actions.

Institution of administrative proceedings of an enforcement nature.

Settlement of injunctive actions.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Jonathan Gottlieb at (202) 272–2200.

Dated: November 20, 1991.

Jonathan G. Katz,

Secretary.

[FR Doc. 91–28257 Filed 11–20–91; 2:07 pm]

BILLING CODE 8010–01–M

Corrections

Federal Register
Vol. 56, No. 226
Friday, November 22, 1991

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF COMMERCE

Agency Information Collection Under Review by the Office of Management and Budget (OMB)

Correction

In notice document 91-22361 appearing on page 47064, in the issue of Tuesday, September 17, 1991, in the second column, the file line was omitted and should read as follows "[FR Doc. 91-22361, Filed 9-16-91; 8:45 am]".

BILLING CODE 1505-01-D

COMMODITY FUTURES TRADING COMMISSION

New York Mercantile Exchange Proposed Contracts

Correction

In notice document 91-26520 beginning on page 56410 in the issue of Monday, November 4, 1991, make the following correction:

On page 56410, in the third column, under **DATES**, in the second line "January 3, 1992" should read "December 4, 1991".

BILLING CODE 1505-01-D

FEDERAL HOUSING FINANCE BOARD

12 CFR Part 932

[No. 91-559]

Eligibility and Financial Disclosure Requirements for Directors of the Fedral Home Loan Banks

Correction

In rule document 91-26825 appearing on page 56929 in the issue of Thursday, November 7, 1991, make the following correction:

§§ 932.18, 932.21, 932.23 [Corrected]

On page 56920, in the second column, in the next to the last line, "3068" should read "3069".

BILLING CODE 1505-01-D

FEDERAL HOUSING FINANCE BOARD

12 CFR Parts 922, 931, and 932

[No. 91-509]

Eligibility and Financial Disclosure Requirements for Directors of the Federal Home Loan Banks; and Responsibilities and Conduct for the Board of Directors of the Federal Housing Finance Board

Correction

In rule document 91-25688 beginning on page 55205 in the issue of Friday, October 25, 1991, and corrected on page 56691 in the issue of Thursday, November 6, 1991, make the following correction:

On page 55210, in the 1st column, in the first full paragraph, in the 19th line, "represent" should read "represents".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR-943-01-4214-10; GP1-367, OR-47552]

Proposed Withdrawal and Opportunity for Public Meeting; Oregon

Correction

In notice document 91-22664 beginning on page 47804 in the issue of Friday, September 20, 1991, make the following corrections:

1. In the second column, in the land description, in the first line, after "Sec. 34" insert a comma.

2. In the same column, in the land description, in the third line, remove the coma appearing after the 3rd " E½".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

National Park Service

Shenandoah National Park; Draft Environmental Impact Statement for U.S. Route 340

Correction

In notice document 91-6861 appearing on page 12258 in the issue of Friday, March 22, 1991, in the first column, in the file line at the end of the document, "FR Doc. 91-6361" should read "FR Doc. 91-6861".

BILLING CODE 1505-01-D

INTERSTATE COMMERCE COMMISSION

[Docket No. AB-52; Sub-No. 73X]

The Atchison, Topeka and Santa Fe Railway Company-Abandonment Exemption-in Buchanan County, MO

Correction

In notice document 91-22269 appearing on page 46804 in the issue of Monday, September 16, 1991, in the second column, in the file line at the end of the document, "FR Doc. 91–22264" should read "FR Doc. 91–22269".

BILLING CODE 1505-01-D

DEPARTMENT OF JUSTICE

Antitrust Division

National Cooperative Research Notification; Center for Emissions Control, Inc.

Correction

In notice document 91-26623 appearing on page 56528 in the issue of Tuesday, November 5, 1991, make the following correction:

In the second column, in the second full paragraph, in the last line "May 13" should read "May 31".

BILLING CODE 1505-01-D

federal register

Friday
November 22, 1991

Part II

Department of Agriculture

Agricultural Marketing Service

7 CFR Part 1001, et al.

Milk in the New England and Other Marketing Areas; Recommended Decision and Opportunity to File Written Exceptions on Proposed Amendments to Tentative Marketing Agreements and to Orders; Proposed Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1001, 1002, 1004, 1005, 1006, 1007, 1011, 1012, 1013, 1030, 1032, 1033, 1036, 1040, 1044, 1046, 1049, 1050, 1064, 1065, 1068, 1075, 1076, 1079, 1093, 1094, 1096, 1097, 1098, 1099, 1106, 1108, 1124, 1126, 1131, 1134, 1135, 1137, 1138, 1139

[Docket No. AO–14–A64, etc; DA–90–017; RIN: 0581–AA37]

Milk in the New England and Other Marketing Areas; Recommended Decision and Opportunity to File Written Exceptions on Proposed Amendments to Tentative Marketing Agreements and to Orders

7 CFR part	Marketing area	AO Nos.
1001	New England	AO–14–A64
1002	New York-New Jersey	AO–71–A79
1004	Middle Atlantic	AO–160–A67
1005	Carolina	AO–388–A3
1006	Upper Florida	AO–356–A29
1007	Georgia	AO–366–A33
1011	Tennessee Valley	AO–251–A35
1012	Tampa Bay	AO–347–A32
1013	Southeastern Florida	AO–286–A39
1030	Chicago Regional	AO–361–A28
1032	Southern Illinois-Eastern Missouri.	AO–313–A39
1033	Ohio Valley	AO–166–A60
1036	Eastern Ohio-Western Pennsylvania.	AO–179–A55
1040	Southern Michigan	AO–225–A42
1044	Michigan Upper Peninsula.	AO–299–A26
1046	Louisville-Lexington-Evansville.	AO–123–A62
1049	Indiana	AO–319–A38
1050	Central Illinois	AO–355–A27
1064	Greater Kansas City	AO–23–A60
1065	Nebraska-Western Iowa	AO–86–A47
1068	Upper Midwest	AO–178–A45
1075	Black Hills, South Dakota.	AO–248–A21
1076	Eastern South Dakota	AO–260–A30
1079	Iowa	AO–295–A41
1093	Alabama-West Florida	AO–386–A11
1094	New Orleans-Mississippi	AO–103–A53
1096	Greater Louisiana	AO–257–A40
1097	Memphis, Tennessee	AO–219–A46
1098	Nashville, Tennessee	AO–184–A55
1099	Paducah, Kentucky	AO–183–A45
1106	Southwest Plains	AO–210–A52
1108	Central Arkansas	AO–243–A43
1124	Pacific Northwest	AO–368–A19
1126	Texas	AO–231–A60
1131	Central Arizona	AO–271–A29
1134	Western Colorado	AO–301–A22
1135	Southwestern Idaho-Eastern Oregon.	AO–380–A9
1137	Eastern Colorado	AO–326–A26
1138	Rio Grande Valley	AO–335–A36
1139	Great Basin	AO–309–A30

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This recommended decision deals with a wide variety of industry proposals to amend all Federal milk marketing orders. The issues addressed in this decision include: Class I (bottling) milk prices; Class II (soft products) milk prices; classification of milk used in the various products; and the treatment of reconstituted milk under the orders. The recommendations in this decision are based on evidence received at a 43-day hearing held in September, October and November 1990. Very briefly stated, the actions recommended include: (1) Providing three uniform classes of milk use in all the orders; and (2) changing the pricing of reconstituted fluid milk products made from concentrated milk or nonfat dry milk.

DATES: Comments are due on or before December 31, 1991.

ADDRESSES: Comments (four copies) should be filed with the Hearing Clerk, room 1083, South Building, United States Department of Agriculture, Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Richard A. Glandt, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090–6456, (202) 720–4829.

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

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this action will not have a significant economic impact on a substantial number of small entities. The amendments would promote orderly marketing of milk by producers and regulated handlers.

When this proceeding was initiated, the Notice of Hearing listed separately the Lubbock-Plainview, Texas (part 1120); the Texas Panhandle (part 1132); and Rio Grande Valley (part 1138) orders. A hearing on a merger of these three orders was held in December 1989. As a result of that hearing, the three orders will be merged effective December 1, 1991, under the name of the New Mexico-West Texas order, which will be 7 CFR part Number 1138. Therefore, all proposed order language in connection with this proceeding is in terms of the merged order. In future documents in this proceeding, the New Mexico-West Texas order will replace the three orders named above. Prior documents in this proceeding:

Advance Notice of Proposed Rulemaking: Issued March 29, 1990; published April 3, 1990 (55 FR 12369).

Notice of Hearing: Issued July 11, 1990; published July 17, 1990 (55 FR 29034).

Extension of Time for Filing Briefs and Reply Briefs: Issued March 28, 1991; published April 3, 1991 (56 FR 13603).

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to proposed amendments to the tentative marketing agreements and the orders regulating the handling of milk in the New England and other marketing areas. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

Interested parties may file written exceptions to this decision with the Hearing Clerk, U.S. Department of Agriculture, Washington, DC 20250, by December 31, 1991. Four copies of the exceptions should be filed. All written submissions made pursuant to this notice will be made available for public inspection at the office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)).

The proposed amendments set forth below are based on the record of a public hearing held from September 5, 1990, through November 20, 1990, at Eau Claire, Wisconsin; Minneapolis, Minnesota; St. Cloud, Minnesota; Syracuse, New York; Tallahassee, Florida; and Irving, Texas, with respect to tentative marketing agreements and to the orders regulating the handling of milk in all Federal milk marketing areas pursuant to the notice of hearing issued July 11, 1990, and published July 17, 1990 (55 FR 29034). The material issues on the record of the hearing relate to:

1. Class I milk pricing and related issues;

2. Class II milk pricing and related issues;

3. Product classification; and

4. Pricing of concentrated and reconstituted milk.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

Background

This proceeding was initiated in response to concerns voiced by midwestern dairy farm groups about the Federal milk marketing order program, and particularly about those provisions relating to Class I prices.

Federal milk marketing orders classify milk according to its use. Most orders have three classes: Class I includes primarily beverage milk; Class II consists primarily of fluid cream items plus "soft" products, such as cottage cheese, ice cream and yogurt. Class III consists primarily of "hard" manufactured products, including butter, nonfat dry milk and hard cheeses. Each class has a specific price, with Class I being the highest, Class II being an intermediate price and Class III being the lowest price.

Class I milk prices since the mid–1960's and early 70's have been determined by adding a market-specific Class I differential to the Minnesota-Wisconsin (M-W) price, which more recently has been for the second preceding month. The differentials currently vary from $1.20 per hundredweight at Minneapolis, Minnesota, to $4.18 per hundredweight at Miami, Florida.

This basic system of pricing was developed over a long period of time. Prior to Congress' passage of the Food Security Act of 1985, the Class I differentials had not been significantly changed in nearly 20 years. However, on May 1, 1986, Class I differential increases mandated by Congress in the Food Security Act of 1985 were implemented in 35 of the orders. Congress also specified that none of the differentials could be reduced for a two-year period beginning May 1, 1986. Congress took this action because the then-current differentials, which reflected a hauling cost of 1.5 cents per hundredweight per 10 miles, no longer covered the costs of hauling milk.

The Class I differential increases implemented on May 1, 1986, varied from $.08 per hundredweight for the Upper Midwest order to $1.03 per hundredweight for the Southeastern Florida order. Since then, increasing dissatisfaction with the resulting Class I pricing structure of Federal milk orders has been voiced by various Upper Midwest parties. Others across the country also expressed various criticisms about the program.

On March 29, 1990, the Secretary announced that USDA would hold a national hearing on milk marketing orders to "* * * determine whether reasons exist to change current Federal milk orders." The main issues at the hearing would be: (1) Class I pricing differentials, (2) multiple base points for pricing, (3) pricing of reconstituted milk, and (4) pricing of Class II milk. Concurrently, the Administrator of the Agricultural Marketing Service issued an Advance Notice of Proposed Rulemaking inviting any interested person to submit proposals on the main issues. Proposals were to be mailed by May 31, 1990.

A Notice of Hearing was issued on July 11, 1990, setting forth 70 proposals that would be considered and announcing the dates and locations of the hearing. The hearing began September 5, 1990, in Eau Claire, Wisconsin, and concluded on November 20, 1990, in Irving, Texas. Other sessions were held in Minneapolis and St. Cloud, Minnesota, Syracuse, New York, and Tallahassee, Florida. In all, the hearing lasted 43 days and produced about 10,000 pages of transcript, 237 exhibits, and an estimated 3,000 pages of Officially Noticed documents.

About 200 witnesses participated in the hearing. Rather than attempting to detail or summarize the testimony of each person or organization we are providing a detailed list of hearing participants, except that we have not identified by name some 25 dairy farmers who testified. Thus, recognition of the hearing participants is provided without reiterating who said what in regard to the Class I and Class II price issues. This will aid in keeping this document a reasonable length.

The following list of hearing participants is grouped according to affiliation:

Dairy Farmer Cooperatives & Other Farmer Organizations

Agri-Mark, Inc.
Alabama Farmers Federation
American Farm Bureau Federation
Bear Lake Milk Cooperative
Central Milk Producers Cooperative (CMPC), consisting of the following organizations: A–G Cooperative Creamery, Alto Dairy Cooperative, Associated Milk Producers Inc., Golden Guernsey Dairy Cooperative, Greenwood Milk Producers Cooperative, Independent Milk Producers Cooperative, Lake to Lake Cooperative (a Division of Land O'Lakes, Inc.), Manitowac Milk Producers Cooperative, Mid-America Dairymen Inc., Midwest Dairymens Company, Milwaukee Cooperative Milk Producers, Southern Milk Sales, Inc., Wisconsin Dairies Cooperative, and Woodstock Progressive Milk Producers Association.
Coalition of Northeastern Dairy Farmers (CONE), consisting of the following organizations: Agri-Mark, Inc., Allied Federated Cooperatives, Inc., Cabot Farmers' Cooperative Creamery Company, Dairylea Cooperative, Inc., Eastern Milk Producers Cooperative Association, Inc., Niagra Milk Cooperative, Inc., St. Albans Cooperative Creamery, Inc., Upstate Milk Cooperatives, Inc., and Regional Cooperative Marketing Agency, Inc.
Darigold Inc.
2Dairymen's Creamery Association, Inc.
Farm Bureau Federations of North Carolina, South Carolina, Georgia, Tennessee, and Virginia
Farmers Union Milk Marketing Cooperative (FUMMC)
Land O'Lakes, Inc.
Louisiana Farm Bureau
Lowville Producers Dairy Co-Op
Maine Farm Bureau
Mid-America Dairymen, Inc. (Mid-Am)
Milk Marketing, Inc. (MMI)
National Family Farm Coalition
National Farmers' Organization (NFO)
National Milk Producers Federation (NMPF)
New York Farm Bureau
New York State Grange
North Dakota Milk Producers Association and the North Dakota Dairy Industries Association
Penn Marva Dairymen's Federation (Penn Marva), consisting of the following organizations: Atlantic Dairy Cooperative, Mid-Atlantic Division of Dairymen, Inc., Maryland Virginia Milk Producers Cooperative Association, and Valley of Virginia Cooperative Milk Producers Association
Pennsylvania Farmers' Association Dairy Committee
Pennsylvania Farmers Union and Northern Tier Milk Cooperative
Pennsylvania State Grange
Prairie Farms Dairy, Inc. (PFD)
Producers Equalization Committee (PEC), consisting of the following organizations: Michigan Milk Producers Association, Independent Cooperative Milk Producers Association, and the National Farmers Organization
Rusk County (Wisconsin) Farm Bureau
Southern Coalition of Dairy Farmers (SCDF), consisting of the following organizations: Associated Dairy Farmers, Inc., Associated Milk Producers, Inc. (Southern Region), Carolina Dairies, Carolina Jersey Milk Producers Association, Carolina Virginia Milk Producers Association, Coble Dairy Products Cooperative, Inc., Dairymen, Inc., Edisto Milk Producers Association, Florida Dairy Farmers Association, Gulf Coast Dairymen, Gulf Dairy Association,

Inc., Land-O-Sun Independent Producers, Mountain Milk Producers Association, Palmetto Milk Producers Association, Piedmont Milk Sales, Inc., Southern Milk Sales, Inc., and Tampa Independent Dairy Farmers Association, Inc.
Texas Farm Bureau
Texas Farmers Union
United Dairy Services
United Oneida-Lewis Milk Producers
Upper Midwest Federal Order Coalition (UMWFOC), consisting of the following organizations: Iowa Dairy Products Association, Minnesota Association of Cooperatives, Minnesota Farm Bureau, Minnesota Farmers Union, Minnesota Milk Producers Association, Wisconsin Farm Bureau Federation, Wisconsin Farmers Union, Wisconsin Federation of Cooperatives, A–G Cooperative Creamery, Alto Dairy Cooperative, Associated Milk Producers, Inc. (Morning Glory Farms Region), Associated Milk Producers, Inc. (North Central Region), Ellsworth Cooperative Creamery, Farmers Union Milk Marketing Cooperative, First District Association, Glencoe Butter and Produce, Land O'Lakes, Inc., Manitowac Milk Producers Co-op, Milwaukee Co-op Milk Producers, Plainview Milk Products Association, Swiss Valley Farms Co., Wisconsin Dairies Cooperative, Minnesota Department of Agriculture, and Wisconsin Department of Agriculture, Trade and Consumer Protection
Western Dairymen Cooperative, Inc. (WDCI)
Wisconsin Farm Bureau Federation
Women Involved in Farm Economics (WIFE)

Proprietary Handlers and Handler Organizations

Americana Foods, Inc., Morningstar Foods, Inc., Blue Bell Creameries, Inc., Hunter Jersey Farms, Inc., Hygeia Dairy Company, Inc., and Pine State Creamery Company (Americana et al.)
Anderson-Erickson Dairy Company
Borden Company
Dean Foods Co.
Farm Fresh
Galloway Company
Gold Star Dairy
Hershey Chocolate, USA
Hunter Jersey Farms, Inc.
Kraft General Foods, Inc.
Kroger Company
Lamers Dairy, Hansens Dairy, Oberweis Dairy, Seeger's Dairy, Inc., Stoer Dairy (Lamers et al.)
Lifeway Foods, Inc.
Marigold Foods
Malone & Hyde Dairy
Milk Industry Foundation and International Ice Cream Association (MIF/IICA)
Morningstar Foods, Inc., Hunter Jersey Farms, Inc., Hygeia Dairy Company, Inc., Pine State Creamery Company (Morningstar et al.)
Nestlé Foods Corporation
Northeast Ad Hoc Federal Order Committee (NEFOC), composed of the following entities: Crowley Foods, Inc., Durling Farms, Farmland Dairies, Inc., H.P. Hood, Inc., Johanna Dairies, and Middlebrook Dairy
Nutrasweet Company
Southern Foods Group
Trade Association of Proprietary Plants (TAPP)
Turner's Dairy
United States Cheesemakers Association, Wisconsin Cheese Makers Association, Ohio Swiss Cheese Association, American Producers of Italian Type Cheese Association (U.S. Cheesemakers et al.)
Wells Dairy

Individual Dairy Farmers

A total of 25 individual dairy farmers testified at this hearing. They include 2 dairy farmers from New York; 3 from Pennsylvania; 7 from Wisconsin; and 13 from Minnesota.

U.S. Members of Congress, Governors, State Representatives, and Candidates

Senator James M. Jeffords, Vermont
Steve Kerr for 25 members of the House of Representatives from the northeastern states of the U.S.
John McCann, New York State Legislator
Marc Smith for Congresswoman Louise Slaughter, New York
Leslie Rowan for Congressman Sherwood L. Boehlert, New York
Jim O'Connor for Congressman James T. Walsh, New York
R. Stephen Hawley, New York State Legislator
James Ziegeweid, Candidate for U.S. House of Representatives, Wisconsin
Al Baldus, Wisconsin State Assemblyman
Congressman Steven Gunderson, Wisconsin
Congressman David R. Obey, Wisconsin
Al Zepp for Congressman Robert W. Kastenmeier, Wisconsin
Virgil Roberts, Wisconsin State Assemblyman
Senator Robert Kasten, Wisconsin
Tommy Thompson, Governor of Wisconsin
Brenda Kettleson for Senator Herb Kohl, Wisconsin
Congressman Arlan Stangeland, Minnesota
Steve Wenzel, Minnesota State Legislator
Sylvester Uphus, Minnesota State Legislator

Federal and State Government Witnesses

Carolyn Liebrand, Agricultural Cooperative Service, USDA, for the Economic Research Service, USDA
Deputy Commissioner of Agriculture, Vermont, for the Commissioner
Director, Dairy Division, Georgia Department of Agriculture
U.S. Department of Justice, Antitrust Division
Representatives from 16 Market Administrator Offices of the Agricultural Marketing Service (AMS), USDA

Other Witnesses

Dr. Robert E. Jacobson, Professor, Department of Agricultural Economics, Ohio State University, at the request of Milk Marketing, Inc.
James N. Putnum, Farm Credit Banks of Springfield, Massachusetts
Milo Olsen, Retired County Agent, Wisconsin
Dr. Emerson Babb, Professor, Food and Resource, Economics Department, University of Florida
Dr. Jerome Hammond, Professor, Department of Agricultural and Applied Economics, University of Minnesota

1. Class I Milk Pricing and Related Issues

No changes should be made in the Class I differentials on the basis of this record. The Notice of Hearing contained 35 proposals on the Class I price issue. Four of those (A–1, A–2, A–3 and A–6) involved eliminating or reducing significantly the Grade A and distance differential components of Class I prices.

Proposals A–1 and A–3 involved the Grade A differentials, while A–2 and A–6 involved distance differentials. There was no sworn testimony in support of proposals A–3 and A–6. Testimony in support of proposals A–1 and A–2 was presented by a witness for the Department of Justice as part of its entire presentation on the general desirability, in its view, of deregulating the milk industry.

Proposals A–4 and A–5 would merge orders to result in four to eight regional orders of more or less equal Class I utilization. Proposal A–4 also would have based the prices to be paid producers on a single site in a milk surplus area in each such region, including adjustments for volume,

market, and production differentials and the grade or quality of milk purchased. The total amount of such adjustments would be not less than $1.12 per hundredweight of milk having 3.5 percent milkfat. There also was no sworn testimony in support of either of these proposals.

Numerous parties spoke in opposition to all of the proposals listed above.

Proposal A–7 called for eliminating the Class I differential increases included in the Food Security Act of 1985, or establishing a uniform system of determining Class I differentials that would be fair to all dairy producers in Federal orders. The latter concept alone was proposal A–8. There was no sworn testimony in support of either proposal. However, several parties specifically opposed adoption of the proposals because there was no detail provided on the notion of "fairness".

Proposal A–9 in the Notice of Hearing called for the Class I milk price to be tied to an escalator formula representing the cost of production plus a return on equity as well as a true representative figure for management. At the hearing, a witness for the proponent (Pennsylvania Farmers Union) modified the proposal to provide a "floor price" on Class III milk at $14.00 per hundredweight, which would be adjusted for inflation twice a year. Also, modified Class I differentials should reflect the total cost of transportation and be adjusted twice each year for inflation. Thus, the modified proposal became similar, in concept, to proposals A–10 (proposed by MMI) and A–11 (proposed by the Producers Equalization Committee), which proposed basic formula "floor prices" of $10.60 and $11.00, respectively.

Several witnesses testified on proposal A–9 as included in the Notice of Hearing, apparently unaware that the proponents had modified, or would modify, the proposal. As a result, there was considerable testimony presented regarding the cost of production for milk in various areas. Although many witnesses indicated a strong belief that cost of production should be a factor in determining Class I milk prices under Federal orders, no one offered any specific mechanism for doing so. Five witnesses spoke in opposition to proposal A–9. Further discussion relative to costs of producing milk appears later in discussing the Class I price issue.

Proponents of specifying a floor under Federal order milk prices generally expressed the view that such action would remove price fluctuations so that producers can better plan their dairy operations. They also claimed that it would provide a greater incentive to have milk made available for Class I use during a falling M–W price, it would assure an equal cost to handlers, rather than relying so heavily on over-order charges, and it would assure an adequate supply of Class I milk to consumers. Opposition to "flooring" prices was presented on behalf of the Milk Industry Foundation and Borden, Inc., and in briefs by Anderson-Erickson Dairy, Co., Marigold Foods, and the Southern Foods Group.

Proposal A–12 in the hearing notice called for a Class I differential of $1.00 over the Class II price (when set at the M–W price) nationwide. The Class I differential would be increased temporarily to attract more milk, if needed. Also, a Class I transportation differential (amount unspecified) would be added to the Class I price nationwide to pay handlers 75 percent of the cost of hauling milk more than 100 miles to meet local needs. There was no sworn testimony in support of this proposal. However, five witnesses voiced strong opposition to the proposal.

Proposal A–13, (by Lamers Dairy, Inc., et al.) specified that the Class I milk price for all orders should be the basic formula price for the second preceding month plus $0.75. At the hearing the proponent modified the proposal so that the differential on all classes would be $0.30.

In support of this proposal, the proponent offered the following points:

(a) Class differentials are no longer needed to attract Grade A producer milk since the supply of Grade A milk is more than adequate.

(b) The manufacturing market over the five-year period 1984–1988 averaged $0.47 higher than the announced M–W price, with a low of $0.29.

(c) Over-order premiums are paid to producers in almost every area in the country. Plants will continue to pay producers a price high enough to ensure themselves an adequate supply.

(d) A 30-cent differential on all classes would still reward dairy farmers for producing Grade A milk, as opposed to producing manufacturing grade milk.

The proponent contended that this proposal would result in a free, competitive market, with over-order charges setting actual prices, simpler orders to administer, no location adjustments, no inefficient movements of milk, and would be a step toward deregulation of business by the government. This would best protect the interests of producers and consumers, in proponent's view.

There was no other supporting testimony. Opposition was voiced by two parties which opposed any reduction of Class I differentials and elimination of classified pricing. One party maintained that the proposal is based on false perceptions about the nature of Federal order markets.

Proposals A–14 and A–15 would specify Class I differential amounts at certain cities and change the Class I differentials for six orders back to what they were prior to May 1, 1986. These proposals were abandoned.

Proposal A–16 proposed a new set of Class I differentials in all Federal order markets in order to restore the alignment of Class I prices that existed prior to May 1, 1986. The proposal, as modified at the hearing amounted to increasing the differentials in a pattern such that the increases due to the Food Security Act of 1985 plus the changes now being proposed would total a minimum 69-cent increase in all orders east of the Rocky Mountains. The only decrease proposed was a minus 12 cents for the Texas order. Increases were not proposed for orders in the Far West and the Southeast.

Proposal A–16 was combined with proposal A–30, which would establish transportation credits for handlers receiving Class I or Class II milk at a rate that would compensate the party responsible for shipping the milk for 80 percent of its transportation costs. The proposed rate would be 2.8 cents per hundredweight per 10 miles for supplemental milk, which was defined as inter-order movements of milk. The monies to fund the transportation credits would come from the higher differentials proposed in A–16, and from an increase in the Class II differential to 50 cents (proposal B–1). The funds would be paid out as transportation credits to handlers operating distributing plants on receipts of supplemental milk and in the form of a fluid market differential to producers whose milk is received at a distributing plant or a supply plant that ships milk to a fluid distributing plant. The testimony offered by a witness for the proponent offered details of exactly how these payments would be calculated. The basic reason for the proposals is to help attract milk to fluid distributing plants. The testimony included examples of difficulties the proponent had experienced in obtaining the desired quantities of milk for its Class I and Class II needs. Two other handlers indicated support for the proposal.

Proposal A–17 would increase the Class I differential in each order by amounts ranging from five cents for the Southwestern Idaho-Eastern Oregon order to $1.10 for the New England order. The proponent of A–17 is Agri-

Mark, Inc., a cooperative association of dairy farmers with 2,000 members in seven northeast states. The proponent's witness indicated he also was authorized to indicate support for the proposal by two other cooperatives in Vermont, which together with the proponent, represent the majority of producers in the New England order.

The proponent's witness indicated the belief that Class I differentials throughout the Federal order system have been administratively depressed for the last two decades. He maintained that information on general price levels, inequities in over-order pricing, intermarket alignment problems in securing adequate supplies for Class I needs, and projections of future milk prices and supplies clearly show that increased differentials are both needed and warranted.

In support of A–17, the witness cited the criteria provided in the Agricultural Marketing Agreement Act of 1937 that the Secretary must consider in establishing milk prices in Federal order markets. The thrust of his testimony was that those criteria need to be reviewed in light of the current situation compared to the situation that existed in the markets when the Class I differentials were set in the late 1960's and then modified somewhat as a result of the 1985 Farm Bill.

The witness then proceeded to review various price changes, concluding that the "real" value of Class I differentials has declined dramatically since 1970. He then reviewed changes in the receipts of producer milk between 1970 and 1989, along with changes in Class I utilization. Although the changes varied from order to order or among regions, he concluded that from a "northeast perspective," existing Class I differentials have not brought about excess supplies of milk. He cited data to show that milk production and the number of farms in all New England States declined in the last 20 years, while U.S. milk production increased more than 23 percent.

The proponent's spokesman projected that milk prices would decline by the end of 1990. He then cited cost-of-production data and foresaw "tremendous" attrition in farm numbers and milk production in the Northeast in general, and in New England in particular. He stated a best guess that over 20 percent of New England dairy farms would go out of business in the next two or three years, removing at least 12 to 15 percent of milk production in the region. Thus, by his analysis, the area could become short of milk and might have to bring in milk from the Upper Midwest. He testified that the proponent's transportation experts estimate that it would cost at least 4.3 cents per hundredweight per 10 miles to haul milk long distances without regular backhauls. In his view, the nation's ultimate reserve supply of Grade A milk is in the Upper Midwest. He noted that the Class I differentials in proposal A–17 are less than transportation costs plus a Grade B/Grade A conversion factor, regardless of whether a transportation cost of 3.5 cents or 4.5 cents per hundredweight is used, except for the Upper Midwest and Southeastern Idaho-Eastern Oregon orders.

The final point offered in justification for higher differentials in the Northeast is over-order Class I premiums. The witness cited premiums charged by the proponent as well as higher differentials that prevailed in Massachusetts, New York, and Pennsylvania.

Adoption of proposal A–17 was supported by a federation of four cooperatives, three in New York and one in Pennsylvania. In addition, the Federation's witness called for a consolidated single Northeast order, continued classified pricing, a Class I differential over $3.00 per hundredweight, component pricing of all milk, and adoption of membrane technology to leave water on the farm and reduce hauling costs. However, the proposals for order merger, component pricing, and adoption of membrane technology are beyond the scope of proposals included in the hearing notice. Therefore, these proposals are not considered further in this decision.

Specific opposition to proposals A–16 and A–17 was voiced by three parties. A witness for the Milk Industry Foundation and the International Ice Cream Association (MIF/IICA) stated that there is no economic justification for broad-based increases or changes in Federal order Class I prices. He also expressed the view that perceived inequities between producers in one area versus others is not a proper basis to increase prices.

A witness spoke in opposition to the proposals on behalf of four handlers that operate milk plants in Florida, Maryland, Texas, Wisconsin, and North Carolina. The primary thrust of his testimony was that higher Class I prices would hurt fluid milk sales. He claimed that the primary area of growth in commercial dairy products is in the cheese segment, while fluid milk sales are stagnant. He also expressed the view that a Class I price surface should not exceed two cents per hundredweight per 10 miles, which would mean a "flattening" of prices rather than price increases. In support of this view, he called attention to development of a new method of hauling packaged milk: the use of one way corrugated boxes, which makes the truck available for a revenue-generating backhaul that can cut in half the costs of distributing milk.

A third witness, on behalf of a handler that, in addition to other plants, operates 28 milk plants fully regulated under 22 Federal orders, also opposed adoption of proposals A–16 and A–17.

Proposal A–18 calls for providing Class I differentials of not less than $2.30 in the New England, New York-New Jersey, Southern Michigan, Eastern Ohio-Western Pennsylvania, Ohio Valley, Indiana, Chicago Regional, Central Illinois, Louisville-Lexington-Evansville, Upper Midwest, Eastern South Dakota, Black Hills, Iowa, Nebraska-Western Iowa, and Greater Kansas City orders and changing the location adjustments in each of these orders as necessary in view of the new level of Class I differentials. The proponents of this proposal were four separate associations of cheesemakers, which operate 176 plants in 18 states and process about 14 billion pounds of milk annually.

The proponents' spokesman clarified the proposal by stating that it is not a proposal for a flat $2.30 in all the areas specified. Rather, it is a proposed minimum for those orders. Also, the proposal to change location adjustments should be considered on a regional basis at a separate hearing or hearings. In this regard, he suggested the Secretary issue a final decision adopting the proposed Class I differential changes but delay the effective date of such prices for six months to hold hearings and adopt location adjustment changes.

In support of proposal A–18, the witness testified that the portion of the value of milk represented by Class I differentials has shrunk during the last several decades because they have not been adjusted to account for inflation or the declining purchasing value of the dollar. As a result, a greater portion of the Class I value is paid through over-order premiums. He claimed purchasing power in constant dollars is a very relevant factor for the Secretary to consider. He also claimed the reduction in the value of the Class I differential has contributed to several problems:

(a) When the M–W price increases at a rate equal to the Class I differential over a period of two months, the minimum Class I price will be below the M–W price, or Class III price for the month, as happened in the fall of 1989. This situation caused a considerable volume of milk to not be pooled. Moreover, handlers that had Class II and Class III milk remaining in the pool

had to make payments into the producer-settlement fund.

(b) The decreasing value of Class I differentials has been offset in many markets by increasing over-order prices for Class I milk, which cause instability that the order program was designed to alleviate.

The witness also said higher Class I differentials in the Midwest are justified because milk production costs there are no longer lower than in most other parts of the country. He claimed that the current level of Class I differentials in the Midwest reflects an assumption that production costs are lower there.

Finally, according to the witness, increased Class I differentials would permit implementation of an effective seasonal incentive plan to help balance the seasonal variations in milk production. The specific seasonal incentive plan proposed by the proponents is described later.

Direct testimony in support of proposal A–18 was presented by NFO. According to the NFO witness, the answer to economic difficulties of dairy farmers is in building up dairy farm prices. He contended that Federal order pricing policy needs to be fashioned with an element of income recognition in it for dairy farmers. In his view, the present structure of Federal order Class I differentials does not generate an adequate and equitable amount of income for producers in the lowest-priced orders east of the Rocky Mountains. This represents a substantial failure of the Federal order program to provide any income to a significant group of producers in an important dairy region. According to the witness, adoption of proposal A–18 would have several positive effects:

(a) It would provide a modest blend price increase to dairy farmers in the lowest-priced Federal orders.

(b) It would establish pricing in the Chicago Regional and Upper Midwest orders that would eliminate the disorder involved in volumes of milk being flip-flopped on and off the orders, as has occurred in recent years and will continue unless some price changes are made. This pooling and de-pooling of milk makes the determination of shipping standards in both orders difficult, if not impossible, with regard to the discretionary adjustments to supply plant performance standards that may be made by the market administrators and the Director of the Dairy Division.

(c) It would establish a larger flat price, northern zone which would tend to encourage more efficient movements of milk to southern points from the nearest geographical location where milk supplies are not committed to fluid usage during times of short supply in the South.

The NFO witness stated that such an increase in northern Class I differentials would require some adjustments in the Class I differentials in the Northeast, Southeast, and Mid-South, as shown in Exhibit No. 89. No changes were proposed for other areas.

A representative for Anderson-Erickson Dairy Company expressed opposition to proposal A–18. He opposed a flat Class I price for the Midwest because it would make it difficult to compete and move milk to areas south of his location and would cause similar problems for other handlers in other orders. He suggested that the Class I price increases advocated by the cheesemakers would do nothing to address the real problem of fluid milk handlers, which is how to attract milk to fluid uses in markets with low Class I utilization levels.

Proposal A–19, by MMI, would increase Class I differentials $1.20 in the Ohio Valley, Eastern Ohio-Western Pennsylvania, and Louisville-Lexington-Evansville orders and $1.00 in the Indiana order.

In support of the proposal, the MMI witness testified that in order for milk to move from where it is produced to where it is needed for Class I, a higher price must be established. He maintained that costs of production and local supply/demand conditions must also be considered in establishing Class I prices. He pointed out that the Pennsylvania Milk Marketing Board has established a Class I minimum price in western Pennsylvania that is $1.20 above the Federal order Class I price for the same area, and that the Board determined such a price was necessary to insure a continuing adequate supply of milk. This is the basis for the proposed increase of $1.20 for the Eastern Ohio-Western Pennsylvania order. The other increases are proposed for price alignment purposes and to insure consumers in those markets a continuing adequate supply of milk.

Opposition to proposal A–19 was expressed by witnesses for MIF and one other handler on the same basis noted above for proposals A–16 and A–17. Opposition testimony also was presented by a witness for the Milk Foundation of Indiana, an organization of six proprietary handlers that operate distributing plants. The witness stated that because of price disparities created by the Class I differential changes implemented on May 1, 1986, Indiana plants lost some 15 to 16 million pounds of Class I sales per month, or nearly 14 percent of their Class I sales, based on a comparison of sales in November 1985 to November 1989. Also, he noted that for the same monthly comparison, Indiana plants' Class I sales in other markets declined some 13 million pounds. Thus, he expressed the view that if A–19 were adopted, Indiana plants would lose another 30 million pounds of Class I sales because of even greater price disparities between Indiana and its neighboring markets.

Proposal A–20 was declared abandoned by the proponent, Prairie Farms Dairy, Inc. A–20 would have established minimum Class I differentials of $2.00 in 18 orders ranging from the Eastern Ohio-Western Pennsylvania order to the Pacific Northwest order and as far south as the Greater Kansas City order. It also would have established multiple basing points at six locations and would have established prices at orders south of a basing point by adding 3 cents for each 10 miles from the nearest basing point, with no changes in plant and producer location adjustments. Class I differentials in the Indiana, Western Colorado, Eastern Colorado, and the three northeastern orders would have been changed. On a simple average, Class I differentials in the 41 orders would have been increased by 40 cents per hundredweight. One handler offered specific opposition to A–20.

Proposal A–21, also proposed by Prairie Farms Dairy, Inc., similarly was abandoned. This proposal would have changed the calculation of location adjustments at pool plants under all orders.

Opposition to proposal A–21 was expressed by two witnesses on behalf of the Coalition of Southern Dairy Farmers and a witness for a group of four proprietary handlers.

Proposal A–22 was offered by Mid-America Dairymen, Inc., a large midwestern dairy farmer cooperative. The proposal would provide a minimum Class I differential of $2.00 in any order currently having a differential less than $2.00. Testimony by a witness for the proponent, however, was limited to supporting the $2.00 figure for the Chicago Regional, Central Illinois, Southern Illinois-Eastern Missouri, Upper Midwest, Eastern South Dakota, Iowa, Nebraska-Western Iowa, and Greater Kansas City orders. He stated that the proposed increases are necessary and justified because of the decrease in milk production that has taken place throughout the area. Compared to 1988, he cited production declines in 1989 throughout the area ranging from 4 percent in Wisconsin to 0.3 percent in Nebraska. He expressed the view that production declines in

Minnesota and Wisconsin are highly significant because these two States have historically served as a reserve supply for other areas of the country, particularly the Southeast. The witness said that unless dairy farmers in the Upper Midwest area receive assurances of long-term price stability they will continue to exit the dairy business. He contended that the order Class I differentials have not been sufficient to attract sufficient supplies of milk for Class I use and that over-order pricing had been utilized to assure bottling plants an adequate supply of milk. He also expressed the view that a portion of the increased differentials should be used to provide a market service payment to those dairy farmers actually supplying the Class I needs of the market.

Proposal A–22 was opposed by witnesses for the MIF/IICA, and by two handlers for the same reasons cited in opposition to other proposals to increase Class I differentials.

Proposal A–23 would reduce the Class I differential for the Nebraska-Western Iowa order from $1.75 to $1.68. This proposal also was abandoned.

Proposal A–24 by the Trade Association of Proprietary Plants (TAPP) has four parts. Part one would restructure Class I differentials throughout the Federal order system. First, the minimum Class I differential would be $2.00 per hundredweight. The maximum Class I differential would be $3.75, based on the cost of processing and transporting nonfat dry milk 1400 miles (estimated straight-line distance) from Eau Claire, Wisconsin, to the Southeastern Florida market. All other Class I differentials would be aligned by drawing a line from the western border of Minnesota southeasterly through the western border of Alabama. East of that line, Class I differentials would be computed based on 200–mile zones radiating out from Eau Claire to the primary basing point in each market. For each 200 miles the differential would increase by 25 cents (reflecting a rate of 12.5 cents per 100 miles). West of the line, differentials would decrease by 25 cents per 200 miles. The proposal would increase Class I differentials in some orders and reduce them in others.

Part two would provide a uniform transportation allowance, or credit, of 30 cents per hundredweight per 100 miles for interplant movements of Class I milk within and between all Federal order markets regardless of direction of milk movement.

Part three would provide a supply-demand adjustor for all Federal orders. Each year, on January 1, Class I differentials would be adjusted based on the percentage of milk production purchased by the Commodity Credit Corporation (CCC) on a total solids milk equivalent basis the prior marketing year. If the percentage was 0 to 5 percent, there would be no adjustment. Negative adjustments would increase from minus 10 cents at 5 percent, up to minus 50 cents if 10 percent of national production was purchased by CCC.

Part four proposed price incentives to encourage producers to adjust the supply of milk to demand on a national seasonal basis through two separate provisions. The first provision would add 50 cents to all Class I differentials in the six lowest U.S. production months and subtract 50 cents in the highest production months. The second provision would institute a takeout-payback plan simultaneously in all Federal orders with the same takeout amounts and months and the same payback months. If both provisions are adopted, maximum takeout in the months of December through June would be 10 cents per hundredweight with a payback period of August through November. If the first provision is not adopted, the maximum takeout would be 10 cents per hundredweight.

The witness for TAPP contended that changes in the Class I price structure were needed and offered his rationale as to why proposal A–24–1 would provide a reasonable system of Class I prices:

(a) The most economical source of supplemental milk for a deficit market, such as Southeastern Florida, for example, is nonfat dry milk for reconstitution.

(b) The Class I differential in the most distant market should be the delivered cost of the amount of powder sufficient to make 100 pounds of reconstituted milk, including the Class I differential at Eau Claire ($1.64), plus a processing cost of making powder ($1.22), plus the cost of reconstituting (estimated at 10 cents), plus the hauling of 11 pounds of powder to West Palm Beach, Florida (43 cents), for a total delivered cost of $3.39.

(c) The difference between $3.39 and $1.64 is $1.75, which divided by 1400 miles (the air-miles distance from Eau Claire to West Palm Beach) results in an adjustment factor of 12.5 cents per 100 miles, or 25 cents per 200 miles. This rate would be used to set the Class I differential in intermediate markets.

This would result, in the proponents' view, in a superior system of Class I prices. Also, according to the witness, a $2.00 Class I differential in Chicago is justified to:

(a) Solve the problem of de-pooling milk because of rapid, large increases in the M–W price.

(b) To allow for a national seasonal pricing plan.

(c) To allow for a national supply-demand adjustor.

(d) To maintain a reasonable Class I price level in other markets.

Under cross-examination, the witness acknowledged that adoption of this part of the proposal is contingent upon adoption of another of TAPP's proposals to classify powder used for reconstitution as a Class I use in the originating market. That proposal is considered elsewhere under issue No. 4 in this decision.

With regard to the transportation credit part of this proposal (A–24–2), the witness maintained that increased costs of transportation have made zoning to cover costs of transportation in Federal orders obsolete. In his view, the transportation credit would result in more equitable pricing and orderly movement of milk within and between Federal orders.

According to the witness, a supply-demand adjustor is needed because over the years Class I prices have become higher than necessary, thus encouraging a more than adequate supply in most Federal order markets.

Finally, the witness contended that there is a need to encourage better seasonal balancing of milk production with demand. He indicated that problems associated with seasonality of production are:

(a) Waste of money associated with:

(1) Unnecessary inventories and storage costs for hard products.

(2) Added hauling costs of moving milk around to handle seasonal surpluses and deficits.

(3) Inefficient manufacturing due to fluctuating milk supplies.

(4) Maintaining costly excess manufacturing capacity.

(b) Erratic fluctuation of milk prices due to manufacturing plants and fluid milk handlers competing for milk during short production months.

There was no other testimony in support of proposal A–24. General opposition was voiced in the testimony of six other parties. One, a proprietary handler, maintained that Class I differentials should be tied to the cost of moving fluid milk, not milk powder.

Proposal A–25, by the Farmers Union Milk Marketing Cooperative, is comprised of three parts. The first part would establish the Class I milk price for each area by adding $1.20 to the basic formula price for the second preceding month plus a "market area differential", derived by multiplying a regional Class I utilization percentage by $2.98 per hundredweight. To this

would be added a handler transportation adjustment. From the monies generated by the transportation adjustment, shipping handlers would receive a transportation credit, and there would also be a producer credit adjustment.

The second part of the proposal would provide that the basic Class I differential of $1.20 would be pooled in a separate national pool. The third part would establish one or more regional marketing areas for pricing and pooling the Class I marketing area differential.

Three witnesses testified in support of proposal A–25, two on behalf of the proponent. The first witness testified that the General Accounting Office Report to the Congress on the milk order program describes "* * * what's wrong and what has to be fixed if marketing orders are to be effective tools in the 1990's."

The second witness testified that proposal A–25 is supportive of proposal A–27, but goes a little farther towards FUMMC's goals. He indicated support for proposal A–27 and cited the testimony of others who testified in support of A–27. The FUMMC witness said national pooling should be adopted because, in his view, the market for Grade A milk is national in scope. In support of this concept he pointed to expanding areas of packaged milk distribution and noted that reserve supplies of Grade A milk can be obtained from many different sources in many different areas. He also contended that Federal order blend prices "* * * do not recognize the integrated nature of fluid milk markets on the production side." He further maintained that orders "* * * serve to artificially localize, through regulation, naturally broader markets by imposing economic penalties on the use of reconstituted concentrated milk."

The brief filed by FUMMC said that the $1.20 in its proposal is justified by the testimony of another witness regarding proposal A–27. The brief relies on a producer's cost of converting to and maintaining Grade A status at 15 cents per hundredweight divided by a national Class I utilization of 45 percent, which gives a factor of 33 cents. This figure, added to an imputed net margin for manufacturing plants of 87 cents equals $1.20.

The FUMMC brief also said that the second tier of the Class I price should be equal to the difference between the individual order's current Class I differential and the $1.20 base differential, or $1.00, whichever is greater. Thus, the smallest Class I differential would be $2.20 and the largest would be $4.18.

The brief also called for a national transportation pool that would compensate handlers for up to 70 percent of the cost of transporting milk to fluid handlers.

The third witness who testified in support of proposal A–25 is a Professor in the Department of Agricultural and Applied Economics at the University of Minnesota. He also was critical of the current Federal order pricing system. He took the view that the current system is inequitable to producers in the Upper Midwest region of the U.S. and that it creates inefficiencies and frequently fails to provide an incentive for suppliers to provide milk for fluid uses.

This witness indicated that the orders should be grouped into regions and suggested the regions that USDA uses for its cost of production studies. He proposed that the Class I price should be the national Class III price (Class II in markets with only two classes) plus a single national base differential of $1.00. To this would be added a price element determined by multiplying the average Class I use percentage of the region for the preceding year by a factor representing the location value of milk and production cost differences among regions. He used $3.00 for illustrative purposes. A third pricing factor would be a transportation Class I component as supported in the testimony of a principal witness for the proponents of proposal A–27. As envisioned by this witness, the base Class I differential of $1.00 would be pooled nationally and would require interregional transfers of funds. Equity considerations justify this approach, according to the witness.

Five witnesses specifically opposed adoption of proposal A–25, mostly on the basis that no changes should be made. In addition, because of the many similarities between A–25 and A–27, opposition to proposal A–27 would generally also be opposition to A–25.

Proposal A–26, by Land O'Lakes, would provide supply balancing credits for handlers who operate plants that supply milk to distributing plants. Also, handlers who have to obtain supplemental milk supplies for Class I use from nonpool sources would receive a payment to cover give-up costs plus a transportation credit. The witness for the proponent indicated that other aspects of proposal A–26 had been incorporated into proposal A–27 and therefore he would not testify on them in connection with proposal A–26.

As proposed, handlers who provide more than ordinary service to the fluid market relative to handlers who provide less than ordinary service would be compensated for that service. Each year the market administrator would use a formula to estimate the total amount of balancing payments to be paid over the next 12 months at a proposed rate of 50 cents per hundredweight. The total of such estimated payments would be divided by the estimated volume of milk at distributing plants to arrive at the Class I surcharge that would fund the balancing payments. Thus, the balancing payment would be funded by handlers as an increment of the Class I differential.

The basis for this proposal is that, according to the proponent: (1) Differences in seasonality of milk production and contra-seasonality in the needs of distributing plants result in a variable volume of reserve milk; (2) Handlers who secure an outlet for the orderly disposal of this reserve incur costs; (3) This disposal cost is not shared equally by the participants in the Federal order pool; (4) This proposal would reestablish equity between pool handlers who provide varying levels of service to distributing plants in the market; and (5) The level of the balancing payment should reflect the fixed costs of maintaining a level of manufacturing capacity adequate to handle the variable Class I market reserve supplies.

This proposal is related to the price issue only because the surcharge would become an annual element in the Class I differential. Basically, it is a proposal for a marketwide service payment.

A second aspect of this proposal is to establish in each order a supplemental milk fund. As proposed, a handler that obtained supplemental milk for Class I uses from nonpool sources would receive a payment of $3.00 per hundredweight plus a transportation credit of 3.5 cents per 10 miles per hundredweight.

As proposed, the market administrator would estimate the total of such payments and would include the rate per hundredweight to cover the payments as part of the transportation surcharge on Class I milk proposed by the UMFOC proposal No. 27.

Land O' Lakes' brief expressed the view that the Secretary should consider limiting the acquisition payment to the months when over-order charges approximate $3.00 per hundredweight and when Class I utilization exceeds 75 percent in the receiving market.

The proponent maintains that this provision would restore equity among handlers because not all handlers have to buy supplemental milk and, therefore, some handlers have higher costs than others. Although no one else specifically addressed this aspect of proposal A–26,

other parties did indicate agreement with this view.

A witness for the Southern Coalition of Dairy Farmers (SCDF) testified in opposition to proposal A–26. In his view, this proposal calls "* * * for the extension of regulation and control over marketing activities and functions which can best be carried out, and made efficient through the competitive process." In its brief, the NFO opposed adoption of balancing payments. The brief noted that claims for such payments "are very market-specific and, therefore, not ripe for adoption on this hearing record." NFO also expressed the view that balancing services are services performed for handlers and that, therefore, the payments for such services should be made by handlers.

Proposal A–27 by the Upper Midwest Federal Order Coalition (UMFOC) as included in the hearing notice was general, calling for Class I prices to be the M–W price for the second preceding month plus a uniform Class I base differential to be pooled nationally and a Class I marketing area differential consisting of a producer credit adjustment and a transportation credit adjustment. In addition, one or more marketing areas would be established for pricing and pooling Class I milk.

At the hearing, a witness for UMFOC modified the proposal and indicated that UMFOC could not present testimony on national pooling. As modified, proposal A–27 would establish the Class I price for each order using the following elements:

(a) The basic formula price for the second preceding month.

(b) A uniform Class I base differential of $1.80 for all markets.

(c) A marketwide service differential based on the hauling costs associated with delivery of pool and nonpool milk to pool distributing plants, which would be unique to each order.

As proposed by UMFOC, the common $1.80 Class I price element was composed of two parts. The first part is an imputed net margin for Minnesota and Wisconsin manufacturing plants of 87 cents per hundredweight. The second part is a Grade A element of 96 cents per hundredweight.

The first element is intended to offset costs incurred by manufacturers in Federal milk order pools. They include the extra cost of maintaining Grade A certification of plant facilities, the market administrator's administrative fees on pooled milk, and the extra cost of maintaining records and filing reports to the market administrator, according to UMFOC's witness. The 87 cents represents an average calculated return to cover such costs at Minnesota and Wisconsin manufacturing plants over a ten-year period ending with 1989, as estimated by another witness for UMFOC. The details of how the imputed net returns were calculated are in the record; they need not be repeated here.

The second element, 96 cents, was based on an analysis of the costs involved for a dairy farmer to convert the farm from Grade B to Grade A. According to UMFOC's witness, the major element of costs involved in converting is the drilling of a new well. Amortized over 10 years, the cost of conversion averaged about 15 cents per hundredweight. The UMFOC position was that producers must be able to recover this cost if they are to continue to produce Grade A milk. In the Chicago Regional market, Class I utilization of milk for August 1989 through July 1990 was about 15.6 percent of all the Grade A milk normally associated with the market, according to the UMFOC witness. In order to have 15 cents per hundredweight available to pay to producers in a market with 15.6 percent Class I use, the Grade A component must carry a value of 96 cents (15 cents divided by .156 = 96 cents). This was the basis for the 96 cents component. The two components added together total $1.83 (.87 + .96 = $1.83), which was rounded to $1.80 for the proposal. This $1.80 would be the basic Class I differential in all Federal milk orders.

The UMFOC also proposed, in addition to the Class I base differential ($1.80), that there be a "producer credit adjustment" and a "transportation credit adjustment," that the Class I base differential be pooled in a separate national pool, and that one or more marketing areas be established for purposes of pricing Class I milk and pooling Class I revenues. At the hearing, these additional proposals were abandoned, except the transportation credit adjustment.

As developed through testimony at the hearing, a transportation credit would be established for each order as follows:

(a) Based on evidence concerning hauling rates, a rate of 3.5 cents per hundredweight per 10 miles is representative of hauling rates. However, to avoid overcompensation and to provide incentives for promoting efficient movements of milk, it was proposed that the transportation credit be 80 percent of the hauling rate. Thus, the transportation credit would be based on 2.8 cents (3.5 cents x .80 = 2.8 cents) per hundredweight per 10 miles.

(b) Each year the market administrator for each order would estimate separately the total distance that milk will be transported from pool and nonpool sources to pool distributing plants over a 12–month period.

(c) The total estimated distance would be multiplied by $0.0035 per mile and the result multiplied by 0.80. For concentrated milk, the multiplier would be 1.0 on product weight. The final figure would be the expected amount of hauling compensation to be provided during the succeeding 12 months.

(d) The total estimated value of handler location adjustments would be deducted from the above estimate of total hauling compensation. The remainder would be the estimated hauling compensation to be provided through marketwide service payments.

(e) The estimated hauling compensation would be divided by the total estimated amount of producer milk to be allocated to Class I in the 12-month period to arrive at the Class I surcharge needed to fund the marketwide service payments.

(f) Payments of hauling compensation would be made to handlers at the rate of $0.28 per hundredweight times the distance from the origin of the milk to the distributing plant on all milk received direct from the farms of producers or as transfers of bulk fluid milk products from pool and nonpool plants, less the difference in location adjustment between the originating plant and the destination plant. For concentrated milk the rate of compensation would be $0.35. Receipts from cooperatives acting as bulk tank handlers would be treated the same as direct-shipped milk.

(g) Distances between plants would be determined using the latest Mileage Guide as published by the Household Goods Carriers Bureau. For direct-shipped milk, it was proposed that the trunk highway intersection nearest to the closest producer on the farm bulk pickup route be used. In the case of plant transfers, transportation credits would not be available on movements of milk from the farms of producers to the plant of first receipt.

(h) Payments in compensation for hauling would be made directly to the handler who ordinarily receives a location adjustment credit for transfers between pool plants. For transfers from a nonpool plant, payment would be made to the operator of the receiving pool distributing plant. For direct-shipped milk, payment would be made to the handler that accounts to the pool for that producer milk. For cooperative bulk tank handler milk, payment would be made to the cooperative. For diverted milk, payment would be made to the diverting handler. For direct-shipped milk, any handler receiving the

marketwide service payments would be required to keep records that show that the payments received were in fact paid out for hauling services or paid directly to producers as partial reimbursement for hauling charges paid by the producers.

(i) Because the amounts of money generated by the Class I surcharge to fund the marketwide service payments may not match exactly the payments to be made, it was proposed that the market administrators establish a reserve within the producer settlement fund so that the accumulation of funds be treated as an obligated reserve.

This proposal for a Class I differential composed of the $1.80 plus the transportation surcharge was designed, according to the proponents, to provide all the necessary incentives to assure an adequate supply of Grade A milk for fluid use in all markets. It would provide incentives to produce and pool Grade A milk, attract it away from manufacturing uses, and transport it to fluid processors. Proponents maintained that if adopted it would perform these functions more efficiently and more effectively than the system of incentives now provided in Federal milk orders.

As envisioned by the proponents, this proposal would have several impacts:

(a) It would likely increase minimum Class I and blend prices in a few midwestern markets and reduce them elsewhere. In those markets with reduced blend prices, locally produced milk could decline while Class I sales would increase in response to lower prices. Overall, national milk supplies would be expected to decrease, resulting in an increase in the value of milk used in manufactured dairy products. The net impact on total dollars flowing into the Grade A milk sector is unknown. Another witness for the proponents later testified about using a computer model and input data for 1988 and 1989 to estimate the net impact of adopting proposal A–27 four years after its implementation. That analysis indicated that after four years, 23 markets would lose $337 million and 14 markets would gain $156 million for a net loss of $181 million.

(b) It would create some new price alignment problems, but the proponents were not able to anticipate in advance all the alignment problems that might arise. It was suggested that local market alignment problems be addressed through regional hearings, as was done in 1986. In this regard, it was stated by a witness for the proponents that if the Secretary "* * * concludes, based on what others may say, that adoption of our proposal without a concurrent change in location adjustments could lead to disorderly marketing, then we suggest that he defer implementation of our final decision until he arrives at a final decision relative to location adjustment hearings and implement them both at the same time."

(c) Another impact of this proposal would be to change the economics of fluid milk distribution. Currently, it is generally more favorable to expand distribution in the direction of higher-priced markets to the south. Under this proposal, expansion of distribution in any direction would be equally favorable. Thus, fluid processors would likely face stiffer competition from their more southerly competitors and less stiff competition from their more northerly competitors. This change in the competitive environment may be painful for some distributing plant operators, according to proponents' witness.

In summary, the principal witness for the proponents indicated their belief that adoption of this proposal would accomplish the following:

(a) Assure an adequate supply of Grade A milk for the system of Federal order markets.

(b) Provide improved incentives to promote the release of Grade A milk and its delivery to the fluid market.

(c) Reduce the Class I cost of assuring an adequate supply of Grade A milk for the fluid market.

(d) Provide greater equity among producers regulated under different orders by reducing blend price differences.

(e) Reflect supply and demand conditions on a system-wide basis.

Thirty-three different persons spoke in support of proposal A–27, including members of Congress, a governor, state representatives, representatives of State government, University faculty and staff members, members of farm organizations and individual dairy farmers. Most of the supporting testimony was very general in nature, basically endorsing the notion that a change is needed in the way milk is priced under Federal orders and indicating support for proposal A–27 as the way to do that.

Fifteen witnesses spoke in opposition to proposal A–27. These included representatives of numerous dairy farmer cooperatives, some speaking on behalf of coalitions and others just for their own organizations. In addition, opposition to A–27 was voiced by proprietary handlers, the Milk Industry Foundation and International Ice Cream Association, and individual dairy farmers.

More will be said later regarding both supporting and opposing testimony concerning proposals A–24, A–25, A–26, and A–27.

Proposal A–28 would provide seven basing points for Class I pricing: Boise, Idaho; Southern Arizona; Central Texas; Eau Claire, Wisconsin; Nashville, Tennessee; North Central Pennsylvania; and Northern New Hampshire and Vermont. Initial Class I differentials would range from $1.50 to $2.50. A location differential of about 10 cents per hundredweight per 100 miles distance from the basing point would be added to the Class I differential, with pricing points in individual marketing areas to allow for movement of milk to metropolitan areas within the marketing area. Also, there could be established a transportation credit pool to pay for transportation of milk from another base point area, controlled by the market administrator based on the need for additional Class I milk. The proponents of this proposal were the North Dakota Milk Producers Association and North Dakota Dairy Industries Association.

The witness for the proponents introduced two exhibits showing details of the proposed prices for each existing order, which would range from $1.75 for the Upper Midwest order to $4.18 for the Southeastern Florida order.

The witness contended that the current pricing system does not adequately price milk throughout the United States and that new production centers now exist other than in Wisconsin. As proposed, Class I milk prices would be increased in the Midwest to stem declining production that is occurring because prices are not sufficient to cover production costs, according to the witness. He cited increased milk production in the Southwest (Texas, Arizona, New Mexico and California) and maintained that if that production increase trend continues, there would be milk available to move to the Southeast or other parts of the country.

The witness also indicated that the Upper Midwest order needs a larger location adjustment to provide an incentive to ship milk. This proposed pricing would allow 20 cents per hundredweight to move milk and would restructure the zones to provide higher prices in southern and northwestern Minnesota and in eastern South Dakota. He suggested that if other areas of the country have similar problems, location adjustments should be changed as indicated based on testimony at the hearing in this proceeding.

In summarizing, the witness indicated that this proposal is designed to provide a new system for the 1990's and beyond and to recognize an ever-changing dairy

supply system, and that it could work towards fewer orders if that is desired by the industry. The witness stated that "It is hopeful that it will stabilize production in the Midwest and slow down the increase that is occurring in the Southwest, both of which would be in the best interest of the industry."

On cross-examination the witness indicated that for those areas for which the proposal did not provide a specific basing point, there would need to be local input from those areas to determine where the basing point should be. He agreed that lacking such input, the record would be short of enough information to decide exactly what to do. There was no other supporting testimony on proposal A–28.

Proposal A–29 was a non-specific proposal to establish a system of multiple basing points. It was proposed by the Rusk County Farm Bureau (Wisconsin). The witness for the proponent contended that a new system was needed and referred to a study by the Economic Research Service of the USDA as the source of information he had relied on in proposing a multiple basing point pricing system. He also indicated that he had relied on the General Accounting Office study. He further indicated that he was supporting a concept but that he did not have a specific proposal to offer.

Five parties specifically opposed adoption of multiple basing points. Mostly the testimony was in opposition to any changes from the current system or was general opposition to any increases in Class I differentials. One witness, for CMPC, expressed the view that proponents have not advanced sufficient data to define the term "multiple basing points", or the need for it or its operation. He further stated that only those areas that have volumes of milk in the fall months in excess of their Class I and Class II needs could be considered as reserve supply areas.

Proposal A–30 was described in connection with proposal A–16.

Proposal A–31 called for a producer fall production incentive program in all Federal order markets. As proposed, five cents per hundredweight would be deducted from the uniform price on all producer milk during the months of April, May and June. The funds so generated would be paid back to producers in the short production months. The payment would be made on the quantity of milk that each dairy farmer produced in excess of 95 percent of the amount produced during the flush months. The proponent was Milk Marketing, Inc.

At the hearing, proponent's witness stated that the seasonal incentive fund should be created by increasing all class prices by 10 cents per hundredweight in the months that the individual markets are normally in the tightest supply/demand conditions.

The witness indicated that seasonally varying patterns of production cause inefficiency in the entire milk marketing system and that seasonal incentive pricing would be beneficial to everyone in the industry and to consumers as well. Since it would be paid for by handlers, producers would view the program as very beneficial and would adjust production patterns to meet market demands. This would result in less costs associated with a low seasonal production pattern and should reduce procurement costs and over-order prices. No one else testified in direct support of proposal A–31.

Proposal A–32 also proposed a seasonal incentive plan providing a take-out of as much as 45 cents per hundredweight during a four-month period, to as little as 20 cents per hundredweight during a nine-month period, and a pay-back of not less than 60 cents per hundredweight each month of September through November. This plan was proposed by the cheesemaker organizations mentioned as proponents of A–18.

The witness for the proponents expressed the view that seasonality of milk production is a national problem requiring a national solution. The problem is one of imbalance between the production of milk with demand for milk in various products, which causes: shortages of milk supplies during the fall months; seasonal needs to transport milk long distance during the fall; assessment of give-up charges to release fall milk supplies; idle manufacturing plant capacity in the fall; inadequate manufacturing capacity in the spring; and instability of minimum prices and premiums. In supporting adoption of the proposal, he pointed to testimony of another witness for the proponent who had studied the costs of contra-seasonality in milk production and who concluded that there is an annual minimum cost of $40 million to the industry.

The proponents' witness claimed that there has been little improvement in the pattern of seasonal production over the last decade. In order to provide an incentive for producers to adjust production seasonally, he proposed a take-out of 45 cents per hundredweight from the uniform price during each of the months of January through June for all markets. The amount so set aside would be paid back to producers with interest during September, October and November. He believed the pay-back would likely exceed $1.00 per hundredweight. However, he urged that the take-out be floored at the M–W price plus 10 cents.

The brief filed by the cheesemakers stated that if the Secretary found that producers under such a plan would lose income not likely to be compensated for in the marketplace, the cheesemakers would not object to a uniform sharing of such costs with producers by all handlers through implementation of a surcharge on Class prices not to exceed 5 cents per hundredweight on a year-round basis. This would allow the take-out to be reduced about 30 percent without reducing the payback, according to the brief.

There was no other direct testimony in support of A–32.

Proposal A–33, by Prairie Farms Dairy, Inc., was another proposal for a seasonal incentive plan. As proposed, for producer milk delivered during April, May and June, an amount equal to 35 percent of the Class I differential would be subtracted, from each handler's total value of pooled milk, provided such adjustment does not provide a uniform price at location of less than the Class III price. For milk delivered in September, October and November, one-third of the amount subtracted would be added.

In his testimony supporting the proposal the proponent's witness modified the proposal by adding March as a deduct month and adding December as a payback month. In addition, the deduction would be equal to 25 percent of the Class I differential, and the deductions could not yield a blend price below the Class III price plus 10 cents. He indicated that the variable deduction would encourage some markets with low Class I utilization and low Class I differentials to participate, even though there is a small difference between the Class III price and the Uniform price. This was the reason for snubbing the deduction so that the blend price would not be less than the Class III price plus 10 cents.

According to the witness, higher deducts in markets with higher Class I use and higher Class I differentials would be beneficial because such markets tend to have a greater need for the market to provide a balancing service to fluid handlers. Thus, if production is balanced to meet fluid handlers' needs, they will need less supplemental milk on a yearly basis, which should reduce the volatility of their raw milk prices. He also said it would benefit suppliers as well. Moreover, larger paybacks in deficit

markets would help attract milk to those markets.

The witness said his analysis showed that nearly 80 percent of the markets would see seasonal blend price swings of at least $1.00 per hundredweight, which would cause many producers to shift their production to better meet the needs of the industry. He also cited several problems that result from an imbalance of production relative to demand for milk. There was no other direct testimony in support of A–33.

A witness for CMPC did not specifically endorse any particular seasonal incentive plan, but indicated support for such a concept, if it is adopted in all orders, has a maximum deduct or charge of four to five cents per hundredweight, pays out to only those producers who perform, and allows some flexibility in developing provisions appropriate to Federal orders.

The brief filed by NFO opposed proposals A–32 and A–33, but supported adoption of A–31 as the best-designed seasonal incentive plan and urged its adoption to address the seasonality cost problem.

Over all, there was not a great deal of support for any seasonal incentive plan except as noted above. Moreover, there was some general opposition to any changes in the orders regarding Class I prices.

Proposal A–34 would amend all orders to provide that the Class I and Class II butterfat differentials be announced on the fifth day of the month for the following month. The proponents are the MIF/IICA. The principal reason advanced by the proponents' witness in support of this proposal was that it would "* * * greatly enhance the ability of Class I and Class II handlers to more accurately determine their raw product costs." He also indicated that over the long run, adoption of the proposal would have no impact on producers and would facilitate more orderly marketing of both Class I and Class II milk products.

Several parties supported adoption of proposal A–34. There was no opposition.

Proposal A–35, submitted by Prairie Farms Dairy, Inc., would provide that a uniform butterfat differential for the month be announced by the fifth of the month. The proposal was abandoned by the proponent.

The above description of proposals and testimony portrays a wide range of views regarding how Federal orders should be changed or not changed. Altogether, nearly 200 persons, including dairy farmers, cooperative association representatives, members of other general farm organizations, proprietary handlers, state officials, members of the United States Congress, and others, testified at the hearing. Thus, the record contains the views and testimony of a broad cross-section of the dairy industry and other interested parties.

In general, the testimony reflects one of two basic views. The first is one of basic support for the order program as is. This point of view was expressed by virtually all parties from areas of the country other than the Midwest. Many of them opposed any broad-based changes in the Class I pricing system of the orders. Others, however, proposed increases in Class I prices, ranging from changes in Class I differentials for a few orders to Class I differential increases in all orders.

The second point of view reflected in the testimony of most parties from the Midwest also expressed strong support for the Federal order program, but was critical of the system of Class I prices that now operates in all the orders. Their criticisms were based on a belief that the current Class I pricing system discriminates against producers in the Midwest. Many of those who participated in the hearing testified that the Class I prices in the Midwest are too low relative to Class I prices in other areas, particularly in the Northeast and the Southwest. In general, those who expressed this view maintained that the costs of producing milk in the Midwest are not very different from the costs of producing milk in other regions. Many maintained that a Class I pricing system based on a single basing point is obsolete, causes pricing inequities, and needs to be substantially revised to reflect current marketing conditions and technology.

Among the most critical of all groups in this regard was the Upper Midwest Federal Order Coalition (UMFOC). UMFOC witnesses offered extensive testimony about what is wrong with the Federal order pricing system. The witness who offered a substantial amount of testimony in this regard stated that the current system of Class I price differentials has deficiencies. These were identified as follows: (1) When prices are above competitive free-market levels due to regulation, there will be increased production in those markets where the blend price is substantially greater than the M–W price; (2) When excess milk production occurs, this milk is either moved outside the market or processing capacity is expanded within the market; and (3) This additional manufactured product is sold, which decreases the value of milk used in manufacturing. This is detrimental to those areas where a large percentage of the milk produced goes into manufacturing.

The witness further contended that the purpose of the orders, to establish and maintain orderly marketing conditions, is not currently being met. He claimed that costs of production are about the same across the country while Class I differentials established through single basing point provisions increase as the distance from Eau Claire, Wisconsin, increases. He further contended that Federal order Class I prices do not reflect supply and demand conditions in that excessive production occurs in some regions. This, he maintained, is a detriment to the Upper Midwest. As a result, in his view, the orders now cause inequitable treatment of producers based on location. In this regard, a major concern cited is single basing point pricing, whereby the Class I differentials increase as distance from Eau Claire increases. The witness claimed that single basing point pricing and order requirements for equalizing payments on reconstituted milk create and maintain a system of local markets that hamper competitive market forces. (The issue of pricing reconstituted milk is discussed under issue No. 4.)

According to the witness, there are three implicit assumptions underlying single basing point pricing:

(1) Locally produced milk is preferred over imports and the pricing system thus should encourage local production. In his opinion, this was true once, but is not true under current marketing conditions.

(2) Cost of production varies directly with distance from the Upper Midwest. The witness also said this was once true, but no longer is true.

(3) The Upper Midwest is a primary source of reserve supplies. Here again, he argued that this is no longer the case. He claimed there were at least 12 other Federal orders that had enough milk available on an annual basis to meet the fluid milk needs of all deficit Federal order markets.

For all the reasons cited above, the witness reached the following conclusions:

(1) Single basing point pricing is no longer supportable;

(2) The current Federal order system of Class I pricing is a source of industry conflicts between regions;

(3) Single basing point pricing, combined with restrictions on reconstituted milk, represents protectionism for the higher-price markets;

(4) The current system restricts free movement of milk from low to high-cost-of-production areas;

(5) The pricing system benefits those producers most distant from the Upper

Midwest, but such prices are not justified on the basis of costs of providing an adequate supply of milk to consumers;

(6) Markets distant from the Midwest, because of excessively high prices, have expanded production beyond Class I needs, thus putting downward pressure on the price of milk used for manufacturing; and

(7) Upper Midwest farmers are unable to share in the returns that distant dairy farmers enjoy based on their high Class I utilization.

For the reasons cited above, the witness argued that it was time for a new approach to establishing Class I milk prices under the Federal order program. He indicated that proposal A–27 was developed with this in mind.

Numerous other parties from the Midwest also expressed the belief that the Federal order Class I pricing system discriminates against midwestern dairy farmers while encouraging milk production in other areas. They also called for changes to "level the playing field."

Many other hearing participants disagreed with the positions and arguments stated by those from the Midwest. These parties generally opposed any changes in the Federal orders that would lower returns to dairy farmers in their respective areas. Among these were witnesses from the Northeast, Middle Atlantic, Southeast, South Central, Southwest, Far West and Pacific Northwest regions. The testimony of most of these parties presents a strong statement of support for the status quo, as well as a defense of the order program as a stabilizing influence in milk markets.

Testimony of various expert witnesses with many years of milk marketing experience provided the record with a history of the order program and the conditions and market experiences that led to its development. These witnesses described in some detail the nature of milk production and the associated marketing problems that make milk marketing regulation unique. In summary, various witnesses indicated that milk is a unique agricultural product that requires special consideration, and that many of the production and marketing problems that originally gave rise to the Federal order system still exist.

After a review of the testimony and other evidence in the record relating to this issue, it is concluded that the present Class I differentials should remain in place. The underlying basis for the level of Class I prices under the order program is the statutory pricing standard which requires that prices reflect the supply and demand for milk. Within this context, the present Class I differentials appear to be set at a reasonably satisfactory level. Although there might be a basis for some downward adjustments in certain markets, such as in the heavy production areas of the Midwest, it is difficult to determine from this record what the adjustments should be. This is particularly so when the industry has strongly supported over the years a coordinated set of differentials based on fairly constant rates of change from market to market.

In reviewing the adequacy of milk supplies in the regulated markets, the supplies and utilization of producer milk were analyzed, order by order and region by region. For this purpose, the monthly data (taken from Federal Milk Order Statistics) for the years 1987, 1988 and 1989 were selected as being representative of normal market conditions. When the market data are reviewed in light of both Class I and Class II needs, it is clear that there are no large supplies of Class III milk left for shipment to other areas except for the Chicago Regional, Upper Midwest, Pacific Northwest and Idaho markets.

The record indicates that in order to serve the varying needs of a Class I market on a year-round basis, reserve milk supplies equal to about 30 percent of the total milk in the market are needed. The views on this point varied from 15 percent to 40 percent, with a fairly persuasive argument for at least 30 percent. Thus, a reserve milk supply equal to 30 to 35 percent of the total milk in the market appears to be a reasonable reserve requirement.

It is in the fall months of the year when market supplies of milk are reduced. Thus, it is the fall months that must be looked at first to determine whether a given market has adequate supplies of milk or whether there are inadequate supplies or excessive supplies available. In order to evaluate each market for this purpose, the months of September, October and November for 1988 and 1989 combined were reviewed. Also, monthly data for the years 1987, 1988 and 1989 were combined to depict this information on a year-round basis rather than just the fall months.

It should be noted here that for this analysis, estimates of Class II use were made for those orders that provide, or did provide during the review period, only two classes of utilization. Eight orders fall into that category: the three Florida orders, the three northeastern orders, the Michigan Upper Peninsula order, and the Black Hills order. There is no data available in the record for the Michigan Upper Peninsula order, and the Black Hills order data are combined with data for the Greater Kansas City and Eastern South Dakota orders, all to preserve confidentiality of proprietary information. For the Florida markets, virtually all use other than Class I was considered to be used in the intermediate classification. For the New England, New York-New Jersey and Middle Atlantic orders, published data were used to extract the pounds of milk used to produce the various intermediate class products. However, for the New England order, market data reported condensed milk with butter, so that an appropriate separation of Class II and Class III in that case was not possible from published data.

The New England order, the New York-New Jersey order and the Middle Atlantic order were amended April 1, 1991, to provide three classes of milk use. (Official notice is taken of the Assistant Secretary's order amending orders for the New England, New York-New Jersey and Middle Atlantic Marketing Areas, Docket Numbers AO–14–A62, etc., issued January 31, 1991, published February 11, 1991, 56 FR 5308.) Market data reported by the market administrator for the New England order for April 1991 were used, specifically the pounds of producer milk assigned to Class II, to go back and adjust the earlier estimates in an attempt to better distinguish the amount of producer milk that would have been Class II if the order had been a three-class order.

The numbers developed as described above for the three northeastern markets were considered to be the pounds of producer milk in Class II. Class III pounds were estimated by subtracting the Class I producer milk and the estimated Class II producer milk from total producer milk receipts for each month.

Also, during the hearing, only market data for the month of September 1990 was available for the Carolina order, since the order for that market did not become fully effective until September 1, 1990. Therefore, we are taking Official Notice of data for October, November, and December 1990 in order to have further information for analysis.

Official notice is taken of the following sources of data for the northeast orders and the Carolina order:

1. New England Milk Market Statistics for the years 1986 and 1990; issued by the Market Administrator, P.O. Box 1478, Boston, MA 02205.

2. Monthly Statistical Report for the New England Marketing Area for April 1991, issued by the Market

Administrator, P.O. Box 1478, Boston, MA 02205.

3. The Market Administrator's Bulletin for the New York-New Jersey Milk Marketing Area, Quarterly issues A, B, C and D for the years 1986 and 1990 (Volumes 46 and 50), issued by the Market Administrator, 708 Third Avenue, New York, NY 10017.

4. Annual Statistical Report for Federal Order No. 4, the Middle Atlantic Marketing Area, for the years 1986, 1987, 1988, 1989 and 1990, issued by the Market Administrator, P.O. Box 25828, Alexandria, VA 22313.

5. Statistical Summary, for October through December 1990, for the Carolina Milk Marketing Order, issued by the Market Administrator, 3920 Bardstown Road, Louisville, KY 40218.

The simplest way to get an overview of combined Class I and Class II use is to look at Class III use in the various orders. If a reserve of at least 30 percent, and maybe as much as 40 percent, is necessary on an annual basis to supply the Class I market, then any market with 40 percent or less Class III use cannot be considered to be a surplus market.

Analysis of the market data for all the orders on an annual basis reveals three distinct groups of markets, as follows:

(1) The orders in the Southeast (Alabama-West Florida; Georgia; Nashville; Tennessee Valley; Upper Florida; Tampa Bay; Southeastern Florida; Memphis, Tennessee; Central Arkansas; New Orleans-Mississippi; Greater Louisiana; and Carolina) have very high levels of Class I use. These orders have low levels of Class II (soft products & ice cream), and very low Class III utilizations. Some of these markets are deficit markets, that is, they do not produce enough milk to supply the Class I needs, including reserves on a year-round basis.

(2) A group of Midwest and Far West and Northwest markets (Upper Midwest; Chicago Regional; Iowa; Nebraska-Western Iowa; Great Basin; Southwestern Idaho-Eastern Oregon; and Pacific Northwest) that obviously have far more milk available than is needed for Class I and Class II use, plus reserves. Even in the fall months (September, October, November, 1988 and 1989 combined) all the markets in this group had Class III utilizations greater than 45 percent, and only one (Great Basin) was below 50 percent.

(3) The remaining markets exhibit essentially a balance between supply and demand. Within this group there is considerable variation of Class II use, from about four percent for the Central Illinois order to nearly 27 percent for the Middle Atlantic order. Class I use in these markets (three-year average) ranges from 41 percent (New York-New Jersey) to over 77 percent (Paducah). For the combined period of 1987 through 1989, only one market in this group had Class III use of above 40 percent, and that was the Southern Michigan market. However, in the fall months, Class III use in the Southern Michigan market was less than 40 percent, and Class III use was less than 35 percent in most of the other markets.

Based on this analysis, it is concluded that producer milk supplies are not excessive outside of the markets identified in the second group above.

When the hearing in this proceeding was held, the Notice of Hearing included the Lubbock-Plainview, Texas; Texas Panhandle; and Rio Grande Valley orders. On December 6–8, 1989, a hearing was held on a proposal to merge these three orders and to expand the marketing area. On August 14, 1991, the Assistant Secretary issued a Decision to merge the three orders and to expand the marketing area. (Official Notice is taken of the Assistant Secretary's Decision for Rio Grande Valley and Certain Other Marketing Areas, Docket Numbers AO–335–A34, etc., issued August 14, 1991, published August 27, 1991 (56 FR 42240) and the Assistant Secretary's Order Amending Orders, Docket Numbers AO–335–A34; etc; issued October 9, 1991, published October 21, 1991 (56 FR 52446)). The merger becomes effective December 1, 1991. Accordingly, in this decision, all order language will be in terms prepared for the merged order, which will be the New Mexico-West Texas order (7 CFR part 1138). The merger decision cited above modified the Class I price structure in eastern New Mexico and reduced the Texas order Class I differential by twelve cents per hundredweight. Other conforming location adjustment changes were provided in the Texas and Southwest Plains orders to recognize the pricing structure of the New Mexico-West Texas order.

Several parties offered testimony in the present national hearing concerning milk production costs in New Mexico and Texas, where milk is produced in New Mexico, and other information concerning plant locations. One purpose of such evidence was to provide a basis for further review of the Class I price relationships in the New Mexico-Texas area. However, that question was previously reviewed in the proceeding that led to the merger and expansion of order territory for the New Mexico-West Texas order, which has already been mentioned. The decision in that proceeding appropriately dealt with the question of price alignment in that region. Accordingly, no action in that regard should be taken on the basis of the record developed in this proceeding.

In its brief, a handler that operates two plants in the Southeast urged that Class I differentials in southern Louisiana under both the New Orleans-Mississippi and Greater Louisiana orders be reduced to recognize that Class I prices under the Texas order had been lowered 12 cents. The brief noted that a regional hearing to consider appropriate location differentials and other issues in the area had been scheduled for December 1990. That hearing has since been postponed indefinitely and the brief concluded that it is now necessary for the Secretary to address the adjustment of Class I prices in southern Louisiana in this proceeding. The brief further maintained that such price adjustments are reasonably within the scope of several proposals included for consideration in this proceeding.

This petition is denied. The alignment of Class I prices in Louisiana and Mississippi and other areas was considered and adjusted based on a regional hearing for that purpose as a result of the changes in Class I differentials established by Congress in the Food Security Act of 1985.

Other Related Issues

National Pooling

There is no basis in this record for concluding that the returns from Class I milk under the present orders should be pooled under some regional or national arrangement. Although some parties expressed a view that there is now a national market for Class I milk, the record does not support such a conclusion. It is true that some Class I and Class II products are distributed over wide areas. Also, it is clear that there are some overlaps in production areas. Although this information may be an indication that some merging of orders may be warranted, there is not a sufficient basis in this record for taking such action.

Cost of Production

Many witnesses expressed views that costs of producing milk should be a factor in determining prices under the order program. However, no one provided a sound basis for doing so or explained just how Federal order prices should be tied to or established using such data.

Elimination of Grade A and Distance Differentials

The proposals to eliminate Grade A and distance differentials in pricing Class I milk amount, in essence, to

proposals to eliminate classified pricing. However, this approach has virtually no support from those who are regulated under Federal orders (handlers) and from producers. Adoption of these proposals would render Federal orders without any basis to recognize the value and service provided by Grade A milk in the marketplace. The record does not provide a persuasive argument for eliminating classified pricing under the order program.

Multiple Basing Points

The orders should not be amended to specify that Class I milk prices will be determined by using several basing points. As noted earlier, it is concluded that the current system of Class I prices is functioning properly and is in accord with the provisions of the Act with regard to establishing milk prices. Thus, no changes in the Class I differentials are adopted.

The record in this proceeding fails to provide sufficient information to provide a sound basis for deciding that multiple basing points should be adopted. Two such proposals were discussed, but in neither case was detailed information provided that would facilitate deciding exactly where basing points should be. One proponent's spokesman indicated that further hearings might be needed to develop more detailed information.

In order to permit a full evaluation of this issue, the record should include a full exploration of those factors that are important in deciding where basing points should be located and how the Class I differential amount at such points should be determined. Additionally, it would be important for the record to provide a basis for properly establishing Class I differentials at locations other than the basing points. This in turn raises questions about location adjustments and price alignment between markets. Although some of these items were touched upon in the record, there nevertheless is a serious lack of information that would be necessary to make a decision that multiple basing points should be adopted and then to follow through with a specific set of order provisions to implement that decision.

Placing a "Floor" Under Federal Order Prices

Several parties supported the concept of placing a "floor" under Federal order prices. The proposals ranged from $10.60 per hundredweight to $14.00 per hundredweight, with adjustments twice a year for inflation. Some proposals would undergird Class I and Class II prices only. One proposal would also specify a minimum Class III price.

Class prices under Federal orders are tied to the M–W price, which currently serves as the "price mover". As the M–W price moves up or down reflecting market forces and competition at work in the market place, so do the Class prices under Federal orders move up or down. This pricing mechanism responds to market changes in the value of milk for manufactured dairy products. This is an important consideration in maintaining a proper relationship between Federal order reserve milk and non-order milk made into the same products. If a floor price were put under the Class III price, this price relationship may not be maintained.

Similarly, the differences in price between Class III uses and Class I and Class II uses state appropriate value differences. Changing such value differences through placing a floor under Class I and Class II prices only could distort these price relationships.

A price floor may be an appropriate mechanism to use if it is necessary to prevent prices from going so low as to jeopardize the adequacy of milk supplies. However, the record evidence in this proceeding does not support a finding that a floor price should be adopted for that purpose. While a price floor could prevent some price fluctuations, it could also isolate Federal order prices from properly responding to changes in market conditions. For these reasons, all proposals to place a "floor" under Federal order minimum prices are denied.

Supply-demand Adjuster

The orders should not be amended to apply a supply-demand adjustor uniformly to all orders, based on the level of dairy product purchases under the price support program. The proposal would result in Class I prices in all orders being reduced by the same amount. Also, as proposed it would work in only one direction, that is, it would reduce the Class I differentials in response to increases in price support purchases. Thus, milk prices could decline; but no mechanism is proposed to deal with a shortage of milk (which could be a signal that a higher price is needed).

It is not apparent that a supply-demand adjustor should apply to all orders at the same time and in the same amount. We cannot conclude, for example, that the Southeastern Florida Class I price should be decreased because price support purchases are large. It does not appear likely that the Southeastern Florida order contributes at all to higher levels of support purchases.

Balancing Payments

The proposal by Land O' Lakes to provide balancing payments to handlers that dispose of a market's reserve milk supplies should not be adopted on the basis of the record in this proceeding.

The proposed payments would be funded by adding a surcharge to the Class I milk price. Thus, all handlers who use Class I milk would help pay the costs of disposing of reserve milk supplies, and Class I prices would be increased in a given market by the amount estimated by the market administrator to be necessary to cover the expected payments.

It has already been stated that there is no basis in the record of this proceeding to restructure Class I milk prices throughout the order program. Thus, the concept of adding specific amounts to a basic Class I price differential as several proposals would have provided has already been rejected.

Payment for services of marketwide benefit are permitted under revisions to the Act contained in the Food Security Act of 1985. However, the adoption of such provisions should be based on evidence pertaining to the need for them in specific market situations. That kind of evidence is not provided in the record of this proceeding. Moreover, there is no indication of support for adoption of this proposal by cooperatives in other markets outside the area that Land O'Lakes serves. Another shortcoming of this record is that there is not adequate information concerning the costs of providing the balancing services, nor of the equity, or lack of equity, concerning the provision of balancing services in the various markets. Thus, the proposal for balancing payments is denied.

Supplemental Milk Credit

After considering the evidence, it is concluded that the proposal to provide a supplemental milk credit should not be adopted. While there is merit to the argument that handlers who have to pay "give-up" charges to manufacturing plants may have a higher cost of milk than those who do not, we do not agree that the proposal offers an appropriate response.

Part of the concern is that it is not demonstrated that there is uniformity in give-up charges. It seems clear that give-up charges are often made on supplemental milk, but supplemental milk may be obtained from various sources. Also, it would appear that adopting such a credit would "institutionalize" a $3.00 give-up charge,

thus tending to insure that such a charge would be applied. It is more appropriate to leave this charge within the context of over-order charges, which are responsive to changes in the competition for milk.

Seasonal Pricing

All of the proposals to provide some form of seasonally varying prices are denied. Evidence submitted in support of those proposals demonstrates that milk production continues to exceed Class I needs in the spring, and often falls short of meeting Class I needs in the fall months. This is a general occurrence, and there are degrees of variation among the orders.

Addressing individual market seasonal production variations is not practicable in a proceeding such as this one that involves all markets. Moreover, the record fails to provide any clear sense that a majority of producers favor one type of plan over another one, or that support for the concept is widespread among producers. Therefore, it is concluded that none of the specific proposals considered in this proceeding should be adopted. If seasonal incentive plans are to be provided, the need for such plans and details of the type of programs desired should be based on local or regional hearings called for that specific purpose.

Advance Announcement of Class I and II Butterfat Differentials

Currently, a single butterfat differential is announced on the fifth day of the month for the previous month. The proposal by MIF and IICA would require the use of one butterfat differential for Class I and Class II and a separate differential for Class III. Each month the producer differential would be the weighted average value for butterfat in all three classes (under actions discussed in Issue No. 3, all orders will have three classes).

The purpose of the proposal is to provide handlers a greater amount of pricing information in advance so that they could more accurately determine their raw product costs.

Even though there was rather broad support for announcing the Class I and Class II butterfat differential in advance, the proposal should not be adopted. There is no question that the proposal would allow handlers, especially those who make Class II items, to more accurately determine their raw product costs. However, there is a consideration in multiple component pricing that overrides this issue. The butterfat differential is a critical factor in determining the value of the component other than the butterfat component in an order with multiple component pricing. In the Great Basin order, the value of protein is established by subtracting from the M–W price the value of butterfat and dividing the remainder by the average percent protein in producer milk. The resulting milk protein price is the same for protein used in both Class II and Class III milk.

It should be noted that, in addition to the multiple component pricing (MCP) plan currently in effect for the Great Basin marketing area, MCP has also been recommended for adoption in the Middle Atlantic order. Additionally, a hearing has been held to consider MCP, for the Indiana, Ohio Valley and Eastern Ohio-Western Pennsylvania orders. (Official notice is taken of the Administrator's recommended decision for the Middle Atlantic Marketing Area, Docket Number AO–160–A65–RO–2, Issued May 23, 1991, published May 31, 1991, 56 FR 24746, and the Administrator's Notice of Hearing on proposed amendments to the Ohio Valley, Eastern Ohio-Western Pennsylvania and Indiana order, issued July 25, 1990, published July 31, 1990 55 FR 31056).

Under the proposal, however, the butterfat differentials for Class II and III would not necessarily be the same. The result would be that the value of butterfat and protein used in Class II would not be the same as that used in Class III. This possibility, and any ramifications that might result with respect to changing product values, was not discussed at the hearing. Thus, a change in the butterfat differential should not be made on the basis of this record.

2. Class II Milk Pricing and Related Issues

a. Level of Class II Differentials

The Class II price differentials under the orders should not be changed, except for the two orders that do not have a Class II differential. These are the Michigan Upper Pennisula and Black Hills orders.

Most of the orders have three classes of use. In most cases, the Class II differential is 10 cents. A 15-cent differential applies under the three Florida orders, and a 25-cent differential applies under the Pacific Northwest order (although this latter differential is reduced whenever the Class III price is based on a butter-powder formula price). Under the existing advance pricing arrangement, however, these various differentials, in actuality, have averaged 4 cents higher during the past 10 years. (Advance pricing will be discussed in a later section.)

Five orders—Michigan Upper Peninsula; Black Hills, South Dakota; Southeastern Florida; Tampa Bay; and Upper Florida—have only two use classes. The Florida orders currently have a 15-cent differential over the Minnesota-Wisconsin price. However, under the Michigan Upper Peninsula and Black Hills orders Class II milk is priced at the Minnesota-Wisconsin price (the Black Hills order has a butter-powder snubber). As indicated earlier, all orders would provide for three classes under the changes adopted herein.

At the time of the hearing, the New England, New York-New Jersey, and Middle Atlantic orders also provided for only two use classes. Effective April 1, 1991, these orders were amended on the basis of an earlier hearing to provide for three classes, with the soft products being included in a new middle-priced class (56 FR 5308). The new Class II price for these three orders is the same as under the other three-class orders, except that the price is subject to the same seasonal adjustments that apply to Class III milk under the three orders.

The notice of hearing included five proposals (B–1, B–4, B–5, B–6, and B–7) that would increase the level of the Class II differentials. The predominate support was for setting the differentials at 50 cents. Other proposals were for differentials of $1.00 and $1.20. Another proposal in the hearing notice (B–3), which would have changed the Class II price formula but kept the present 10-cent differential, was modified at the hearing to provide for a 15-cent differential.

In supporting Class II differentials of 50 cents or more, the basic contention of proponents was that milk used in soft products has far more value to Class II processors than is reflected by the current 10-cent differential. Proponents, which included both cooperatives and proprietary handlers, pointed out that processors want a steady supply of high-quality milk for Class II uses and are willing to pay much more than the minimum Class II prices set by the orders. They indicated that over-order prices for Class II milk are common throughout the country, often ranging from 50 cents to $1.00 or more over the Class III price. Proponents also indicated that these higher payments for Class II milk are not disruptive to the marketing of producer milk in that processors find little incentive to seek alternative ingredients for making Class II products, such as Grade B milk or nonfat dry milk.

In supporting a substantially higher Class II price, proponents also claimed that Class II uses should bear, along

with fluid milk products, a reasonable part of the cost of attracting a sufficient supply of high-quality milk to the market. They indicated that this is particularly relevant today since Class II products in many areas now must be made from Grade A milk. In addition, they contended that the cost of moving producer milk to Class II outlets far exceeds the order Class II differentials and that only through over-order prices can milk be attracted away from the more remunerative Class III outlets, which are usually located within the milkshed.

Proponents of substantially higher Class II differentials were not in agreement on the level that should be adopted. Some argued that a differential much higher than 50 cents would provide an economic incentive for processors to substitute alternative ingredients. At the same time, others pointed out that substantially higher over-order prices are being paid without disruption of the marketing of producer milk to Class II outlets.

The cooperative proposing the Class II differential of $1.00 argued that this much higher price level reflects what processors are willing to pay for Class II milk. The cooperative also indicated that this is a more realistic price level in view of the strong position of Class II products in the marketplace. Citing retail and wholesale price indices for Class II products, the cooperative pointed out that Class II products show greater strength and profitability relative to dairy products in general. At the same time, it was argued, producers have not shared appreciably in these returns. According to the proponent, adopting a $1.00 Class II differential would help close the gap between the prices received by producers and the wholesale prices received by Class II processors.

In proposing a Class II differential of 15 cents, the trade associations of milk and ice cream processors argued that the price of Class II milk under the orders should remain essentially unchanged. The proposed 5-cent increase in the Class II differentials, they claimed, is merely to offset the 4-cent per hundredweight price enhancement to producers that the present advance pricing arrangement has provided but which would be eliminated under the processors' proposal to change advance pricing, as discussed later. The associations indicated that it is their desire to make the Class II pricing changes revenue neutral for producers.

In supporting no change in the Class II price level, the trade associations argued basically three points. First, these groups claimed that on the basis of price elasticity studies a much higher differential would result in a significant decline in the consumption of Class II products. Any loss of Class II sales, they noted, would mean an increase in surplus milk, which could drive down all milk prices.

A second concern by processors was that a much higher Class II price for producer milk would result in an economic incentive for processors to use cheaper alternative ingredients. Also, in this same vein, processors are concerned that a higher order price would eventually cause consumers to shift to less expensive nondairy substitutes.

A third concern is the potential inequity that could exist between regulated and unregulated processors if Class II prices are increased under the orders. The processor groups claimed that this situation was recognized by the Secretary when the present 10-cent differential was established in the mid-1970's.

It is clear from the record that the present Class II prices under the orders substantially understate the price that regulated handlers are paying for Class II milk. Although the Class II differential in most markets is 10 cents, handlers in most areas are paying much more than this to get a supply of milk for the soft product uses. Over-order prices for such milk range anywhere from 50 cents to $1.00 or more over the Class III price, depending on the particular marketing conditions in the area.

Although the Class II market usually represents a relatively small part of their business, handlers nevertheless consider the processing of Class II products an important part of their total operation. Handlers want a regular supply of Grade A milk for such uses, which requires essentially all of the costly supply services associated with procuring milk for the Class I market. These include moving the milk long distances from the milkshed to the city processing plants and balancing milk supplies with demand. Handlers also often want milk delivered in a standardized form.

A Class II price that is only 10 cents higher than the Class III price does not cover the cost of these services. Unless a processor is willing to pay more for the milk, the cooperative associations that are supplying the milk find it more profitable to channel the milk into the Class III uses, which do not entail the same costly services.

Most handlers are already having to pay substantial over-order prices to obtain milk for Class II use. Such pay prices in conjunction with Class I prices are generating adequate supplies of Grade A milk for both Class I and Class II uses. As discussed under the Class I pricing issue, an analysis of supply and demand conditions under the orders indicates that there are adequate reserves of Class III milk to balance both Class I and Class II needs under the program. Thus, it is concluded that an increase in Class II differentials under all orders is not needed.

b. Advance Pricing of Class II Milk

The advance pricing procedure that applies under most orders to Class II milk should not be modified.

For most orders, the Class II price is the M–W price for the second preceding month as adjusted by an "updating" product price formula (the basic Class II formula price provision of those orders), plus the amount by which the simple average of the basic formula prices (M–W prices) for the most recent 12-month period, plus 10 cents, exceeds the same 12-month period's average of the basic Class II formula prices. The Class II price is announced by the 15th of the previous month. However, if the announced Class II price for a given month is less than the Class III price for the same month, the difference between these prices is then "added back" in computing the second succeeding month's Class II price.

The purpose of the basic Class II formula price (Section 51a in most orders) is to provide a mechanism for updating the M–W price for the second preceding month so that the Class II price for the current month can be based on this M–W price but still reflect more current marketing conditions that might indicate forthcoming changes in the M–W price. This updating is done by comparing movements of wholesale prices for butter, nonfat dry milk, and Cheddar cheese during the first 15 days of the preceding month with such price movements during the same period a month earlier.

Of the eight Class II price proposals on which there was testimony, all except proposal B–1 proposed, either directly or indirectly, the elimination of the basic Class II formula pricing provisions from the orders. Four of the proposals (B–3, B–4, B–5, and B–7) specifically called instead for the use of a Class II price announcement procedure that would operate in the same manner as for the Class I price, i.e., the Class II price would be the basic formula price for the second preceding month plus a specified differential.

While proposal B–6 did not specifically call for the elimination of the basic Class II formula price

provision, testimony by the proponent was clear that the proposed $1.00 per hundredweight Class II differential would operate in the same manner as under proposals B–3, B–4, B–5, and B–7, leaving no need to retain the basic Class II formula price provisions. Also, proposals B–9, B–10, and B–11, which call, in part, for the establishment of floor prices on Class II milk, would leave the basic Class II formula price with little value in the establishment of a Class II price.

Witnesses supporting a Class II price announcement procedure identical to that used for the Class I price indicated that the revised procedure would better reflect and respond to market conditions. They also testified that it would be simpler for everyone to understand than using the complex basic Class II formula pricing provisions. Witnesses generally indicated that the basic Class II formula price had worked reasonably well when there was price stability in the marketplace, but that this was not the case today.

One proponent testified that because the basic Class II formula price attempts to forecast future M–W prices in arriving at a current Class II price, large M–W price movements often send confusing market signals by having Class I and Class II prices move in opposite directions and with differing magnitude. Another proponent noted that this had occurred nine times in the past three years. Similarly, another testified that because of large milk price swings, there is less reliability in the basic Class II formula price projecting raw milk costs for any given month. This results, according to this proponent, in time-lags in the adjustment of product costs and prices that are burdensome to manufacturers. Another proponent said that this sort of opposite price movement was difficult to explain to customers.

Most proponents for eliminating the basic Class II formula price maintained that Class I and Class II milk prices should move in the same direction. They claimed that Class I and Class II products are closely interrelated and that keeping the basic Class II formula pricing provision would not ensure the desired relationship between Class I and Class II prices.

It would be helpful to handlers to have the Class II price move in the same magnitude and direction as the Class I price. However, with a basic differential of 10 cents it is more important that the Class II price be coordinated with the current month's Class III price, since Class III products can be used as an alternative source of ingredients for Class II use. The updating product price formula is intended to obtain this objective.

In most markets the effective Class II prices are those announced by cooperative associations and they are substantially higher than the minimum order prices. Thus in practice it is not often that the order price is the effective price faced by handlers. On those occasions that it is the effective price handlers still have the benefit of knowing the price well in advance. Accordingly, it is concluded that the current Class II pricing formula should be continued under the orders.

c. The Class II "Add-Back" Provision

The proponents of proposals B–1 and B–3 believe that if the Class II milk price for a given month is less than the Class III price for the same month, the difference between these prices should not be "added back" in computing the second succeeding month's Class II price, as most orders now provide. However, the proponents of B–4, B–5, and B–6 believe that this difference should be "added-back" in calculating the next month's Class II milk price. This "add-back" provision is an integral part of these proposals.

The proponent of proposal B–3 testified that adding an additional amount to the Class II price in those months when the M–W price increases dramatically and may be greater than the announced Class II price would result over the long-term in a Class II price level that is significantly higher than their proposed Class II differential of 15 cents per hundredweight. A witness who testified in support of proposal B–3 believed that if the Class II price is established by the basic formula price plus a differential, the "add-back" provision is not needed. This witness said that the current basic Class II formula price cannot provide a guarantee that producers will receive at least the Class III value for Class II milk and therefore, the "add-back" provision was justified. Adopting this proposal, said this witness, would eliminate this need because dairy farmers would be assured of receiving no less than the basic formula price plus the Class II differential for Class II sales in two months' time. Similarly, a proponent of proposal B–1 testified that the "add-back" provision results in a Class II price that is higher than the intended amount above the Class III price.

It is important to recognize that since the adoption of the "add-back" provision in the Class II pricing mechanism contained in most Federal orders, the effective Class II differential has averaged 4 cents higher than the intended differential level of 10 cents per hundredweight. The add-back feature was intended to ensure that producers receive not less than the Class III value for Class II milk in the blend price whenever the M–W price exceeds the announced Class II price. Thus, the add-back provision of the Class II price formula should be retained so as not to reduce returns to producers.

d. Recognizing Class II Needs in Establishing Shipping Requirements

There were proposals to require supply plants to ship milk for Class II uses or otherwise recognize Class II milk needs in the performance standards of the orders. After considering all the evidence, it is concluded that such recognition should not be provided under the orders.

A few handlers expressed concern that the Federal orders no longer function to secure adequate supplies of milk for Class I and Class II uses. They noted, for example, that the present Class II differential does not even cover the cost of moving milk from the farm to the plant where Class II milk is used. Thus, in their view, if a higher Class II price is to be paid, then a part of the increased price should be used to help make milk more available for Class II. It was argued that shipping standards should be increased and that monies generated by the higher Class II differential should be paid out only to those producers who delivered their milk to either Class I or Class II plants.

There was not a large base of support for the concept of requiring additional milk to be delivered to Class I and Class II operations. The CMPC position, for example, was that this matter could be handled outside the order program and so CMPC did not propose shipping requirements to meet Class II needs. Others opposed such a requirement for orders in the Southeast and Southwest. Moreover, without an increase in the Class II differential it is questionable whether proponents would maintain their position on these proposals.

The question of whether or not shipping or other performance standards for pooling milk should be changed cannot be dealt with properly on the basis of this hearing. Pooling standards were not an issue and the testimony and other evidence generated at the hearing are not directed towards this issue. This record provides no basis for determining how performance standards should be changed on an order-by-order basis. This matter should be handled in another proceeding or proceedings, if there is a need to deal with it further.

3. Product Classification

The Federal milk order system should contain uniform classification provisions. The uniform provisions adopted herein would provide for three classes of use, and are based primarily on the present "uniform classification" provisions contained in most orders. The Agricultural Marketing Agreement Act of 1937 requires that milk be classified "in accordance with the form in which or the purpose for which it is used."

Several of the proposals considered in this proceeding under the heading "Product classification" dealt specifically with the need for uniform classification provisions throughout the order system. Although other proposals under the same heading dealt only with the classification of milk used in particular products, the proponents also recognized the importance of having changes in classification considered on a national basis, rather than only in particular orders. There was no support at the hearing for retaining or establishing differing classification provisions for different orders.

The need for uniform classification provisions has grown since 1974 as intermarket movements of milk products have increased due to improved highways and transportation methods. In addition, new technologies and equipment have increased the capacity of milk plants, resulting in fewer and larger plants with wider distribution. In this competitive environment, differences in classification and resulting differences in the prices paid for milk used to process or manufacture dairy products result in competitive inequities between handlers regulated under different orders. The artificial competitive advantage caused by classification differences between orders can also influence handlers' decisions of where to build plants and produce products whose classification is inconsistent between orders. Classification differences can threaten the orderly marketing of milk between orders.

A survey of each order's Class II provisions by one of the hearing participants delineated a significant variation in classification between the orders. According to the witness, the impact of such variation has become greater as movements of Class II products of as much as 1,000 miles between marketing areas and between regions increase.

Several proposals considered at the hearing would replace the current 3-class pricing system with a 2-class system. Under these proposals, surplus products and a few of the products currently in Class II would be in the lower-priced class, while all other milk uses would be Class I. Proponents of the adoption of 2 use classes stated that the proposals would increase blend prices to producers by adding products to the higher-priced class, and counteract a long-term decline in the percentage of milk used in Class I.

The record shows no legitimate basis for replacing the current 3-class pricing system with 2 classes. The 3-class pricing system allows for greater differentiation among products based on the form in which and the purpose for which they are used than would a 2-class system. Factors such as the form and function of a product, its perishability, and the manner in which it is packaged and distributed can and should be considered in the determination of its classification. The 3-class pricing system has worked well in most Federal orders for a number of years. Some fine-tuning is necessary to achieve uniformity of classification, but a change to 2 classes would not be an improvement. Although a desire to increase returns to producers is understandable, such a goal would be more appropriately addressed through changes in price rather than changes in classification.

A proposal to establish a new Class II–A for some current Class II uses of milk in the event Class II prices are increased significantly is unnecessary because this decision adopts no Class II price increase. A witness for Darigold, Inc., a large cooperative association operating in the Pacific Northwest marketing area, testified that Darigold supports three classes of use. However, he stated, Darigold would like to see a division of Class III into two parts, with the price for each part based on values returned by the marketplace for the products in that part of Class III. The witness explained that Darigold has experienced problems with a "misalignment" between Federal order Class III prices for butter and nonfat dry milk and the returns the cooperative has been able to realize from the sale of those products. The Darigold witness stated that when returns for one Class III product, such as cheese, are greater than for other Class III products such as butter and powder, plant facilities cannot be changed to manufacture the higher-valued product, in part because the adjustment in the price of the noncompetitive product may be temporary. According to the witness, some highly efficient plants could lose their markets and their place in the industry if the situation is not corrected.

Although it is true that at times the market prices obtainable for butter and powder return less for the milk used in these products than the price of cheese does for milk used in cheese, the record of this proceeding does not support a conclusion that the problem addressed by the Darigold witness is one that should be addressed in this proceeding. There is no indication that the problem is widespread. None of the other witnesses testified with regard to the issue. The hearing record does not contain sufficient basis for evaluating the merits of such a proposal. Accordingly, classification of milk in all of the Federal milk orders should be on the basis of three uniform classes, without subclasses.

Testimony by a number of witnesses, and also post-hearing briefs, addressed the issue of the criteria to be used in establishing the appropriate classification of milk used in various products. Many of those testifying advocated a particular classification for milk used to make a specific product, and therefore identified criteria that best supported the classification they favored. The criteria identified by those testifying on the subject of classification fell into two principal categories: Characteristics of particular products, and issues relating to the demand for those products and for the milk needed to produce them.

The characteristics of specific milk uses mentioned by witnesses include the physical characteristics of the products themselves, such as perishability, form, percentage of moisture and butterfat, similarity to other products, and packaging, and also the location at which products are processed and the area over which they are distributed. Issues raised in the proceeding that relate to the demand for milk used in various products included whether demand by handlers is for a relatively constant supply of high-quality milk and whether it is related to the demand by consumers for the processed product, whether a product represents a surplus or balancing use of milk or its production is driven by consumer demand, the elasticity of demand or price-sensitivity of a particular product, and whether the value returned by the market for a product should be reflected in returns to the dairy farmers who produced the milk ingredients of the product.

Historically, the fluid or beverage uses of milk have been classified in the highest-priced class of use (Class I), and the lowest-priced class (Class III) has been reserved for the hard, or dry, uses. The soft products, those from which some moisture has been removed, have fallen into an intermediate class of use

(Class II). Closely related to these classifications on the basis of the physical forms in which products are marketed is the concept of storability versus perishability. The demand by handlers for a readily available supply of high-quality milk for fluid purposes is directly related to the perishability of these fluid products. Consumers expect to find fluid milk products available at all times. Because of the perishable nature of beverage milk products, handlers must be able to replenish stocks in the supermarket dairy case on a fairly constant basis, and have a regular and dependable supply of producer milk from which to process those stocks. Milk supplies that are available for use in fluid products consequently command a higher price than milk supplies used in less perishable products.

Products such as butter, nonfat dry milk and Cheddar cheese, however, are storable for significant periods of time. These products can be made whenever milk supplies are available and held in inventory for some time. In addition, the role played by these products in balancing the supply of and demand for fresh fluid milk is recognized by the dairy price support program of the United States government through its purchases of butter, powder and cheese. As a result, the market value of these products is the foundation upon which prices for the higher use-classifications of milk supplied to handlers are based.

The products included in the intermediate class of use are those that are neither as perishable as fluid products nor perform a balancing function for the market. The milk used in these intermediate products, generally described as "soft" products, is used to process or manufacture products for which handlers know a consumer demand exists. Generally, these products have some of the water content removed from producer milk or contain a high enough butterfat content that they will not be used as beverages. Many Class II products have longer shelf-lives than fluid milk products, while being less storable than the markets' surplus uses for milk.

Class II products traditionally have been processed primarily in the same facilities that process fluid milk products, and therefore require reliable supplies of Grade A milk. It is clear from the record of this proceeding that a number of soft product processing plants are separate from any fluid milk facility, and that not all jurisdictions require that Grade A milk be used in these products. However, the area over which products such as ice cream and cottage cheese are distributed has clearly grown beyond intra-regional and may be, for some centrally located Class II processors, national. At the same time, the availability of Grade B milk has declined, leaving many handlers with no alternative to Grade A supplies. However, even if handlers wished to obtain supplies of Grade B milk for use in Class II products, their inability to sell a product made from non-Grade A milk in many jurisdictions would complicate greatly their ability to distribute that product across broad regions of the country.

The primary distinction between Class II products and the truly surplus milk uses of the market is existing consumer demand. Handlers do not process milk into perishable or semi-perishable dairy products if they do not have a consumer market for those products. Similarly, commercial food processing establishments do not buy milk or intermediate dairy products to use as ingredients in other food products if there is no commercial market for the finished products. Although the argument can be made that a commercial market exists for cheese, nonfat dry milk and butter, all of these products, at the time of their manufacture, are in the position of having to successfully compete in the commercial market or being taken off the market by the government as surplus. These surplus products are manufactured as a means of storing non-perishable milk products for later use. Their potential for storage is the manner in which these products perform their balancing role.

The concept of elasticity of demand, or price sensitivity, often is raised by economists in questions of classification. Some claim that the inelastic nature of demand for fluid milk products has been used as a basis for pricing Class I milk above the level of other dairy products. The demand for Class II and Class III dairy products, on the other hand, has been viewed as being more price elastic. Although testimony was received in this proceeding that cited price sensitivity as a basis for determining the appropriate classification of milk used to produce specific products, the record contains no actual data on the relative price elasticities of the demand for various dairy products. Therefore, there is insufficient basis in the record of this proceeding for using elasticity as a criterion for classification decisions about specific products.

The "form" and "use" requirements of the Act provide most of the needed criteria for classifying milk used in various products. When combined with consideration of types of packaging and recognition of the ability of some dairy products to compete with, or substitute for, others that clearly belong within a certain class, these criteria should make the classification of most products relatively easy to determine.

The new uniform classification provisions for the orders will necessitate new "fluid milk product" and "fluid cream product" definitions that are uniform throughout the orders. In addition, the format of several orders that were not included in the 1974 uniform classification decisions should be changed so that provisions dealing with classification will be more uniform between the orders.

The orders that must be amended substantially to change their classification provisions to accommodate three classes instead of two are the Federal orders regulating the handling of milk in the Upper Florida, Tampa Bay, Michigan Upper Peninsula, and Black Hills marketing areas. In addition, the Southeastern Florida order, which currently provides a Class III price only for the butterfat salvaged from milk of which the skim portion is dumped or used for fertilizer or animal feed, should be amended to incorporate uniform classification provisions.

Class I milk should be all skim milk and butterfat contained in milk products that are intended to be consumed in fluid form as beverages. Fluid milk products require dependable supplies of Grade A milk, usually delivered to city locations with rapid access to concentrations of consumers. However, the most salient features of Class I products are that they are fluid in form and used as beverages. Consequently, a hearing proposal to classify kefir as Class II because it competes with liquid, or drinkable, yogurt should be denied. Instead, milk used to make the beverage form of yogurt should be Class I. Both of these cultured products clearly are intended to be consumed as beverages, and are packaged as beverage milk products.

In addition, milk used to make other heretofore Class II beverage products should also be Class I, without specifying a maximum nonfat solids content or a butterfat content less than 9 percent, at which point fluid products are considered "fluid cream products." Specifically (but not exclusively), eggnog and milkshake drinks that are sold in the dairy case in the same type of packaging as other fluid milk products should be considered fluid milk products. Some of these products may contain previously processed and priced

skim milk and butterfat, such as ice cream mix. In such case, only the fluid skim milk and butterfat used in the beverage (not the ice cream mix) should be considered Class I.

A proposal that the classification of packaged fluid milk products in inventory at the end of each month be classified as Class I instead of Class III should be adopted. Testimony by a proponent witness representing Milk Marketing, Inc., stated that such a change would result in less administrative difficulty in adjusting inventory values in the following month, when the products are actually distributed. In addition, he stated, exclusion of Class I milk from component pricing provisions would result in very complex adjustments in the following month if the fluid milk products in inventory were originally priced on a component basis in Class III.

The post-hearing brief filed on behalf of the National Farmers Organization stated that Class III classification of packaged fluid milk products in inventory at the end of the month allows handlers a 30-day lag in payment for use of milk in Class I, and increases the market administrator's administrative and bookkeeping burden in having to make an adjustment to the handler's obligation in the following month. Although the representative of a group of midwestern cooperative associations indicated that the group was taking no position on the proposal because some members of the group opposed it, there was no testimony in opposition to the proposal.

The proposal should be adopted because it is reasonable to require handlers to pay for the milk used in fluid products for the month in which they used it. Furthermore, adoption of the proposal will assure that handlers ceasing operation at the end of a month will pay the appropriate price for any milk left in inventory. For the markets which have incorporated, or will incorporate, component pricing provisions in their orders, adoption of this proposal will simplify the pricing of fluid milk products in inventory.

A provision is needed in each order where the classification of ending inventory of packaged fluid milk products is being changed from Class III to Class I to specify in the allocation section that in the first month this change is effective, beginning inventory should be subtracted from the skim milk and butterfat remaining in each class, in series beginning with Class III. Beginning with the second month, such beginning inventory would be subtracted from Class I. This procedure will avoid the assignment to Class I without an upcharge of inventory that was classified the previous month in Class III.

Class II milk should be all skim milk and butterfat contained in fluid cream products; used to produce soft, or "spoonable," dairy products regardless of butterfat content; used to produce intermediate dairy products for further processing; and used as ingredients in other food products or other food ingredients. These uses of milk are all governed by consumer demand for the milk components, either as dairy products or as other food products that use milk as an ingredient. Classifying any of these uses as surplus would result in undervaluing the milk produced by dairy farmers. Further, the cost of making Class II products from alternative ingredients, such as nonfat dry milk or condensed milk, would be greater than the cost of using milk priced as Class III to make such products because of the processing or manufacturing costs involved in making the alternative ingredients.

The "fluid cream product" definition now in most orders should be amended to remove sour cream as an item which must be accounted for as disposed of instead of on a used-to-produce basis and to incorporate a standard minimum butterfat content for fluid cream products of 9 percent. The new fluid cream product definition should also be included in those orders without such a definition.

Most products included in Class II as a result of the 1974 uniform classification decisions should continue to be classified as Class II, including frozen desserts, yogurt and cottage cheese, and products that resemble these products in form and use. These products cannot, in the form in which they are acquired by consumers, be consumed as beverages and generally must be eaten with spoons. Frozen desserts should include ice cream, ice milk, frozen yogurt, and milkshake mixes that are disposed of for use in soft-serve form, such as for use in fast-food restaurant dispensers. Milkshake drinks that are disposed of in consumer-type packaging, such as those sold in supermarket dairy cases as beverages, should be considered fluid milk products and classified in Class I regardless of their solids content.

The amended orders should specify that a Class II classification of milk used to produce formulas especially prepared for infant feeding or dietary use should apply only to formulas that constitute replacements for meals, rather than merely having some added vitamins and minerals.

A considerable amount of the testimony dealing with classification involved handlers advocating Class III classification for specific uses of milk that have been, or will be, classified as Class II. A handler representative testified that buttermilk biscuit mix is a very price-sensitive product, that it is distributed over a much wider area than are fluid milk products, and that Class II classification of milk used in the product would make it very susceptible to substitution by dry milk products. Other witnesses stressed the importance of classifying buttermilk biscuit mix uniformly under all of the orders. Several parties expressed the opinion that buttermilk biscuit mix and similar products should be Class II.

Biscuit and pancake mixes, like other batter-type products such as coatings, are sold in a form that allows them to be poured, but certainly are not used or intended for use as beverages. At the same time, their production is driven by demand for the products in which they are used. These uses are in no way surplus uses of milk. Since the production of these products uses a fluid milk product as an ingredient in another product for which there is a specific market demand, it is only equitable that dairy farmers share in the market value of those products by having the milk used in those products priced above the surplus level.

Several witnesses testified that milk disposed of to commercial food processing establishments or used to make sweetened condensed milk sold to commercial food processing establishments should be classified as Class III. One witness stated that Class III classification of milk in such uses would affect only one percent of total milk pooled, and therefore would have little effect on producer returns. A Wisconsin handler who processes sweetened condensed milk testified that that product fits the description of a Class III product in that it has a long shelf life without special packaging or processing, it is manufactured close to the milkshed rather than close to the end users of the product, and that it is not processed or distributed in the same channels as fluid milk products. According to the witness, 75 percent of the sweetened condensed product sold by the handler is processed to meet customers' proprietary formulas, and the product is sold by Wisconsin handlers to locations as far away as Florida, Texas and California. The witness claimed that any Class II price differential would result in a price disadvantage three times the differential for sweetened condensed milk versus

nonfat milk powder because the sweetened condensed product is condensed to one-third of its original volume.

During the five years preceding the hearing, the Minnesota-Wisconsin, or Class III, price ranged from slightly over $10 to almost $15 per hundred weight. The largest percentage by which the Class II price could have exceeded the Class III price during this period, using an average 15-cent Class II price differential, would have been 1.5 percent. The smallest percentage difference between the two prices would have been approximately 1 percent. During the same time period, sweetened condensed milk formulated to meet customers' proprietary formulas was apparently moved to Florida, Texas and California, among other destinations, at costs per hundredweight for transportation that represented 10–25% of the Class III price of the milk from which the product was made. (The cost of transportation was computed by dividing the 3.83 cents/hundredweight/10 miles hauling rate established in the record by 3 to adjust for condensation of the product, and multiplying the resulting 1.3-cent rate by the mileage to St. Petersburg, Florida (1301 miles); Dallas, Texas (1078 miles); and San Francisco, California (2196 miles) from a location approximately 175 miles north of Chicago, as described by the witness.)

It is not logical that a differential of less than 2 percent over the Class III price would persuade food processors who are already paying a significant cost for a product custom-tailored to their needs to be delivered over a considerable distance to change their ingredient use from sweetened condensed to powder. The product purchased by the food processors is not a standardized surplus product, but one that is made specifically for their purposes according to their specifications. In addition, the processors apparently are willing to pay significantly more than the raw product cost for the ingredient product they are purchasing. Accordingly, milk used to make sweetened condensed milk should be classified as Class II.

Arguments advanced to classify milk moved to commercial food processors as Class III instead of Class II also are not persuasive. A witness representing the Trade Association of Proprietary Plants (TAPP), a proponent of such a classification change, stated that Class II classification of milk disposed of to a commercial food processor represents unnecessary regulation and government intrusion into the business of unregulated plants. TAPP's brief stated that enhancement of the value of the marketwide pool and the relative value of end products sold by a commercial food processor are not appropriate reasons for extending pricing, accounting and regulation to non-fluid uses of milk. The brief also argued that milk disposed of to commercial food processors does not meet the criteria of competing with or following the same channels of commerce as fluid milk products.

A brief filed by Kraft, another proponent of Class III classification of milk disposed of to commercial food processors, stated that products produced by such facilities are more similar to Class III uses than to Class II. The brief concluded that the milk used to make such products should be classified as Class III or followed through the facility and prorated to its ultimate use, as is done in milk plants. A Kraft witness had testified at the hearing that milk delivered to a commercial food processing establishment in Wisconsin for use in a cheese powder product is Class II, while milk used to make the same product at a nonpool cheese plant in Missouri is classified as Class III. The witness advocated adoption of a size criterion to distinguish between true commercial food processing establishments, such as small bakery operations, and true processing plants. Milk delivered to commercial food processors would be Class II, and milk moved to processing plants would be Class III.

It is unclear how the classification of milk moved to commercial food processors is any more of a government intrusion than classification of milk used in a pool plant, or how Class II classification differs in this regard from classification in any other class. The potential of Class II classification in such uses for enhancing the value of marketwide pools is an effect of Class II classification, and not the cause. The ingredient use of milk or its components in any food products of which the manufacture is driven by consumer demand is one basis for determining that Class II classification is appropriate. Dairy farmers should share in the value of their product when its value as an ingredient in other food products is recognized in the marketplace. Many consumers rely on the nutritional value, as well as the convenience, of processed food products, and the contribution of milk to that value should not be understated by pricing ingredient-use milk as if it were surplus to the requirements of the market. The criterion of following the same channels of commerce as fluid milk products is one of the characteristics descriptive of Class II use, but not the only one.

Use of milk, or its components, as an ingredient in other food products is a Class II use. Therefore, milk disposed of to a commercial food processor does not have to be followed through the facility to its end use to determine classification. Although some products produced by commercial food processors may, in some respects, resemble Class III products, they cannot be classified as Class III because they are not surplus uses of milk and do not compete directly with such uses. In addition, milk used in food products that may be processed in milk plants, pool or nonpool, should be classified as Class II. Milk used in the cheese powder products such as those discussed by Kraft should be classified as Class II wherever the product is processed. The cheese used in making the powder has already been priced as Class III and should not be affected, but the condensed fluid milk products used to make the powder represent milk used to process another food product. A description of the dry milk products that should be considered Class III is contained in the later discussion of milk to be classified as Class III.

No distinctions between commercial food processing establishments and processing plants should be made on the basis of size. Adoption of such a distinction would result in small candy makers disadvantaged by the cost of their ingredients in relation to large candy manufacturers, who already enjoy advantages in regard to economies of scale. Other small food product processors would be similarly disadvantaged on the basis of the size of their operations.

The orders should be amended to allow diversions of producer milk directly from farms to commercial food processors. A number of hearing participants testified in favor of such a change on the basis that it would result in transportation efficiencies. No reasons were given, and none is apparent, for limiting milk receipts at commercial food processors to those which come through pool plants. Such a change will improve the efficiency with which milk can be moved from producers' farms to where it will be used. Therefore, the minor amendments necessary to effect such a change should be made.

Based on the above determinations that milk used as an ingredient in other food products should be Class II, it very clearly follows that milk used in the

manufacture of milk chocolate and of a "dairy protein-based fat substitute" should be Class II. Extensive arguments supporting the Class III classification of milk used to make milk chocolate were offered on behalf of Hershey and Nestle, two well-known chocolate manufacturers. However, the witnesses' many comparisons of the properties of chocolate crumb, an intermediate product of the milk chocolate-manufacturing process, with those of Class III products overlooked the fact that chocolate crumb is not a surplus dairy product and, in fact, is not a dairy product at all. In milk chocolate, milk is used as a necessary ingredient of a product whose production is driven by consumer demand and not, as implied by proponents, by the availability of milk during the spring months.

Hershey and Nestle may, as they claimed, be able to replace their fresh fluid milk receipts with less expensive sources of whole milk powder, or with other sources of fresh milk. However, if such replacement were easily accessible or significantly less expensive, it is unlikely that handlers in Wisconsin would be able to market sweetened condensed milk to Florida, Texas and California for use in candy-making, as the record indicates they are able to do. The manufacturing process described by Hershey that results in a higher cost of production than would a process using whole milk powder is the result of manufacturing decisions made by Hershey that without doubt have a major effect on the company's ability to market a product of the quality it desires. However, there is no reason for dairy farmers to, in effect, pay the additional costs associated with Hershey's preferred manufacturing process.

A witness for Nutrasweet testified that milk used to produce a new product manufactured by that company, a "dairy protein-based fat substitute," should be Class III because it can also be made from egg whites or from whey protein concentrate, and will compete with vegetable oils and cellulose gel. The witness stated that the product has been approved for use in frozen desserts, but should be seen as an opportunity for the dairy industry to maintain its share of the food market and sell more dairy protein rather than as a substitute for butterfat.

A trade group of handlers supported Class III classification for milk used to make any new fat-substitute products on the basis that dairy-based ingredients should not be priced higher than non-dairy ingredients used for the same purpose. Two cooperative association spokesmen argued that milk used to make the fat substitute product should be classified and priced according to the classification of the product in which it is used as a substitute for milkfat.

The dairy protein-based fat substitute is very likely only one of the first to be made from milk components, and it is important to assure that the milk used to produce such products is not priced as if these were surplus uses. Milk and its components have unique and valuable nutritive qualities, and they should not be undervalued, either by those who would use them to produce new products desired by consumers or by the dairy farmers who produce the raw materials. Consequently, milk used to produce new products that cannot be clearly identified as belonging in either Class I or in Class III should be classified as Class II. An attempt has been made to describe in order language the types of products that are intended to be included in each class of use, so that classification of new products will be more clear-cut than at present. New products for which the appropriate classification is not readily apparent should be classified in Class II until the proper classification is established through another proceeding.

A proposal to classify mozzarella and other Italian cheeses as Class II instead of Class III should be denied. Although testimony that the manufacture of these cheeses is demand-generated and that Mozzarella has a relatively short shelf-life appears to be accurate, the form in which Mozzarella and some of the other Italian cheeses are sold is like that of Cheddar cheese. Although Mozzarella is considered a soft cheese and has a higher moisture content (52–60 percent) than Cheddar (maximum 39% moisture), it maintains its shape in a block and is sold to consumers in the same packaging and form (sliced, shredded) as cheddar. (Official notice is taken of the publication Cheese Varieties and Descriptions, U.S. Department of Agriculture, Agricultural Handbook Number 54, Prepared by Agricultural Research Service, Issued December 1953, Slightly revised January 1978; Reprinted by National Cheese Institute, 699 Prince Street, Alexandria, Virginia). The moisture content of Provolone is just a little higher than that of Cheddar, and Parmesan cheese contains less moisture, at 32%, than any of the others. In terms of "form", all of the cheeses mentioned so far exist in a solid form and, when shredded or grated, the small pieces of cheese remain separate without flowing back together. Although Mozzarella is not customarily eaten as an hors d'oeuvre with crackers, it and the other "hard" Italian cheeses are often used similarly to Cheddar, as sprinkled toppings and additives to food for the purpose of enhancing flavor. Therefore, milk used in manufacturing these Italian cheeses should be classified with Cheddar cheese as Class III.

Although the proponent for classifying Italian cheese as Class II considered Italian cheeses as a group, it is clear that Ricotta cheese differs significantly from the others. Ricotta has a moisture content of 68–73 percent, comparable to that of cottage cheese (70–72 percent). Ricotta is packaged in cup form, similar to the packaging of cottage cheese and yogurt, does not hold a solid form, and cannot be shredded or grated into pieces that remain distinct. Ricotta and cottage cheese can be used as substitutes in some prepared foods. Although whey is a major ingredient in the manufacture of Ricotta cheese, the whey constituents would already have been priced (as Class II or Class III) as part of the milk used to make cottage cheese or cheese. Therefore, only the fresh skim milk and butterfat used to make Ricotta should be classified and priced as Class II.

In the three Northeastern orders, whey is currently included as a by-product with cottage cheese as a Class II product and with cheese as a Class III product. None of the other orders mentions the classification of skim milk and butterfat used to produce whey, as it is considered a by-product of cottage cheese and cheese manufacture. There is no need to continue to specify under any order a classification for whey in the classification section. Although whey often is converted to a powdered product, dried whey is not considered a milk product. The production of whey is incidental to the manufacture of cottage cheese and cheese, and all of the skim milk and butterfat used to produce such products should be classified in the same class as the product which is intended to be manufactured.

Class III milk should be all skim milk and butterfat used to make hard cheeses, of types that can be grated or shredded; butter and other spreads such as cream cheese, and alternative forms in which milkfat or butterfat can be stored for later use such as butteroil, anhydrous milkfat and plastic cream, and nonfat dry milk and other forms of dry milk that can be reconstituted as fluid milk products. Evaporated or condensed products in consumer packaging should also be included in Class III because of their highly storable nature and because those products, too, can be reconstituted as fluid products by consumers. In addition, fluid milk

products and Class II products that are dumped or sold as livestock feed for reasons beyond a handler's control (such as spoilage or failure to form cottage cheese curd, for instance) or lost in accidents, should be Class III. The portion of nonfluid milk products used to fortify fluid milk products with nonfat solids that do not represent an increase in the volume of fluid milk products should be Class III, as should skim milk and butterfat in shrinkage or plant loss up to the limit determined in the shrinkage provision.

In determining the appropriate products to be included in Class III use the form and purpose of the primary surplus products must be considered, as well as the forms and purposes of products that may be used as substitutes or are similar in form and/or purpose. The basic surplus products are Cheddar cheese, butter and nonfat dry milk. These are the products purchased by the United States government in the operation of the price support program. The primary purpose of these three products is as a means of storing milk solids in non-perishable form when milk production exceeds the market's immediate needs. A common physical characteristic of the products is that they are in a solid form, in that they hold their shape at room temperature.

A witness representing Central Milk Producers Cooperative supported a change in the classification of anhydrous milkfat, plastic cream and butteroil from Class II to Class III by explaining that these products are used to store fat for later use, and are marketed largely for export for reconstitution purposes. The witness stated that the butterfat content of these products makes them very much like butter, and that plastic cream is stiff and moisture-reduced. A Kraft representative testified that anhydrous milkfat is used for balancing the fat content of processed cheese, and a brief filed on behalf of Kraft asserted that none of these products meets the criteria of Class II use, that they all contain less skim milk than butter does, and that they are storable for longer periods.

According to USDA General Specifications for Approved Dairy Plants and Standards for Grades of Dairy Products, plastic cream contains approximately 80 percent milkfat, equivalent to the milkfat content of butter; and anhydrous milkfat and butteroil both contain over 99 percent fat and less than .3 percent moisture. (Official notice is taken of the specifications, issued October 2, 1975; published October 10, 1975; 40 FR 47925.) It is apparent that these products do represent a means of storing milkfat for later use, and are distributed not only on a national basis, but in international commerce as well. Accordingly, their classification should be in Class III.

Cream cheese, although a soft cheese with a high moisture content, is sold in a brick form, like harder cheeses. Although its physical form does not lend itself to grating or shredding, cream cheese is used as a substitute for butter in that product's function as a spread. Consequently, milk used to produce cream cheese should be classified as Class III.

Nonfat dry milk and other dry milk products such as whole milk powder and buttermilk powder that can be reconstituted as fluid milk products should be classified as Class III. These products exist in dry powdered form, and serve the function of storing milk solids for later use in a variety of fluid products, Class II dairy products, and other food products, in place of fresh fluid milk. Although testimony in the record indicates that whole milk powder has a much shorter shelf life than skim milk powder, both products take the same form and are used for somewhat the same purposes. In addition, national market prices for whole milk powder are reported along with those for butter, Cheddar cheese and nonfat dry milk. (Official notice is taken of Dairy Market News, Volume 58, Report 22, page 9, for the week of May 27–31, 1991).

The Class III milk uses which are not discussed in this decision represent no change from the current Class III classification provisions resulting from the 1974 uniform classification decisions. In several orders, provisions closely related to the actual classification language, including shrinkage, will be changed so that the orders will be more uniform.

In view of the accommodations of Class II diversions to commercial food processors and the change in the classification of unspecified products as Class II rather than Class III, the classification of transfers and diversions to nonpool plants from fully regulated plants should be amended to give priority assignment to Class II over Class III. Products processed at nonpool plants often compete with products processed by commercial food processors.

4. Pricing of Concentrated and Reconstituted Milk

All orders should be amended to define concentrated milk that contains less than 50 percent total milk solids as a fluid milk product. As a result, the classification of receipts of concentrated milk will be determined in a manner similar to receipts of bulk fluid milk. Concentrated milk will encompass "condensed milk", which is an accepted alternative name for "concentrated milk", but will not include other concentrated forms of milk that are distinguishable products, such as "sweetened condensed milk" and "evaporated milk." In order to reduce confusion, the term "condensed milk" would be eliminated from all orders.

Current regulatory provisions that apply to reconstituted milk made from nonfluid milk ingredients, such as nonfat dry milk, should be modified. Any payment obligation that currently applies to reconstituted fluid milk products made from such ingredients should be reduced by $1.00 per hundredweight. Also, an additional option is provided that allows for the Class I value of reconstituted milk to be passed back to the Federal order market that provides the nonfluid milk ingredients. These modifications will apply if labeled reconstituted products are distributed. Furthermore, receipts of nonfat dry milk should be allocated to Class I use on a pro rata basis the same as receipts of concentrated milk.

A number of proposals were considered that concerned regulatory changes to deal with intermediate concentrated milk products, such as concentrated milk and nonfat dry milk, that are reconstituted and disposed of as fluid milk products. Concentrated milk products were referred to collectively throughout the hearing as those milk products from which water has been removed by evaporation and drying processes or the use of reverse osmosis (RO) technology. Most hearing participants contended that new technology, such as RO, could increase marketing efficiencies if current regulatory provisions were revised. The overlying basis of most of the proposals is the potential for increased marketing efficiency that could result from reduced hauling costs obtained by shipping concentrated milk products long distances to supply or supplement the fluid milk needs of deficit markets.

Under the current provisions of most orders, milk that is used to produce nonfat dry milk is priced as a Class III use. Milk that is used to produce concentrated milk that is disposed of in bulk form is priced in Class II, unless the handler can establish a Class III use. However, any beverage reconstituted milk which is made by combining water with nonfat dry milk or a concentrated milk product is defined as a fluid milk product and is a Class I use.

In order to provide uniform pricing among handlers for milk in Class I use, the orders provide a procedure for recognizing any conversion of lower-priced nonfluid milk products into the higher-priced fluid uses. This is accomplished by allocating a handler's receipts of nonfluid milk products to the lowest-priced class (referred to as down allocation) and then in sequence to the higher-priced classes of milk. If any of the nonfluid receipts are allocated to Class I, then a charge on such receipts equal to the difference between the Class I and Class III prices is applied (referred to as a compensatory payment).

Most of the parties advancing changes in the pricing of reconstituted milk contend that the current regulatory treatment inhibits the use of these concentrated milk ingredients as an alternative to bulk fluid milk. Also, others contend that the payment at the Class I price for nonfat dry milk that is reconstituted is excessive since no recognition is given to the extra manufacturing costs involved in the initial processing of the nonfat dry milk. Most of the industry proposals would preserve classified pricing as a necessary element to stabilize marketing conditions by pricing the milk used in concentrated ingredients (when used in fluid milk products) as a Class I use in some manner although proposals that would eliminate any Class I pricing were also considered. Elimination of Class I pricing for reconstituted nonfat dry milk was proposed as a first step in the elimination of Federal milk order regulation by the Antitrust Division of the Department of Justice (DOJ).

The major issue raised by the DOJ is that Federal milk orders are no longer necessary in view of a number of changes that have occurred in the milk industry. On the other hand, other hearing participants testified that inherently unstable marketing conditions continue to exist because of a number of unique features that are associated with the production and marketing of milk. This discussion does not deal with this basic issue of whether a government-enforced classified pricing plan continues to be necessary to promote the orderly marketing of milk. Instead, it deals only with proposed changes to the treatment of concentrated milk ingredients and reconstituted milk in the context of the current regulatory plan.

The other remaining proposals would maintain classified pricing by pricing concentrated milk ingredients (both concentrated milk and powder) in the same manner as fluid milk receipts are now priced. The obvious intent of the proposals is to provide for the minimum order pricing of concentrated ingredients in the source market or plant on the basis of the classification in the destination plant or market. The first step necessary to accomplish this objective would be to expand the fluid milk product definition to include concentrated ingredients. Such a definitional change would automatically result in the application of the order provisions concerning the classification of bulk fluid milk products, including the provisions that apply to the classification of transfers of such products.

Provisions to classify transfers of bulk fluid milk products are necessary to determine a handler's complete utilization of the total amount of milk that is received. Also, the purpose of the provisions concerning the classification of producer milk that are commonly referred to as allocation provisions is to determine how a handler's different types of receipts have been used. The end result is the amount of producer milk used in each class that is subject to Class prices. The relationship between the two sets of provisions is that bulk fluid milk that is transferred is classified in accordance with the manner in which it is allocated to uses in the transferee plant or market.

The regulatory treatment of nonfluid milk products is significantly different from the treatment accorded to fluid milk products. For example, the amount of milk that is used to produce nonfat dry milk is priced in Class III under the order regulating the initial receipt of milk. If the nonfat dry milk is supplied to an other order plant, that order allocates the receipts of milk (the nonfat dry milk plus the water originally associated with such product) to a plant's uses of milk. Any Class I use allocation is retained in such market without affecting the original obligation under the source order.

The provisions concerning the classification of transfers and producer milk in most orders are based on the regulatory treatment provided by the uniform classification decisions issued February 19, 1974 (39 FR 8202, 8452, 8712 and 9012) and decisions issued June 19, 1964 concerning the manner of integrating into the regulatory plan milk that is not subject to classified pricing (29 FR 9002, 9110 and 9214).

The consensus of opinion among hearing participants is that the use of concentrated ingredients provides a potential for substantial marketing efficiencies because of reduced hauling costs. However, actual marketing experience with the use of such ingredients is extremely limited. There has been some use of nonfat dry milk for reconstitution of certain fluid milk products in milk shortage situations in southern areas of the country. However, there is no marketing experience with the use of concentrated milk for fluid products. This is despite the fact that concentrated milk is already defined as a fluid milk product in the three Florida orders which have had the need to import substantial quantities of supplemental supplies of bulk fluid milk from distant areas.

Despite the lack of marketing experience, the conclusion that there is a potential for substantially reducing hauling costs is logical in view of the weight-reduction associated with the removal of water from milk. The record identifies the substantial amounts of milk that have been shipped from surplus to deficit areas over a number of years. The removal of one-half to two-thirds of the water from milk obviously has the potential to greatly reduce the number of loads of milk that would need to be shipped to meet fluid milk demand. As a result, concentrated milk should be defined as a fluid milk product to provide the potential to take advantage of weight-reducing technology in supplying fluid milk needs. However, nonfat dry milk should not be so defined.

Nonfat dry milk is a storable product that is marketed through different channels than fresh fluid milk, including concentrated milk. Fluid milk is priced in the month in which it is marketed, including milk that is used to produce nonfat dry milk which is a Class III, surplus use product. The conversion of nonfat dry milk to a fluid use, and the time delay between its initial production and the conversion to fluid use, presents a host of technical, administrative, and equity problems in determining the appropriate Class I value to associate with nonfat dry milk if it were to be defined and treated as a fluid milk product.

In addition to other areas of concern, questions were raised as to which Class I price should apply, i.e., the price that applied during the month the nonfat dry milk was made or the price during the month that the nonfat dry milk is reconstituted. In order to provide for uniform Class I pricing, it would appear that the month of reconstitution would be the appropriate basis for Class I pricing. The application of such price would then require a payment by the handler that originally processed the milk to make the nonfat dry milk. With the time lag involved, the plant making

the nonfat dry milk may not be a pool plant, or may not even be operating, in the month of reconstitution. Thus, the issue of the uniform treatment of regulated versus unregulated milk as potential sources of nonfat dry milk is also presented. Even if the original plant is identifiable and regulated in the month of reconstitution, such Class I pricing after the fact has implications to the original value of the nonfat dry milk. On the other hand, pricing the milk at the Class I value during the month that the nonfat dry milk is processed obviously would have an immediate impact on the price of nonfat dry milk. It is questionable as to why a manufacturer would be willing to pay the Class I price for milk used to make nonfat dry milk when it is not known if it will eventually be used in fluid milk products.

It is obvious that the processing, storing and marketing of nonfat dry milk does not lend itself to including such dry milk ingredients within the fluid milk product definition. Such concerns are not evident with respect to concentrated milk which, in its fresh fluid form, is marketed over a short period of time. Although nonfat dry milk should not be treated as a fluid milk product, reconstituted milk made from nonfluid milk ingredients should continue to be defined as a fluid milk product as is currently provided under orders. However, some pricing and allocation changes should be made to the current process that recognizes the conversion from a nonfluid to a fluid use, as discussed later.

Concentrated milk that contains less than 50 percent total milk solids should be defined as a fluid milk product. The use of the 50 percent milk solids standard was generally proposed and referred to in testimony. However, there was no significant testimony relating directly to the use of such standard. In this regard, it is noted that the process of removing up to two-thirds of the water contained in milk or skim milk would result in a product that contains substantially less than 50 percent total milk solids. Thus, the use of such a standard to distinguish between fluid and nonfluid products would accommodate the objectives that are sought.

The definitional change for concentrated milk automatically results in the application of different provisions to establish the classification of receipts of such milk, as previously mentioned. Basically, the provisions applicable to the classification of bulk fluid milk would be applied to concentrated milk, with some modifications that are discussed later. Currently, bulk fluid milk that is transferred between orders is priced in the transferor order on the basis of the classification in the transferee order. Such milk can be classified as Class II or Class III to the extent that such use is available if the operators of both plants agree on such uses. Otherwise, such transfers are prorated to Class uses on the basis of the receiving plant's or market's Class I use, whichever is lower. Bulk fluid milk transfers between plants regulated under the same order are assigned to Class I, unless the operators of both plants request the same classification in another class, but are limited to the pounds of butterfat and skim milk remaining in each class.

Although most of the testimony concerning the potential benefits of shipping concentrated milk dealt with intermarket shipments, the definitional change also results in fundamental changes to intramarket shipments of such milk which could also result in reduced hauling costs. Furthermore, such milk may also be received from unregulated supply plants. Such movements should likewise be accommodated under the regulatory provisions, but with some modification from current provisions.

The removal of water from milk to make a concentrated milk product obviously creates some administrative and accountability difficulties. A handler who concentrates milk that is received from producers is obligated to pay for the amount of milk that was originally received. Thus, it is necessary to account for the original volume of water that was associated with the producer milk. In addition, accountability is further complicated since the classification of the concentrated milk that is transferred to another market will be determined on the basis of its allocation to uses in the second market. A handler who reconstitutes concentrated milk must likewise account for the water that was originally associated with the producer milk. Otherwise, fluid milk disposition would exceed the receipts of milk. A full accounting of the milk solids content of milk received is not conducted since virtually all orders provide for only butterfat and skim milk accounting.

In view of possible accounting problems, some hearing participants suggested that it might be necessary to account for milk on the basis of both the butterfat and nonfat milk solids content of milk. On the other hand, order provisions currently recognize the potential problem by requiring that a handler must account for an equivalent amount of water originally associated with nonfat milk solids that are ultimately disposed of by the handler. Conversion factors are generally used to determine a full accounting of milk receipts. For example, nonfat dry milk is converted to its fluid skim equivalent by multiplying the pounds of nonfat dry milk by a factor of 11. Other factors are applied for lesser concentrations of milk solids. In addition, the marketing of concentrated milk would generally reflect the pounds of product marketed as well as the butterfat and solids content. Such information, in conjunction with standard conversion factors, would appear to accommodate the marketing of concentrated milk for fluid use. In the event that actual marketing experience with concentrated milk indicates accountability problems, further rule making proceedings are available to deal with such actual problems that may develop. Until such time as any further precision is necessary, the use of available market information and conversion factors appears to be sufficient to account for the marketing of concentrated milk.

Although concentrated milk should be defined as a fluid milk product, such milk should not be classified in exactly the same manner as applies to transfers of bulk fluid milk products. A modification is necessary to further promote marketing efficiency that would not exist if current provisions were applied to concentrated milk. The modification is also consistent with the views of at least one hearing participant who suggested that concentrated milk should be followed to insure that it is used in Class I to provide for a classification in the same manner that applies to bulk fluid milk. The hearing participant contended that simply defining concentrated milk as a fluid milk product would place free standing Class II nonpool plants at a disadvantage in using concentrated ingredients relative to pool distributing plants that have Class II uses.

Absent a modification, concentrated milk that is now shipped from one order to another for other than fluid use would be allocated to some extent to Class I use if the receiving plant has any Class I use. Such milk would then be priced in the transferor market at a lower price than the transferee market if the transfer is from a lower-priced to a higher-priced market. The price difference between the two markets is, in effect, a location adjustment credit that would cover some of the transportation cost. As a result of such a classification, a corresponding amount of producer milk in the transferee market would be

In order to provide uniform pricing among handlers for milk in Class I use, the orders provide a procedure for recognizing any conversion of lower-priced nonfluid milk products into the higher-priced fluid uses. This is accomplished by allocating a handler's receipts of nonfluid milk products to the lowest-priced class (referred to as down allocation) and then in sequence to the higher-priced classes of milk. If any of the nonfluid receipts are allocated to Class I, then a charge on such receipts equal to the difference between the Class I and Class III prices is applied (referred to as a compensatory payment).

Most of the parties advancing changes in the pricing of reconstituted milk contend that the current regulatory treatment inhibits the use of these concentrated milk ingredients as an alternative to bulk fluid milk. Also, others contend that the payment at the Class I price for nonfat dry milk that is reconstituted is excessive since no recognition is given to the extra manufacturing costs involved in the initial processing of the nonfat dry milk. Most of the industry proposals would preserve classified pricing as a necessary element to stabilize marketing conditions by pricing the milk used in concentrated ingredients (when used in fluid milk products) as a Class I use in some manner although proposals that would eliminate any Class I pricing were also considered. Elimination of Class I pricing for reconstituted nonfat dry milk was proposed as a first step in the elimination of Federal milk order regulation by the Antitrust Division of the Department of Justice (DOJ).

The major issue raised by the DOJ is that Federal milk orders are no longer necessary in view of a number of changes that have occurred in the milk industry. On the other hand, other hearing participants testified that inherently unstable marketing conditions continue to exist because of a number of unique features that are associated with the production and marketing of milk. This discussion does not deal with this basic issue of whether a government-enforced classified pricing plan continues to be necessary to promote the orderly marketing of milk. Instead, it deals only with proposed changes to the treatment of concentrated milk ingredients and reconstituted milk in the context of the current regulatory plan.

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In view of possible accounting problems, some hearing participants suggested that it might be necessary to account for milk on the basis of both the butterfat and nonfat milk solids content of milk. On the other hand, order provisions currently recognize the potential problem by requiring that a handler must account for an equivalent amount of water originally associated with nonfat milk solids that are ultimately disposed of by the handler. Conversion factors are generally used to determine a full accounting of milk receipts. For example, nonfat dry milk is converted to its fluid skim equivalent by multiplying the pounds of nonfat dry milk by a factor of 11. Other factors are applied for lesser concentrations of milk solids. In addition, the marketing of concentrated milk would generally reflect the pounds of product marketed as well as the butterfat and solids content. Such information, in conjunction with standard conversion factors, would appear to accommodate the marketing of concentrated milk for fluid use. In the event that actual marketing experience with concentrated milk indicates accountability problems, further rule making proceedings are available to deal with such actual problems that may develop. Until such time as any further precision is necessary, the use of available market information and conversion factors appears to be sufficient to account for the marketing of concentrated milk.

Although concentrated milk should be defined as a fluid milk product, such milk should not be classified in exactly the same manner as applies to transfers of bulk fluid milk products. A modification is necessary to further promote marketing efficiency that would not exist if current provisions were applied to concentrated milk. The modification is also consistent with the views of at least one hearing participant who suggested that concentrated milk should be followed to insure that it is used in Class I to provide for a classification in the same manner that applies to bulk fluid milk. The hearing participant contended that simply defining concentrated milk as a fluid milk product would place free standing Class II nonpool plants at a disadvantage in using concentrated ingredients relative to pool distributing plants that have Class II uses.

Absent a modification, concentrated milk that is now shipped from one order to another for other than fluid use would be allocated to some extent to Class I use if the receiving plant has any Class I use. Such milk would then be priced in the transferor market at a lower price than the transferee market if the transfer is from a lower-priced to a higher-priced market. The price difference between the two markets is, in effect, a location adjustment credit that would cover some of the transportation cost. As a result of such a classification, a corresponding amount of producer milk in the transferee market would be

assigned to other than Class I use. As a result, the minimum order price for milk in Class I use would be reduced for a distributing plant that has Class II and Class III uses even though the receipt of concentrated milk was intended for a Class II or Class III use. Under these circumstances, there would be no marketing efficiency gain. Fluid milk sales and revenues would be merely transferred from the higher-priced market to the lower-priced market. The potential gain from treating concentrated milk as a fluid milk product only occurs if milk is shipped in its concentrated form for use in fluid milk products.

In order to accomplish the intended objectives, interorder transfers of concentrated milk should be treated the same as transfers of bulk fluid milk products if the transferee plant establishes an actual disposition of a concentrated or labeled reconstituted fluid milk product. Otherwise, any receipts of concentrated milk are to be down allocated. The same requirement should also be applied to receipts of concentrated milk from unregulated supply plants to establish a uniform treatment for such types of shipments.

The pricing of intramarket transfers is somewhat different than intermarket shipments where a location adjustment credit automatically applies when milk is transferred from a lower to higher-priced market. Intramarket shipments are assigned to Class I use, unless both handlers agree on a lower classification, but are limited to the pounds of skim milk and butterfat remaining in each class. Milk that is assigned to Class I use is priced at the transferee plant subject to a location adjustment credit that may apply if it is demonstrated that such milk is actually needed for Class I use. This assignment of location adjustment credits is intended to prohibit the needless reduction of pool proceeds by having milk priced at distant, lower-priced areas when it is not demonstrated that it is needed for Class I use.

In order to provide a measure of equal treatment between intramarket and intermarket shipments, the location adjustment credits that now apply under the orders should be applied to the fluid milk equivalent of any concentrated milk shipped between pool plants. A failure to do so, and to base such credits on product pounds shipped, would reduce a supply plant's location adjustment credit and increase the handler's order obligation for Class I milk. Such an increase would partially offset any potential savings that could be realized from lower hauling costs associated with shipping milk in concentrated form.

It is noted that the inclusion of concentrated milk in the fluid milk product definition could affect the regulatory status of any number of plants. Plants that currently ship condensed milk could become regulated plants under other orders as a result of such qualifying shipments of fluid milk products. At the same time, plants that currently receive condensed milk shipments will experience an increase of fluid milk receipts that could jeopardize their regulatory status. Such regulatory issues were not considered at the hearing and, thus, the full impacts of the definitional change cannot be foreseen at this time. Any potential problems will have to be dealt with as circumstances warrant.

With respect to nonfat dry milk, a number of parties expressed the concern that the current procedure results in a total payment for nonfat dry milk that is in excess of fluid milk Class I prices because no recognition is given to the additional cost that is incurred in processing milk into nonfat dry milk. On this basis they contend that nonfat dry milk is prohibited from becoming a viable economic alternative to the use of supplemental supplies of fresh fluid milk for Class I use. Basically, the argument implies that the full Class I price in any market need not be applied to reconstituted milk because the additional processing costs involved offset a portion of the difference between the Class I and Class III prices for fluid milk.

In establishing minimum Class I prices, Federal orders have generally not recognized any processing costs that might be incurred by a fluid milk handler. With minimum raw milk prices being uniform among handlers, the remaining aspects of competition among handlers is the efficiency of their plant processing and distribution activities. Recognition of costs that might be incurred in processing operations, or because of an election by a handler to use nonfluid rather than fluid ingredients, would tend to diminish the economic incentive to minimize operating costs and maximize efficiency. Thus, the types of receipts, and the associated costs of such receipts, have had no bearing on the minimum order price for milk in Class I uses.

A decision by a handler to use nonfat dry milk to reconstitute skim milk would obviously be based on the relative costs of using nonfat dry milk or fluid skim milk. At a minimum, the order Class I price versus the cost of nine pounds of nonfat dry milk plus the difference between the Class I and Class III prices would provide the basis of the comparison.

Under the Upper Midwest order, the cost of nine pounds of Grade A nonfat dry milk exceeded the average Class I price for skim milk (with the value of all butterfat removed) by 71 cents and $1.89 per hundredweight for 1988 and 1989, respectively. With the application of a compensatory payment to reflect the difference between the minimum order Class I and Class III prices, the average cost per hundredweight of reconstituted skim milk versus fresh skim milk would have increased to $1.74 and $2.68 per hundredweight for 1988 and 1989. Such cost differences do not reflect any reconstituting costs.

Under the Southeastern Florida order, where the Class I price is substantially higher, the cost of fresh fluid Class I skim milk exceeded the cost of nine pounds of nonfat dry milk by $2.31 and $1.09 per hundredweight for 1988 and 1989. Such comparison excludes any transportation cost for Grade A nonfat dry milk. With a compensatory payment, the cost of a hundredweight of reconstituted skim milk would have exceeded the cost of Class I skim milk by the same amounts as under the Upper Midwest order.

In view of the increasing cost of nonfat dry milk over the years, it no longer appears necessary to apply an additional payment at the full difference between an order's Class I and Class III prices to maintain an effective classified pricing plan. The basic reason for such a conclusion is that the cost of processing milk into nonfat dry milk, as reflected in the prices of nonfat dry milk, has increased substantially while Class I differentials have increased little, except for increases mandated by the 1985 Farm Bill.

A number of parties referred to the margin between the Price Support level for manufacturing grade milk and the CCC purchase prices for butter and nonfat dry milk of $1.22 per hundredweight as an indication of the cost of manufacturing nonfat dry milk. Other parties referred to processing costs in the range of $1.00 or more per hundredweight. Furthermore, a September 1989 Cornell University study on manufacturing costs in butter/powder plants concluded that the average cost per pound of manufacturing nonfat dry milk was 13.29 cents. Such cost averaged 7.89 cents per pound of nonfat dry milk if manufacturing operations were projected to 100 percent capacity. (Official Notice is taken of Manufacturing Costs in Ten Butter/

Powder Processing Plants, by Mark W. Stephenson and Andrew Novakovic, Department of Agricultural Economics, Cornell University Agricultural Experiment Station, A. E. Res. 89–15, September 1989.) Such costs per pound of powder result in different costs per hundredweight of milk to process powder depending on the yield of powder from milk. However, since nine pounds of nonfat dry milk are necessary to produce one hundredweight of reconstituted milk, the processing cost per hundredweight would be in the area of $1.20 to 71 cents for the high and low costs per pound of powder indicated above.

As a result, the compensatory payment for converting a Class III use to a Class I use should be reduced by $1.00 per hundredweight, provided that the difference between the Class I and Class III prices is not less than $1.00. Such a reduction will preserve a classified pricing plan and also facilitate the potential use of nonfat dry milk to reconstitute fluid milk products. However, in order to qualify for the payment reduction, a handler will have to demonstrate a disposition of a labeled reconstituted milk product. Otherwise, there would be no basis to demonstrate that a payment reduction is in fact warranted. The application of the assignment provisions under orders can result in the assignment of receipts of nonfat dry milk to Class I when no reconstitution takes place. For example, if a handler fails to account for receipts of producer milk that is used in Class I, other source milk receipts could end up being assigned to such Class I use. Obviously, producers should receive the full Class I value of such Class I use. Moreover, sales of unlabeled reconstituted milk in competition with that which is appropriately labeled could result in unfair methods of competition among handlers, since the unlabeled product could be mistaken as a fresh milk product which is likely to command a higher price than a labeled reconstituted product. Also, in the absence of a different treatment of the unlabeled product the orders would fail to protect the interest of consumers by their not being informed that the product is other than a fresh milk product.

In addition, a further option should be provided that may be elected by a handler that distributes labeled reconstituted fluid milk products made from nonfat dry milk. This option will provide for a regulatory treatment that is similar to that being provided for concentrated milk, i.e., where the fluid milk value can be passed back to the market of origin.

Under this option, a handler can elect to be a partially regulated pool plant with respect to sales of reconstituted fluid milk products made from nonfat dry milk. Under this option, a handler will have the opportunity to make a pool obligation payment to the order under which the producer milk was priced that was used to produce the nonfat dry milk used for reconstituted milk. This essentially provides that the full Class I value accrues to the source market.

A final major change should also be made in the manner in which receipts of nonfat dry milk are allocated to a handler's Class I, II, and III uses of milk. Rather than being assigned to Class III uses, receipts of nonfat dry milk should be prorated to the classes of use in the same manner as contained herein for concentrated milk. Such an allocation procedure will place these concentrated products on the same basis as producer milk if it is demonstrated that such receipts are necessary to supplement fluid milk needs by their use in labeled reconstituted fluid milk products.

Conforming Changes

As proposed in the Notice of Hearing, conforming changes are provided wherever necessary to assure that all the provisions of the orders will function as intended. For example, in connection with providing three uniform classes of utilization, in orders currently having only two classes of utilization, it is necessary, in addition to all the changes in sections of the orders dealing with classification, to also provide for a Class III price. Changes such as this, and numerous others, have been made for the purpose stated above.

For a different reason, numerous non-substantive changes also are being made in the Ohio Valley (part 1033) and the Black Hills, South Dakota (part 1075) orders. These changes are made to bring the overall format of these two orders to more nearly conform with the format of most of the other orders. These changes will not have any bearing upon the classification and pricing of milk under these two orders.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the New England and Other Marketing Area orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) The tentative marketing agreements and the orders, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing areas, and the minimum prices specified in the tentative marketing agreements and the orders, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The tentative marketing agreements and the orders, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, marketing agreements upon which a hearing has been held.

Recommended Marketing Agreements and Orders Amending the Orders

Recommended marketing agreements are not included in this decision because the regulatory provisions thereof would be the same as those contained in the orders, as hereby proposed to be amended. The following orders amending the orders, as amended regulating the handling of milk in the New England and Other Marketing Areas are recommended as the detailed and appropriate means by which the foregoing conclusions may be carried out.

List of Subjects in 7 CFR Parts 1001, 1002, 1004, 1005, 1006, 1007, 1011, 1012, 1013, 1030, 1032, 1033, 1036, 1040, 1044, 1046, 1049, 1050, 1064, 1065, 1068, 1075, 1076, 1079, 1093, 1094, 1096, 1097, 1098, 1099, 1106, 1108, 1124, 1126, 1131, 1134, 1135, 1137, 1138, 1139

Milk

1. The authority citation for 7 CFR parts 1001, 1002, 1004, 1005, 1006, 1007, 1011, 1012, 1013, 1030, 1032, 1033, 1036, 1040, 1044, 1046, 1049, 1050, 1064, 1065, 1068, 1075, 1076, 1079, 1093, 1094, 1096, 1097, 1098, 1099, 1106, 1108, 1124, 1126, 1131, 1134, 1135, 1137, 1138, 1139 continues to read as follows:

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

PART 1001—MILK IN THE NEW ENGLAND MARKETING AREA

1. Section 1001.17 is revised to read as follows:

§ 1001.17 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include: (1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

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

2. Section 1001.18 is revised to read as follows:

§ 1001.18 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1001.22 is added under the heading "Definitions" to read as follows:

§ 1001.22 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1001.15, 1001.41 and 1001.52.

4. Section 1001.40 is amended by revising paragraphs (b) and (c) to read as follows:

§ 1001.40 Classes of utilization.

* * * * *

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be

verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1001.17 and the fluid cream product definition pursuant to § 1001.18; and

(7) In shrinkage assigned pursuant to § 1001.41(a) to the receipts specified in § 1001.41(a)(2) and in shrinkage specified in § 1001.41(b) and (c).

5. Section 1001.42 is amended by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1001.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

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

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

* * * * *

6. In § 1001.44 the introductory text of paragraph (a)(7) is revised, a new paragraph (a)(7)(ix) is added and paragraphs (a)(11) and (a)(12) are amended by replacing the colon at the end of the introductory text of each of the paragraphs with a period and by adding the following sentences immediately thereafter, to read as follows:

§ 1001.44 Classification of producer milk.

* * * * *

(a) * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class in series beginning with Class III, except as specified in paragraph (a)(7)(ix) of this section, the pounds of skim milk in each of the following:

* * * * *

(ix) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use:

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(ix) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use:

* * * * *

7. Section 1001.60 is amended by replacing the period after paragraph (g)(2) with a semicolon and adding new paragraphs (h) and (i) to read as follows:

§ 1001.60 Handler's value of milk for computing basic blended price.

* * * * *

(h) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(i) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1001.61(e).

8. Section 1001.61 is amended by redesignating paragraph (c) as paragraph (d), revising paragraphs (a) and (d), and adding new paragraphs (c) and (e) to read as follows:

§ 1001.61 Partially regulated distributing plant operator's value of milk for computing basic blended price.

* * * * *

(a) Subtract from the quantity of route disposition, except reconstituted milk products, distributed in the marketing area by the partially regulated distributing plant operator the quantity of fluid milk products (except reconstituted milk products and those described in paragraph (b) of this section) received at the plant during the month that is classified and priced as Class I milk or the equivalent thereof under any marketwide pool Federal order and that is not used to offset route disposition in any other marketing area, and multiply the result by the applicable Class I price;

* * * * *

(c) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant. Add the amount obtained from multiplying the pounds of labeled reconstituted milk included previously in this paragraph by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

(d) Add the values pursuant to paragraphs (a) through (c) of this section.

(e) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1002—MILK IN THE NEW YORK-NEW JERSEY MARKETING AREA

1. Section 1002.15 is revised to read as follows:

§ 1002.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product*

means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1002.18 is revised to read as follows:

§ 1002.18 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1002.20 is added under the heading 'General provisions and definitions" to read as follows:

§ 1002.20 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages.

4. Section 1002.41 (c) and (d) are revised to read as follows:

§ 1002.41 Classes of utilization.

* * * * *

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

(1) Disposed of in the form of a fluid cream product and any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil), that resembles a fluid cream product, except as otherwise provided in paragraph (d) of this section;

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a), (b) or (d) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (c)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (c)(1) and paragraphs (c)(4)(i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (c)(1) and paragraphs (c)(4)(i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (c)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (c)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1002.15 and the fluid cream product definition pursuant to § 1002.18; and

(7) In shrinkage assigned pursuant to § 1002.42(a) to the receipts specified in § 1002.42(a)(2) and in shrinkage specified in § 1002.42(b) and (c).

5. Section 1002.44 is amended by revising paragraphs (d)(3)(i) and (ii), redesignating paragraphs (d)(3)(iv) through (d)(3)(vii) as paragraphs (d)(3)(v) through (d)(3)(viii) and adding a new paragraph (d)(3)(iv), to read as follows:

§ 1002.44 Transfers.

* * * * *

(d) * * *

(3) * * *

(i) Packaged receipts of concentrated or labeled reconstituted fluid milk products from Federal order sources shall first be assigned to any route disposition of such products in Federal order marketing areas and packaged receipts of other fluid milk products from Federal order sources shall be assigned to other route disposition in

Federal order marketing areas (assigning receipts to sales in the same market to the extent possible) and any residual shall be assigned to Class I–B sales of the respective products.

(ii) Bulk receipts of concentrated fluid milk products at such transferee plant from Federal order sources shall next be assigned to any remaining route disposition of concentrated or labeled reconstituted fluid milk products in Federal order marketing areas and bulk receipts of other fluid milk products at such transferee plant from Federal order sources shall be assigned to remaining route disposition in any Federal order marketing area. For this purpose, receipts from each Federal order market shall first be assigned to remaining route sales in such marketing area and any remainder of such receipts shall be prorated with all Federal order receipts to remaining route disposition in all Federal order marketing areas.

* * * * *

(iv) Receipts of concentrated fluid milk products from unregulated sources shall next be assigned to any remaining route sales of concentrated or labeled reconstituted fluid milk products in the marketing area and the remainder of such receipts shall be assigned in series to Class III, Class II and Class I–B utilization at the transferee plant. Any such receipts assigned to Class I–A disposition shall be subject to the pricing specified in § 1002.60(d)(2).

* * * * *

6. In § 1002.45, the introductory text of paragraph (a)(8) is revised, a new paragraph (a)(8)(vi) is added to read as follows, and paragraphs (a)(13)(i) and (a)(15) are amended by replacing the colon in the middle of paragraph (a)(13)(i) and at the end of the paragraph (a)(15) with a period and by adding the following sentences immediately thereafter, to read as follows:

§ 1002.45 Allocation of skim milk and butterfat classified.

* * * * *

(a) * * *

(8) Subtract in the order specified below from the pounds of skim milk remaining in Class I–A, Class II and Class III milk, in series beginning with Class III, except as specified in paragraph (a)(8)(vi) of this section, the pounds of skim milk in:

* * * * *

(vi) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(15) of this section on the same basis as concentrated milk.

* * * * *

(13)(i) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use. * * *

* * * * *

(15) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(8)(vi) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1002.60 is amended by changing the ";" to a "," at the end of paragraph (d)(2) and adding a proviso, and by adding a new paragraph (d)(5), to read as follows:

§ 1002.60 Net pool obligation of handlers.

* * * * *

(d) * * *

(2) * * * *provided,* That with respect to labeled reconstituted fluid milk products made from nonfluid milk product ingredients assigned to Class I use and processed from producer milk regulated under another Federal order, the handler may elect to make payment to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price;

* * * * *

(5) Subtract, for reconstituted milk made from receipts of nonfluid milk products, and for which the pool obligation is computed pursuant to paragraph (d)(2) of this section, an amount computed by multiplying $1.00 (but not more than the difference between the Class I–A price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products. Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1002.60(d)(2).

* * * * *

PART 1004—MILK IN THE MIDDLE ATLANTIC MARKETING AREA

1. Section 1004.15 is revised to read as follows:

§ 1004.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1004.16 is revised to read as follows:

§ 1004.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1004.22 is added under the heading "Definitions" to read as follows:

§ 1004.22 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or

producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1004.12, 1004.13, and 1004.41.

4. Section 1004.40 (b) and (c) are revised to read as follows:

§ 1004.40 Classes of utilization.

* * * * *

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1004.15 and the fluid cream product definition pursuant to § 1004.16; and

(7) In shrinkage assigned pursuant to § 1004.41(a) to the receipts specified in § 1004.41(a)(2) and in shrinkage specified in § 1004.41(b) and (c).

5. Section 1004.42 is amended by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1004.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

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

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

* * * * *

6. In § 1004.44 the introductory text of paragraph (a)(8) is revised, a new paragraph (a)(8)(vii) is added and paragraphs (a)(12) and (a)(13) are amended by replacing the colon at the end of the introductory text of each of the paragraphs with a period and by adding the following sentences immediately thereafter, to read as follows:

§ 1004.44 Classification of producer milk.

* * * * *

(a) * * *

(8) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III except as specified in paragraph (a)(8)(vii) of this section, the pounds of skim milk in each of the following:

* * * * *

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of

use in sequence beginning with Class III use.

* * * * *

(13) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1004.60 is amended by removing "and" after the ";" in paragraph (e), replacing the period after paragraph (f) with ";", and adding new paragraphs (g) and (h) to read as follows:

§ 1004.60 Handler's value of milk for computing uniform price.

* * * * *

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1004.76(c).

8. Section 1004.76 is amended by revising paragraphs (b)(3) and (b)(5) and adding a new paragraph (c) to read as follows:

§ 1004.76 Payments by a handler operating a partially regulated distributing plant.

* * * * *

(b) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

(4) * * *

(5) From the value of such milk at the Class I price, subtract its value at the weighted average price, and add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (b)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1005—MILK IN THE CAROLINA MARKETING AREA

1. Section 1005.15 is revised to read as follows:

§ 1005.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1005.16 is revised to read as follows:

§ 1005.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1005.19 is added to read as follows:

§ 1005.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1005.13, 1005.41 and 1005.53.

4. Section 1005.40 is revised to read as follows:

§ 1005.40 Classes of utilization.

Except as provided in § 1005.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1005.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, Ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraph (b)(4) (i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1005.15 and the fluid cream product definition pursuant to § 1005.16; and

(7) In shrinkage assigned pursuant to § 1005.41(a) to the receipts specified in § 1005.41(a)(2) and in shrinkage specified in § 1005.41 (b) and (c).

5. Section 1005.42 is amended by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1005.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

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

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

* * * * *

6. Section 1005.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(vii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1005.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

* * * * *

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1005.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth

in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1005.60 is amended by removing "and" after the ";" in paragraph (e), replacing the period after paragraph (f) with ";", and adding new paragraphs (g) and (h) to read as follows:

§ 1005.60 Handler's value of milk for computing uniform price.

* * * * *

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1005.76(c).

8. Section 1005.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1005.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1006—MILK IN THE UPPER FLORIDA MARKETING AREA

1. Section 1006.15 is revised to read as follows:

§ 1006.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1006.16 is revised to read as follows:

§ 1006.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1006.21 is added under the heading "Definitions" to read as follows:

§ 1006.21 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages.

Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1006.13, 1006.41 and 1006.52.

4. Section 1006.40 is revised to read as follows:

§ 1006.40 Classes of utilization.

Except as provided in § 1006.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1006.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1006.15 and the fluid cream product definition pursuant to § 1006.16; and

(7) In shrinkage assigned pursuant to § 1006.41(a) to the receipts specified in § 1006.41(a)(2) and in shrinkage specified in § 1006.41 (b) and (c).

5. Section 1006.42 is revised to read as follows:

§ 1006.42 Classification of transfers and diversions.

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

(1) The skim milk and butterfat classified in each class shall be limited to the amount of skim milk and butterfat, respectively, remaining in such class at the transferee-plant after the computations pursuant to § 1006.44(a)(12) and the corresponding step of § 1006.44(b);

(2) If the transferor-plant received during the month other source milk to be allocated pursuant to § 1006.44(a)(7) or the corresponding step of § 1006.44(b), the skim milk or butterfat so transferred shall be classified so as to allocate the least possible Class I utilization to such other source milk; and

(3) If the transferor-handler received during the month other source milk to be allocated pursuant to § 1006.44 (a)(11) or (a)(12) or the corresponding steps of § 1006.44(b), the skim milk or butterfat so transferred, up to the total of the skim milk and butterfat, respectively, in such receipts of other source milk, shall not be classified as Class I milk to a greater extent than would be the case if the other source milk had been received at the transferee-plant.

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

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

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

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

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

(5) For purposes of this paragraph, if the other order provides for a different number of classes of utilization than is provided for under this part, skim milk or butterfat allocated to a class consisting primarily of fluid milk

products shall be classified as Class I products shall be classified as Class I milk, and skim milk or butterfat allocated to the other classes shall be classified as Class III milk; and

(6) If the form in which any fluid milk product that is transferred to an other order plant is not defined as a fluid milk product under such other order, classification under this paragraph shall be in accordance with the provisions of § 1006.40.

(c) *Transfers to producer-handlers and to exempt distributing plants.* Skim milk or butterfat in the following forms that is transferred from a pool plant to a producer-handler under this or any other Federal order or to an exempt distributing plant shall be classified:

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

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

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

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

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

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

(A) The transferor-handler or divertor-handler claims such classification in its report of receipts and utilization filed pursuant to § 1006.30 for the month within which such transaction occurred; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(viii) In determining the nonpool plant's utilization for purposes of this paragraph, any fluid milk products and bulk fluid cream products transferred from such nonpool plant to a plant not fully regulated under any Federal milk order shall be classified on the basis of the second plant's utilization using the same assignment priorities at the second plant that are set forth in paragraph (d)(2) of this section.

6. Section 1006.43 is amended by adding a new paragraph (c), to read as follows:

§ 1006.43 General classification rules.

* * * * *

(c) The classification of producer milk for which a cooperative association is the handler pursuant to § 1006.9(b) or (c) shall be determined separately from the operations of any pool plant operated by such cooperative association.

7. Section 1006.44 is revised to read as follows:

§ 1006.44 Classification of producer milk.

For each month the market administrator shall determine the classification of producer milk of each handler described in § 1006.9(a) for each of his pool plants separately and of each handler described in § 1006.9(b) and (c) by allocating the handler's receipts of skim milk and butterfat to his utilization as follows:

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

(1) Subtract from the total pounds of skim milk in Class III the pounds of skim milk in shrinkage specified in § 1006.41(b);

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable

provisions of another Federal milk order in the immediately preceding month;

(3) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in fluid milk product received in packaged form from an other order plant, except that to be subtracted pursuant to paragraph (a)(7)(vi) of this section, as follows:

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

(ii) From Class I the remainder of such receipts.

(4) Subtract from the pounds of skim milk in Class II the pounds of skim milk in products specified in § 1006.40(b)(1) that were received in packaged form from other plants, but not in excess of the pounds of skim milk remaining in Class II;

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1006.40(b)(1) that were in inventory at the beginning of the month in packaged form, but not in excess of the pounds of skim milk remaining in Class II. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph (a)(5) or comparable provisions of another Federal milk order in the immediately preceding month;

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in other source milk (except that received in the form of a fluid milk product or a fluid cream product) that is used to produce, or added to, any product specified in § 1006.40(b), but not in excess of the pounds of skim milk remaining in Class II;

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

(i) Other source milk (except that received in the form of a fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1006.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5), and (a)(6) of this section;

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

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

(iv) Receipts of fluid milk products from a producer-handler as defined under this or any other Federal milk order and from an exempt distributing plant;

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

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

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

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

(i) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i) and (a)(7)(v) of this section for which the handler requests a classification other than Class I, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(ii) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (a)(7)(v), and (a)(8)(i) of this section which are in excess of the pounds of skim milk determined pursuant to paragraphs (a)(8)(ii)(A) through (C) of this section. Should the pounds of skim milk to be subtracted from Class II and Class III combined exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount:

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

(B) Subtract from the above result the sum of the pounds of skim milk in receipts at all pool plants of the handler of producer milk, fluid milk products from pool plants of other handlers, and bulk fluid milk products from other order plants that were not subtracted pursuant to paragraph (a)(7)(vi) of this section; and

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

(iii) The pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraph (a)(7)(vi) of this section, if Class II or Class III classification is requested by the operator of the other order plant and the handler, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1006.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

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

(11) Subject to the provisions of paragraphs (a)(11) (i) and (ii) of this section, subtract from the pounds of skim milk remaining in each class at the plant, pro rata to the total pounds of skim milk remaining in Class I and in Class II and Class III combined at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler), with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, the pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (a)(7)(v), and (a)(8) (i) and (ii) of this section and that were not offset by transfers or diversions of fluid milk products to the same unregulated supply plant from which fluid milk products to be allocated at this step were received. Skim milk in receipts of concentrated fluid milk products shall also be subject

to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use:

(i) Should the pounds of skim milk to be subtracted from Class II and Class III combined pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(ii) Should the pounds of skim milk to be subtracted from Class I pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount, beginning with the nearest plant at which Class I utilization is available;

(12) Subtract in the manner specified below from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraphs (a)(7)(vi) and (a)(8)(iii) of this section. Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use:

(i) Subject to the provisions of paragraphs (a)(12) (ii), (iii), and (iv) of this section, such subtraction shall be pro rata to the pounds of skim milk in Class I and in Class II and Class III combined, with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, with respect to whichever of the following quantities represents the lower proportion of Class I milk:

(A) The estimated utilization of skim milk of all handlers in each class as announced for the month pursuant to § 1006.45(a); or

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

(ii) Should the proration pursuant to paragraph (a)(12)(i) of this section result in the total pounds of skim milk at all pool plants of the handler that are to be subtracted at this allocation step from Class II and Class III combined exceeding the pounds of skim milk remaining in Class II and Class III at all such plants, the pounds of such excess shall be subtracted from the pounds of skim milk remaining in Class I after such proration at the pool plants at which such other source milk was received;

(iii) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class II and Class III combined that exceeds the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(iv) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class I that exceeds the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount beginning with the nearest plant at which Class I utilization is available;

(13) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of fluid milk products and bulk fluid cream products from another pool plant according to the classification of such products pursuant to § 1006.42(a); and

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

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

(c) The quantity of producer milk in each class shall be the combined pounds of skim milk and butterfat remaining in each class after the computations pursuant to paragraph (a)(14) of this section and the corresponding step of paragraph (b) of this section.

§ 1006.45 [Amended]

8. In § 1006.45, the reference "§ 1006.44(a)(9)" is changed to "§ 1006.44(a)(12)".

9. Section 1006.50 is amended by adding a new paragraph (c) to read as follows:

§ 1006.50 Class prices.

* * * * *

(c) *Class III price.* The Class III price shall be the basic formula price for the month.

10. Section 1006.60 is revised to read as follows:

§ 1006.60 Handler's value of milk for computing the uniform price.

For the purpose of computing the uniform price the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1006 (b) and (c) as follows:

(a) Multiply the pounds of producer milk in each class as determined pursuant to § 1006.44(a) by the applicable class prices and add the resulting amounts;

(b) Add the amounts obtained from multiplying the pounds of overage

subtracted from each class pursuant to § 1006.44(a)(14) and the corresponding step of § 1006.44(b) by the respective class prices, as adjusted by the butterfat differential specified in § 1006.74, that are applicable at the location of the pool plant;

(c) Add the amount obtained from multiplying the difference between the Class III price for the preceding month and the Class I price applicable at the location of the pool plant or the Class II price, as the case may be, for the current month by the hundredweight of skim milk and butterfat subtracted from Class I and Class II pursuant to § 1006.44(a)(9) and the corresponding step of § 1006.44(b);

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1006.44(a)(7) (i) through (iv) and the corresponding step of § 1006.44(b), excluding receipts of bulk fluid cream products from an other order plant;

(e) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the transferor-plant and the Class III price by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1006.44(a)(7) (v) and (vi) and the corresponding step of § 1006.44(b);

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1006.44(a)(11) and the corresponding step of § 1006.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1006.76(c).

11. Section 1006.76 is amended by revising paragraphs (b)(3) and (b)(5) and by adding a new paragraph (c) to read as follows:

§ 1006.76 Payments by a handler operating a partially regulated distributing plant.

* * * * *

(b) * * *

(3) Deduct from any remainder the pounds of reconstituted milk made from nonfluid milk products, and milk or skim milk contained in receipts from producer-handlers and exempt plants defined in any order, which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) From the value of such milk at the Class I price applicable at the location of the nonpool plant, subtract its value at the uniform price applicable at such location, and add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (b)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

12. In § 1006.85, the reference "§ 1006.44 (a)(3) and (a)(8)" is changed to "§ 1006.44 (a)(7) through (a)(11)".

PART 1007—MILK IN THE GEORGIA MARKETING AREA

1. Section 1007.15 is revised to read as follows:

§ 1007.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1007.16 is revised to read as follows:

§ 1007.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1007.21 is added under the heading "Definitions" to read as follow:

§ 1007.21 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products

and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages.

Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1007.13, 1007.41 and 1007.52.

4. Section 1007.40 is revised to read as follows:

§ 1007.40 Classes of utilization.

Except as provided in § 1007.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1007.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1007.15 and the fluid cream product definition pursuant to § 1007.16; and

(7) In shrinkage assigned pursuant to § 1007.41(a) to the receipts specified in § 1007.41(a)(2) and in shrinkage specified in § 1007.41 (b) and (c).

5. Section 1007.42 is amended by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1007.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

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

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

* * * * *

6. Section 1007.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(vii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1007.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

* * * * *

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1007.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1007.60 is amended by removing "and" after the ";" in paragraph (e), replacing the period after paragraph (f) with ";", revising paragraph (g), and adding a new paragraph (h) to read as follows:

§ 1007.60 Handler's value of milk for computing uniform price.

* * * * *

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1007.76(c).

8. Section 1007.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1007.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1011—MILK IN THE TENNESSEE VALLEY MARKETING AREA

1. Section 1011.15 is revised to read as follows:

§ 1011.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1011.16 is revised to read as follows:

§ 1011.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1011.19 is added to read as follows:

§ 1011.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such

receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1011.13, 1011.41 and 1011.52.

4. Section 1011.40 is revised to read as follows:

§ 1011.40 Classes of utilization.

Except as provided in § 1011.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1011.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1011.15 and the fluid cream product definition pursuant to § 1011.16; and

(7) In shrinkage assigned pursuant to § 1011.41(a) to the receipts specified in § 1011.41(a)(2) and in shrinkage specified in § 1011.41 (b) and (c).

5. Section 1011.42 is amended by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1011.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

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

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

* * * * *

6. Section 1011.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(vii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1011.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

* * * * *

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1011.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1011.60 is amended by removing "and" after the ";" in paragraph (e), replacing the period after paragraph (f) with ";", revising paragraph (g), and adding a new paragraph (h) to read as follows:

§ 1011.60 Handler's value of milk for computing uniform price.

* * * * *

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1011.76(c).

8. Section 1011.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1011.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

(4) * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1012—MILK IN THE TAMPA BAY MARKETING AREA

1. Section 1012.15 is revised to read as follows:

§ 1012.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1012.16 is revised to read as follows:

§ 1012.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1012.20 is added under the heading "Definitions" to read as follows:

§ 1012.20 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such

receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages.

Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1012.13, 1012.41 and 1012.52.

4. Section 1012.40 is revised to read as follows:

§ 1012.40 Classes of utilization.

Except as provided in § 1012.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1012.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraphs (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1012.15 and the fluid cream product definition pursuant to § 1012.16; and

(7) In shrinkage assigned pursuant to § 1012.41(a) to the receipts specified in § 1012.41(a)(2) and in shrinkage specified in § 1012.41 (b) and (c).

5. Section 1012.42 is revised to read as follows:

§ 1012.42 Classification of transfers and diversions.

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

(1) The skim milk and butterfat classified in each class shall be limited to the amount of skim milk and butterfat, respectively, remaining in such class at the transferee-plant after the computations pursuant to § 1012.44(a)(12) and the corresponding step of § 1012.44(b);

(2) If the transferor-plant received during the month other source milk to be allocated pursuant to § 1012.44(a)(7) or the corresponding step of § 1012.44(b), the skim milk or butterfat so transferred shall be classified so as to allocate the least possible Class I utilization to such other source milk; and

(3) If the transferor-handler received during the month other source milk to be allocated pursuant to § 1012.44 (a)(11) or (a)(12) or the corresponding steps of § 1012.44(b), the skim milk or butterfat so transferred, up to the total of the skim milk and butterfat, respectively, in such receipts of other source milk, shall not be classified as Class I milk to a greater extent than would be the case if the other source milk had been received at the transferee-plant.

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

bulk fluid cream products, respectively, that are in the same category as described in paragraph (b)(1), (b)(2), or (b)(3) of this section:

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

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

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

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

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

(6) If the form in which any fluid milk product that is transferred to an other order plant is not defined as a fluid milk product under such other order, classification under this paragraph shall be in accordance with the provisions of § 1012.40.

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

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

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

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

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

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

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

(A) The transferor-handler or divertor-handler claims such classification in its report of receipts and utilization filed pursuant to § 1012.30 for the month within which such transaction occurred; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(viii) In determining the nonpool plant's utilization for purposes of this paragraph, any fluid milk products and bulk fluid cream products transferred from such nonpool plant to a plant not fully regulated under any Federal milk order shall be classified on the basis of the second plant's utilization using the same assignment priorities at the second plant that are set forth in paragraph (d)(2) of this section.

6. Section 1012.43 is amended by adding a new paragraph (c), to read as follows:

§ 1012.43 General classification rules.

* * * * *

(c) The classification of producer milk for which a cooperative association is the handler pursuant to § 1012.9(b) or (c) shall be determined separately from the

operations of any pool plant operated by such cooperative association.

7. Section 1012.44 is revised to read as follows:

§ 1012.44 Classification of producer milk.

For each month the market administrator shall determine the classification of producer milk of each handler described in § 1012.9(a) for each of his pool plants separately and of each handler described in § 1012.9(b) and (c) by allocating the handler's receipts of skim milk and butterfat to his utilization as follows:

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

(1) Subtract from the total pounds of skim milk in Class III the pounds of skim milk in shrinkage specified in § 1012.41(b);

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(3) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in fluid milk product received in packaged form from another order plant, except that to be subtracted pursuant to paragraph (a)(7)(vi) of this section, as follows:

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

(ii) From Class I the remainder of such receipts.

(4) Subtract from the pounds of skim milk in Class II the pounds of skim milk in products specified in § 1012.40(b)(1) that were received in packaged form from other plants, but not in excess of the pounds of skim milk remaining in Class II;

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1012.40(b)(1) that were in inventory at the beginning of the month in packaged form, but not in excess of the pounds of skim milk remaining in Class II. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph (a)(5) or comparable provisions of another Federal milk order in the immediately preceding month;

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in other source milk (except that received in the form of a fluid milk product or a fluid cream product) that is used to produce, or added to, any product specified in § 1012.40(b), but not in excess of the pounds of skim milk remaining in Class II; and

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

(i) Other source milk (except that received in the form of a fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1012.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5), and (a)(6) of this section;

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

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

(iv) Receipts of fluid milk products from a producer-handler as defined under this or any other Federal milk order;

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

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

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

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

(i) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i) and (a)(7)(v) of this section for which the handler requests a classification other than Class I, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(ii) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (a)(7)(v), and (a)(8)(i) of this section which are in excess of the pounds of skim milk determined pursuant to paragraphs (a)(8)(ii) (A) through (C) of this section. Should the pounds of skim milk to be subtracted from Class II and Class III combined exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount:

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

(B) Subtract from the above result the sum of the pounds of skim milk in receipts at all pool plants of the handler of producer milk, fluid milk products from pool plants of other handlers, and bulk fluid milk products from other order plants that were not subtracted pursuant to paragraph (a)(7)(vi) of this section; and

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

(iii) The pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraph (a)(7)(vi) of this section, if Class II or Class III classification is requested by the operator of the other order plant and the handler, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of

skim milk in fluid milk products and products specified in § 1012.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

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

(11) Subject to the provisions of paragraphs (a)(11)(i) and (ii) of this section, subtract from the pounds of skim milk remaining in each class at the plant, pro rata to the total pounds of skim milk remaining in Class I and in Class II and Class III combined at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler), with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, the pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(7)(v), and (a)(8) (i) and (ii) of this section and that were not offset by transfers or diversions of fluid milk products to the same unregulated supply plant from which fluid milk products to be allocated at this step were received. Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use:

(i) Should the pounds of skim milk to be subtracted from Class II and Class III combined pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(ii) Should the pounds of skim milk to be subtracted from Class I pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount, beginning with the nearest plant at which Class I utilization is available;

(12) Subtract in the manner specified below from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraphs (a)(7)(vi) and (a)(8)(iii) of this section. Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use:

(i) Subject to the provisions of paragraphs (a)(12)(ii), (iii), and (iv) of this section, such subtraction shall be pro rata to the pounds of skim milk in Class I and in Class II and Class III combined, with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, with respect to whichever of the following quantities represents the lower proportion of Class I milk:

(A) The estimated utilization of skim milk of all handlers in each class as announced for the month pursuant to § 1012.45(a); or

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

(ii) Should the proration pursuant to paragraph (a)(12)(i) of this section result in the total pounds of skim milk at all pool plants of the handler that are to be subtracted at this allocation step from Class II and Class III combined exceeding the pounds of skim milk remaining in Class II and Class III at all such plants, the pounds of such excess shall be subtracted from the pounds of skim milk remaining in Class I after such proration at the pool plants at which such other source milk was received;

(iii) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12)(i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class II and Class III combined that exceeds the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(iv) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12)(i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class I that exceeds the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount beginning with the nearest plant at which Class I utilization is available;

(13) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of fluid milk products and bulk fluid cream products from another pool plant according to the classification of such products pursuant to § 1012.42(a); and

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

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

(c) The quantity of producer milk in each class shall be the combined pounds of skim milk and butterfat remaining in each class after the computations

pursuant to paragraph (a)(14) of this section and the corresponding step of paragraph (b) of this section.

§ 1012.45 [Amended]

8. In § 1012.45 the reference "§ 1012.44(a)(9)" is changed to "§ 1012.44(a)(12)".

9. Section 1012.50 is amended by adding a new paragraph (c) to read as follows:

§ 1012.50 Class prices.

* * * * *

(c) *Class III price.* The Class III price shall be the basic formula price for the month.

10. Section 1012.60 is revised to read as follows:

§ 1012.60 Handler's value of milk for computing the uniform price.

For the purpose of computing the uniform price the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1012.9 (b) and (c) as follows:

(a) Multiply the pounds of producer milk in each class as determined pursuant to § 1012.44(c) by the applicable class prices and add the resulting amounts;

(b) Add the amounts obtained from multiplying the pounds of overage subtracted from each class pursuant to § 1012.44(a)(14) and the corresponding step of § 1012.44(b) by the respective class prices, as adjusted by the butterfat differential specified in § 1012.74, that are applicable at the location of the pool plant;

(c) Add the amount obtained from multiplying the difference between the Class III price for the preceding month and the Class I price applicable at the location of the pool plant or the Class II price, as the case may be, for the current month by the hundredweight of skim milk and butterfat subtracted from Class I and Class II pursuant to § 1012.44(a)(9) and the corresponding step of § 1012.44(b);

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1012.44(a)(7) (i) through (iv) and the corresponding step of § 1012.44(b), excluding receipts of bulk fluid cream products from an other order plant;

(e) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the transferor-plant and the Class III price by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1012.44(a)(7) (v) and (vi) and the corresponding step of § 1012.44(b);

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1012.44(a)(11) and the corresponding step of § 1012.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1012.76(c).

10. Section 1012.76 is amended by revising paragraphs (b)(3) and (b)(5) and by adding a new paragraph (c) to read as follows:

§ 1012.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(b) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant and milk or skim milk contained in receipts from producer-handlers and exempt plants defined in any order disposed of as route disposition in the marketing area;

* * * * *

(5) From the value of such milk at the Class I price applicable at the location of the nonpool plant, subtract its value at the uniform price applicable at such location, and add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (b)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

11. Section 1012.85 is amended by changing the reference "§ 1012.44 (a)(3) and (a)(8)" to "§ 1012.44 (a)(7) and (a)(11)".

PART 1013—MILK IN THE SOUTHEASTERN FLORIDA MARKETING AREA

1. Section 1013.15 is revised to read as follows:

§ 1013.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1013.16 is revised to read as follows:

§ 1013.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1013.20 is added under the heading "Definitions" to read as follows:

§ 1013.20 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages.

Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1013.13, 1013.41 and 1013.52.

4. Section 1013.40 is revised to read as follows:

§ 1013.40 Classes of utilization.

Except as provided in § 1013.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1013.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1013.15 and the fluid cream product definition pursuant to § 1013.16; and

(7) In shrinkage assigned pursuant to § 1013.41(a) to the receipts specified in § 1013.41(a)(2) and in shrinkage specified in § 1013.41 (b) and (c).

5. Section 1013.42 is revised to read as follows:

§ 1013.42 Classification of transfers and diversions.

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

(1) The skim milk and butterfat classified in each class shall be limited to the amount of skim milk and butterfat, respectively, remaining in

such class at the transferee-plant after the computations pursuant to § 1013.44(a)(12) and the corresponding step of § 1013.44(b);

(2) If the transferor-plant received during the month other source milk to be allocated pursuant to § 1013.44(a)(7) or the corresponding step of § 1013.44(b), the skim milk or butterfat so transferred shall be classified so as to allocate the least possible Class I utilization to such other source milk; and

(3) If the transferor-handler received during the month other source milk to be allocated pursuant to § 1013.44 (a)(11) or (a)(12) or the corresponding steps of § 1013.44(b), the skim milk or butterfat so transferred, up to the total of the skim milk and butterfat, respectively, in such receipts of other source milk, shall not be classified as Class I milk to a greater extent than would be the case if the other source milk had been received at the transferee-plant.

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

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

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

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

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

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

(6) If the form in which any fluid milk product that is transferred to an other order plant is not defined as a fluid milk product under such other order, classification under this paragraph shall be in accordance with the provisions of § 1013.40.

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

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

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

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

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

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

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

(A) The transferor-handler or divertor-handler claims such classification in its report of receipts and utilization filed pursuant to § 1013.30 for the month within which such transaction occurred; and

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

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

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

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

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

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

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

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

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

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

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

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

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

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro

rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

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

(viii) In determining the nonpool plant's utilization for purposes of this paragraph, any fluid milk products and bulk fluid cream products transferred from such nonpool plant to a plant not fully regulated under any Federal milk order shall be classified on the basis of the second plant's utilization using the same assignment priorities at the second plant that are set forth in paragraph (d)(2) of this section.

6. Section 1013.43 is amended by adding a new paragraph (c), to read as follows:

§ 1013.43 General classification rules.

* * * * *

(c) The classification of producer milk for which a cooperative association is the handler pursuant to § 1013.9(b) or (c) shall be determined separately from the operations of any pool plant operated by such cooperative association.

7. Section 1013.44 is revised to read as follows:

§ 1013.44 Classification of producer milk.

For each month the market administrator shall determine the classification of producer milk of each handler described in § 1013.9(a) for each of his pool plants separately and of each handler described in § 1013.9(b) and (c) by allocating the handler's receipts of skim milk and butterfat to his utilization as follows:

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

(1) Subtract from the total pounds of skim milk in Class III the pounds of skim milk in shrinkage specified in § 1013.41(b);

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(3) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in fluid milk product received in packaged form from an other order plant, except that to be subtracted pursuant to paragraph (a)(7)(vi) of this section, as follows:

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

(ii) From Class I the remainder of such receipts.

(4) Subtract from the pounds of skim milk in Class II the pounds of skim milk in products specified in § 1013.40(b)(1) that were received in packaged form from other plants, but not in excess of the pounds of skim milk remaining in Class II;

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1013.40(b)(1) that were in inventory at the beginning of the month in packaged form, but not in excess of the pounds of skim milk remaining in Class II. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph (a)(5) or comparable provisions of another Federal milk order in the immediately preceding month;

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in other source milk (except that received in the form of a fluid milk product or a fluid cream product) that is used to produce, or added to, any product specified in § 1013.40(b), but not in excess of the pounds of skim milk remaining in Class II;

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

(i) Other source milk (except that received in the form of a fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1013.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5), and (a)(6) of this section;

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

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

(iv) Receipts of fluid milk products from a producer-handler as defined under this or any other Federal milk order;

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

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

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

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

(i) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i) and (a)(7)(v) of this section for which the handler requests a classification other than Class I, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(ii) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (a)(7)(v), and (a)(8)(i) of this section which are in excess of the pounds of skim milk determined pursuant to paragraphs (a)(8)(ii)(A) through (C) of this section. Should the pounds of skim milk to be subtracted from Class II and Class III combined exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount:

(A) Multiply by 1.25 the sum of the pounds of skim milk remaining in Class I at this allocation step at all pool plants

of the handler (excluding any duplication of Class I utilization resulting from reported Class I transfers between pool plants of the handler);

(B) Subtract from the above result the sum of the pounds of skim milk in receipts at all pool plants of the handler of producer milk, fluid milk products from pool plants of other handlers, and bulk fluid milk products from other order plants that were not subtracted pursuant to paragraph (a)(7)(vi) of this section; and

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

(iii) The pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraph (a)(7)(vi) of this section, if Class II or Class III classification is requested by the operator of the other order plant and the handler, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1013.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

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

(11) Subject to the provisions of paragraphs (a)(11)(i) and (ii) of this section, subtract from the pounds of skim milk remaining in each class at the plant, pro rata to the total pounds of skim milk remaining in Class I and in Class II and Class III combined at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler), with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, the pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(7)(v), and (a)(8) (i) and (ii) of this section and that were not offset by transfers or diversions of fluid milk products to the same unregulated supply plant from which fluid milk products to be allocated at this step were received. Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use:

(i) Should the pounds of skim milk to be subtracted from Class II and Class III combined pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(ii) Should the pounds of skim milk to be subtracted from Class I pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount, beginning with the nearest plant at which Class I utilization is available;

(12) Subtract in the manner specified below from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraphs (a)(7)(vi) and (a)(8)(iii) of this section. Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use:

(i) Subject to the provisions of paragraphs (a)(12)(ii), (iii), and (iv) of this section, such subtraction shall be pro rata to the pounds of skim milk in Class I and in Class II and Class III combined, with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, with respect to whichever of the following quantities represents the lower proportion of Class I milk:

(A) The estimated utilization of skim milk of all handlers in each class as announced for the month pursuant to § 1013.45(a); or

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

(ii) Should the proration pursuant to paragraph (a)(12)(i) of this section result in the total pounds of skim milk at all pool plants of the handler that are to be subtracted at this allocation step from Class II and Class III combined exceeding the pounds of skim milk remaining in Class II and Class III at all such plants, the pounds of such excess shall be subtracted from the pounds of skim milk remaining in Class I after such proration at the pool plants at which such other source milk was received;

(iii) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class II and Class III combined that exceeds the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(iv) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class I that exceeds the pounds of skim milk remaining in such class, the

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

(13) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of fluid milk products and bulk fluid cream products from another pool plant according to the classification of such products pursuant to § 1013.42(a); and

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

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

(c) The quantity of producer milk in each class shall be the combined pounds of skim milk and butterfat remaining in each class after the computations pursuant to paragraph (a)(14) of this section and the corresponding step of paragraph (b) of this section.

§ 1013.45 [Amended]

8. In § 1013.45, the reference "§ 1013.44(a)(10)" is changed to "§ 1013.44(a)(12)".

9. Section 1013.50 is amended by revising paragraph (c) to read as follows:

§ 1013.50 Class prices.

* * * * *

(c) *Class III price.* The Class III price shall be the basic formula price for the month.

10. Section 1013.60 is revised to read as follows:

§ 1013.60 Handler's value of milk for computing the uniform price.

For the purpose of computing the uniform price the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1013.9 (b) and (c) as follows:

(a) Multiply the pounds of producer milk in each class as determined pursuant to § 1013.44(c) by the applicable class prices and add the resulting amounts;

(b) Add the amounts obtained from multiplying the pounds of overage subtracted from each class pursuant to § 1013.44(a)(14) and the corresponding step of § 1013.44(b) by the respective class prices, as adjusted by the butterfat differential specified in § 1013.74, that are applicable at the location of the pool plant;

(c) Add the amount obtained from multiplying the difference between the Class III price for the preceding month and the Class I price applicable at the location of the pool plant or the Class II price, as the case may be, for the current month by the hundredweight of skim milk and butterfat subtracted from Class I and Class II pursuant to § 1013.44(a)(9) and the corresponding step of § 1013.44(b);

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1013.44(a)(7) (i) through (iv) and the corresponding step of § 1013.44(b), excluding receipts of bulk fluid cream products from an other order plant;

(e) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the transferor-plant and the Class III price by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1013.44(a)(7) (v) and (vi) and the corresponding step of § 1013.44(b);

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1013.44(a)(11) and the corresponding step of § 1013.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1013.76(c).

10. Section 1013.76 is amended by revising paragraphs (b)(3) and (b)(5) and by adding a new paragraph (c) to read as follows:

§ 1013.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(b) * * *

(3) Deduct from any remainder the pounds of reconstituted milk that are made from nonfluid milk products and milk or skim milk contained in receipts from producer-handlers and exempt plants defined in any other order, which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) From the value of such milk at the Class I price applicable at the location of the nonpool plant, subtract its value at the uniform price applicable at such location, and add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (b)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I

price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

§ 1013.85 [Amended]

11. Section 1013.85 is amended by changing the reference "§ 1013.44(a)(3), (a)(4), and (a)(9)" to "§ 1013.44(a)(6), (a)(7), and (a)(11)" in paragraph (a)(2).

PART 1030—MILK IN THE CHICAGO REGIONAL MARKETING AREA

1. Section 1030.15 is revised to read as follows:

§ 1030.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1030.16 is revised to read as follows:

§ 1030.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1030.21 is added under the heading "Definitions" to read as follows:

§ 1030.21 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1030.13, 1030.41 and 1030.52.

4. Section 1030.40 is revised to read as follows:

§ 1030.40 Classes of utilization.

Except as provided in § 1030.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1030.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood,

fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1030.15 and the fluid cream product definition pursuant to § 1030.16; and

(7) In shrinkage assigned pursuant to § 1030.41(a) to the receipts specified in § 1030.41(a)(2) and in shrinkage specified in § 1030.41(b) and (c).

5. Section 1030.42 is amended by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1030.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

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

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

* * * * *

6. Section 1030.44 is amended by adding a new paragraph (a)(2)(iii), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(ix), revising paragraph (a)(9), amending paragraph (a)(11) by replacing the semicolon at the end of the text with a period and adding a sentence immediately thereafter, and amending paragraph (a)(12) by replacing the colon at the end of the introductory text with a period and adding the following sentence immediately thereafter, to read as follows:

§ 1030.44 Classification of producer milk.

* * * * *

(a) * * *

(2) * * *

(iii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(ix) of this section, the pounds of skim milk in each of the following:

* * * * *

(ix) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1030.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(iii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(ix) of this section, shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use:

* * * * *

7. Section 1030.60 is amended by removing "and" after the ";" in paragraph (g), replacing the period after paragraph (h) with ";" and adding new paragraphs (i) and (j) to read as follows:

§ 1030.60 Handler's value of milk for computing uniform price.

* * * * *

(i) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(j) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1030.76(c).

8. Section 1030.76 is amended by revising paragraphs (a)(3) and (a)(5) and adding a new paragraph (c) to read as follows:

§ 1030.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1032—MILK IN THE SOUTHERN ILLINOIS-EASTERN MISSOURI MARKETING AREA

1. Section 1032.15 is revised to read as follows:

§ 1032.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1032.16 is revised to read as follows:

§ 1032.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1032.19 is added to read as follows:

§ 1032.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1032.13, 1032.41 and 1032.52.

4. Section 1032.40 is revised to read as follows:

§ 1032.40 Classes of utilization.

Except as provided in § 1032.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1032.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition

pursuant to § 1032.15 and the fluid cream product definition pursuant to § 1032.16; and

(7) In shrinkage assigned pursuant to § 1032.41(a) to the receipts specified in § 1032.41(a)(2) and in shrinkage specified in § 1032.41(b) and (c).

5. Section 1032.42 is amended by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1032.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

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

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

* * * * *

6. Section 1032.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(vii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1032.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

* * * * *

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1032.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1032.60 is amended by redesignating paragraph (g) as paragraph (i) and adding new paragraphs (g) and (h) to read as follows:

§ 1032.60 Handler's value of milk for computing uniform price.

* * * * *

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products;

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1032.76(c); and

8. Section 1032.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1032.76 Payments by a handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were

processed (but not to be less than the Class III price) and the Class III price.

1. The table of contents of part 1033 is amended to read as follows:

PART 1033—MILK IN THE OHIO VALLEY MARKETING AREA

Secs. 1–19, 48 Stat 31, as amended,

Authority: 7 U.S.C. 601–674.

§ 1033.6 [Redesignated as § 1033.2]

2. Section 1033.6 is re-designated as § 1033.2.

§ 1033.8 [Redesignated as § 1033.3]

3. Section 1033.8 is re-designated as § 1033.3, and amended by changing the reference "§ 1033.41(a)" to "§ 1033.40(a)".

§ 1033.9 [Redesignated as § 1033.4]

4. Section 1033.9 is re-designated as § 1033.4.

§ 1033.19 [Removed]

§ 1033.5 [Redesignated as § 1033.19]

5. Section 1033.19 is removed, and § 1033.5 is re-designated as § 1033.19.

§ 1033.10 [Redesignated as § 1033.5]

6. Section 1033.10 is re-designated as § 1033.5

§ 1033.11 [Redesignated as § 1033.6]

7. Section 1033.11 is re-designated as § 1033.6.

§ 1033.13 [Redesignated as § 1033.8]

8. Section 1033.13 is re-designated as § 1033.8.

§ 1033.16 [Redesignated as § 1033.9 and Amended]

9. Section 1033.16 is re-designated as § 1033.9 and amended by changing the reference "§ 1033.15" in paragraph (b) to "§ 1033.13", the reference "§ 1033.17" in paragraph (e) to "§ 1033.10" and the reference "§ 1033.56" in paragraph (f) to "§ 1033.7(d)".

§ 1033.17 [Redesignated as § 1033.10]

10. Section 1033.17 is re-designated as § 1033.10.

§ 1033.15 [Redesignated as § 1033.13 and Amended]

11. Section 1033.15 is re-designated as § 1033.13, and amended by changing all references to "§ 1033.16" to "§ 1033.9".

12. Section 1033.7 is re-designated as § 1033.15, and revised to read as follows:

§ 1033.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

13. Section 1033.12 is re-designated as § 1033.7 and amended in the introductory text by changing the reference "§ 1033.56" to "paragraph (d) of this section", in paragraph (b) by changing the reference "§ 1033.16(c)" to "§ 1033.9(c)" and adding a new paragraph (d) to read as follows:

§ 1033.7 Pool plant.

* * * * *

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

(1) A producer-handler plant;

(2) A plant subject to the classification and pricing provisions of another order issued pursuant to the Act, unless the plant is qualified as a pool plant pursuant to paragraph (a) or (b) of this section during the current month and the immediately preceding month and a greater volume of fluid milk products, except filled milk, is disposed of in each such month from such plant as route disposition in the Ohio Valley marketing area than is disposed of from such plant as route disposition in the marketing area regulated pursuant to the other order and to plants qualified as fully regulated plants under such other order on the basis of route disposition in the marketing area;

(3) A plant qualified pursuant to § 1033.7(a) which also meets the requirements of a fully regulated plant pursuant to the provisions of another Federal order on the basis of distribution in such other marketing area and from which the Secretary determines route disposition, except filled milk, during the month in this marketing area is greater than route

disposition in such other marketing area but which plant is, nevertheless, fully regulated under such other Federal order.

§ 1033.14 [Redesignated as § 1033.12 and Amended]

14. Section 1033.14 is re-designated as § 1033.12, and amended by changing the following references:

a. In paragraph (a)(2), the reference "§ 1033.16(c)" is changed to "§ 1033.9(c)";

b. In paragraph (a)(3), the reference "§ 1033.15" is changed to "§ 1033.13"; and

c. In paragraph (b)(2), the reference "§ 1033.46(a)(8)(ii) and the corresponding step of § 1033.46(b)" is changed to "§ 1033.44(a)(8)(ii) and the corresponding step of § 1033.44(b)".

§ 1033.18 [Redesignated as § 1033.14 and Amended]

15. Section 1033.18 is re-designated as § 1033.14, and amended in paragraph (b) by changing the reference "§ 1033.41(b)(1) and (b)(3)" to "§ 1033.40(b)(1) and (b)(4)".

16. A new § 1033.16 is added to read as follows:

§ 1033.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

§ 1033.20 [Redesignated as § 1033.17]

17. Section 1033.20 is re-designated as § 1033.17.

§ 1033.21 [Redesignated as § 1033.20 and Amended]

18. Section 1033.21 is re-designated as § 1033.20 and amended in the introductory text by changing the reference "§ 1033.51a" to "§ 1033.51(b)".

19. A new § 1033.21 is added to read as follows:

§ 1033.21 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1033.13, 1033.41 and 1033.52.

§ 1033.27 [Removed]

20. Section 1033.27 is removed.

§ 1033.30 [Amended]

21. Section 1033.30 is amended by changing the following references:

a. In paragraphs (a)(1)(iv) and (a)(2), the reference "§ 1033.41(b)(1)" is changed to "§ 1033.40(b)(1)";

b. In paragraph (b)(1), the reference "§ 1033.16(b) or (c)" is changed to "§ 1033.9 (b) or (c)"; and

c. In paragraph (b)(2), the reference "§ 1033.15(b)" is changed to "§ 1033.13(b)".

§ 1033.31 [Redesignated as § 1033.32 and Amended]

§ 1033.32 [Redesignated as § 1033.31 and Amended]

22. Section 1033.31 is re-designated as § 1033.32, and § 1033.32 is re-designated as § 1033.31. Re-designated § 1033.31 is amended by changing the reference "§ 1033.57(a)" in paragraph (b) to "§ 1033.76(a)"; and re-designated § 1033.32 is amended by changing the references "§ 1033.16(c)" in paragraphs (c)(4), (d)(3) and (e)(4) to "§ 1033.9(c)", and the reference "§ 1033.32" in paragraph (g) to "§ 1033.31".

§ 1033.40 [Removed]

§ 1033.41 [Redesignated as § 1033.40]

23. Section 1033.40 is removed and § 1033.41 is re-designated as § 1033.40, and revised to read as follows:

§ 1033.40 Classes of utilization.

Except as provided in § 1033.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1033.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section

that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1033.7 and the fluid cream product definition pursuant to § 1033.16; and

(7) In shrinkage assigned pursuant to § 1033.41(a) to the receipts specified in § 1033.41(a)(2) and in shrinkage specified in § 1033.41 (b) and (c).

24. Section 1033.42 is re-designated as § 1033.41, and revised to read as follows:

§ 1033.41 Shrinkage.

For purposes of classifying all skim milk and butterfat to be reported by a handler pursuant to § 1033.30, the market administrator shall determine the following:

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

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

(2) In other source milk not specified in paragraphs (b) (1) through (6) of this section which was received in bulk fluid form;

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

(1) Two percent of the skim milk and butterfat, respectively, in producer milk (excluding milk diverted by the plant operator to another plant and milk received from a handler described in § 1033.9(c));

(2) Plus 1.5 percent of the skim milk and butterfat, respectively, in milk received from a handler described in § 1033.9(c) and in milk diverted to such plant from another pool plant, except that, in either case, if the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph (b)(2) shall be 2 percent;

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

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

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

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

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

(c) The quantity of skim milk and butterfat, respectively, in shrinkage of milk from producers for which a cooperative association is the handler pursuant to § 1033.9 (b) or (c), but not in excess of 0.5 percent of the skim milk and butterfat, respectively, in such milk. If the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph for the cooperative association shall be zero.

25. Section 1033.43 is re-designated as § 1033.42, and revised to read as follows:

§ 1033.42 Classification of transfers and diversions.

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

(1) The skim milk and butterfat classified in each class shall be limited to the amount of skim milk and butterfat, respectively, remaining in such class at the transferee-plant or divertee-plant after the computations pursuant to § 1033.44(a)(12) and the corresponding step of § 1033.44(b);

(2) If the transferor-plant or divertor-plant received during the month other source milk to be allocated pursuant to § 1033.44(a)(7) or the corresponding step of § 1033.44(b), the skim milk or butterfat so transferred shall be classified so as to allocate the least possible Class I utilization to such other source milk; and

(3) If the transferor-handler or divertor-handler received during the month other source milk to be allocated pursuant to § 1033.44(a) (11) or (12) or the corresponding steps of § 1033.44(b), the skim milk or butterfat so transferred, up to the total of the skim milk and butterfat, respectively, in such receipts of other source milk, shall not be classified as Class I milk to a greater extent than would be the case if the other source milk had been received at the transferee-plant or divertee-plant.

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

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

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

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

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

(5) For purposes of this paragraph, if the other order provides for a different number of classes of utilization than is provided for under this part, skim milk or butterfat allocated to a class consisting primarily of fluid milk products shall be classified as Class I products shall be classified as Class I milk, and skim milk or butterfat allocated to the other classes shall be classified as Class III milk; and (6) If the form in which any fluid milk product that is transferred to an other order plant is not defined as a fluid milk product under such other order, classification under this paragraph shall be in accordance with the provisions of § 1033.40.

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

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

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

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

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

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

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

(A) The transferor-handler or divertor-handler claims such classification in its report of receipts and utilization filed pursuant to § 1033.30 for the month within which such transaction occurred; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(viii) In determining the nonpool plant's utilization for purposes of this paragraph, any fluid milk products and bulk fluid cream products transferred from such nonpool plant to a plant not fully regulated under any Federal milk order shall be classified on the basis of the second plant's utilization using the same assignment priorities at the second plant that are set forth in paragraph (d)(2) of this section.

26. Section 1033.45 is re-designated as § 1033.43, and revised to read as follows:

§ 1033.43 General classification rules.

In determining the classification of producer milk pursuant to § 1033.44, the following rules shall apply:

(a) Each month the market administrator shall correct for mathematical and other obvious errors all reports filed pursuant to § 1033.30 and shall compute separately for each pool plant and for each cooperative association with respect to milk for

which it is the handler pursuant to § 1033.9 (b) or (c) the pounds of skim milk and butterfat, respectively, in each class in accordance with §§ 1033.40, 1033.41, and 1033.42;

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

(c) The classification of producer milk for which a cooperative association is the handler pursuant to § 1033.9 (b) or (c) shall be determined separately from the operations of any pool plant operated by such cooperative association.

(d) Bulk fluid milk products transferred or diverted from a pool plant operated by a cooperative association to another pool plant shall be classified in accordance with the rules set forth in § 1033.42(a) and the value thereof at class prices (applicable at the location of the transferee-plant) shall be used to compute the receiving handler's pool obligation for such milk pursuant to § 1033.60.

27. A new § 1033.44 is added to read as follows:

§ 1033.44 Classification of producer milk.

For each month the market administrator shall determine the classification of producer milk of each handler described in § 1033.9 (a), (b), and (c) by allocating the handler's receipts of skim milk and butterfat to his utilization pursuant to paragraphs (a) through (c) of this section. If a handler with two or more pool plants has no fluid milk products to be assigned under paragraphs (a)(11) or (a)(12) and the corresponding steps of (b) of this section, allocations under this section shall be determined separately for each of his pool plants. Otherwise, the market administrator shall combine the receipts and utilization in each of the respective classes at all pool plants of such handler for purposes of this paragraph.

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

(1) Subtract from the total pounds of skim milk in Class III the pounds of skim milk in shrinkage specified in § 1033.41(b);

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(3) Subtract from the remaining pounds of skim milk in each class the pounds of skim milk in fluid milk products received in packaged form from an other order plant, except that to be subtracted pursuant to paragraph (a)(7)(vi) of this section, as follows:

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

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

(4) Subtract from the pounds of skim milk in Class II the pounds of skim milk in products specified in § 1033.40(b)(1) that were received in packaged form from other plants, but not in excess of the pounds of skim milk remaining in Class II;

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1033.40(b)(1) that were in inventory at the beginning of the month in packaged form, but not in excess of the pounds of skim milk remaining in Class II.

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in other source milk (except that received in the form of a fluid milk product or a fluid cream product) that is used to produce, or added to, any product specified in § 1033.40(b), but not in excess of the pounds of skim milk remaining in Class II;

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

(i) Other source milk (except that received in the form of a fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1033.40(b)(1) that was not subtracted pursuant to paragraph (a) (4), (5), and (6) of this section;

(ii) Receipts of fluid milk products (except filled milk) and bulk cream for which bottling grade certification is not established;

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

(iv) Receipts of fluid milk products and bulk cream from a producer-handler, as defined under this or any other Federal order;

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

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

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

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

(i) Receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a) (2)(i) and (7)(v) of this section for which the handler requests classification other than Class I, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(ii) Receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a) (2)(i), (7)(v), and (8)(i) of this section which are in excess of the pounds of skim milk determined pursuant to paragraphs (a)(8)(ii) (A) through (C) of this section. Should the pounds of skim milk to be subtracted from Class II and Class III combined exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount:

(A) Multiply by 1.25 the pounds of skim milk remaining in Class I at this

allocation step (exclusive of transfers between pool plants of the same handler) at all pool plants of the handler;

(B) Subtract from the above result the sum of the pounds of skim milk in receipts at all pool plants of the handler of producer milk, fluid milk products from pool plants of other handlers, and bulk fluid milk products from other order plants that were not subtracted pursuant to paragraph (a)(7)(vi) of this section; and

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

(iii) Receipts of bulk fluid milk products from another order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraph (a)(7)(vi) of this section, if Class II or Class III classification is requested by the operator of the other order plant and the handler, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1033.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a) (2)(ii), (5) and (7)(i) of this section;

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

(11) Subject to the provisions of paragraphs (a)(11) (i) and (ii) of this section, subtract from the pounds of skim milk remaining in each class at the plant, pro rata to the total pounds of skim milk remaining in Class I and in Class II and Class III combined at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler), with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, the pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a) (2)(i), (7)(v), and 8 (i) and (ii) of this section and that were not offset by transfers or diversions of fluid milk products to the same unregulated supply plant from which fluid milk products to be allocated at this step were received. Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use:

(i) Should the pounds of skim milk to be subtracted from Class II and Class III combined pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(ii) Should the pounds of skim milk to be subtracted from Class I pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount, beginning with the nearest plant at which Class I utilization is available;

(12) Subtract in the manner specified below from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of bulk fluid milk products from another order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraphs (a) (7)(vi) and (8)(iii) of this section. Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use:

(i) Subject to the provisions of paragraphs (a)(12) (ii), (iii), and (iv) of this section, such subtraction shall be pro rata to the pounds of skim milk in Class I and in Class II and Class III combined, with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, with respect to whichever of the following quantities represents the lower proportion of Class I milk:

(A) The estimated utilization of skim milk of all handlers in each class as announced for the month pursuant to § 1033.45(a); or

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

(ii) Should the proportion pursuant to paragraph (a)(12)(i) of this section result in the total pounds of skim milk at all pool plants of the handler that are to be subtracted at this allocation step from Class II and Class III combined exceeding the pounds of skim milk remaining in Class II and Class III at all such plants, the pounds of such excess shall be subtracted from the pounds of skim milk remaining in Class I after such proration at the pool plants at which such other source milk was received;

(iii) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class II and Class III combined that exceeds the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(iv) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class I that exceeds the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such

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

(13) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of fluid milk products and bulk fluid cream products from another pool plant according to the classification of such products pursuant to § 1033.42(a); and

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

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

(c) The quantity of producer milk in each class shall be the combined pounds of skim milk and butterfat remaining in each class after the computations pursuant to paragraph (a)(14) of this section and the corresponding step of paragraph (b) of this section.

28. A new § 1033.45 is added to read as follows:

§ 1033.45 Market administrator's reports and announcements concerning classification.

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

(a) Whenever required for the purpose of allocating receipts from other order plants pursuant to § 1033.44(a)(12) and the corresponding step of § 1033.44(b), estimate and publicly announce on or before the 10th day of the month the utilization (to the nearest whole percentage) in each class during the month of skim milk and butterfat, respectively, in producer milk of all handlers. Such estimate shall be based upon the most current available data and shall be final for such purpose;

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from another order plant, the class to which such receipts are allocated pursuant to § 1033.44 on the basis of such report, and, thereafter, any change in such allocation required to correct errors disclosed in the verification of such report; and

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

(d) On or before the 14th day after the end of each month, report to each cooperative association, upon request by such association, the percentage of the milk caused to be delivered by the cooperative association or its members which was utilized in each class at each pool plant receiving such milk. For the purpose of this report, the milk so received shall be allocated to each class at each pool plant in the same ratio as all producer milk received at such plant during the month.

§ 1033.46 [Removed]

29. Section 1033.46 is removed.

§ 1033.50 [Removed]

30. Section 1033.50 is removed.

§ 1033.51 [Redesignated as § 1033.50 and Amended]

31. Section 1033.51 is re-designated as § 1033.50 and amended by changing the reference "§ 1033.53" in the introductory language to "§ 1033.52", the reference "§ 1033.51a" in paragraph (b) to "§ 1033.51(b)", the reference "§ 1033.50" in paragraph (b)(1) to "§ 1033.50(a)", and the reference "§ 1033.51a" in paragraph (b)(2) to "§ 1033.51(b)".

32. A new § 1033.51 is added to read as follows:

§ 1033.51 Basic formula prices.

(a) The *basic formula price* shall be the average price per hundredweight for manufacturing grade milk, f.o.b. plants in Minnesota and Wisconsin, as reported by the Department for the month, adjusted to a 3.5 percent butterfat basis and rounded to the nearest cent. For such adjustment, the butterfat differential pursuant to § 1033.73 shall be used.

(b) The *basic Class II formula price* for the month shall be the basic formula price determined pursuant to § 1033.51(a) for the second preceding month plus or minus the amount computed pursuant to paragraphs (b) (1) through (4) of this section:

(1) The gross values per hundredweight of milk used to manufacture cheddar cheese and butter-nonfat dry milk shall be computed, using price data determined pursuant to § 1033.20 and yield factors in effect under the Dairy Price Support Program authorized by the Agricultural Act of 1949, as amended, for the first 15 days of the preceding month and, separately, for the first 15 days of the second preceding month as follows:

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

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

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

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

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

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

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

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

(3) Compute weighting factors to be applied to the changes in gross values determined pursuant to paragraph (b)(2) of this section by determining the relative proportion that the data included in each of the following subparagraphs is of the total of the data represented in paragraphs (b)(3) (i) and (ii) of this section:

(i) Combine the total American cheese production for the States of Minnesota and Wisconsin, as reported by the National Agricultural Statistics Service of the Department for the third preceding month, and divide by the yield factor used under the Price Support Program for cheddar cheese to determine the quantity of milk used in the production of American cheddar cheese; and

(ii) Combine the total nonfat dry milk production for the States of Minnesota

and Wisconsin, as reported by the National Agricultural Statistics Service of the Department for the third preceding month, and divide by the yield factor used under the Price Support Program for nonfat dry milk to determine the quantity of milk used in the production of butter-nonfat dry milk.

(4) Compute a weighted average of the changes in gross values per hundredweight of milk determined pursuant to paragraph (b)(2) of this section in accordance with the relative proportions of milk determined pursuant to paragraph (b)(3) of this section.

§ 1033.51a [Removed]

33. Section 1033.51a is removed.

§ 1033.53 [Redesignated as 1033.52 and Amended]

34. Section 1033.53 is re-designated as § 1033.52, and amended by changing the reference "§ 1033.51(a)" in paragraph (a) introductory text to "§ 1033.50(a)", the reference "§ 1033.6" in paragraph (a)(1) to "§ 1033.2", and the reference "§ 1033.46 (a)(1) through (a)(12) and the corresponding steps of § 1033.46(b)" in paragraph (b) to "§ 1033.44(a)(1) through (a)(12) and the corresponding steps of § 1033.44(b)".

35. A new § 1033.53 is added to read as follows:

§ 1033.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price for the following month, the Class III price for the preceding month, and on or before the 15th day of each month the Class II price for the following month computed pursuant to § 1033.50(b).

§ 1033.56 [Removed]

36. Section 1033.56 is removed.

37. Section 1033.60, is revised to read as follows:

§ 1033.60 Handler's value of milk for computing uniform price.

For the purpose of computing the uniform price, the market administrator shall determine for each month the value of milk for each pool plant of each handler and for each handler pursuant to § 1033.9 (b) and (c) as follows:

(a) Multiply the pounds of producer milk in each class as determined pursuant to § 1033.44(c) and the pounds of bulk fluid milk products received from a pool plant operated by a cooperative association pursuant to § 1033.43(d) in each class as determined pursuant to § 1033.42(a) by the applicable class price and add the resulting amounts;

(b) Add the amounts obtained from multiplying the pounds of overage deducted from each class pursuant to § 1033.44(a)(14) and the corresponding step of § 1033.44(b) by the applicable class price, as adjusted by the butterfat differential specified in § 1033.73;

(c) Add the amount obtained from multiplying the difference between the Class III price for the preceding month and the Class I or Class II price for the current month, as the case may be, by the hundredweight of skim milk and butterfat subtracted from Class I and Class II pursuant to § 1033.44(a)(9) and the corresponding step of § 1033.44(b);

(d) Add the amount obtained from multiplying the difference between the Class I price at the pool plant and Class III price, both for the current month, by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to 1033.44(a)(7) (i) through (iv) and the corresponding steps of § 1033.44(b), except that for receipts of fluid milk products assigned to Class I pursuant to § 1033.44(a)(7) (v) and (vi) and the corresponding steps of § 1033.44(b) the Class I price shall be adjusted to the location of the transferor plant (but not to be less than the Class III price);

(e) Add the amount obtained from multiplying the Class I price adjusted for the location of the nearest unregulated supply plants from which an equivalent volume was received, but not to be less than the Class III price, by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1033.44(a)(11) and the corresponding step of § 1033.44(b), excluding such skim milk or butterfat disposed of to such plant by handlers under this or any other order issued pursuant to the Act is classified and priced as Class I milk and is not used as an offset on any other payment obligation under this or any other order;

(f) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(g) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1033.76(c).

§ 1033.61 [Amended]

38. Section 1033.61 is amended by changing the reference "§ 1033.60(g)" in paragraph (f)(2) to "§ 1033.60(e)".

§ 1033.70 [Amended]

39. In § 1033.70, paragraph (c) is removed and paragraph (a) is revised and paragraph (b) is added to read as follows:

(a) All payments made by handlers pursuant to §§ 1033.71, 1033.76, and 1033.77 shall be deposited in this fund, and all payments made pursuant to §§ 1033.72 and 1033.77 shall be made out of this fund;

(b) The difference between the amount added pursuant to § 1033.61(e) and the amount resulting from the subtraction pursuant to § 1033.61(g) shall be deposited in, or withdrawn from, this fund, as the case may be.

40. Section 1033.71 is amended by changing the reference "paragraph (c)" in paragraph (a) and the introductory text of paragraph (b) to "paragraph (d)", changing the references "§ 1033.60(g)" in paragraph (b) introductory text and paragraph (b)(1) to "§ 1033.60(e)", redesignating paragraph (c) as paragraph (d), adding a new paragraph (c), and revising the introductory text of redesignated paragraph (d) to read as follows:

§ 1033.71 Payments to the market administrator.

* * * * *

(c) Subject to paragraph (d) of this section, each handler operating a distributing plant that is subject to the classification and pricing provisions of another order which provides for individual handler pooling shall pay to the market administrator for the producer-settlement fund on or before the 25th day after the end of the month an amount computed as follows:

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

(2) Compute the value of the quantity of reconstituted skim milk assigned in paragraph (b)(1) of this section to route disposition in this marketing area at the Class I price under this part applicable at the location of the other order plant (not to be less than the Class III price)

and subtract its value at the Class III price.

(d) The following conditions shall apply with respect to the payments prescribed in paragraphs (a), (b) and (c) of this section:

* * * * *

§ 1033.72 [Amended]

41. Section 1033.72 is amended by changing the reference "§ 1033.75" in paragraph (b)(2) to "§ 1033.86" and the reference "§ 1033.71(c)(2)" in paragraph (e)(2) to "§ 1033.71(d)(2)".

42. Section 1033.74 is revised to read as follows:

§ 1033.74 Plant location adjustments for producers and on nonpool milk.

(a) The uniform price for producer milk at a plant outside the Central Zone shall be the Central Zone uniform price adjusted according to the location of the plant at the rates set forth in § 1033.52(a); and

(b) For the purpose of computations pursuant to § 1033.71(b)(1), the weighted average price shall be adjusted at the rate set forth in § 1033.52(a) that is applicable at the location of the nonpool plant from which other source milk was received.

§ 1033.75 [Redesignated as § 1033.86]

43. Section 1033.75 is re-designated as § 1033.86 and the title of re-designated § 1033.86 is revised to "Deduction for marketing services."

§ 1033.76 [Redesignated as § 1033.85 and Amended]

44. Section 1033.76 is re-designated as § 1033.85, the title of re-designated § 1033.85 is revised to "Assessment for order administration.", and re-designated § 1033.85 is amended by changing the following references:

a. In paragraph (a), the reference "§ 1033.16(c)" is changed to "§ 1033.9(c)".

b. In paragraphs (a) and (b), the reference "§ 1033.45(d)" is changed to "§ 1033.43(d)".

c. In paragraph (c), the reference "§ 1033.46(a)(6), (a)(7), and (a)(11) and the corresponding steps of § 1033.46(b)" is changed to "§ 1033.44(a)(7) and (a)(11) and the corresponding steps of § 1033.44(b)"; and the reference "§ 1033.60(g)" is changed to "§ 1033.60(e)".

d. In paragraph (d)(2), the reference "§ 1033.57(b)(2)(ii)" is changed to "§ 1033.76(b)(2)(ii)".

§ 1033.57 [Redesignated as § 1033.76]

45. Section 1033.57 is re-designated as § 1033.76, and re-designated § 1033.76 is amended by revising the section heading, changing the reference "§ 1033.32(b)" in the introductory language and in paragraph (a)(1)(ii) to "§ 1033.31(b)", the reference "§ 1033.60(g)" in paragraph (a)(1)(i) to "§ 1033.60(e)", and the reference "§ 1033.12(b)" in paragraph (a)(1)(ii) to "§ 1033.7(b)"; revising paragraphs (b)(3) and (b)(5) and adding a new paragraph (c) to read as follows:

§ 1033.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(b) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) From the value of such milk at the Class I price applicable at the location of the nonpool plant (not to be less than the Class III price) subtract its value at the weighted average price applicable at such location (not to be less than the Class III price), and add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (b)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

46. The center headings in part 1033 would be removed and new center headings would be added to precede the redesignated sections as follows:

a. Preceding § 1033.1, "General Provisions";

b. Preceding § 1033.2, "Definitions";

c. Preceding § 1033.30, "Handler Reports";

d. Preceding § 1033.40, "Classification of Milk";

e. Preceding § 1033.50, "Class Prices";

f. Preceding § 1033.60, "Uniform Price";

g. Preceding § 1033.70, "Payments for Milk"; and

h. Preceding § 1033.85, "Administrative Assessment and Marketing Service Deduction".

PART 1036—MILK IN THE EASTERN OHIO-WESTERN PENNSYLVANIA MARKETING AREA

1. Section 1036.15 is revised to read as follows:

§ 1036.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated to not more than 50 percent total milk solids, or reconstituted.

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

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

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

2. Section 1036.16 is revised to read as follows:

§ 1036.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1036.21 is added under the heading "Definitions" to read as follows:

§ 1036.21 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1036.13, 1036.41 and 1036.52.

4. Section 1036.40 is revised to read as follows:

§ 1036.40 Classes of utilization.

Except as provided in § 1036.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1036.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, Ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1036.15 and the fluid cream product definition pursuant to § 1036.16; and

(7) In shrinkage assigned pursuant to § 1036.41(a) to the receipts specified in § 1036.41(a)(2) and in shrinkage specified in § 1036.41(b) and (c).

5. Section 1036.41 is revised to read as follows:

§ 1036.41 Shrinkage.

For purposes of classifying all skim milk and butterfat to be reported by a handler pursuant to § 1036.30, the market administrator shall determine the following:

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

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

(2) In other source milk not specified in paragraphs (b)(1) through (b)(6) of this section which was received in bulk fluid form;

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

(1) Two percent of the skim milk and butterfat, respectively, in producer milk (excluding milk diverted by the plant operator to another plant and milk received from a handler described in § 1036.9(c));

(2) Plus 1.5 percent of the skim milk and butterfat, respectively, in milk received from a handler described in § 1036.9(c) and in milk diverted to such plant from another pool plant, except that, in either case, if the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat

tests determined from farm bulk tank samples, the applicable percentage under this paragraph (b)(2) shall be 2 percent;

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

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

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

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

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

(c) The quantity of skim milk and butterfat, respectively, in shrinkage of milk from producers for which a cooperative association is the handler pursuant to § 1036.9(b) or (c), but not in excess of 0.5 percent of the skim milk and butterfat, respectively, in such milk. If the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph for the cooperative association shall be zero.

6. Section 1036.42 is amended by revising paragraph (c)(3)(iv) to read as follows:

§ 1036.42 Classification of transfers and diversions.

* * * * *

(c) * * *

(3) * * *

(iv) To the extent that Class I utilization is not so assigned to it, the skim milk and butterfat so transferred or diverted shall be classified as Class II milk to the extent Class II utilization is available and the remainder as Class III milk; and;

* * * * *

7. Section 1036.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(vi), revising paragraph (a)(9) and amending paragraphs (a)(12) and (a)(13) by replacing the semicolon at the end of paragraph (a)(2) and the colon at the end of the introductory text of paragraph (a)(13) with a period and adding the following sentences immediately thereafter, as follows:

§ 1036.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class in series beginning with Class III, except as specified in paragraph (a)(7)(vi) of this section, the pounds of skim milk in each of the following:

* * * * *

(vi) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(13) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1036.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(13) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vi) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

8. Section 1036.60 is amended by removing "and" after the ";" in paragraph (d), replacing the period after paragraph (e) with ";", revising paragraph (f) and adding a new paragraph (g) to read as follows:

§ 1036.60 Handler's value of milk for computing uniform price.

* * * * *

(f) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(g) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1036.76(c).

9. Section 1036.76 is amended by revising paragraphs (b)(3) and (b)(5) and by adding a new paragraph (c) to read as follows:

§ 1036.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(b) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled

reconstituted milk included in paragraph (b)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1040—MILK IN THE SOUTHERN MICHIGAN MARKETING AREA

1. Section 1040.15 is revised to read as follows:

§ 1040.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1040.16 is revised to read as follows:

§ 1040.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1040.19 is added to read as follows:

§ 1040.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1040.13, 1040.41 and 1040.52.

4. Section 1040.40 is revised to read as follows:

§ 1040.40 Classes of utilization.

Except as provided in § 1040.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1040.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1040.15 and the fluid cream product definition pursuant to § 1040.16; and

(7) In shrinkage assigned pursuant to § 1040.41(a) to the receipts specified in § 1040.41(a)(2) and in shrinkage specified in § 1040.41(b) and (c).

5. Section 1040.42 is amended by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1040.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

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

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

* * * * *

6. Section 1040.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(vii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the semi-colon and colon, respectively, at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1040.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

* * * * *

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1040.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs 1040.44(a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1040.60 is amended by removing "and" after the ";" in paragraph (f), replacing the period after paragraph (g) with ";", revising paragraph (h), and adding a new paragraph (i) to read as follows:

§ 1040.60 Handler's value of milk for computing uniform price.

* * * * *

(h) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(i) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1040.76(c).

8. Section 1040.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1040.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph

(a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1044—MILK IN THE MICHIGAN UPPER PENINSULA MARKETING AREA

1. Section 1044.6 is revised to read as follows:

§ 1044.6 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. A new § 1044.18 is added to read as follows:

§ 1044.18 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1044.20 is added under "General provisions and definitions" to read as follows:

§ 1044.20 Product prices.

The following product prices shall be used in calculating the basic Class II formula price pursuant to § 1044.51(b):

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

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

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

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

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

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

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

4. A new § 1044.21 is added under the heading "General provisions and definitions" to read as follows:

§ 1044.21 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages.

Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating

to diversions to plants, including but not limited to, provisions in §§ 1044.14, 1044.41 and 1044.53.

5. Section 1044.22 is amended by revising paragraphs (i)(1)(iii) and adding a new paragraph (i)(3) to read as follows:

§ 1044.22 Additional duties of the market administrator.

* * * * *

(i) * * *

(1) * * *

(iii) The Class III price for the preceding month; and

(2) * * *

(3) On or before the 15th day of each month the Class II price for the following month computed pursuant to § 1044.50(b).

* * * * *

§ 1044.40 [Removed]

§ 1044.41 [Redesignated as § 1044.40]

6. Section 1044.40 is removed and § 1044.41 is re-designated as § 1044.40, and revised to read as follows:

§ 1044.40 Classes of utilization.

Except as provided in § 1044.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1044.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) paragraphs (b)(4) (i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1044.6 and the fluid cream product definition pursuant to § 1044.18; and

(7) In shrinkage assigned pursuant to § 1044.41(a) to the receipts specified in § 1044.41(a)(2) and in shrinkage specified in § 1044.41 (b) and (c).

§ 1044.42 [Redesignated as § 1044.41]

7. Section 1044.42 is re-designated as § 1044.41 and revised to read as follows:

§ 1044.41 Shrinkage.

For purposes of classifying all skim milk and butterfat to be reported by a handler pursuant to § 1044.30, the market administrator shall determine the following:

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

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

(2) In other source milk not specified in paragraphs (b)(1) through (b)(6) of this section which was received in bulk fluid form;

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

(1) Two percent of the skim milk and butterfat, respectively, in producer milk (excluding milk diverted by the plant operator to another plant and milk received from a handler described in § 1044.10(c));

(2) Plus 1.5 percent of the skim milk and butterfat, respectively, in milk received from a handler described in § 1044.10(c) and in milk diverted to such plant from another fluid milk plant, except that, in either case, if the

operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph (b)(2) shall be 2 percent;

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

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

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

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

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

(c) The quantity of skim milk and butterfat, respectively, in shrinkage of milk from producers for which a cooperative association is the handler pursuant to § 1044.10 (c) or (d), but not in excess of 0.5 percent of the skim milk and butterfat, respectively, in such milk. If the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph for the cooperative association shall be zero.

§ 1044.43 [Redesignated as § 1044.42]

8. Section 1044.43 is redesignated as § 1044.42, and revised to read as follows:

§ 1044.42 Classification of transfers.

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

(1) The skim milk and butterfat classified in each class shall be limited to the amount of skim milk and butterfat, respectively, remaining in such class at the transferee-plant after the computations pursuant to § 1044.44(a)(11) and the corresponding step of § 1044.44(b);

(2) If the transferor-plant received during the month other source milk to be allocated pursuant to § 1044.44(a)(7) or the corresponding step of § 1044.44(b), the skim milk or butterfat so transferred shall be classified so as to allocate the least possible Class I utilization to such other source milk; and

(3) If the transferor-handler received during the month other source milk to be allocated pursuant to § 1044.44(a)(11) or the corresponding steps of § 1044.44(b), the skim milk or butterfat so transferred, up to the total of the skim milk and butterfat, respectively, in such receipts of other source milk, shall not be classified as Class I milk to a greater extent than would be the case if the other source milk had been received at the transferee- plant.

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

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

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

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

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

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

(6) If the form in which any fluid milk product that is transferred to an other order plant is not defined as a fluid milk product under such other order, classification under this paragraph shall be in accordance with the provisions of § 1044.40.

(c) *Transfers to producer-handlers and to exempt plants.* Skim milk or butterfat in the following forms that is transferred from a fluid milk plant to a producer-handler under this or any other Federal order or to an exempt plant shall be classified:

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

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

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

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

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

(i) If the conditions described in paragraphs (d)(2)(i)(A) and (B) of this section are met, transfers or diversions in bulk form shall be classified on the basis of the assignment of the nonfluid milk plant's utilization to its receipts as

set forth in paragraphs (d)(2)(ii) through (viii) of this section:

(A) The transferor-handler or divertor-handler claims such classification in its report of receipts and utilization filed pursuant to § 1044.30 for the month within which such transaction occurred; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(viii) In determining the nonfluid milk plant's utilization for purposes of this paragraph, any fluid milk products and bulk fluid cream products transferred from such nonfluid milk plant to a plant not fully regulated under any Federal milk order shall be classified on the basis of the second plant's utilization using the same assignment priorities at the second plant that are set forth in paragraph (d)(2) of this section.

§ 1044.45 [Redesignated as § 1044.43]

9. Section 1044.45 is re-designated as § 1044.43, and revised to read as follows:

§ 1044.43 General classification rules.

In determining the classification of producer milk pursuant to § 1044.44, the following rules shall apply:

(a) Each month the market administrator shall correct for mathematical and other obvious errors all reports filed pursuant to § 1044.30 and shall compute separately for each fluid milk plant and for each cooperative association with respect to milk for which it is the handler pursuant to § 1044.10 (c) or (d) the pounds of skim milk and butterfat, respectively, in each class in accordance with §§ 1044.40, 1044.41, and 1044.42;

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

(c) The classification of producer milk for which a cooperative association is the handler pursuant to § 1044.10(c) or (d) shall be determined separately from the operations of any fluid milk plant operated by such cooperative association.

(d) Bulk fluid milk products transferred or diverted from a fluid milk plant operated by a cooperative association to another fluid milk plant shall be classified in accordance with the rules set forth in § 1044.42(a) and the value thereof at class prices (applicable at the location of the transferee-plant) shall be used to compute the receiving handler's net obligation for such milk pursuant to § 1044.60.

§ 1044.46 [Redesignated as § 1044.44]

10. Section 1044.46 is re-designated as § 1044.44 and revised to read as follows:

§ 1044.44 Classification of producer milk.

For each month the market administrator shall determine the classification of producer milk at each fluid milk plant described in § 1044.10(a) by allocating the plant's receipts of skim milk and butterfat to its utilization pursuant to paragraphs (a) through (c) of this section.

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

(1) Subtract from the total pounds of skim milk in Class III the pounds of skim milk in shrinkage specified in § 1044.41(b);

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the fluid milk plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(3) Subtract from the remaining pounds of skim milk in each class the pounds of skim milk in fluid milk products received in packaged form from any other order plant, except that to be subtracted pursuant to paragraph (a)(7)(vi) of this section, as follows:

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

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

(4) Subtract from the pounds of skim milk in Class II the pounds of skim milk in products specified in § 1044.40(b)(1) that were received in packaged form from other plants, but not in excess of the pounds of skim milk remaining in Class II;

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1044.40(b)(1) that were in inventory at the beginning of the month in packaged form, but not in excess of the pounds of skim milk remaining in Class II. This paragraph (a)(5) shall apply only if the fluid milk plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in other source milk (except that received in the form of a fluid milk product or a fluid cream product) that is used to produce, or added to, any product specified in § 1044.40(b), but not in excess of the pounds of skim milk remaining in Class II;

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

(i) Other source milk (except that received in the form of a fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1044.40(b)(1) that was not subtracted pursuant to paragraph (a)(4), (a)(5), and (a)(6) of this section;

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

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

(iv) Receipts of fluid milk products from a producer-handler as defined under this or any other Federal milk order;

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

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

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

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

(i) Receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i) and (a)(7)(v) of this section for which the handler requests classification other than Class I, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(ii) Receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (a)(7)(v), and (a)(8)(i) of this section which are in excess of the pounds of skim milk determined pursuant to paragraphs (a)(8)(ii)(A) through (C) of this section. Should the pounds of skim milk to be subtracted from Class II and Class III combined exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other fluid milk plant of the handler, and then at each successively more distant fluid milk plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other fluid milk plants shall be adjusted in the reverse direction by a like amount:

(A) Multiply by 1.25 the pounds of skim milk remaining in Class I at this allocation step (exclusive of transfers between fluid milk plants of the same handler) at all fluid milk plants of the handler;

(B) Subtract from the above result the sum of the pounds of skim milk in receipts at all fluid milk plants of the handler of producer milk, fluid milk products from fluid milk plants of other handlers, and bulk fluid milk products from other order plants that were not subtracted pursuant to paragraph (a)(7)(vi) of this section; and

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

(iii) Receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraph (a)(7)(vi) of this section, if Class II or Class III classification is requested by the operator of the other order plant and the handler, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1044.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

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

(11) Subtract from the pounds of skim milk remaining in each class, pro rata to the total pounds of skim milk remaining in each class in all fluid milk plants of the receiving handler:

(i) The pounds of skim milk in receipts of fluid milk products from unregulated supply plants that were not subtracted pursuant to paragraphs (a)(7)(vi) and (a)(8) (i) and (ii) of this section. Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use; and

(ii)(A) The pounds of skim milk in receipts of fluid milk products in bulk from an other order plant(s), in excess in each case of similar transfers to the same plant, that were not subtracted pursuant to paragraph (a)(8)(iii) of this section;

(B) Should such proration result in the amount to be subtracted from any class exceeding the pounds of skim milk remaining in such class in the fluid milk plant at which such skim milk was received, the pounds of skim milk in such class shall be increased to the amount to be subtracted and the pounds of skim milk in the other class shall be decreased a like amount. In such case the utilization of milk at other fluid milk plant(s) of such handler shall be adjusted in the reverse direction by an

identical amount in sequence beginning with the nearest other fluid milk plant of such handler at which such adjustment can be made;

(12) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of fluid milk products and bulk fluid cream products from other fluid milk plants according to the classification of such products pursuant to § 1044.42(a). Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use; and

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

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

(c) The quantity of producer milk in each class shall be the combined pounds of skim milk and butterfat remaining in each class after the computations pursuant to paragraph (a)(13) of this section and the corresponding step of paragraph (b) of this section.

§ 1044.50 [Removed]

11. Section 1044.50 is removed.

§ 1044.51 [Redesignated as § 1044.50]

12. Section 1044.51 is re-designated as § 1044.50 and is amended in the introductory text by changing the reference "§ 1044.52" to "§ 1044.53", revising paragraph (b), and by adding a new paragraph (c) to read as follows:

§ 1044.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be computed by the Director of the Dairy Division and transmitted to the market administrator on or before the 15th day of the preceding month. The Class II price shall be the basic Class II formula price computed pursuant to § 1044.51(b) for the month plus the amount that the value computed pursuant to paragraph (b)(1) of this section exceeds the value computed pursuant to paragraph (b)(2) of this section, plus any amount by which the basic Class II formula price for the second preceding month, adjusted pursuant to paragraphs (b)(1) and (b)(2) of this section, was less than the Class III price for the second preceding month.

(1) Determine for the most recent 12-month period the simple average (rounded to the nearest cent) of the basic formula prices computed pursuant to § 1044.51(a) and add 10 cents; and

(2) Determine for the same 12-month period as specified in paragraph (b)(1) of this section the simple average (rounded to the nearest cent) of the basic Class II formula prices computed pursuant to § 1044.51(b).

(c) *Class III price.* The Class III price shall be the basic formula price for the month.

13. A new § 1044.51 is added to read as follows:

§ 1044.51 Basic formula prices.

(a) The *basic formula price* shall be the average price per hundredweight for manufacturing grade milk, f.o.b. plants in Minnesota and Wisconsin, as reported by the Department for the month, adjusted to a 3.5 percent butterfat basis and rounded to the nearest cent. For such adjustment, the butterfat differential pursuant to § 1044.62 shall be used.

(b) The *basic Class II formula price* for the month shall be the basic formula price determined pursuant to § 1044.51(a) for the second preceding month plus or minus the amount computed pursuant to paragraphs (1) through (4) of this section:

(1) The gross values per hundredweight of milk used to manufacture cheddar cheese and butter-nonfat dry milk shall be computed, using price data determined pursuant to § 1044.20 and yield factors in effect under the Dairy Price Support Program authorized by the Agricultural Act of 1949, as amended, for the first 15 days of the preceding month and, separately, for the first 15 days of the second preceding month as follows:

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

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

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

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

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

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

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

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

(3) Compute weighing factors to be applied to the changes in gross values determined pursuant to paragraph (2) of this section by determining the relative proportion that the data included in each of the following subparagraphs is of the total of the data represented in paragraphs (3)(i) and (ii) of this section:

(i) Combine the total American cheese production for the States of Minnesota and Wisconsin, as reported by the National Agricultural Statistics Service of the Department for the third preceding month, and divide by the yield factor used under the Price Support Program for cheddar cheese to determine the quantity of milk used in the production of American cheddar cheese; and

(ii) Combine the total nonfat dry milk production for the States of Minnesota and Wisconsin, as reported by the National Agricultural Statistics Service of the Department for the third preceding month, and divide by the yield factor used under the Price Support Program for nonfat dry milk to determine the quantity of milk used in the production of butter-nonfat dry milk.

(4) Compute a weighted average of the changes in gross values per hundredweight of milk determined pursuant to paragraph (2) of this section in accordance with the relative proportions of milk determined pursuant to paragraph (3) of this section.

§ 1044.60 [Amended]

14. Section 1044.60 is amended by changing the words "Class II" in paragraph (c) introductory text and paragraph (c)(2) to "Class III", and by changing references as follows:

In paragraph (a), the reference "§ 1044.46(c)" is changed to read "§ 1044.44(c)".

In paragraph (b), the reference "§ 1044.46(a)(9)" is changed to read

"§ 1044.44(a)(13)", and the reference "§ 1044.46(b)" is changed to read "§ 1044.44(b)".

In paragraph (c)(1), the reference "§ 1044.46(a)(5) and the corresponding step of § 1044.46(b)" is changed to read "§ 1044.44(a)(9) and the corresponding step of § 1044.44(b)."

In paragraph (c)(2), the reference "§ 1044.46(a)(7)(i) and the corresponding step of § 1044.46(b)" is changed to read "§ 1044.44(a)(8)(i) and the corresponding step of § 1044.44(b)."

§ 1044.63 [Amended]

15. Section 1044.63 is amended by changing the reference "§ 1044.51" to "§ 1044.50".

§ 1044.71 [Amended]

16. In § 1044.71, the reference "§ 1044.46(a)(3) and (7)(i) and the corresponding steps of § 1044.46(b)" is changed to read "§ 1044.44(a)(2)(ii), (a)(5) and (a)(7)(vi) and the corresponding steps of § 1044.44(b)."

PART 1046—MILK IN THE LOUISVILLE-LEXINGTON-EVANSVILLE MARKETING AREA

1. Section 1046.15 is revised to read as follows:

§ 1046.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1046.16 is revised to read as follows:

§ 1046.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1046.19 is added to read as follows:

§ 1046.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1046.13, 1046.41 and 1046.52.

4. Section 1046.40 is revised to read as follows:

§ 1046.40 Classes of utilization.

Except as provided in § 1046.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1046.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of

having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1046.15 and the fluid cream product definition pursuant to § 1046.16; and

(7) In shrinkage assigned pursuant to § 1046.41(a) to the receipts specified in § 1046.41(a)(2) and in shrinkage specified in § 1046.41(b) and (c).

5. Section 1046.42 is amended by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1046.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

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

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

* * * * *

6. Section 1046.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(viii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1046.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(viii) of this section, the pounds of skim milk in each of the following:

* * * * *

(viii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1046.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(viii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1046.60 is amended by removing "and" after the ";" in paragraph (e), replacing the period after paragraph (f) with ";", revising paragraph (g) and by adding a new paragraph (h) to read as follows:

§ 1046.60 Handler's value of milk for computing uniform price.

* * * * *

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1046.76(c).

8. Section 1046.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1046.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating

the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1049—MILK IN THE INDIANA MARKETING AREA

1. Section 1049.15 is revised to read as follows:

§ 1049.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1049.16 is revised to read as follows:

§ 1049.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1049.19 is added to read as follows:

§ 1049.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1049.13, 1049.41 and 1049.52.

4. Section 1049.40 is revised to read as follows:

§ 1049.40 Classes of utilization.

Except as provided in § 1049.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1049.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes, distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of

having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1049.15 and the fluid cream product definition pursuant to § 1049.16; and

(7) In shrinkage assigned pursuant to § 1049.41(a) to the receipts specified in § 1049.41(a)(2) and in shrinkage specified in § 1049.41(b) and (c).

5. Section 1049.42 is amended by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1049.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

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

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

* * * * *

6. Section 1049.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(vii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1049.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

* * * * *

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1049.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1049.60 is amended by removing "and" after the ";" in paragraph (e), replacing the period after paragraph (f) with ";" and adding new paragraphs (g) and (h) to read as follows:

§ 1049.60 Handler's value of milk for computing uniform price.

* * * * *

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1049.76(c).

8. Section 1049.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1049.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the

nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1050—MILK IN THE CENTRAL ILLINOIS MARKETING AREA

1. Section 1050.15 is revised to read as follows:

§ 1050.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1050.16 is revised to read as follows:

§ 1050.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1050.19 is added to read as follows:

§ 1050.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1050.13, 1050.41 and 1050.52.

4. Section 1050.40 is revised to read as follows:

§ 1050.40 Classes of utilization.

Except as provided in § 1050.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1050.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of

having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1050.15 and the fluid cream product definition pursuant to § 1050.16; and

(7) In shrinkage assigned pursuant to § 1050.41(a) to the receipts specified in § 1050.41(a)(2) and in shrinkage specified in § 1050.41 (b) and (c).

5. Section 1050.42 is amended by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1050.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

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

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

* * * * *

6. Section 1050.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(vii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1050.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

* * * * *

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1050.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1050.60 is amended by redesignating paragraph (g) as paragraph (i) and adding new paragraphs (g) and (h) to read as follows:

§ 1050.60 Handler's value of milk for computing uniform price.

* * * * *

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1050.76(c).

8. Section 1050.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1050.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the

difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1064—MILK IN THE GREATER KANSAS CITY MARKETING AREA

1. Section 1064.15 is revised to read as follows:

§ 1064.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1064.16 is revised to read as follows:

§ 1064.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1064.19 is added to read as follows:

§ 1064.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1064.13, 1064.41 and 1064.52.

4. Section 1064.40 is revised to read as follows:

§ 1064.40 Classes of utilization.

Except as provided in § 1064.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1064.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of

having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1064.15 and the fluid cream product definition pursuant to § 1064.16; and

(7) In shrinkage assigned pursuant to § 1064.41(a) to the receipts specified in § 1064.41(a)(2) and in shrinkage specified in § 1064.41 (b) and (c).

5. Section 1064.42 is amended by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1064.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

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

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

* * * * *

6. Section 1064.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(vii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1064.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

* * * * *

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1064.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1064.60 is amended by removing "and" after the ";" in paragraph (e), replacing the period after paragraph (f) with ";" and adding new paragraphs (g) and (h) to read as follows:

§ 1064.60 Handler's value of milk for computing uniform price.

* * * * *

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1064.76(c).

8. Section 1064.76 is amended by revising paragraphs (a)(3) and (a)(5) and adding a new paragraph (c) to read as follows:

§ 1064.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the

nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1065—MILK IN THE NEBRASKA-WESTERN IOWA MARKETING AREA

1. Section 1065.15 is revised to read as follows:

§ 1065.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1065.16 is revised to read as follows:

§ 1065.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1065.19 is added to read as follows:

§ 1065.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1065.13, 1065.41 and 1065.52.

4. Section 1065.40 is revised to read as follows:

§ 1065.40 Classes of utilization.

Except as provided in § 1065.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1065.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of

having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1065.15 and the fluid cream product definition pursuant to § 1065.16; and

(7) In shrinkage assigned pursuant to § 1065.41(a) to the receipts specified in § 1065.41(a)(2) and in shrinkage specified in § 1065.41 (b) and (c).

5. Section 1065.42 is amended by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1065.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

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

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

* * * * *

6. Section 1065.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(vii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1065.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

* * * * *

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1065.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1065.60 is amended by removing "and" after the ";" in paragraph (e), replacing the period after paragraph (f) with ";" and adding new paragraphs (g) and (h) to read as follows:

§ 1065.60 Handler's value of milk for computing uniform price.

* * * * *

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1065.76(c).

8. Section 1065.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1065.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the

nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1068—MILK IN THE UPPER MIDWEST MARKETING AREA

1. Section 1068.15 is revised to read as follows:

§ 1068.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1068.16 is revised to read as follows:

§ 1068.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1068.19 is added to read as follows:

§ 1068.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1068.13, 1068.41 and 1068.52.

4. Section 1068.40 is revised to read as follows:

§ 1068.40 Classes of utilization.

Except as provided in § 1068.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1068.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) or this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of

having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1068.15 and the fluid cream product definition pursuant to § 1068.16; and

(7) In shrinkage assigned pursuant to § 1068.41(a) to the receipts specified in § 1068.41(a)(2) and in shrinkage specified in § 1068.41 (b) and (c).

5. Section 1068.42 is amended by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1068.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

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

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

* * * * *

6. Section 1068.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(vii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1068.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

* * * * *

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1068.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1068.60 is amended by removing "and" after the ";" in paragraph (f), replacing the period after paragraph (g) with ";" and adding new paragraphs (h) and (i) to read as follows:

§ 1068.60 Handler's value of milk for determining pool obligation.

* * * * *

(h) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(i) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1068.76(c).

8. Section 1068.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1068.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price

applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

1. The table of contents is revised to read as follows:

PART 1075—BLACK HILLS, SOUTH DAKOTA

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

§ 1075.6 [Redesignated as § 1075.2]

2. Section 1075.6 is redesignated as § 1075.2.

§ 1075.20 [Redesignated as § 1075.3]

3. Section 1075.20 is redesignated as § 1075.3 and amended by changing the reference "§ 1075.41(a)" to "§ 1075.40(a)".

§ 1075.10 [Redesignated as § 1075.6]

4. Section 1075.10 is redesignated as § 1075.6 and amended by changing the reference "§ 1075.12" to "§ 1075.7(b)".

§ 1075.15 [Redesignated as § 1075.10]

5. Section 1075.15 is redesignated as § 1075.10.

§ 1075.18 [Redesignated as § 1075.15]

6. Section 1075.18 is redesignated as § 1075.15 and revised to read as follows:

§ 1075.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* s all not include:

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

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

§ 1075.5 [Redesignated as § 1075.18]

7. Section 1075.5 is redesignated as § 1075.18.

§ 1075.9 [Redesignated as § 1075.5]

8. Section 1075.9 is redesignated as § 1075.5.

§ 1075.14 [Redesignated as § 1075.9]

9. Section 1075.14 is redesignated as § 1075.9.

§ 1075.19 [Redesignated as § 1075.14]

10. Section 1075.19 is redesignated as § 1075.14 and revised to read as follows:

§ 1075.14 Other source milk.

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

(a) Receipts of fluid milk products and bulk products specified in § 1075.40(b)(1) from any source other than producers, or pool plants;

(b) Receipts in packaged form from other plants of products specified in § 1075.40(b)(1);

(c) Products (other than fluid milk products, products specified in § 1075.40(b)(1), and products produced at the plant during the same month) from any source which are reprocessed, converted into, or combined with another product in the plant during the month; and

(d) Receipts of any milk product (other than a fluid milk product or a product specified in § 1075.40(b)(1)) for which the handler fails to establish a disposition.

§ 1075.7 [Removed]

§ 1075.12 [Redesignated as § 1075.7]

11. Section 1075.7 is removed and § 1075.12 is redesignated as § 1075.7, and a new paragraph (c) is added to read as follows:

§ 1075.7 Pool plant.

* * * * *

(c) The term *pool plant* shall not apply to the following plants:

(1) A producer-handler;

(2) A plant qualified pursuant to paragraph (a) of this section from which a lesser volume of fluid milk products, except filled milk, is disposed of from such plant to retail or wholesale outlets in the Black Hills marketing area and to pool plants under this part than is disposed of in the marketing area and to pool plants regulated pursuant to another order.

§ 075.8 [Redesignated as § 1075.12]

Section 1075.8 is redesignated as § 1075.12 and revised to read as follows:

§ 1075.12 Producer.

Producer means any person, except a producer-handler as defined in any order (including this part) issued pursuant to the Act, who produces milk in compliance with the Grade A inspection requirements of a duly constituted health authority, which milk is (a) received at a pool plant, or (b) diverted from a pool plant to a nonpool plant for the account of either the operator of the pool plant or a cooperative association.

§ 1075.13 [Redesignated as § 1075.8]

13. Section 1075.13 is redesignated as § 1075.8.

§ 1075.17 [Redesignated as § 1075.13]

14. Section 1075.17 is redesignated as § 1075.13 and revised to read as follows:

§ 1075.13 Producer milk.

Producer milk means the skim milk and butterfat contained in milk (a) received at a pool plant directly from producers or (b) diverted from a pool plant to a nonpool plant. Provided, that milk diverted pursuant to this section shall be deemed to have been received at the location of the plant from which diverted.

§ 1075.23 [Redesignated as § 1075.17]

15. Section 1075.23 is redesignated as § 1075.17.

§ 1075.11 [Removed]

16. Section 1075.11 is removed.

17. Section 1075.16 is revised to read as follows:

§ 1075.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

§§ 1075.22 and 1075.27 [Removed]

18. Sections 1075.22 and 1075.27 are removed.

19. A new § 1075.19 is added to read as follows:

§ 1075.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1075.13, 1075.41 and 1075.52.

20. Section 1075.20 is added to read as follows:

§ 1075.20 Product prices.

The following product prices shall be used in calculating the basic Class II formula price pursuant to § 1075.51(b):

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

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

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

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

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

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

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

21. Section 1075.30 is revised to read as follows:

§ 1075.30 Reports of receipts and utilization.

On or before the 5th day after the end of each month, each handler, except a producer-handler, shall report to the market administrator for such month for each of his pool plants in the detail and on forms prescribed by the market administrator, as follows:

(a) Each handler, with respect to each of his pool plants, shall report the quantities of skim milk and butterfat contained in or represented by:

(1) Receipts of producer milk, including producer milk diverted by the handler from the pool plant to other plants;

(2) Receipts of fluid milk products and bulk fluid cream products received from pool plants;

(3) Receipts of other source milk;

(4) Inventories at the beginning and end of the month of fluid milk products and products specified in § 1075.40(b)(1);

(5) The utilization or disposition of all milk, filled milk and milk products required to be reported pursuant to this paragraph.

(b) Each handler who operates a partially regulated distributing plant shall report with respect to such plant in the same manner as prescribed for reports required in paragraph (a) of this section. Receipts of milk that would have been producer milk if the plant had been fully regulated shall be reported in lieu of producer milk. Such report shall show also the quantity of reconstituted skim milk in fluid milk products disposed of on routes in the marketing area.

(c) Each handler described in § 1075.9(b) shall report:

(1) The quantities of all skim milk and butterfat contained in receipts of milk from producers; and

(2) The utilization or disposition of all such receipts.

(d) Each handler not specified in paragraphs (a) through (c) of this section shall report with respect to his receipts and utilization of milk, filled milk, and milk products in such manner as the market administrator may prescribe.

22. Section 1075.31 is amended by changing the title, removing paragraph (a), redesignating paragraph (b) as paragraph (a), changing the reference "§ 1075.62(b)" in re-designated paragraph (a) to "§ 1075.76(b)" and adding a new paragraph (b) to read as follows:

§ 1075.31 Payroll reports.

* * * * *

(b) Each handler operating a partially regulated distributing plant who elects to make payment pursuant to § 1075.76(b) shall report for each dairy farmer who would have been a producer if the plant had been fully regulated in the same manner as prescribed for reports required by paragraph (a) of this section.

23. A new § 1075.32 is added to read as follows:

§ 1075.32 Other reports.

(a) In addition to the reports required pursuant to §§ 1075.30 and 1075.31, each handler shall report such other information as the market administrator deems necessary to verify or establish such handler's obligation under the order.

(b) Each producer handler shall make reports to the market administrator at such time and in such manner as the market administrator may prescribe.

§ 1075.40 [Removed]

§ 1075.41 [Redesignated as § 1075.40]

24. Section 1075.40 is removed, and § 1075.41 is re-designated as § 1075.40, and revised to read as follows:

§ 1075.40 Classes of utilization.

Except as provided in § 1075.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1075.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1075.15 and the fluid cream product definition pursuant to § 1075.16; and

(7) In shrinkage assigned pursuant to § 1075.41(a) to the receipts specified in § 1075.41(a)(2) and in shrinkage specified in § 1075.41 (b) and (c).

§ 1075.42 [Redesignated as § 1075.41]

25. Section 1075.42 is redesignated as § 1075.41 and revised to read as follows:

§ 1075.41 Shrinkage.

For purposes of classifying all skim milk and butterfat to be reported by a handler pursuant to § 1075.30, the market administrator shall determine the following:

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

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

(2) In other source milk not specified in paragraphs (b) (1) through (6) of this section which was received in bulk fluid form;

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

(1) Two percent of the skim milk and butterfat, respectively, in producer milk (excluding milk diverted by the plant operator to another plant);

(2) [Reserved]

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

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

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

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

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

(c) The quantity of skim milk and butterfat, respectively, in shrinkage of milk from producers for which a cooperative association is the handler pursuant to § 1075.9(b), but not in excess of 0.5 percent of the skim milk and butterfat, respectively, in such milk. If the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph for the cooperative association shall be zero.

§ 1075.44 [Redesignated as § 1075.42]

26. Section 1075.44 is redesignated as § 1075.42, and revised to read as follows:

§ 1075.42 Classification of transfers and diversions.

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

(1) The skim milk and butterfat classified in each class shall be limited to the amount of skim milk and butterfat, respectively, remaining in such class at the transferee-plant after the computations pursuant to § 1075.44(a)(12) and the corresponding step of § 1075.44(b);

(2) If the transferor-plant received during the month other source milk to be allocated pursuant to § 1075.44(a)(7) or the corresponding step of § 1075.44(b), the skim milk or butterfat so transferred shall be classified so as to allocate the least possible Class I utilization to such other source milk; and

(3) If the transferor-handler received during the month other source milk to be allocated pursuant to § 1075.44 (a)(11) or (a)(12) or the corresponding steps of § 1075.44(b), the skim milk or butterfat so transferred, up to the total of the skim milk and butterfat, respectively, in such receipts of other source milk, shall not be classified as Class I milk to a greater extent than would be the case if the other source milk had been received at the transferee-plant.

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

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

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

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

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

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

(6) If the form in which any fluid milk product that is transferred to an other order plant is not defined as a fluid milk product under such other order, classification under this paragraph shall be in accordance with the provisions of § 1075.40.

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

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

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

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

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

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

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

(A) The transferor-handler or divertor-handler claims such classification in its report of receipts and utilization filed pursuant to § 1075.30 for the month within which such transaction occurred; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(viii) In determining the nonpool plant's utilization for purposes of this paragraph, any fluid milk products and bulk fluid cream products transferred from such nonpool plant to a plant not fully regulated under any Federal milk order shall be classified on the basis of the second plant's utilization using the same assignment priorities at the second plant that are set forth in paragraph (d)(2) of this section.

§ 1075.45 [Redesignated as § 1075.43]

27. Section 1075.45 is redesignated as § 1075.43, and revised to read as follows:

§ 1075.43 General classification rules.

In determining the classification of producer milk pursuant to § 1075.44, the following rules shall apply:

(a) Each month the market administrator shall correct for mathematical and other obvious errors all reports filed pursuant to § 1075.30 and shall compute separately for each pool plant and for each cooperative association with respect to milk for which it is the handler pursuant to § 1075.9(b) the pounds of skim milk and butterfat, respectively, in each class in accordance with §§ 1075.40, 1075.41, and 1075.42;

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

(c) The classification of producer milk for which a cooperative association is the handler pursuant to § 1075.9(b) shall be determined separately from the operations of any pool plant operated by such cooperative association.

§ 1075.46 [Redesignated as § 1075.44]

28. Section 1075.46 is redesignated as § 1075.44 and revised to read as follows:

§ 1075.44 Classification of producer milk.

For each month the market administrator shall determine the classification of producer milk of each handler described in § 1075.9 (a) and (b) by allocating the handler's receipts of skim milk and butterfat to his utilization pursuant to paragraphs (a) through (c) of this section. If a handler with two or more pool plants has no fluid milk products to be assigned under paragraphs (a)(11) or (a)(12) and the corresponding steps of (b) of this section, allocations under this section shall be determined separately for each of his pool plants. Otherwise, the market administrator shall combine the receipts and utilization in each of the respective

classes at all pool plants of such handler for purposes of this paragraph.

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

(1) Subtract from the total pounds of skim milk in Class III the pounds of skim milk in shrinkage specified in § 1075.41(b);

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(3) Subtract from the remaining pounds of skim milk in each class the pounds of skim milk in fluid milk products received in packaged form from an other order plant, except that to be subtracted pursuant to paragraph (a)(7)(vi) of this section, as follows:

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

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

(4) Subtract from the pounds of skim milk in Class II the pounds of skim milk in products specified in § 1075.40(b)(1) that were received in packaged form from other plants, but not in excess of the pounds of skim milk remaining in Class II;

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1075.40(b)(1) that were in inventory at the beginning of the month in packaged form, but not in excess of the pounds of skim milk remaining in Class II;

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in other source milk (except that received in the form of a fluid milk product or a fluid cream product) that is used to produce, or added to, any product specified in § 1075.40(b), but not in excess of the pounds of skim milk remaining in Class II;

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

(i) Other source milk (except that received in the form of a fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1075.40(b)(1) that was not subtracted pursuant to paragraph (a)(4), (a)(5), and (a)(6) of this section;

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

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

(iv) Receipts of fluid milk products from a producer-handler, as defined under this or any other Federal order;

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

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

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

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

(i) Receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i) and (a)(7)(v) of this section for which the handler requests classification other than Class I, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(ii) Receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (a)(7)(v), and (a)(8)(i) of this section which are in excess of the pounds of skim milk determined pursuant to paragraphs (a)(8)(ii)(A) through (C) of this section. Should the pounds of skim milk to be subtracted from Class II and Class III combined exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount:

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

(B) Subtract from the above result the sum of the pounds of skim milk in receipts at all pool plants of the handler of producer milk, fluid milk products from pool plants of other handlers, and bulk fluid milk products from other order plants that were not subtracted pursuant to paragraph (a)(7)(vi) of this section; and

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

(iii) Receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraph (a)(7)(vi) of this section, if Class II or Class III classification is requested by the operator of the other order plant and the handler, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1075.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

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

(11) Subject to the provisions of paragraphs (a)(11) (i) and (ii) of this section, subtract from the pounds of skim milk remaining in each class at the plant, pro rata to the total pounds of skim milk remaining in Class I and in Class II and Class III combined at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler), with the quantity prorated to

Class II and Class III combined being subtracted first from Class III and then from Class II, the pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (a)(7)(v), and (a)(8) (i) and (ii) of this section and that were not offset by transfers or diversions of fluid milk products to the same unregulated supply plant from which fluid milk products to be allocated at this step were received. Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

(i) Should the pounds of skim milk to be subtracted from Class II and Class III combined pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(ii) Should the pounds of skim milk to be subtracted from Class I pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount, beginning with the nearest plant at which Class I utilization is available;

(12) Subtract in the manner specified below from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraphs (a)(7)(vi) and (a)(8)(iii) of this section. Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

(i) Subject to the provisions of paragraphs (a)(12)(ii), (a)(12)(iii), and (a)(12)(iv) of this section, such subtraction shall be pro rata to the pounds of skim milk in Class I and in Class II and Class III combined, with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, with respect to whichever of the following quantities represents the lower proportion of Class I milk:

(A) The estimated utilization of skim milk of all handlers in each class as announced for the month pursuant to § 1075.45(a); or

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

(ii) Should the proration pursuant to paragraph (a)(12)(i) of this section result in the total pounds of skim milk at all pool plants of the handler that are to be subtracted at this allocation step from Class II and Class III combined exceeding the pounds of skim milk remaining in Class II and Class III at all such plants, the pounds of such excess shall be subtracted from the pounds of skim milk remaining in Class I after such proration at the pool plants at which such other source milk was received;

(iii) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class II and Class III combined that exceeds the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(iv) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class I that exceeds the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount beginning with the nearest plant at which Class I utilization is available;

(13) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of fluid milk products and bulk fluid cream products from another pool plant according to the classification of such products pursuant to § 1075.42(a); and

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

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

(c) The quantity of producer milk in each class shall be the combined pounds of skim milk and butterfat remaining in each class after the computations pursuant to paragraph (a)(14) of this section and the corresponding step of paragraph (b) of this section.

29. Section 1075.45 is added to read as follows:

§ 1075.45 Market administrator's reports and announcements concerning classification.

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

(a) Whenever required for the purpose of allocating receipts from other order plants pursuant to § 1075.44(a)(12) and the corresponding step of § 1075.44(b), estimate and publicly announce on or before the 10th day of the month the

utilization (to the nearest whole percentage) in each class during the month of skim milk and butterfat, respectively, in producer milk of all handlers. Such estimate shall be based upon the most current available data and shall be final for such purpose;

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1075.44 on the basis of such report, and, thereafter, any change in such allocation required to correct errors disclosed in the verification of such report; and

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

§ 1075.50 [Removed]

30. Section 1075.50 is removed.

§ 1075.51 [Redesignated as § 1075.50]

31. Section 1075.51 is re-designated as § 1075.50 and amended in the introductory text by removing the reference "and § 1075.53", revising paragraph (b), and adding a new paragraph (c) to read as follows:

§ 1075.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be computed by the Director of the Dairy Division and transmitted to the market administrator on or before the 15th day of the preceding month. The Class II price shall be the basic Class II formula price computed pursuant to § 1075.51(b) for the month plus the amount that the value computed pursuant to paragraph (b)(1) of this section exceeds the value computed pursuant to paragraph (b)(2) of this section, plus any amount by which the basic Class II formula price for the second preceding month, adjusted pursuant to paragraphs (b)(1) and (b)(2) of this section, was less than the Class III price for the second preceding month.

(1) Determine for the most recent 12-month period the simple average (rounded to the nearest cent) of the basic formula prices computed pursuant to § 1075.51(a) and add 10 cents; and

(2) Determine for the same 12-month period as specified in paragraph (b)(1) of this section the simple average (rounded to the nearest cent) of the basic Class II formula prices computed pursuant to § 1075.51(b).

(c) *Class III price.* The Class III price shall be the basic formula price for the month, but in no event shall the Class III price exceed an amount computed as follows:

(1) Multiply by 4.2 the Chicago butter price;

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

(3) From the sum of the results arrived at under paragraphs (c)(1) and (2) of this section subtract 48 cents, and round to the nearest cent.

32. New § 1075.51 is added to read as follows:

§ 1075.51 Basic formula prices.

(a) The *basic formula price* shall be the average price per hundredweight for manufacturing grade milk, f.o.b. plants in Minnesota and Wisconsin, as reported by the Department for the month, adjusted to a 3.5 percent butterfat basis and rounded to the nearest cent. For such adjustment, the butterfat differential pursuant to § 1075.74 shall be used.

(b) The *basic Class II formula price* for the month shall be the basic formula price determined pursuant to § 1075.51(a) for the second preceding month plus or minus the amount computed pursuant to paragraphs (b) (1) through (4) of this section:

(1) The gross values per hundredweight of milk used to manufacture cheddar cheese and butter-nonfat dry milk shall be computed, using price data determined pursuant to § 1075.20 and yield factors in effect under the Dairy Price Support Program authorized by the Agricultural Act of 1949, as amended, for the first 15 days of the preceding month and, separately, for the first 15 days of the second preceding month as follows:

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

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

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

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

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

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

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

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

(3) Compute weighing factors to be applied to the changes in gross values determined pursuant to paragraph (b)(2) of this section by determining the relative proportion that the data included in each of the following subparagraphs is of the total of the data represented in paragraphs (b)(3) (i) and (ii) of this section:

(i) Combine the total American cheese production for the States of Minnesota and Wisconsin, as reported by the National Agricultural Statistics Service of the Department for the third preceding month, and divide by the yield factor used under the Price Support Program for cheddar cheese to determine the quantity of milk used in the production of American cheddar cheese; and

(ii) Combine the total nonfat dry milk production for the States of Minnesota and Wisconsin, as reported by the National Agricultural Statistics Service of the Department for the third preceding month, and divide by the yield factor used under the Price Support Program for nonfat dry milk to determine the quantity of milk used in the production of butter-nonfat dry milk.

(4) Compute a weighted average of the changes in gross values per hundredweight of milk determined pursuant to paragraph (b)(2) of this section in accordance with the relative proportions of milk determined pursuant to paragraph (b)(3) of this section.

§ 1075.53 [Redesignated as § 1075.52]

33. Section 1075.53 is redesignated as § 1075.52, and revised to read as follows:

§ 1075.52 Plant location adjustments for handlers.

(a) For producer milk received at a pool plant located 100 miles or more by the shortest hard-surfaced highway distance as determined by the market administrator, from the nearest of the Post Offices of Rapid City, Lead, Hot Springs, and Custer, South Dakota; and classified as Class I milk or assigned Class I location adjustment credit pursuant to paragraph (b) of this section and for other source milk for which a location adjustment is applicable, the price computed pursuant to § 1075.50(a) shall be reduced by 15 cents, plus 1.5 cents for each 10 miles or fraction thereof that such distance exceeds 110 miles;

(b) For purposes of calculating such adjustment, transfers between pool plants shall be assigned Class I disposition at the transferee plant, in excess of the sum of receipts at such plant of producer milk, and the volume assigned as Class I to receipts from other order plants and unregulated supply plants, such assignment to be made first to transferor plants at which no location adjustment credit is applicable and then in sequence beginning with the plant at which the least location adjustment would apply.

34. A new § 1075.53 is added to read as follows:

§ 1075.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price for the following month, the Class III price for the preceding month, and on or before the 15th day of each month, the Class II price for the following month computed pursuant to § 1075.50(b).

§ 1075.60 [Removed]

§ 1075.70 [Redesignated as § 1075.60]

35. Section 1075.60 is removed and § 1075.70 is redesignated as new § 1075.60 and is revised to read as follows:

§ 1075.60 Handler's value of milk for computing uniform price.

For the purpose of computing the uniform price, the market administrator shall determine for each month the value of milk of each handler with respect to each of his pool plants and of each handler described in § 1075.9(b) as follows:

(a) Multiply the quantity of producer milk in each class, as computed pursuant to § 1075.44(c), by the applicable class prices adjusted pursuant to § 1075.52;

(b) Add the amount obtained from multiplying the pounds of overage deducted from each class pursuant to § 1075.44(a)(14) and the corresponding step of § 1075.44(b) by the applicable class prices;

(c) Add the amount obtained from multiplying the difference between the Class III price for the preceding month and the Class I price applicable at the location of the pool plant or the Class II price, as the case may be, for the current month by the hundredweight of skim milk and butterfat subtracted from Class I and Class II pursuant to § 1075.44(a)(9) and the corresponding step of § 1075.44(b);

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1075.44(a)(7)(i) through (a)(7)(iv) and the corresponding step of § 1075.44(b), excluding receipts of bulk fluid cream products from an other order plant.

(e) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the transferor-plant and the Class III price by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1075.44(a)(7)(v) and (a)(7)(vi) and the corresponding step of § 1075.44(b);

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1075.44(a)(11) and the corresponding step of § 1075.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1075.76(c).

§ 1075.61 [Removed]

§ 1075.72 [Redesignated as § 1075.61]

36. Section 1075.61 is removed and § 1075.72 is redesignated as new § 1075.61 and is revised to read as follows:

§ 1075.61 Computation of uniform price (including weighted average price).

For each month the market administrator shall compute an aggregate value from which to determine the uniform price per hundredweight for producer milk of 3.5 percent butterfat content, f.o.b. plants located within 100 miles of the Post Offices of Rapid City, Lead, Hot Spring, and Custer, South Dakota, as follows:

(a) Combine into one total the value computed pursuant to § 1075.60 for all handlers who filed reports prescribed in § 1075.30 for the month, except those in default of payments required pursuant to § 1075.71 for the preceding month;

(b) Add an amount equal to the sum of the location differential deductions to be made pursuant to § 1075.75;

(c) Add an amount equal to one-half of the unobligated cash balance in the producer-settlement fund.

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

(1) The total hundredweight of producer milk; and

(2) The total hundredweight for which a value is computed pursuant to § 1075.60(f); and

(e) Subtract not less than 4 cents nor more than 5 cents from the price computed pursuant to paragraph (d) of this section. The result shall be the *weighted average price* or the *uniform price* for producer milk.

§ 1075.62 [Redesignated as § 1075.76]

37. Section 1075.62 is redesignated as § 1075.76, and a new § 1075.62 is added to read as follows:

§ 1075.62 Announcement of uniform price and butterfat differential.

The market administrator shall announce publicly on or before:

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

(b) The 10th day after the end of each month the uniform price for such month.

§ 1075.83 [Redesignated as § 1075.70]

38. Section 1075.83 is redesignated as § 1075.70 and is revised to read as follows:

§ 1075.70 Producer-settlement fund.

The market administrator shall maintain a separate fund known as the *producer-settlement fund* into which he shall deposit all payments made by handlers pursuant to §§ 1075.71, 1075.76, and 1075.77 and out of which he shall make all payments pursuant to §§ 1075.72 and 1075.77; *Provided*, That the market administrator shall offset the payment due to a handler against payments due from such handler.

§ 1075.71 [Removed]

§ 1075.84 [Redesignated as § 1075.71]

39. Section 1075.71 is removed and § 1075.84 is re-designated as new § 1075.71 and is revised to read as follows:

§ 1075.71 Payments to the producer-settlement fund.

(a) On or before the 10th day after the end of the month each handler shall pay to the market administrator the amount, if any, by which the total amounts specified in paragraph (a)(1) of this section exceed the amounts specified in paragraph (a)(2) of this section:

(1) The total of the net pool obligation computed pursuant to § 1075.60 for such handler; and

(2) The sum of:

(i) The amount of the obligation pursuant to § 1075.73 of each handler for producer milk received during the month; and

(ii) The value at the weighted average price applicable at the location of the plant(s), from which received (not to be less than the value at the Class III price) with respect to other source milk for which a value is computed pursuant to § 1075.60(f).

(b) Each handler operating a distributing plant that is subject to the classification and pricing provisions of another order which provides for individual handler pooling, shall pay to the market administrator for the producer-settlement fund on or before the 25th day after the end of the month an amount computed as follows:

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

(2) Compute the value of the quantity assigned in paragraph (1) to Class I disposition in this area, at the Class I price under this part applicable at the location of the other order plant and subtract its value at the Class III price.

§ 1075.85 [Redesignated as § 1075.72]

40. Section 1075.85 is redesignated as § 1075.72 and is revised to read as follows:

§ 1075.72 Payments from the producer-settlement fund.

On or before the 10th day after the end of each month the market administrator shall pay to each handler the amount, if any, by which the amount computed pursuant to § 1075.71(a)(2) exceeds the amount computed pursuant to § 1075.71(a)(1).

§ 1075.80 [Redesignated as § 1075.73 and Amended]

41. Section 1075.80 is redesignated as § 1075.73 and amended by changing the title to "Payments to producers and to cooperative associations"; in paragraph (a), changing the reference "§ 1075.72" to "§ 1075.61" and the reference "§§ 1075.81 and 1075.82" to "§§ 1075.74 and 1075.75"; and in paragraph (b), changing the word "approved" to "producer" (2 occurrences).

§ 1075.81 [Redesignated as § 1075.74]

42. Section 1075.81 is redesignated as § 1075.74.

§ 1075.82 [Redesignated as § 1075.75]

43. Section 1075.82 is redesignated as § 1075.75 and amended by changing the title to "Plant location adjustments for producers and on nonpool milk"; in paragraph (a), changing the reference "§ 1075.53" to "§ 1075.52"; and in paragraph (b), changing the reference "§§ 1075.84 and 1075.85" to "§§ 1075.71 and 1075.72" and the reference "§ 1075.53" to "§ 1075.52".

44. New § 1075.76 is added to read as follows:

§ 1075.76 Payments by handler operating a partially regulated distributing plant.

Each handler who operates a partially regulated distributing plant shall pay to the market administrator for the producer-settlement fund on or before the 25th day after the end of the month either of the amounts (at the handler's election) calculated pursuant to paragraph (a) or (b) of this section. If the handler fails to report pursuant to §§ 1075.30 and 1075.31 the information necessary to compute the amount specified in paragraph (b) of this section, he shall pay the amount computed pursuant to paragraph (a) of this section:

(a) An amount computed as follows:

(1) Determine the respective amounts of skim milk and butterfat disposed of as Class I milk on routes in the marketing area;

(2) Deduct the respective amounts of skim milk and butterfat received as Class I milk at the partially regulated distributing plant from pool plants and other order plants except that deducted under a similar provision of another order issued pursuant to the Act;

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

(4) Combine the amounts of skim milk and butterfat remaining into one total and determine the weighted average butterfat content; and

(5) From the value of such milk at the Class I price applicable at the location of the nonpool plant, subtract its value at the weighted average price applicable at such location (not to be less than the Class III price) and add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

(b) An amount computed as follows:

(1)(i) The obligation that would have been computed pursuant to § 1075.60 at such plant shall be determined as though such plant were a pool plant. For purposes of such computation, receipts at such nonpool plant from a pool plant or an other order plant shall be assigned to the utilization at which classified at the pool plant or other order plant and transfers from such nonpool plant to a pool plant or an other order plant shall be classified as Class III milk if allocated to such class at the pool plant or other order plant and be valued at the weighted average price of the respective order if so allocated to Class I milk,

except that reconstituted skim milk in filled milk shall be valued at the Class III price. There shall be included in the obligation so computed a charge in the amount specified in § 1075.60(f) and a credit in the amount specified in § 1075.71(a)(2)(ii) with respect to receipts from an unregulated supply plant, except that the credit for receipts of reconstituted skim milk in filled milk shall be at the Class III price, unless an obligation with respect to such plant is computed as specified in paragraph (b)(1)(ii) of this section; and

(ii) If the operator of the partially regulated distributing plant so requests, and provides with his reports pursuant to §§ 1075.30 and 1075.31 similar reports with respect to the operations of any other nonpool plant which serves as a supply plant for such partially regulated distributing plant by shipments to such plant during the month equivalent to the requirements of § 1075.7(b) with agreement of the operator of such plant that the market administrator may examine the books and records of such plant for purposes of verification of such reports, there will be added the amount of the obligation computed at such nonpool supply plant in the same manner and subject to the same conditions as for the partially regulated distributing plant.

(2) From this obligation there will be deducted the sum of (i) the gross payments made by such handler for Grade A milk received during the month from dairy farmers at such plant and like payments made by the operator of a supply plant(s) included in the computations pursuant to paragraph (b)(1) of this section, and (ii) any payments to the producer-settlement fund of another order under which such plant is also a partially regulated distributing plant.

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

§§ 1075.86, 1075.87 [Removed]

45. Sections 1075.86 and 1075.87 are removed and new § 1075.77 is added to read as follows:

§ 1075.77 Adjustment of accounts.

(a) Whenever verification by the market administrator of reports or payments of any handler discloses errors in payments to or from the producer-settlement fund pursuant to §§ 1075.71 and 1075.72, the market administrator shall promptly bill such handler for any unpaid amounts and such handler shall, within 5 days of such billing, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is due from the market administrator to any handler, the market administrator shall within 5 days, make such payment to such handler.

(b) Whenever verification by the market administrator of the payments by a handler to any producer or cooperative association, discloses payment of less than is required by § 1075.73 the handler shall make up such payment to the producer or cooperative association not later than the time of making payments next following such disclosure.

46. Section 1075.88 is re-designated as § 1075.85 and amended by changing the title to "Assessment for order administration", and changing the reference "§ 1075.46 (a)(3) and (a)(7) and the corresponding steps of § 1075.46" to § 1075.44 (a)(7) and (a)(11) and the corresponding steps of § 1075.44".

47. The center headings in Part 1075 are removed and new center headings are added preceding the redesignated sections as follows:

a. Preceding § 1075.1, "General Provisions";

b. Preceding § 1075.2, "Definitions";

c. Preceding § 1075.30, "Handler Reports";

d. Preceding § 1075.40, "Classification of Milk";

e. Preceding § 1075.50, "Class Prices";

f. Preceding § 1075.60, "Uniform Price";

g. Preceding § 1075.70, "Payments for Milk"; and

h. Preceding § 1075.85, "Administrative Assessment and Marketing Service Deduction".

PART 1076—MILK IN THE EASTERN SOUTH DAKOTA MARKETING AREA

1. Section 1076.15 is revised to read as follows:

§ 1076.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1076.16 is revised to read as follows:

§ 1076.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1076.19 is added to read as follows:

§ 1076.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1076.13, 1076.41 and 1076.52.

4. Section 1076.40 is revised to read as follows:

§ 1076.40 Classes of utilization.

Except as provided in § 1076.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1076.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1076.15 and the fluid cream product definition pursuant to § 1076.16; and

(7) In shrinkage assigned pursuant to § 1076.41(a) to the receipts specified in § 1076.41(a)(2) and in shrinkage specified in § 1076.41(b) and (c).

5. Section 1076.42 is amended by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1076.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

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

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

* * * * *

6. Section 1076.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(vii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1076.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

* * * * *

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and

distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1076.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) of this section, shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1076.60 is amended by removing "and" after the ";" in paragraph (e), replacing the period after paragraph (f) with ";" and adding new paragraphs (g) and (h) to read as follows:

§ 1076.60 Handler's value of milk for computing uniform price.

* * * * *

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1076.76(c).

8. Section 1076.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1076.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1079—MILK IN THE IOWA MARKETING AREA

1. Section 1079.15 is revised to read as follows:

§ 1079.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1079.16 is revised to read as follows:

§ 1079.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1079.19 is added to read as follows:

§ 1079.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages.

Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1079.13, 1079.41 and 1079.52.

4. Section 1079.40 is revised to read as follows:

§ 1079.40 Classes of utilization.

Except as provided in § 1079.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1079.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1079.15 and the fluid cream product definition pursuant to § 1079.16; and

(7) In shrinkage assigned pursuant to § 1079.41(a) to the receipts specified in § 1079.41(a)(2) and in shrinkage specified in § 1079.41(b) and (c).

5. Section 1079.42 is amended by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1079.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

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

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

* * * * *

6. Section 1079.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(vii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1079.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

* * * * *

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and

distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1079.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) of this section, shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1079.60 is amended by removing "and" after the ";" in paragraph (f), replacing the period after paragraph (g) with ";" and adding new paragraphs (h) and (i) to read as follows:

§ 1079.60 Handler's value of milk for computing uniform price.

* * * * *

(h) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(i) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1079.76(c).

8. Section 1079.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1079.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1093—MILK IN THE ALABAMA-WEST FLORIDA MARKETING AREA

1. Section 1093.15 is revised to read as follows:

§ 1093.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1093.16 is revised to read as follows:

§ 1093.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. Section 1093.19 to read as follows:

§ 1093.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages.

Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1093.13, 1093.41 and 1093.52.

4. Section 1093.40 is revised to read as follows:

§ 1093.40 Classes of utilization.

Except as provided in § 1093.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1093.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1093.15 and the fluid cream product definition pursuant to § 1093.16; and

(7) In shrinkage assigned pursuant to § 1093.41(a) to the receipts specified in § 1093.41(a)(2) and in shrinkage specified in § 1093.41 (b) and (c).

5. Section 1093.42 is amended by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1093.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

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

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

* * * * *

6. Section 1093.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(vii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1093.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

* * * * *

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses

under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1093.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1093.60 is amended by removing "and" after the ";" in paragraph (e), replacing the period after paragraph (f) with ";", revising paragraph (g), and adding a new paragraph (h) to read as follows:

§ 1093.60 Handler's value of milk for computing uniform price.

* * * * *

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1093.76(c).

8. Section 1093.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1093.76 Payments by a handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1094—MILK IN THE NEW ORLEANS-MISSISSIPPI MARKETING AREA

1. Section 1094.15 is revised to read as follows:

§ 1094.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1094.16 is revised to read as follows:

§ 1094.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1094.19 is added to read as follows:

§ 1094.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages.

Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1094.13, 1094.41 and 1094.52.

4. Section 1094.40 is revised to read as follows:

§ 1094.40 Classes of utilization.

Except as provided in § 1094.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1094.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) paragraphs (b)(4)(i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1094.15 and the fluid cream product definition pursuant to § 1094.16; and

(7) In shrinkage assigned pursuant to § 1094.41(a) to the receipts specified in § 1094.41(a)(2) and in shrinkage specified in § 1094.41(b) and (c).

5. Section 1094.42 is amended by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1094.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

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

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

* * * * *

6. Section 1094.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(vii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1094.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

* * * * *

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and

distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1094.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1094.60 is amended by removing "and" after the ";" in paragraph (f), replacing the period after paragraph (g) with ";", revising paragraph (h) and adding a new paragraph (i) to read as follows:

§ 1094.60 Handler's value of milk for computing uniform price.

* * * * *

(h) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(i) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1094.76(c).

8. Section 1094.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding paragraph (c) to read as follows:

§ 1094.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1096—MILK IN THE GREATER LOUISIANA MARKETING AREA

1. Section 1096.15 is revised to read as follows:

§ 1096.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1096.16 is revised to read as follows:

§ 1096.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1096.19 is added to read as follows:

§ 1096.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1096.13, 1096.41 and 1096.52.

4. Section 1096.40 is revised to read as follows:

§ 1096.40 Classes of utilization.

Except as provided in § 1096.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1096.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1096.15 and the fluid cream product definition pursuant to § 1096.16; and

(7) In shrinkage assigned pursuant to § 1096.41(a) to the receipts specified in § 1096.41(a)(2) and in shrinkage specified in § 1096.41(b) and (c).

5. Section 1096.42 is amended by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1096.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

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

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

* * * * *

6. Section 1096.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(vii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1096.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

* * * * *

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and

distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1096.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1096.60 is amended by removing "and" before the ";" in paragraph (e), replacing the period after paragraph (f) with ";", revising paragraph (g), and adding a new paragraph (h) to read as follows:

§ 1096.60 Handler's value of milk for computing uniform price.

* * * * *

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1096.76(c).

8. Section 1096.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1096.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1097—MILK IN THE MEMPHIS, TENNESSEE MARKETING AREA

1. Section 1097.15 is revised to read as follows:

§ 1097.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1097.16 is revised to read as follows:

§ 1097.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1097.19 is added to read as follows:

§ 1097.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1097.12, 1097.41 and 1097.52.

4. Section 1097.40 is revised to read as follows:

§ 1097.40 Classes of utilization.

Except as provided in § 1097.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1097.30 shall be classified as follows:

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

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

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

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

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

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

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

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

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

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

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

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

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

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1097.15 and the fluid cream product definition pursuant to § 1097.16; and

(7) In shrinkage assigned pursuant to § 1097.41(a) to the receipts specified in § 1097.41(a)(2) and in shrinkage specified in § 1097.41(b) and (c).

5. Section 1097.42 is amended by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1097.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

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

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

* * * * *

6. Section 1097.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(vi), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1097.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

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

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(vi) of this section, the pounds of skim milk in each of the following:

* * * * *

(vi) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and

distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1097.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes disposition of reconstituted or concentrated fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vi) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

PART 1098—MILK IN THE NASHVILLE, TENNESSEE MARKETING AREA

1. Section 1098.15 is revised to read as follows:

§ 1098.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

2. Section 1098.16 is revised to read as follows:

§ 1098.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1098.19 is added to read as follows:

§ 1098.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1098.13, 1098.41 and 1098.52.

4. Section 1098.40 is revised to read as follows:

§ 1098.40 Classes of utilization.

Except as provided in § 1098.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1098.30 shall be classified as follows:

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

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

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

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product and any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil), that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Any concentrated milk product in bulk fluid form that is used to produce a Class III product;

(v) Evaporated or condensed milk (plain or sweetened) in a consumer-type package and evaporated or condensed skim milk (plain or sweetened) in a consumer-type package; and

(2) In inventory at the end of the month of fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1098.15 and the fluid cream product definition pursuant to § 1098.16; and

(7) In shrinkage assigned pursuant to § 1098.41(a) to the receipts specified in § 1098.41(a)(2) and in shrinkage specified in § 1098.41 (b) and (c).

5. Section 1098.42 is amended by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1098.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1098.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(viii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1098.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(viii) of this section, the pounds of skim milk in each of the following:

* * * * *

(viii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1098.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(viii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1098.60 is amended by removing "and" after the ";" in paragraph (e), replacing the period after paragraph (f) with ";" and adding new paragraphs (g) and (h) to read as follows:

§ 1098.60 Handler's value of milk for computing uniform price.

* * * * *

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1098.76(c).

8. Section 1098.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1098.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled

reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1099—MILK IN THE PADUCAH, KENTUCKY MARKETING AREA

1. Section 1099.15 is revised to read as follows:

§ 1099.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1099.16 is revised to read as follows:

§ 1099.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1099.19 is added to read as follows:

§ 1099.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1099.13, 1099.41 and 1099.52.

4. Section 1099.40 is revised to read as follows:

§ 1099.40 Classes of utilization.

Except as provided in § 1099.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1099.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product and any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil), that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Any concentrated milk product in bulk fluid form that is used to produce a Class III product;

(v) Evaporated or condensed milk (plain or sweetened) in a consumer-type package and evaporated or condensed skim milk (plain or sweetened) in a consumer-type package; and

(2) In inventory at the end of the month of fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1099.15 and the fluid cream product definition pursuant to § 1099.16; and

(7) In shrinkage assigned pursuant to § 1099.41(a) to the receipts specified in § 1099.41(a)(2) and in shrinkage specified in § 1099.41(b) and (c).

5. Section 1099.42 is amended by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1099.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1099.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(vii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1099.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

* * * * *

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1099.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1099.60 is amended by revising paragraph (g), and adding a new paragraph (h) to read as follows:

§ 1099.60 Handler's value of milk for computing uniform price.

* * * * *

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1099.76(c).

8. Section 1099.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1099.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated

distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1106—MILK IN THE SOUTHWEST PLAINS MARKETING AREA

1. Section 1106.15 is revised to read as follows:

§ 1106.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1106.16 is revised to read as follows:

§ 1106.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1106.19 is added to read as follows:

§ 1106.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1106.13, 1106.41 and 1106.52.

4. Section 1106.40 is revised to read as follows:

§ 1106.40 Classes of utilization.

Except as provided in § 1106.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1106.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product and any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil), that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Any concentrated milk product in bulk fluid form that is used to produce a Class III product;

(v) Evaporated or condensed milk (plain or sweetened) in a consumer-type package and evaporated or condensed skim milk (plain or sweetened) in a consumer-type package; and

(2) In inventory at the end of the month of fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section

that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1106.15 and the fluid cream product definition pursuant to § 1106.16; and

(7) In shrinkage assigned pursuant to § 1106.41(a) to the receipts specified in § 1106.41(a)(2) and in shrinkage specified in § 1106.41(b) and (c).

5. Section 1106.42 is amended by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1106.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1106.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(viii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1106.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(viii) of this section, the pounds of skim milk in each of the following:

* * * * *

(viii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1106.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(viii) shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1106.60 is amended by removing "and" after the ";" in paragraph (f), replacing the period after paragraph (g) with ";", and adding new paragraphs (h) and (i) to read as follows:

§ 1106.60 Handler's value of milk for computing uniform price.

* * * * *

(h) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(i) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1106.76(c).

8. Section 1106.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1106.76 Payments by a handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to

be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1108—MILK IN THE CENTRAL ARKANSAS MARKETING AREA

1. Section 1108.15 is revised to read as follows:

§ 1108.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1108.16 is revised to read as follows:

§ 1108.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1108.19 is added to read as follows:

§ 1108.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1108.13, 1108.41 and 1108.52.

4. Section 1108.40 is revised to read as follows:

§ 1108.40 Classes of utilization.

Except as provided in § 1108.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1108.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product and any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil), that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Any concentrated milk product in bulk fluid form that is used to produce a Class III product;

(v) Evaporated or condensed milk (plain or sweetened) in a consumer-type package and evaporated or condensed skim milk (plain or sweetened) in a consumer-type package; and

(2) In inventory at the end of the month of fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4) (i)-(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4) (i)-(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1108.15 and the fluid cream product definition pursuant to § 1108.16; and

(7) In shrinkage assigned pursuant to § 1108.41(a) to the receipts specified in § 1108.41(a)(2) and in shrinkage specified in § 1108.41 (b) and (c).

5. Section 1108.42 is amended by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1108.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1108.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(vii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1108.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

* * * * *

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1108.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1108.60 is amended by replacing the period after paragraphs (d) and (f) with ";", removing "and" after the ";" in paragraph (e), replacing the period after paragraph (g) with ";" and adding new paragraphs (h) and (i) to read as follows:

§ 1108.60 Handler's value of milk for computing uniform price.

* * * * *

(h) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(i) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1108.76(c).

8. Section 1108.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1108.76 Payments by a handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

(4) * * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated

distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

(b) * * * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1124—MILK IN THE PACIFIC NORTHWEST MARKETING AREA

1. Section 1124.15 is revised to read as follows:

§ 1124.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1124.16 is revised to read as follows:

§ 1124.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1124.20 is added under the heading "Definitions" to read as follows:

§ 1124.20 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1124.13, 1124.41 and 1124.52.

4. Section 1124.40 is revised to read as follows:

§ 1124.40 Classes of utilization.

Except as provided in § 1124.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1124.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product and any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil), that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Any concentrated milk product in bulk fluid form that is used to produce a Class III product;

(v) Evaporated or condensed milk (plain or sweetened) in a consumer-type package and evaporated or condensed skim milk (plain or sweetened) in a consumer-type package; and

(2) In inventory at the end of the month of fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section

that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1124.15 and the fluid cream product definition pursuant to § 1124.16; and

(7) In shrinkage assigned pursuant to § 1124.41(a) to the receipts specified in § 1124.41(a)(2) and in shrinkage specified in § 1124.41 (b) and (c).

5. Section 1124.42 is amended by revising paragraphs (d)(2) (vi) and (vii) to read as follows, and removing paragraph (e):

§ 1124.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1124.44 is amended by revising the introductory text of paragraph (a)(8), adding a new paragraph (a)(8)(viii) and amending paragraphs (a)(12) and (a)(13) by replacing the semicolon and colon respectively at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1124.44 Classification of producer milk.

* * * * *

(a) * * *

(8) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(8)(viii) of this section, the pounds of skim milk in each of the following:

* * * * *

(viii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(13) of this section on the same basis as concentrated milk.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(13) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(8)(viii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1124.60 is amended by removing "and" after the ";" in paragraph (f), redesignating paragraph (g) as (i) and adding new paragraphs (g) and (h) to read as follows:

§ 1124.60 Handler's value of milk for computing uniform price.

* * * * *

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products;

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1124.76(c); and

* * * * *

8. Section 1124.76 is amended by revising paragraphs (b)(3) and (b)(4) and by adding a new paragraph (c) to read as follows:

§ 1124.76 Payments by a handler operating a partially regulated distributing plant.

* * * * *

(b) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

(4) From the value of such milk at the Class I price applicable at the location of the nonpool plant, subtract its value at the uniform price applicable at such location (not to be less than the Class III price), and add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (b)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid

milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1126—MILK IN THE TEXAS MARKETING AREA

1. Section 1126.15 is revised to read as follows:

§ 1126.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1126.16 is revised to read as follows:

§ 1126.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1126.21 is added under the heading "Definitions" to read as follows:

§ 1126.21 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1126.13, 1126.41 and 1126.52.

4. Section 1126.40 is revised to read as follows:

§ 1126.40 Classes of utilization.

Except as provided in § 1126.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1126.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product and any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil), that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, Ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Any concentrated milk product in bulk fluid form that is used to produce a Class III product;

(v) Evaporated or condensed milk (plain or sweetened) in a consumer-type package and evaporated or condensed skim milk (plain or sweetened) in a consumer-type package; and

(2) In inventory at the end of the month of fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1126.15 and the fluid cream product definition pursuant to § 1126.16; and

(7) In shrinkage assigned pursuant to § 1126.41(a) to the receipts specified in § 1126.41(a)(2) and in shrinkage specified in § 1126.41(b) and (c).

5. Section 1126.42 is amended by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1126.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1126.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(viii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1126.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(viii) of this section, the pounds of skim milk in each of the following:

* * * * *

(viii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1126.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(viii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1126.60 is amended by removing "and" after the ";" in paragraph (f), replacing the period after paragraph (g) with ";", replacing the period after paragraph (h) with ";", and adding new paragraphs (i) and (j) to read as follows:

§ 1126.60 Handler's value of milk for computing uniform price.

* * * * *

(i) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(j) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1126.76(c).

8. Section 1126.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1126.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not

to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1131—MILK IN THE CENTRAL ARIZONA MARKETING AREA

1. Section 1131.15 is revised to read as follows:

§ 1131.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1131.16 is revised to read as follows:

§ 1131.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1131.19 is added to read as follows:

§ 1131.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk or associated producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1131.12, 1131.13, 1131.22, 1131.41 and 1131.52.

4. Section 1131.40 is revised to read as follows:

§ 1131.40 Classes of utilization.

Except as provided in § 1131.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1131.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product and any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil), that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Any concentrated milk product in bulk fluid form that is used to produce a Class III product;

(v) Evaporated or condensed milk (plain or sweetened) in a consumer-type package and evaporated or condensed skim milk (plain or sweetened) in a consumer-type package; and

(2) In inventory at the end of the month of fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such

dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1131.15 and the fluid cream product definition pursuant to § 1131.16; and

(7) In shrinkage assigned pursuant to § 1131.41(a) to the receipts specified in § 1131.41(a)(2) and in shrinkage specified in § 1131.41(b) and (c).

5. Section 1131.42 is amended by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1131.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant pursuant to § 1131.22 or from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1131.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(viii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1131.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(viii) of this section, the pounds of skim milk in each of the following:

* * * * *

(viii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1131.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(viii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1131.60 is amended by removing "and" after the ";" in paragraph (e), replacing the period after paragraph (f) with ";", and adding new paragraphs (g) and (h) to read as follows:

§ 1131.60 Handler's value of milk for computing uniform price.

* * * * *

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1131.76(c).

8. Section 1131.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1131.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid

milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1134—MILK IN THE WESTERN COLORADO MARKETING AREA

1. Section 1134.15 is revised to read as follows:

§ 1134.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1134.16 is revised to read as follows:

§ 1134.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1134.20 is added under the heading "Definitions" to read as follows:

§ 1134.20 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1134.12, 1134.13, 1134.41 and 1134.52.

4. Section 1134.40 is revised to read as follows:

§ 1134.40 Classes of utilization.

Except as provided in § 1134.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1134.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product and any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil), that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Any concentrated milk product in bulk fluid form that is used to produce a Class III product;

(v) Evaporated or condensed milk (plain or sweetened) in a consumer-type package and evaporated or condensed skim milk (plain or sweetened) in a consumer-type package; and

(2) In inventory at the end of the month of fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such

dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1134.15 and the fluid cream product definition pursuant to § 1134.16; and

(7) In shrinkage assigned pursuant to § 1134.41(a) to the receipts specified in § 1134.41(a)(2) and in shrinkage specified in § 1134.41 (b) and (c).

5. Section 1134.42 is amended by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1134.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1134.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(vii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1134.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

* * * * *

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1134.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1134.60 is amended by removing "and" after the ";" in paragraph (f), replacing the period after paragraph (g) with ";", and adding new paragraphs (h) and (i) to read as follows:

§ 1134.60 Handler's value of milk for computing uniform price.

* * * * *

(h) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(i) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1134.76(c).

8. Section 1134.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1134.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not

to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1135—MILK IN THE SOUTHWESTERN IDAHO-EASTERN OREGON MARKETING AREA

1. Section 1135.15 is revised to read as follows:

§ 1135.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1135.16 is revised to read as follows:

§ 1135.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1135.20 is added under the heading "Definitions" to read as follows:

§ 1135.20 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1135.13, and 1135.41.

4. Section 1135.40 is revised to read as follows:

§ 1135.40 Classes of utilization.

Except as provided in § 1135.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1135.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product and any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil), that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Any concentrated milk product in bulk fluid form that is used to produce a Class III product;

(v) Evaporated or condensed milk (plain or sweetened) in a consumer-type package and evaporated or condensed skim milk (plain or sweetened) in a consumer-type package; and

(2) In inventory at the end of the month of fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such

dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1135.15 and the fluid cream product definition pursuant to § 1135.16; and

(7) In shrinkage assigned pursuant to § 1135.41(a) to the receipts specified in § 1135.41(a)(2) and in shrinkage specified in § 1135.41 (b) and (c).

5. Section 1135.42 is amended by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1135.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1135.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(vii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the semicolon at the end of the introductory text of paragraph (a)(12) with a period and adding the following sentences at the end of the introductory text of each paragraph, to read as follows:

§ 1135.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

* * * * *

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1135.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1135.60 is amended by removing "and" after the ";" in paragraph (e), replacing the period after paragraph (f) with ";", and adding new paragraphs (g) and (h) to read as follows:

§ 1135.60 Handler's value of milk for computing uniform price.

* * * * *

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1135.76(c).

8. Section 1135.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1135.76 Payments by a handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price

applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1137—MILK IN THE EASTERN COLORADO MARKETING AREA

1. Section 1137.15 is revised to read as follows:

§ 1137.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1137.16 is revised to read as follows:

§ 1137.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1137.20 is added under the heading "Definitions" to read as follows:

§ 1137.20 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1137.12, 1137.13, 1137.41 and 1137.52.

4. Section 1137.40 is revised to read as follows:

§ 1137.40 Classes of utilization.

Except as provided in § 1137.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1137.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product and any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil), that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Any concentrated milk product in bulk fluid form that is used to produce a Class III product;

(v) Evaporated or condensed milk (plain or sweetened) in a consumer-type package and evaporated or condensed skim milk (plain or sweetened) in a consumer-type package; and

(2) In inventory at the end of the month of fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products and products specified in paragraph (b)(1) paragraphs (b)(4) (i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler

to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1137.15 and the fluid cream product definition pursuant to § 1137.16; and

(7) In shrinkage assigned pursuant to § 1137.41(a) to the receipts specified in § 1137.41(a)(2) and in shrinkage specified in § 1137.41(b) and (c).

5. Section 1137.42 is amended by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1137.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1137.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(vii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1137.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(vii) of this section, the pounds of skim milk in each of the following:

* * * * *

(vii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1137.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(vii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1137.60 is amended by removing "and" after the ";" in paragraph (f), replacing the period after paragraph (g) with ";", and adding new paragraphs (h) and (i) to read as follows:

§ 1137.60 Handler's value of milk for computing uniform price.

* * * * *

(h) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(i) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1137.76(c).

8. Section 1137.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1137.76 Payments by the handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid

milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1138—MILK IN THE NEW MEXICO-WEST TEXAS MARKETING AREA

1. Section 1138.15 is revised to read as follows:

§ 1138.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1138.16 is revised to read as follows:

§ 1138.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1138.21 is added under the heading "Definitions" to read as follows:

§ 1138.21 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1138.13, 1138.41 and 1138.53.

4. Section 1138.40 is revised to read as follows:

§ 1138.40 Classes of utilization.

Except as provided in § 1138.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1138.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product and any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil), that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Any concentrated milk product in bulk fluid form that is used to produce a Class III product;

(v) Evaporated or condensed milk (plain or sweetened) in a consumer-type package and evaporated or condensed skim milk (plain or sweetened) in a consumer-type package; and

(2) In inventory at the end of the month of fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4) (i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler

to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1138.15 and the fluid cream product definition pursuant to § 1138.16; and

(7) In shrinkage assigned pursuant to § 1138.41(a) to the receipts specified in § 1138.41(a)(2) and in shrinkage specified in § 1138.41(b) and (c).

5. Section 1138.42 is amended by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1138.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1138.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(viii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1138.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(viii) of this section, the pounds of skim milk in each of the following:

* * * * *

(viii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1138.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(viii) of this section shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1138.60 is amended by removing "and" after the ";" in paragraph (f), replacing the period after paragraph (g) with ";", and adding new paragraphs (h) and (i) to read as follows:

§ 1138.60 Handler's value of milk for computing uniform price.

* * * * *

(h) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(i) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1138.76(c).

8. Section 1138.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1138.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid

milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

PART 1139—MILK IN THE GREAT BASIN MARKETING AREA

1. Section 1139.15 is revised to read as follows:

§ 1139.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and eggnog, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1139.16 is revised to read as follows:

§ 1139.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1139.21 is added under the heading "Definitions" to read as follows:

§ 1139.21 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1139.12, 1139.13, 1139.41 and 1139.52.

4. Section 1139.40 is revised to read as follows:

§ 1139.40 Classes of utilization.

Except as provided in § 1139.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1139.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product and any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil), that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, farmers cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products to be used in processing such prepared food products;

(vii) Any concentrated milk product in bulk fluid form that is not used to produce a product specified in paragraph (a) or (c) of this section; and

(viii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Any concentrated milk product in bulk fluid form that is used to produce a Class III product;

(v) Evaporated or condensed milk (plain or sweetened) in a consumer-type package and evaporated or condensed skim milk (plain or sweetened) in a consumer-type package; and

(2) In inventory at the end of the month of fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products and products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and in products specified in paragraph (b)(1) and paragraphs (b)(4)(i)–(iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such

dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1139.15 and the fluid cream product definition pursuant to § 1139.16; and

(7) In shrinkage assigned pursuant to § 1139.41(a) to the receipts specified in § 1139.41(a)(2) and in shrinkage specified in § 1139.41 (b) and (c).

5. Section 1139.42 is amended by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1139.42 Classification of transfers and diversions.

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1139.44 is amended by revising paragraph (a)(2), revising the introductory text of paragraph (a)(7), adding a new paragraph (a)(7)(viii), revising paragraph (a)(9) and amending paragraphs (a)(11) and (a)(12) by replacing the colon at the end of the introductory text of each paragraph with a period and adding the following sentences immediately thereafter, to read as follows:

§ 1139.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, except as specified in paragraph (a)(7)(viii) of this section, the pounds of skim milk in each of the following:

* * * * *

(viii) Receipts of nonfat dry milk made from producer milk priced under any order that are reconstituted and distributed as labeled reconstituted fluid milk products shall be allocated to uses under paragraph (a)(12) of this section on the same basis as concentrated milk.

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1139.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) * * * Skim milk in receipts of concentrated fluid milk products shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

(12) * * * Skim milk in receipts of concentrated fluid milk products and receipts specified in paragraph (a)(7)(viii) shall also be subject to the proration set forth in this paragraph provided that the handler establishes a disposition of concentrated or labeled reconstituted fluid milk products, otherwise, such receipts shall be allocated to classes of use in sequence beginning with Class III use.

* * * * *

7. Section 1139.60 is amended by adding new paragraphs (j) and (k) to read as follows:

§ 1139.60 Computation of handlers' obligation to pool.

* * * * *

(j) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use, provided that the handler establishes a disposition of labeled reconstituted fluid milk products; and

(k) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1139.76(c).

§ 1139.61 [Amended]

8. Section 1139.61(a) is amended by changing the reference "(a) through (g)," to read "(a) through (g) and (j) and (k),".

9. Section 1139.76 is amended by revising paragraphs (a)(1)(iii) and (a)(1)(v) and by adding a new paragraph (c) to read as follows:

§ 1139.76 Payments by a handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(1) * * *

(iii) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(v) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(1)(iii) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the

nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to route disposition of labeled reconstituted fluid milk products made from receipts of nonfluid milk ingredients assigned to Class I use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price.

Signed at Washington, DC, on: November 6, 1991.

Daniel D. Haley,

Administrator.

[FR Doc. 91-27096 Filed 11-15-91; 2:00 pm]

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Friday
November 22, 1991

Part III

Department of Defense

Corps of Engineers, Department of the Army

33 CFR Part 330

Nationwide Permit Program Regulations and Issue, Reissue, and Modify Nationwide Permits; Final Rule

DEPARTMENT OF DEFENSE

Corps of Engineers, Department of the Army

33 CFR Part 330

Final Rule for Nationwide Permit Program Regulations and Issue, Reissue, and Modify Nationwide Permits

AGENCY: U.S. Army Corps of Engineers, DOD.

ACTION: Final rule.

SUMMARY: The Corps of Engineers is hereby amending its nationwide permit program regulations at 33 CFR part 330. The amendments will simplify and clarify the nationwide permit program and reduce the effort expended in regulating activities with minimal impacts.

The Corps is also reissuing the existing nationwide permits, some with modifications, issuing 10 new nationwide permits, and adding new conditions to all of the nationwide permits.

EFFECTIVE DATE: January 21, 1992.

ADDRESSES: Information can be obtained by writing to: The Chief of Engineers, U.S. Army Corps of Engineers, ATTN: CECW-OR, Washington, DC 20314–1000.

FOR FURTHER INFORMATION CONTACT: Mr. Sam Collinson or Mr. John Studt at (202) 272–1782.

SUPPLEMENTARY INFORMATION: On April 10, 1991, the Corps published its proposed revision to the Nationwide Permit Program regulations and its proposal to issue, reissue, and modify the nationwide permits (56 FR 14598). The changes were proposed with the intent to simplify and clarify the nationwide permit program and to reduce the effort expended in regulating activities with minimal impacts. In addition, we proposed to reissue the existing 26 nationwide permits, some with modifications, to issue 13 new nationwide permits, to add new conditions to all of the nationwide permits. A public hearing on the proposed rule and nationwide permits was held on May 10, 1991, in Washington, DC. We received over 700 comments in response to the proposed regulations and there were 17 speakers at the public hearing. In response to these comments, we made a number of revisions to the nationwide permit program regulations and to the nationwide permits.

The Corps is restructuring the regulations governing the nationwide permit (NWP) program. In addition, the Corps is adopting changes that will allow the district engineer (DE) to assert a discretionary authority to modify, suspend, or revoke NWPs for individual activities; broaden the basis for asserting discretionary authority to include all public interest factors; provide that the DE require an individual permit whenever he determines that an activity would have more than minimal adverse environmental effects, either individually or cumulatively, or would be contrary to the public interest; and, modify the predischarge notification (PDN) process required by some NWPs.

The Corps is also reissuing the existing NWPs; issuing 10 new NWPs; modifying some of the existing NWPs; converting the best management practices (BMPs) to permit conditions to increase their enforceability; and, clarifying recurring questions about the applicability of some of the NWPs to certain situations.

Upon the expiration of the NWPs in five years from their effective date, we will remove appendix A from the CFR and issue the NWPs separately from the regulations governing their use. In this way, issuance of the NWPs will follow procedures similar to those for individual permits and regional general permits. Until the NWPs in appendix A are removed from the CFR, the proposed issuance, reissuance, modification, and revocation of NWPs would be published in the **Federal Register** concurrent with regional public notices issued by district engineers, to solicit comments and to provide the opportunity to request a public hearing. All comments would be included in the administrative record, and substantive comments addressed in a decision document for each NWP. The final decisions on the NWPs will be announced by publication in the **Federal Register** concurrent with regional public notices issued by district engineers.

All the changes taken together should result in an overall increase in protection of the aquatic environment and an overall decrease in workload. Any workload savings will be devoted to more efficient individual permit evaluation and increased enforcement and compliance activities.

Discussion of Public Comments and Changes

General Comments.

Part 330—Nationwide Permit Program

Section 330.1(a)(b)(c): Most commenters agree that the nationwide permits are a valuable tool in the regulatory program. The vast majority of comments were directed toward the procedures developed for implementing this program. Our responses to the comments we received are listed in the appropriate sections of this preamble. Comments and responses to specific procedures and terms and conditions are addressed in the following sections of this preamble.

Section 330.1(d): We received a considerable number of comments on this portion of the proposed regulation. Many commenters supported our proposal to allow the Division and District Engineers to modify, suspend or revoke nationwide permits on a regional basis, or on a case-by-case basis for specific activities where the adverse environmental effects may be more than minimal or otherwise warranted by other factors of the public interest. A few commenters thought this would lead to a further expansion of the nationwide permit program. This was never our intent. In response to this concern we have made it clear in the regulation that the Division and District Engineers can not expand a nationwide permit but rather this provision can only be used to restrict or further limit a nationwide permit.

Many commenters thought that the provision to allow the District Engineer to consider all factors in the public interest as well as concerns for the aquatic environment would overly restrict the utility of the nationwide permits. Many of these same commenters recommended that we include an appeal procedure to the Division Engineer or Chief of Engineers in those cases where a District or Division Engineer has asserted discretionary authority, or that we should establish standards or a clear definition of the term "public interest factors." We believe that neither of these are necessary since the public interest factors are discussed at length in the Corps' regulations at 33 CFR parts 320 and 325. We have full confidence in each District Engineer's ability to apply the public interest factors fairly, since these factors are routinely considered in all individual permit applications. Further, in those cases where a District or Division Engineer has asserted discretionary authority, the proposed activity would still have an opportunity to receive approval through the individual permit process. However, we have revised the language of § 330.1(d) to clarify that the authority of Division and District Engineers is limited to restricting or limiting the use of nationwide permits where there is concern for the environment or other factors of the public interest. Discretionary authority is also discussed at 33 CFR 330.4(e) and 330.5.

Section 330.1(e): Many commenters supported eliminating the natural resource agencies from the PDN review process while many others strongly objected to exclusion of state and federal agency review. Some felt that the "resource agencies" have professionals who are knowledgeable about local resources and that eliminating agency comments could adversely impact wetlands, wildlife and other aquatic resources. Other commenters indicated that the Corps is the most knowledgeable office concerning impacts from NWPs and is well equipped to conduct PDN reviews on its own. A few commenters had other suggestions regarding alternative notification procedures.

We continue to believe that the existing predischarge notification process (PDN) must be modified because it has become extremely burdensome and that the natural resource agencies are generally not providing substantive, site-specific comments. Agency comments frequently merely cite regulations or policies governing alternatives analysis and/or mitigation policy. Furthermore, we believe that the interdisciplinary Corps regulatory staff is extremely knowledgeable of resource values and fully capable of evaluating impacts resulting from NWP activities. Over 70% (700) of the Corps regulatory personnel, nationwide, are natural resource scientists, many with advanced degrees. However, to assure that potential environmental impacts are not overlooked, the Corps is instituting at the "Notification" general condition (number 13) a mandatory process requiring notification of the natural resource agencies and solicitation of their comments. DEs are required upon receipt of a PDN to provide immediately (e.g. fax, overnight mail or other expeditious manner) a copy to the appropriate offices of the Fish and Wildlife Service, State natural resource or water quality agency, EPA, and (if appropriate) National Marine Fisheries Service. With the exception of NWP 37, these agencies will then have 5 calendar days from the date the material is transmitted to telephone the DE if they intend to provide substantive, site-specific comments. If so contacted by an agency, the DE will wait an additional 10 calendar days before making a decision on the PDN. The DE will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency. Applicants are encouraged to provide the Corps multiple copies of PDNs to expedite agency notification.

Some commenters indicated that the number of PDNs is expanding and that this fact makes the NWP program more complex, confusing, and time-consuming. Other commenters stated that the PDN process will add to the burden already experienced by Corps staff. Another commenter felt that it would speed review by reducing the number of parties involved.

We agree that the increased number of PDNs will increase workload for Corps regulatory staff. However, this increase will be offset by a reduction in the number of actions requiring individual permits, by a simplified PDN procedure, by eliminating proposed PDN requirements for two proposed NWPs, and by eliminating two proposed NWPs which would have required a PDN.

Many commenters supported the 30-day requirement for a decision on PDNs. However, some felt that a specific time limit should be established for requesting additional information to complete the notification and several asked for clarification of the information required for a PDN. A few commenters requested a 60-day review period. Another commenter requested that any decision to take discretionary authority be in a written letter which provides specific reasons for the decision.

We believe that the language as adopted is reasonable and provides adequate protection against unreasonable delays. The provision for a decision within 30 days has been retained. The requirements for a PDN are found in General Condition 13 and further clarification is not needed.

A few commenters indicated that the requirement for a wetland delineation on NWPs imposes an unreasonable burden on applicants and it is the government's responsibility to determine the scope of its jurisdiction. Some commenters stated that the Corps should provide a delineation within 30 days, if the applicant's delineation is disputed. Another commenter recommended that a delineation report be submitted with all wetland delineations furnished by the prospective permittee. Several commenters suggested deleting reference to the Federal Manual since it is controversial and has not been adopted by public notice and comment for rule making.

We agree in principle that determining jurisdiction is, ultimately, the government's responsibility. However, the Corps does not have the resources to provide timely wetland delineations in all cases. Accordingly, the applicant must submit a wetland delineation to assure a timely decision. Further, we disagree that all wetland delineations submitted to the Corps should include a detailed report. We believe that the degree of documentation necessary to review a wetland delineation will be dependent upon the site conditions of the property under review. Further, the amount of data collection necessary to prepare a wetland delineation report is appropriately discussed in the Federal Manual. We also disagree with deleting reference to the Federal Manual, since we have specifically included the phrase "or current method being used by the Corps" to recognize and ensure that the appropriate method will be utilized if the current wetland delineation manual is revised.

Some commenters recommended that the Corps institute a simple reporting requirement to provide data necessary to determine cumulative impacts of NWPs and whether PDNs should be required in the future. Another commenter suggested that PDNs should be voluntary to allow proponents to determine applicability of NWPs to their projects, while others favored adding PDN requirements to all NWPs.

We disagree that a simple reporting requirement would be successful in obtaining necessary data for cumulative impact assessment. We also disagree with adding PDN requirements to all NWPs. We believe that neither approach would be reasonable or practical, since they add significant workload requirements to our limited staff resources and unnecessarily burden the public with reporting activities that clearly have only minimal adverse effects on the environment. Applicants can request a determination of the applicability of NWPs at any time regardless of PDN requirements.

The PDN process is necessary for certain NWPs and we have retained it, where appropriate, to ensure that only minimal adverse environmental effects will occur.

A number of commenters objected to the language advising applicants that an activity may proceed, in most cases, without notifying the DE because they fear an increase in unauthorized activities. Other commenters stated that specific enforcement provisions should be included in this section to address the failure of applicants to provide required notification prior to starting the discharge.

We disagree that advising applicants that they may proceed, in most cases, without notifying the DE will increase the number of unauthorized activities. This procedure has been in effect since the NWPs were first issued by the Corps in 1975. Further, there is no evidence

that this has resulted in a substantial number of unauthorized activities. We agree, however, that language should be included in § 330.1(c) which addresses failure to provide timely and accurate notification. This Section has been amended to specifically allow the DE the discretion to authorize a discharge after-the-fact, after considering whether the failure to provide notification was knowing or intentional or other indications of the need for a penalty.

A few commenters suggested that § 330.4(c)(6) and 330.4(d)(6) be modified to require that the 30 day notification period begin when the notification is submitted rather than after Section 401 certification or coastal zone management consistency is received. An NWP decision would then be conditional upon receipt of the appropriate state determination.

We agree with this approach. The denial of Section 401 certification or coastal zone management consistency results in denial of authorization under NWPs without prejudice until the state has provided an individual certification or consistency determination concurrence. The Corps will begin and complete its review of a PDN within 30 days and notify the prospective permittee that the proposed activity qualifies for the NWP, is denied without prejudice, and will be authorized when the prospective permittee furnishes the Corps with an individual 401 water quality certification or waiver and/or with a CZM consistency concurrence or presumed concurrence. Sections 330.4(c)(6) and 330.4(d)(6) are being adopted accordingly.

Section 330.1(f): A few commenters objected to requiring the DE to review all incoming applications to determine if they comply with a nationwide permit. However, this procedure is currently a routine aspect of the DE's review of an application package for completeness. Furthermore, it is unreasonable to require an applicant to proceed through the individual permit process where the activity can be appropriately authorized by a general permit.

As such, we have retained the language of this section.

Section 330.1(g): We received no substantive comments on this section, and we have retained the language as proposed.

Section 330.2(a): Several commenters requested that we define the term "public interest factors". We believe this term is sufficiently described at 33 CFR 320.4. In addition, a few commenters recommended that we include a definition of "ordinary high water" in this section. This term is currently defined at 33 CFR 328.3(e) and is applicable to this part. Therefore, we have not included a definition of that term in this section.

Several commenters requested that we define the term "minimal" as used in the context of the regulatory program. The word "minimal" is not defined anywhere within the regulatory program. The determination of "minimal" adverse environmental effects is left to the discretion of the DE. The District represents the most knowledgeable office concerning the aquatic resources within that particular region, and the DE is therefore the most capable of assessing relative impacts that would result from activities authorized under the NWP program. Each District is unique in regard to its aquatic resources and the effect of regulated activities. As such, what constitutes minimal adverse environmental effects can vary significantly from state to state, county to county, watershed to watershed as well as district to district. Obviously, the factors utilized by the DE in the decision making process must be evaluated based upon the environmental setting of the District and the project itself. Given this variability, the term "minimal" would be difficult to define with any utility on a nationwide basis.

Section 330.2(b) Nationwide Permit: We received no substantive comments on this section. We have retained the language as proposed.

Section 330.2(c) Authorization: A few commenters favored the procedures in the regulation for written verification of NWP compliance; however, they recommended that the notification procedure at § 330.1(e) be modified to include a requirement for a response from the DE within 30 days. A few commenters suggested that this verification of compliance with the terms and conditions of all NWPs should be mandatory. We have not included this requirement for all NWPs, since we believe it is unnecessary. Furthermore, this recommendation would defeat the purpose of the NWP program, which is to reduce the effort expended in regulating activities with minimal adverse environmental effects. One commenter referred to the addition of activity-specific conditions or regional conditions as being the equivalent of discretionary authority. This is correct, and we agree with this conclusion. Regional or project specific conditions can be added by a Division or District Engineer to ensure compliance with the terms and conditions of an NWP or to assure that the adverse environmental effects both individually and cumulatively are minimal (see 33 CFR 330.5(c)&(d) and 33 CFR 330.6(a)).

Section 330.2(d) Headwaters: Some commenters from the Southwestern United States expressed concern that the current and proposed definition of headwaters does not adequately protect ephemeral and intermittent waters. Among these commenters there was confusion as to whether the establishment of five cubic feet per second (5 cfs) for 50 percent of the time represented when a dry stream is flowing or on an annual basis. A recommendation was made to calculate headwaters during those periods when flow is occurring, and not on an annual basis. This option for the District Engineer was adopted on July 19, 1977, to allow the DE to establish the demarcation point for the headwaters based on the median rather than the average flow. A median flow of five cubic feet per second means that 50% of the time the flow is greater than five cubic feet per second and 50% of the time the flow is less than this value. This approach was added to recognize that streams with highly irregular flows, such as those occurring in the western portion of the country, could be dry at the "headwaters" point for most of the year and still average, on an annual basis, a flow of five cubic feet per second because of high volumes, flash flood type flows which greatly distort the average. Furthermore, we recognize that using the median flow for an entire year in streams that have no stream flow for over half the year but with flows greater than 5 cfs for several months would also distort the average. Accordingly, we have modified the wording under the definition of headwaters to clarify the intent of the headwaters calculation for such streams is to be based on the median flow, but including a provision that the median be based on the six wettest months (they do not have to be consecutive) to more realistically represent the headwaters. In addition, regarding the concern expressed over the protection of ephemeral and intermittent streams we encourage District and Division Engineers, where individual and cumulative adverse environmental effects would be more than minimal, to exercise discretionary authority to require individual permits and thereby effectively move the point for authorization by NWP 26 upstream of the 5 cfs point. It should also be noted that precision is not required in establishing the five cubic feet per second point. The definition allows the DE to use approximate means to compute it. The drainage area that will

contribute an average annual flow of five cubic per second can be estimated by approximating the proportion of the average annual precipitation that is expected to find its way into the stream. Having the area that will produce this flow, the five cubic feet per second point can be approximated from drainage area maps.

As stated in the definition found at § 330.2(d), headwaters are those waters, including adjacent wetlands, upstream of the point on the river or stream (i.e. a surface tributary) at which the average annual flow is less than 5 cubic feet per second (5 cfs).

A surface tributary system may consist of either: a.) defined channel or dendritic (tree-like, branching) arrangement of channels with adjacent wetlands, or b.) part of a large continuum of waters or wetlands. In tributary systems where there exists one or more defined channels, any wetlands which are not isolated should be considered adjacent to the waterbody(s). In these cases, the determining factor as to which of the waterbodies the wetland should be considered adjacent to should be the level of influence between the waterbody and the adjacent wetland. The waterbody which has the greatest hydrologic influence or exchange with the wetland is the one to which it is considered adjacent.

In systems where there is a broad continuum of wetlands, all are considered adjacent to the major waterbody to which it is contiguous. This type of broad system should not be dissected for purposes of determining where the 5 cfs point does or does not exist as it is all hydrologically and ecologically part of the same system and should be treated as a whole. Where linear wetlands with defined stream channels connect to a stream of greater than 5 cfs or to a broad continuum of wetlands adjacent to a stream of greater than 5 cfs, the portion of the linear wetlands that are to be considered headwaters is that portion which has the greatest influence or exchange with the defined stream channel upstream of the 5 cfs point.

Section 330.2(e) Isolated Waters: Two commenters recommended that we establish a distance limit for adjacency. We believe that this would be an unreasonable approach due to the potential variability of the factors utilized in establishing adjacency for each individual project such as man-made barriers and natural river berms. Some commenters recommended that the term "interstate waters or" be included within the definition of isolated waters to be consistent with the current definition. We agree with this recommendation. Furthermore, we believe our proposal was not entirely clear in defining isolated waters. Accordingly, we have not adopted the proposed definition of the term "isolated waters". Instead, we have decided to retain the existing definition, which does include the phrase "interstate waters or". However, we did further clarify the existing definition to more clearly state what we intended in the proposed rule.

For the purposes of NWP 26, we have defined isolated waters to be waters of the United States that are not part of a "surface tributary system" to interstate waters or navigable waters of the United States. A surface tributary system includes the waterbody itself, as well as any waters of the United States, including wetlands, that are adjacent to the waterbody. Adjacent wetlands include those that are separated from the river, stream, or other waterbody by man-made or natural barriers such as dikes, roads, river berms, or beach dunes. Thus, a water of the United States is isolated only when it meets the following conditions: it is nontidal, not part of an interstate or navigable water or tributary thereof, and not adjacent to such waters.

Section 330.2(f) Filled Area: Some commenters appear to have misinterpreted the intent of this definition, particularly in regard to pipeline installation. They interpret the phrase "eliminate or cover" to imply permanency, and this may lead to misapplication of the definition to pipeline projects where fill is only temporarily sidecast. A filled area which is eliminated or covered as a direct result of a discharge, whether permanent or temporary, is the focus of the jurisdictional determination. In the case of pipeline installation in a section 404 water, the filled area is the wetland or water covered by utility line backfill or bedding material and the area covered by the temporary sidecasting of trench material. We have carefully considered all comments we received concerning this section, and have determined that the language is sufficiently clear and appropriate. Accordingly, we have retained the language as proposed.

Section 330.2(g) Discretionary authority: Two commenters requested clarification of the term "modification", within the context of discretionary authority, to clarify that modification results in additional conditioning of the permit making it more restrictive. Although we never intended the language found at Section 330.1 to allow expansion of NWP coverage, we have added language to clarify this term (See section 330.1(d)).

Section 330.2(h) Terms and conditions: We received no substantive comments on this section and have retained the language as proposed.

Currently serviceable (proposed at section 330.2(i)): Several commenters requested clarification of the two-year limit expressed in NWP 3. We have decided to delete this definition since the term is only applicable to NWP 3, and we believe that it is sufficiently defined within the text of that NWP. Additionally, the language within NWP 3 has been reworded to clarify the phrase "two years", as it applies to that NWP.

Section 330.2(i) Single and complete project (proposed at section 330.2(j)): One commenter objected to the statement that multiple crossings of the same waterbody could be considered a single and complete project, and further that all the crossings should be totaled to determine the affected acreage for compliance with the NWP. Some commenters felt the definition of single and complete was biased against large scale development. They recommended that we allow districts to develop separate guidelines for large scale projects which would define separate sections or phases of a development as single and complete, provided they had a separate time schedule for development, consisted of at least 20 acres of land, and did not impact the same headwater or isolated water more than once. A recommendation was also made to develop an acceptable ratio calculation on the acreage filled to the project acreage. These recommendations were determined to be unreasonable, due to the variability in the quantity and quality of aquatic resources between regions and individual projects. Many commenters objected to the definition of single and complete, particularly as it pertains to linear projects. The basis for their objections involved the potential for cumulative adverse environmental effects associated with multiple crossings along a single waterway or wetland, resulting in a cumulative loss of habitat and wetland fragmentation. Suggested recommendations to eliminate cumulative impacts under the NWP included deleting the latter portion of the definition which discusses linear projects. Another suggestion was to entirely re-define "single and complete." Several commenters requested that we define "distant locations," or exclude it from the definition as it is an ambiguous term. We do not agree with the practicability of defining "distant

locations." Situations will occur where a linear project crosses separate waterbodies or the same waterbody at distant locations and does comply with the terms and conditions of the NWP and does not result in adverse effects on the environment, either individually or cumulatively.

On the other hand, a DE has authority to assert discretionary authority to add project-specific conditions to reduce the adverse effects on the environment to the minimal level or to require the prospective permittee to apply for authorization under an individual permit. This decision by the DE can be based upon concerns for adverse effects on the environment or other factors of the public interest.

The purpose of separating out "linear projects", within the text of the definition for "single and complete project" was to effectively implement the NWP program by reducing the effort expended in regulating activities with minimal impacts. It was never our intention to encourage the use of this definition to justify piecemealing of projects. It is the responsibility of each DE to assure against piecemealing through the appropriate use of discretionary authority. We believe that this procedure will assure effective and efficient administration of the NWP program.

Accordingly, we have adopted this definition as proposed but reorganized to make it clearer.

We have learned that, in certain situations, developers have purchased large properties including substantial areas of wetlands, and then have subdivided those properties into smaller parcels, and sold the parcels intending that each individual parcel could be filled under the authority of NWP 26. Such subdivision projects constitute an abuse of NWP 26 which was never intended by the Corps, and which cannot be reconciled with the limitations of the Clean Water Act section 404(e). The new language added in NWP 26 states that, in the future, a subdivision created after October 5, 1984, will be treated in its entirety as a single and complete project for purposes of the pre-discharge notification and the ten-acre limit of NWP 26, unless exempted by the DE under specified circumstances; this should prevent the abuse of the NWP described above. The determination to allow the exemption for subdivisions is a discretionary decision on the part of the DE, and one which will only apply to a limited number of subdivisions. The date of October 5, 1984, was selected because on that date the one-acre and ten-acre limits were added to NWP 26. This rule recognizes the fact that most subdivisions are really unified projects, where each separate lot or parcel is often inter-related with the other lots and with the subdivision streets, utilities, etc. On the other hand, we recognize that in some situations tracts of land have been divided and sold in circumstances which clearly are not abuses of NWP 26. We expect the DEs to use their sound judgement while applying this rule, and we have provided the DEs with discretion to exempt any subdivision or parcel thereof where an exemption would be appropriate. DEs should ensure that enforcement of this regulation does not lead to unfair or unreasonable burdens for individual lot owners, and should assert the discretionary authority wherever necessary to ensure respect for this regulation.

Section 330.2(j) Special aquatic sites (proposed at section 330.2(k)): One commenter suggested that the definition of special aquatic sites should be expanded to include all habitats where State or Federally listed rare, threatened, or endangered species are known to occur. We disagree with this recommendation since it includes all habitats, and is not limited to those habitats recognized as special aquatic sites. A few commenters requested more precise definitions for riffle and pool complex, sanctuaries and refuges. One commenter appeared to misinterpret the definition of special aquatic sites, as they questioned how to distinguish wetlands identified in the Federal Manual from these special aquatic sites. It should be noted that wetlands are a special aquatic site and are included as part of that definition. The definition of special aquatic sites we are using for NWPs is found in EPA regulations at 40 CFR 230.40–230.45. We have added the term to this regulation for additional information only. To clarify this intent we have included a reference to EPA's regulations.

Section 330.3 (a) and (b): Two commenters stated that language should be added to indicate that activities permitted by prior regulations continue to be authorized by the proposed NWPs, while another commenter questioned what was meant by the language "unless the activities are modified". Activities which were authorized by previous NWP authorizations continue to be authorized. However, modifications of previously authorized activities may result in more than minimal adverse environmental effects. We believe this language is appropriate, and have retained it as proposed.

Another commenter suggested that we move this section to appendix A with the nationwide permits. We believe that the location of this section is appropriate and have retained it at section 330.3.

Section 330.4(a) and (b): Most of the comments we received in response to these sections expressed concerns of NWPs being used to override the local approval process. We disagree with this concern, although we did include a minor rewording of this section regarding state and local approvals for clarification.

Section 330.4 (c): The majority of comments objected to our authorization of NWP activities in a state that has denied the 401 water quality certification for a particular NWP. It was further added that the denial of 401 water quality certification for a particular NWP should automatically require processing of an individual permit application. We believe that the denial of 401 water quality certification should not be the sole basis for requiring an individual permit application for activities which would otherwise comply with the terms and conditions of a nationwide permit. Denial of state water quality certification does not necessarily mean that adverse environmental effects will occur. Rather, it indicates that the state standards have not been met. Thus, when the state standards are met, (i.e. an individual 401 certification issued) the NWP authorization should be available to the prospective permittee. To assure that more than minimal adverse environmental effects do not occur, it is specifically noted that the DE may exercise his discretionary authority in those cases where the adverse effects on the environment either individually or cumulatively would be more than minimal or where the DE has concerns for other factors of the public interest.

Several commenters requested that for those NWPs requiring notification, the 30-day review period should commence immediately upon receipt of the notification rather than upon receipt of the 401 water quality certification. We agree with this recommendation as previously discussed in section 330.1(e) and have so modified the language of this section.

Several states indicated that a final determination could not be made until the final regulations have been published or the Corps submits a request for final certification for review and comment. In response to these comments, it should be noted that the states will have an opportunity to make a final decision on certification of the NWPs upon publication of the final regulation.

Section 330.4(d): Several states indicated that a final determination could not be made until the final regulations have been published or the Corps submits a final consistency determination for review and comment. In response to these comments, it should be noted that the states will have an opportunity to make a decision on consistency determination of the NWPs upon publication of the final regulation.

Several commenters objected to any activities being authorized under an NWP in states which have previously disagreed with the coastal zone management consistency determination for that NWP. We believe that a disagreement with coastal zone management consistency should not be the sole basis for requiring an individual permit application for activities which would otherwise comply with the terms and conditions of a nationwide permit. We have made only minor revisions to this section since it is specifically noted that the DE may exercise his discretionary authority in those cases where the adverse effects on the environment would be more than minimal or where the DE has concerns for other factors of the public interest.

Several commenters requested that for those NWPs requiring notification, the 30-day review period should commence immediately upon receipt of an individual coastal zone management consistency determination. We agree with this recommendation as previously discussed in section 330.1(e) and have so modified the language of this section.

In 1990, section 307(c)(1) of the CZMA was amended to require that Federal agency activities within or outside the coastal zone that affect any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of the approved state coastal zone management programs. This amendment was intended to reverse the Supreme Court decision in *California* v. *Watt* which found that an activity must be within the coastal zone in order to "directly affect" the coastal zone. However, this amendment does not change the long standing position of the Department of the Army that, for the purposes of the NWPs, activities occurring wholely within one state need not receive CZM consistency agreement from adjacent states.

Section 330.4(e): Many commenters recommended that we include an appeal procedure to the Division Engineer or Chief of Engineers in those cases where a District or Division Engineer has asserted discretionary authority. We believe that an appeal process would be unmanageable and burdensome to both the Corps and the public. Furthermore, even where discretionary authority has been asserted to require an individual permit, the activity would still have an opportunity to receive approval through the individual permit process. As such, we have not provided any appeal procedures for this section.

Section 330.4(f): Some commenters requested that we enter into section 7 consultation relative to the Nationwide Permit Program. We have decided that a section 7 consultation is not required since the program specifically does not authorize any activity that jeopardizes the continued existence of a threatened or endangered species, or destroys or adversely modifies the critical habitat of such species. The regulations as written provide the appropriate procedure where the permittee, or other source, notifies the DE that such impacts might occur.

Several commenters requested that for those NWPs with notification requirements that the resource agencies should be included in that process. We have decided to provide notice to the resource agencies during the notification process. Further discussion of this issue can be found in our discussion for Appendix A.

Many commenters objected to the use of the word "proposed" in the phrase "species proposed for such designation" as being too vague and undefined. However, this term is used in the Endangered Species Act and is used in that context.

Section 330.4(g): Several commenters considered that the NWP program is inconsistent with the National Historic Preservation Act (NHPA) or 36 CFR 800, Protection of Historic Properties. We have determined that the NWP condition at appendix A complies with the requirements of the NHPA and is consistent with 36 CFR 800 as implemented by 33 CFR 325 appendix C.

Several commenters requested a definition of a "reasonable opportunity to comment" for awaiting replies from the SHPO. The procedures for providing the SHPO and the ACHP a reasonable opportunity to comment on the effects of Corps permit actions on historic properties are addressed in 33 CFR 325 appendix C. To be consistent with appendix C we have reworded this section to clarify that compliance with appendix C is required.

Several commenters objected to the term "potentially eligible for listing" as being too ambiguous and uncertain and requested clarification. It is our intent to require reporting on important properties that the prospective permittee has reason to believe may be eligible for the National Register of Historic Places so that we could take into account their eligibility and the impacts on such properties. We do not believe that reporting should be limited to properties that were listed or determined eligible for the National Register. In an effort to clarify this point we have decided to use the phrase "which the prospective permittee has reason to believe may be eligible for listing." We recognize there is still some uncertainty in this term. However, if the prospective permittee has any doubt about the historic significance of the property to be affected by the proposed project, he should contact the State Historic Preservation Officer (SHPO) for more information. If the SHPO believes that the property may be eligible, the prospective permittee must notify the DE. Appendix A has been revised to reflect this change.

A few commenters questioned why we made a distinction between Federal permittees and non-federal permittees in this section. It should be noted that Federal permittees must comply with the provisions of Section 106 of the National Historic Preservation Act and will follow their own procedures to comply with the Act. While the Federal permittee's procedures will normally satisfy the NHPA, this does not remove the Corps responsibility to ensure that the Federal permittee's action also satisfies the Corps responsibilities under the NHPA.

Section 330.5(a): One commenter suggested that § 330.5 should be placed in appendix A with the NWPs. The inference was that the format was confusing and applicants would only read appendix A regardless of references. One commenter requested that an NWP could not be modified without input from resource agencies. We do not agree that applicants will only read appendix A. And further, if an NWP is modified, the modification must comply with the procedures specified in § 330.5, which provides for public review and comment.

Section 330.5(b): Two commenters stated that the date of issuance and the effective date were unclear. One commenter requested that the notice, procedure, and proposals to issue, modify, or reissue NWPs should include the state agency responsible for water quality certification. One commenter suggested that it should be just as easy to ask for revocation of a permit as it is to issue the permit. One commenter suggested that the Chief of Engineers should respond in writing within 30 days with the results of his consideration of

newly proposed NWPs to the person who proposes a new permit, conditions, or changes to existing NWPs. One commenter stated that the procedures appear unworkable and recommended a sequential procedure to finalize the NWPs before regional conditions are developed.

The effective date of the NWPs will be clearly stated when they are published by the Chief of Engineers. We see no need to require the state agency responsible for water quality certification to be included in the public notice. We will leave this decision to the Division Engineer if he determines it is beneficial to include the state agency in the public notice. The procedure for revocation of an NWP, should this be deemed appropriate, are actually easier than issuance since documentation under NEPA and 404(b)(1) compliance analysis would not be required. A public notice and opportunity for a public hearing would be required to obtain public comment. We do not agree that the Chief of Engineers should be required to respond within 30 days to the person who proposes a new permit, conditions, or changes to existing NWPs. The correspondence will be acknowledged but not necessarily within 30 days or by the Chief of Engineers. We do not agree that sequencing is required to include regional conditions to the NWP. Any conflicts that may develop during final issuance of an NWP can be resolved and regional conditions modified, deleted, or added before final publication of the NWPs.

Section 330.5(c): Several commenters requested that a grand-fathering period from one to two years be specified for those who have commenced work or made substantial commitments in reliance on an existing NWP. One commenter suggested that the Division Engineer retain the authority to modify, suspend, or revoke an NWP for a specific geographic area while another commenter suggested that only the Chief of Engineers could revoke an NWP on a state level. One commenter requested that Executive Order 12630 should be followed, stating that the NWP being modified, suspended, or revoked could be considered a taking where an applicant may have established vested rights in a project based on the NWP authorization.

We agree that the grandfather period needs to be specified to avoid confusion and to be consistent. Therefore, the word "equitable" has been deleted and a grand-fathering period, if appropriate, will be as specified in § 330.6(b). We do not agree that discretionary authority should not be delegated to either the Division Engineer or District Engineer. The Division Engineer and the District Engineer are capable of making these decisions as demonstrated by previous determinations. Exercising discretionary authority does not constitute a taking of property for which compensation is due. The decision by a Division or District Engineer to assert discretionary authority is based on a determination that the adverse environmental effects either individually or cumulatively would be more than minimal or that there are other concerns for the public interest that would be more appropriately evaluated in a regional general permit or an individual permit application. Further, asserting discretionary authority is not a final decision since the proposed project would have the opportunity to receive approval as a regional general permit or an individual permit.

Section 330.5(d): Several commenters were in favor of the District Engineer's authority to modify, suspend, or revoke a specific activity's authorization under an NWP. Several commenters requested that the Division Engineer retain discretionary authority as a check and balance. Several commenters were concerned that no public notice was being issued when the District Engineer exercised his discretionary authority. Several commenters requested that an appeal process should be included in the NWP program when the District Engineer exercises discretionary authority.

We disagree that the exclusive right to exercise discretionary authority should be retained with the Division Engineer. Division Engineers have agreed with the District Engineers' recommendations ninety-five percent of the time. The five percent where the Division Engineer has not agreed with the District Engineer is not sufficient reason to retain discretionary authority with the Division Engineer. There seems to be some confusion as to the District Engineer's exercising discretionary authority for a specific activity's authorization under an NWP. The exercising of discretionary authority is for an individual activity and not regional or statewide. Therefore, there is no need to issue a public notice. In the event that a DE asserts discretionary authority to require an individual permit application, a public notice of the subsequent application would be published by the DE. We have not included an appeal procedure for discretionary authority. We believe that an appeal procedure would be unnecessary and burdensome, and further, the assertion of discretionary authority by a DE does not represent a final decision, since the activity in question may still be authorized by an individual permit.

Section 330.6(a): Most commenters recommended that when a DE is requested to verify an NWP authorization by a permittee, that the DE should be required to respond to the permittee with a written confirmation within 30 days of receipt of such request. Other commenters incorrectly assumed that notification for all NWPs was mandatory.

Since all NWP activities (except those requiring PDNs) are authorized without the requirement to notify the Corps, the DE's written verification is considered a service to the public. Therefore, we have not provided a specific time limit for DE verification of NWPs. However, we have indicated that the DE will respond as promptly as his workload priorities allow. Because of the dynamic nature of the section 404 program, the intent of the two-year time limit on written verifications is to allow for appropriate adjustments or clarifications in jurisdiction, policy and procedure. Furthermore, we are changing the wording of the paragraph to clarify that the verification is valid for a period of no more than two years, unless the NWP is modified, suspended, or revoked, such that the activity would no longer comply with the terms and conditions of the NWP. In these cases the provisions of § 330.6(b) will apply for those activities which have commenced or are under contract to commence.

Another commenter suggested that we add a "grandfather" provision to § 330.6(b) for activities authorized by NWP #26 so that re-verification of the NWP authorization would not be required as a result of the NWP reissuance; unless the proposed activity would no longer comply with the terms and conditions of any modifications (i.e. acreage limits) in the final regulations. We recognize that many activities authorized by the existing NWPs will be unaffected by any changes in this regulation. As such, we have included language in this section to clarify that a verification letter written by the DE confirming authorization under an NWP continues to be valid beyond the date of the NWP expiration and any subsequent reissuance or modification, provided the reissuance or modification does not affect the activity's compliance with the NWP. It should be further noted that this provision will be applicable to all activities authorized by NWPs. We have also added a subparagraph to this section to provide, in situations where a

state has denied 401 water quality certification and/or did not agree with the Corps CZM consistency determination, for verification of activities subject to the prospective permittee satisfying the 401 water quality certification and/or CZM consistency concurrence requirements of 33 CFR 330.4(c) and/or 33 CFR 330.4(d).

Section 330.6(b): Two commenters indicated that the language concerning expiration of the NWPs in this section is not consistent with the language found in 33 CFR 330.5(b). These commenters also questioned the need for the language stating that work completed under the authorization of an NWP continued to be authorized under the NWP. One commenter requested that the DE should be allowed to extend the expiration date for a project that has been commenced beyond the 12 month time limit. If acreage limits are revised, the commenter indicated that previously approved projects that exceed the revised acreage limits would have to apply for a new individual permit.

We agree that the language concerning expiration of the NWPs may have been confusing. To clarify this point, we have clarified the language of this regulation to indicate that the NWPs will expire five years from the effective date, unless sooner modified or revoked. At the time of publication, the effective date of the NWPs will be specified. The commenters appear to have mistakenly believed that the NWPs only authorize construction. As with individual permits, the NWPs authorize not only construction, but also continued maintenance and operation of any structure or fill completed under such authorization. We believe that 12 months from the expiration, modification, or revocation of an NWP is a reasonable amount of time to complete a project that has been previously authorized, and as such, we have not extended this time limit.

Section 330.6(c): Most commenters objected to multiple use of NWPs ("stacking") saying that the policy would allow more than minimal adverse environmental effects by piecemeal and cumulative filling. Some commenters objected because allowing multiple use of NWPs on a single project site would prejudice future applications on the same property. Still others believed that the concept of more than minimal and single and complete project were not adequately defined. Reference is made to 33 CFR 330.2 for the definition of single and complete project and the preamble language on 330.2(i).

We disagree with the commenters and are retaining the proposed wording of § 330.6(c). If an activity authorized by an NWP is likely to occur independently of a large single and complete project, considerations of fairness and equity require that it be allowed. The Corps is involved in regulating many projects where there is, in fact, independent utility for a portion of a project where an NWP would authorize activities which would allow the activity to go forward. In such cases there is often an additional portion of the project which would need an individual permit.

However, the portion that would be allowed by NWP would proceed whether or not the additional portion of the overall project were authorized. We believe this position is supported by the NEPA case law. Those commenters' concerns that adverse environmental effects may be more than minimal should be alleviated by the requirement that the same NWP can only be used once for a single and complete project, except for linear projects. Furthermore, where a DE believes that adverse environmental effects are more than minimal he may invoke his discretionary authority to add project specific conditions or to require an individual permit application.

Section 330.6(d): Many commenters objected to this section, suggesting that combining NWPs and individual permits would constitute piecemealing, and requested that activities with portions requiring an individual permit should be evaluated as a whole under the individual permit review. They suggested that fragmentation would increase cumulative adverse impacts and eliminate options for improvement to proposed projects. Several commenters suggested that combining the NWP would preclude decisions on individual permits based on complaints of "substantial commitments" with regard to financial obligations. We do not agree that the combining of NWPs and individual permits necessarily constitutes piecemealing. There are many situations where a portion of an overall project that only involves adverse environmental effects covered by an NWP would be built (i.e., have independent utility) with or without associated activities that may require an individual permit. In such cases it would be inequitable to delay a decision on the NWP pending a decision on the individual permit. The proposed language requires that the individual permit documentation must include a discussion of the adverse environmental effects of the entire project, including related activities authorized by NWP. The applicant must understand that authorization of an NWP will not prejudice the decision on an individual permit regardless of financial commitments.

Appendix A to Part 330—Nationwide Permits and Conditions

We have moved the nationwide permits and their required conditions from 33 CFR 330.5 (a) and (b) to a new appendix A. We have reissued the 26 existing nationwide permits, some with modifications, and have issued 10 new nationwide permits, rather than the 13 proposed. In addition, we have added the existing best management practices now found at 33 CFR 330.6 as conditions to the nationwide permits and have added two new conditions. We have reserved the NWP numbers 29, 30, 31, and 39. They will be used for any new proposed NWPs after notice and opportunity for public comment in accordance with 33 CFR 330.5.

Nationwide permits (NWPs) are a type of general permit issued by the Chief of Engineers and designed to regulate certain activities having minimal adverse effects on the environment both individually and cumulatively, in a manner entailing little, if any, delay or paperwork. If the project does not comply with the terms and conditions of the NWP and can not be or is not modified to comply with the terms and conditions of the NWP, then the proposed project is not authorized by NWP but may be evaluated for authorization under a regional general permit or an individual permit. These nationwide permits are proposed, issued, modified, reissued (extended) and revoked from time to time after opportunity for public notice and comment. Proposed new NWPs or modification to or reissuance of existing NWPs will be adopted only after public comment, the opportunity to request a public hearing, and a finding of compliance with applicable standards. The Corps will give full consideration to all comments received prior to reaching a final decision.

General Comments

Many commenters generally supported the NWP program because it allows the Corps to focus resources on activities with greater adverse environmental effects. Some disagreed that the NWPs will result in a decrease in overall workload. Many commenters felt that the terms and conditions of some of the NWPs were too vague and needed to be clarified. Some felt that clear standards for the use of mitigation are needed. One commenter requested that forms should be used for the information required for condition 13. Many of the NWPs are being clarified.

Form ENG 4345 may be used for notification.

A majority of the commenters who were opposed to the NWP program were opposed because they believe that the program will contribute to wetland losses and the destruction of wildlife habitat, and that the program is contrary to the President's goal of no net loss of wetlands. We support the President's goal of no net loss of wetlands. Wetland losses under the nationwide permit program have been substantially reduced from the program's inception in 1977. This reduction in adverse effects continues and the proposed changes will result in additional substantial reduction in adverse effects over the 1986 nationwide permit program. Although there will be continued small losses of wetlands under the nationwide permit program, the net losses of wetlands and wildlife habitat will be minimal. Concerns for local types or areas of wetlands and other local concerns should be directed to the appropriate DEs for possible exclusion through the use of discretionary authority or regional conditions.

Many of the commenters recommended that the Corps develop a system to monitor and assess cumulative adverse environmental effects to wetlands under the NWP program. The Corps has enhanced its efforts in recent years to monitor and assess cumulative adverse effects to wetlands under the NWP program and we intend to continue to improve this effort.

Several of the commenters were concerned that removing the NWPs from the CFR would complicate the administration of the NWP program, make it less enforceable, confuse the public, and might not comply with the Administrative Procedure Act. We disagree, and upon the expiration of the NWPs in five years from their effective date, will remove appendix A from the CFR and issue the NWPs separately from the regulations governing their use. Until the NWPs in appendix A are removed from the CFR, the proposed issuance, reissuance, modification, and revocation of NWPs will be published in the **Federal Register** concurrent with regional public notices issued by district engineers. After the NWPs are removed from the CFR, the Chief of Engineers and district engineers will issue public notices to solicit comments and to provide the opportunity to request a public hearing. All comments will be included in the administrative record, and substantive comments addressed in a decision document for each NWP. The final decisions on the NWPs will be announced by the Chief of Engineers concurrent with regional public notices issued by district engineers.

One commenter suggested that we change the language in the first sentence of appendix A from "optional" to "mandatory." One commenter thought that the changes to the NWP program, including the addition of new NWPs, would undermine state and local efforts to regulate activities and that consistency is needed. Another was concerned about the applicability of old RGLs when the new NWPs are issued. The term "optional" nationwide permit is intended to indicate that a prospective permittee is not necessarily required to proceed under the terms of an NWP but at his option may apply for an individual or regional general permit. It should be noted, however, that the introduction to appendix A has been rewritten to clarify the mandatory nature of the permit conditions if a prospective permittee chooses to undertake an activity authorized by an NWP. We believe that the program will not undermine any state or local efforts to regulate wetlands and that consistency is enhanced by the nationwide permit program. RGLs addressing NWP matters have been captured in the nationwide permit regulation and are no longer applicable.

All the changes taken together should result in an overall increase in protection of the aquatic environment and an overall decrease in workload. Any workload savings will be devoted to more efficient individual permit processing and increased enforcement and compliance activities.

Mitigation

Many commenters objected to allowing the DE to consider mitigation to reduce, "buy down" or "write down" the adverse environmental effects of a proposed NWP activity to the minimum impact level. Many commenters indicated that requiring mitigation is contradictory with the presumption that NWP actions do not have more than minimal individual or cumulative adverse environmental effects. Many commenters further requested that the DE should be required to make the minimal impact determination prior to considering any proposed mitigation. Many commenters objected that the sequencing requirement (to consider avoidance, minimization and only then compensation) has not been included in the NWP Program. Others also objected that the mitigation requirements of the NWP Program are not consistent with the Army/EPA Memorandum of Agreement on Mitigation, dated February 1, 1990.

Concerning the Mitigation Options discussed in the April 10, 1991 **Federal Register** notice, three times as many commenters favored Mitigation Option 2 over Mitigation Option 1. Many of the commenters who favored Option 2 supported the concept that mitigation should only be required if the DE determines that resources need to be conserved. Some commenters recommended that mitigation development should be left to the discretion of the applicant. Others requested that the DE should be required to coordinate with other Federal and state resource agencies to determine what is appropriate and practicable mitigation.

Many commenters requested that criteria for appropriate and practicable mitigation should be included in the mitigation discussion. Others requested a discussion of how to determine when mitigation is practicable. Many other commenters requested that guidance be included to assist prospective permittees in developing appropriate mitigation proposals.

In response to the comments concerning whether the DE should allow an activity to proceed under a relevant NWP when the mitigation reduces the adverse environmental effects to the minimal level (the "buy down" or "write down" concept), we believe it is indeed appropriate for the DE to consider mitigation in determining whether the proposed activity will result in no more than a minimal level of adverse environmental effects. While the Memorandum of Agreement on Mitigation between the Army and the EPA applies only to standard (individual) permits, it specifically provides for the concept of mitigation to reduce adverse environmental effects. The Council of Environmental Quality's National Environmental Policy Act Implementing Regulations and the section 404(b)(1) Guidelines also provide for using mitigation to reduce adverse environmental effects prior to determining whether the effects are significant. Section 230.7(b)(1) of the section 404(b)(1) Guidelines do not require that general permits (including nationwide permits) comply with § 230.10(a) (alternatives analysis) of the 404(b)(1) Guidelines. An alternative analysis which includes consideration of off-site alternatives is not required for evaluating projects under the nationwide permit process. On the other hand, it is appropriate to avoid and minimize impacts on-site and to use other forms of mitigation to reduce adverse environmental effects of nationwide permit activities to the

minimal impact level. In summary, the net impact concept regarding the determination of minimal is consistent with NEPA, the Army/EPA Mitigation MOA and the section 404(b)(1) Guidelines as they pertain to general permits.

After considering the comments received on Mitigation Options, we have determined that a modified version of Mitigation Option 2 is appropriate for the nationwide permit program. DEs should use the following procedure in evaluating nationwide permit proposals that might require a mitigation analysis prior to determining whether the proposed activity is authorized by a particular nationwide permit.

In reviewing an activity under the notification procedure, the DE will first determine whether the activity will result in more than minimal adverse environmental effects. The prospective permittee may, at his option, submit a proposed mitigation plan with the predischarge notification to expedite the process, and the DE will consider any optional mitigation the applicant has included in the proposal in determining whether the net effect of the proposed work is minimal. The DE will follow the notification procedures and will consider any comments from Federal and state agencies concerning the need for mitigation to reduce the project's adverse environmental effects to a minimal level. If the DE determines that the activity complies with the terms and conditions of the NWP, he will notify the nationwide permittee and include any conditions he deems necessary.

If the DE determines that the adverse effects of the proposed work are more than minimal, then he will notify the prospective permittee either: (1) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; or (2) that the project is authorized under the nationwide permit subject to the permittee submitting a mitigation proposal that would reduce the adverse environmental effects to the minimal level. This mitigation proposal must be approved by the DE in writing prior to commencing work. It will be optional whether the DE notifies the Federal and state resource agencies of the mitigation proposal. These agencies will submit their comments on what they consider to be appropriate mitigation in their response to the original predischarge notification. The DE will not be required to commence a second 30-day notification procedure. If the net adverse environmental effects of the project (with the mitigation proposal) are minimal, the DE will provide a timely response to the applicant informing him that the project can proceed under the terms and conditions of the nationwide permit.

DEs are encouraged to provide information in appropriate circumstances to the public on what they will normally consider to be appropriate mitigation for determining what constitutes minimum adverse environmental effects in certain situations and/or for certain wetland types.

Several commenters supported mitigation banking and the trust fund concept, while several other commenters objected to one or both concepts. One commenter requested that clear guidelines should be required for the use of mitigation banks or trust funds. Another commenter suggested that regional mitigation banking strategies should be developed. Several commenters indicated that mitigation banking should only be considered as a last resort after minimization, restoration, creation and enhancement have been exhausted. One commenter recommended that monitoring and utilizing evaluation methodologies should be performed regularly to account for losses and gains at banks. Finally one commenter favored mitigation banks because they are better than having numerous small wetland mitigation projects.

We believe that mitigation banking and utilizing trust funds are acceptable methods of mitigating for adverse impacts that might result from the use of nationwide permits. Due to the minor nature of adverse environmental effects caused by activities authorized by nationwide permits, both of these concepts are excellent methods of mitigating for numerous small projects. Furthermore, appropriate utilization of mitigation banks for numerous small discharges is better for the environment because mitigation banks can result in large blocks of contiguous wetlands that perform many functions. Appropriate methods of utilizing these concepts should be determined regionally, although we expect to provide further national guidance in the future.

Need for EIS

A few commenters felt that the nationwide permit program as a whole is a major Federal action significantly affecting the quality of the human environment and that an EIS should be prepared. Some felt that all or some of the nationwide permits would result in more than minimal adverse environmental effects, and that the Corps had no evidence to support its preliminary determination otherwise. One commenter was concerned that secondary impacts have not been considered. In response, we have made a final determination that this action does not constitute a major Federal action significantly affecting the quality of the human environment. In addition, environmental documentation has been prepared for each proposed nationwide permit. This documentation includes an environmental assessment and, where relevant, a section 404(b)(1) Guidelines compliance review. Copies of these documents are available for inspection at the office of the Chief of Engineers and at each Corps district office. The NEPA documents demonstrate that the NWPs comply with the requirements for issuance under general permit authority. This includes consideration that the nationwide permits which may have a potential to cause more than minimal adverse effects on the environment have been conditioned to require notification to the DE. In this way, we have insured that activities will not occur under the NWPs which would cause more than minimal adverse effects on the environment. Secondary and cumulative impacts have been considered in the documentation.

Nationwide Permits

1 Aids to Navigation. One commenter requested that this NWP be conditioned to comply with its state CZM plan. Another commenter requested that predischarge notification be added to this NWP so that applicants could be advised that a permit is required from that State. 33 CFR 330.4(a)(2) states that the NWPs do not obviate the need to obtain other Federal, state, or local authorizations required by law. We disagree that there is a need to add further conditions. As such we have retained the proposed wording.

2. Structures in Artificial Canals: One commenter suggested that the term "artificial canal" is interpreted by some to include channelized natural areas and these should be clearly excluded in the proposed language. Another commenter supported limiting the NWP to structures serving only single-family residences and suggested that structures which interfere with water circulation be excluded. Another commenter stated that artificial canals may support important habitats for fish and wildlife and suggested that the NWP should state that structures that may directly impact vegetated wetlands or productive water bottoms are not authorized.

It is a valid concern that the term artificial canal may be interpreted by some to include channelized natural areas. However, we believe that our district personnel will have the resources to distinguish between the two. In accordance with 33 CFR 322.5(g) structures in previously authorized canals would have been considered under applications for the original canal work. In grandfathered canals or in cases where structures may not have been considered, the District Engineer may use discretionary authority to evaluate structures if more than minimal impacts are anticipated. Therefore, we do not find it necessary to limit structures to those only serving single-family residences. General condition 4 of appendix A to part 330 states, in part, that "no activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody. We believe that this condition will ensure that adverse impacts to aquatic life will not occur or if they may occur will be a basis for discretionary authority by the DE.

3. *Maintenance:* We received a wide range of comments on this proposed nationwide permit. While a few commenters objected to this nationwide permit stating that it was too broad, others commented that it was too restrictive. However, the majority of comments were generally supportive of our proposed changes. Many favored the clarification of "currently serviceable" to allow two years for the repair or replacement of those structures and fills damaged or destroyed by storms, fire, floods or other discrete events. Several commenters indicated that the proposed NWPs contained confusing language and requested that we define or clarify the terms "current safety standards", "substantial change", "minor deviations" and "within the past two years". We agree that the two-year time limit and the term "substantial change" may have been confusing to some so we have reworded the provision for the two-year time limit for repair or replacement for certain structures and fills to clarify our intent, and we have deleted the term "substantial change". However, experience has shown that all structures and fills require maintenance periodically. As a part of this maintenance effort it is important to note that improvements in technology and concerns for public safety warrant minor deviations for repair and replacement activities. As such, we have retained the terms "current safety standards" and "minor deviations" to provide the flexibility necessary for this nationwide permit to keep pace with construction technology and public safety. As with all nationwide permits, activities performed under this nationwide permit must comply with the terms and conditions of the nationwide permit. Further, it should be noted that the DE has the authority to further modify or restrict this nationwide permit or to assert discretionary authority over any specific activity where the adverse environmental effects are more than minimal.

4. *Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities:* As a part of the proposed modification of this nationwide permit, we were seeking comments on whether to add small aquaculture activities to this nationwide permit. In response to this, we received many comments that objected to the addition of small aquaculture activities to this nationwide permit, while other commenters, including some state agencies requested that we define this term before we seek public comments. However, a few commenters suggested that we include small-scale shellfish aquaculture activities since this activity has a long and successful tradition. We agree that traditional clam and oyster farming and harvesting activities have only minimal adverse environmental effects. In fact, these activities themselves are environmentally sensitive and are dependent upon a healthy aquatic environment for their continued success. As such, we have added shellfish seeding to this nationwide permit provided this activity does not occur in wetlands or vegetated shallows. However, after reviewing the comments we received in response to the term "small aquaculture activities," we have decided not added other aquaculture activities to this nationwide permit. However, we believe that these types of activities can be accomplished in most cases with minimal adverse effects on the environment, including the aquatic environment, and may be appropriate for a regional general permit under certain conditions.

5. *Scientific Measurement Devices:* Most of those who commented on this permit agreed to the added activities. A few were concerned that there was no description of what would be considered as a "small" weir or flume, and structures might be permitted that would interfere with migratory fish. To address these issues we have limited the quantity of fill for small weirs and flumes to 25 cubic yards consistent with the limits imposed by nationwide permit 18. Also we have required a notification on those small weirs and flumes requiring a discharge of more than 10 cubic yards of fill material. Such notification requirement should provide the opportunity for a review of those activities large enough to affect migratory fish. Furthermore, general condition 4 has been modified to reduce potential disruption of migratory fish.

6. *Survey Activities:* Some of those commenting misunderstood that the nationwide permit specifically does not authorize discharges associated with drilling, roads, and well pads. A second concern was killing aquatic organisms, especially endangered species, by the blast shock during seismic tests. The NWP is clear that drilling, roadway and well pads are not authorized. The district engineer must be guided by the presence or absence of endangered species habitat in his consideration to regionally condition or take discretionary authority over seismic test operations involving discharges. General condition II requires that the permittee notify the DE if any listed species or critical habitat might be affected or is in the vicinity of the project. In such cases, no work shall begin on the activity authorized by the NWP until the permittee is notified by the DE.

7. *Outfall Structures:* Several commenters recommended that this nationwide permit should not apply to activities exempt under NPDES, such as some stormwater outfalls, or in states that have not assumed responsibilities under NPDES from the EPA. Others stated that review of outfall structures under both NPDES and this nationwide permit were negligent in recognizing the requirements for review under the NHPA. It was recommended that the Corp obtain clearance from the appropriate SHPO prior to any written nationwide permit verification.

In response to the above comments, we refer to the "notification" procedure required for this NWP. The DE may add conditions on a case-by-case basis for any activity where it is determined that conditions are necessary to satisfy the terms and conditions of the nationwide permit. Further, general condition 12 requires the permittee to inform the DE if the authorized activity may adversely affect any historic properties. Where such properties may be affected, the permittee may not begin work until the DE has satisfied the procedures at 33 CFR 330.4(g).

A few commenters agreed with the proposed revisions to this NWP, since it would authorize outfalls, previously authorized in compliance with, or otherwise exempt from NPDES.

Some commenters objected to the advance "notification", as they felt it to

be a duplication of reporting systems since the Corps is presently notified of pending NPDES permit applications. Of these commenters, one also objected to the DE's ability to add conditions without division approval.

Many commenters objected to the proposed revisions for this NWP. The stated concerns included: a lack of citing criteria, no design specifications for the outfall structure itself, or associated construction methodologies; reliance on NPDES regulation is inappropriate since it focuses primarily on impacts associated with effluent, and does not satisfactorily review activities subject to section 404 regulations; application of the section 404(b)(1) Guidelines should be required since they are not addressed under NPDES regulations. Further, concern was expressed over impacts relating to structures, fills, and effluent discharges into special aquatic sites.

We believe that the incorporation of specific design criteria for outfall structures in the NWP would be impractical, due to the variability in the size of structures, preparatory work required and construction materials utilized. However, the concerns raised by these comments can be addressed through the required notification procedure at § 330.1(e). Under the notification procedure the DE will ensure that the activity complies with the terms and conditions of the NWP and further, that the adverse impacts on the aquatic environment, and other aspects of the public interest are individually and cumulatively minimal. It is the responsibility of EPA pursuant to section 402 of the Clean Water Act to regulate the effluent of outfall structures. The Corps has responsibility for those activities associated with the construction of these structures. These activities can be effectively regulated by this NWP through the notification procedure, which does address construction impacts to special aquatic sites. We have considered all comments received in response to this nationwide permit and have retained the wording as proposed.

8. *Oil and Gas Structures.* Many commenters objected to this NWP on the basis of general environmental concerns associated with oil drilling structures. Others suggested that this NWP not apply in sensitive areas such as wetlands, riverbeds, mudflats, and marine sanctuaries. One commenter supported this NWP but suggested that notification procedures be implemented.

This NWP authorizes oil and gas structures only within areas leased for such purposes by the Department of Interior, Minerals Management Service. In addition to the Corps NEPA documentation for this NWP, the Service prepares NEPA documentation before issuing a lease which also addresses the environmental impacts of oil drilling. In accordance with 33 CFR 322.5(f), the Corps review is limited to the effects on navigation and national security. Consistent with this review we are therefore retaining the proposed wording of the paragraph to exclude established danger zones and Corps/EPA Dredged Material Management Areas.

9. *Structures in Fleeting and Anchorage Areas:* Two commenters inquired whether "structures" include filling activities under section 404 authority. Only section 10 structures which do not involve filling activities are authorized by this NWP. Other NWPs (i.e. NWP 18, NWP 25, etc.) may be applicable if the terms and conditions of those NWPs are met. One commenter asked if NWP 9 applied to established or proposed to be established fleeting or anchorage areas. NWP 9 applies to all fleeting or anchorage area that have been established by the U.S. Coast Guard. One commenter expressed concern that no limits were proposed on the size and design of the structures. We disagree that size and design limits are needed. NWP General Condition 1, Navigation, will not allow any structures that would cause more than a minimal adverse effect on navigation.

10. Mooring Buoys: Two commenters suggested that restrictions be placed on water depths and type of anchors to be used under this NWP. Another commenter listed specific sensitive regional areas that should be excluded from the NWP or have mooring limits established. Two commenters expressed concerns about cumulative impacts from the installation and/or use of mooring buoys. Comments regarding specific areas that should be excluded or other special restrictions that are needed to protect special areas such as shellfish beds or submerged aquatic vegetation can, and should, be more appropriately dealt with by the addition of regional conditions. Based on our experience, we do not anticipate that the mooring buoys and anchorage systems will have more than minimal adverse effects either individually or cumulatively.

11. *Temporary Recreational Structures.* Several commenters suggested that the terms "temporary" and "seasonal" should be replaced with a specific time limitation and that the size of structures be more clearly defined. Several commenters favored excluding the use of the NWP in shallow water areas or vegetated shallows. Two commenters recommended that the NWP be used only for discrete events. Two commenters expressed concerns about navigation safety and with other water related recreation. Several commenters indicated that state approval must be obtained for these structures. We disagree with the approach of placing time limitations on temporary or seasonal structures because of the seasonal variations for recreation from region to region. Regional conditions can be developed for the NWP and/or District Engineers may use discretionary authority on a case-by-case basis if duration, structure size or location require such action. Limiting the NWP to discrete events would greatly reduce its utility. In appendix A to part 330, general condition C. 1 states that no activity may cause more than a minimal adverse effect on navigation. Section 330.4(b)(2) states that NWPs do not obviate the need to obtain other Federal, state, or local authorizations required by law.

12. *Utility Line Backfill and Bedding.* We are clarifying that this NWP does not apply to tile or similar drainage works (although it does apply to pipes conveying drainage collected from another area) and that material resulting from trench excavation can be temporarily sidecast into waters of the United States, provided there is little or no flow to disperse the excavated material. Also all exposed slopes and streambanks must be stabilized immediately upon completion of the utility line In addition, the area of waters of the United States that can be disturbed must be limited to the minimum necessary to construct the utility line. We have received frequent questions as to whether this NWP was restricted to crossing-type situations, as is typically the case in NWP 14. There is nothing in the language of the NWP to restrict use of this NWP to crossings, nor was there any intention to do so. Adverse environmental effects will be minimized by compliance with the terms and conditions of the NWP, including the requirement to restore the area to its preconstruction contours and the requirements to avoid and minimize discharges of dredged or fill material to the maximum extent practicable. Furthermore, in wetlands the top 6" to 12" of the trench should generally be backfilled with topsoil from the trench.

Many commenters objected to the six months that sidecast material may remain in waters of the United States and suggested shorter periods ranging from 14 to 60 days. We considered that these suggestions have some validity and have reduced temporary sidecasting to three months. Furthermore, considering the variation in terrain

conditions throughout the country we encourage the DEs to further address this issue, as appropriate, with a regional condition.

Many commenters requested that a PDN should be required for this NWP based on the fact that these could be major projects affecting large areas of wetlands of varied types with the potential for significant impacts to fish and wildlife, endangered species, or water quality.

We believe that major utility lines will have little opportunity to escape our notice and this fact will allow the DE to assert discretionary authority, where appropriate. This will minimize the type of losses described by the commenters. This would also apply to several comments requesting a limit on the size/length of the project that may be considered under this NWP.

Several commenters noted the potential for a french drain effect caused by backfill being more permeable than the native soil which may drain wetlands. This appears to be a valid concern. However, we believe this condition would be controlled through normal construction techniques. Further, this condition should normally cease after the disturbed soils have an opportunity to settle and compact. It should be further noted that this problem as well as other difficult soil management characteristics will vary throughout the country and can be easily addressed by regional conditions, if necessary.

Several commenters suggested that sidecasting in special aquatic sites be prohibited. We believe that the NWP, as written, has the affect of minimizing the adverse effects to special aquatic sites. This, combined with the ability of the DE to condition the NWP and assert discretionary authority, assures minimal impact.

Many commenters had concern over the requirements to replace the top 6" to 12" of topsoil. In approximately equal numbers they either considered it impractical to strip, store and retrieve this thin veneer of soil or they wished that at least a minimum of 12" should be replaced with even more stringent conditions for protecting stored soil material from erosion, dehydration etc. We believe that 6 to 12 inches is sufficient for restoration of a wetland condition. However, the permittee may replace more than 12 inches at his option.

Several commenters requested that this NWP be modified to include overhead utility lines. Overhead utility lines have traditionally been installed on towers or similar structures that do not involve discharges of dredged or fill material into waters of the United States. However, discharges associated with the construction of such structures may be authorized by one, or more, other nationwide permits. To assure adequate evaluation of navigation and other factors of the public interest, we have not expanded this nationwide permit to include structures in Section 10 waters.

13. *Bank Stabilization:* Many commenters favored the expansion of the NWP 13, believing the environment was reasonably protected. However, some commenters were opposed to expanding the NWP 13. These commenters were concerned about piecemeal cumulative impacts, loss of special aquatic sites, use of unsuitable materials, such as asphalt, car bodies, and trees, secondary impacts to adjacent upland riparian areas, and lack of need. Many commenters recommended that vegetative shoreline stabilization techniques be encouraged in lieu of bulkheads, while a few recommended that NWP 13 only allow the use of rip-rap. Some commenters recommended that more than 1 cubic yard of discharge and some sparse vegetation impacts be allowed, while others favored limiting the NWP 13 to less than 200 feet.

Shoreline stabilization devices and methods (e.g., bulkheads, seawalls, rip-rap, vegetative plantings) are typically constructed to prevent the loss of upland property from erosion. However, the rate of erosion can vary substantially from shoreline to shoreline. In some cases there may be no apparent erosion. In other cases there may be accretion. In low wave energy areas, wetland vegetation often exists and functions as a shoreline stabilizer and erosion prevention. In view of the above, we are retaining the proposed wording of the paragraph. The commenters' concerns should be alleviated by the terms and conditions which prohibit discharges in special aquatic sites, including wetlands, the use of unsuitable and toxic materials, and the requirement that the proposed stabilization be the minimum necessary. In some cases, where the impacts may be more than minimal (i.e., shorelines greater than 500 feet, and/or greater than 1 cubic yard per linear foot of shoreline), notification to the DE is required as per the general condition in part C (13). The intent is to accommodate a wide range of users, techniques and materials with minimal time delay and maximum protection of valuable wetland resources.

14. *Road Crossing:* Many commenters indicated that this NWP should be eliminated or reduced in scope for a number of reasons including the following: it is not consistent with section 404(e) of the Clean Water Act, the section 404(b)(1) guidelines, and the mitigation MOA; should include notification for all crossings; lacks careful consideration of the term "single and complete project"; does not address low flows in the movement of aquatic organisms; lacks compensation for lost flood storage; a lack of resource agency review; cumulative and secondary impacts are not adequately addressed; and that it should include mitigation for all wetland acreage loss.

Several commenters expressed support for this NWP, stating that there should be no limit on the length or acreage of a crossing. They further indicated that mitigation should not be required and that the delineation of special aquatic sites would be burdensome.

We have carefully considered these comments and have decided to modify this NWP to assure that projects authorized by this NWP have only minimal adverse effects on the environment. We have revised the language of this NWP to provide for the maintenance of low flow and the movement of aquatic organisms. The notification procedures have been revised to include a review by the appropriate resource agencies. Based upon our evaluation of this NWP, we believe it is consistent with the Clean Water Act.

15. *U.S. Coast Guard Approved Bridges:* Several commenters expressed concern over the absence of limits on the size of fills that may be addressed by this NWP. Based on the requirement for notification on this NWP and the ability of the DE to assert discretionary authority should the nature of the impacts warrant, it was decided not to impose such limits.

The resource agencies should be included in the notification process. This has been changed to include the resource agencies in the notification process.

Several commenters expressed concern over the inclusion of approach fills in this NWP. It was our belief that the Coast Guard permit process combined with the DE's independent review of the required notification would provide adequate safeguards and ensure minimization of impacts to special aquatic sites. However, upon further consideration, we believe that given the potential impacts of some approach fills it is more appropriate to conduct an individual permit review. Accordingly, approach fills have been deleted from NWP 15.

16. *Return Water From Upland Contained Disposal Areas:* Some commenters requested that the states should be given an opportunity to issue generic water quality certification as well as a site-specific certification or waiver. Based upon the Corps' experience and knowledge of dredging and disposal operations, we believe that technology is readily available to control the quality of return water from contained upland disposal sites. Any adverse environmental effects resulting from this type of activity would be minimal provided the effluent meets established water quality standards and adequate monitoring of the activity is performed to assure compliance with these standards. With this in mind, it was our intent with the proposed language of this NWP to clearly provide the states an opportunity to review each activity under this NWP authorization to assure compliance with the state's standards. This is clearly a requirement in those states that have denied water quality certification for this NWP authorization. However, in some Corps districts the standards for such effluent have been established jointly by the Federal and state agencies and are readily available for public information. In cases, where water quality standards are established, we see no need to require additional state review unless the state has denied certification for the NWP authorization. As such, we have deleted the provision requiring a site-specific certification or waiver under section 401. However, we reiterate that a prospective permittee must receive an individual certification or waiver from the state in those states that have denied water quality certification for the NWP authorization.

Several commenters indicated that this NWP was not appropriate since it would not allow adequate review of containment design, quality of the effluent and the potential to cause irreversible damage. We believe that these issues will be thoroughly addressed, as they have been in the past, by the state water quality certification process.

One commenter suggested that since dredging and upland disposal are considered "de minimis" and do not require 401 certification, this activity should not require authorization. This NWP is responding to the return of effluent to waters of the United States and is not intended to address dredging. The effluent has been administratively defined as a discharge of dredged material.

A few commenters requested that wetlands which develop on disposal sites should not be considered jurisdictional wetlands. We do not consider that such a condition is appropriate. Rather, such cases should be evaluated on a case by case basis to determine whether jurisdictional wetlands are present. In accordance with our regulations, such areas generally are not jurisdictional wetlands unless the disposal operation has been abandoned.

17. *Hydropower Projects:* Many commenters expressed concern with regard to the expansion of this NWP to include all hydropower projects authorized by the Federal Energy Regulatory Commission (FERC), noting that very large projects with the potential for major impacts could be authorized without adequate review. There was considerable concern that the FERC process was not compatible with the Corps process. Concern was also expressed that the broad nature of the types of projects that could be authorized was contrary to the intent of the nationwide permit program to simplify permitting of minimal impact activities of a similar nature. Several commenters had expressed support for the expanded NWP considering that it would eliminate regulatory duplication and that the FERC process would adequately address environmental concerns. In addition, there were a variety of other comments recommending conditions or modifications of the proposed NWP.

After careful consideration of all comments, we have decided to reissue this existing NWP with only minor changes. In addition to the Corps NEPA documentation for this NWP the FERC also addresses environmental concerns for those small hydropower projects at existing reservoirs, which are covered by this NWP. We have expanded this NWP to include those projects which FERC has granted an exemption from licensing pursuant to section 408 of the Energy Security Act of 1980 and section 30 of the Federal Power Act, as amended. This exemption can apply to hydropower projects up to 5000KW. We have also included hydropower projects, at existing reservoirs requiring individual licenses, up to 5000KW, the same limit that applies to exemption projects. We have retained the notification requirement for this NWP, since we believe that a notification requirement for small hydropower projects under the revised limits may be necessary to ensure that some of these projects have minimal adverse effects. We believe that this expansion of the NWP is only minor and only those activities with minimal adverse environmental effects can be authorized by this NWP.

18. *Minor Discharges:* Many commenters objected to the expansion of NWP 18 from 10 to 25 cubic yards; including fill in wetland areas and other special aquatic sites; and eliminating the stream diversion restriction. Many other commenters requested that greater quantities of material (over 25 cubic yards) or unlimited quantities be authorized, while restricting use of the NWP to ⅒ acre in special aquatic sites, including wetlands. We disagree with any changes to the quantities specified in the proposed regulations because we believe they are reasonable levels. We are requiring notification for all proposals over 10 cubic yards and for all projects involving special aquatic sites, including wetlands. DEs will be able to exert discretionary authority or add appropriate conditions to reduce any adverse impacts in special aquatic sites, or determine the project to have more than minimal impacts. We have changed the wording of this NWP to clarify that discharging material for the purpose of stream diversion is prohibited. One commenter requested a restriction that upland property or fastland couldn't be created by this NWP. We disagree that such a restriction should be included. Many commenters requested that the notification requirement be dropped because the actions are minimal by definition of an NWP. We disagree because a DE should be given the opportunity to review proposals over 10 cubic yards and those in special aquatic sites. Several commenters requested that mitigation be required in special aquatic sites and that "flooded" be defined. Mitigation should be required if it is deemed necessary by a DE. See section 330.2 for more information on flooding. Finally, several commenters requested more uniformity in the quantities and acreage impacted between the various NWPs such as NWP 14, 18, 19 and 26. We agree and have adjusted NWP 19 to be consistent with NWP 18 by increasing the quantities of NWP 19 to 25 cubic yards. We have made one additional change in wording by combining the second sentence of "d" with "b", so that it is clarified that the ⅒ acre limit applies to the footprint of the discharge as well as the area flooded or drained. We do not agree that the ⅒ limit should be changed.

19. *Minor Dredging:* Several commenters supported the proposed increase in the quantity limitations from 10 to 20 cubic yards while several other commenters also favored increasing the quantity and making the yardage

limitations consistent with NWP 18. Several commenters recommended that dredging should not be allowed in special aquatic sites. A few commenters also expressed concerns about potential sediment toxicity and requested testing of the sediments prior to dredging. Three commenters indicated that they believe this proposed NWP involves a discharge and that section 401 water quality certification should be required.

We have reviewed the comments and agree that making the volume limitations of NWPs 18 and 19 consistent has merit. The maximum quantity of dredging authorized by this NWP has been increased to 25 cubic yards. We agree that some types of special aquatic sites such as coral reefs, submerged aquatic vegetation beds, and wetlands as well as anadromous fish spawning areas should be excluded from this NWP and to further ensure the impacts will be minimal we are including activities that would degrade such sites through siltation in this exclusion. However, we believe that dredging quantities of 25 cubic yards or less in other special aquatic sites (i.e., riffle and pools, sanctuaries, and mud flats) would result in only minimal adverse effects on environment, provided the activity complies with the terms and conditions of the NWP. With the exclusion of coral reefs, submerged aquatic vegetation beds, and wetlands, we believe that increasing the dredging limitation to 25 cubic yards would still result in only minimal adverse environmental effects both individually and cumulatively. Areas containing contaminated sediments have generally been previously identified. We believe that this issue can be addressed through by a regional condition of this NWP or by activity-specific conditions required by the DE, if necessary. Regional conditions can be developed to exclude known contaminated areas (such as sites on the NPL) or to require testing in areas of suspected contamination. Furthermore, we are encouraging DEs, where there is reason to believe the material to be dredged is contaminated, to consider exercising discretionary authority. The assertion that *"de minimis"* soil movement associated with dredging operations constitutes a discharge under section 404 is specifically addressed in the Corps' regulations at 33 CFR 323.2. Since 1977, the Corps has consistently held that section 404 does not apply to incidental soil movements during normal dredging operations. In order to be more consistent with NWP 18, we have changed the title of this NWP to "Minor Dredging".

20. *Oil Spill Cleanup:* We have determined, based on our evaluations, that fills discharged under this NWP are very small, infrequent, and at widely scattered locations. Therefore, the benefits to be accrued from expeditious oil spill cleanup far outweigh the impacts resulting from minor fills associated with cleanup operations. In addition to compliance with Federal regulations at 40 CFR 300 and 40 CFR 112.3 and a State Contingency Plan (if one exists), NWP 20 also requires approval by the Regional Response Team, which further safeguards implementation of cleanup operations on a case by case basis. Further, we believe those parties responsible for overseeing implementation of the National Oil and Hazardous Substances Pollution Contingency Plan and the Spill Control and Countermeasure Plan insure environmental compliance and re-establishment of pre-existing conditions.

While most commenters agreed with the revisions proposed for NWP 20, one commenter recommended that State representatives be contacted, regarding concurrence with State contingency plans, while another commenter similarly recommended that cleanup be in compliance with State and Federal Contingency Plans. We agree with this recommendation as it acknowledges the potential requirement for compliance with the State Contingency Plan, if one exists, without overburdening the application with compliance under the terms and conditions of the NWP. Therefore, we have reworded this NWP to include any State Contingency Plan.

21. *Surface Coal Mining Activities:* Many commenters expressed concern that the Department of the Interior's Surface Mining Control and Reclamation Act (SMCRA) environmental procedures were inadequate as the procedures did not afford protection to existing wetlands and other aquatic resources and therefore opposed this NWP. There were concerns that surface mining projects resulted in large impacts to wetlands and water quality. A few commenters recommended that impacts to special aquatic sites not be authorized by the NWP. One commenter stated that the NWP should be revised to allow impacts to special aquatic sites where they constitute only a minor portion of the total mining area or within other threshold limitations. Some commenters were concerned that Section 106 of the National Historic Preservation Act was not being complied with on these mining activities.

Several commenters believed that the Department of the Interior's Office of Surface Mining and states with approved programs were capable of protecting wetlands and aquatic areas and opposed the notification and wetland delineation requirements as unnecessary duplication of effort. One commenter proposed that the notice under 30 CFR 773.13 could satisfy the notification requirement or that the Corps should notify DOI after final rule and urge them to amend their rule to avoid duplication. Some commenters requested that coordination with the resource agencies be required.

Other commenters recommended 1:1 mitigation of functions and values for aquatic resources, requiring notification for mining activities impacting greater than one acre of waters of the United States, and revising the title of the NWP to "Surface Coal Mining Activities".

In addition to the Corps NEPA documentation for this NWP the Department of the Interior's SMCRA program also addresses environmental concerns for activities under its program. The SMCRA program sets up requirements for the use of "best technology currently available" to minimize impacts to fish and wildlife resources and water quality. Wetlands are defined as in the Corps regulations. Also, wetlands and riparian vegetation are specifically designated in SMCRA regulations as resources for which protection is required. DOI and SMCRA permittees must consider impacts on historic properties, endangered species, and coordinate with the U.S. Fish and Wildlife Service under the FWCA. Also, in accordance with SMCRA other Federal and state agencies are provided notification well in advance of the applicant's notification to the Corps. Therefore, we believe additional coordination with agencies would be unnecessary duplication. However, we believe the 30-day notification and delineation of affected special aquatic sites, including wetlands, are necessary to insure that the DE has the opportunity to assert discretionary authority when he believes impacts are more than minimal and mitigation is not proposed to reduce these impacts. We believe the amount of mitigation that may be required should be determined by the DE. The DE is better able to determine impacts and appropriate and practicable mitigation for his geographical region. We believe revising the title of the NWP to "Surface Coal Mining Activities" would provide clarification concerning activities authorized, and we have adopted that recommendation.

22. *Removal of Vessels:* One commenter requested that the terms "minor fills", "temporary structures",

and "structures" be defined and one commenter suggested that the definition of "minor fill" be the same as the requirements of § 330.6(B)(18). Several commenters were pleased to see the requirement to coordinate to ensure compliance with the National Historical Preservation Act (NHPA) and the State Historic Preservation Officer (SHPO). One commenter suggested that vessels greater than 50 years of age be evaluated, in consultation with the SHPO, for listing in the National Register and those eligible or listed on the National Register could be evaluated as an individual permit. One commenter requested that the NWP be added to the list of activities requiring pre-discharge notification, since affected parties may not receive sufficient notification that a state permit may be needed.

We do not agree the terms "minor fills," "temporary structures," and "structures" require defining since these terms are intended to be subject to the DE's interpretation on a case-by-case basis as a project is being evaluated. The criteria described in § 330.6(B)(18) for minor discharges of dredged or fill material could be used as a guide in evaluating the environmental impacts, but is not meant to be a definition of "minor fill". Requiring the applicant to check the Register of Historic Places to determine if the vessel or structure is listed or eligible for listing prior to removal should ensure against unauthorized removal. We do not agree that vessels at least 50 years of age should not qualify for the NWP and be evaluated as an individual permit. Any vessel listed or eligible for listing in the National Register may be removed under the NWP as long as they have complied with the NHPA and consulted with SHPO. We do not agree that a pre-discharge notification procedure should be added to ensure the applicant complies with state permit requirements.

23. *Approved Categorical Exclusions:* Several commenters were opposed to the proposed NWP. A few commenters indicated that the NWP allows Federal agencies to circumvent the environmental review process and suggested that their activities should be evaluated under individual permit review. One commenter requested that the NWP language clearly indicate that the Chief of Engineers does not approve another agency's Categorical Exclusion but rather approves application of the NWP. A few commenters indicated that the notification requirement is self-defeating, unnecessary and negates the utility of the NWP. Several commenters favored excluding fill in special aquatic sites.

The establishment of categorical exclusions is consistent with the Council on Environmental Quality Regulation for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR part 1500). Prior to an agency's categorical exclusion being approved for inclusion in the NWP, the Chief of Engineers will conduct a public interest review by soliciting public comment. Not all agency categorical exclusions are accepted under this NWP. In some cases only parts of categorical exclusions are accepted or they may be accepted with certain conditions for approval under the NWP. We can and have required notification to DEs where appropriate and necessary for specific categorical exclusions. However, we do not believe it is appropriate to require notification across the board and therefore have deleted the last paragraph of the proposed NWP, which requires notification for fills in special aquatic sites, including wetlands.

24. *State Administered Section 404 Programs:* Although only two comments were received, both commenters supported the NWP 24. One commenter requested that the Corps retain the right to veto or modify the State Administered section 404 permits. This NWP authorizes only section 10 activities within the jurisdiction of the state 404 program (i.e. historic navigable waters). Therefore, it is inappropriate for the Corps to modify, suspend, or revoke individual state-administered section 404 permits. However, it is noted that the EPA has the right to conduct programmatic reviews of the state-administered section 404 programs.

25. *Structural Discharge:* Several commenters expressed support for this NWP as a means of reducing regulatory burdens on the public. Several commenters requested that this NWP specifically exclude non-water dependent structures, except those listed. We believe the wording restricting this NWP to structural members for standard pile supported structures, with the exclusions already in place are adequate.

A few commenters requested an upper limit on the area of impact authorized under this NWP be included. Given the limited actual footprint of impact typical of the types discussed in the NWP we consider that such a limit is not required.

A couple of commenters requested that the structures referenced in RGL 90–8 be authorized in this NWP. The appropriate inclusions from previous RGLs have been incorporated in these NWPs and reflect the experience gained in implementing the program in the past. Those not included were considered inappropriate for an NWP.

A couple of comments requested that bulkheads and fill in special aquatic sites be excluded from this NWP. We believe that the NWP, as written, excludes actual fill in special aquatic sites and that bulkheads are not standard pile supported structures.

26. *Headwaters and Isolated Waters Discharges:* In the **Federal Register** notice of April 10, 1991, we stated that we were considering changing the acreage limits of NWP 26. Presently, discharges of dredged or fill material that cause the loss or substantial adverse modification of one to 10 acres of waters of the United States require a predischarge notification. Activities that affect less than one acre may proceed without notifying the Corps. We proposed 3 options for the acreage limits that would define when a predischarge notification must be submitted, and we sought comments on these options. These options were:

Option 1: 1 to 10 acres.

Option 2: 1 to 5 acres.

Option 3: ½ to 5 acres.

There are other acreage limits that could have been adopted and the Corps sought comments on those as well.

A great many comments were received concerning the acreage limits appropriate for this NWP. Approximately half the commenters favored retaining the 1 to 10 acres stating that many projects, including those still in the planning stages, have relied upon the flexibility offered by this NWP. An equally large number of commenters favored reducing the acreage of this NWP stating that it represents an unacceptable cumulative loss of wetlands. Some commenters favored the total elimination of this NWP since, in their view, it does not conform with the provisions of section 404(e) of the Clean Water Act.

Based upon review of the comments, and based on our experience and judgement concerning the potential for adverse effects on the environment associated with the various alternatives, we determined that the appropriate limits for this NWP at this time should continue to be one (1) to ten (10) acres, subject to the predischarge notification and requiring mitigation to ensure that adverse environmental effects are minimal. Activities that affect less than one (1) acre may proceed without notifying the Corps. Those that affect over 10 acres require authorization by an individual or regional general permit. Mitigation cannot be used to lower the acreage limits (e.g., if a project affects 2

acres of wetlands a prospective permittee cannot create 1.1 acres to get below the 1 acre limit). The Corps will continue to monitor the effects of NWP 26 and the appropriateness of the acreage limits as well as the categories of waters that are appropriate for coverage under NWP 26. If, in the future, the Corps determines that lowering the acreage limits or eliminating categories of waters may be appropriate, the Corps will propose such changes for public comment. It must also be noted that the Division Engineers and District Engineers have, and will exercise, discretionary authority to require individual permits for activities in certain water of the United States such as high quality wetlands.

Many commenters recommended that the resource agencies be included in the notification process for this NWP. We have decided to solicit comments from the resource agencies during our notification process. This process is discussed in the preamble language at section 330.1(e). There were several recommendations for minor revisions to the language of this NWP and where they would simplify or clarify the meaning these changes were made.

The predischarge notification (PDN) process and the requirement to make an immediate determination of what constitutes a "loss or substantial adverse modification" has made use of this permit so complicated that it has defeated the purpose of this NWP; that is, to reduce regulatory delays and burdens on the public, to place greater reliance on state and local controls, and to free our limited resources for more effective regulation of other activities with greater potential for adverse effects on the aquatic environment. As a part of this regulation, we have modified the complex 20-day PDN process currently required for this NWP and replaced it with a simple 30-day PDN. Furthermore, we have modified the acreage measured from the "loss or substantial adverse modification" to the filled area plus flooded, excavated, or drained areas. These changes should reduce public confusion and make administration of this NWP simpler by making the determination of its general applicability clear-cut, while ensuring that large fills in these waters with greater than minimal adverse effects on the environment are not authorized by this NWP.

The term "filled area" refers to the area of waters of the United States actually covered by fill, and was adopted rather than the area of "substantial adverse modification," in order to simplify administration of this permit. However, by including in the acreage measurement of NWP 26, waters of the United States that are flooded, excavated, or drained, those projects that would cause a "substantial adverse modification" would no longer qualify for the NWP. The notification requirement would ensure that the DE has the opportunity to consider such indirect impacts from the discharge. If the combined effect of direct and such indirect adverse impacts would cause more than minimal adverse effects on the environment, the DE will assert discretionary authority and not allow authorization under the NWP unless the prospective permittee elects to propose mitigation so that the adverse environmental effects would be minimal.

We believe that the activities authorized by this NWP will have only minimal adverse effects on the environment both individually and cumulatively, provided the terms and conditions of the NWP are satisfied. However, we recognize that there are circumstances where authorization of a specific activity under this NWP would not be appropriate. Examples of this type of situation may include certain types of wetlands or other aquatic resources, or aquatic resources in certain parts of the country, or generally, any areas where the Division or District Engineer may have concerns for the environment that are not satisfied by the terms and conditions of this NWP. In those cases, the Division or District Engineer should assert discretionary authority to add regional conditions or to revoke the NWP authorization for activities in such areas. We believe that the Division and District Engineers are more familiar with the wetlands and other aquatic resources in their area and can best determine which of these should be subject to individual permit evaluations or regional conditions. On the other hand, we are encouraging districts that have wetland types of low value, where greater than ten (10) acres of fill would result in no more than minimal adverse environmental effects, or where the wetlands are adequately regulated by state or local agencies, to develop regional general permits for these areas.

We believe that our expanded basis for allowing District and Division Engineers to assert discretionary authority, the modified notification procedures, the requirement for mitigation, where appropriate, and the revised language for this NWP, will assure that only those projects with minimal adverse effects on the environment will be authorized by this NWP. Moreover, we believe that providing the District Engineers with a clear message to protect the environment while maintaining the flexibility to use NWP 26 for acreage up to 10 acres, particularly in low value areas, is consistent with the Administration's desire to fully protect our environment with the least burden on the regulated public.

We have added a provision to NWP 26 which provides for certain subdivisions to be treated as a single and complete project for the purposes of determining the acreage limits of this NWP. This provision was discussed previously in the Preamble at Section 330.2(i).

27. *Wetland Riparian, Restoration and Creation Activities:* Many commenters opposed future discharges of dredged and fill material associated with reversion of a restored wetland on private lands to its prior condition and use. Several commenters stated they believed these activities would result in a waste of time and money. We believe that allowing restoration of altered and degraded wetlands that might not have occurred without allowing the option of reversion to its prior use and condition is a good opportunity to increase aquatic habitat even if it would be temporary. We are of the opinion that many of these projects would not be reverted and therefore would provide increases in permanent habitat over what presently exists. We also clarify that Federal surplus lands, Farmers Home Administration inventory properties and Resolution Trust Corporation inventory properties that are under Federal control prior to being transferred to the private sector are not subject to reversion to their prior condition under this NWP. Several commenters recommended that the Corps require the notification and wetland delineation requirements and conduct the monitoring and tracking of these actions. We believe that a notification requirement for this NWP would be unnecessarily burdensome since the activities authorized by this NWP would be discussed in a contract between the Federal government and a landowner. We also believe that the monitoring and tracking associated with any future restoration or reversion is best left with the federal contract agency (USFWS, USFS, SCS, BLM), since these agencies would possess greater knowledge of the site and the terms of the contract.

One commenter believed that wetland restoration projects would be difficult and complicated and recommended an individual permit be required for these activities. We do not agree with this

comment because there have been many successful wetland restoration projects around the nation. One commenter stated concerns for the degradation and elimination of protected uses in wetlands associated with the U. S. Environmental Protection Agency's anti-degradation policy and whether the NWP would apply to agreements in effect before the issuance of the final rule. We believe that the purpose of these restoration projects would not conflict with uses associated with EPA's anti-degradation policy. One commenter recommended only applying the NWP to activities involving 10 acres or less of wetlands. We believe this would greatly limit the participation and opportunity to provide enhancement of altered and degraded wetlands.

Many commenters recommended expanding the scope of the NWP to include wetlands restoration projects proposed by all Federal, state, local and private entities. We believe that all entities should be encouraged to participate in wetland restoration projects. We are concerned that expanding this NWP to all entities could provide for misuse since this is a relatively new regulatory approach to addressing these types of activities. However, we did review other Federal programs and believe it is appropriate to include the wetland and riparian restoration projects of the U.S. Forest Service (FS) and the Bureau of Land Management (BLM) under this NWP.

We believe the established procedures of the USFWS, FS, BLM and the SCS are appropriate for this NWP. The USFWS has restored approximately 55,000 acres of wetlands through activities associated with private land wetland restoration and protection initiatives since 1987 and is presently restoring wetlands on approximately 2,000 to 2,500 sites per year. Under the 1990 Farm Bill and other associated private land wetland restoration activities approved by Congress, it is expected that the USFWS and the SCS will accomplish 8,000 to 10,000 wetland restoration projects per year. We would encourage other entities that are considering wetland restoration and creation projects to enter into a contact with the USFWS or the SCS, if applicable, for authorization under this NWP. We also encourage our DEs to develop regional general permits to reduce the regulatory burden and paperwork associated with evaluating other Federal, state, local and private wetland restoration projects.

A few commenters requested that tidal wetlands be included, particularly those tidal wetlands in Federal, state and municipal ownership. The present programs of the USFWS, SCS, FS, and BLM apply primarily to non-tidal wetlands. As a result, we believe only non-tidal wetland restoration projects are appropriate at this time. Some commenters recommended that we include wetlands that have not been degraded or altered if subject to a USFWS or SCS contract. We do not believe it would be appropriate to expand the scope of this NWP to include wetland areas that are not altered or degraded. A few commenters suggested that the NWP would encourage mitigation banking and serve to meet the goal of no net loss of wetlands. We agree that an increase in wetland restoration activities may generate interest in mitigation banking. However, we do not believe that the activities authorized by this NWP can be considered a mitigation bank, since the restoration activities are generally for a specified period of time with a provision for reversion of the area, and further, the participating parties are generally compensated by the USFWS or SCS.

One commenter recommended expanding the scope to the creation of wetlands in uplands areas where discharges of dredged and fill material into waters of the United States were necessary for the creation. We agree with this recommendation to include wetland creation in certain upland areas. It appears to us that appropriate upland areas for consideration under this NWP would be cropland, pasture land, and other upland areas designated suitable by the USFWS and the Corps. We believe it would be appropriate to authorize discharges of dredged and fill material into waters of the United States associated with the creation of wetlands on above specified uplands and the future discharges of dredged and fill material associated with the reversion of the area to its prior condition and use, if subject to a contract with the USFWS, FS, BLM or SCS.

A few commenters recommended that the Corps define "binding wetland restoration contract", "altered", and "degraded" to prevent potential abuse of this NWP. One commenter stated that activities under this NWP should be coordinated with the resource agencies. We believe the terms are clear when consideration is given to the wetland and riparian restoration programs of the USFWS, SCS, FS, and BLM. We believe that additional coordination with the resource agencies is unnecessary given the expertise of the agencies involved. Additionally, with the inclusions of riparian and upland areas we believe a more accurate title for this NWP would be "Wetland Riparian, Restoration and Creation Activities".

The term riparian has not been defined in this regulation. Since this term is only referenced in this NWP with applicability for those projects funded or proposed by the U.S. Forest Service, we have relied upon the definition developed by the U.S. Forest Service.

28. *Modifications of Existing Marinas:* Several commenters requested that notification be required to assure that proposed activities are indeed covered activities. Notification should be required by a regional condition if this is warranted for a specific area. Two commenters requested that additional slips and docks formed from existing floats, with no additional surface area coverage, should be allowed. We disagree with this request because the intent is not to allow any additional slips or docks that could result in more moorage resulting in additional water quality and navigational or safety impacts. Several commenters objected to the use of this NWP in required mitigation areas. We believe that it would be appropriate to add a special condition to any individual permit authorizing the marina and mitigation areas to prevent future impacts to such mitigation areas, if warranted. Few marinas contain such mitigation areas. Several commenters requested that the movement of fuel handling and sewage pump-out facilities be specifically prohibited from being authorized by this NWP. Again it would be more appropriate to regionally condition this NWP to prevent relocation of these facilities, if warranted. Two commenters objected because the use of this NWP might impact design and safety standards of previously authorized marinas. If problems occurred, a DE could use the modification procedures in Section 330.5(d) to rectify the situation. Also NWP General Condition 1 on Navigation must be followed for the NWP to be utilized.

29. *Reserved:* A few commenters indicated that the reservation of NWP 29 was confusing. Some thought there was a "hidden agenda", (i.e., that we might issue an NWP without public review). We have been preparing the revisions to the regulations and the NWPs over the past 4 years. During that period we have considered many possible NWPs and deleted and added several NWPs for possible proposal. To avoid confusion, especially for record keeping reasons, we decided not to renumber those NWPs which were not affected. For the same reason we are not renumbering the proposed NWPs that

we are not issuing. In addition to NWP 29, those NWP numbers will be reserved, as well. When we prepare new NWPs, they will be proposed at the reserved numbers and will go through the same public review process codified at 33 CFR 330.

30. Reserved.

Dewatering Construction Sites (Proposed as NWP 30): The activities proposed for authorization by this NWP are similar to the activities proposed for NWP 33 and so they have been combined.

31. Reserved.

Small Docks and Piers (Proposed as NWP 31): Several commenters expressed concerns about potential cumulative impacts and opposed issuance of this proposed NWP. Several commenters also indicated that the proposed NWP would have adverse impacts on cultural resources, wildlife habitat, and special aquatic sites. A few commenters proposed that special aquatic sites within the vicinity of the proposed dock/pier be delineated. Technical requirements such as size limitations and construction materials were the subject of several comments. A few commenters indicated that existing Regional Permits are preferable to the proposed NWP 31.

This NWP was proposed to authorize relatively small docks and piers which overall would have only minimal impacts. This determination was made in consideration of the limitations set forth in the proposed NWP. We have reviewed the comments received and further discussed this proposed NWP with Corps' District staff. Out of necessity, dock dimensions and construction techniques vary widely to meet special regional conditions and needs. Consequently, we have determined that this NWP, as written, would be only minimally utilized on a national basis. We also do not believe that it is feasible to propose a "universal" NWP (with appropriate limitations) to authorize the various types of small docks and piers that are typically constructed. We agree with the commenters that regional permits are the most appropriate mechanism for streamlined permitting of these types of structures. Therefore, we have deleted this proposed NWP. Where regional permits (RPs) have not been developed, District Engineers will be encouraged to develop RPs and/or to utilize the Letter of Permission process to authorize small docks and piers.

32. *Completed Enforcement Actions:* Several commenters suggested that this nationwide permit should be eliminated and the violation be processed as an individual permit. Some felt that authorizing enforcement actions by NWP would circumvent the intent of Section 404 of the Clean Water Act. Several commenters requested that the NWP be rescinded unless provisions for State input are included. Several commenters requested that the NWP be expanded to include all settlements and not restricted to judicial determinations. Several commenters went so far as to suggest that once the Corps/EPA have decided on the appropriate restoration/mitigation and/or administrative fine, the remaining fill or structures and any new work to accomplish the ordered restoration/mitigation should be eligible for this permit. Several commenters suggested that the language be clarified to ensure the nationwide permit was intended only for those agreements settled by the Corps or the EPA to prevent local court decisions from tying the hands of the federal government. Several commenters felt the NWP language was too vague as to the type of activities covered and that in order to understand the intent, the preamble had to be read.

We do not agree that the NWP should be eliminated and after-the-fact permits be processed after a Federal judicial decision has been made. In order to reach an equitable environmentally sound decision to resolve an illegal activity, extensive coordination among the Corps/EPA/U.S. Fish and Wildlife Service/National Marine Fisheries Service and the U.S. Department of Justice is required. The judicial decision is binding and can only be changed by a judicial modification to the document or by a higher court. For this reason, this nationwide permit is not applicable to non-judicial agreements since they are subject to modification following a full public interest review. In addition, allowing non-judicial agreements to be included in the NWP could encourage unauthorized activities. We do not agree that in order for the NWP to apply, a State's approval would have to be obtained. However, the fill or structure authorized by the NWP has been determined to have minimal impact on the environment and the NWP is only valid if the State has granted/waived water quality certification and determined the fill/structure complies with their coastal zone management program. However we have reworded the language of this NWP to clarify that it applies only to Federal court decisions or settlements initiated by the Corps or EPA. We believe that the adopted language has clarified our intent and that repeating the language of the preamble in the NWP itself would be redundant and unnecessary. We also believe that the NWP is clear as to the type and extent of activities it covers. The NWP would cover any section 404 and/or Section 10 activity that is allowed to remain as part of a court-ordered settlement or agreement agreed to by the United States.

33. *Temporary Construction and Access:* The majority of the commenters suggested establishing specific limitations to the size, volume, and duration of discharges or structures authorized under this NWP and the proposed NWP 30. Others objected to the use of this permit to authorize fill in wetlands and special aquatic sites. Several of the commenters recommended elimination of the notification requirements. Others indicated that the NWP might be used to authorize mining activities or excavation of marina basins. We have combined NWPs 30 and 33 and have clarified that they only apply to construction fills associated with projects that have already been authorized by the Corps or the U.S. Coast Guard and not to construction activities in waters of the U.S. which would not otherwise be regulated. We disagree with the suggestion to include specific limitations. The requirement for notification will prevent any activities from occurring under this NWP that have more than minimal adverse effects on the environment. For this reason, the proposed limitation on cofferdams not to exceed 55% of the width of a waterway has been deleted.

34. *Cranberry Production Activities:* In the **Federal Register** notice of April 10, 1991, the Corps sought comments on the detriments and benefits of cranberry production activities, possible conditions or limits that could reduce any adverse impacts, and types of cranberry production activities that should or should not be authorized by nationwide permit. The overwhelming majority of comments received were from those involved in the cranberry industry in support of a nationally issued permit for cranberry operations. The most commonly suggested language included provisions for discharges that would result in the expansion of existing cranberry operations for 10 acres or less per year per operator; notification to the DE in accordance with the notification procedures; and provisions that the expansion would not cause a net loss of wetland acreage. Those commenting in opposition to the proposed permit did not provide alternative suggestions but rather requested elimination of the permit from consideration because cranberry operations, both individually and cumulatively, would result in more than minimal adverse environmental

effects. Their position was that individual permit review was more acceptable as the mechanism for evaluating the impacts of cranberry related permit applications. Consequently, most negative comments did not even address the limited suggestions used in requesting conditions or limits under which a nationwide permit might be issued.

There has been considerable interest from the cranberry growing industry in developing a nationwide permit for activities associated with the production of cranberries. There has also been considerable concern expressed by state and Federal resource agencies regarding potential adverse impacts on aquatic resources of cranberry production activities, such as converting existing natural wetlands into cranberry bogs. The typical cranberry operation involves clearing and leveling of wetlands, construction of dikes and berms, installation of water control structures, ditching, and flooding. In some circumstances, up to fifteen acres of reservoir are set aside for each acre of actual bed/bog. However, every cranberry operation is unique. There are no standard sizes for cranberry beds and no established water management techniques. It is further recognized that the commercial cultivation of cranberries requires large quantities of readily-available water. Some commenters expressed concern over the potential impacts to water quality resulting from cranberry operations. We believe that the DE will be able to identify these potentially adverse situations and assert discretionary authority by adding activity-specific conditions or requiring an individual permit, if he feels that the adverse environmental effects are more than minimal or that the activity is contrary to the public interest. We also believe that it is in the best interest of the cranberry growers themselves that they strive to maintain water quality for the benefit of their crops. This is particularly important for those cranberry operations that recirculate water within their beds for repeated use. We believe that by limiting this NWP to existing operations and requiring notification to the DE, any adverse effects to water quality resulting from the actual discharges authorized by this NWP, as well as the operation of these facilities, will be minimal. Furthermore, water quality standards are specifically evaluated by the states through the Section 401 Water Quality Certification process, which may generate additional conditions on a regional basis.

Our difficulty in developing this nationwide permit is related to the diversity of circumstances affecting cranberry operations, and the difficulty thus engendered in determining what is a nationally acceptable permit. Some activities associated with ongoing cranberry growing operations have been exempted by section 404(f) of the Clean Water Act, leaving primarily construction discharges associated with expansions and new operations as activities to be regulated. The nationwide permit issued by this regulation applies to discharges of dredged or fill material for dikes, berms, pumps, water control structures or clearing and grading of beds associated with expansion, enhancement or modification activities at existing cranberry production operations only and does not authorize new cranberry operations. This NWP is intended to address those operations which exist at the time this NWP is effective. Any changes in management or ownership of existing operations to seek additional use of this NWP is not appropriate. With regard to what we identify as a single operation, we believe that the definition of the term "single and complete project" found at 33 CFR 330.2 should provide adequate guidance. Due to the variability of cranberry cultivation operations, we believe that the DE can best determine what constitutes a single and complete cultivation operation. Generally, the expansion of an existing operation would be contiguous or in close proximity to the existing operation. It should be further noted that this NWP only applies to discharges required for the cultivation of cranberries and does not apply to related activities such as warehouses, processing plants, or parking areas.

We believe that new cranberry operations are not burdened with previous investments and technology. Accordingly, we have not included new cranberry cultivation operations under this NWP.

The scope of the nationwide permit recommended by the cranberry industry is greater than the scope which we have adopted for this nationwide permit. However, we considered the potential adverse effects on the environment, both individually and cumulatively, other factors of the public interest, and the utility of this nationwide permit considering regional differences and the likelihood of discretionary authority being exercised at the time a district was notified about a pending activity. For those activities exceeding 10 acres we believe it may be appropriate for Division and District Engineers to consider a regionally based general permit. That type of negotiation would exceed the scope of the investigation of options used in developing this nationwide permit.

Several commenters expressed concern over the impacts to fish and wildlife resources resulting from the removal of natural vegetation. It is recognized by both wildlife experts and the cranberry industry that the replacement of natural vegetation with a monoculture of cranberries will have an adverse effect on wildlife values. The diversity of wildlife is generally reduced by a monoculture environment. However, wildlife values will not be eliminated by cranberry beds and reservoirs. Some species will be encouraged in these areas. Pond or reservoir modification could result in increased wetland acreage by flooding adjacent uplands. Reservoirs may also support submerged aquatic vegetation and open water areas to benefit fisheries resources. By limiting this NWP to expansion of existing facilities, we believe that pristine wildlife habitat is less likely to be adversely impacted. Furthermore, we believe that appropriate mitigation measures can be developed during the notification process to minimize the adverse effects to wildlife resources.

Several commenters expressed an objection to any nationwide permit for cranberry activities. However, we have determined that the activities that will be authorized by this nationwide permit are similar in nature and will be properly conditioned so that they will, both individually and cumulatively, have only minimal adverse effects on the environment. As with all NWPs, we will be monitoring the use of this NWP and if it appears that a modification or revocation is appropriate, we will initiate such action. Furthermore, we will have data upon which to reevaluate this permit when it expires after 5 years.

Finally, to address regional differences in cranberry production activities we are encouraging the DEs to work with the states and industry concerning the need for and acceptablility of regional conditions and/or general permits.

35. *Maintenance Dredging of Existing Basins:* Many commenters indicated that the proposed language is too vague. Many commenters requested that dredging volumes be limited and that the NWP only apply to uncontaminated sediments. Several commenters requested a better understanding of what constitutes a Corps approved disposal site and whether or not this would include any other site other than

an upland site. Many commenters indicated that maintenance dredging should only occur to previous documented depths. Some commenters requested that notification be included in the NWP. Some commenters requested that the NWP exclude dredging in special aquatic sites.

We do not agree with the approach of placing an across the board limitation on dredging volumes because this would decrease the utility of the NWP. However, we have modified the language to eliminate vagueness and more clearly define the intended limitations for use of the NWP. As the proposed language states the NWP is for maintenance and is therefore not intended for new work dredging. The modified language will state maintenance "to the lesser of previously authorized depths or controlling depths for ingress/egress". The phrase "or a Corps approved disposal site" will be deleted. Areas containing contaminated sediments have generally been previously identified. We believe that regional conditioning of this NWP would be the appropriate mechanism to address this issue. Regional conditions can be developed to exclude known contaminated areas (such as sites on the NPL) or to require testing in areas of suspected contamination. Furthermore, we are encouraging DEs, where there is reason to believe the material to be dredged is contaminated, to consider exercising discretionary authority. It should be pointed out that the NWP is for upland disposal only and does not authorize return water (see NWP 16). Since the NWP is for maintenance for previously authorized work, adverse effects on the environment have already been considered or are expected to be minimal.

36. *Boat Ramps:* Several commenters suggested that this NWP be subject to the Notification requirements. The Corps notes that no fill material would be allowed to be discharged into special aquatic sites as a parameter of this NWP, and boat launch ramps are exempt from NEPA documentation as per 33 CFR part 325, appendix B. Given this and the discretionary authority provisions, we believe the Notification requirement would be unduly burdensome upon the regulated public. Several commenters suggested modifications to the limitations of this NWP, but the Corps believes this NWP, as written, adequately balances the need for public access to the nation's waterways while protecting aquatic resources. The wording of this NWP has been changed to clarify that the 50 cubic yard fill limitation pertains to fill placed into waters of the United States and that unsuitable material that causes unacceptable chemical pollution or is structurally unstable is not authorized.

37. *Emergency Watershed Protection:* Several commenters indicated that true emergency situations require response in less than 30 days and requested notification time be reduced to 2 days. Another commenter suggested the DE should have discretion to wave 30 day PDN procedure if emergency necessitates immediate action. We have retained the notification requirement for this NWP. However, we have modified the language of the 30-day time limit to accommodate true emergency situations. Under the revised notification a project may proceed in less than 30 days provided the DE has completed his review and has notified the permittee.

Some commenters felt SCS approval will not carry out the provisions of section 404 since flood hazard projects involve work in waterways which result in the loss of fish and fish habitat. Other commenters indicated SCS review abdicates Corps responsibility for reviewing proposals and protecting wetlands and waterways and does not comply with NEPA. Yet another commenter suggested that the NWP be expanded to cover all emergency public flood control projects.

We disagree that the substantive provisions of Section 404 or NEPA will be avoided by this NWP. SCS, like all other Federal agencies, must comply with NEPA, Fish and Wildlife Coordination Act, Endangered Species Act, and all other Federal statutes and Executive Orders. In addition, the DE has the opportunity through the PDN process to determine if individual projects have more than minimal adverse effects on the environment and to require an individual permit. We also disagree with including all emergency public flood control projects since compliance with Federal statutes and Executive Orders could not be assured.

A number of commenters recommended such restrictions to the NWP as authorizing temporary structures only, excluding stream channelization, prohibiting wetland modification and alteration of wetland hydrology or aquatic organisms migratory pathways. We disagree that these types of restrictions are necessary in the NWP since the DE will have the ability to review individual proposals to determine if modifications are required or if the adverse effects are more than minimal thus requiring an individual permit.

Several commenters suggested that emergency plans be approved by State and Federal fish and wildlife agencies and EPA. We have modified the notification process to include the appropriate natural resource agencies. However, we disagree with the recommendation that the activity must be approved by these agencies during the Corps' PDN process. It must be noted, however, that an activity must receive a specific 401 water quality certification in those circumstances where a state has denied water quality certification for the NWP authorization.

Several commenters requested that the term "emergency" be defined and type and extent of projects authorized should be clarified. The Corps has defined the term "emergency" at 33 CFR 325.2(e)(4), and SCS exigency is defined in 7 CFR part 624. Also, 7 CFR part 624 contains a description of the type of projects which would be authorized.

The Forest Service has requested that its Emergency Burned Area Rehabilitation activities should be included in this NWP. We have considered their request and have expanded this NWP to include activities done by or funded by the Forest Service under their Burned-Area Emergency Rehabilitation Handbook.

38. *Cleanup of Hazardous and Toxic Waste:* The Corps recognizes a potential lack of Section 404 considerations in cleanup orders and has included the notification requirement with this NWP to allow adequate review of any adverse effects on the environment. Three commenters suggested that a wetland delineation is not necessary, but we believe they are necessary in order to assess potential impacts as part of the notification process. A number of commenters recommended that this NWP not be implemented in view of the potential for significant adverse environmental impacts associated with cleanups of hazardous or toxic wastes. However, the Corps believes that this NWP is appropriate, and that the aquatic environment will benefit from expeditious cleanup of such areas.

39. *Reserved.*

Agricultural Discharges (Proposed as NWP 39): Most commenters were confused regarding the type of activities that would be permitted under this NWP since Section 404(f) exempts normal farming activities. Also, many were confused by the preamble language which discussed authorizing discharges for silvacultural and aquacultural activities, as well as agricultural activities. Accordingly, many commenters indicated the NWP was either too open-ended or too restrictive. Many commenters felt the NWP would

not be useful to the agricultural community.

We originally intended to cover silvacultural and aquacultural activities under this NWP but those activities were dropped prior to publishing the proposed rule. We agree the NWP as proposed has little utility and have dropped it from the final rule.

40. *Farm Buildings:* Many commenters opposed this NWP and stated that it was vague and too broad, and questioned its need. Several commenters expressed the need to define "agricultural related structures" and "farming activities", as well as to establish size limitations. These commenters were concerned that large production facilities i.e. fertilizer plants, processing and boarding facilities, and other commercial structures would be authorized by this NWP.

We share the concerns of the above commenters and have provided limitations and removed "agricultural related structures necessary for farming activities" from the NWP. This NWP will authorize farm buildings such as equipment sheds, supply storage, animal housing and production facilities located on a farm or ranch. The fill for these buildings and associated grounds will be limited to the minimum necessary, and shall not involve filling more than one acre of farmed wetlands.

Many commenters stated that these agricultural-related structures were non-water dependent and would result in large cumulative losses to wetlands. While most commenters recognized the applicability of this NWP to only farmed wetlands in agricultural production, there was concern for the loss of the functions and values these farmed wetlands possess. Several commenters stated concern for the release of pesticides and pollutants to ground and surface waters during flooding. Also, that allowing agricultural related structures in farmed wetlands was counter to national efforts to discourage construction in flood prone areas. Another commenter expressed concern for the loss to prairie potholes, playas, and vernal pools as a result of this NWP.

We believe that impacts to farmed wetlands will be minimized in accordance with section 404 condition number 4. Also, that construction of structures in flood prone areas would most often be elevated to avoid flooding and that this loss in flood storage would be minimal both individually and cumulatively. We believe the release of pollutants as a result of flooding would be rare and should this occur the impacts would be localized and have minimal effect. Furthermore, we have clarified that this NWP does not authorize discharges into prairie potholes, playa lakes, or vernal pools.

Several commenters requested that this NWP should be subject to the notification procedures and include a delineation of special aquatic sites, and that the NWP be coordinated with the federal resource agencies. One commenter expressed concern that this NWP would set a precedent for allowing all types of buildings in wetlands. Another commenter recommended that all building pads and foundations up to 3,000 square feet in rural areas be subject to this NWP. One commenter believed that agricultural related structures would be constructed and then their use converted to nonagricultural purposes.

We believe that notification and delineation of special aquatics sites is unnecessary since this NWP only applies to farmed wetlands that are currently in agricultural production, and further, this NWP has been modified to limit the disturbance to one acre of farmed wetlands. The farmed wetland designation is assigned by the Soil Conservation Service. We do not agree that this would be setting a precedent, since there are specific conditions and limitations to the types of activities authorized by this NWP. For this reason, we do not agree with the recommendation to allow all building pads and foundations in wetlands in rural areas. Furthermore, we believe it is unlikely that a farm building would be constructed and then its use converted to some use other than farming.

One commenter asked whether the NWP applied to silvicultural and aquacultural related buildings or structures. A few commenters stated that the NWP was necessary to maintain farming operations and suggested ways to minimize impacts. Silvicultural and aquacultural related buildings or structures are not authorized by this NWP. We agree that the NWP would benefit farming operations and that minimizing impacts is required.

Nationwide Permit Conditions

General Conditions

Several of the commenters questioned the incorporation of the BMPs into the NWP Conditions. They believed that the BMPs are impractical, impossible to achieve, and may constitute a taking. They felt that they are too vague to be enforceable or easily complied with, and that failure of a prospective permittee to comply with a condition should not trigger an enforcement action. The Corps disagrees with these comments. The BMPs are now being included as conditions in order to make them more enforceable. Flexibility is built into the conditions in response to differing conditions throughout the nation. The conditions do not constitute a taking of private property, and we maintain that enforcement actions are appropriate in instances where a permittee fails to adhere to the conditions.

1. *Navigation:* In response to comments questioning the change from previous policy on navigation, the Corps believes the proposed wording is more appropriate in that navigational interests are better protected.

2. *Proper Maintenance:* There were no comments on this condition and it is being adopted as proposed.

3. *Erosion and Siltation:* Several comments were directed at the "vagueness" of the wording of this condition. The Corps believes that parameters should not be specified in that erosion and siltation control methods vary throughout the nation.

4. *Aquatic Life Movement:* Several comments requested that the Corps define activities which may substantially disrupt aquatic life movements, and others suggested that the Corps require culverts be designed to facilitate passage of aquatic organisms. The Corps believes that this condition is sufficiently clear, and that it is not reasonable or practical for the suggestion to be included as an NWP condition. We did modify this condition that this condition also pertains to species which normally migrate through the area as well as indigenous species.

5. *Equipment:* There were no comments on this condition and it is being adopted as proposed.

6. *Regional and Case-by-Case Conditions:* There were no comments on this condition and it is being adopted as proposed.

7. *Wild and Scenic Rivers:* In response to comments that state Wild & Scenic Rivers and state or national Outstanding Resource Waters be added, the Corps believes this is neither reasonable nor practical.

8. *Tribal Rights:* In response to a comment that tribes should be informed of NWP activities, the Corps believes the condition as worded is sufficient to protect tribal rights.

9. *Water Quality Certification:* This subject has been addressed in detail in Section 330.4(c). After considerable review of all comments, this condition has been retained as proposed.

10. *Coastal Zone Management:* This subject has been addressed in detail in section 330.4(d). After considerable

review of all comments, this condition has been retained as proposed.

11. *Endangered Species:* The majority of commenters objected to the use of the language "or species proposed for such designation" as being too vague and uncertain. Concern was also expressed that such language implies that the Corps is giving such species status they are not entitled to under the Endangered Species Act. This term is defined in the ESA and is used in that context in this regulation. Other commenters expressed concern relative to the removal of section 7 consultation requirements from this condition. This requirement is now located in § 330.4(f). After careful evaluation of all comments, the language of this condition has been retained with only minor revisions.

12. *Historic Properties:* Many commenters objected to the term "potentially eligible for listing" as being too uncertain. We have replaced "potentially" with "which the prospective permittee has reason to believe may be" to clarify this statement.

Other commenters felt that this condition does not adequately address the Corps responsibilities under the NHPA. We disagree. The Corps procedures as outlined in this NWP condition comply with the requirements of 33 CFR 325 appendix C, which implements 36 CFR 800 and fully satisfies the requirements of the NHPA.

13. *Notification:* We received a large number of comments relating to this condition. Our response to these comments has been addressed in the preamble at section 330.1(e) and in the General Comments for all NWPs. We have modified the language concerning the 30-day advance notification to address those concerns for emergency situations. We have also added a process requiring notification of the natural resource agencies and solicitation of their comments. As noted previously in this document, we have selected Mitigation Option 2 as a part of the notification requirement. The language of this condition reflects this decision.

In addition, in an effort to assist the DE in obtaining information needed by the Corps to satisfy the requirements of the ESA and NHPA, we have included a requirement that prospective permittees include a statement in the PDN certifying that they have contacted the appropriate resource agencies regarding the effects of the proposed activity on endangered or threatened species and/or their critical habitat, and on historic properties. This statement should also include any information provided by the USFWS and NMFS regarding the presence of any endangered or threatened species and/or their critical habitat in or near the permit area that may be affected by the proposed activity; and from the SHPO regarding the presence of any historic property in the permit area that may be affected by the proposed activity. This provision does not require the prospective permittee to delay transmittal of the PDN until USFWS/NMFS and/or the SHPO provide information. It does require that the prospective permittee contact these agencies to determine whether any information is available. Furthermore, we encourage prospective permittees to contact these agencies at any time concerning these issues, even for those NWP activities that do not require notification to the DE to assure compliance with ESA and NHPA.

Section 404 Only Conditions

1. *Water Supply Intakes:* Three commenters requested that "proximity" to water supply intakes be defined. We believe that it would not be prudent to place a specific restriction on the distance from a water supply intake on a national level.

2. *Shellfish Production:* Several commenters requested clarification or modification of this condition, but the Corps believes this would be inappropriate on a national level.

3. *Suitable Material:* Several commenters recommended modification of this condition, or that we include EPA's list of toxins and toxic amounts. Including such a list is not feasible in that the condition would have to be modified each time EPA's list is modified.

4. *Mitigation:* The title of this condition and the condition itself have been modified to state that discharges of dredged or fill material must be minimized or avoided to the maximum extent practicable at the project site, unless the DE has approved a compensation mitigation plan for the specific regulated activity.

5. *Spawning Areas:* Several commenters recommended that this condition be expanded to include avoidance of other activities or that all discharges in spawning areas during spawning seasons be prohibited. The Corps finds this unduly restrictive and believes that the wording, as adopted, provides adequate protection.

6. *Obstruction of High Flows:* There were no comments on this condition and it is being adopted as proposed.

7. *Adverse Impacts From Impoundments:* The Corps is in agreement with a recommendation to modify the wording of this condition to require minimization to the maximum extent practicable.

8. *Waterfowl Breeding Areas:* Several commenters recommended that this condition should be expanded to include avoidance of other activities or protection of additional resources, but we believe this is unreasonable and impractical and that the condition as worded provides sufficient protection.

9. *Removal of Temporary Fills:* One commenter requested that establishment of pre-existing soil, vegetation and hydrologic conditions should also be required. The Corps believes that restoration of pre-existing contours is sufficient.

Discretionary Authority

In addition to the NWP conditions being required by the Chief of Engineers, the division and district engineers may add regional conditions or revoke NWP authorization for some or portions of the NWPs. Regional conditions may also be required by state Section 401 water quality certification or for state coastal zone consistency. When a State has denied Section 401 Water Quality Certification or disagreed with the Corps consistency determination for an NWP as of the effective date of the NWPs, the Corps will deny those affected activities without prejudice on the effective date. Subsequently, to perform these activities the applicant must obtain a section 401 Water Quality Certification or consistency certification from the State. District Engineers will announce regional conditions or revocations by issuing local public notices. Information on regional conditions and revocations can be obtained from the appropriate district engineer as indicated below.

Alabama

Mobile District Engineer, ATTN: CESAM–OP–S, P.O. Box 2288, Mobile, AL 36628–0001.

Alaska

Alaska District Engineer, ATTN: CENPA–CO–R, P.O. Box 898, Anchorage, AK 99506–0898.

Arizona

Los Angeles District Engineer, ATTN: CESPL–CO–R, P.O. Box 2711, Los Angeles, CA 90053–2325.

Arkansas

Little Rock District Engineer, ATTN: CESWL–CO–P, P.O. Box 867, Little Rock, AR 72203–0867.

California

Sacramento District Engineer, ATTN: CESPK–CO–O, 650 Capitol Mall, Sacramento, CA 95814–4794.

Colorado

Albuquerque District Engineer, ATTN: CESWA–CO–R, P.O. Box 1580, Albuquerque, NM 87103–1580.

Connecticut

New England Division Engineer, ATTN: CENED–OD–R, 424 Trapelo Road, Waltham, MA 02254–9149.

Delaware

Philadelphia District Engineer, ATTN: CENAP–OP–R, U.S. Custom House, 2nd and Chestnut Street, Philadelphia, PA 19106–2991.

Florida

Jacksonville District Engineer, ATTN: CESAJ–RD, P.O. Box 4970, Jacksonville, FL 32232–0019.

Georgia

Savannah District Engineer, ATTN: CESAS–OP–F, P.O. Box 889, Savannah, GA 31402–0889.

Hawaii

Honolulu District Engineer, ATTN: CEPOD–CO–O, Building 230, Fort Shafter, Honolulu, HI 96858–5440.

Idaho

Walla Walla District Engineer, ATTN: CENPW–OP–RF, Building 602, City-County Airport, Walla Walla, WA 99362–9265.

Illinois

Rock Island District Engineer, ATTN: CENCR–OD–S, Clock Tower Building, Rock Island, IL 61201–2004.

Indiana

Louisville District Engineer, ATTN: CEORL–OR–F, P.O. Box 59, Louisville, KY 40201–0059.

Iowa

Rock Island District Engineer, ATTN: CENCR–OD–S, Clock Tower Building, Rock Island, IL 61201–2004.

Kansas

Kansas City District Engineer, ATTN: CEMRK–OD–P, 700 Federal Building, 601 E. 12th Street, Kansas City, MO 64106–2896.

Kentucky

Louisville District Engineer, ATTN: CEORL–OR–F, P.O. Box 59, Louisville, KY 40201–0059.

Louisiana

New Orleans District Engineer, ATTN: CELMN–OD–S, P.O. Box 60267, New Orleans, LA 70160–0267.

Maine

New England Division Engineer, ATTN: CENED–OD–R, 424 Trapelo Road, Waltham, MA 02254–9149.

Maryland

Baltimore District Engineer, ATTN: CENAB–OP–R, P.O. Box 1715, Baltimore, MD 21203–1715.

Massachusetts

New England Division Engineer, ATTN: CENED–OD–R, 424 Trapelo Road, Waltham, MA 02254–9149.

Michigan

Detroit District Engineer, ATTN: CENCE–CO–L, P.O. Box 1027, Detroit, MI 48231–1027.

Minnesota

St. Paul District Engineer, ATTN: CENCS–CO–R, 180 Kellogg Blvd. E., Room 1421, St. Paul, MN 55101–1479.

Mississippi

Vicksburg District Engineer, ATTN: CELMK–OD–F, 3515 I–20 Frontage Road, Vicksburg, MS 39180–5191.

Missouri

Kansas City District Engineer, ATTN: CEMRK–OD–P, 700 Federal Building, 601 E. 12th Street, Kansas City, MO 64106–2896.

Montana

Omaha District Engineer, ATTN: CEMRO–OP–R, P.O. Box 5, Omaha, NE 68101–0005.

Nebraska

Omaha District Engineer, ATTN: CEMRO–OP–R, P.O. Box 5, Omaha, NE 68101–0005.

Nevada

Sacramento District Engineer, ATTN: CESPK–CO–O, 650 Capitol Mall, Sacramento, CA 95814–4794.

New Hampshire

New England Division Engineer, ATTN: CENED–OD–R, 424 Trapelo Road, Waltham, MA 02254–9149.

New Jersey

Philadelphia District Engineer, ATTN: CENAP–OP–R, U.S. Custom House, 2nd and Chestnut Street, Philadelphia, PA 19106–2991.

New Mexico

Albuquerque District Engineer, ATTN: CESWA–CO–R, P.O. Box 1580, Albuquerque, NM 87103–1580.

New York

New York District Engineer, ATTN: CENAN–OP–R, 26 Federal Plaza, New York, NY 10278–0090.

North Carolina

Wilmington District Engineer, ATTN: CESAW–CO–E, P.O. Box 1890, Wilmington, NC 28402–1890.

North Dakota

Omaha District Engineer, ATTN: CEMRO–OP–R, P.O. Box 5, Omaha, NE 68101–0005.

Ohio

Huntington District Engineer, ATTN: CEORH–OR–F, 502 8th Street, Huntington, WV 25701–2070.

Oklahoma

Tulsa District Engineer, ATTN: CESWT–OD–RF, P.O. Box 61, Tulsa, OK 74121–0061.

Oregon

Portland District Engineer, ATTN: CENPP–PL–R, P.O. Box 2946, Portland, OR 97208–2946.

Pennsylvania

Baltimore District Engineer, ATTN: CENAB–OP–R, P.O. Box 1715, Baltimore, MD 21203–1715.

Rhode Island

New England Division Engineer, ATTN: CENED–OD–R, 424 Trapelo Road, Waltham, MA 02254–9149.

South Carolina

Charleston District Engineer, ATTN: CESAC–CO–P, P.O. Box 919, Charleston, SC 29402–0919.

South Dakota

Omaha District Engineer, ATTN: CEMRO–OP–R, P.O. Box 5, Omaha, NE 68101–0005.

Tennessee

Nashville District Engineer, ATTN: CEORN–OR–F, P.O. Box 1070, Nashville, TN 37202–1070.

Texas

Ft. Worth District Engineer, ATTN: CESWF–OD–O, P.O. Box 17300, Ft. Worth, TX 76102–0300.

Utah

Sacramento District Engineer, ATTN: CESPK–CO–O, 650 Capitol Mall, Sacramento, CA 95814–4794.

Vermont

New England Division Engineer, ATTN: CENED–OD–R, 424 Trapelo Road, Waltham, MA 02254–9149.

Virginia

Norfolk District Engineer, ATTN: CENAO–OP–P, 803 Front Street, Norfolk, VA 23510–1096.

Washington

Seattle District Engineer, ATTN: CENPS–OP–RG, P.O. Box C–3755, Seattle, WA 98124–2255.

West Virginia

Huntington District Engineer, ATTN: CEORH–OR–F, 502 8th Street, Huntington, WV 25701–2070.

Wisconsin

St. Paul District Engineer, ATTN: CENCS–CO–R, 1421 USPO & Custom House, St. Paul, MN 55101–9806.

Wyoming

Omaha District Engineer, ATTN: CEMRO–OP–R, P.O. Box 5, Omaha, NE 68101–0005.

District of Columbia

Baltimore District Engineer, ATTN: CENAB–OP–R, P.O. Box 1715, Baltimore, MD 21203–1715.

Pacific Territories

Honolulu District Engineer, ATTN: CEPOD–CO–O, Building 230, Fort Shafter, Honolulu, HI 96858–5440.

Puerto Rico & Virgin Is

Jacksonville District Engineer, ATTN: CESAJ–RD, P.O. Box 4970, Jacksonville, FL 32232–0019.

Environmental Documentation

We have determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment. Environmental documentation has been prepared for each nationwide permit. Accordingly, for actions where there is other Federal agency involvement, there is no need to conduct an independent review of the other Federal agency's NEPA documentation under 40 CFR 1506.3(c). The Corps documentation includes an environmental assessment and, where relevant, a section 404(b)(1) Guidelines compliance review. Copies of these documents are available for inspection at the office of the Chief of Engineers and at each Corps district office. Based on these documents the Corps has determined that the NWPs comply with the requirements for issuance under general permit authority.

Note 1—The Department of the Army has determined that this document does not contain a major rule requiring a regulatory impact analysis under Executive Order 12291 because it will not result in an annual effect on the economy of $100 million or more and it will not result in a major increase in costs or prices.

Note 2—The term "he" and its derivatives used in these regulations are generic and should be considered as applying to both male and female.

I hereby certify that this matter will have no significant negative impact on a substantial number of small entities within the meaning and intent of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq.

List of Subjects in 33 CFR Part 330

Administrative practice and procedure, Intergovernmental relations, Navigation (water), Water pollution control, Waterways.

Dated: November 12, 1991.

Approved:

Nancy P. Dorn,

Assistant Secretary of the Army, (Civil Works).

Accordingly, 33 CFR part 330 is revised to read as follows:

PART 330—NATIONWIDE PERMIT PROGRAM

Sec.

Authority: 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413.

§ 330.1 Purpose and policy.

(a) *Purpose.* This part describes the policy and procedures used in the Department of the Army's nationwide permit program to issue, modify, suspend, or revoke nationwide permits; to identify conditions, limitations, and restrictions on the nationwide permits; and, to identify any procedures, whether required or optional, for authorization by nationwide permits.

(b) *Nationwide permits.* Nationwide permits (NWPs) are a type of general permit issued by the Chief of Engineers and are designed to regulate with little, if any, delay or paperwork certain activities having minimal impacts. The NWPs are proposed, issued, modified, reissued (extended), and revoked from time to time after an opportunity for public notice and comment. Proposed NWPs or modifications to or reissuance of existing NWPs will be adopted only after the Corps gives notice and allows the public an opportunity to comment on and request a public hearing regarding the proposals. The Corps will give full consideration to all comments received prior to reaching a final decision.

(c) *Terms and conditions.* An activity is authorized under an NWP only if that activity and the permittee satisfy all of the NWP's terms and conditions. Activities that do not qualify for authorization under an NWP still may be authorized by an individual or regional general permit. The Corps will consider unauthorized any activity requiring Corps authorization if that activity is under construction or completed and does not comply with all of the terms and conditions of an NWP, regional general permit, or an individual permit. The Corps will evaluate unauthorized activities for enforcement action under 33 CFR part 326. The district engineer (DE) may elect to suspend enforcement proceedings if the permittee modifies his project to comply with an NWP or a regional general permit. After considering whether a violation was knowing or intentional, and other indications of the need for a penalty, the DE can elect to terminate an enforcement proceeding with an after-the-fact authorization under an NWP, if all terms and conditions of the NWP have been satisfied, either before or after the activity has been accomplished.

(d) *Discretionary authority.* District and division engineers have been delegated a discretionary authority to suspend, modify, or revoke authorizations under an NWP. This discretionary authority may be used by district and division engineers only to further condition or restrict the applicability of an NWP for cases where they have concerns for the aquatic environment under the Clean Water Act section 404(b)(1) Guidelines or for any factor of the public interest. Because of the nature of most activities authorized by NWP, district and division engineers will not have to review every such activity to decide whether to exercise discretionary authority. The terms and conditions of certain NWPs require the DE to review the proposed activity before the NWP authorizes its construction. However, the DE has the discretionary authority to review any activity authorized by NWP to determine whether the activity complies with the NWP. If the DE finds that the proposed activity would have more than

minimal individual or cumulative net adverse effects on the environment or otherwise may be contrary to the public interest, he shall modify the NWP authorization to reduce or eliminate those adverse effects, or he shall instruct the prospective permittee to apply for a regional general permit or an individual permit. Discretionary authority is also discussed at 33 CFR 330.4(e) and 330.5.

(e) *Notifications.* (1) In most cases, permittees may proceed with activities authorized by NWPs without notifying the DE. However, the prospective permittee should carefully review the language of the NWP to ascertain whether he must notify the DE prior to commencing the authorized activity. For NWPs requiring advance notification, such notification must be made in writing as early as possible prior to commencing the proposed activity. The permittee may presume that his project qualifies for the NWP unless he is otherwise notified by the DE within a 30-day period. The 30-day period starts on the date of receipt of the notification in the Corps district office and ends 30 calendar days later regardless of weekends or holidays. If the DE notifies the prospective permittee that the notification is incomplete, a new 30-day period will commence upon receipt of the revised notification. The prospective permittee may not proceed with the proposed activity before expiration of the 30-day period unless otherwise notified by the DE. If the DE fails to act within the 30-day period, he must use the procedures of 33 CFR 330.5 in order to modify, suspend, or revoke the NWP authorization.

(2) The DE will review the notification and may add activity-specific conditions to ensure that the activity complies with the terms and conditions of the NWP and that the adverse impacts on the aquatic environment and other aspects of the public interest are individually and cumulatively minimal.

(3) For some NWPs involving discharges into wetlands, the notification must include a wetland delineation. The DE will review the notification and determine if the individual and cumulative adverse environmental effects are more than minimal. If the adverse effects are more than minimal the DE will notify the prospective permittee that an individual permit is required or that the prospective permittee may propose measures to mitigate the loss of special aquatic sites, including wetlands, to reduce the adverse impacts to minimal. The prospective permittee may elect to propose mitigation with the original notification. The DE will consider that proposed mitigation when deciding if the impacts are minimal. The DE shall add activity-specific conditions to ensure that the mitigation will be accomplished. If sufficient mitigation cannot be developed to reduce the adverse environmental effects to the minimal level, the DE will not allow authorization under the NWP and will instruct the prospective permittee on procedures to seek authorization under an individual permit.

(f) *Individual Applications.* DEs should review all incoming applications for individual permits for possible eligibility under regional general permits or NWPs. If the activity complies with the terms and conditions of one or more NWP, he should verify the authorization and so notify the applicant. If the DE determines that the activity could comply after reasonable project modifications and/or activity-specific conditions, he should notify the applicant of such modifications and conditions. If such modifications and conditions are accepted by the applicant, verbally or in writing, the DE will verify the authorization with the modifications and conditions in accordance with 33 CFR 330.6(a). However, the DE will proceed with processing the application as an individual permit and take the appropriate action within 15 calendar days of receipt, in accordance with 33 CFR 325.2(a)(2), unless the applicant indicates that he will accept the modifications or conditions.

(g) *Authority.* NWPs can be issued to satisfy the permit requirements of section 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act, section 103 of the Marine Protection, Research, and Sanctuaries Act, or some combination thereof. The applicable authority will be indicated at the end of each NWP. NWPs and their conditions previously published at 33 CFR 330.5 and 330.6 will remain in effect until they expire or are modified or revoked in accordance with the procedures of this part.

§ 330.2 Definitions.

(a) The definitions found in 33 CFR parts 320–329 are applicable to the terms used in this part.

(b) *Nationwide* permit refers to a type of general permit which authorizes activities on a nationwide basis unless specifically limited. (Another type of general permit is a "regional permit" which is issued by division or district engineers on a regional basis in accordance with 33 CFR part 325). (See 33 CFR 322.2(f) and 323.2(h) for the definition of a general permit.)

(c) *Authorization* means that specific activities that qualify for an NWP may proceed, provided that the terms and conditions of the NWP are met. After determining that the activity complies with all applicable terms and conditions, the prospective permittee may assume an authorization under an NWP. This assumption is subject to the DE's authority to determine if an activity complies with the terms and conditions of an NWP. If requested by the permittee in writing, the DE will verify in writing that the permittee's proposed activity complies with the terms and conditions of the NWP. A written verification may contain activity-specific conditions and regional conditions which a permittee must satisfy for the authorization to be valid.

(d) *Headwaters* means non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, that are part of a surface tributary system to an interstate or navigable water of the United States upstream of the point on the river or stream at which the average annual flow is less than five cubic feet per second. The DE may estimate this point from available data by using the mean annual area precipitation, area drainage basin maps, and the average runoff coefficient, or by similar means. For streams that are dry for long periods of the year, DEs may establish the point where headwaters begin as that point on the stream where a flow of five cubic feet per second is equaled or exceeded 50 percent of the time.

(e) *Isolated waters* means those non-tidal waters of the United States that are:

(1) Not part of a surface tributary system to interstate or navigable waters of the United States; and

(2) Not adjacent to such tributary waterbodies.

(f) *Filled area* means the area within jurisdictional waters which is eliminated or covered as a direct result of the discharge (i.e., the area actually covered by the discharged material). It does not include areas excavated nor areas impacted as an indirect effect of the fill.

(g) *Discretionary authority* means the authority described in §§ 330.1(d) and 330.4(e) which the Chief of Engineers delegates to division or district engineers to modify an NWP authorization by adding conditions, to suspend an NWP authorization, or to revoke an NWP authorization and thus require individual permit authorization.

(h) *Terms and conditions.* The "terms" of an NWP are the limitations and provisions included in the description of the NWP itself. The "conditions" of

NWPs are additional provisions which place restrictions or limitations on all of the NWPs. These are published with the NWPs. Other conditions may be imposed by district or division engineers on a geographic, category-of-activity, or activity-specific basis (See 33 CFR 330.4(e)).

(i) *Single and complete project* means the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. For example, if construction of a residential development affects several different areas of a headwater or isolated water, or several different headwaters or isolated waters, the cumulative total of all filled areas should be the basis for deciding whether or not the project will be covered by an NWP. For linear projects, the "single and complete project" (i.e. single and complete crossing) will apply to each crossing of a separate water of the United States (i.e. single waterbody) at that location; except that for linear projects crossing a single waterbody several times at separate and distant locations, each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly-shaped wetland or lake, etc., are not separate waterbodies.

(j) *Special aquatic sites* means wetlands, mudflats, vegetated shallows, coral reefs, riffle and pool complexes, sanctuaries, and refuges as defined at 40 CFR 230.40 through 230.45.

§ 330.3 Activities occurring before certain dates.

The following activities were permitted by NWPs issued on July 19, 1977, and, unless the activities are modified, they do not require further permitting:

(a) Discharges of dredged or fill material into waters of the United States outside the limits of navigable waters of the United States that occurred before the phase-in dates which extended Section 404 jurisdiction to all waters of the United States. The phase-in dates were: After July 25, 1975, discharges into navigable waters of the United States and adjacent wetlands; after September 1, 1976, discharges into navigable waters of the United States and their primary tributaries, including adjacent wetlands, and into natural lakes, greater than 5 acres in surface area; and after July 1, 1977, discharges into all waters of the United States, including wetlands. (section 404)

(b) Structures or work completed before December 18, 1968, or in waterbodies over which the DE had not asserted jurisdiction at the time the activity occurred, provided in both instances, there is no interference with navigation. Activities completed shoreward of applicable Federal Harbor lines before May 27, 1970 do not require specific authorization. (section 10)

§ 330.4 Conditions, limitations, and restrictions.

(a) *General.* A prospective permittee must satisfy all terms and conditions of an NWP for a valid authorization to occur. Some conditions identify a "threshold" that, if met, requires additional procedures or provisions contained in other paragraphs in this section. It is important to remember that the NWPs only authorize activities from the perspective of the Corps regulatory authorities and that other Federal, state, and local permits, approvals, or authorizations may also be required.

(b) *Further information.* (1) DEs have authority to determine if an activity complies with the terms and conditions of an NWP.

(2) NWPs do not obviate the need to obtain other Federal, state, or local permits, approvals, or authorizations required by law.

(3) NWPs do not grant any property rights or exclusive privileges.

(4) NWPs do not authorize any injury to the property or rights of others.

(5) NWPs do not authorize interference with any existing or proposed Federal project.

(c) *State 401 water quality certification.* (1) State 401 water quality certification pursuant to section 401 of the Clean Water Act, or waiver thereof, is required prior to the issuance or reissuance of NWPs authorizing activities which may result in a discharge into waters of the United States.

(2) If, prior to the issuance or reissuance of such NWPs, a state issues a 401 water quality certification which includes special conditions, the division engineer will make these special conditions regional conditions of the NWP for activities which may result in a discharge into waters of United States in that state, unless he determines that such conditions do not comply with the provisions of 33 CFR 325.4. In the latter case, the conditioned 401 water quality certification will be considered a denial of the certification (see paragraph (c)(3) of this section).

(3) If a state denies a required 401 water quality certification for an activity otherwise meeting the terms and conditions of a particular NWP, that NWP's authorization for all such activities within that state is denied without prejudice until the state issues an individual 401 water quality certification or waives its right to do so. State denial of 401 water quality certification for any specific NWP affects only those activities which may result in a discharge. That NWP continues to authorize activities which could not reasonably be expected to result in discharges into waters of the United States.[1]

(4) DEs will take appropriate measures to inform the public of which activities, waterbodies, or regions require an individual 401 water quality certification before authorization by NWP.

(5) The DE will not require or process an individual permit application for an activity which may result in a discharge and otherwise qualifies for an NWP solely on the basis that the 401 water quality certification has been denied for that NWP. However, the district or division engineer may consider water quality, among other appropriate factors, in determining whether to exercise his discretionary authority and require a regional general permit or an individual permit.

(6) In instances where a state has denied the 401 water quality certification for discharges under a particular NWP, permittees must furnish the DE with an individual 401 water quality certification or a copy of the application to the state for such certification. For NWPs for which a state has denied the 401 water quality certification, the DE will determine a reasonable period of time after receipt of the request for an activity-specific 401 water quality certification (generally 60 days), upon the expiration of which the DE will presume state waiver of the certification for the individual activity covered by the NWP's. However, the DE and the state may negotiate for additional time for the 401 water quality certification, but in no event shall the period exceed one (1) year (see 33 CFR 325.2(b)(1)(ii)). Upon receipt of an individual 401 water quality

[1] NWPs numbered 1, 2, 8, 9, 10, 11, 19, 24, 28, and 35, do not require 401 water quality certification since they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge and in the case of NWP 8 is seaward of the territorial seas. NWPs numbered 3, 4, 5, 6, 7, 13, 14, 18, 20, 21, 22, 23, 27, 32, 36, 37, and 38, involve various activities, some of which may result in a discharge and require 401 water quality certification, and others of which do not. State denial of 401 water quality certification for any specific NWP in this category affects only those activities which may result in a discharge. For those activities not involving discharges, the NWP remains in effect. NWPs numbered 12, 15, 16, 17, 25, 26, and 40 involve activities which would result in discharges and therefore 401 water quality certification is required.

certification, or if the prospective permittee demonstrates to the DE state waiver of such certification, the proposed work can be authorized under the NWP. For NWPs requiring a 30-day predischarge notification the district engineer will immediately begin, and complete, his review prior to the state action on the individual section 401 water quality certification. If a state issues a conditioned individual 401 water quality certification for an individual activity, the DE will include those conditions as activity-specific conditions of the NWP.

(7) Where a state, after issuing a 401 water quality certification for an NWP, subsequently attempts to withdraw it for substantive reasons after the effective date of the NWP, the division engineer will review those reasons and consider whether there is substantial basis for suspension, modification, or revocation of the NWP authorization as outlined in § 330.5. Otherwise, such attempted state withdrawal is not effective and the Corps will consider the state certification to be valid for the NWP authorizations until such time as the NWP is modified or reissued.

(d) *Coastal zone management consistency determination.* (1) Section 307(c)(1) of the Coastal Zone Management Act (CZMA) requires the Corps to provide a consistency determination and receive state agreement prior to the issuance, reissuance, or expansion of activities authorized by an NWP that authorizes activities within a state with a Federally-approved Coastal Management Program when activities that would occur within, or outside, that state's coastal zone will affect land or water uses or natural resources of the state's coastal zone.

(2) If, prior to the issuance, reissuance, or expansion of activities authorized by an NWP, a state indicates that additional conditions are necessary for the state to agree with the Corps consistency determination, the division engineer will make such conditions regional conditions for the NWP in that state, unless he determines that the conditions do not comply with the provisions of 33 CFR 325.4 or believes for some other specific reason it would be inappropriate to include the conditions. In this case, the state's failure to agree with the Corps consistency determination without the conditions will be considered to be a disagreement with the Corps consistency determination.

(3) When a state has disagreed with the Corps consistency determination, authorization for all such activities occurring within or outside the state's coastal zone that affect land or water uses or natural resources of the state's coastal zone is denied without prejudice until the prospective permittee furnishes the DE an individual consistency certification pursuant to section 307(c)(3) of the CZMA and demonstrates that the state has concurred in it (either on an individual or generic basis), or that concurrence should be presumed (see paragraph (d)(6) of this section).

(4) DEs will take appropriate measures, such as public notices, to inform the public of which activities, waterbodies, or regions require prospective permittees to make an individual consistency determination and seek concurrence from the state.

(5) DEs will not require or process an individual permit application for an activity otherwise qualifying for an NWP solely on the basis that the activity has not received CZMA consistency agreement from the state. However, the district or division engineer may consider that factor, among other appropriate factors, in determining whether to exercise his discretionary authority and require a regional general permit or an individual permit application.

(6) In instances where a state has disagreed with the Corps consistency determination for activities under a particular NWP, permittees must furnish the DE with an individual consistency concurrence or a copy of the consistency certification provided to the state for concurrence. If a state fails to act on a permittee's consistency certification within six months after receipt by the state, concurrence will be presumed. Upon receipt of an individual consistency concurrence or upon presumed consistency, the proposed work is authorized if it complies with all terms and conditions of the NWP. For NWPs requiring a 30-day predischarge notification the DE will immediately begin, and may complete, his review prior to the state action on the individual consistency certification. If a state indicates that individual conditions are necessary for consistency with the state's Federally-approved coastal management program for that individual activity, the DE will include those conditions as activity-specific conditions of the NWP unless he determines that such conditions do not comply with the provisions of 33 CFR 325.4. In the latter case the DE will consider the conditioned concurrence as a nonconcurrence unless the permittee chooses to comply voluntarily with all the conditions in the conditioned concurrence.

(7) Where a state, after agreeing with the Corps consistency determination, subsequently attempts to reverse it's agreement for substantive reasons after the effective date of the NWP, the division engineer will review those reasons and consider whether there is substantial basis for suspension, modification, or revocation as outlined in 33 CFR 330.5. Otherwise, such attempted reversal is not effective and the Corps will consider the state CZMA consistency agreement to be valid for the NWP authorization until such time as the NWP is modified or reissued.

(8) Federal activities must be consistent with a state's Federally-approved coastal management program to the maximum extent practicable. Federal agencies should follow their own procedures and the Department of Commerce regulations appearing at 15 CFR Part 930 to meet the requirements of the CZMA. Therefore, the provisions of 33 CFR 330.4(d)(1)–(7) do not apply to Federal activities. Indian tribes doing work on Indian Reservation lands shall be treated in the same manner as Federal applicants.

(e) *Discretionary authority.* The Corps reserves the right (i.e., discretion) to modify, suspend, or revoke NWP authorizations. Modification means the imposition of additional or revised terms or conditions on the authorization. Suspension means the temporary cancellation of the authorization while a decision is made to either modify, revoke, or reinstate the authorization. Revocation means the cancellation of the authorization. The procedures for modifying, suspending, or revoking NWP authorizations are detailed in § 330.5.

(1) A division engineer may assert discretionary authority by modifying, suspending, or revoking NWP authorizations for a specific geographic area, class of activity, or class of waters within his division, including on a statewide basis, whenever he determines sufficient concerns for the environment under the section 404(b)(1) Guidelines or any other factor of the public interest so requires, or if he otherwise determines that the NWP would result in more than minimal adverse environmental effects either individually or cumulatively.

(2) A DE may assert discretionary authority by modifying, suspending, or revoking NWP authorization for a specific activity whenever he determines sufficient concerns for the environment or any other factor of the public interest so requires. Whenever the DE determines that a proposed specific activity covered by an NWP would have more than minimal individual or cumulative adverse effects on the environment or otherwise may be

contrary to the public interest, he must either modify the NWP authorization to reduce or eliminate the adverse impacts, or notify the prospective permittee that the proposed activity is not authorized by NWP and provide instructions on how to seek authorization under a regional general or individual permit.

(3) The division or district engineer will restore authorization under the NWPs at any time he determines that his reason for asserting discretionary authority has been satisfied by a condition, project modification, or new information.

(4) When the Chief of Engineers modifies or reissues an NWP, division engineers must use the procedures of § 330.5 to reassert discretionary authority to reinstate regional conditions or revocation of NWP authorizations for specific geographic areas, class of activities, or class of waters. Division engineers will update existing documentation for each NWP. Upon modification or reissuance of NWPs, previous activity-specific conditions or revocations of NWP authorization will remain in effect unless the DE specifically removes the activity-specific conditions or revocations.

(f) *Endangered species.* No activity is authorized by any NWP if that activity is likely to jeopardize the continued existence of a threatened or endangered species as listed or proposed for listing under the Federal Endangered Species Act (ESA), or to destroy or adversely modify the critical habitat of such species.

(1) Federal agencies should follow their own procedures for complying with the requirements of the ESA.

(2) Non-federal permittees shall notify the DE if any Federally listed (or proposed for listing) endangered or threatened species or critical habitat might be affected or is in the vicinity of the project. In such cases, the prospective permittee will not begin work under authority of the NWP until notified by the district engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized. If the DE determines that the activity may affect any Federally listed species or critical habitat, the DE must initiate section 7 consultation in accordance with the ESA. In such cases, the DE may:

(i) Initiate section 7 consultation and then, upon completion, authorize the activity under the NWP by adding, if appropriate, activity-specific conditions; or

(ii) Prior to or concurrent with section 7 consultation, assert discretionary authority (see 33 CFR 330.4(e)) and require an individual permit (see 33 CFR 330.5(d)).

(3) Prospective permittees are encouraged to obtain information on the location of threatened or endangered species and their critical habitats from the U.S. Fish and Wildlife Service, Endangered Species Office, and the National Marine Fisheries Service.

(g) *Historic properties.* No activity which may affect properties listed or properties eligible for listing in the National Register of Historic Places, is authorized until the DE has complied with the provisions of 33 CFR part 325, appendix C.

(1) Federal permittees should follow their own procedures for compliance with the requirements of the National Historic Preservation Act and other Federal historic preservation laws.

(2) Non-federal permittees will notify the DE if the activity may affect historic properties which the National Park Service has listed, determined eligible for listing, or which the prospective permittee has reason to believe may be eligible for listing, on the National Register of Historic Places. In such cases, the prospective permittee will not begin the proposed activity until notified by the DE that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. If a property in the permit area of the activity is determined to be an historic property in accordance with 33 CFR part 325, appendix C, the DE will take into account the effects on such properties in accordance with 33 CFR part 325, appendix C. In such cases, the district engineer may:

(i) After complying with the requirements of 33 CFR part 325, appendix C, authorize the activity under the NWP by adding, if appropriate, activity-specific conditions; or

(ii) Prior to or concurrent with complying with the requirements of 33 CFR part 325, appendix C, he may assert discretionary authority (see 33 CFR 330.4(e)) and instruct the prospective permittee of procedures to seek authorization under a regional general permit or an individual permit. (See 33 CFR 330.5(d).)

(3) The permittee shall immediately notify the DE if, before or during prosecution of the work authorized, he encounters an historic property that has not been listed or determined eligible for listing on the National Register, but which the prospective permittee has reason to believe may be eligible for listing on the National Register.

(4) Prospective permittees are encouraged to obtain information on the location of historic properties from the State Historic Preservation Officer and the National Register of Historic Places.

§ 330.5 Issuing, modifying, suspending, or revoking nationwide permits and authorizations.

(a) *General.* This section sets forth the procedures for issuing and reissuing NWPs and for modifying, suspending, or revoking NWPs and authorizations under NWPs.

(b) *Chief of Engineers.* (1) Anyone may, at any time, suggest to the Chief of Engineers, (ATTN: CECW–OR), any new NWPs or conditions for issuance, or changes to existing NWPs, which he believes to be appropriate for consideration. From time-to-time new NWPs and revocations of or modifications to existing NWPs will be evaluated by the Chief of Engineers following the procedures specified in this section. Within five years of issuance of the NWPs, the Chief of Engineers will review the NWPs and propose modification, revocation, or reissuance.

(2) *Public notice.* (i) Upon proposed issuance of new NWPs or modification, suspension, revocation, or reissuance of existing NWPs, the Chief of Engineers will publish a document seeking public comments, including the opportunity to request a public hearing. This document will also state that the information supporting the Corps' provisional determination that proposed activities comply with the requirements for issuance under general permit authority is available at the Office of the Chief of Engineers and at all district offices. The Chief of Engineers will prepare this information which will be supplemented, if appropriate, by division engineers.

(ii) Concurrent with the Chief of Engineers' notification of proposed, modified, reissued, or revoked NWPs, DEs will notify the known interested public by a notice issued at the district level. The notice will include proposed regional conditions or proposed revocations of NWP authorizations for specific geographic areas, classes of activities, or classes of waters, if any, developed by the division engineer.

(3) *Documentation.* The Chief of Engineers will prepare appropriate NEPA documents and, if applicable, section 404(b)(1) Guidelines compliance analyses for proposed NWPs. Documentation for existing NWPs will be modified to reflect any changes in these permits and to reflect the Chief of Engineers' evaluation of the use of the permit since the last issuance. Copies of all comments received on the document will be included in the administrative

record. The Chief of Engineers will consider these comments in making his decision on the NWPs, and will prepare a statement of findings outlining his views regarding each NWP and discussing how substantive comments were considered. The Chief of Engineers will also determine the need to hold a public hearing for the proposed NWPs.

(4) *Effective dates.* The Chief of Engineers will advise the public of the effective date of any issuance, modification, or revocation of an NWP.

(c) *Division Engineer.* (1) A division engineer may use his discretionary authority to modify, suspend, or revoke NWP authorizations for any specific geographic area, class of activities, or class of waters within his division, including on a statewide basis, by issuing a public notice or notifying the individuals involved. The notice will state his concerns regarding the environment or the other relevant factors of the public interest. Before using his discretionary authority to modify or revoke such NWP authorizations, division engineers will:

(i) Give an opportunity for interested parties to express their views on the proposed action (the DE will publish and circulate a notice to the known interested public to solicit comments and provide the opportunity to request a public hearing);

(ii) Consider fully the views of affected parties;

(iii) Prepare supplemental documentation for any modifications or revocations that may result through assertion of discretionary authority. Such documentation will include comments received on the district public notices and a statement of findings showing how substantive comments were considered;

(iv) Provide, if appropriate, a grandfathering period as specified in § 330.6(b) for those who have commenced work or are under contract to commence in reliance on the NWP authorization; and

(v) Notify affected parties of the modification, suspension, or revocation, including the effective date (the DE will publish and circulate a notice to the known interested public and to anyone who commented on the proposed action).

(2) The modification, suspension, or revocation of authorizations under an NWP by the division engineer will become effective by issuance of public notice or a notification to the individuals involved.

(3) A copy of all regional conditions imposed by division engineers on activities authorized by NWPs will be forwarded to the Office of the Chief of Engineers, ATTN: CECW–OR.

(d) *District Engineer.* (1) When deciding whether to exercise his discretionary authority to modify, suspend, or revoke a case specific activity's authorization under an NWP, the DE should consider to the extent relevant and appropriate: Changes in circumstances relating to the authorized activity since the NWP itself was issued or since the DE confirmed authorization under the NWP by written verification; the continuing need for, or adequacy of, the specific conditions of the authorization; any significant objections to the authorization not previously considered; progress inspections of individual activities occurring under an NWP; cumulative adverse environmental effects resulting from activities occurring under the NWP; the extent of the permittee's compliance with the terms and conditions of the NWPs; revisions to applicable statutory or regulatory authorities; and, the extent to which asserting discretionary authority would adversely affect plans, investments, and actions the permittee has made or taken in reliance on the permit; and, other concerns for the environment, including the aquatic environment under the section 404(b)(1) Guidelines, and other relevant factors of the public interest.

(2) *Procedures.* (i) When considering whether to modify or revoke a specific authorization under an NWP, whenever practicable, the DE will initially hold informal consultations with the permittee to determine whether special conditions to modify the authorization would be mutually agreeable or to allow the permittee to furnish information which satisfies the DE's concerns. If a mutual agreement is reached, the DE will give the permittee written verification of the authorization, including the special conditions. If the permittee furnishes information which satisfies the DE's concerns, the permittee may proceed. If appropriate, the DE may suspend the NWP authorization while holding informal consultations with the permittee.

(ii) If the DE's concerns remain after the informal consultation, the DE may suspend a specific authorization under an NWP by notifying the permittee in writing by the most expeditious means available that the authorization has been suspended, stating the reasons for the suspension, and ordering the permittee to stop any activities being done in reliance upon the authorization under the NWP. The permittee will be advised that a decision will be made either to reinstate or revoke the authorization under the NWP; or, if appropriate, that the authorization under the NWP may be modified by mutual agreement. The permittee will also be advised that within 10 days of receipt of the notice of suspension, he may request a meeting with the DE, or his designated representative, to present information in this matter. After completion of the meeting (or within a reasonable period of time after suspending the authorization if no meeting is requested), the DE will take action to reinstate, modify, or revoke the authorization.

(iii) Following completion of the suspension procedures, if the DE determines that sufficient concerns for the environment, including the aquatic environment under the section 404(b)(1) Guidelines, or other relevant factors of the public interest so require, he will revoke authorization under the NWP. The DE will provide the permittee a written final decision and instruct him on the procedures to seek authorization under a regional general permit or an individual permit.

(3) The DE need not issue a public notice when asserting discretionary authority over a specific activity. The modification, suspension, or revocation will become effective by notification to the prospective permittee.

§ 330.6 Authorization by nationwide permit.

(a) *Nationwide permit verification.* (1) Nationwide permittees may, and in some cases must, request from a DE confirmation that an activity complies with the terms and conditions of an NWP. DEs should respond as promptly as practicable to such requests.

(2) If the DE decides that an activity does not comply with the terms or conditions of an NWP, he will notify the person desiring to do the work and instruct him on the procedures to seek authorization under a regional general permit or individual permit.

(3) If the DE decides that an activity does comply with the terms and conditions of an NWP, he will notify the nationwide permittee.

(i) The DE may add conditions on a case-by-case basis to clarify compliance with the terms and conditions of an NWP or to ensure that the activity will have only minimal individual and cumulative adverse effects on the environment, and will not be contrary to the public interest.

(ii) The DE's response will state that the verification is valid for a specific period of time (generally but no more than two years) unless the NWP authorization is modified, suspended, or revoked. The response should also

include a statement that the verification will remain valid for the specified period of time, if during that time period, the NWP authorization is reissued without modification or the activity complies with any subsequent modification of the NWP authorization. Furthermore, the response should include a statement that the provisions of § 330.6(b) will apply, if during that period of time, the NWP authorization expires, or is suspended or revoked, or is modified, such that the activity would no longer comply with the terms and conditions of an NWP. Finally, the response should include any known expiration date that would occur during the specified period of time. A period of time less than two years may be used if deemed appropriate.

(iii) For activities where a state has denied 401 water quality certification and/or did not agree with the Corps consistency determination for an NWP the DE's response will state that the proposed activity meets the terms and conditions for authorization under the NWP with the exception of a state 401 water quality certification and/or CZM consistency concurrence. The response will also indicate the activity is denied without prejudice and cannot be authorized until the requirements of §§ 330.4(c)(3), 330.4(c)(6), 330.4(d)(3), and 330.4(d)(6) are satisfied. The response will also indicate that work may only proceed subject to the terms and conditions of the state 401 water quality certification and/or CZM concurrence.

(iv) Once the DE has provided such verification, he must use the procedures of 33 CFR 330.5 in order to modify, suspend, or revoke the authorization.

(b) *Expiration of nationwide permits.* The Chief of Engineers will periodically review NWPs and their conditions and will decide to either modify, reissue, or revoke the permits. If an NWP is not modified or reissued within five years of its effective date, it automatically expires and becomes null and void. Activities which have commenced (i.e, are under construction) or are under contract to commence in reliance upon an NWP will remain authorized provided the activity is completed within twelve months of the date of an NWP's expiration, modification, or revocation, unless discretionary authority has been exercised on a case-by-case basis to modify, suspend, or revoke the authorization in accordance with 33 CFR 330.4(e) and 33 CFR 330.5 (c) or (d). Activities completed under the authorization of an NWP which was in effect at the time the activity was completed continue to be authorized by that NWP.

(c) *Multiple use of nationwide permits.* Two or more different NWPs can be combined to authorize a "single and complete project" as defined at 33 CFR 330.2(i). However, the same NWP cannot be used more than once for a single and complete project.

(d) *Combining nationwide permits with individual permits.* Subject to the following qualifications, portions of a larger project may proceed under the authority of the NWPs while the DE evaluates an individual permit application for other portions of the same project, but only if the portions of the project qualifying for NWP authorization would have independent utility and are able to function or meet their purpose independent of the total project. When the functioning or usefulness of a portion of the total project qualifying for an NWP is dependent on the remainder of the project, such that its construction and use would not be fully justified even if the Corps were to deny the individual permit, the NWP does not apply and all portions of the project must be evaluated as part of the individual permit process.

(1) When a portion of a larger project is authorized to proceed under an NWP, it is with the understanding that its construction will in no way prejudice the decision on the individual permit for the rest of the project. Furthermore, the individual permit documentation must include an analysis of the impacts of the entire project, including related activities authorized by NWP.

(2) NWPs do not apply, even if a portion of the project is not dependent on the rest of the project, when any portion of the project is subject to an enforcement action by the Corps or EPA.

(e) *After-the-fact authorizations.* These authorizations often play an important part in the resolution of violations. In appropriate cases where the activity complies with the terms and conditions of an NWP, the DE can elect to use the NWP for resolution of an after-the-fact permit situation following a consideration of whether the violation being resolved was knowing or intentional and other indications of the need for a penalty. For example, where an unauthorized fill meets the terms and conditions of NWP 13, the DE can consider the appropriateness of allowing the residual fill to remain, in situations where said fill would normally have been permitted under NWP 13. A knowing, intentional, willful violation should be the subject of an enforcement action leading to a penalty, rather than an after-the-fact authorization. Use of after-the-fact NWP authorization must be consistent with the terms of the Army/EPA Memorandum of Agreement on Enforcement. Copies are available from each district engineer.

Appendix A to Part 330—Nationwide Permits and Conditions

A. Index of the Nationwide Permits and Conditions

Nationwide Permits

Nationwide Permit Conditions

General Conditions

Section 404 Only Conditions

1. Water Supply Intakes
2. Shellfish Production
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B. Nationwide Permits

1. *Aids to Navigation.* The placement of aids to navigation and regulatory markers which are approved by and installed in accordance with the requirements of the U.S. Coast Guard. (See 33 CFR part 66, chapter I, subchapter C). (section 10)

2. *Structures in Artificial Canals.* Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR 322.5(g)). (section 10)

3. *Maintenance.* The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area including those due to changes in materials, construction techniques, or current construction codes or safety standards which are necessary to make repair, rehabilitation, or replacement are permitted, provided the environmental impacts resulting from such repair, rehabilitation, or replacement are minimal. Currently serviceable means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction. This nationwide permit authorizes the repair, rehabilitation, or replacement of those structures destroyed by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced or under contract to commence within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the District Engineer, provided the permittee can demonstrate funding, contract, or other similar delays. Maintenance dredging and beach restoration are not authorized by this nationwide permit. (sections 10 and 404)

4. *Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.* Fish and wildlife harvesting devices and activities such as pound nets, crab traps, crab dredging, eel pots, lobster traps, duck blinds, clam and oyster digging; and small fish attraction devices such as open water fish concentrators (sea kites, etc). This nationwide permit authorizes shellfish seeding provided this activity does not occur in wetlands or vegetated shallows. This nationwide permit does not authorize artificial reefs or impoundments and semi-impoundments of waters of the United States for the culture or holding of motile species such as lobster. (sections 10 and 404)

5. *Scientific Measurement Devices.* Staff gages, tide gages, water recording devices, water quality testing and improvement devices and similar structures. Small weirs and flumes constructed primarily to record water quantity and velocity are also authorized provided the discharge is limited to 25 cubic yards and further for discharges of 10 to 25 cubic yards provided the permittee notifies the district engineer in accordance with "Notification" general condition. (sections 10 and 404)

6. *Survey Activities.* Survey activities including core sampling, seismic exploratory operations, and plugging of seismic shot holes and other exploratory-type bore holes. Drilling and the discharge of excavated material from test wells for oil and gas exploration is not authorized by this nationwide permit; the plugging of such wells is authorized. Fill placed for roads, pads and other similar activities is not authorized by this nationwide permit. The discharge of drilling muds and cuttings may require a permit under section 402 of the Clean Water Act. (sections 10 and 404)

7. *Outfall Structures.* Activities related to construction of outfall structures and associated intake structures where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted, or are otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System program (section 402 of the Clean Water Act), provided that the nationwide permittee notifies the district engineer in accordance with the "Notification" general condition. (Also see 33 CFR 330.1(e)). Intake structures per se are not included—only those directly associated with an outfall structure. (sections 10 and 404)

8. *Oil and Gas Structures.* Structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of the Interior, Minerals Management Service. Such structures shall not be placed within the limits of any designated shipping safety fairway or traffic separation scheme, except temporary anchors that comply with the fairway regulations in 33 CFR 322.5(l). (Where such limits have not been designated, or where changes are anticipated, district engineers will consider asserting discretionary authority in accordance with 33 CFR 330.4(e) and will also review such proposals to ensure they comply with the provisions of the fairway regulations in 33 CFR 322.5(l)). Such structures will not be placed in established danger zones or restricted areas as designated in 33 CFR part 334: nor will such structures be permitted in EPA or Corps designated dredged material disposal areas. (section 10)

9. *Structures in Fleeting and Anchorage Areas.* Structures, buoys, floats, and other devices placed within anchorage or fleeting areas to facilitate moorage of vessels where such areas have been established for that purpose by the U.S. Coast Guard. (section 10)

10. *Mooring Buoys.* Non-commercial, single-boat, mooring buoys. (section 10)

11. *Temporary Recreational Structures.* Temporary buoys, markers, small floating docks, and similar structures placed for recreational use during specific events such as water skiing competitions and boat races or seasonal use provided that such structures are removed within 30 days after use has been discontinued. At Corps of Engineers reservoirs, the reservoir manager must approve each buoy or marker individually. (section 10)

12. *Utility Line Backfill and Bedding.* Discharges of material for backfill or bedding for utility lines, including outfall and intake structures, provided there is no change in preconstruction contours. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquefiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication. The term "utility line" does not include activities which drain a water of the United States, such as drainage tile, however, it does apply to pipes conveying drainage from another area. Material resulting from trench excavation may be temporarily sidecast (up to three months) into waters of the United States provided that the material is not placed in such a manner that it is

dispersed by currents or other forces. The DE may extend the period of temporary side-casting up to 180 days, where appropriate. The area of waters of the United States that is disturbed must be limited to the minimum necessary to construct the utility line. In wetlands, the top 6" to 12" of the trench should generally be backfilled with topsoil from the trench. Excess material must be removed to upland areas immediately upon completion of construction. Any exposed slopes and streambanks must be stabilized immediately upon completion of the utility line. The utility line itself will require a Section 10 permit if in navigable waters of the United States. (See 33 CFR part 322). (section 404)

13. *Bank Stabilization.* Bank stabilization activities necessary for erosion prevention provided:

a. No material is placed in excess of the minimum needed for erosion protection;

b. The bank stabilization activity is less than 500 feet in length;

c. The activity will not exceed an average of one cubic yard per running foot placed along the bank below the plane of the ordinary high water mark or the high tide line;

d. No material is placed in any special aquatic site, including wetlands;

e. No material is of the type or is placed in any location or in any manner so as to impair surface water flow into or out of any wetland area;

f. No material is placed in a manner that will be eroded by normal or expected high flows (properly anchored trees and treetops may be used in low energy areas); and,

g. The activity is part of a single and complete project.

Bank stabilization activities in excess of 500 feet in length or greater than an average of one cubic yard per running foot may be authorized if the permittee notifies the district engineer in accordance with the "Notification" general condition and the district engineer determines the activity complies with the other terms and conditions of the nationwide permit and the adverse environmental impacts are minimal both individually and cumulatively. (sections 10 and 404)

14. *Road Crossing.* Fills for roads crossing waters of the United States (including wetlands and other special aquatic sites) provided:

a. The width of the fill is limited to the minimum necessary for the actual crossing;

b. The fill placed in waters of the United States is limited to a filled area of no more than ⅓ acre. Furthermore, no more than a total of 200 linear feet of the fill for the roadway can occur in special aquatic sites, including wetlands;

c. The crossing is culverted, bridged or otherwise designed to prevent the restriction of, and to withstand, expected high flows and tidal flows, and to prevent the restriction of low flows and the movement of aquatic organisms;

d. The crossing, including all attendant features, both temporary and permanent, is part of a single and complete project for crossing of a water of the United States; and,

e. For fills in special aquatic sites, including wetlands, the permittee notifies the district engineer in accordance with the "Notification" general condition. The notification must also include a delineation of affected special aquatic sites, including wetlands.

Some road fills may be eligible for an exemption from the need for a Section 404 permit altogether (see 33 CFR 323.4). Also, where local circumstances indicate the need, district engineers will define the term "expected high flows" for the purpose of establishing applicability of this nationwide permit. (sections 10 and 404)

15. *U.S. Coast Guard Approved Bridges.* Discharges of dredged or fill material incidental to the construction of bridges across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills provided such discharges have been authorized by the U.S. Coast Guard as part of the bridge permit. Causeways and approach fills are not included in this nationwide permit and will require an individual or regional section 404 permit. (section 404)

16. *Return Water From Upland Contained Disposal Areas.* Return water from an upland, contained dredged material disposal area. The dredging itself requires a section 10 permit if located in navigable waters of the United States. The return water from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d) even though the disposal itself occurs on the upland and thus does not require a section 404 permit. This nationwide permit satisfies the technical requirement for a section 404 permit for the return water where the quality of the return water is controlled by the state through the section 401 certification procedures. (section 404)

17. *Hydropower Projects.* Discharges of dredged or fill material associated with (a) small hydropower projects at existing reservoirs where the project, which includes the fill, is licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; and has a total generating capacity of not more than 5000 KW; and the permittee notifies the district engineer in accordance with the "Notification" general condition; or (b) hydropower projects for which the FERC has granted an exemption from licensing pursuant to section 408 of the Energy Security Act of 1980 (16 U.S.C. 2705 and 2708) and section 30 of the Federal Power Act, as amended; provided the permittee notifies the district engineer in accordance with the "Notification" general condition. (section 404)

18. *Minor Discharges.* Minor discharges of dredged or fill material into all waters of the United States provided:

a. The discharge does not exceed 25 cubic yards;

b. The discharge will not cause the loss of more than 1/10 acre of a special aquatic site, including wetlands. For the purposes of this nationwide permit, the acreage limitation includes the filled area plus special aquatic sites that are adversely affected by flooding and special aquatic sites that are drained so that they would no longer be a water of the United States as a result of the project;

c. If the discharge exceeds 10 cubic yards or the discharge is in a special aquatic site, including wetlands, the permittee notifies the district engineer in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. (Also see 33 CFR 330.1(e)); and

d. The discharge, including all attendant features, both temporary and permanent, is part of a single and complete project and is not placed for the purpose of stream diversion. (sections 10 and 404)

19. *Minor Dredging.* Dredging of no more than 25 cubic yards below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the United States as part of a single and complete project. This nationwide permit does not authorize the dredging or degradation through siltation of coral reefs, submerged aquatic vegetation, anadromous fish spawning areas, or wetlands or, the connection of canals or other artificial waterways to navigable waters of the United States (see 33 CFR 322.5(g)). (section 10)

20. *Oil Spill Cleanup.* Activities required for the containment and

cleanup of oil and hazardous substances which are subject to the National Oil and Hazardous Substances Pollution Contingency Plan, (40 CFR part 300), provided that the work is done in accordance with the Spill Control and Countermeasure Plan required by 40 CFR 112.3 and any existing State contingency plan and provided that the Regional Response Team (if one exists in the area) concurs with the proposed containment and cleanup action. (sections 10 and 404)

21. *Surface Coal Mining Activities.* Activities associated with surface coal mining activities provided they are authorized by the Department of the Interior, Office of Surface Mining, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 and provided the permittee notifies the district engineer in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. (Also see 33 CFR 330.1(e)). (sections 10 and 404)

22. *Removal of Vessels.* Temporary structures or minor discharges of dredged or fill material required for the removal of wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This nationwide permit does not authorize the removal of vessels listed or determined eligible for listing on the National Register of Historic Places unless the district engineer is notified and indicates that there is compliance with the "Historic Properties" general condition. This nationwide permit does not authorize maintenance dredging, shoal removal, or river bank snagging. Vessel disposal in waters of the United States may need a permit from EPA (see 40 CFR 229.3). (sections 10 and 404)

23. *Approved Categorical Exclusions.* Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where that agency or department has determined, pursuant to the Council on Environmental Quality Regulation for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR part 1500 et seq.), that the activity, work, or discharge is categorically excluded from environmental documentation because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment, and the Office of the Chief of Engineers (ATTN: CECW–OR) has been furnished notice of the agency's or department's application for the categorical exclusion and concurs with that determination. Prior to approval for purposes of this nationwide permit of any agency's categorical exclusions, the Chief of Engineers will solicit public comment. In addressing these comments, the Chief of Engineers may require certain conditions for authorization of an agency's categorical exclusions under this nationwide permit. (sections 10 and 404)

24. *State Administered Section 404 Program.* Any activity permitted by a state administering its own section 404 permit program pursuant to 33 U.S.C. 1344(g)–(l) is permitted pursuant to section 10 of the Rivers and Harbors Act of 1899. Those activities which do not involve a section 404 state permit are not included in this nationwide permit, but certain structures will be exempted by section 154 of Public Law 94–587, 90 Stat. 2917 (33 U.S.C. 59l) (see 33 CFR 322.3(a)(2)). (section 10)

25. *Structural Discharge.* Discharges of material such as concrete, sand, rock, etc. into tightly sealed forms or cells where the material will be used as a structural member for standard pile supported structures, such as piers and docks; and for linear projects, such as bridges, transmission line footings, and walkways. The NWP does *not* authorize filled structural members that would support buildings, homes, parking areas, storage areas and other such structures. Housepads or other building pads are also not included in this nationwide permit. The structure itself may require a section 10 permit if located in navigable waters of the United States. (section 404)

26. *Headwaters and Isolated Waters Discharges.* Discharges of dredged or fill material into headwaters and isolated waters provided:

a. The discharge does not cause the loss of more than 10 acres of waters of the United States;

b. The permittee notifies the district engineer if the discharge would cause the loss of waters of the United States greater than one acre in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. (Also see 33 CFR 330.1(e)); and

c. The discharge, including all attendant features, both temporary and permanent, is part of a single and complete project.

For the purposes of this nationwide permit, the acreage of loss of waters of the United States includes the filled area plus waters of the United States that are adversely affected by flooding, excavation or drainage as a result of the project. The ten-acre and one-acre limits of NWP 26 are absolute, and cannot be increased by any mitigation plan offered by the applicant or required by the DE.

Subdivisions: For any real estate subdivision created or subdivided after October 5, 1984, a notification pursuant to subsection b. of this nationwide permit is required for any discharge which would cause the aggregate total loss of waters of the United States for the entire subdivision to exceed one (1) acre. Any discharge in any real estate subdivision which would cause the aggregate total loss of waters of the United States in the subdivision to exceed ten (10) acres is not authorized by this nationwide permit; unless the DE exempts a particular subdivision or parcel by making a written determination that: (1) The individual and cumulative adverse environmental effects would be minimal and the property owner had, after October 5, 1984, but prior to January 21, 1992, committed substantial resources in reliance on NWP 26 with regard to a subdivision, in circumstances where it would be inequitable to frustrate his investment-backed expectations, or (2) that the individual and cumulative adverse environmental effects would be minimal, high quality wetlands would not be adversely affected, and there would be an overall benefit to the aquatic environment. Once the exemption is established for a subdivision, subsequent lot development by individual property owners may proceed using NWP 26. For purposes of NWP 26, the term "real estate subdivision" shall be interpreted to include circumstances where a landowner or developer divides a tract of land into smaller parcels for the purpose of selling, conveying, transferring, leasing, or developing said parcels. This would include the entire area of a residential, commercial or other real estate subdivision, including all parcels and parts thereof. (section 404)

27. *Wetland and Riparian Restoration and Creation Activities.* Activities in waters of the United States associated with the restoration of altered and degraded non-tidal wetlands and creation of wetlands on private lands in accordance with the terms and conditions of a binding wetland restoration or creation agreement between the landowner and the U.S. Fish and Wildlife Service (USFWS) or the Soil Conservation Service (SCS); or

activities associated with the restoration of altered and degraded non-tidal wetlands, riparian areas and creation of wetlands and riparian areas on U.S. Forest Service and Bureau of Land Management lands, Federal surplus lands (e.g., military lands proposed for disposal), Farmers Home Administration inventory properties, and Resolution Trust Corporation inventory properties that are under Federal control prior to being transferred to the private sector. Such activities include, but are not limited to: Installation and maintenance of small water control structures, dikes, and berms; backfilling of existing drainage ditches; removal of existing drainage structures; construction of small nesting islands; and other related activities. This nationwide permit applies to restoration projects that serve the purpose of restoring "natural" wetland hydrology, vegetation, and function to altered and degraded non-tidal wetlands and "natural" functions of riparian areas. For agreement restoration and creation projects only, this nationwide permit also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its prior condition and use (i.e., prior to restoration under the agreement) within five years after expiration of the limited term wetland restoration or creation agreement, even if the discharge occurs after this nationwide permit expires. The prior condition will be documented in the original agreement, and the determination of return to prior conditions will be made by the Federal agency executing the agreement. Once an area is reverted back to its prior physical condition, it will be subject to whatever the Corps regulatory requirements will be at that future date. This nationwide permit does not authorize the conversion of natural wetlands to another aquatic use, such as creation of waterfowl impoundments where a forested wetland previously existed. (sections 10 and 404)

28. *Modifications of Existing Marinas.* Reconfigurations of existing docking facilities within an authorized marina area. No dredging, additional slips or dock spaces, or expansion of any kind within waters of the United States are authorized by this nationwide permit. (section 10)

29. Reserved

30. Reserved

31. Reserved

32. *Completed Enforcement Actions.* Any structure, work or discharge of dredged or fill material undertaken in accordance with, or remaining in place in compliance with, the terms of a final Federal court decision, consent decree, or settlement agreement in an enforcement action brought by the United States under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899. (sections 10 and 404)

33. *Temporary Construction, Access and Dewatering.* Temporary structures and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites; provided the associated permanent activity was previously authorized by the Corps of Engineers or the U.S. Coast Guard, or for bridge construction activities not subject to Federal regulation. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must be of materials and placed in a manner that will not be eroded by expected high flows. Temporary fill must be entirely removed to upland areas following completion of the construction activity and the affected areas restored to the pre-project conditions. Cofferdams cannot be used to dewater wetlands or other aquatic areas so as to change their use. Structures left in place after cofferdams are removed require a section 10 permit if located in navigable waters of the United States. (See 33 CFR part 322). The permittee must notify the district engineer in accordance with the "Notification" general condition. The notification must also include a restoration plan of reasonable measures to avoid and minimize impacts to aquatic resources. The district engineer will add special conditions, where necessary, to ensure that adverse environmental impacts are minimal. Such conditions may include: limiting the temporary work to the minimum necessary; requiring seasonal restrictions; modifying the restoration plan; and requiring alternative construction methods (e.g. construction mats in wetlands where practicable). This nationwide permit does not authorize temporary structures or fill associated with mining activities or the construction of marina basins which have not been authorized by the Corps. (sections 10 and 404)

34. *Cranberry Production Activities:* Discharges of dredged or fill material for dikes, berms, pumps, water control structures or leveling of cranberry beds associated with expansion, enhancement, or modification activities at existing cranberry production operations provided:

a. The cumulative total acreage of disturbance per cranberry production operation, including but not limited to, filling, flooding, ditching, or clearing, does not exceed 10 acres of waters of the United States, including wetlands;

b. The permittee notifies the District Engineer in accordance with the notification procedures; and

c. The activity does not result in a net loss of wetland acreage.

This nationwide permit does not authorize any discharge of dredged or fill material related to other cranberry production activities such as warehouses, processing facilities, or parking areas. For the purposes of this nationwide permit, the cumulative total of 10 acres will be measured over the period that this nationwide permit is valid. (section 404)

35. *Maintenance Dredging of Existing Basins.* Excavation and removal of accumulated sediment for maintenance of existing marina basins, canals, and boat slips to previously authorized depths or controlling depths for ingress/egress whichever is less provided the dredged material is disposed of at an upland site and proper siltation controls are used. (section 10)

36. *Boat Ramps.* Activities required for the construction of boat ramps provided:

a. The discharge into waters of the United States does not exceed 50 cubic yards of concrete, rock, crushed stone or gravel into forms, or placement of pre-cast concrete planks or slabs. (Unsuitable material that causes unacceptable chemical pollution or is structurally unstable is not authorized);

b. The boat ramp does not exceed 20 feet in width;

c. The base material is crushed stone, gravel or other suitable material;

d. The excavation is limited to the area necessary for site preparation and all excavated material is removed to the upland; and

e. No material is placed in special aquatic sites, including wetlands.

Dredging to provide access to the boat ramp may be authorized by another NWP, regional general permit, or individual permit pursuant to section 10 if located in navigable waters of the United States. (sections 10 and 404)

37. *Emergency Watershed Protection and Rehabilitation.* Work done by or funded by the Soil Conservation Service qualifying as an "exigency" situation (requiring immediate action) under its Emergency Watershed Protection Program (7 CFR part 624) and work done or funded by the Forest Service under its Burned-Area Emergency Rehabilitation Handbook (FSH 509.13) provided the district engineer is notified in accordance with the notification general

condition. (Also see 33 CFR 330.1(e)). (sections 10 and 404)

38. *Cleanup of Hazardous and Toxic Waste.* Specific activities required to effect the containment, stabilization or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority provided the permittee notifies the district engineer in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. Court ordered remedial action plans or related settlements are also authorized by this nationwide permit. This nationwide permit does not authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste. (sections 10 and 404)

39. Reserved

40. *Farm Buildings.* Discharges of dredged or fill material into jurisdictional wetlands (but not including prairie potholes, playa lakes, or vernal pools) that were in agricultural crop production prior to December 23, 1985 (i.e., farmed wetlands) for foundations and building pads for buildings or agricultural related structures necessary for farming activities. The discharge will be limited to the minimum necessary but will in no case exceed 1 acre (see the "Minimization" section 404 only condition). (section 404)

C. Nationwide Permit Conditions

General Conditions: The following general conditions must be followed in order for any authorization by a nationwide permit to be valid:

1. *Navigation.* No activity may cause more than a minimal adverse effect on navigation.

2. *Proper maintenance.* Any structure or fill authorized shall be properly maintained, including maintenance to ensure public safety.

3. *Erosion and siltation controls.* Appropriate erosion and siltation controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills must be permanently stabilized at the earliest practicable date.

4. *Aquatic life movements.* No activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody, including those species which normally migrate through the area, unless the activity's primary purpose is to impound water.

5. *Equipment.* Heavy equipment working in wetlands must be placed on mats or other measures must be taken to minimize soil disturbance.

6. *Regional and case-by-case conditions.* The activity must comply with any regional conditions which may have been added by the division engineer (see 33 CFR 330.4(e)) and any case specific conditions added by the Corps.

7. *Wild and Scenic Rivers.* No activity may occur in a component of the National Wild and Scenic River System; or in a river officially designated by Congress as a "study river" for possible inclusion in the system, while the river is in an official study status. Information on Wild and Scenic Rivers may be obtained from the National Park Service and the U.S. Forest Service.

8. *Tribal rights.* No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

9. *Water quality certification.* In certain states, an individual state water quality certification must be obtained or waived (see 33 CFR 330.4(c)).

10. *Coastal zone management.* In certain states, an individual state coastal zone management consistency concurrence must be obtained or waived. (see 33 CFR 330.4(d)).

11. *Endangered Species.* No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act, or which is likely to destroy or adversely modify the critical habitat of such species. Non-federal permittees shall notify the district engineer if any listed species or critical habitat might be affected or is in the vicinity of the project and shall not begin work on the activity until notified by the district engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized. Information on the location of threatened and endangered species and their critical habitat can be obtained from the U.S. Fish and Wildlife Service and National Marine Fisheries Service. (see 33 CFR 330.4(f))

12. *Historic properties.* No activity which may affect Historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized, until the DE has complied with the provisions of 33 CFR 325, appendix C. The prospective permittee must notify the district engineer if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the National Register of Historic Places, and shall not begin the activity until notified by the District Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the State Historic Preservation Office and the National Register of Historic Places (see 33 CFR 330.4(g)).

13. *Notification.* (a) Where required by the terms of the NWP, the prospective permittee must notify the District Engineer as early as possible and shall not begin the activity:

(1) Until notified by the District Engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or

(2) If notified by the District or Division engineer that an individual permit is required; or

(3) Unless 30 days have passed from the District Engineer's receipt of the notification and the prospective permittee has not received notice from the District or Division Engineer. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) The notification must be in writing and include the following information and any required fees:

(1) Name, address and telephone number of the prospective permittee;

(2) Location of the proposed project;

(3) Brief description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; any other NWP(s), regional general permit(s) or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity;

(4) Where required by the terms of the NWP, a delineation of affected special aquatic sites, including wetlands; and

(5) A statement that the prospective permittee has contacted:

(i) The USFWS/NMFS regarding the presence of any Federally listed (or proposed for listing) endangered or threatened species or critical habitat in the permit area that may be affected by the proposed project; and any available information provided by those agencies. (The prospective permittee may contact Corps District Offices for USFWS/NMFS agency contacts and lists of critical habitat.)

(ii) The SHPO regarding the presence of any historic properties in the permit area that may be affected by the proposed project; and the available information, if any, provided by that agency.

(c) The standard individual permit application form (Form ENG 4345) may be used as the notification but must clearly indicate that it is a PDN and must include all of the information required in (b) (1)–(5) of General Condition 13.

(d) In reviewing an activity under the notification procedure, the District Engineer will first determine whether the activity will result in more than minimal individual or cumulative adverse environmental effects or will be contrary to the public interest. The prospective permittee may, at his option, submit a proposed mitigation plan with the predischarge notification to expedite the process and the District Engineer will consider any optional mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed work are minimal. The District Engineer will consider any comments from Federal and State agencies concerning the proposed activity's compliance with the terms and conditions of the nationwide permits and the need for mitigation to reduce the project's adverse environmental effects to a minimal level. The district engineer will upon receipt of a notification provide immediately (e.g. facsimile transmission, overnight mail or other expeditious manner) a copy to the appropriate offices of the Fish and Wildlife Service, State natural resource or water quality agency, EPA, and, if appropriate, the National Marine Fisheries Service. With the exception of NWP 37, these agencies will then have 5 calendar days from the date the material is transmitted to telephone the District Engineer if they intend to provide substantive, site-specific comments. If so contacted by an agency, the District Engineer will wait an additional 10 calendar days before making a decision on the notification. The District Engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency. The District Engineer will indicate in the administrative record associated with each notification that the resource agencies' concerns were considered. Applicants are encouraged to provide the Corps multiple copies of notifications to expedite agency notification. If the District Engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects are minimal, he will notify the permittee and include any conditions he deems necessary. If the District Engineer determines that the adverse effects of the proposed work are more than minimal, then he will notify the applicant either: (1) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; or (2) that the project is authorized under the nationwide permit subject to the applicant's submitting a mitigation proposal that would reduce the adverse effects to the minimal level. This mitigation proposal must be approved by the District Engineer prior to commencing work. If the prospective permittee elects to submit a mitigation plan, the DE will expeditiously review the proposed mitigation plan, but will not commence a second 30-day notification procedure. If the net adverse effects of the project (with the mitigation proposal) are determined by the District Engineer to be minimal, the District Engineer will provide a timely written response to the applicant informing him that the project can proceed under the terms and conditions of the nationwide permit.

(e) *Wetlands Delineations:* Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic site. There may be some delay if the Corps does the delineation. Furthermore, the 30-day period will not start until the wetland delineation has been completed.

(f) *Mitigation:* Factors that the District Engineer will consider when determining the acceptability of appropriate and practicable mitigation include, but are not limited to:

(1) To be practicable the mitigation must be available and capable of being done considering costs, existing technology, and logistics in light of overall project purposes;

(2) To the extent appropriate, permittees should consider mitigation banking and other forms of mitigation including contributions to wetland trust funds, which contribute to the restoration, creation, replacement, enhancement, or preservation of wetlands.

Furthermore, examples of mitigation that may be appropriate and practicable include but are not limited to: reducing the size of the project; establishing buffer zones to protect aquatic resource values; and replacing the loss of aquatic resource values by creating, restoring, and enhancing similar functions and values. In addition, mitigation must address impacts and cannot be used to offset the acreage of wetland losses that would occur in order to meet the acreage limits of some of the nationwide permits (e.g. 5 acres of wetlands cannot be created to change a 6 acre loss of wetlands to a 1 acre loss; however, the 5 created acres can be used to reduce the impacts of the 6 acre loss).

Section 404 Only Conditions

In addition to the General Conditions, the following conditions apply only to activities that involve the discharge of dredged or fill material and must be followed in order for authorization by the nationwide permits to be valid:

1. *Water supply intakes.* No discharge of dredged or fill material may occur in the proximity of a public water supply intake except where the discharge is for repair of the public water supply intake structures or adjacent bank stabilization.

2. *Shellfish production.* No discharge of dredged or fill material may occur in areas of concentrated shellfish production, unless the discharge is directly related to a shellfish harvesting activity authorized by nationwide permit 4.

3. *Suitable material.* No discharge of dredged or fill material may consist of unsuitable material (e.g., trash, debris, car bodies, etc.) and material discharged must be free from toxic pollutants in toxic amounts (see section 307 of the Clean Water Act).

4. *Mitigation.* Discharges of dredged or fill material into waters of the United States must be minimized or avoided to the maximum extent practicable at the project site (i.e. on-site), unless the DE has approved a compensation mitigation plan for the specific regulated activity.

5. *Spawning areas.* Discharges in spawning areas during spawning seasons must be avoided to the maximum extent practicable.

6. *Obstruction of high flows.* To the maximum extent practicable, discharges must not permanently restrict or impede the passage of normal or expected high flows or cause the relocation of the water (unless the primary purpose of the fill is to impound waters).

7. *Adverse impacts from impoundments.* If the discharge creates an impoundment of water, adverse impacts on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow shall be minimized to the maximum extent practicable.

8. *Waterfowl breeding areas.* Discharges into breeding areas for

migratory waterfowl must be avoided to the maximum extent practicable.

9. *Removal of temporary fills.* Any temporary fills must be removed in their entirety and the affected areas returned to their preexisting elevation.

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November 22, 1991

Part IV

Department of Housing and Urban Development

Office of the Secretary

24 CFR Part 207 et al.

Smoke Detectors for HUD-Assisted or Insured Rental Housing and Public and Indian Housing; Proposed Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

24 CFR Parts 207, 213, 215, 220, 221, 231, 232, 234, 236, 242, 880, 881, 882, 883, 884, 885, 886, 887, and 965

[Docket No. R-91-1567; FR-3081-P-01]

RIN 2502-AF59

Smoke Detectors for HUD-Assisted or Insured Rental Housing and Public and Indian Housing

AGENCY: Office of the Secretary, HUD.

ACTION: Proposed rule.

SUMMARY: This rule would amend HUD regulations to require, at a minimum, one smoke detector in rental dwelling units assisted or insured by HUD, and in public and Indian housing dwelling units. The purpose of this rule is to assure that fire safety equipment is included and maintained in HUD-associated rental units, and to further the National Housing Goal of a decent home and a suitable living environment for every American family.

DATES: Comments must be submitted on or before January 21, 1992.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Office of the General Counsel, Rules Docket Clerk, room 10276, Department of Housing and Urban Development, 451 Seventh Street SW, Washington, DC 20410. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying during regular business hours (7:30 a.m.–5:30 p.m. Eastern Time) at the above address. As a convenience to commenters, the Rules Docket Clerk will accept brief public comments transmitted by facsimile ("FAX") machine. The telephone number of the FAX receiver is (202) 708–4337. (This is not a toll-free number.) Only public comments of six or fewer total pages will be accepted via FAX transmittal. This limitation is necessary to assure reasonable access to the equipment. Comments sent by FAX in excess of six pages will not be accepted. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Rules Docket Clerk at (202) 708–2084 (TDD (202) 708–3259). (These are not toll-free numbers.)

FOR FURTHER INFORMATION CONTACT: For Section 8 rental certificate, rental voucher, and moderate rehabilitation programs, contact Gerald Benoit, Room 6122, telephone (202) 708–1800; (TDD (202) 708–4594); for Section 202 Elderly and Handicapped Housing, contact Robert Wilden, Room 6116, telephone (202) 708–2730; (TDD (202) 708–4594); for Public and Indian Housing, contact Janice Rattley, Room 4136, telephone (202) 708–1800; (TDD (202) 708–0850); for HUD-insured and other programs, contact James Tahash, Room 6182, telephone (202) 708–3944; (TDD) (202) 708–4594); 451 Seventh Street SW, Washington, DC 20410. (Telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: The primary objective of HUD housing programs is to advance the long-established national commitment to decent, safe, and sanitary housing for every American. This standard is required under Annual Contributions contracts with public housing agencies (PHAs) and Indian Housing Authorities (IHAs), as well as the Housing Assistance Payments contracts with owners of housing assisted under Section 8 of the U.S. Housing Act of 1937. The standard is also the underlying purpose of HUD's Minimum Property Standards (MPS) and housing quality standards (HQS).

Fire safety in all HUD-associated rental units is critical to achieving the goal of a safe environment for all families residing in those units. It is common knowledge that the early detection of fires through smoke alarms can be a primary factor in saving lives and preventing injury. This rule would ensure that each unit to which it applies contains, at a minimum, one working smoke detector.

Under the MPS contained in subpart S of 24 CFR part 200, all units developed or substantially rehabilitated with HUD assistance, including insured financing, since 1978 are required to be equipped with smoke detectors. In addition, public and Indian housing units that have received assistance for comprehensive modernization under the Comprehensive Improvement Assistance Program (CIAP) since 1985 are required to have smoke detectors.

The Department also requires smoke detectors in all units owned by HUD or for which HUD is the mortgagee-in-possession.

With respect to all other units not covered by the requirements of the MPS or CIAP program, or units which HUD does not own or is not the mortgagee-in-possession, HUD believes that most of those units may already be equipped with smoke detectors under requirements imposed by State and local codes or by fire or liability insurance carriers. This rule would not preempt those requirements. However, in order to meet the HQS or regulatory requirements for the applicable programs, each assisted unit must contain at least one working smoke detector.

The rule would amend the HQS in 24 CFR parts 882, 886, and 887, which describe the minimum requirements for units in the Section 8 Rental Certificate and Rental Voucher programs, the Moderate Rehabilitation programs, Projected-Based Certificate Assistance, Loan Management Set-Aside and Property Disposition programs, as well as any other units required to meet the HQS described in those regulations. Subparts B and C of part 885, which govern section 202 elderly and handicapped housing, would also be amended to include the requirement for smoke detectors, as would parts 880 (New Construction), 881 (Substantial Rehabilitation), 883 (State Housing Agencies), 884 (Section 515 Rural Rental Housing), and 215 (Rent Supplement).

With respect to public and Indian housing dwelling units, the rule would amend 24 CFR part 965. (A final rule published on January 9, 1991 (56 FR 918) explains that part 965 is still applicable to Indian housing. When the final version of part 905 (the Consolidated Indian Housing rule (55 FR 24722, June 18, 1990) is issued, the provisions in part 965 applicable to Indian housing will be made a part of the final version.)

The rule would also apply to HUD-insured multifamily rental projects and care-type properties. Units in insured projects constructed or substantially rehabilitated after 1978 are required to contain smoke detectors under the MPS, as discussed above. The effect of this rule, therefore, would be to ensure that pre-1978 insured projects are subject to the requirement as well. The rule would amend parts 207, 213, 215, 220, 221, 231, 232, 234, 236, and 242 to apply the smoke detector requirement to multifamily rental and care-type projects insured and regulated under those parts.

It is the Department's intention that smoke detectors be required in all HUD-associated multifamily rental and care-type housing. Multifamily programs or units not specifically covered in this proposed rule may be added at the final rule stage, to the extent considered appropriate.

The rule would require that each unit (or occupied room in the case of care-type properties) be equipped with at least one battery-operated or hardwired smoke detector, in proper working condition, located in a hallway adjacent to the bedroom or bedrooms. The rule would also prescribe the requirements

for units occupied by hearing-impaired persons.

Other Matters

This rule does not constitute a "major rule" as that term is defined in section 1(d) of the Executive Order on Federal Regulations issued by the President on February 17, 1981. An analysis of the rule indicates that it would not (1) have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs of prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR Part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969. The Finding is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, Office of the General Counsel, Department of Housing and Urban development, Room 10276, 451 Seventh Street SW., Washington, DC 20410.

The General Counsel, as the designated official under Executive Order 12606, The Family, has determined that this rule does not have a potential significant impact on the formation, maintenance, and general well-being of the family and, thus, is not subject to review under that Order. The rule amends the property standards under which Section 8-assisted units and public and Indian housing units are operated.

The General Counsel has also determined, as the Designated Official for HUD under section 6(a) of Executive Order 12612, Federalism, that the policies contained in this rule do not have federalism implications and, thus, are not subject to review under that Order. The requirements of the rule do not replace or affect any requirements that may already be imposed by States and local governments with respect to the use of smoke detectors in rental housing.

In accordance with 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the Undersigned hereby certifies that this rule does not have a significant economic impact on a substantial number of small entities. The rule applies equally to all owners of Section 8-assisted housing, as well as PHAs and Indian Housing Authorities.

This rule was listed as item 1392 in the Department's Semiannual Agenda of Regulations published at 56 FR 53380, 53405 on October 21, 1991, under Executive Order 12291 and the Regulatory Flexibility Act.

List of Subjects

24 CFR Part 207

Manufactured homes, Mortgage insurance, Reporting and recordkeeping requirements, Solar energy.

24 CFR Part 213

Cooperatives, Mortgage insurance, Reporting and recordkeeping requirements.

24 CFR Part 215

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 220

Home improvement, Loan programs—housing and community development, Mortgage insurance, Reporting and recordkeeping requirements, Urban renewal.

24 CFR Part 221

Low and moderate income housing, Mortgage insurance, Reporting and recordkeeping requirements.

24 CFR Part 231

Aged, Mortgage insurance, Reporting and recordkeeping requirements.

24 CFR Part 232

Fire prevention, Health facilities, Loan programs—health, Loan programs—housing and community development, Mortgage insurance, Nursing homes, Reporting and recordkeeping requirements.

24 CFR Part 234

Condominiums, Mortgage insurance, Reporting and recordkeeping requirements.

24 CFR Part 236

Grant programs—housing and community development, Low and moderate income housing, Mortgage insurance, rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 242

Hospitals, Mortgage insurance, Reporting and recordkeeping requirements.

24 CFR Part 880

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 881

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 882

Grant programs—housing and community development, Lead poisoning, Manufactured homes, Homeless, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 883

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 884

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements, Rural areas.

24 CFR Part 885

Aged, Handicapped, Loan programs—housing and community development, Low and moderate income housing, Reporting and recordkeeping requirements.

24 CFR Part 886

Grant programs—housing and community development, Lead poisoning, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 887

Grant programs—housing and community development, Rent subsidies Reporting and recordkeeping requirements.

24 CFR Part 965

Energy conservation, Government procurement, Grant programs—housing and community development, Lead poisoning, Loan programs—housing and community development, Public housing, Reporting and recordkeeping requirements, Utilities.

Accordingly, for the reasons set forth in the preamble, 24 CFR parts 207, 213, 215, 220, 221, 231, 232, 234, 236, 242, 880, 881, 882, 883, 884, 885, 886, 887, and 965 would be amended to read as follows:

PART 207—MULTIFAMILY HOUSING MORTGAGE INSURANCE

1. The authority citation for 24 CFR part 207 would continue to read as follows:

Authority: Secs. 207, 211, National Housing Act (12 U.S.C. 1713, 1715b); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)). Sections 207.258 and 207.258b are also issued under section 203(e), Housing and Community Development Amendments of 1978 (12 U.S.C. 1701z–11(e)).

2. Part 207 would be amended by adding § 207.24a, to read as follows:

§ 207.24a Smoke detectors.

(a) *Performance requirement.* After *[insert date 60 days after effective date of the final rule],* each dwelling unit must include at least one battery-operated or hard-wired smoke detector in proper working condition. If the unit is occupied by hearing-impaired persons, smoke detectors must have an alarm system, designed for hearing-impaired persons, in each bedroom occupied by a hearing-impaired person.

(b) *Acceptability criteria.* The smoke detector must be located, to the extent practicable, in a hallway adjacent to a bedroom, unless the unit is occupied by a hearing-impaired person, in which case each bedroom occupied by a hearing-impaired person must have an alarm system connected to the smoke detector installed in the hallway.

PART 213—COOPERATIVE HOUSING MORTGAGE INSURANCE

3. The authority citation for part 213 would continue to read as follows:

Authority: Secs. 211, 213, National Housing Act (12 U.S.C. 1715b, 1715e); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

4. Part 213 would be amended by adding § 213.41, to read as follows:

§ 213.41 Smoke detectors.

(a) *Performance requirement.* After *[insert date 60 days after effective date of the final rule],* each dwelling unit must include at least one battery-operated or hard-wired smoke detector in proper working condition. If the unit is occupied by hearing-impaired persons, smoke detectors must have an alarm system, designed for hearing-impaired persons, in each bedroom occupied by a hearing-impaired person.

(b) *Acceptability criteria.* The smoke detector must be located, to the extent practicable, in a hallway adjacent to a bedroom, unless the unit is occupied by a hearing-impaired person, in which case each bedroom occupied by a hearing-impaired person must have an alarm system connected to the smoke detector installed in the hallway.

PART 215—RENT SUPPLEMENT PAYMENTS

5. The authority citation for part 215 would continue to read as follows:

Authority: Sec. 101(g), Housing and Urban Development Act of 1965 (12 U.S.C. 1701s); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

6. Part 215 would be amended by adding § 215.16, to read as follows:

§ 215.16 Smoke detectors.

(a) *Performance requirement.* After *[insert date 60 days after effective date of the final rule],* each dwelling unit must include at least one battery-operated or hard-wired smoke detector in proper working condition. If the unit is occupied by hearing-impaired persons, smoke detectors must have an alarm system, designed for hearing-impaired persons, in each bedroom occupied by a hearing-impaired person.

(b) *Acceptability criteria.* The smoke detector must me located, to the extent practicable, in a hallway adjacent to a bedroon, unless the unit is occupied by a hearing-impaired person, in which case each bedroom occupied by a hearing-impaired person must have an alarm system connected to the smoke detector installed in the hallway.

Part 220—MORTGAGE INSURANCE AND INSURED IMPROVEMENT LOANS FOR URBAN RENEWAL AND CONCENTRATED DEVELOPMENT AREAS

7. The authority citation for part 220 would continue to read as follows:

Authority: Secs. 207, 211, 220, National Housing Act (12 U.S.C. 1713, 1715b, 1715k); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

8. Subpart C of part 229 would be amended by adding § 200.511, to read as follows:

§ 220.511 Smoke detectors.

(a) *Performance requirement.* After *[insert date 60 days after effective date of the final rule],* each dwelling unit must include at least one battery-operated or hard-wired smoke detector in proper working condition. If the unit is occupied by hearing-impaired persons, smoke detectors must have an alarm system, designed for hearing-impaired persons, in each bedroom occupied by a hearing-impaired person.

(b) *Acceptability criteria.* The smoke detector must be located, to the extent practicable, in a hallway adjacent to a bedroom, unless the unit is occupied by a hearing-impaired person, in which case each bedroom occupied by a hearing-impaired person must have an alarm system connected to the smoke detector installed in the hallway.

PART 221—LOW COST AND MODERATE INCOME MORTGAGE INSURANCE

9. The authority citation for part 221 would continue to read as follows:

Authority: Secs. 211, 221, National Housing Act (12 U.S.C. 1715b, 1715l), sec. 7(d), Department of Housing and Urabna Development Act (42 U.S.C. 3535(d)); sec. 221.544(a)(3) is also issued under sec. 201(a), National Housing Act (12 U.S.C. 1707(a)).

10. Subpart C of part 221 would be amended by adding § 221.545a, to read as follows:

§ 221.545a Smoke detectors.

(a) *Performance requirement.* After *[insert date 60 days after effective date of the final rule],* each dwelling unit must include at least one battery-operated or hard-wired smoke detector in proper working condition. If the unit is occupied by hearing-impaired persons, smoke detectors must have an alarm system, designed for hearing-impaired persons, in each bedroom occupied by a hearing-impaired person.

(b) *Acceptability criteria.* The smoke detector must be located, to the extent practicable, in a hallway adjacent to a bedroom, unless the unit is occupied by a hearing-impaired person, in which case each bedroom occupied by a hearing-impaired person must have an alarm system connected to the smoke detector installed in the hallway.

PART 231—HOUSING MORTGAGE INSURANCE FOR THE ELDERLY

11. The authority citation for part 231 would continue to read as follows:

Authority: Secs. 211, 231, National Housing Act (12 U.S.C. 1715b, 1715v); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

12. Part 231 would be amended by adding § 231.15, to read as follows:

§ 231.15 Smoke detectors.

(a) *Performance requirement.* After *[insert date 60 days after effective date of the final rule],* each dwelling unit must include at least one battery-operated or hard-wired smoke detector in proper working condition. If the unit is occupied by hearing-impaired persons, smoke detectors must have an alarm system, designed for hearing-impaired persons, in each bedroom occupied by a hearing-impaired person.

(b) *Acceptability criteria.* The smoke detector must be located, to the extent practicable, in a hallway adjacent to a bedroom unless the unit is occupied by a hearing-impaired person, in which case each bedroom occupied by a hearing-impaired person must have an alarm system connected to the smoke detector installed in the hallway.

PART 232—MORTGAGE INSURANCE FOR NURSING HOMES, INTERMEDIATE CARE FACILITIES, AND BOARD AND CARE HOMES

13. The authority citation for part 232 would continue to read as follows:

Authority: Secs. 211, 232, National Housing Act (12 U.S.C. 1715b, 1715w); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

14. Part 232 would be amended by adding § 232.591 under the heading "Property Requirements," to read as follows:

§ 232.591 Smoke detectors.

After *[insert date 60 days after effective date of the final rule],* each occupied room must include at least one battery-operated or hard-wired smoke detector in proper working condition. If the room is occupied by hearing-impaired persons, the smoke detector must have an alarm system designed for hearing-impaired persons.

PART 234—CONDOMINIUM OWNERSHIP MORTGAGE INSURANCE

15. The authority citation for part 234 would continue to read as follows:

Authority: Secs. 211, 234, National Housing Act (12 U.S.C. 1715b, 1715y); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)). Section 234.520(a)(2)(ii) is also issued under sec. 201(a), National Housing Act (12 U.S.C. 1707(a)).

16. Part 234 would be amended by adding § 234.521, to read as follows:

§ 234.521 Smoke detectors.

(a) *Performance requirement.* After *[insert date 60 days after effective date of the final rule],* each dwelling unit must include at least one battery-operated or hard-wired smoke detector in proper working condition. If the unit is occupied by hearing-impaired persons, smoke detectors must have an alarm system, designed for hearing-impaired persons, in each bedroom occupied by a hearing-impaired person.

(b) *Acceptability criteria.* The smoke detector must be located, to the extent practicable, in a hallway adjacent to a bedroom, unless the unit is occupied by a hearing-impaired person, in which case each bedroom occupied by a hearing-impaired person must have an alarm system connected to the smoke detector installed in the hallway.

PART 236—MORTGAGE INSURANCE AND INTEREST REDUCTION PAYMENT FOR RENTAL PROJECTS

17. The authority citation for part 236 would continue to read as follows:

Authority: Secs. 211, 236, National Housing Act (12 U.S.C. 1715b, 1715z); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

18. Part 236 would be amended by adding § 236.85, to read as follows:

§ 236.85 Smoke detectors.

(a) *Performance requirement.* After *[insert date 60 days after effective date of the final rule],* each dwelling unit must include at least one battery-operated or hard-wired smoke detector in proper working condition. If the unit is occupied by hearing-impaired persons, smoke detectors must have an alarm system, designed for hearing-impaired persons, in each bedroom occupied by a hearing-impaired person.

(b) *Acceptability criteria.* The smoke detector must be located, to the extent practicable, in a hallway adjacent to a bedroom, unless the unit is occupied by a hearing-impaired person, in which case each bedroom occupied by a hearing-impaired person must have an alarm system connected to the smoke detector installed in the hallway.

PART 242—MORTGAGE INSURANCE FOR HOSPITALS

19. The authority citation for part 242 would continue to read as follows:

Authority: Secs. 211, 233(f), 242, National Housing Act (12 U.S.C. 1715b, 1715n(f), 1715z-7), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

20. Part 242 would be amended by adding § 242.86, to read as follows:

§ 242.86 Smoke detectors.

After *[insert date 60 days after effective date of the final rule],* each occupied room must include at least one battery-operated or hard-wired smoke detector in proper working condition. If the unit is occupied by hearing-impaired persons, smoke detectors must have an alarm system, designed for hearing-impaired persons.

PART 880—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM FOR NEW CONSTRUCTION

21. The authority citation for part 880 would continue to read as follows:

Authority: Secs. 3, 5, 8, United States Housing Act of 1937 (42 U.S.C. 1437a, 1437c, 1437f); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

22. Section 880.207 would be amended by adding paragraph (g), to read as follows:

§ 880.207 Property standards.

* * * * *

(g) *Smoke detectors.* (1) *Performance requirement.* After *[insert date 60 days after effective date of the final rule],* each dwelling unit must include at least one battery-operated or hard-wired smoke detector in proper working condition. If the unit is occupied by hearing-impaired persons, smoke detectors must have an alarm system, designed for hearing-impaired persons, in each bedroom occupied by a hearing-impaired person.

(2) *Acceptability criteria.* The smoke detector must be located, to the extent practicable, in a hallway adjacent to a bedroom, unless the unit is occupied by a hearing-impaired person, in which case each bedroom occupied by a hearing-impaired person must have an alarm system connected to the smoke detector installed in the hallway.

PART 881—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM FOR SUBSTANTIAL REHABILITATION

23. The authority citation for part 881 would continue to read as follows:

Authority: Secs. 3, 5, 8, United States Housing Act of 1937 (42 U.S.C. 1437a, 1437c, 1437f); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

24. Section 881.207 would be amended by adding (g), to read as follows:

§ 881.207 Property standards.

* * * * *

(g) *Smoke detectors.* (1) *Performance requirement.* After *[insert date 60 days after effective date of the final rule],* each dwelling unit must include at least one battery-operated or hard-wired smoke detector in proper working condition. If the unit is occupied by hearing-impaired persons, smoke detectors must have an alarm system, designed for hearing-impaired persons, in each bedroom occupied by a hearing-impaired person.

(2) *Acceptability criteria.* The smoke detector must be located, to the extent practicable, in a hallway adjacent to a bedroom, unless the unit is occupied by a hearing-impaired person, in which case each bedroom occupied by a hearing-impaired person must have an alarm system connected to the smoke detector installed in the hallway

PART 882—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM—EXISTING HOUSING

25. The authority citation for part 882 would continue to read as follows:

Authority: Secs. 3, 5, 8, United States Housing Act of 1937, (42 U.S.C. 1437a, 1437c, 1437f); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)). Subpart H is also issued under secs. 401 and 441, Stewart B. McKinney Homeless Assistance Act, Public Law 100–77, approved July 22, 1987; secs. 481 and 485, Stewart B. McKinney Homeless Assistance Amendments Act of 1988, Public Law 100–628, approved November 7, 1988.

26. Section 882.109 would be amended by adding paragraph (r), to read as follows:

§ 882.109 Housing quality standards.

* * * * *

(r) *Smoke detectors.* (1) *Performance requirement.* After [*insert date 60 days after effective date of the final rule*], each dwelling unit must include at least one battery-operated or hard-wired smoke detector in proper working condition. If the unit is occupied by hearing-impaired persons, smoke detectors must have an alarm system, designed for hearing-impaired persons, in each bedroom occupied by a hearing-impaired person.

(2) *Acceptability criteria.* The smoke detector must be located, to the extent practicable, in a hallway adjacent to a bedroom, unless the unit is occupied by a hearing-impaired person, in which case each bedroom occupied by a hearing-impaired person must have an alarm system connected to the smoke detector installed in the hallway.

PART 883—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM—STATE HOUSING AGENCIES

27. The authority citation for part 883 would continue to read as follows:

Authority: Secs. 3, 5, 8, United States Housing Act of 1937, (42 U.S.C. 1437a, 1437c, 1437f); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

28. Section 883.310 would be amended by adding paragraph (d), to read as follows:

§ 883.310 Property standards.

* * * * *

(c) *Smoke detectors.* (1) *Performance requirement.* After [*insert date 60 days after effective date of the final rule*], each dwelling unit must include at least one battery-operated or hard-wired smoke detector in proper working condition. If the unit is occupied by hearing-impaired persons, smoke detectors must have an alarm system, designed for hearing-impaired persons, in each bedroom occupied by a hearing-impaired person.

(2) *Acceptability criteria.* The smoke detector must be located, to the extent practicable, in a hallway adjacent to a bedroom, unless the unit is occupied by a hearing-impaired person, in which case each bedroom occupied by a hearing-impaired person must have an alarm system connected to the smoke detector installed in the hallway.

PART 884—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM, NEW CONSTRUCTION SET-ASIDE FOR SECTION 515 RURAL RENTAL HOUSING PROJECTS

29. The authority citation for part 884 would continue to read as follows:

Authority: Secs. 3, 5, 8, United States Housing Act of 1937, (42 U.S.C. 1437a, 1437c, 1437f); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

30. Section 884.110 would be amended by adding paragraph (d), to read as follows:

§ 884.110 Types of housing and property standards.

* * * * *

(c) *Smoke detectors.* (1) *Performance requirement.* After [*insert date 60 days after effective date of the final rule*], each dwelling unit must include at least one battery-operated or hard-wired smoke detector in proper working condition. If the unit is occupied by hearing-impaired persons, smoke detectors must have an alarm system, designed for hearing-impaired persons, in each bedroom occupied by a hearing-impaired person.

(2) *Acceptability criteria.* The smoke detector must be located, to the extent practicable, in a hallway adjacent to a bedroom, unless the unit is occupied by a hearing-impaired person, in which case each bedroom occupied by a hearing-impaired person must have an alarm system connected to the smoke detector installed in the hallway.

PART 885—LOANS FOR HOUSING FOR THE ELDERLY OR HANDICAPPED

31. The authority citation for Part 885 would continue to read as follows:

Authority: Sec. 202, Housing Act of 1959 (12 U.S.C. 1701q); sec. 8, United States Housing Act of 1937 (42 U.S.C. 1437f), sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

32. Subpart B of part 885 would be amended by adding § 885.429, to read as follows:

§ 885.429 Smoke detectors.

(a) *Performance requirement.* After [*insert date 60 days after effective date of the final rule*], each dwelling unit must include at least one battery-operated or hard-wired smoke detector in proper working condition. If the unit is occupied by hearing-impaired persons, smoke detectors must have an alarm system, designed for hearing-impaired persons, in each bedroom occupied by a hearing-impaired person.

(b) *Acceptability criteria.* The smoke detector must be located, to the extent practicable, in a hallway adjacent to a bedroom, unless the unit is occupied by a hearing-impaired person, in which case each bedroom occupied by a hearing-impaired person must have an alarm system connected to the smoke detector installed in the hallway.

33. Section 885.717 of subpart C, part 885, would be amended by adding paragraph (d), to read as follows:

§ 885.717 Project standards.

* * * * *

(d) *Smoke detectors.* (1) *Performance requirement.* After [*insert date 60 days after effective date of the final rule*], each dwelling unit must include at least one battery-operated or hard-wired smoke detector in proper working condition. If the unit is occupied by hearing-impaired persons, smoke detectors must have an alarm system, designed for hearing-impaired persons, in each bedroom occupied by a hearing-impaired person.

(2) *Acceptability criteria.* The smoke detector must be located, to the extent practicable, in a hallway adjacent to a bedroom, unless the unit is occupied by a hearing-impaired person, in which case each bedroom occupied by a hearing-impaired person must have an alarm system connected to the smoke detector installed in the hallway.

PART 886—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAMS—SPECIAL ALLOCATIONS

34. The authority citation for part 886 would continue to read as follows:

Authority: Secs. 3, 5, and 8, United States Housing Act of 1937 (42 U.S.C. 1437a, 1437c, and 1437f); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

35. Section 886.113 would be amended by redesignating paragraph (m) as paragraph (n), and by adding a new paragraph (m), to read as follows:

§ 886.113 Housing quality standards.

* * * * *

(m) *Smoke detectors.* (1) *Performance requirement.* After [*insert date 60 days after effective date of the final rule*], each dwelling unit must include at least one battery-operated or hard-wired smoke detector in proper working condition. If the unit is occupied by hearing-impaired persons, smoke detectors must have an alarm system, designed for hearing-impaired persons, in each bedroom occupied by a hearing-impaired person.

(2) *Acceptability criteria.* The smoke detector must be located, to the extent practicable, in a hallway adjacent to a bedroom, unless the unit is occupied by a hearing-impaired person, in which case each bedroom occupied by a hearing-impaired person must have an alarm system connected to the smoke detector installed in the hallway.

* * * * *

36. Section 886.307 would be amended by adding paragraph (p) to read as follows:

§ 886.307 Housing quality standards.

* * * * *

(p) *Smoke detectors.* (1) *Performance requirement.* After [*insert date 60 days after effective date of the final rule*], each dwelling unit must include at least one battery-operated or hard-wired smoke detector in proper working condition. If the unit is occupied by hearing-impaired persons, smoke detectors must have an alarm system, designed for hearing-impaired persons, in each bedroom occupied by a hearing-impaired person.

(2) *Acceptability criteria.* The smoke detector must be located, to the extent practicable, in a hallway adjacent to a bedroom, unless the unit is occupied by a hearing-impaired person, in which case each bedroom occupied by a hearing-impaired person must have an alarm system connected to the smoke detector installed in the hallway.

PART 887—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM—HOUSING VOUCHERS

37. The authority citation for part 887 would continue to read as follows:

Authority: Secs. 3, 5, and 8, United States Housing Act of 1937 (42 U.S.C. 1437a, 1437c, and 1437f); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

38. Section 887.251 would be amended by adding paragraph (m), to read as follows:

§ 887.251 Housing quality standards.

* * * * *

(m) *Smoke detectors.* (1) *Performance requirement.* After [*insert date 60 days after effective date of the final rule*], each dwelling unit must include at least one battery-operated or hard-wired smoke detector in proper working condition. If the unit is occupied by hearing-impaired persons, smoke detectors must have an alarm system, designed for hearing-impaired persons, in each bedroom occupied by a hearing-impaired person.

(2) *Acceptability criteria.* The smoke detector must be located, to the extent practicable, in a hallway adjacent to a bedroom, unless the unit is occupied by a hearing-impaired person, in which case each bedroom occupied by a hearing-impaired person must have an alarm system connected to the smoke detector installed in the hallway.

PART 965—PHA OWNED OR LEASED PROJECTS—MAINTENANCE AND OPERATIONS

39. The authority citation for part 965 would continue to read as follows:

Authority: Secs. 2, 3, 6, and 9, United States Housing Act of 1937 (42 U.S.C. 1437, 1437a, 1437d, and 1437g); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)). Subpart H is also issued under the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846).

40. Part 965 would be amended by adding subpart I, to read as follows:

Subpart I—Fire Safety

Sec.
965.800 Applicability.
965.805 Smoke detectors.

§ 965.800 Applicability.

This subpart applies to all PHA-owned or -leased housing and IHA-owned or -leased housing, including Mutual Help and Turnkey III.

§ 965.805 Smoke detectors.

(a) *Performance requirement.* After [*insert 60 days after effective date of rule*], each unit covered by this subpart must be equipped with at least one battery-operated or hard-wired smoke detector, or such greater number as may be required by state or local codes, in working condition. In units occupied by hearing-impaired residents, smoke detectors must be hard-wired.

(b) *Acceptability criteria.* (1) The smoke detector must be located, to the extent practicable, in a hallway adjacent to the bedroom or bedrooms. In units occupied by hearing-impaired residents, hard-wired smoke detectors must be connected in an alarm system designed for hearing-impaired persons and installed in the bedroom or bedrooms occupied by the hearing-impaired residents. Individual units that are jointly occupied by both hearing and hearing-impaired residents must be equipped with both audible and visual types of alarm devices.

(2) If needed, battery-operated smoke detectors, except in units occupied by hearing-impaired residents, may be installed as a temporary measure where no detectors are present in a unit. Temporary battery-operated smoke detectors must be replaced with hard-wired electric smoke detectors in the normal course of a PHA's or IHA's planned CIAP program to meet the required HUD Modernization Standards or state or local codes, whichever standard is stricter. Smoke detectors for units occupied by hearing-impaired residents must be installed in accordance with the acceptability criteria in paragraph (b)(1) of this section.

Dated: November 14, 1991.

Alfred A. DelliBovi,

Deputy Secretary.

[FR Doc. 91–27952 Filed 11–21–91; 8:45 am]

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federal register

Friday,
November 22, 1991

Part V

Department of Education

34 CFR Part 722

Educational Partnerships Program; Notice of Proposed Rulemaking

DEPARTMENT OF EDUCATION

34 CFR Part 722

RIN 1850-AA40

Educational Partnerships Program

AGENCY: Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary issues a notice of proposed rulemaking for the Educational Partnerships program. These regulations are needed to implement the discretionary grant program authorized by the Educational Partnerships Act of 1988, title VI, subtitle A, chapter 5 of the Omnibus Trade and Competitiveness Act of 1988 (Act).

DATES: Comments must be received on or before December 23, 1991.

ADDRESSES: All comments concerning these proposed regulations should be addressed to Lois N. Weinberg, Office of Educational Research and Improvement, U.S. Department of Education, 555 New Jersey Avenue NW., Washington, DC 20208-5644.

A copy of any comments that concern information collection requirements should also be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble.

FOR FURTHER INFORMATION CONTACT: Lois N. Weinberg, Telephone: (202) 219-2116. Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1-800-877-8339 (in the Washington, DC 202 area code, telephone 708-9300) between 8 a.m. and 7 p.m., Eastern time.

SUPPLEMENTARY INFORMATION: The Educational Partnerships Program encourages the creation of alliances between local educational agencies or institutions of higher education or both, and representatives of the private sector. The purpose and activities of this program complement the AMERICA 2000 strategies. An eligible partnership must include a local educational agency or an institution of higher education, or both, and must also include one or more of the following: a business concern, community-based organization, nonprofit private organization, museum, library, educational television or radio station, or an appropriate State agency. A variety of school improvement activities, programs for gifted and talented and disadvantaged students, tutoring, career awareness, and academic internship programs are authorized. Students and teachers in public elementary and secondary schools, and in public and private institutions of higher education may benefit from these activities. Private elementary and secondary schools are not eligible to participate.

These proposed regulations specify that in any fiscal year the Secretary may establish funding priorities. By the selection of funding priorities, the Secretary limits a competition to specific program categories or awards additional points to an application that addresses specific program activities in an especially effective manner. Proposed priorities are derived from the National Education Goals and AMERICA 2000 strategies for improvement in school readiness, an increase in the high school graduation rate, improved achievement in certain school subjects, preparation for employment or further education for high school graduates, responsible citizenship, and improved learning environment, and reduced violence and use of drugs in schools. Other proposed priorities are for statewide or multi-state projects, projects that would operate as part of broader school improvement efforts and systemic change programs, projects that serve historically underrepresented and underserved populations of students, and projects that involve businesses. The program activities specified in the proposed regulations may also be selected as funding priorities with the AMERICA 2000 strategy at the forefront.

The Secretary proposes that an applicant be required to include in an application three assurances required by the Act: First, that the eligible partnership will provide the non-Federal share of the cost of the project from non-Federal funds; second, that the eligible partnership will take steps to continue project activities after the period of Federal funding ends; and third, that the eligible partnership will disseminate information about the project.

Also proposed are the selection criteria by which the Secretary will evaluate applications for grants, including the composition of the eligible partnership, the need for the project, the plan of operation, the quality of key personnel, the evaluation plan, and the cost-effectiveness and adequacy of the budget and resources to support the project.

The Act limits the total amount of funds that can be awarded in any single State to the greater of 15 percent of the total funds appropriated or $1,000,000 in any fiscal year. The Secretary will consider this limitation in selecting applications for funding.

A special requirement of this program, established in the Act, is that the Secretary may not fund an application if a State educational agency (SEA) has determined that the proposed project would be inconsistent with State plans for elementary and secondary education. During the Department's review process, the Secretary proposes to provide an opportunity for SEAs to review applications from their States that have received high enough rankings to be considered for funding. This will spare SEAs the burden of reviewing large numbers of applications that are not likely to be funded, and will spare applicants the burden of providing additional copies of their applications to the SEAs for review. SEA approval is required in addition to the State government review under Executive Order 12372, as described below.

The Act limits the Federal share of the total cost of the project to no more than 90 percent for the first year, 75 percent for the second year, 50 percent for the third year and 33⅓ percent for the fourth year. The eligible partnership must provide the remaining cost of the project from non-Federal funds, in cash or in-kind support. Provisions incorporating these requirements are included in the proposed regulations.

The Secretary proposes to limit the amount of grant funds that may be used to purchase equipment in any fiscal year. However, an applicant would be permitted to count as part of the cash or in-kind matching support the costs of any equipment provided by members of the eligible partnership.

The proposed regulations incorporate provisions in the Act that require grantees to disseminate information about project activities, but limit the amount of grant funds that may be used for this purpose to one percent. However, as with equipment, grantees may count as part of the cash or in-kind matching support dissemination costs provided by members of the eligible partnership beyond those costs supported by grant funds.

Executive Order 12291

These proposed regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the order.

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 LEAs, businesses, private nonprofit organizations, or community based organizations that would receive Federal funds under this program. However, the regulations would not have a significant economic impact on the small entities 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 1980

Section 722.21 contains information collection requirements. As required by the Paperwork Reduction Act of 1980, the Department of Education will submit a copy of this section to the Office of Management and Budget (OMB) for its review. (44 U.S.C. 3504(h))

Eligible partnerships as described above are eligible to apply for grants under these regulations. The Department needs and uses the information to make grants.

Annual public reporting burden for this collection of information is estimated to average 20 hours per response for 400 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.

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 3002, New Executive Office Building, Washington, DC 20503; Attention: Daniel J. Chenok.

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, the document is intended to provide early notification of the Department's specific plans and actions for this program.

Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding these 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 504, 555 New Jersey Ave. NW., Washington, DC between the hours of 8:30 a.m. and 4 p.m., Monday through Friday of each week except Federal holidays.

To assist the Department in complying with the specific requirements of Executive Order 12291 and the Paperwork Reduction Act of 1980 and their overall requirement of reducing regulatory burden, the Secretary invites comment on whether there may be further opportunities to reduce any regulatory burdens found in these proposed regulations.

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 or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 722

Education, Elementary and Secondary Education, Business, Colleges and Universities, Grants, Reporting and recordkeeping requirements, Students, Teachers.

Dated: July 29, 1991.

Lamar Alexander,

Secretary of Education.

(Catalog of Federal Domestic Assistance Number 84.228, Educational Partnerships Program)

The Secretary proposes to amend title 34 of the Code of Federal Regulations by adding a new part 722 to read as follows:

PART 722—EDUCATIONAL PARTNERSHIPS PROGRAM

Subpart A—General

Sec.

Authority: 20 U.S.C. 5031–5039, unless otherwise noted.

Subpart A—General

§ 722.1 What is the Educational Partnerships Program?

The Educational Partnerships Program encourages the creation of alliances between public elementary and secondary schools or institutions of higher education, or both, and the private sector in order to—

(a) Encourage excellence in education by applying the resources of the private and nonprofit sectors of the community to the needs of the pubic elementary and secondary schools or the institutions of higher education in that community;

(b) Encourage businesses to work with educationally disadvantaged and gifted students;

(c) Apply the resources of communities for the improvement of elementary and secondary education or higher education; and

(d) Enrich the career awareness of secondary or postsecondary students and provide exposure to the work of the private sector.

(Authority: 20 U.S.C. 5032)

§ 722.2 Who is eligible for an award?

(a) An eligible partnership may apply for an award.

(b) An eligible partnership must consist of one or more local educational agencies or institutions of higher education, or both, and one or more of the following:

(1) A business concern.

(2) A community-based organization.

(3) A nonprofit private organization.

(4) A museum.

(5) A library.

(6) An educational television or radio station.

(7) An appropriate State agency.

(Authority: 20 U.S.C. 5033, 5039)

§ 722.3 What activities may the Secretary fund?

Under the Educational Partnerships Program, the Secretary may fund

projects designed to do one or more of the following:

(a) Through model cooperative programs, apply the resources of the private and nonprofit sectors of the community to improve the education of students in the public elementary and secondary schools or institutions of higher education in that community.

(b) Encourage business concerns and other participants from the private sector to address the special educational needs of disadvantaged students or gifted and talented students, or both, in the public elementary and secondary schools or institutions of higher education.

(c) Enrich the career awareness of public secondary students or postsecondary students through exposure to officers and employees of business concerns and other agencies and organizations participating in the eligible partnership.

(d) Encourage tutorial and volunteer work in public elementary and secondary schools or institutions of higher education by personnel employed by business concerns and other participants in the eligible partnership.

(e) Conduct academic internship programs, for students or teachers, including if possible the opportunity to earn academic credit, involving activities designed to carry out the purpose of this part.

(f) Provide special training for staff to develop skills necessary to facilitate cooperative arrangements between the private and nonprofit sectors and local educational agencies or institutions of higher education.

(g) Conduct statewide activities to carry out the purpose of this Part, including the development of model State statutes for the support of cooperative arrangements between the private and nonprofit sectors and local educational agencies or institutions of higher education.

(Authority: 20 U.S.C. 5034)

§ 722.4 What priorities may the Secretary establish?

The Secretary may establish as a priority, in any fiscal year, one or more or any combination of activities that carry out the purposes of this program, including—

(a) Projects that directly address one or more of the following elements of the National Education Goals:

(1) School readiness.

(2) Increased high school graduation rates.

(3) Improved achievement in specific subject areas, such as English, mathematics, science, history, or geography.

(4) Preparation for responsible citizenship.

(5) Preparation for employment or further education for secondary school students after they complete high school.

(6) Improved learning environment.

(7) Reduced presence of drugs and violence in schools.

(b) Projects designed to operate within the context of broader school improvement efforts such as effective schools initiatives, providing choice, restructuring, or other approaches to systemic change.

(c) Projects designed to serve historically underrepresented and underserved populations of students, including females, minorities, handicapped students, students with limited English proficiency, and migrant students.

(d) Projects operated on a statewide or multi-state basis.

(e) Projects that involve businesses in carrying out the project activities.

(f) One or more of the activities listed in § 722.3 or combinations of those activities.

(Authority: 20 U.S.C. 5004, 5031–5039)

§ 722.5 What regulations apply?

The following regulations apply to the Educational Partnerships program:

(a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR part 74 (Administration of Grants to institutions of Higher Education, Hospitals, and Nonprofit Organizations), part 75 (District Grant Programs), part 77 (Definitions that Apply to Department Regulations), part 79 (Intergovernmental Review of Department of Education Programs and Activities), Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Government), part 81 (General Education Provisions Act—Enforcement), part 82 (New Restrictions on Lobbying), part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)), and part 86 (Drug-Free Schools and Campuses).

(b) The regulations in this part 722.

(Authority: 20 U.S.C. 5031–5039)

§ 722.6 What definitions apply?

(a) *Definitions in the Act.* The following terms used in this part are defined in section 6049 of the Act: Elementary school, Institution of higher education, Secondary school.

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1: Applicant, Application, EDGAR, Grant, Local educational agency, Nonprofit, State, State educational agency.

(c) *Other definitions.* The following definitions also apply to this part:

Act means the Educational Partnerships Act of 1988.

Community-based organization means a local support, advocacy, special interest or service group or agency, including but not limited to, a parent-teacher organization, club, service organization, professional association, or city or county agency such as a police department or health and welfare department.

State agency means a public agency that operates at a State level, including a State educational agency (SEA).

(Authority: 20 U.S.C. 5031–5039)

Subpart B—How Does One Apply for an Award?

§ 722.10 What assurances must an applicant include in an application?

An applicant must include in an application assurances that the eligible partnership will—

(a) Pay from non-Federal funds the non-Federal share of the cost of activities for which assistance is sought;

(b) Take such steps as may be available to it to continue the activities for which assistance is sought after the period of Federal funding ends; and

(c) Disseminate information about the activities for which assistance is sought, using not more than one percent of the Federal funds awarded to the project in any fiscal year.

(Authority: 20 U.S.C. 5035)

Subpart C—How Does the Secretary Make an Award?

§ 772.20 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application on the basis of the criteria in § 722.21.

(b) The Secretary awards up to 100 points for the criteria in § 722.21.

(c) The maximum possible score for each criteria is indicated in parentheses.

(Authority: 20 U.S.C. 5031–5039)

§ 722.21 What selection criteria does the Secretary use?

The Secretary uses the following criteria to evaluate an application:

(a) *Composition of the eligible partnership.* (15 points) The Secretary reviews each application to determine the extend to which—

(1) The eligible partnership brings together the public and private sectors of the community;

(2) The membership of the eligible partnership is relevant to the specific goals of the proposed project;

(3) Each of the members of the eligible partnership is committed to participate in the project if the project is selected for funding.

(b) *Need for the project.* (15 points) The Secretary reviews each application to determine—

(1) The quality of the assessment of the needs to be addressed through the project;

(2) The magnitude of the need for the project in each elementary or secondary school or institution of higher education where the project would be carried out;

(3) The objectives that each member of the eligible partnership expects to accomplish through participation in this project;

(4) The extent to which the needs identified can be addressed through the proposed partnership approach;

(5) The extent to which the proposed approach and activities make effective use of the resources of the eligible partnership;

(6) The extent to which the proposed activities will improve or expand the nature of support for elementary and secondary education in the community or in the State; and

(7) The national significance of the proposed project.

(c) *Plan of operation.* (30 points) The Secretary reviews each application to determine the quality of the design of the proposed project and the applicant's plans for carrying it out, including the quality of—

(1) The applicant's plans to carry out one or more of the activities described in § 722.3, including specific measurable goals for the project, a timetable of important milestones to be accomplished during the project, and appropriate measures for determining whether project goals are reached;

(2) The organizational plans for staffing and management to ensure communication and coordination among and between members of the eligible partnership;

(3) The plans for each member of the eligible partnership to assume specific responsibilities for carrying out project activities;

(4) The plans to provide training and supervision of personnel from the private sector who may participate in tutoring and other volunteer activities in elementary and secondary schools, if these volunteer activities are proposed;

(5) The plans to provide training for educational personnel, employees of the members of the eligible partnership, and other project participants, if this training is proposed;

(6) The plans to disseminate information about successful project activities, or materials developed by the project, to others who might find them of value; and

(7) The plans to continue successful project activities after the period of Federal support has ended.

(d) *Quality of key personnel.* (10 points) (1) The Secretary reviews each application to determine the quality of key personnel the applicant plans to use on the project, including—

(i) The qualifications of the project director;

(ii) The qualifications of each of the other key personnel to be used on the project;

(iii) The time that each person referred to in paragraphs (d)(1) (i) and (ii) of this section will commit to the project; and

(iv) How the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender or handicapping condition.

(2) To determine the qualifications of personnel referred to in paragraphs (d)(1) (i) and (ii) of this section, the Secretary considers—

(i) Experience and training in fields related to the objectives of the project; and

(ii) Any other qualifications that pertain to the project.

(e) *Evaluation plan.* (15 points) The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which the applicant's methods of evaluation—

(1) Will allow the applicant to assess its progress toward meeting project goals and objectives;

(2) Are objective, include outcome measures, and will produce data that are both qualitative and quantitative;

(3) Will document information about project activities, participants, and accomplishments;

(4) Will document the extent to which activities assisted through the project have improved or expanded the nature of support for elementary and secondary education in the community or in the State; and

(5) Will document the impact of activities assisted through the project upon the educational characteristics of the participating elementary and secondary schools and institutions of higher education and upon the members of the eligible partnership.

(f) *Cost-effectiveness and adequacy of budget and resources.* (15 points) The Secretary reviews each application to determine the extent to which—

(1) The budget is adequate to support the project;

(2) Costs are reasonable in relation to the objectives of the project;

(3) The members of the eligible partnership or other sources are committed to provide for each year of funding requested the applicant's share of the total cost of the project as determined by § 722.23; and

(4) The specific resources, including personnel, facilities, equipment and supplies, that will be provided by each member of the eligible partnership are adequate to support the project.

(Authority: 20 U.S.C. 5031–5039)

§ 722.22 What additional factors does the Secretary consider?

(a) In determining the order of selection for awards under the Educational Partnerships program, the Secretary makes no award that would result in a total amount of funds awarded in any State in any fiscal year exceeding the greater of—

(1) 15 percent of the funds appropriated under this part for that fiscal year; or

(2) $1,000,000.

(b)(1) Before an application proposing activities related to elementary and secondary education is selected for funding, the Secretary provides an opportunity for the SEA for each State in which any member of the eligible partnership is located to review the application.

(2) If the SEA notifies the Secretary that the application is inconsistent with State plans for elementary and secondary education, the Secretary does not select that application for funding.

(Authority: 20 U.S.C. 5036, 5037)

§ 722.23 How is the Federal share of the cost of a project determined?

The Federal share of the total cost of each project selected for funding may not exceed—

(a) 90 percent for the first year;

(b) 75 percent for the second year;

(c) 50 percent for the third year; and

(d) 33⅓ percent for the fourth year.

(Authority: 20 U.S.C. 5037)

Subpart D—What Conditions Must Be Met After An Award Is Made?

§ 722.30 How does the Secretary limit the use of grant funds?

(a) Not more than one percent of a grant may be used to pay for the dissemination activities described in § 722.31 in any fiscal year.

(b) The Secretary may restrict the amount of funds made available for capital equipment purchases to a certain

percentage of the total grant for a project.

(Authority: 20 U.S.C. 5035)

§ 722.31 What dissemination activities shall a grantee conduct?

(a) A grantee shall disseminate information about the activities conducted through the project.

(b) To disseminate information about project activities, a grantee may use strategies including, but not limited to—

(1) Providing descriptive materials to interested parties;

(2) Making presentations at conferences;

(3) Submitting articles about the project to appropriate publications; and

(4) Submitting the project for review by the Program Effectiveness Panel of the National Diffusion Network in accordance with 34 CFR part 786.

(Authority: 20 U.S.C. 5035)

§ 722.32 What additional requirements must be met by a grantee?

A grantee shall participate in meetings and workshops conducted by the Secretary to the extent funds are provided in the grant for this purpose.

(Authority: 20 U.S.C. 5035, 5038)

[FR Doc. 91-28085 Filed 11-21-91; 8:45 am]

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federal register

Friday
November 22, 1991

Part VI

Department of Education

Grants and Cooperative Agreements, Availability, Rehabilitation Long-Term Training and Rehabilitation Counseling, Notices

DEPARTMENT OF EDUCATION

[CFDA No.: 84.129B]

Rehabilitation Long-Term Training: Rehabilitation Counseling; Notice Inviting Applications for New Awards for Fiscal Year (FY) 1992

Purpose of Program: To provide grants to increase the supply of qualified personnel available for employment in public and private agencies and institutions involved in the vocational rehabilitation and independent living rehabilitation of individuals with disabilities, especially those individuals with the most severe disabilities, and to maintain and upgrade the skills and knowledge of personnel employed as providers of vocational, social, or psychological rehabilitation services.

Eligible Applicants: State agencies and other public or nonprofit agencies and organizations, including institutions or higher education, are eligible for assistance under this program.

Deadline for Transmittal of Applications: February 3, 1992.

Deadline for Intergovernmental Review: April 3, 1992.

Applications Available: December 9, 1991.

Available Funds: $1,700,000.

It is expected that $1,700,000 will be available for new grants in the area of Rehabilitation Counseling. However, the actual level of funding is contingent upon final congressional action.

Estimated Range of Awards: $80,000–$120,000.

Estimated Average Size of Awards: $100,000.

Estimated Number of Awards: 17.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 85, and 86; and (b) The regulations for this program in 34 CFR Part 385 and 386.

Supplementary Information: A notice of proposed priorities for fiscal year 1992 for the Rehabilitation Long-Term Training program is published elsewhere in this issue of the **Federal Register**. The notice contains a proposed absolute priority in the area of Rehabilitation Counseling—Doctoral Level Programs. If that proposed absolute priority for Rehabilitation Counseling—Doctoral Level Programs is published as a final priority, a separate notice inviting applications for new awards in the absolute priority area will be published at a later date.

Applicants proposing doctoral level programs are eligible to respond to this notice inviting applications and may also apply for funding in response to the application notice for Rehabilitation Counseling—Doctoral Level Programs when it is published in the **Federal Register**.

For Applications or Information Contact: Bruce Rose, U.S. Department of Education, 400 Maryland Avenue, SW., room 3332, Switzer Building, Washington, DC 20202–2649. To request an application, call (202) 732–1347; to receive further information, call (202) 732–1325. Deaf and hearing impaired individuals may call the Federal Dual Relay Service on 1–800–877–8339 (in the Washington, DC 202 area code, telephone 708–9300) between 8 a.m. and 7 p.m., Eastern time.

Program Authority: 29 U.S.C. 774.

Dated: November 19, 1991.

Michael E. Vader,

Acting Assistant Secretary, Office of Special Education and Rehabilitative Services.

[FR Doc. 91–28166 Filed 11–21–91; 8:45 am]

BILLING CODE 4000–01–M

Rehabilitation Long-Term Training

AGENCY: Department of Education.

ACTION: Notice of Proposed Priorities for Fiscal Year 1992.

SUMMARY: The Secretary proposes priorities for fiscal year 1992 under the Rehabilitation Long-Term Training program. The Secretary takes this action to focus Federal financial assistance on academic and non-academic training in areas of personnel shortages in the field of rehabilitation, as identified through data collection, analysis, needs assessments, and professional literature. One of the National Education Goals calls for preparing all adults for responsible citizenship, further learning, and productive employment in our modern economy. The Department supports a variety of training activities for vocational rehabilitation personnel so that they may assist individuals with disabilities in gaining the knowledge and skills to obtain employment and compete in a global economy.

These priorities are intended to increase the number of qualified rehabilitation professionals serving in the State-Federal program of vocational rehabilitation (VR) for individuals with disabilities.

DATES: Comments must be received on or before December 23, 1991.

ADDRESSES: All comments concerning these priorities should be addressed to Mark E. Shoob, U.S. Department of Education, 400 Maryland Avenue, SW., room 3036, Switzer Building, Washington, DC 20202–2575.

FOR FURTHER INFORMATION CONTACT: Dr. Richard Melia, U.S. Department of Education, 400 Maryland Avenue, SW., room 3324, Switzer Building, Washington, DC 20202–2649. Telephone: (202) 732–1400. Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1–800–877–8339 (in the Washington, DC 202 area code, telephone 708–9300) between 8 a.m. and 7 p.m. eastern time.

SUPPLEMENTARY INFORMATION:

The Rehabilitation Long-Term Training program is authorized by title III, section 340 of the Rehabilitation Act of 1973, as amended. Under this discretionary grant program, Federal support may be provided for the purpose of academic and non-academic training in areas of personnel shortages relating to the provision of vocational, medical, social, and psychological rehabilitation services.

The Rehabilitation Long-Term Training program provides financial assistance for—(1) Projects that provide basic or advanced training leading to an academic degree in designated fields of study related to vocational rehabilitation; (2) Projects that provide a number of interrelated training activities designed to improve the professional competence of employed rehabilitation workers in one of the designated fields but not directly related to the awarding of an academic degree; (3) Projects that provide undergraduate medical students with an orientation to the concepts and techniques of rehabilitation medicine; and (4) Projects that provide support for medical residents enrolled in residency training programs in the specialty of physical medicine and rehabilitation.

The Secretary will announce the final priorities in a notice in the **Federal Register**. The final priorities will be determined by responses to this notice, available funds, and other considerations of the Department. Funding of particular projects depends on the availability of funds, the nature of the final priorities, and the quality of applications received. The publication of these proposed priorities does not preclude the Secretary from proposing additional priorities, nor does it limit the Secretary to funding only these priorities, subject to meeting applicable rulemaking requirements.

Note: This notice of proposed priorities does not solicit applications. A notice inviting

applications under these competitions will be published in the **Federal Register** concurrent with or following publication of the notice of final priorities.

Priorities

Under 34 CFR 75.105(c)(3) and 34 CFR 386.1, the Secretary proposes to give an absolute preference to applications that meet one of the following priorities. The Secretary proposes to fund under these competitions only applications that meet one of these absolute priorities.

Proposed Priority 1—Rehabilitation Counseling—Doctoral Level Programs

Background

The 1989 National Survey of Personnel Shortages and Training Needs in Vocational Rehabilitation study by Pelvain Associates (September, 1989) identified significant shortages of rehabilitation counselors employed by State VR agencies and other service providers. The study recommended targeting training for rehabilitation counseling as a major priority. At the Department of Education public meeting on the Rehabilitation Training Program (May 9, 1991), several presenters (State agencies and universities) indicated that faculty available to train new counselors is dwindling in number. Many of the master's level programs in Rehabilitation Counseling began over 25 years ago, and many of the faculty and heads of those departments are nearing retirement. Therefore, doctoral level Rehabilitation Counseling programs are needed to train a new generation of faculty and administrators for university-based programs as well as State VR agencies and other related agencies and nonprofit organizations serving individuals with severe disabilities.

Priority

Projects must prepare doctoral graduates to serve as faculty in institutions training vocational rehabilitation professionals for service in the State-Federal VR program and prepare doctoral graduates to serve in leadership positions in the State-Federal VR program. Programs must include training in teaching skills, research, and rehabilitation administration.

Proposed Priority 2—Client Assistance—Projects of National Scope

Background

Client Assistance Programs (CAPs) are authorized under section 112 of the Rehabilitation Act of 1973, as amended (Act), and the regulations in 34 CFR part 370 to—(1) Provide assistance in informing and advising individuals who are seeking or receiving services under the Act of all available benefits under the Act; (2) Assist those individuals in their relationships with projects, programs, and facilities providing services to them under the Act; and (3) Provide information on available services under the Act to any individual with a disability in the State. In addition, CAPs are authorized to help individuals with disabilities understand rehabilitation services programs under the Act; help individuals with disabilities by pursuing, or assisting them in pursuing, legal, administrative, and other available remedies if necessary to ensure the protection of their rights under the Act; advise State and other agencies of identified problem areas in the delivery of rehabilitation services to individuals with disabilities and suggest methods and means of improving agency performance; and provide information to the public concerning the client assistance program.

The Department of Education public meeting on the Rehabilitation Training Program (May 9, 1991) and written comments received in response to a notice in the **Federal Register** (May 1, 1991) included statements regarding the training needs of CAP personnel. These needs included additional training in topic areas such as client and counselor issue identification; analysis of service delivery problems; problem-solving; mediation, negotiation, and dispute resolution; and techniques to address system-level issues.

Priority

Projects must provide training to administrative and service delivery personnel employed by CAPs in areas related to the needs identified in the background section of this priority. Projects must be national in scope. Projects can provide training through a national seminar or workshop or a structured series of regional seminars or workshops.

Proposed Priority 3—Other Fields Contributing to the Rehabilitation of Individuals With Handicaps, Especially Individuals With Severe Handicaps, Including Homebound or Institutionalized Individuals—National Clearinghouse of Rehabilitation Training Materials

Background

RSA has funded a clearinghouse for rehabilitation training materials since 1961. Over the years, the clearinghouse has facilitated the development and dissemination of material with potential use in the training of rehabilitation personnel. Regulations for the Rehabilitation Training Program in 34 CFR 385.42 state that "a set of any training materials developed under the Rehabilitation Training Program must be submitted to any information clearinghouse designated by the Secretary." The project awarded under this priority will be designated to receive training materials developed during the project's duration. Users of the clearinghouse cover the range of rehabilitation professionals, but most frequently include State VR agency personnel, other rehabilitation counselors, rehabilitation educators, and rehabilitation facility personnel.

Priority

Projects must establish a national clearinghouse of rehabilitation training materials. Projects must propose to—(1) Identify and gather rehabilitation information and training materials for use in preparing pre-service and post-employment education and training for rehabilitation personnel; and (2) Disseminate, in a cost-effective manner, rehabilitation information and training materials for use in preparing pre-service and post-employment training education and training for rehabilitation personnel.

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.

Invitation To Comment

Interested persons are invited to submit comments and recommendations regarding these priorities.

All comments submitted in response to this notice will be available for public inspection, during and after the comment period, in room 3219 Switzer Building, 330 "C" Street, SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Monday through Friday of each week except Federal holidays.

Applicable Program Regulations

34 CFR parts 385 and 386.

Program Authority: 29 U.S.C. 774.

(Catalog of Federal Domestic Assistance Number 84.129, Rehabilitation Long—Term Training)

Dated: November 19, 1991.

Lamar Alexander,

Secretary of Education.

[FR Doc. 91–28165 Filed 11–21–91; 8:45 am]

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federal register

Friday
November 22, 1991

Part VII

Department of Commerce

National Telecommunications and Information Administration

15 CFR Part 2301

Public Telecommunications Facilities Program and Policy Statement; Final Rules

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

15 CFR Part 2301

[Docket No. 91 0636-1246]

Public Telecommunications Facilities Program

AGENCY: National Telecommunications and Information Administration (NTIA), Commerce.

ACTION: Final rules.

SUMMARY: This document revises and clarifies the rules and appendix governing administration of the Public Telecommunications Facilities Program (PTFP). PTFP is authorized to provide matching grants to plan and construct public telecommunications facilities.[1] In 56 FR 38007 published August 9, 1991, the National Telecommunications and Information Administration (NTIA) announced proposed revisions of the rules that govern the PTFP and requested public comment on those revisions. NTIA has reviewed the comments submitted as a result of the notice and is now responding to the comments and issuing final rules.

EFFECTIVE DATE: December 23, 1991.

FOR FURTHER INFORMATION CONTACT: Dennis R. Connors, Director, Public Telecommunications Facilities Program, NTIA/DOC, 14th Street and Constitution Avenue, NW., Room H-4625, Washington, DC 20230; Telephone: (202) 377-1835.

SUPPLEMENTARY INFORMATION: In response to the notice of proposed rulemaking (56 FR 38007, August 9, 1991), NTIA received comments from 11 different organizations.[2] In the Notice, NTIA divided the clarifications and revisions into two broad categories, Applicant Guidelines and Grantee Responsibilities. Clarifications or revisions for Applicant Guidelines were proposed under the following headings—Priorities, Catastrophic Damage, Additional Information for Applications, Withdrawals and Deferrals, Appropriate Applicant/PTFP Contact, Filing of FCC Applications, Support for Salary Expenses, Premature Obligation of Non-Federal Funds, and Assurances. Clarifications or revisions of Grantee responsibilities were proposed under the headings Site Right Documentation and Administration of Federal Grant Funds and Control and Use of Facilities.

No opposition was received to many of NTIA's proposed changes to the regulations, including the following: Priority 1B, deletion of the reference in the 1987 rules to "cable penetration" in the criteria used to determine the priority of television station activations; Priority 2, clarification of the criteria by expressly including "urgency" in the discussion of funding considerations; addition of § 2301.15(f), which clarifies appropriate applicant-NTIA contacts during the application review period; additional assurances in § 2301.5(d)(2)(xx) required of applicants regarding the maintenance of a drug-free workplace and disclosure of lobbying activities; and the reinsertion and revision of several sections regarding administrative procedures to place all PTFP Rules and requirements in one convenient document. These sections are § 2301.11(a)—public availability of PTFP applications; § 2301.16(d)—method of calculation of final total project cost; § 2301.18—Payment of the Federal Grant, § 2301.19—Retention of Records; § 2301.20—Completion of Projects; § 2301.21—Annual Status Report for Construction Projects; § 2301.22—Conditions Attached to the Federal Grant; § 2301.23—Grant Suspensions, Terminations, and Transfers; and § 2301.24—Equipment. The proposed changes have been incorporated into the final rules.

Applicant Guidelines

A. Priorities

Priority 1C—Downlinks

There was widespread support for NTIA's proposal to establish Priority 1C for satellite downlinks that would provide the first satellite-distributed public radio programming to the applicant's service area.[3] NFCB and IBS recommended that *all* downlinks be included in Priority 1. Both respondents cited "diversity of program service"[4] as supporting expansion of this Priority to include all radio downlink applications. NTIA recognizes the desirability of providing diverse program radio services to an area, but believes that the current ranking of Priority 2, to maintain the sole broadcast signal in an area, and Priority 3, to establish the first local service in an area, accurately reflect the objectives of the Act.[5] For this reason, NTIA has created a new category, Priority 4A, with which to highlight the need for satellite downlinks for stations in areas already served by another public radio station (discussed below).

RMCPB proposed that, for consistency, Priority 1C should be applied to low-power television as well.[6] NTIA's establishment of Priority 1C was done in response to the recommendations of the Public Radio Expansion Task Force, to actions by the Corporation for Public Broadcasting, and to actions by operators of the public radio satellite distribution system to promote access to satellite-distributed programming by small public radio stations. While NTIA is unaware of any similar need on the part of low-power public television stations, the Agency agrees that the policy should include both radio and television facilities that can provide the first nationally distributed programming to an unserved area. The language of Priority 1C has been changed to add television in the appendix to the final rules.

OSBE proposed that NTIA make broadcast equipment replacement, especially transmission equipment, the PTFP's first priority, in place of the NTIA's current Priority 1, which is the establishment of a first radio and television signal to an unserved geographic area. OSBE's purpose in making this proposal was "to recognize and reinforce congressional intent in establishment and maintaining support for PTFP as a vital means of providing universal public broadcasting services to the American public."[7] NTIA believes, however, that the current Priority 1 reflects the basic goal of the legislation authorizing the PTFP, which emphasizes that the extention of service to unserved areas is the primary of the three purposes for the PTFP.[8] Congress has also explicitly stated that "PTFP's primary goal must be to ensure that unserved areas of the country receive access to public broadcast programming

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[1] See 47 U.S.C. 390-393, 397 (1988). The Communications Act of 1934, as amended. Unless otherwise noted, all statutory citations are to title 47 of the United States Code.

[2] Comments were submitted by the following organizations: Association of America's Public Television Stations and the Public Broadcasting Service in a joint filing (Joint Comments); the Corporation for Public Broadcasting (CPB); the Intercollegiate Broadcasting System, Inc., Vails Gate, NY (IBS); public radio station KCSU, Colorado State University, Fort Collins, CO; Minnesota Public Radio, St. Paul, MN (MPR); the National Federation of Community Broadcasters (NFCB); National Public Radio (NPR); the Organization of State Broadcasting Executives, Columbia, SC (OSBE); Rocky Mountain Corporation for Public Broadcasting, Albuquerque, NM (RMCPB); and the WGBH Educational Broadcasting Foundation, Boston, MA (WGBH).

[3] CPB, IBS, NFCB, NPR, and RMCPB filed comments in general support of this proposal.

[4] IBS at 2; NFCB at 3.

[5] Sections 390 and 393(b).

[6] RMCPB at 1.

[7] OSBE at 1.

[8] Sections 390 and 393(b).

to the maximum extent practicable".[9] NTIA will continue, therefore, to assign Priority 1 status only to projects that will provide first service to unserved areas.

Priority 4A—Replacement and Improvement

A number of respondents commented on NTIA's proposal to accord somewhat higher status under Priority 4 to applications to replace or improve equipment from broadcast stations that produce a high percentage of public broadcasting's nationally-distributed programming. MPR and the APTS/PBS joint submission supported the proposal.[10] NPR, NFCB, RMCPB, and IBS strongly opposed it.[11]

Opponents of the proposal felt that favoritism, or a perception of favoritism, toward such stations might result from its implementation. In addition, they expressed the fear that the proposal would lead to diminished funding for other projects. RMCPB was concerned with "improvement/replacement grants to less advantaged stations", while NFCB and IBS were concerned about "the development and improvement of emerging stations."

The APTS/PBS joint submission and the NPR comments noted that the expression "high percentage of programming" is vague and asked for a definition. The joint submission also suggested that the proposal's focus should be exclusively on production-related equipment and recommended that NTIA consider establishing a "distribution threshold above which stations would automatically qualify under Priority 4A".[12]

In response, NTIA observes that any time a cluster of stations is made the subject of a distinct priority or subpriority, a perception of "favoritism" or "discriminatory treatment" may arise. NTIA asserts, however, that this proposal does not represent an attempt at favoritism and that the PTFP record in awarding grants to such stations for these purposes bears this out and will continue to bear it out.

Admittedly, this proposal pertains far more to public television than to public radio. It stems from NTIA's observation that a disproportionate amount of public television's national programming originates from a relatively few stations located in major urban markets served by more than one public broadcast signal. Given PTFP's priority structure, applications from these stations—no matter how urgent the demonstrated need for replacement equipment—can never qualify for a Priority 2. This places these few, critical stations at a perpetual disadvantage in the competition for funding. This situation, NTIA thinks, warrants the slight additional emphasis—from Priority 4 to Priority 4A—on such applications. On a related point, NTIA concedes that the expressions "high percentage" and "significant amount" are imprecise. Nonetheless, because the universe of potential beneficiaries is so small, and because the application of a "percentage-of-programming" yardstick might be considered by many to be impermissibly arbitrary, NTIA has concluded that no distribution threshold is called for. The proposal, with the "significant amount" language, has thus been retained in the final rules.

Finally, NTIA agrees with APTS and PBS that its intent in suggesting this Priority 4A subcategory was to asssist the stations in question with production-related equipment and the language in the final rules has been changed accordingly.

The attention of those who fear that smaller or emerging stations may be put at a disadvantage by this proposal is directed to several factors that protect such stations. First, station activations in unserved areas remain Priority 1. Second, the upgrading and improvement of "emerging" public radio stations have become a matter of NTIA's special attention, in good part as a result of the Public Radio Expansion Task Force deliberations. Third, applications for equipment replacement from stations in small communities usually merit a Priority 2, because they generally provide the sole signal or the only locally originated signal to a service area. Stations that are located in multi-station markets and therefore cannot qualify for Priority 2 will be considered in Priority 4A for equipment replacement. The stations in multi-station markets and national producers therefore will be considered in the same Priority in the final rules, just as they were considered in the same Priority under the 1987 final rules.

Priority 4A—Downlinks

NTIA proposed that another element of the new Priority 4A would be for the acquisition of satellite downlinks by public radio stations in areas already served by one or more full-service public radio stations. In such situations, the applicant would have to demonstrate that it would broadcast a program schedule that would not merely duplicate what is already available in its service area, and certify that it will continue to provide such a schedule for a minimum of five years after project completion.

CPB supported this proposal.[13] NFCB, NPR, and IBS strongly opposed certain aspects of it,[14] and RMCPB raised a question about the five-year certification.[15]

NPR, NFCB, and IBS objected to the program schedule requirement. IBS commented that "NTIA should not include in its new rules any PTFP policy that directs or mandates a particular program schedule in order to secure PTFP funding".[16]

NPR characterized the requirement as "an unprecedented and unwise intervention into local programming authority".[17] It asserted, "The requirement that a station certify its program schedule in any way is directly contrary to the fundamental structure of public broadcasting that was established by Congress * * * NTIA's proposal threatens to compromise the authority over programming that the Federal government has long delegated solely to the local station licensee."[18] NPR also stated that "program content is best judged by the marketplace" and that a "federal 'Big Brother' that reviews program content and scheduling is inefficient, unwarranted, and sets a dangerous precedent."[19]

NTIA believes that NPR, IBS, and NFCB have misinterpreted the Agency's purpose in this proposal and have misread its intentions. It was never NTIA's design to direct or mandate a program schedule or pass judgment on its applicants' program content. The Agency agrees that such actions would be improper. NTIA does hold, however, that, in a world of scarce Federal resources and intense competition for those resources, it has a responsibility to ensure that PTFP's relatively limited funds are not used to enable a station merely to offer a community a service that, for all practical purposes, it already has. NTIA strongly believes that a grant award for such a purpose would represent wasteful grants management.

NTIA hastens to assure the public broadcasting community that in implementing this proposal it will restrict itself to ensuring that, in the most general terms, the program

[9] House Report 98-772, accompanying H.R. 5541 ("Public Broadcasting Amendments Act of 1984"), at 7.

[10] MPR at 1; Joint Comments at 19-20.

[11] NPR at 15-14; NFCB at 4; RMCPB at 2; IBS at 3.

[12] Joint Comments at 20.

[13] CPB at 8.

[14] NFCB at 3; NPR at 12-14; IBS at 3.

[15] RMCPB at 2.

[16] IBS at 3.

[17] NPR at 12.

[18] *Id.* at 12-13.

[19] *Id.* at 13.

schedule of the applicant in question will not substantially duplicate the service already provided to the community. The Agency wishes to emphasize the expression "in the most general terms". It certainly will not direct or mandate that an applicant offer "a particular program schedule in order to secure PTFP funding" nor will it review "program scheduling and content". NTIA will confine itself to an overview of an applicant's program schedule and the audience the applicant wishes to reach with that schedule.

Moreover, the Agency agrees with NPR that marketplace forces should play an important role in program selection. If these forces are not considered, the likelihood of the applicant's remaining on-air for the full period of Federal interest in the PTFP-funded equipment is diminished and the Federal interest in the equipment is to that extent jeopardized. NTIA suggests, however, that these forces should be considered before the entity applies for a PTFP grant award and that its deliberations should be evident in the application, preferably in the form of a commitment to a non-duplicative program schedule.

NTIA has thus retained the requirement that, to be assigned to this element of the new Priority 4A, the applicant must demonstrate that its program schedule will not substantially duplicate that of the other station or stations serving the area.

At the same time, NTIA has reassessed its proposed requirement that an applicant in this priority certify that it will continue to provide an alternative schedule for a minimum of five years after project completion. This was done in response to comments from RMCPB and IBS. The former noted the discrepancy between the five-year certification and the 10-year period of Federal interest in the project equipment.[20] The latter recommended that successful applicants be required to submit to PTFP, in lieu of the certification, "an annual report outlining the programming obtained through use of the downlink equipment within the past year" for the first five years of the Federal interest period.[21]

NTIA believes that IBS's recommendation would be at least as burdensome and more intrusive to grant recipients than would be the certification. Furthermore, NTIA has concluded that such a certification is too vague and might give rise to needless controversy. It has, therefore, deleted references to a five-year certification and has decided against a five-year annual reporting requirement.

As noted above, however, NTIA will review Priority 4A downlink applications for evidence of a non-duplicative program schedule and will, to a great extent, rely on such evidence in assigning the application its priority and in considering its competitiveness.

Priority 4A—Basic Complement of Equipment

RMCPB and NPR supported the proposal to place into Priority 4A applications from public broadcasting stations that have gone on the air sometime in the preceding five years without PTFP support and with a complement of equipment well short of what PTFP considers to be basic for effective operation.[22]

NPR pointed out, however, that NTIA offered no justification for limiting this proposal to stations that have gone on-air "sometime in the preceding five years". NPR recommended that this part of the proposal be deleted. In response, NTIA reassessed its own thinking on this issue and has concluded that the five-year limitation was arbitrary and might exclude from this priority worthy applications from stations that have been struggling successfully to survive for more than five years and, having accumulated sufficient funds to match a Federal grant, are ready to upgrade their services. The above-quoted phrase has been deleted from the final rules.

Priority 4B

RMCPB expressed some reservations about NTIA's proposal to move certain types of station activation projects from the Special Applications category to Priority 4B, which includes the improvement and non-urgent replacement of equipment at any public broadcasting station.[23] The projects of concern to RMCPB would activate public broadcast stations in areas already served by a station or stations with local origination capability when the proposed stations would not merit substantial Special Consideration because of significant participation by minorities or women. RMCPB also questioned NTIA's statement that the change would cluster virtually all broadcast applications in the Priorities. RMCPB suggested that it would be more desirable to keep such activation applications in the Special Applications category because such consideration "has the virtue of requiring services different from those in place and responsive to community needs and is thus consonant with the intent to emphasize unique 'service' ".

NTIA re-evaluated its proposal in response to RMCPB's comments and concluded that such station activation projects fall outside the logical scope of the five PTFP Priorities. It also noted that such "second-service" stations, even those without substantial involvement of women or minorities, often offer the promise of greatly enriched program service to a community and, by considering these applications in Special Applications, PTFP reserves the right to elevate them in fundability to the level of the highest priorities. NTIA has decided, therefore, that it is wiser to continue placing these applications into the Special Applications category. The proposed change has thus been deleted from the final rules.

Special Applications

WGBH questioned whether the language of the Special Applications section is sufficiently inclusive.[24] The comments stressed the importance of extending public and instructional television to disabled individuals, especially to the deaf and hearing impaired, the blind and visually impaired, and to speakers of languages other than English. They also asked that granting funds for research and development become part of the PTFP mission, and that disabled people be accorded the same special consideration that the PTFP statute accords women and minorities.[25] These comments reflect a misunderstanding about PTFP. Accordingly, NTIA takes this opportunity to reduce possible confusion.

NTIA agrees with WGBH's general statement that PTFP's central mission is to extend public telecommunications. This is mandated by PTFP's authorizing legislation to "extend delivery of public telecommunications services to as many citizens of the United States as possible * * *".[26] WGBH further noted that the PTFP Rules benefit and guarantee participation of racial and ethnic minorities and women,[27] and urged that disabled Americans get the same benefits. NTIA is sensitive to the needs of disabled Americans and will continue to fund projects that benefit them. Until Congress supplies more specific direction, however, applications that

[20] RMCPB at 2.

[21] IBS at 3.

[22] RMCPB at 2; NPR at 15–16.

[23] RMCPB at 2.

[24] WGBH at 1–2.

[25] *Id.*

[26] Section 390 (1988).

[27] Sections 390(2), 392(f), 393(b)(2) (1988) and 15 CFR 2301.3 (1989).

benefit disabled Americans will have to be evaluated without the advantage of Special Consideration (see 2301.3).

WGBH also urged that PTFP grant funds for research and development. In this matter, NTIA is constrained by the PTFP's authorizing legislation. The statute authorizes grants for the "planning and construction of public telecommunications facilities" [28] and specifies that the Federal government shall retain an interest in any PTFP-funded equipment for a period of ten years after project completion.[29] These provisions are intended to ensure continuity of service to the public for a ten-year period. NTIA interprets this statutory mandate to preclude grants for purposes of research and development. Also, each year NTIA must defer almost two thirds of the applications it receives. Thus, even if the Agency were not restricted by the statutory mandate noted above, NTIA could not afford to grant PTFP funds for research and development.

B. Catastrophic Damage

No disagreement was expressed with NTIA's proposal to establish a process to timely accept applications from public broadcast stations that suffer catastrophic damage and need assistance to restore public telecommunications services to their communities. APTS and PBS pointed out, however, that the Rule as proposed might be read as making "stations with legally mandated self-insurance regimes" ineligible for assistance under this rule.[30] This was not NTIA's intention, and § 2301.5(g)(3) has been revised in the final rules.

C. Additional Information for Applications

Three commenters expressed concern about the elimination of the 45-day period after the closing date during which applicants formerly were permitted to submit additional information and to make minor changes in their applications.[31] The concerns related to the fact that "problems beyond the applicant's reasonable control may arise and not be capable of resolution by the PTFP's closing date." [32] NTIA has long recognized that certain documents and information needed for a full evaluation of an application may not be available by the closing date if they are to be supplied by independent third parties. This concern is addressed in the final rules by the requirement that applicants "must immediately provide * * * two copies of information received after the closing date *that materially affects the application*" (emphasis supplied) (see § 2301.6(b)).

As suggested by APTS and PBS,[33] NTIA's intent now as in the past is to accept for filing and evaluation applications that are substantially complete. The rules provide that "substantially incomplete applications will be returned by the Agency" (see § 2301.9(c)).

NTIA intends to continue its established practice of requesting additional information that may be needed to permit evaluation of the application, as provided in § 2301.6(a). The final rules set a 15-day deadline for applicant response to such requests. RMCPB was concerned that delays in the mail could interfere with applicants' ability to meet the deadline.[34] The deadline was established in order to keep the PTFP application review and evaluation process on schedule, and the 15-day period is consistent with the way in which the PTFP has long handled other notices to applicants and grantees.

RMCPB asked that NTIA state explicitly that it will consult with state telecommunications agencies during review and evaluation of PTFP applications, and it noted language inconsistencies in two passages in the rules—§§ 2301.7(b) and 2301.15(b)—that mention such agencies.[35] Since it seeks input on applications from such agencies and the consultation is clearly implied by the requirement that an applicant serve a copy of its application on these state agencies (*see* § 2301.7(b)), NTIA has revised the wording of § 2301.12(b) to state the matter plainly in the final rules, as well as to make consistent the language between it and §§ 2301.7(b) and 2301.15(b).

RMCPB also noted a difference in the language of the opening paragraphs of § 2301.13 and § 2301.14 and suggested they be made consistent.[36] NTIA appreciates having this called to its attention, and § 2301.14 has been changed to be consistent with § 2301.13.

D. Withdrawals and Deferrals of Applications

NPR supported the addition to the Rules of a provision for the formal withdrawal of an application without affecting future funding decisions.[37] In addition, it asked that applicants be notified formally when their applications are deferred and given the reasons for the deferral. NTIA presently notifies applicants when their applications have been deferred and will continue doing so, but believes it is impractical to write several hundred "rejection letters" detailing the reasons for deferral. At the same time, NTIA points out that PTFP Program Officers are available to discuss deferred or prospective applications during the period between the time grants are awarded in one cycle and the closing date for the next cycle.

RMCPB agreed that it is desirable to provide for the withdrawal of an application, but it disagreed with the proposal to treat requests for deferral as requests for withdrawal. It saw this as a burden to applicants because they have to file new applications if they wish to have their projects considered later. It also described the limit of two reactivations for any deferred application as "overkill".[38] Since the reactivation of a deferred application requires the applicant to submit a new application form and to bring all other elements of the original application up to date (see § 2301.5(e)(4)), NTIA believes the submission of a completely new application is a minor issue and it continues to believe that after three years applicants need to re-evaluate their applications before they are submitted for a fourth time. The Agency, therefore, retains the proposed rule unchanged in the final rules except for the removal of minor discrepancies in language in § 2301.9(g) (1) and (2). Deferred applications that have been reactivated two or more times when these Final Rules are published will be permitted one (1) additional reactivation in the 1992 grant round before a new application must be submitted in order to receive continued consideration of the same project.

E. Appropriate Applicant/PTFP Contacts

No comments were received on NTIA's proposal to formalize a policy previously distributed to all 1991 applicants. It is restated here for the convenience of interested parties.

As a publicly funded discretionary grant program, NTIA must follow procedures that are fair and impartial to all applicants. To avoid the appearance of impropriety, NTIA has formalized in the final rules its guidelines on the topic (see § 2301.15(f)). In particular, in order to maintain the integrity of the

[28] Section 390 (1988).
[29] Section 392(g) (1988).
[30] Joint Comments at 23.
[31] *Id.* at 20–22; KCSU at 1; RMCPB at 2–3.
[32] Joint Comments at 21.
[33] *Id.* at 22.
[34] RMCPB at 3.
[35] *Id.* at 4 and 5.
[36] *Id at 5.*
[37] NPR at 17
[38] RMCPB at 3.

application review process, NTIA/PTFP staff are not authorized to discuss the merits of an application while it is under review. Some contacts during the grant review cycle are appropriate, however, and they are indicated in the final rules.

F. Filing of FCC Applications

There was general support for NTIA's proposals to accept and process applications for facilities such as television translators and low-power television stations before FCC construction permit applications are filed when the FCC's filing "window" occurs after the PTFP closing date, and to allow later filing of FCC applications for STL's, remote pick-up units, C-band downlink facilities, and Very Small Aperture Terminals (VSATs). APTS and PBS suggested "this provision should also apply in the future to any other facilities that may be subject to FCC restrictions on filing dates."[39] It is NTIA's present intention to do so, but prudence forbids a blanket provision in the PTFP Rules without the particulars needed for a proper assessment of the situation. If it concludes that the general principles behind this rule should apply to additional FCC filings in the future, the Agency can advise applicants of this fact and give instructions on how to proceed in the guidelines booklet that is included in the application package each year.

Since the proposed rule was published, it has come to NTIA's attention that the FCC has decided to register, instead of license, C-band satellite downlinks. The FCC requires construction of the downlinks to be completed within six months of frequency coordination. NTIA recognizes that it is not practical for PTFP applicants to complete their frequency coordination prior to the submission of a PTFP application and meet the FCC deadline, since the PTFP application review process itself takes more than six months. Therefore, NTIA has added a new § 2301.8(c) to indicate that submission of FCC registration for C-band downlinks must be submitted to PTFP by grantees prior to, and will be a condition for, the release of Federal funds for C-band downlink construction.

G. Support for Salary Expenses

No comments were received on NTIA's proposed clarification of its policy concerning the support of salary expenses for construction projects. The statement is repeated here for the convenience of all interested parties.

NTIA regards its primary mandate to be funding the acquisition of equipment and only secondarily the funding of salary expenses, even when allowed by law. Moreover, NTIA notes that competition for PTFP funding remains intense. To ensure that PTFP monies are distributed as effectively as possible in this competitive atmosphere, NTIA must weigh carefully its support for any project cost not directly involved with the purchase of equipment.

Therefore, NTIA generally will not fund salary expenses, including staff installation costs, pre-application legal and engineering fees, and pre-operational expenses of new entities. NTIA will support such costs only when the applicant demonstrates that exceptional need exists or that substantially greater efficiency would result from the use of staff installation instead of contractor installation (see § 2301.17(b)-(3)).

As regards the installation of transmission equipment, NTIA strongly favors the use of either manufacturer or professional contractor personnel and commonly funds these costs. NTIA believes that the value of transmission equipment and the complicated nature of its installation require expertise beyond that normally found on station staffs.

NTIA rarely will support requests for assistance for the installation of studio and test equipment, whether that installation is by staff or by contract employees. Such installation is normally of minimum difficulty, and the associated installation costs should be absorbed in the recipient's normal operating budget. Again, NTIA will take into account demonstrations of exceptional need.

H. Premature Obligation of Non-Federal Funds

RMCPB endorsed NTIA's proposal to remove the inconsistency between two references regarding the permissible date for applicant obligation of non-Federal funds (§§ 2301.16(a)(3) and 2301.16(c)), but recommended that the reference be to the date when an applicant files its application, rather than to the NTIA closing date. RMCPB suggested that permitting applicants to expend the non-Federal portion of the proposed project upon the filing of the application would result in significant cost savings due to purchase of equipment before price increases and in faster completion of projects due to avoidance of weather delays.[40]

In NTIA's experience few if any applications are submitted more than a week or two before the closing date. The opportunity for cost or time savings is therefore minimal. The closing date for receipt of applications is a uniform date that applies to all applicants and is included by the Department of Commerce Office of Federal Assistance, in the official award document as the effective date when non-Federal funds may be obligated. It would not be feasible to have that date be different for every grant awarded, and the Agency has retained the proposed language in the final rules.

I. Assurances

RMCPB objected to a change in the wording of § 2301.5(d)(2)(vi) from, "Documentation that the applicant will have, when needed, the funds to match any grant the Agency may provide." to, "Documentation that the applicant will have, when needed, the funds to construct any facilities for which the Agency has granted matching funds." RMCPB felt that the new language is not as "inclusive" as the old.[41] NTIA believes, however, that the new wording is more inclusive than the old since it requires applicants to certify that they will have not only the local funds to match a PTFP grant, if awarded, but also the local funds to pay any costs that are ineligible for PTFP support, but which must be paid in order for the project to be constructed.

In a related area, RMCPB recommended that NTIA change the requirement that applicants provide information on their Federal and non-Federal support during the three preceding fiscal years. (See § 2301.5(d)(2)(viii).) RMCPB finds this requirement "unclear * * * confusing * * * considerable waste of time," and requested "clarification and simplification."[42]

NTIA has found the information contained in the three-year financial statement (exhibit A of the PTFP Application Form) to be useful in evaluating the applicant's financial resources to construct the requested facility and to continue operating the facility during the ten-year period of Federal interest. To lessen the administrative burden on applicants in meeting this requirement, NTIA not only permits but recommends that applicants qualified to receive funds from the Corporation for Public Broadcasting (which is the vast majority of PTFP applicants) use copies of their CPB

[39] Joint Comments at 22.

[40] RMCPB at 4.

[41] *Ibid.*

[42] *Ibid.*

Annual Reports (schedule A and Certification of Non-Federal Financial Support) in lieu of the forms provided as exhibit A by PTFP. The information contained in the three-year financial statements is particularly valuable in evaluating applications from non-broadcast entities. Since nonbroadcast entities are eligible to receive PTFP funding only for the construction or expansion of a facility, they usually do not have a past history with PTFP and are, therefore, unknown to the program.

NTIA provides guidance on submitting this information in the application material sent to all potential applicants. The material is updated each year. The guidelines request that if the entity that is the subject of the PTFP application, such as a radio station or ITFS facility, is a unit of a larger institution, such as a university, the information submitted for the three-year financial statement should pertain to the revenue of the facility that is the subject of the application (*e.g.*, an ITFS facility) rather than the revenue of the larger unit (*e.g.*, a university). Where revenue information is not available for the entity that is the subject of the PTFP application, the applicant should provide revenue information for the entire institution and should explain the reason for submitting information for the entire institution.

PTFP staff is available to provide technical assistance regarding the completion of the PTFP application form during the weeks preceding the application closing date. Applicants are encouraged to contact the PTFP staff regarding clarification of any aspect of preparation of the PTFP application form.

J. Applicant Debts

Two parties had negative comments about the way NTIA is required to treat debt delinquency.[43] The Rules prohibit release of funds to an entity that has outstanding debts to any agency of the Federal government.[44] The prohibition applies to all sub-units of an entity. The comments stated that applicants should not be penalized for the outstanding debts of other sub-units. KCSU feared that this could penalize an applicant unfairly. NPR suggested that a waiver provision of OMB Circular A–129 be specifically incorporated into the PTFP rule.

The Federal government's policy is to collect all outstanding debts. In furtherance of this policy all entities, even those with many sub-units, are treated as one. The Department of Commerce may permit waiver of the ban on granting funds to entities with outstanding debt to the Federal government "upon a specific determination that it is in the best interest of the government." [45] As a general matter, NTIA will consider requests for such waivers. A waiver may be granted if the applicant makes a strong showing that it is in the best interest of the government to do so. It should be noted, however, that the general rule, discussed above, militates against granting such a waiver except in rare circumstances.

Grantee Responsibilities

K. Site Rights Documentation

The proposed new Rules included formalization of a procedural change for documenting that site rights have been obtained for a project. The change requires a letter of certification from a local attorney that the site rights meet PTFP requirements.

RMCPB indicated that the new site rights rule appears to be "advantageous to applicants, but if it allows no alternative to an attorney's opinion letter, it may unnecessarily increase a new station's costs." [46] NTIA's experience with attorney letters of certification is positive. Site rights can be processed and funds released to grantees quicker than under the prior system whereby NTIA's Office of Chief Counsel reviewed each lease or deed. The cost of the attorney's letter of certification appears to be minimal. NTIA strongly urges the submission of an attorney's letter of certification. The final rule does provide, however, for NTIA's right to review site rights documentation "if deemed necessary".

Based on further consideration, NTIA takes this opportunity to revise the timing of when the attorney's letter of certification is required. NTIA formerly required site rights to be obtained prior to the submission of an application, but this posed difficulties for applicants who were reluctant to purchase property or enter into a lease before knowing whether a project would be funded. Section 2301.5(d)(2)(ix) has been changed to require that the application include a letter or letters of intent with the prospective lessor or seller, if the applicant does not already have rights to the necessary site(s). NTIA will expect grantees to finalize the site rights within six months of the beginning of the project period. Language regarding the attorney's certification has been relocated from § 2301.5(d)(2)(ix) to a new § 2301.22(a)(4). This section indicates that the attorney's letter of certification will not be required until after an award is made, and will be a condition for the release of Federal funds for the project.

L. Administration of Federal Grant Funds and Control and Use of Facilities

APTS and PBS questioned NTIA's requirement that an initial lien on grant-funded equipment be filed with the Federal government within 90 days of the start of the project period, usually before any equipment is purchased or Federal funds expended. (See § 2301.22(a)(2).) After project completion, NTIA requires the filing of a lien that includes manufacturers' names and the model and serial numbers of equipment actually purchased as a result of the competitive bidding process. APTS and PBS indicated that this "two step process * * * is an unnecessary and expensive burden on grantees." [47] NTIA believes that the initial lien, which usually costs only a nominal filing fee, is not an expensive burden. In any event, it is necessary to protect adequately the Federal interest in the equipment. Completion of PTFP-funded projects often takes two years or longer. Delay in filing a lien on the Federally funded equipment until the project is completed would leave the Federal interest in the equipment unprotected for a lengthy period. Further, the initial lien, filed within 90 days of the start of a project, protects the Federal interest on equipment in the event that the project is not completed by the end of the award period.

M. Equipment

NPR raised several issues regarding NTIA's standard for equipment purchased with PTFP funding. NPR said that "NTIA's historic reliance on the phrase 'professional broadcast equipment' no longer ensures high quality, reliability, or durability." [48] NPR recommended that NTIA provide applicants with an "NTIA-sanctioned list of equipment, by make and model numbers, * * * to ensure that their equipment selections will meet fully NTIA's standards for performance quality, reliability and durability." [49]

NTIA supplements the "professional broadcast quality" standard mentioned in § 2301.24 with detailed equipment

[43] NPR at 17; KCSU at 2.

[44] 15 CFR 2301.4(d) incorporating OMB Circular A–129, Managing Federal Credit Programs.

[45] U.S. Department of Commerce, Credit and Debt Management Operating Standards and Procedures Handbook, chapter 5, section 8.02.

[46] RMCPB at 4.

[47] Joint Comments at 24.

[48] NPR at 20.

[49] *Id.* at 19.

lists contained in the guideline materials sent to all potential applicants. These equipment lists, which ran 14 pages in the 1991 application guidelines, are updated each year and are developed by NTIA after consultation with national public telecommunications organizations and from feedback from grantees. The field of telecommunications equipment is vast and constantly changing. NTIA does not believe it practical to establish a list of all approved equipment by make and model numbers as proposed, and also believes that such a list, if prepared, would be of limited use. Many PTFP grantees indicate that items on the approved equipment list must be changed simply because new equipment is introduced between the time the application is prepared and the time that equipment is purchased. NTIA encourages applicants to discuss their equipment proposals with PTFP staff before submission of applications. NTIA also encourages grantees to contact PTFP regarding possible changes in the equipment list in response to the availability of new equipment on the market.

NPR also suggested that frequent changes in equipment product lines, particularly in broadcast studio equipment, coupled with significant advances in consumer electronics, may warrant NTIA's review of the Federal 10-year interest in PTFP funded equipment.[50] NPR recognized that NTIA's ten-year interest is based statutory [51] and encouraged NTIA to conduct a detailed agency review which could lead to a revision of the statute. NTIA appreciates NPR's view on this issue and will take its recommendation under advisement.

N. Discrimination

PTFP requires grantees to provide information on any pending discrimination complaints or adverse judgments. For non-profit institutions, colleges or universities the discrimination information must cover the entire organization. State or municipal agencies, however, report only for themselves, not the entire state or municipal government (see § 2301.21(b)(1)(ii). RMCPB called the distinction inequitable and discriminatory.[52]

The distinction is statutory, and NTIA has no discretion to change it. Congress directed Federal agencies such as NTIA that extend financial assistance to prevent discrimination on the basis of race, color or national origin.[53] Congress then mandated, for the purposes of the statute, that the operations of an entire corporation are included.[54] For state or municipal governments only the operations of "a department, agency, special purpose district, or other instrumentality of a State or of a local government" are specified.[55] The PTFP reporting requirements reflect this distinction.

Under Executive Order (E.O.) 12291, the Department must determine whether a regulation is a "major" rule within the meaning of section 1 of E.O. 12291 and therefore subject to the requirement that a Regulatory Impact Analysis be performed. These rules are not a major rule because it is not "likely to result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumer, individual industries * * *; or (3) significant adverse effects on competition, employment, investment, productivity or innovation * * *" Therefore, preparation of a Regulatory Impact Analysis is not required.

A Regulatory Flexibility Analysis is not required under The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), because as explained above, the rules were not required to be promulgated as proposed rules before issuance as final rules by section 553 of the Administrative Procedures Act (5 U.S.C. 553) or by any other law. This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

The Department has determined that these rules will not significantly affect the quality of the human environment. Therefore, no draft or final Environmental Impact Statement has been or will be prepared.

The Office of Management and Budget has approved the information collection requirements contained in these rules pursuant to the Paperwork Reduction Act under OMB Control No. 0660–0003. Public Reporting for this collection of information is estimated to vary from 16 hours to 200 hours and has an average of 125 hours per application, including associated exhibits. This total includes the time for review instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Office of Policy Coordination and Management, NTIA, U.S. Department of Commerce, Washington DC 20230; and to the Paperwork Reduction Project (0660–0003), Office of Information and Regulatory Affairs, Office of Management and Budget, Washington DC 20503.

List of subjects in 15 CFR Part 2301

Administrative procedure, Grant programs—communications, telecommunications.

Janice Obuchowski,

Administrator.

For the reasons set out above, title 15, Chapter XXIII, part 2301 of the Code of Federal Regulations is revised as set forth below:

PART 2301—PUBLIC TELECOMMUNICATIONS FACILITIES PROGRAM

Subpart A—Definitions, Program Purposes and Special Consideration

Subpart B—Eligibility and Application Procedures

Subpart C—Federal Financial Participation

Subpart D—Accountability for Federal Funds

Subpart E—Control and Use of Facilities

[50] *Id.* at 21.

[51] 47 U.S.C. 392(g).

[52] RMCPB at 5.

[53] 42 U.S.C. 2000d, 2000d–1 (1964).

[54] 42 U.S.C. 2000d–4a(3)(A) (i), (ii) (1988). The statute makes no mention of an entity's non-profit status, however PTFP may extend financial assistance only to non-profit entities. 47 U.S.C. 390, 397 (6), (8) (1988).

[55] 42 U.S.C. 2000d–4a(1) (A), (B) (1988).

Authority: Public Telecommunications Financing Act of 1978, Pub. L. 95–567, 92 Stat. 2405, codified at 47 U.S.C. 390–394, 397–399b; and the Public Broadcasting Amendments Act of 1981, Pub. L. 97–35, 95 Stat. 725, and the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. 99–272, section 5001, 100 Stat. 117. The Public Telecommunications Act of 1988, Pub. L. 100–626, 102 Stat. 3207.

Subpart A—Definitions, Program Purposes and Special Consideration

§ 2301.1 Definitions.

Act means part IV of title III of the Communications Act of 1934, 47 U.S.C. 390–394 and 397–399b, as amended.

Administrator means the Assistant Secretary for Communications and Information of the United States Department of Commerce.

Agency means the National Telecommunications and Information Administration of the United States Department of Commerce.

Broadcast means the distribution of electronic signals to the public at large using television (VHF or UHF) or radio (AM or FM) technologies.

Construction (as applied to public telecommunications facilities) means acquisition (including acquisition by lease), installation, and improvement of public telecommunications facilities and preparatory steps incidental to any such acquisition, installation or improvement.

Department means the United States Department of Commerce.

FCC means the Federal Communications Commission.

Federal interest period means the period of time during which the Federal government retains a reversionary interest in all facilities constructed with Federal grant funds. This period begins with the purchase of the facilities and continues for ten (10) years after the official completion date of the project.

Nonbroadcast means the distribution of electronic signals by a means other than broadcast technologies. Examples of nonbroadcast are Instructional Television Fixed Service (ITFS), teletext, and cable.

Noncommercial educational broadcast station or *public broadcast station* means a television or radio broadcast station that is eligible to be licensed by the FCC as a noncommercial educational radio or television broadcast station and that is owned (controlled) and operated by a state, a political or special purpose subdivision of a state, public agency or nonprofit private foundation, corporation, institution, or association, or owned (controlled) and operated by a municipality and transmits only noncommercial educational, cultural or instructional programs.

Noncommercial telecommunications entity means any enterprise that is owned (controlled) and operated by a state, a political or special purpose subdivision of a state, a public agency, or a nonprofit private foundation, corporation, institution, or association; and that has been organized primarily for the purpose of disseminating audio or video noncommercial educational, cultural or instructional programs to the public by means other than a primary television or radio broadcast station, including, but not limited to, coaxial cable, optical fiber, broadcast translators, cassettes, discs, satellite, microwave or laser transmission.

Non-Federal financial support means the total value of cash and the fair market value of property and services received,

(1) As gifts, grants, bequests, donations, or other contributions for the construction or operation of noncommercial educational broadcast stations, or for the production, acquisition, distribution, or dissemination of educational, cultural or instructional television or radio programs, and related activities, from any source other than (i) the United States or any agency or instrumentality of the United States; or (ii) any public broadcasting entity; or,

(2) As gifts, grants, donations, contributions, or payments from any State, or any educational institution, for the construction or operation of noncommercial educational broadcast stations or for the production, acquisition, distribution, or dissemination of educational, cultural or instructional television or radio programs, or payments in exchange for services or materials with respect to the provision of educational, cultural or instructional television or radio programs.

Nonprofit (as applied to any foundation, corporation, institution or association) means a foundation, corporation, institution, or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

Operational cost means those approved costs incurred in the operation of an entity or station such as overhead labor, material, contracted services (such as building or equipment maintenance), including capital outlay and debt service.

Pre-operational expenses means all nonconstruction costs incurred by new public telecommunications entities before the date on which they began providing service to the public, and all nonconstruction costs associated with the expansion of existing stations before the date on which such expanded capacity is activated, except that such expenses shall not include any portion of the salaries of any personnel employed by an operating public telecommunications entity.

PTFP means the Public Telecommunications Facilities Program, which is administered by the Agency.

PTFP Director means the Agency employee who recommends final action on public telecommunications facilities applications and grants to the Administrator.

Public telecommunications entity means any enterprise which is a public broadcast station or noncommercial telecommunications entity and which disseminates public telecommunication services to the public.

Public telecommunications facilities means apparatus necessary for production, interconnection, captioning, broadcast, or other distribution of programming, including but not limited to studio equipment, cameras, microphones, audio and video storage or processors and switchers, terminal equipment, towers, antennas, transmitters, remote control equipment, transmission line, translators, microwave equipment, mobile equipment, satellite communications equipment, instructional television fixed service equipment, subsidiary communications authorization transmitting and receiving equipment, cable television equipment, optical fiber communications equipment and other means of transmitting, emitting, storing, and receiving images and sounds or information, except that such term does not include the buildings to house such apparatus (other than small equipment shelters that are part of satellite earth stations, translators, microwave interconnection facilities, and similar facilities).

Public telecommunications services means noncommercial educational and cultural radio and television programs, and related noncommercial instructional or informational material that may be transmitted by means of electronic communications. It does not include essentially sectarian programming.

Sectarian means that which has the purpose or function of advancing or propagating a religious belief.

State includes each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

System of public telecommunications entities means any combination of public telecommunications entities acting cooperatively to produce, acquire or distribute programs, or to undertake related activities.

§ 2301.2 Program purposes.

(a) The Agency's determination to fund an application and the amount of the grant awarded shall be governed by whether the application will, in the following order of priority, result in:

(1) The establishment of new public telecommunications facilities to extend services to areas not currently receiving such services;

(2) The expansion of the service areas of existing public telecommunications entities; or,

(3) The improvement of the capabilities of existing licensed public broadcasting stations to provide public telecommunications services.

(b) Notwithstanding paragraph (a) of this section, the Agency may award a grant to an applicant which is otherwise eligible for funding, but whose proposal does not specifically meet any of the purposes enumerated above. Such grant, however, must fulfill the overall objectives of the Act.

§ 2301.3 Special consideration.

In accordance with section 392(f) of the Act, the Agency will give special consideration to applications that foster ownership or control of, operation of, and participation in public telecommunications entities by minorities and women. The Agency interprets "ownership" and "owned" as meaning control of an entity through the possession or exercise of the normal incidents of ownership, such as participation on the governing board or holding corporate offices. The Agency will accord special consideration only where women and/or minorities hold more than fifty (50) percent control of the applicant. The Agency will consider the composition of the applicant's governing body, management levels, or policy-making positions.

Subpart B—Eligibility and Application Procedures

§ 2301.4 Eligible organizations and projects.

(a) Eligible applicants (Construction Grants). In order to apply for and receive a PTFP Construction Grant, an applicant must be:

(1) A public or noncommercial educational broadcast station;

(2) A noncommercial telecommunications entity;

(3) A system of public telecommunications entities;

(4) A nonprofit foundation, corporation, institution, or association organized primarily for educational or cultural purposes; or,

(5) A state or local government or agency, or a political or special purpose subdivision of a state.

(b) Eligible applicants (Planning Grants). In order to apply for and receive a PTFP Planning Grant, an applicant must be:

(1) Any of the organizations described in paragraph (a) of this section; or,

(2) A nonprofit foundation, corporation, institution, or association organized for any purpose except primarily religious.

(c) Eligible projects. An applicant that is eligible under paragraph (a) or (b) of this section may file an application with the Agency for a planning or construction grant to achieve the following:

(1) The provision of new public telecommunications facilities to extend service to areas currently not receiving public telecommunications services;

(2) The expansion of the service areas of existing public telecommunications entities;

(3) The establishment of new public telecommunications entities serving areas currently receiving public telecommunications services; or

(4) The improvement of the capabilities of existing licensed public broadcast stations to provide public telecommunications services.

(d) Applicants must certify whether they are delinquent on any Federal debt. In accordance with OMB Circular A–129, an applicant with outstanding accounts receivable with any agency of the Federal government will not receive an NTIA grant until the debt is paid or arrangements to repay which are satisfactory to the government agency in question are made. This includes debts incurred by sub-units of the applicant other than the sub-unit that is applying to NTIA, and includes debts owed to any agency of the Federal government, not just to the Department or NTIA.

(e) An applicant whose proposal requires an authorization from the FCC must be eligible to receive such authorization.

(f) Preliminary determination of eligibility. In order to obtain a preliminary determination of applicant or proposal eligibility, a prospective applicant must send a letter requesting such determination to the Agency.

(1) The request letter should be addressed to: PTFP Director, NTIA/DOC, 14th Street and Constitution Avenue, NW., room H–4625, Washington, DC 20230.

(2) In the request letter the prospective applicant must:

(i) Describe the proposed project;

(ii) Include a copy of the organization's articles of incorporation and bylaws, or other similar documentation, which specifies the nature and powers of the prospective applicant (unless the prospective applicant has received a PTFP grant within the last ten (10) years, in which case only a copy of the most recent Annual Report or Quarterly Performance Report and any changes in the articles of incorporation and bylaws since the last grant must be provided); and,

(iii) If the prospective applicant is a nonprofit foundation, corporation, institution, or association which has not received a PTFP grant within the previous ten (10) years, provide a copy of a letter from the Internal Revenue Service granting the prospective applicant tax exempt status under section 501(c)(3) of the Internal Revenue Code, or other legal documentation of nonprofit status.

(3) A favorable preliminary determination of eligibility does not guarantee that the Agency will accept a future application for filing or award a subsequent grant.

(4) A prospective applicant may appeal an unfavorable preliminary determination of eligibility to the Administrator under § 2301.10.

§ 2301.5 Application procedures.

(a) Address. The following address should be used for all communications with the Agency: Public Telecommunications Facilities Program NTIA/DOC, 14th Street and Constitution Avenue NW., room H–4625 Washington, DC 20230.

(b) Application materials may be obtained from the address listed in paragraph (a) of this section.

(c) Closing date. The Administrator shall select and publish in the **Federal Register** a date by which applications for funding in a current fiscal year are to be filed.

(d) New applications. (1) All applications, whether mailed or hand delivered, must be received by the Agency at the address listed in the annual **Federal Register** announcement requesting applications at or before 5 p.m. on the closing date.

(2) A complete application must include an original and one copy of the

Agency application form with the signature of an officer of the applicant who is legally authorized to sign for the applicant, and all the information required by the Agency application materials, which shall include:

(i) A brief narrative statement (of not more than four (4) pages) describing the proposed project with particular attention to satisfying the appropriate funding criteria as listed in § 2301.13 or § 2301.14;

(ii) If the applicant has not received a PTFP grant within the previous ten (10) years, a copy of the applicant's articles of incorporation, bylaws, a list of the members of the board of directors, and other similar documentation specifying the nature and powers of the applicant, except that state or local government entities need only provide a reference to the statutory or other authority under which they operate;

(iii) If the applicant is a nonprofit foundation, corporation, institution or association which has not received a PTFP grant within the previous ten (10) years, a copy of a letter from the Internal Revenue Service granting the applicant tax exempt status under section 501(c)(3) of the Internal Revenue Code, or other legal documentation of nonprofit status.

(iv) If the applicant received a PTFP grant within the previous ten (10) years, then it must reference the number of the previous grant, provide a copy of the most recent Annual Report or Quarterly Performance Report submitted to the PTFP, and submit a copy of any changes in the applicant's articles of incorporation or bylaws which have taken effect since the last grant was awarded;

(v) If the applicant applied for a preliminary determination of eligibility and received a positive determination, it may submit a copy of the official notification from the PTFP in lieu of the eligibility requirements of this section;

(vi) Documentation that the applicant will have, when needed, the funds to construct any facilities for which the Agency has granted matching funds;

(vii) Documentation that the applicant will have the funds necessary to operate and maintain those facilities once constructed;

(viii) Documentation of the amount of Federal and non-Federal financial support received by the applicant organization during each of the preceding three fiscal years or for the length of time the organization has been in existence if less than three years;

(ix) Information about the applicant's leasehold or ownership rights to the premises on which the facilities requested will be located. If the applicant does not yet have an executed lease or has not purchased the site(s) involved, a copy of a letter or letters of intent with the proposed lessor(s) or seller(s) must be filed with the application. The applicant must have the right to occupy, construct, maintain, operate, inspect, and remove the project equipment without impediment, and nothing must prevent the Federal government from entering the property and reclaiming or securing PTFP-funded property. The Agency reserves the right to review an applicant's site rights documents if deemed necessary;

(x) An inventory of all equipment (if any) currently owned by the applicant that corresponds to the type of equipment requested in the current application or that would be closely associated with the proposed project. The inventory should include manufacturers' names, model numbers, production years, and the dates of acquisition;

(xi) Within the narrative or as an optional exhibit no longer than two pages, a five-year plan outlining the applicant's projected facilities requirements and the projected costs of such requirements;

(xii) If special consideration is requested under § 2301.3, information detailing the basis for the request on the exhibit form provided by the Agency;

(xiii) Copies of letters transmitting a copy of the application to each of the entities required under § 2301.7;

(xiv) Significant documentation supporting the applicant's request for equipment, including as necessary the proper FCC authorization(s) cited in §§ 2301.8 and 2301.9, and if applicable, documentation indicating high incidence of repair or periods of inoperability;

(xv) Evidence that the applicant has participated (or, in the case of a planning grant, will participate) in comprehensive planning for the proposed project, including community involvement, an evaluation of alternate technologies and coordination with state telecommunications agencies, if any;

(xvi) Assurance that during the period in which the applicant possesses or uses the Federally funded facilities (whether or not this period extends beyond the Federal interest period), the applicant will not use or allow the use of the Federally funded equipment for essentially sectarian purposes;

(xvii) A detailed list and explanation of any complaints of discrimination (see § 2301.22(b)(15), below) currently pending or decided against the applicant before any court or governmental agency;

(xviii) A copy of any Environmental Impact Statement or other environmental assessment document prepared in conjunction with the proposed project as may be required by any Federal, state, or local law or regulation;

(xix) Assurance of compliance with all applicable Federal laws, rules or regulations relating to the project, as described on the application form provided by the Agency;

(xx) Assurance of compliance with all provisions of the Drug-Free Workplace Requirements and the Certifications for Contracts, Grants, Loans and Cooperative Agreements found in the application form;

(xxi) Assurance that the applicant has taken into account all non-Federal sources of financial support for this project; that the non-Federal share stated by the Applicant as being available for this project is the maximum amount available from such sources; and that the applicant will initiate and complete the work within the applicable time frame after receipt of approval from the Agency; and,

(xxii) Assurance that the applicant will make the most economical and efficient use of the Federal funds.

(e) Deferred applications. (1) An applicant may reactivate an application deferred by the Agency during the prior year under § 2301.15 if the applicant has not substantially changed the stated purpose of the application.

(2) An applicant may reactivate a deferred application only during the two consecutive years following the application's initial acceptance for filing by the Agency.

(3) To reactivate a deferred application, the applicant must file the information described in paragraph (e)(4) of this section whether mailed or hand delivered, at or before 5 p.m. on the closing date.

(4) To file a complete reactivation request, the applicant must submit an original and one copy of the following:

(i) Part I of the approved Agency application form with the original signature of an officer of the applicant who is legally authorized to sign for the applicant, with a notation of the file number of the earlier application;

(ii) A brief narrative statement (not more than four (4) pages) describing the project proposed in the current application;

(iii) An update of the availability of operating funds and the necessary non Federal share of the project;

(iv) An update of the financial information required by paragraph (d)(2)(viii) of this section;

(v) A revised listing of current eligible project costs, if necessary;

(vi) A revised inventory as described in paragraph (d)(2)(x) of this section. Applicants having previously submitted an inventory need submit only updated information ;

(vii) A revised five-year plan as described in paragraph (d)(2)(xi) of this section outlining the applicant's projected facilities requirements and the projected costs of such requirements;

(viii) If special consideration is requested under § 2301.3, current information detailing the basis for the request on the exhibit form provided by the Agency;

(ix) Copies of letters transmitting a copy of the current application to each of the entities required under § 2301.7;

(x) An updated explanation of any complaints of discrimination currently pending or decided against the applicant before any court or governmental agency; and,

(xi) Assurance of compliance with all applicable Federal laws, rules or regulations relating to the project, as described on the application form provided by the Agency.

(f) Deferred applications that are resubmitted under paragraph (e) of this section and contain substantial changes will be considered as new applications and must comply with the requirements of § 2301.5(d). All deferred applications may be subject to a second determination of eligibility.

(g) Applications resulting from catastrophic damage. (1) An application may be filed with a request for a waiver of the closing date, as provided in § 2301.25, when an eligible broadcast applicant suffers catastrophic damage to the basic equipment essential to its continued operation as a result of a natural or manmade disaster and is in dire need of assistance in funding replacement of the damaged equipment.

(2) The request for a waiver must set forth the circumstances that prompt the request and be accompanied by appropriate supporting documentation.

(3) A waiver will be granted only if it is determined that the applicant either carried adequate insurance or had acceptable self-insurance coverage.

(4) Applications filed and accepted pursuant to this paragraph must contain all of the elements stipulated in paragraph (d) or (e) of this section and will be subject to the same review and evaluation process followed for applications accepted for filing in the normal application cycle, although the Administrator may establish a special timetable for review and evaluation to permit an appropriately timely decision.

§ 2301.6 Additional information.

(a) The Agency may request from the applicant any additional information that the Agency deems necessary or pertinent. Applicants must provide to the Agency two copies of any additional information that the Agency requests within fifteen (15) days of the date of the Agency's notice.

(b) Applicants must immediately provide to the Agency two copies of information received after the closing date that materially affects the application, including:

(1) State Single Point of Contact and State Telecommunications Agency comments on applications;

(2) FCC file numbers and changes in the status of FCC applications necessary for the proposed project;

(3) Changes in the status of proposed local matching funds, including notification of the passage (including reduction or rejection) of a proposed state appropriation or receipt (or denial) of a proposed substantial matching gift;

(4) Changes in the licensee, in the licensee's board structure, in the applicant's IRS section 501(c)(3) status, or in the applicant's Articles of Incorporation or Bylaws;

(5) Changes in the status of proposed production, participation or distribution agreements (if relevant to the proposed project);

(6) Changes in lease or site rights agreements; and

(7) Complete failure of major items of equipment for which replacement costs have been requested or changes in the status of the needs of the equipment requested.

(c) Applicants must place copies of any additional information submitted to the Agency in the copy of the application available for public inspection pursuant to § 2301.11.

(d) Potential grant recipients may be subject to the following Department Pre-Award Administrative Requirements and Policies:

(1) Name Check forms (Form CD–346) may be used to ascertain background information on key individuals associated with potential grantees. The Name Check requests information to determine if any key individuals in the organization have been convicted of, or are under indictment or have been charged with criminal offenses such as fraud, theft, perjury, or other matters pertinent to management honesty or financial integrity;

(2) Potential grantee organizations may also be subject to reviews of Dun and Bradstreet data or other similar credit checks.

§ 2301.7 Service of applications.

On or before the closing date all new or deferred applicants must serve a copy of the application on the following agencies:

(a) In the case of an application for a construction grant for which FCC authorization is necessary, the Secretary, Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554;

(b) The state telecommunications agency(-ies), if any, having jurisdiction over the development of broadcast and/or nonbroadcast telecommunications in the state(s) and the community (-ies) to be served by the proposed project; and,

(c) The state office established to review applications under Executive Order 12372 as amended by Executive Order 12416, if the state has established such an office and wishes to review these applications.

§ 2301.8 Federal Communications Commission Authorization.

(a) Each applicant whose project requires FCC authorization must file an application for that authorization on or before the closing date. Recommended submission date for applications to the FCC is at least 60 days prior to the closing date. The applicant should clearly identify itself to the FCC as a PTFP applicant.

(b) In the case of FCC authorizations where it is not possible or practical to submit the FCC license application with the PTFP application, such as C-band satellite uplinks, low power television stations and translators, remote pickups, studio-to-transmitter links, and Very Small Aperture Terminals, a copy of the FCC application as it will be submitted to the FCC, or the equivalent engineering data, must be included in the PTFP application.

(c) Applications requesting C-band downlinks do not have to submit the FCC application, or equivalent engineering data, as part of the PTFP application. When such a project is funded, however, grantees must submit evidence of FCC registration of the C-band downlink prior to the release of Federal funds.

(d) Any FCC authorization required for the project must be in the name of the applicant for the PTFP grant.

(e) If the project is to be associated with an existing station, FCC operating authority for that station must be current and valid.

(f) For any project requiring new authorization(s) from the FCC, the applicant must file a copy of each FCC application and any amendments with the Agency.

(g) If the applicant fails to file the required FCC application(s) by the closing date, or if the FCC returns, dismisses, or denies an application required for the project or any part thereof, or for the operation of the station with which the project is associated, the Agency may return the application.

(h) No grant will be awarded until confirmation has been received from the FCC that any necessary authorization will be issued.

§ 2301.9 Acceptance for filing.

After the closing date, the Agency will examine each application for timeliness, completeness, eligibility, and FCC authorization.

(a) The Agency will publish a notice in the Federal Register listing all applications accepted for filing. Acceptance of an application for filing does not preclude subsequent return or disapproval of the application, nor does it assure that the application will be funded. Publication merely operates to qualify the application to compete for funding with other applications accepted for filing.

(b) The notice of acceptance for filing will also include a request for comments on the applications from any interested party. The procedural requirements of § 2301.11 will be set forth in the notice.

(c) Substantially incomplete applications will be returned by the Agency.

(d) Any application, amendment to an application, or request to reactivate a deferred application that is filed after the closing date will be returned by the Agency.

(e) When the Agency finds that either the applicant or the project is ineligible under the Act and/or these Rules, it will return the application and inform the applicant of the denial of eligibility.

(f) If the Agency finds that a proposed project requires authorization from the FCC and that the applicant did not tender its application for such authorization, the Agency will return the application.

(g) With respect to requests to withdraw or to defer applications from consideration:

(1) Applicants may request withdrawal of an application from consideration for funding without affecting future funding decisions. Withdrawn applications will be returned by the Agency.

(2) Applicants may not request that the Agency defer an application for subsequent consideration. If such a request is received, the Agency will treat it as a request for withdrawal.

(h) Deferred applications that are submitted for reactivation for a third time will be returned by the Agency.

§ 2301.10 Appeals.

(a) Within 15 calendar days after the date on which the Agency sends a written notice to an applicant denying the eligibility of the applicant or the proposed project, or notifying an applicant that its application is substantially incomplete, the applicant may file a written notice of appeal with the Administrator at the address listed in § 2301.5(a). Applicants may not appeal the return of applications filed after the closing date.

(b) The notice of appeal must show that the denial of eligibility or determination of incompleteness is factually or legally incorrect. If the applicant relies on any written documents or other materials to dispute the Agency's action, the applicant should list and attach a copy of each item or indicate that the Agency has a copy of the item in its possession.

(c) Upon receipt of the notice of appeal, the Administrator will review the appeal in consultation with the Chief Counsel and the PTFP Director and will render a written decision within 30 calendar days.

(d) If the Administrator sustains the denial of eligibility or the determination of incompleteness, the Agency will return the application to the applicant.

(e) All decisions of the Administrator made under paragraph (c) of this section are final.

§ 2301.11 Public comments.

(a) The applicant shall make a copy of its application available at its offices for public inspection during normal business hours.

(b) Any interested party may file comments with the Agency supporting or opposing an application and setting forth the grounds for support or opposition. Such comments must contain a certification that a copy of the comments has been delivered to the applicant. Comments must be sent to the address listed in § 2301.5(a).

(c) The Agency will incorporate all comments from the public and any replies from the applicant in the applicant's official file.

§ 2301.12 Coordination with interested agencies and organizations.

In acting on applications and carrying out other responsibilities under the Act, the Agency shall consult with:

(a) The FCC, with respect to functions that are of interest to, or affect other functions of the FCC;

(b) The Corporation for Public Broadcasting, state telecommunications agencies, if any, public broadcasting agencies, organizations, other agencies, and institutions administering programs which may be coordinated effectively with Federal assistance provided under the Act; and

(c) The state office established to review applications under Executive Order 12372 as amended by Executive Order 12416, if the state has established such an office and wishes to review these applications.

§ 2301.13 Funding criteria for construction applications.

In determining whether to approve or defer a construction grant application, in whole or in part, and the amount of such grant, the Agency will evaluate all the information in the application file and consider the following factors, each of which has equal weight:

(a) The extent to which the project meets the program purposes set forth in § 2301.2 as well as the specific program priorities set forth in the appendix to this part;

(b) The adequacy and continuity of financial resources for long-term operational support;

(c) The extent to which non-Federal funds will be used to meet the total cost of the project;

(d) The extent to which the applicant has:

(1) Assessed specific educational, informational, and cultural needs of the community(-ies) to be served, and the extent to which the proposed service will not duplicate service already available;

(2) Evaluated alternative technologies and the bases upon which the technology was selected;

(3) Provided significant documentation of its equipment requirements, and the urgency of acquisition or replacement;

(4) Provided documentation of an increasing pattern of substantial non-Federal financial support;

(5) Provided other evidence of community support, such as letters from elected or appointed policy-making officials, and from agencies for which the applicant produces or will produce programs or other materials;

(e) The extent to which the evidence supplied in the application reasonably assures an increase in public telecommunications services and facilities available to, operated by, and owned or controlled by minorities and women;

(f) The extent to which various items of eligible apparatus proposed are

necessary to, and capable of, achieving the objectives of the project and will permit the most efficient use of the grant funds;

(g) The extent to which the eligible equipment requested meets current broadcast industry performance standards;

(h) The extent to which the applicant will have available sufficient qualified staff to operate and maintain the facility and provide services of professional quality;

(i) The extent to which the applicant has planned and coordinated the proposed services with other telecommunications entities in the service area;

(j) The extent to which the project implements local, statewide or regional public telecommunications systems plans, if any; and,

(k) The readiness of the FCC to grant any necessary authorization.

§ 2301.14 Funding criteria for planning applications.

In determining whether to approve or defer a planning grant application, in whole or in part, and the amount of such grant, the Agency will evaluate all the information in the application file and consider the following factors, each of which has equal weight:

(a) The extent to which the applicant's interests and purposes are consistent with the purposes of the Act and the priorities of the Agency;

(b) The qualifications of the proposed project planner;

(c) The extent to which the project's proposed procedural design assures that the applicant would adequately:

(1) Obtain financial, human and support resources necessary to conduct the plan;

(2) Coordinate with other telecommunications entities at the local state, regional and national levels;

(3) Evaluate alternative technologies and existing services; and

(4) Receive participation by the public to be served (and by minorities and women in particular) in the project planning;

(d) Any pre-planning studies conducted by the applicant showing the technical feasibility of the proposed planning project (such as the availability of a frequency assignment, if necessary, for the project); and,

(e) The feasibility of the proposed procedure and time-table for achieving the expected results.

§ 2301.15 Action on all applications.

(a) After consideration of an application which the Agency has accepted for filing, any comments filed by interested parties and replies thereto, and any other relevant information, the Agency will take one of the following actions:

(1) Select the application for funding, in whole or in part;

(2) Defer the application for subsequent consideration;

(3) Return the application as ineligible pursuant to § 2301.9 with a notice of the grounds and reason; or,

(4) Return applications which remain unfunded after consideration by the Agency for three years.

(b) Upon the approval or deferral, in whole or in part, of an application, the Agency will inform:

(1) The applicant;

(2) The state educational telecommunications agency(-ies), if any, in any state any part of which lies within the service area of the applicant's facility;

(3) The FCC; and,

(4) The Corporation for Public Broadcasting and, as appropriate, other public telecommunications entities.

(c) If the Agency decides to fund an application, the award documents will include grant terms and conditions and whatever other provisions are required by Federal law or regulations, or which may be deemed necessary or desirable for the achievement of program purposes.

(d) An applicant or an objecting party may not appeal to the Administrator the Agency's determination to fund or not fund a particular application.

(e) Information about grant terms and conditions or other applicable laws and regulations is available from PTFP at the address listed in § 2301.5(a).

(f) Written and oral contacts between PTFP staff members and applicants and their representatives during the application review period are governed by the following:

(1) Members of the PTFP staff are not authorized to discuss the merits of an application when it is under review.

(2) Applicants are expected to notify PTFP of events that occur after the closing date and that materially affect the application, including those items requested in § 2301.6(b).

(3) Other permissible contacts include:

(i) Appeals of PTFP determinations of the eligibility of an application, pursuant to § 2301.10;

(ii) Responses to adverse comments filed by members of the public pursuant to § 2301.11; and

(iii) Discussion of matters relating to other PTFP awards an organization may have.

(4) Nothing in this section should be interpreted as preventing PTFP staff from requesting an applicant to submit information that may not have been included in the original submission.

Subpart C—Federal Financial Participation

§ 2301.16 Amount of the Federal grant.

(a) Construction grants. (1) A Federal grant for the construction of a public telecommunications facility shall be in an amount determined by the Agency and set forth in the award document. Such amount may not exceed seventy-five (75) percent of the amount determined by the Agency to be the reasonable and necessary cost of such project.

(2) No part of the grantee's matching share of the eligible project costs may be met with funds paid by the Federal government, except where the use of such funds to meet a Federal matching requirement is specifically and expressly authorized by the relevant Federal statute.

(3) After the closing date, the applicant may, at its own risk, obligate non-Federal matching funds for the acquisition of proposed equipment. No funds from the Federal share of the total project cost may be obligated until the award period start date. If an applicant or recipient obligates Federal Award funds before the start date, the Department may refuse to offer the award or, if the award has already been granted, terminate the grant.

(4) Funds supplied to an applicant by the Corporation for Public Broadcasting may not be used for the required non-Federal matching purposes, except upon a clear compelling showing of need.

(b) Planning grants. A Federal grant for the planning of a public telecommunications facility shall be in an amount determined by the Agency and set forth in the award document and the attachments thereto. The Agency may provide up to one hundred (100) percent of the funds necessary for the planning of a public telecommunications construction project.

(c) Project costs do not include the value of eligible apparatus owned or acquired by the applicant prior to the closing date. Accepting title to donated equipment prior to the closing date is considered ownership or acquisition of equipment.

(d) If the actual costs incurred in completing the planning or construction project are less than the estimated project total costs, which were the basis for the Agency's determination of the initial grant award, the Agency shall reduce the amount of the final grant award so that the final grant award bears the same ratio to the actual cost of

the project as the initial grant award bore to the estimated total project costs. If, however, the actual costs incurred in completing the project are more than the estimated total project costs, then in no case will the final grant award exceed the initial grant award.

§ 2301.17 Items and costs ineligible for Federal funding.

The following items and costs are ineligible for funding under the Act:

(a) *Equipment and supplies.* Each year, the Agency will review its list of ineligible equipment and supplies. A copy of the currently applicable list of ineligible equipment will be provided with every application package for PTFP grants.

(b) *Other expenses ineligible for funding.* (1) Buildings and modifications to buildings to house eligible equipment and fences surrounding them are not themselves eligible for funding under this program, except that small equipment shelters that are part of satellite earth stations, translators, microwave interconnection facilities, and similar facilities are eligible for funding;

(2) Land and land improvements;

(3) Salaries of personnel employed by an operating public telecommunications entity and other operational costs, except

(i) For planning projects (see section 392(c) of the Act); or,

(ii) To the extent that an applicant can demonstrate exceptional need or that substantially greater efficiency would result from staff installation.

(4) Moving costs required by relocations;

(5) Such other expenses as the Agency may determine prior to the award of a grant.

§ 2301.18 Payment of the Federal grant.

(a) The Department will not make any payment under an award, unless and until the recipient complies with all relevant requirements imposed by this part. Additionally:

(1) With regard to a public telecommunications entity requiring FCC authorization, the Department will not make any payment until it receives confirmation that the FCC has granted any necessary authorization;

(2) The Department will not make any payment under an award unless and until any special award conditions stated in the award documents are met; and

(3) An agreement to share ownership of the grant equipment (*e.g.*, a joint venture for a tower) must be approved by the Agency before any funds for the project will be released.

(b) After the conditions indicated in paragraph (a) of this section have been satisfied, the Department will make payments to the grantee in such installments consistent with the percentage of project completion. As a general matter, the Agency expects grantees to expend local matching funds at a rate at least equal to the ratio of the local match to the Federal grant as stipulated in the grant award.

(c) When an applicant completes a construction project, the Agency will assign a completion date that the Agency will use to calculate the termination date of the Federal interest period. The completion date will be the date on which the grantee certifies in writing that the project is complete and in accord with the terms and conditions of the grant, as required under § 2301.20. If the PTFP Director determines that the grantee improperly certified the project to be complete, the PTFP Director will amend the completion date accordingly.

Subpart D—Accountability for Federal Funds

§ 2301.19 Retention of records.

(a) Each recipient of assistance under this program shall keep intact and accessible the following records:

(1) A complete and itemized inventory of all public telecommunications facilities under the control of the grantee, whether or not financed, in whole or in part, with Federal funds;

(2) Complete and current financial records that fully disclose the total amount of the project; the amount of the grant; the disposition of the grant proceeds; and the amount, nature and source of non-Federal funds associated with the project; and,

(3) All records specified in Office of Management and Budget Circular A–110 (for educational institutions, hospitals and nonprofit organizations) and 15 CFR part 24 (for State and Local Governments).

(b) The grantee shall mark project apparatus in a permanent manner in order to assure easy and accurate identification and reference to inventory records. The marking shall include the PTFP grant number and a unique inventory number assigned by the grantee.

§ 2301.20 Completion of projects.

(a) Upon completion of a planning project, the grantee must promptly provide to the Administrator two copies of any report or study conducted in whole or in part with funds provided under this program by sending the copies to the Agency. This report shall meet the goals and objectives for which the grant is awarded and shall follow the written instructions and guidance provided by the Agency. The grant award goals and objectives are stated in the planning narrative as amended and are incorporated by reference into the award agreement. The Agency shall review this report for the extent to which those goals and objectives are addressed and met, for evidence that the work contracted for under the grant award was in fact performed, and that the written instructions and guidance provided by the Agency, if any, were followed. If this report fails to address or meet any grant award goals or objectives, or if there is no evidence that the work contracted for was in fact performed, or if this report clearly indicates that the written instructions and guidance provided by the Agency, if any, were disregarded, then the Agency may pursue remedial action. Remedial action includes, but is not limited to, demand for submission, in whole or in part, of an acceptable final report. An unacceptable final report may result in the establishment of an account receivable by the Department.

(b) Upon completion of a construction project, the grantee must:

(1) Certify that the grantee has acquired, installed and begun operating the project equipment in accordance with the project as approved by the Agency and has complied with all terms and conditions of the grant as specified in § 2301.5;

(2) Certify that the grantee has obtained any necessary FCC authorizations to operate the project apparatus following the acquisition and installation of the apparatus and document the same;

(3) Certify that the facilities have been acquired, that they are in operating order and that the grantee is using the facilities to provide public telecommunications services in accordance with the project as approved by the Agency and document same;

(4) Certify that the grantee has obtained adequate insurance to protect the Federal interest in the project in the event of loss through casualty and provide the Agency with a copy of its insurance policy;

(5) Certify, if not previously provided, that the grantee has acquired all necessary leases or other site rights required for the project;

(6) Certify, if appropriate, that the grantee has qualified for receipt of funds from the Corporation for Public Broadcasting;

(7) Provide a complete and accurate final inventory of equipment acquired under the project and a final accounting

of all project expenditures, including non-equipment costs (*e.g.*, installation costs); and

(8) Execute and record a final priority lien reflecting the completed project and assuring the Federal government's reversionary interest in all equipment purchased under the grant project for the duration of the Federal interest period.

§ 2301.21 Annual status report for construction projects.

(a) Recipients of construction grants are required to submit an Annual Status Report for each grant project that is in the Federal interest period. The Reports are due no later than April 1 in each year of the period. In the Annual Status Report, the grant recipient must certify:

(1) That it remains an eligible entity as defined in the PTFP Rules;

(2) That it continues to use the equipment purchased under the grant to provide public telecommunications services as approved by the Agency for the original purposes of the grant;

(3) That it continues to hold any FCC authorizations necessary to operate the project apparatus;

(4) That it continues to protect all equipment purchased under the grant with adequate insurance coverage;

(5) That it remains in compliance with all of the terms and conditions of the grant; and

(6) That no significant changes have occurred during the reporting period with respect to any of the terms and conditions of the grant.

(b) In addition, the grant recipient must:

(1) Provide information as to whether any discrimination complaints are pending against it and whether, during the reporting period, any adverse judgments have been rendered against it because of discriminatory practices—

(i) Pending complaints must be described and their status given; adverse judgments must be summarized and a description given of what action the recipient has taken or is taking to remedy the effects of the adjudged discrimination;

(ii) If the recipient is a non-profit institution, or a college or university, discrimination complaints and adverse judgments must be reported for the entire organization, not just for the broadcast station. If the recipient is a state or municipal agency, discrimination complaints and adverse judgments should be reported only for the agency that received the Federal grant money, not the entire state or municipal government;

(2) Certify, if it is an academic institution, that it does not discriminate in its admissions policies or in the opportunities it affords to persons to participate in the receiving or providing of services (*Nota Bene:* this certification applies to the entire academic institution, not just to the entity that was the subject of the grant);

(3) Submit a separate Annual Status Report with an original signature for each grant it has received that is still in the Federal interest period; and

(4) Take whatever steps may be necessary to ensure that the Federal government's reversionary interest continues to be protected for the 10-year period by recording, when and where required, a lien continuation statement and reporting that fact in the Annual Status Report.

Subpart E—Control and Use of Facilities

§ 2301.22 Conditions attached to the Federal grant.

When an applicant is awarded a Federal grant under the PTFP, the applicant (now the grantee) takes the grant subject to certain conditions concerning the use of the Federal monies and the equipment obtained with those monies. The conditions are those listed at § 2301.15(c) plus the following specific conditions:

(a) In order to assure that the Federal investment in public telecommunications facilities funded under the Act will continue to be used to provide public telecommunications services to the public during the period of Federal interest, which shall be no less than ten (10) years from the date of completion of the project, all grantees shall:

(1) Execute and record a document establishing that the Federal government has a priority lien on any facilities purchased with funds under the Act during the period of continuing Federal interest. The document shall be recorded where liens are normally recorded in the community where the facility is located and in the community where the grantee's headquarters are located;

(2) File a certified copy of the recorded lien with the Administrator ninety (90) days after the grant award is received;

(3) Not dispose of or encumber its title or other interests in the equipment acquired under this grant and will, if applicable, file any continuation statements necessary to preserve the Federal government's secured interest in the equipment acquired with Federal funds.

(4) If not a part of the original application, demonstrate that the grantee has obtained rights to the site(s) necessary to the construction of the project. Grantees receiving funds for the purchase of transmission or interconnection equipment should provide an opinion letter from their attorney stating that the grantee will have either fee simple title or a long-term (*i.e.*, ten-year) lease to any real or personal property necessary for the installation of the equipment. Grantees receiving funds for the purchase only of studio or test equipment should provide a similar letter regarding main transmission sites to ensure that they will be able to utilize PTFP-funded equipment to provide public telecommunications services throughout the Federal interest period. The grantee must have the right to occupy, construct, maintain, operate, inspect, and remove the project equipment without impediment, and nothing must prevent the Federal government from entering the property and reclaiming or securing PTFP-funded property. Grantees must submit the attorney's letter of certification prior to the release of Federal funds. The Agency reserves the right to review a grantee's site rights documents if deemed necessary.

(b) During the construction of a project and the Federal interest period, the grantee must:

(1) Continue to be an eligible organization as described in § 2301.4, above;

(2) Obtain and continue to hold any necessary FCC authorization(s);

(3) Use the Federal funds for which the grant was made for the equipment and other expenditure items specified in the application for inclusion in the project, except that the grantee may substitute other items where necessary or desirable to carry out the purpose of the project if approved in advance by the agency in writing;

(4) Use the facilities and any monies generated through the use of the facilities primarily for the provision of public telecommunications services and ensure that the use of the facilities for other than public telecommunications purposes does not interfere with the provision of the public telecommunications services for which the grant was made;

(5) Not make its facilities available to any person for the broadcast or other transmission intended to be received directly by the public, of any advertisement, unless such broadcast or transmission is expressly and specifically permitted by law or authorized by the FCC;

(6) Hold appropriate title or lease satisfactory to protect the Federal

interest to the site or sites on which apparatus proposed in the project will be operated, including the right to construct, maintain, operate, inspect and remove such apparatus, sufficient to assure continuity of operation of the facility;

(7) Maintain protection against common hazards through adequate insurance coverage or other equivalent undertakings, except that, to the extent the applicant follows a different policy of protection with respect to its other property, the applicant may extend such policy to apparatus acquired and installed under the project, if they received express written approval for this different policy from the Director. The grantee will purchase flood insurance (in communities where such insurance is available) if the facilities will be constructed in any area that has been identified by the Secretary of Health and Human Services as having special flood hazards;

(8) Submit to the Agency, in triplicate, within thirty (30) calendar days of the award date, a construction schedule or a revised planning timetable that will include the information requested in the grant terms and conditions in the award package;

(9) Comply with 15 CFR part 24 and the provisions of the Office of Management and Budget Circulars A–87 and A–128, as implemented in 15 CFR part 29a (for State and Local Governments and political subdivisions); and OMB Circulars A–21, A–110, A–122, and A–133, as implemented in 15 CFR part 29b (for institutions of higher education, hospitals and other nonprofit organizations) for the procurement of equipment and services funded in whole or in part with Federal monies;

(10) Remit interest earned on advances of Federal funds to the Agency in accordance with all relevant Federal laws and regulations;

(11) State when advertising for bids for the purchase of equipment that the Federal government has an interest in facilities purchased with Federal funds under this program which begins with the purchase of the facilities and continues for ten (10) years after the completion of the project;

(12) Submit, during the construction of this project, both performance reports and the required financial reports, in triplicate, on a calendar year quarterly basis for the periods ending March 31, June 30, September 30, and December 31, or any portion thereof. Reports are due no later than thirty (30) days following the end of each reporting period. The Quarterly Performance Reports should contain the following information:

(i) A comparison of actual accomplishments during the reporting period with the goals and dates established in the Construction or Planning Schedule for that reporting period;

(ii) A description of any problems that have arisen or reasons why established goals have not been met;

(iii) Actions taken to remedy any failures to meet goals; and

(iv) Construction projects must also include a list of equipment purchased during the reporting period compared with the equipment authorized. This information must include manufacturer, make and model number, brief description, number of the items purchased, and cost;

(13) Promptly complete the project and place the public telecommunications facility into operation;

(14) Permit inspections during normal working hours by the Agency and the Comptroller General of the United States or their duly authorized representatives, of the public telecommunications facilities acquired with Federal financial assistance or of any books, documents, papers, and records relating to those facilities;

(15) Comply with Federal statutes relating to nondiscrimination. These include but are not limited to:

(i) Title VI of the Civil Rights Act of 1964 (Pub. L. 88–352), which prohibits discrimination on the basis of race, color or national origin;

(ii) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681–1683, and 1685–1686), which prohibits discrimination on the basis of sex;

(iii) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794, which prohibits discrimination on the basis of handicaps;

(iv) The Age Discrimination Act of 1975, as amended (42 U.S.C. 6101–6107), which prohibits discrimination on the basis of age.

(v) The Drug Abuse Office and Treatment Act of 1972 (Pub. L. 92–255), as amended, relating to nondiscrimination on the basis of drug abuse;

(vi) The Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 Pub. L. 91–616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism;

(vii) Sections 523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. 290 dd–3 and 290 ee–3), as amended, relating to confidentiality of alcohol and drug abuse patient records;

(viii) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financing of housing;

(ix) Any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and

(x) The requirements of any other nondiscrimination statute(s) which may apply to the application.

(16) Obtain the Agency's prior approval for substantial changes in the approved grant project, including but not limited to the following:

(i) Costs (including planning costs),

(ii) Essential specifications of the equipment,

(iii) The engineering configuration of the project,

(iv) Extensions of the approved grant award period, and

(v) Transfers of a grant award to a successor in interest, pursuant to § 2301.23(c)(1).

(17) Comply with all applicable Federal laws, rules or regulations relating to the project.

(c) The Agency will allow the acquisition of facilities by lease; however, several provisions must be followed:

(1) The lease must be for a term of years not greater than the remaining useful life of the facilities nor less than ten (10) years following completion of the project (including renewal options);

(2) The cost of the lease must not be more than the total of the non-Federal share of the matching funds;

(3) The actual amount of the lease must not be more than the outright purchase price would be; and

(4) The lease agreement must state that in the event of anticipated or actual termination of the lease, the Federal government through the Agency has the right to transfer and assign the leasehold to a new grantee for the duration of the lease contract.

(d) During the period in which the grantee possesses or uses the Federally funded facilities (whether or not this period extends beyond the Federal interest period), the grantee may not use or allow the use of the Federally funded equipment for purposes the essential thrust of which are sectarian.

§ 2301.23 Grant suspensions, terminations, and transfers.

(a) *Suspension or termination for cause.* If a grantee fails to meet any conditions attached to the grant, as specified in §§ 2301.15(c) and 2301.22 of this part, the Agency reserves the right

to recommend any appropriate action including, but not limited to:

(1) Suspending a particular grant in whole or in part and withholding further payments under that grant, pending corrective action by the grantee;

(2) Prohibiting a grantee from incurring additional obligations of funds, pending corrective action by the grantee;

(3) Where the grantee cannot (or will not) comply with the condition (or conditions) attached to a particular grant, terminating the grant and requiring the grantee to repay the Federal government an amount bearing the same ratio to the fair market value of the facilities at the time of termination as the Federal grant bore to the project;

(4) Where the condition (or conditions) is also attached to other grants that the grantee has received from the Agency, suspending payments under all these other grants;

(5) Where the condition (or conditions) is also attached to other grants that the grantee has received from the Agency, terminating all these other grants and requiring the grantee to repay the Federal government an amount bearing the same ratio to the fair market value of the facilities at the time of termination as the Federal grants bore to the projects for which they were granted.

(b) *Termination for convenience.* When the Agency and the grantee agree that the continuation of the project would not produce beneficial results commensurate with the expenditure of further Federal funds, the parties may terminate the grant, in whole or in part, with all the conditions and on an effective date that the parties have mutually agreed in writing.

(c) *Transfers.* If necessary to further the purpose of the Act, the Agency may approve transfers as follows:

(1) *Transfer of grant.* The Agency may transfer a grant to a successor in interest or subsidiary corporation of a grantee in cases where a similar operational entity remains in control of the grant and the original objectives of the grant remain in effect.

(2) *Transfer of equipment.* Where the grant equipment is no longer needed for the original purposes of the project, the Agency may transfer the equipment to the Federal government or an eligible third party, in accordance with Office of Management and Budget guidelines.

(3) *Transfer of Federal interest to different equipment.* The Agency may transfer the Federal interest in PTFP-funded equipment to other eligible equipment presently owned or to be purchased by the grantee with non-Federal monies.

(i) Equipment previously funded by PTFP that is within the Federal interest period, may not be used in a transfer request as the designated equipment to which the Federal interest is to be transferred.

(ii) The same item can be used only once to substitute for the Federal interest; however, it may be used to cover grants if the request for each is submitted at the same time.

(iii) A lien on equipment transferred to the Federal interest must be recorded in accordance with § 2301.22 of the PTFP Rules. A copy of the lien document must be filed with the PTFP within sixty (60) days of the date of approval of the transfer of Federal interest.

(iv) If the Federal interest is to be transferred to other equipment presently owned or to be purchased by a grantee, the Federal interest in the new equipment must be at least equal to the Federal interest in the original equipment.

(d) *Termination by buy-out.* A grantee may terminate the PTFP grant by buying out the Federal interest with non-Federal monies. Buy-outs may be requested at any time.

§ 2301.24 Equipment.

All equipment, which a grantee acquires under this program, shall be of professional broadcast quality. An applicant proposing to utilize nonbroadcast technology shall propose and purchase equipment that is compatible with broadcast equipment wherever the two types of apparatus interface.

Subpart F—Waivers

§ 2301.25 Waivers.

For good cause shown, the Administrator may waive the regulations adopted pursuant to section 392(e) of the Act.

Appendix to Part 2301—Special Applications and Priorities

Special Applications

NTIA possesses the discretionary authority to recommend awarding grants to eligible broadcast and nonbroadcast applicants whose proposals are so unique or innovative that they do not clearly fall within the priorities listed below. Innovative projects submitted under this category must address demonstrated and substantial community needs (*e.g.*, service to identifiable ethnic or linguistic minority audiences, service to the blind or deaf, electronic text, and nonbroadcast projects offering educational or instructional services).

Priorities

Priority 1—Provision of Public Telecommunications Facilities for First Radio and Television Signals to a Geographic Area

Within this category, NTIA establishes three subcategories:

A. *Projects that include local origination capacity.* This subcategory includes the planning or construction of new facilities that can provide a full range of radio and/or television programs including material that is locally produced. Eligible projects include new radio or television broadcast stations, new cable systems, or first public telecommunications service to existing cable systems, provided that such projects include local origination capacity.

B. *Projects that do not include local origination capacity.* This subcategory includes projects such as increases in tower height and/or power of existing stations and construction of translators, cable networks and repeater transmitters that will result in providing public telecommunications services to previously unserved areas.

C. *Projects that provide first nationally distributed programming.* This subcategory includes projects that provide satellite downlink facilities to noncommercial radio and television stations that would bring nationally distributed programming to a geographic area for the first time.

Priority 1 and its subcategories apply only to grant applicants proposing to plan or construct new facilities to bring public telecommunications services to geographic areas that are presently unserved, *i.e.*, areas that do not receive any public telecommunications services whatsoever. (It should be noted that television and radio are considered separately for the purposes of determining coverage.)

An applicant proposing to plan or construct a facility to serve a geographical area that is presently unserved, should indicate the number of persons who would receive a first public telecommunications signal as a result of the proposed project.

Priority 2—Replacement of Basic Equipment of Existing Essential Broadcast Stations

Projects eligible for consideration under this category include the urgent replacement of obsolete or worn out equipment in existing broadcast stations that provide either the only public telecommunications signal or the only locally originated public telecommunications signal to a geographical area.

In order to show that the urgent replacement of equipment is necessary, applicants must provide documentation indicating excessive downtime, or a high incidence of repair (*i.e.*, copies of repair records, or letters documenting non-availability of parts.) Additionally, applicants must show that the station is the only public telecommunications station providing a signal to a geographical area or the only station with local origination capacity in a geographical area.

The distinction between Priority 2 and Priority 4 is that Priority 2 is for the urgent replacement of basic equipment for essential stations. Where an applicant seeks to

"improve" basic equipment in its station (*i.e.*, where the equipment is not "worn out"), or where the applicant is not an essential station, NTIA would consider the applicant's project under Priority 4.

Priority 3—Establishment of a First Local Origination Capacity in a Geographical Area

Projects in this category include the planning or construction of facilities to bring the first local origination capacity to an area already receiving public telecommunications services from distant sources through translators, repeaters or cable systems.

Applicants seeking funds to bring the first local origination capacity to an area already receiving some public telecommunications services may do so, either by establishing a new (and additional) public telecommunications facility, or by adding local origination capacity to an existing facility. A source of a public telecommunications signal is distant when the geographical area to which the source is brought is beyond the grade B contour of the origination facility.

Priority 4—Replacement and Improvement of Basic Equipment for Existing Broadcast Stations

Projects eligible for consideration under this category include the replacement of obsolete or worn-out equipment and the upgrading of existing origination or delivery capacity to current industry performance standards (*e.g.*, improvements to signal quality, and significant improvements in equipment flexibility or reliability). As under Priority 2, applicants seeking to replace or improve basic equipment under Priority 4 should show that the replacement of the equipment is necessary by including in their applications data indicating excessive downtime, or a high incidence or repair (such as documented in repair records). Within this category, NTIA establishes two subcategories:

A. Under Priority 4A, NTIA will consider applications to replace urgently needed equipment from public broadcasting stations that do not meet the Priority 2 criteria because they do not provide either the only public telecommunications signal or the only locally originated public telecommunications signal to a geographic area. NTIA will also consider applications that improve as well as replace urgently needed production-related equipment at public radio and television stations that do not qualify for Priority 2 consideration but that produce, on a continuing basis, significant amounts of programming distributed nationally to public radio or television stations.

This subcategory will also enable the acquisition of satellite downlinks for public radio stations in areas already served by one or more full-service public radio stations. The applicant must demonstrate that it will broadcast a program schedule that does not merely duplicate what is already available in its service area.

The final projects included in this subcategory would enable the acquisition of the necessary items of equipment to bring the inventory of an already-operating station to the basic level of equipment requirements established by PTFP. This is intended to assist stations that went on the air with a complement of equipment well short of what the Agency considers as the basic complement.

B. This subcategory includes the improvement and non-urgent replacement of equipment at any public broadcasting station.

Priority 5—Augmentation of Existing Broadcast Stations

Projects in this category would equip an existing station beyond a basic capacity to broadcast programming from distant sources and to originate local programming.

A. *Projects to equip auxiliary studios at remote locations, or to provide mobile origination facilities.* An applicant must demonstrate that significant expansion in public participation in programming will result. This subcategory includes mobile units, neighborhood production studios or facilities in other locations within a station's service area that would make participation in local programming accessible to additional segments of the population.

B. *Projects to augment production capacity beyond basic level in order to provide programming or related materials for other than local distribution.* This subcategory would provide equipment for the production of programming for regional or national use. Need beyond existing capacity must be justified.

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15 CFR Part 2301

[Docket No. 91 0635-1245]

Public Telecommunications Facilities Program (PTFP); Policy Statement

AGENCY: National Telecommunications and Information Administration (NTIA), Commerce.

ACTION: Further statement of program policy.

SUMMARY: This further statement of Program Policy clarifies funding considerations for the Public Telecommunications Facilities Program (PTFP). In 56 FR 38004, published August 9, 1991, the National Telecommunications and Information Administration (NTIA) announced further refinements of PTFP policies and requested public comment on the proposals. NTIA has reviewed the comments submitted as a result of the notice and is now responding to the comments and issuing the Further Statement of Program Policy.

EFFECTIVE DATE: December 23, 1991.

FOR FURTHER INFORMATION CONTACT: Dennis R. Connors, Director, Public Telecommunications Facilities Program, NTIA/DOC, 14th Street and Constitution Avenue, NW., room H-4625, Washington, DC 20230; telephone: (202) 377-1835.

SUPPLEMENTARY INFORMATION: In response to the Proposed Further Statement of Program Policy (56 FR 38004, August 9, 1991), NTIA received comments from nine different organizations.[1] The Statement encourages the submission of applications seeking to further public educational efforts through the use of broadcast and nonbroadcast public telecommunications. In addition, it assists potential PTFP grant applicants [2] in evaluating the prospects for obtaining funding for certain projects by summarizing NTIA's programmatic concerns and the legal considerations affecting the funding of three types of projects:

(1) Educational and instructional projects;

(2) Expansion or improvement of nonbroadcast services; and

(3) Broadcast improvement and augmentation projects. The Statement provides guidance to potential grant applicants in determining whether to apply for PTFP funds, and it supplies a uniform response to frequently arising questions about the competitiveness of certain applications.

Responses to the Comments on the Proposed Further Statement of Program Policy

Educational and Instructional Projects

The comments received generally supported "NTIA's encouragement of PTFP applications that would assist educational and instructional projects" [3] and praised the Agency "for affirming its long-standing commitment to educationally oriented goals".[4] At the

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[1] Comments were submitted by the following organizations: Association of America's Public Television Stations and the Public Broadcasting Service in a joint filing (Joint Comments); the Corporation for Public Broadcasting (CPB); Greenville Technical College, Greenville, SC (GTC); Mercer County Community College, Trenton, NJ (MCCC); National Public Radio (NPR); the New York Network, State University of New York, Albany, NY (NYN); the Organization of State Broadcasting Executives, Columbia, SC (OSBE); and the WGBH Educational Broadcasting Foundation, Boston, MA (WGBH).

[2] PTFP is authorized to provide matching grants to plan and construct public telecommunications facilities. See 47 U.S.C. 390-393, 397 (1988). The Communications Act of 1934, as amended. Unless otherwise noted, all statutory citations are to title 47 of the United States Code.

[3] Joint Comments at 4.

[4] CPB at 2-3.

same time CPB pointed out that, "no other institution * * * does more than public broadcasting to service the Nation's daily needs for timely, thoughtful and in-depth educational programming and news and information programming on issues which are vital to the general population and workforce." [5] APTS and PBS urged NTIA to "be fully aware of the extent of educational and instructional programming currently provided by the nation's public broadcasting stations" [6] and provided a fairly detailed summary of that "extent".[7]

NTIA is very aware of "the unique capability of a *broadcasting* service dedicated to public service and education." [8] NTIA hopes in formulating and publishing this policy statement that public broadcasters will be stimulated to develop a number of projects with an educational component to further their contributions to education.

Some public broadcasting organizations expressed concern that the Agency's encouragement of applications to assist educational and instructional projects would result in less NTIA support for public broadcasting projects.[9] In the Statement, NTIA tried to emphasize the important role of public broadcasting in providing educational services, and it takes this opportunity to state clearly that it has no intention of abandoning its commitment to public radio and television. It anticipates that the rate and ratio of funding of high-priority broadcast and nonbroadcast projects will remain approximately the same as it has been in the past. NTIA's intent in issuing this Policy Statement is to "encourage the submission of more applications focusing on educational objectives" [10] from both broadcast and nonbroadcast applicants.

The commenters focused their responses on the educational policies put forth in the proposal. These policy initiatives may be broken into three broad categories—public availability and project purposes, technology, and interactivity.

Public Availability and Project Purposes

In the Statement, NTIA pointed out its obligation to "look only to projects offering instruction to the public," excluding "from its purview televised coursework that is both produced and received within the confines of either a school building or a single campus," contrasted with a "distance learning project" offering "students expert instruction in an advanced subject while they remain hundreds or thousands of miles from the instructor." [11] The Statement also identified several factors that might make a project more highly competitive for funding, such as whether it:

- Reaches a large number of potential students, especially those in remote, isolated areas;
- Reaches students who clearly would never receive the coursework offered without the project;
- Reaches a high number of potential beneficiaries;
- Meets some special need; *e.g.* a state mandate to raise substantially the educational achievement level of all students, including those in isolated areas; and
- Assists the nation's international competitiveness.[12]

Some commenters read these factors as a voluntary curtailment of NTIA's discretion to fund educational projects that serve a local, as opposed to a regional or national, audience.[13] These parties were concerned that use of phrases such as "a large number of potential students", or "far ranging course distribution system" [14] indicated a bias in favor of nationally distributed educational programming.[15] This is not NTIA's intention.

NTIA recognizes that the nation's educational system is based upon local schools governed by local boards of education. In addition, the myriad and positive contributions that local public radio and television stations make to the education effort, no matter what the grade level, is a fact well known to NTIA. The factors that NTIA listed in the Statement were not intended as dispositive to the final funding decision. Rather they were intended to delineate some of the parameters within which PTFP may consider applications with educational benefits. Therefore, NTIA will continue to maintain its discretion in deciding which types of project to fund. Whether a project promises to reach the entire nation or a portion of a single school system will not be the only factor considered when evaluating an application. NTIA also will be aware of CPB's stress on the advantages of supporting "services principally directed at the general at-home audience population that are also usable in the classroom" and be mindful that "the long-term educational benefits of its investment * * * will be defined by the number of users of the services, the frequency and variety of educational uses, the special contributions to education which the services can provide, the effectiveness and uniqueness of the services, and the long-term sustainability and usefulness of the services." [16]

Technology

As a general matter, NTIA cannot bind itself to favor any one specific technology over another. The language of the statute is clear in its intent that all types of technology, whether broadcast or non-broadcast, are to be considered for funding.[17] While agreeing that "expansion of public radio into unserved and under-served areas continues to be a Congressional priority," [18] NTIA cannot agree with NPR's contention that Congress intended PTFP to fund nonbroadcast technology "simply as an alternative delivery mechanism for public television and radio broadcast programming".[19]

Federal support for public broadcasting began in 1962 with passage of the Educational Television Facilities Act.[20] In 1978 responsibility for this program was transferred to NTIA, and the Program was renamed the Public Telecommunications Facilities Program.[21] The Public Telecommunications Financing Act of 1978 also substantially amended the substance of the PTFP's authorizing statute.[22] In the 1978 Act's Declaration of Purpose, language referring to public broadcasting was struck and the term "public telecommunications facilities" inserted.

PTFP has funded projects using nonbroadcast technology ever since NTIA began administering the grant program. These funding decisions were based on NTIA's interpretation of PTFP's authorizing statute.[23] Among the

[5] *Id.* at 3.
[6] Joint Comments at 5.
[7] See *Id.* at 5–7 and appendices A and B.
[8] CPB at 3 (emphasis in the original).
[9] See Joint Comments at 9–12, *passim*; NPR at 3; and, inferentially, CPB at 3.
[10] 56 FR 38004.
[11] 56 FR 38005.
[12] *Ibid.*
[13] Joint Comments at 12; GTC at 6–7.
[14] *Ibid.*
[15] Joint Comments at 12.
[16] CPB at 5.
[17] *See* section 390, using the phrase "public telecommunications facilities." The phrase is defined to include a wide variety of equipment, both broadcast and non-broadcast. *See* section 397(13).
[18] NPR at 9.
[19] NPR at 3 and similarly at 8.
[20] House Report No. 100–825, "Public Telecommunications Act of 1988", at 4.
[21] *Id.*
[22] See, *e.g.*, House Report 95–1178 and Senate Report 95–858 "Public Telecommunications Financing Act of 1978."
[23] Section 390–393, 397.

projects funded were Instructional Television Fixed Service (ITFS) and nation-wide satellite distribution systems for specialized instructional programming.

NTIA's interpretation that PTFP's statute permits the funding of nonbroadcast technologies has remained constant for thirteen years and three amendments to the statute.[24] It is significant that since 1978, Congress has amended the statute several times and has not changed the agency's interpretation of the statute.[25]

Telecommunications equipment is continuously changing and improving and, as CPB urged, NTIA will monitor "upcoming advances and opportunities in the broadcast systems it has supported." [26] NTIA will be alert to the possibilities of such promising developments as digital audio broadcasting (DAB) and high definition television (HDTV) as they are developed, get acceptance from broadcasters and the public, and become important in providing public telecommunications services.

There are two distinct opinions in the comments received as to the efficacy of "broadcasting" versus "narrowcasting" to deliver educational programming.[27] Parties on both sides of the issue agreed, however, that numbers alone (*e.g.*, establishment of a reach threshold) should not be NTIA's sole consideration.[28] The Agency states, therefore, that its policy is to consider the number of potential beneficiaries from a given project, but stresses that this is only one consideration.

Based on the foregoing discussion, NTIA announces the following policies with regard to the technology used by applicants proposing to extend education through public telecommunications:

- There will be no automatic prejudgments based merely on the type of technology proposed.
- PTFP is authorized to extend the reach of public telecommunications and will remain alert to promising new technologies.
- NTIA declines to establish a reach threshold by which to measure the efficiency of a proposal.

Interactivity

Among the variety of other issues that NTIA thought commenters might view as important to judging the merits of a particular proposal was the one of interactivity—that is, whether one-way systems with no possibility of student feedback should be considered comparable to two-way systems.[29] Those who commented were in agreement that interactivity is not amenable to a strict definition, and that such a definition is not desirable.[30] The commenters felt that applicants are the appropriate parties to address this issue because only they can determine whether interactivity is an essential component of a project.[31] NTIA agrees with this proposition.

Further, APTS and PBS suggested several factors that NTIA hopes applicants will address in any proposal to use interactive technology in a project. These include, but are not limited to, the educational background and motivation of the target audience, the nature of the organization and content of the course, the age of the target audience, the preparation and effectiveness of the instructor, the training of receiving site personnel, and the setting in which courses are received.[32] The burden of justifying interactivity, with its added expense and complexity, is on the applicant. NTIA will consider such proposals, if otherwise eligible, but does not believe interactivity is a prerequisite for an educational project to be funded.

Review

CPB recommended that NTIA "revisit these policy issues again in approximately five years".[33] The Agency tries to monitor the field on an on-going basis so as to be prepared for policy changes that may be needed, and it will continue to do so. NTIA expects to propose and seek comment on revisions whenever it seems necessary to help NTIA carry out its mission.

Expansion or Improvement of Nonbroadcast Services

NTIA noted in the Policy Statement that the PTFP authorizing legislation prohibits the Agency from awarding grants that would result in the improvement of already-operating nonbroadcast entities. The Statement then asked for comments on six major issues that have arisen over the years as the program attempted to apply this Congressionally-imposed limitation to diverse nonbroadcast applications.

Three commenters addressed this element of the Statement. APTS and PBS approved PTFP's present approaches, saying, "The Joint Commenters believe that the current policies and practices utilized by NTIA to classify nonbroadcast equipment requests have worked well and should be continued * * *".[34]

The other two commenters—Mercer County Community College and the New York Network/State University of New York—advised PTFP to alter its policies on this matter. MCCC explicitly suggested that the policy prohibiting the funding for the improvement of operating nonbroadcast entities be changed so as to allow such funding.[35] In response, NTIA notes that the prohibition in question is statutory [36] and cannort be altered except by legislative action.

The New York Network submission emphasized the extraordinary diversity of telecommunications delivery systems that has been developed over the past 20 years and argued that "NTIA's policies must reflect this amazing migration of technology".[37] The submission recommended that, to be cost effective in making its funding decisions on such projects, NTIA should apply as one criteria the record of the applicant's demonstrated achievement in distance learning: "The rules should * * * allow those who are the most active and innovative in producing Distance Education to be eligible for facilities funding" and NTIA should "tap those organizations who are *currently* contributing with their own resources. The use of PTFP funds should provide

[24] 47 U.S.C. 390–393, 397 (1988), The Communications Act of 1934, *amended by* Public Law 97–35, 95 Stat. 357,725 "Public Broadcasting Amendments Act of 1981" approved August 13, 1981; Public Law 100–626, 102 Stat. 3207 "Public Telecommunications Act of 1988" *approved* October 19, 1988; H.R. 2977, "Public Telecommunications Act of 1991".

[25] The Supreme Court has noted "[i]t is commonplace in our jurisprudence that an administrative agency's consistent, longstanding interpretation of the statute under which it operates is entitled to considerable weight." *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Daniel* 439 U.S. 551, 566, fn. 20 (1979) [citations omitted], and see *Saxbe* v. *Bustos* 419 U.S. 65, 74 (1974).

[26] CPB at 6.

[27] For example, GTC at 2 and WGBH at 2. The Joint Comments at 5–9 detailed the efforts that public television stations have made in education.

[28] See, *e.g.*, GTC at 2 and Joint Comments at 16.

[29] 56 FR 38005.

[30] GTC at 5; Joint Comments at 14–16.

[31] See, *inter alia*, Joint Comments at 16 and GTC at 6.

[32] Joint Comments at 16, citing Stone, A Comparative Analysis of Interactive and Non-Interactive Video Delivery of Off-Campus Graduate Engineering Education (The American Society for Engineering Education, 1990) and Holt, Interaction: What is it and How Much is Enough? Tel-Con (May 1991).

[33] CPB at 7.

[34] Joint Comments at 17.

[35] MCCC at 1–2.

[36] Section 393(b) (1)–(2).

[37] NYN at 2.

for the extension of those *existing* efforts and not contribute to a duplication of facilities where there may be no actual sustaining educational mandate or revenue source." [38]

NYN continued this theme in its comments on the Statement's Issue One, which asked to what extent an applicant's pre-existing activities should affect the eligibility of a nonbroadcast application. NYN said, "The possession of a single piece of advanced communications technology should not cause unduly harsh limitation on the ability to apply for funds especially where such hardware will directly serve an educational entity and its population." [39] In stating this, NYN apparently had in mind primarily the acquisition of multiple satellite receive-only earth stations at sites that receive a vast amount of statellite-delivered programming.

NYN also commented on NTIA's Issue Four—whether, in a service expansion project, the applicant should be permitted to use PTFP funds to acquire production equipment if it is to replace leased, borrowed, or inferior equipment. Noting that NTIA's interpretation would inhibit NYN's ability to provide the extensive programming that it might wish over its wide-spread and sophisticated system, the Network stated, "To extend our services to more locations may at some point require an increase in the capacity to support those needs and hence the addition of similar equipment. Yet under the strict application of existing NTIA rules such an application would not be permitted." [40]

The clear trend of all these comments is towards NTIA's funding applications to improve the facilities of already-operating nonbroadcast entiteis. As we noted above and discussed fully in the Statement, the issue is governed by statute, and any change in the policy may be brought about only by Congressional action. NTIA reaffirm, however, that to the extent that a proposed project would result in the extension of a nonbroadcast entity's geographic scope or bring its service to a new and distinct audience, PTFP may accept the application as eligible for funding consideration. NTIA agrees with NYN's suggestion that applicants' demonstrated achievement in distance learning is relevant in the evaluation of an application and encourages applications to address this issue.

Finally, NYN urged NTIA to recognize the significance of digitally compressed video as an vehicle for transmitting vast quantities of programming: "The NTIA PTFP policies should allow the upgrade and expansion of non-broadcast networks and facilities to adopt this new more efficient technology." [41]

As noted in the earlier discussion on technology in the section on Educational and Instructional Projects, NTIA will monitor developments in telecommunications technology. NTIA re-emphasizes that it considers all established telecommunications technologies to be eligible for funding. This includes equipment to allow the use of digitally compressed video. There is, of course, one major limitation: the proposed use of the technology in question must be in compliance with PTFP's Congressionally mandated goals and objective. If—but only if—the "upgrade and expansion of non-broadcast networks and facilities" in question would result in the expansion of the applicant's service in a manner conforming to the dictates of PTFP's authorizing legislation, then the application would be considered eligible for program funding.

Broadcast Improvement and Augmentation Projects

Since 1987 NTIA's policy on local matching requirements has been to fund projects providing first service to a geographic area at up to 75% of the eligible project costs, with a presumption of 50% Federal funding for equipment replacement projects. The policy has also been the NTIA would consider showings of extraordinary need, such as regional economic problems or emergency situations, as justification for the submission of a replacement project application for more than 50% Federal funding. In the Policy Statement, NTIA extended the presumption of 50% Federal funding to broadcast improvement and augmentation projects with the same provision for applicants to demonstrate extraordinary need.

No comments were received on extending the policy, but APTS and PBS "believe that the same matching standard should be applicable both for new service and transmitter replacement applications. Both should be entitled to 75/25% grants or both should be entitled to 50/50% grants. To do otherwise jeopardizes the continued service of existing stations". [42]

As explained in the Statement, NTIA established the 50/50% policy in 1987 so that PTFP could participate in a greater number of replacement projects by making the available funds go further. This approach enabled NTIA to award $2,688,217 in PTFP grants that would have gone unfunded in 1991 if all transmitter grants had been funded automatically at 75%.

It has been the Agency's exprience that this policy has posed no problem or threat for stations since any applicant in an especially severe economic situation could seek funding at 75/25%. A number of such submissions in fact have been made and funded. [43] This fact gives NTIA confidence that there is no reason automatically to fund transmitter replacement at 75% and that continuing the 50/50% policy for equipment replacement projects and extending it to broadcast improvement and augmentation projects will not adversely affect any station.

Statement of Program Policy

The National Telecommunications and Information Administration, (NTIA), U.S. Department of Commerce, is charged with administration of the Public Telecommunications Facilities Program (PTFP). In order to assist potential PTFP grant applicants to evaluate the potential for obtaining PTFP grant funding for certain projects, NTIA summarizes below its programmatic concerns and the legal considerations affecting funding of three types of projects:

(1) Educational and instructional projects;

(2) Projects to expand or improve nonbroadcast services; and

(3) Broadcast improvement and augmentation projects. Immediately below, we state our policies for each type.

Educational and Instructional Projects

Introduction

Public education is an important element in any country's competitive arsenal, and the United States has come to recognize that a well-educated work force is a necessity if it wishes to maintain its high standard of living. In its administration of the PTFP, NTIA has sought to support educational projects through its broad-based assistance for public broadcasting services and by funding nonbroadcast projects offering

[38] Ibid.; emphasis supplied.

[39] Ibid.; emphasis in original.

[40] NYN at 3.

[41] *Id.* at 2–3.

[42] Joint Comments at 18.

[43] In 1991, for example, seven transmitter projects—three for television and four for radio—received grants of more than 50% in response to the economic showings the applicants made.

specific educational or instructional benefits.

NTIA would like to encourage the submission of more applications focusing on educational objectives, and believes that is has sufficient latitude within its current legislative and regulatory mandate to fund a wide range of both broadcast and nonbroadcast projects of this nature. NTIA already has a funding category called Special Applications.[44] This category is related to, but separate from, the PTFP funding priporities. Important educational and instructional projects—whether broadcast or nonbroadcast—can be given preferential consideration, in the Administrator's discretion, within this category. In this policy statement NTIA identifies factors that will be relevant in exercising its discretion to fund educational projects.

Background

NTIA is authorized to use PTFP funds to support the purchase of telecommunications equipment to be used by public telecommunications entities to provide educational programming to the public.[45] NTIA has exercised that authority to fund educational projects using both broadcast and nonbroadcast technologies.

In the field of broadcast instruction, PTFP funds are consistently made available to noncommercial television and radio stations, the former of which are generally stations affiliated with the Public Broadcasting Service (PBS). Typically, such PTFP grants have been awarded to local public broadcast stations providing educational services as part of their programming day. In some cases, those services are directed to the school population, sometimes to the public at large.

With respect to nonbroadcast instruction, NTIA has awarded grants to support the activation and extension of satellite networks to distribute instructional programming to a large geographical area, often nationwide. The networks so funded have usually been composed of entities at the college or university level and have offered coursework in advanced fields, such as engineering, science, math, agricultural science and management.

NTIA also has awarded grants to nonbroadcast projects to establish local instructional television networks. The technology involved usually has been microwave, utilized as Instructional Television Fixed Service (ITFS) systems. The entities funded have included regional school systems, state telecommunications organizations, vocational schools, and colleges and universities. Such systems offer many channels of instruction and usually reflect the educational concerns of a community or relatively small region. Satellite networks and ITFS system transmissions are both usually one-way video with a telephone line audio interconnection for question-and-answer periods.

As summarized above, PTFP's own grant history illustrates that education may be brought to citizens in many ways. Of greatest current interest to NTIA is the concept of "distance learning", which NTIA interprets to mean the use of telecommunications to make instruction available to students at locations apart from the teacher.

Funding Considerations

To further its statutory mandate to advance educational goals,[46] NTIA believes it is timely to reemphasize that education is a significant PTFP program purpose within the meaning of its Rules and to amplify how the funding criteria set forth therein may be applied to such project proposals.[47]

Public availability. In seeking to define its role in providing funding support, NTIA is attentive to certain threshold considerations. The first is the requirement, arising from PTFP's authorizing statute, that NTIA look only to projects offering instruction "to the public".[48] Thus, NTIA will exclude from its purview televised coursework that is both produced and received within the confines of either a school building or a single campus. Such a project would be in contrast to a distance learning project—*e.g.*, a communications satellite network—which would offer students expert instruction in an advanced subject while they remain hundreds or thousands of miles from the instructor.

Technology. Secondly, as indicated above, NTIA's experience is that education can be provided effectively to distant students through both broadcast and nonbroadcast technologies, and PTFP's legislative authority allows funding of projects within both categories.[49] Accordingly, NTIA will not automatically favor one technology over another with respect to educational project applications, but rather will consider the services to be rendered and the efficiency of the technology proposed.

Project purposes. Given the extraordinary diversity within the field, a project will be considered more highly competitive for funding if it promises to accomplish one or more of the following objectives:

- Reach a large number of potential students, especially those in remote isolated areas, or, reach a high number of potential beneficiaries (an example of the latter might be the activation of a series of satellite transmit earth stations [uplinks] to form the nucleus of a far-ranging course distribution system);
- Reach students who clearly would never receive the coursework offered without the project;
- Meet some special need; *e.g.*, a state mandate to raise substantially the educational achievement level of all students, including those in isolated areas; and
- Assist the nation's international competitiveness.

NTIA also regards as particularly relevant the participation of minorities and women in providing instructional programming or in receiving it.[50]

These factors are not rigid critieria, nor will they supplant the existing funding criteria and priorities.[51] Like all applications, educational/distance learning applications will continue to be evaluated on a case-by-case basis, and other factors might raise the competitiveness of any given application.

Further, NTIA will not make prejudgments about a variety of other issues that might be viewed as important in judging the merits of a particular proposal. For example, NTIA is not prepared to issue a definitive opinion on the question of whether one-way video broadcasting, without the possibility of student feedback, should be considered comparale to more sophisticated two-way educational systems. In assessing applications relating to educational or instructional projects, NTIA will expect the applicant to demonstrate the merits of whichever type of system—be it one-way or interactive—is proposed. NTIA also assumes that such applicants will show that alternative systems could not be anticipated to work as well as the proposed method. In making their case, NTIA urges educational/instructional applicants to consider such concerns as the educational background and

[44] PTFP Rules are at 15 CFR part 2301. See Appendix. (Hereinaafter Rules 2301.)

[45] Sections 390–393, 397.

[46] Sections 390(2), 397(14).

[47] Rules 2301.2, 2301.13, 2301.14.

[48] Section 392(a)(1), 397(12).

[49] Section 390(1).

[50] Sections 390(2) and 393(b)(3) direct the Agency to "increase public telecommunications services and facilities available to, operated by, and owned by minorities and women".

[51] Sections 390 (1)-(3), 393(b); Rules 2301.13, 2301.14, and Appendix.

motivation of the target audience, the nature of the applicant organization, the content of the relevant coursework, the age of the target students, the preparation and effectiveness of the faculty, the training of the staff at the receive sites, and the setting in which the courses are received.

Similarly, NTIA makes no judgment as to whether a course has to be "live" to count as effective distance learning. Nor will NTIA stipulate what sort of equipment it will consider eligible for funding in educational projects.

Finally, although NTIA will continue to be interested in the number of students the proposed educational programming will reach, the Agency is not ready to impose any reach threshold; *i.e.*, a designated minimum number of students expected to receive the programming below which NTIA will not consider an application project truly competitive. Also, being alert to the singular role that the local community has in United States education, NTIA will not automatically elevate a proposed national-distribution system to a competitive position above that of a strictly local system just because of the presumed greater "reach" of the former. NTIA believes that the fears of some local systems that they will be crowded out by bigger, more powerful national systems are exaggerated. The Agency notes that often the presence of a nationally-distributed service strengthens a local system simply by allowing the latter to enrich its curriculum through the addition of the nationally-fed coursework. Nonetheless, NTIA realizes that all types of distribution systems—local, state, regional, and national—have their merits. NTIA will, therefore, look at each application in turn to determine, case by case, which most deserve PTFP support.

Improvement of Nonbroadcast Telecommunications Services

Every year NTIA receives applications that raise the question of whether the applicant is proposing an improvement of an already operating nonbroadcast facility and, thus, whether the project is eligible for PTFP funds pursuant to statutory guidelines.[52] In contrast to the authority granted to fund improvements of broadcast projects,[53] the statute limits funding of nonbroadcast projects to those designed for the provisions of

> * * * new telecommunications facilities to extend service to areas currently not receiving public telecommunications services; [or] the expansion of the service areas of existing public telecommunications entities.[54]

NTIA interprets the phrases "extend service to areas" and "expression of the service areas" to mean an enlargement of geographic scope or a targeting of a new and distinct audience for the nonbroadcast service in question. Nonbroadcast applications submitted by operating entities that do not expand the geographic scope or target a new and distinct audience will continue to be ineligible for funding. Complexities constantly arise, however, in applying the statutory text to specific circumstances. NTIA has identified six such issues and states its position on each.

Issue One: To What Extent do an Applicant's Pre-Existing Activities Affect the Eligibility of a Nonbroadcast Application?

Some PTFP nonbroadcast applicants have had some previous telecommunications experience. For example, many colleges have a small studio for producing instructional materials or a satellite downlink, for on-campus distribution of programming. Should the possession of such facilities disqualify an applicant from obtaining PTFP funds for the establishment of a new nonbroadcast entity on the grounds that the new activity is soley an "improvement" outside the scope of NTIA's funding authority?

Of relevance here is the Act's formal definition of a "noncommercial telecommunications entity" [55]—an organization which disseminates audio or video noncommercial educational, instructional or cultural programming to the public by nonbroadcast means, such as coaxial cable, optical fiber, satellite, microwave, or ITFS transmission. NTIA believes, therefore, that a vital factor in determining whether an applicant is an already-operating nonbroadcast entity is its ability to distribute programming to the public.

NTIA considers the distribution of programming when confined to either a single building or a single campus to be "closed circuit" transmissions and not dissemination of programming to the public. Thus, an organization that possesses only a satellite downlink, or that produces instructional programs not disseminated to the public, is not a noncommercial telecommunications entity as PTFP uses the term. Its PTFP application for nonbroadcast equipment—assuming that the equipment would be used to establish a public nonbroadcast services—would therefore be eligible for consideration for PTFP funding.

Issue Two: In Establishing a New Nonbroadcast Telecommunications Entity, May an Applicant Use PTFP Funds To Acquire Origination (Production) Equipment To Replace Old or Non-Standard Equipment Owned by the Applicant?

Sometimes colleges or universities have studio equipment not used for public telecommunications, as that term is discussed in Issue One, above. The existing equipment may consist only of consumer- or industrial-level quality. Occasionally, it is of broadcast-level quality, but obviously obsolete and fit only for closed-circuit purposes.

NTIA insists that all equipment acquired with PTFP funds be of professional broadcast quality.[56] It does so to ensure that the equipment will provide a high quality, reliable service to the public. NTIA also wants to be assured that the equipment purchased will hold up for the full period of Federal interest in it.

Under these circumstances, NTIA believes that it is appropriate for PTFP to fund new production equipment to replace substandard equipment as part of a project to establish a new nonbroadcast entity. NTIA also will support the purchase of new production equipment to complement existing equipment—even if the latter is broadcast quality—if the result would be to bring the applicant's production capability to the minimum recognized standard for broadcast operations.

Issue Three: Must a Nonbroadcast Telecommunications Entity Have Studio Production Capability?

Some PTFP applicants request funds to establish a production studio for use with an already-operating nonbroadcast dissemination facility. NTIA believes that a nonbroadcast telecommunications entity can acquire and distribute programming without the use of studio production equipment and thus studio production capability is not necessary for the operation of a nonbroadcast entity. While production equipment admittedly would strengthen the entity's service, a request to acquire production equipment in these circumstances would be an improvement and therefore not eligible for PTFP funds.

[52] Section 393(b) (1), (2).

[53] Section 390(3), 393(b)(4).

[54] Section 393(b) (1), (2) and see Section 390.

[55] Section 397(7).

[56] Rules 2301.24.

Issue Four: In a Service Expansion Project, Should the Applicant Be Permitted to use PTFP Funds To Acquire Origination (Production) Equiment if it Is To Replace Leased, Borrowed or Inferior Equipment?

Periodically, an already operating nonbroadcast entity proposes to expand its existing service area and includes in its PTFP application a request for funds to replace existing production equipment.

With respect to already operating nonbroadcast entities, NTIA believes that such a purchase would represent an improvement in the applicant's capabilities. Therefore, the portion of the application involving production equipment would not be eligible for PTFP funding. The application could be accepted for consideration, but the only equipment eligible for funding would be that required for expansion of the service area, primarily dissemination and interconnection equipment.

NTIA believes that applications for funds to acquire new production equipment, rather than relying on leased or borrowed equipment, should also be denied. Customarily, applicants in these situations point out that they do not currently own any production equipment and characterize this part of the project as the "establishment" or as the "completion of construction" of their nonbroadcast facility. As noted under Issue Three, NTIA believes that a nonbroadcast entity does not require a local production facility in order to provide service to the public. Therefore, an applicant already disseminating nonbroadcast services to the public is not eligible to improve its facility by constructing a production studio with the use of PTFP funds.

Issue Five: What Is the Effect of an Applicant's Activating a Nonbroadcast Facility Between the Closing Date and the Award Date, or the Effect of Such Action on the Reactivation of Deferred Application?

Applicants have submitted proposals which indicate that a substantial portion of the proposed nonbroadcast project will be activated after the closing date (when the application is due at NTIA), but before the award period start date. The latter is the date on which the project period begins, generally eight or nine months after the closing date. NTIA has determined that the legal nature of a nonbroadcast application does not change when, after the closing date, the applicant acquires equipment from the proposed equipment list and begins project operations. In such an instance, the application continues to be eligible during the grant cycle for which it is submitted.

NTIA has also concluded that the activation of a proposed nonbroadcast facility, however, represents a substantial change in the applicant's circumstances. Activation of the facility creates a "public telecommunications entity", and subsequent applications would be eligible for funding only if the project is an "expansion" of service area as outlined above. In the event the original application is not granted by NTIA, the activation of the nonbroadcast facility disqualifies the applicant from reactivating the application for further consideration in subsequent grant cycles.

Issue Six: Should a University That Operates a Full Broadcast Standard Production Facility in One of its Colleges Be Permitted To Receive PTFP Funds for the Establishment of a Nonbroadcast Production Facility in a Different College?

In the past, NTIA has received requests for nonbroadcast studio equipment in these circumstances, and will look to the following factors to confirm that the project is an eligible service "expansion":

- Dedication of the existing production facility to serving a distinctly different audience from that to be reached by the proposed facility, with a distinctly different curriculum and, perhaps, via a different distribution system;
- Full utilization of the existing production facility for its current purpose and its consequent unavailability for the proposed project;
- Expense of interconnecting the existing production facility with that of the proposed project; or,
- Inaccessibility to the applicant college of the existing production facility.

Broadcasting Improvement and Augmentation Projects

NTIA hereby clarifies its policy on local matching requirements. In its previous policy NTIA stated that it would fund projects to provide first service to a geographic area at up to 75% of the eligible project costs while a presumption of 50% Federal funding would be the general rule for equipment replacement projects.[57] The policy further stated that the agency would accept showings of extraordinary need such as regional economic problems in agriculture or other industries or emergency situations as justification for submission of a replacement application for more than 50% Federal funding.

NTIA established this policy so it could participate in a greater number of replacement projects. NTIA continues to believe that encouraging greater Federal/local partnership in this way, along with an allowance for hardships and special circumstances as previously announced, is an efficient means of administering PTFP funds.

NTIA will now treat broadcast "improvement" and "augmentation" projects in the manner of "replacement" projects that normally are supported only at the 50% Federal funding level. NTIA believes that this addition is consistent with the existing policy and allows for more equitable treatment of applications. Again, a showing of extraordinary need will be taken into consideration as justification for grants of up to 75% of the project cost.

In a related matter, NTIA also takes this opportunity to reaffirm its existing policy on the use of Corporation for Public Broadcasting (CPB) funds to meet the local matching requirements of the PTFP grant.[58] As previously announced, CPB grants are not considered "funds supplied by Federal departments and agencies" within the meaning of the Rules and therefore there is no absolute proscription against the use of such CPB grants.[59]

NTIA continues to believe, however, that the policies and purposes underlying the PTFP requirements could be significantly frustrated if applicants routinely relied upon another Federally supported grant program for its local match. Accordingly, NTIA has limited the use of CPB funds for the non-Federal share of PTFP projects to circumstances of "clear and compelling need." [60] It intends to maintain that standard and to apply it on a case-by-case basis in future years.

Other Information

Under Executive Order (E.O.) 12291, the Department must determine whether a policy statement is a "major" rule within the meaning of section 1 of E.O. 12291 and therefore subject to the requirement that a Regulatory Impact Analysis be performed. This policy statement is not a major rule because it is not "likely to result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries * * *; or (3) significant adverse effects on competition,

[57] Section 392(b), 52 FR 31497 (1987).

[58] Section 392(b); Rules 2301.16(a)(2).

[59] Rules 2301.16 and 44 FR 30698 at 30907 (1979).

[60] Rules 2301.16(a)(4).

employment, investment, productivity or innovation * * *" Therefore, preparation of a Regulatory Impact Analysis is not required.

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) does not apply to this policy statement, because, as explained above, the policy statement was not required to be promulgated as a proposed policy statement before issuance as a Final Policy Statement by Section 553 of the Administrative Procedures Act (5 U.S.C. 553) or by any other law or regulation. Neither an initial nor final Regulatory Flexibility Analysis was prepared. This policy statement does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

The Office of Management and Budget has approved the information collection requirements contained in this policy statement pursuant to the Paperwork Reduction Act under OMB Control No. 0660–0003. Public Reporting for this collection of information is estimated to vary from 16 hours to 200 hours and has an average of 125 hours per application, including associated exhibits. This total includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Office of Policy Coordination and Management, NTIA, U.S. Department of Commerce, Washington, DC 20230; and to the Paperwork Reduction Project (0660–0003), Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

Janice Obuchowski,

Assistant Secretary for Communications and Information.

[FR Doc. 91–28118 Filed 11–21–91; 8:45 am]

BILLING CODE 3510–60–M

federal register

Friday
November 22, 1991

Part VIII

Department of Commerce

National Telecommunications and Information Administration

Public Telecommunications Facilities Program; Closing Date for Applications; Notice

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration Public Telecommunications Facilities Program: Closing Date for Applications

AGENCY: National Telecommunications and Information Administration, Commerce.

ACTION: Public Telecommunications Facilities Program: Notice of closing date for applications.

SUMMARY: The National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce, announces that applications are available for planning and construction grants for public telecommunications facilities under the Public Telecommunications Facilities Program administered by NTIA.

Applicants for grants under the PTFP must file their applications on or before March 5, 1992. NTIA anticipates making grant awards by late summer 1992.

Applications delivered by mail must be received no later than 5 p.m., March 5, 1992, and must be addressed to: Public Telecommunications Facilities Program, NTIA/DOC, room 4625, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Applications delivered by hand must be delivered to the above address between 8:30 a.m. and 5 p.m. on or before March 5, 1992. Applicants whose applications are not received by 5 p.m., March 5, 1992, will be notified that their applications will not be considered in the current grant cycle and will be returned.

Final Rules for the Public Telecommunications Facilities Program appear in this issue of the **Federal Register**. Those rules will be in effect for 1992 applications.

FOR FURTHER INFORMATION CONTACT: Dennis R. Connors, Director, PTFP/NTIA/DOC, room 4625, Washington, DC 20230. Telephone (202) 377–5802.

Authority: The Public Telecommunications Financing Act of 1978, 47 U.S.C. 390–394, 397–399b (Act), as amended by the Public Broadcasting Amendments of 1981, Public Law 97–35, 95 Stat. 725 (1981 Amendments), and the Consolidated Omnibus Budget Reconciliation Act of 1985, Public Law 99–272, § 5001, 100 Stat. 82, 117 (1986).

(Catalog of Federal Domestic Assistance No. 11.550)

Dennis R. Connors,

Director, Office of Policy Coordination and Management.

[FR Doc. 91–28116 Filed 11–21–91; 8:45 am]

BILLING CODE 3510–60–M

federal register

Friday
November 22, 1991

Part IX

Department of Agriculture

Commodity Credit Corporation

7 CFR Part 1435

Sugar and Crystalline Fructose Information Reporting and Recordkeeping Requirements; Final Rule

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1435

Sugar and Crystalline Fructose Information Reporting and Recordkeeping Requirements

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Final rule.

SUMMARY: This rule adopts as final, with certain changes, a provision of the interim rule which set forth regulations for the collection of information from, and recordkeeping by, sugarcane and sugar beet processors, sugar refiners and manufacturers of crystalline fructose. The specific provision being adopted as final is section 1435.402(b)(1), regarding the submission of reports, with changes in the due dates for the initial and subsequent reports, such that the reports for October, November, and December will be due by January 31, 1992 and subsequent reports will be due by the third Friday of the month following the month for which data are reported.

EFFECTIVE DATE: November 22, 1991.

FOR FURTHER INFORMATION CONTACT: Robert Barry, Assistant to the Deputy Administrator for Program Planning and Development, Agricultural Stabilization and Conservation Service, room 3741, South Agriculture Building, U.S. Department of Agriculture, Washington, DC; telephone: (202) 720–3391.

SUPPLEMENTARY INFORMATION: This final rule has been reviewed under United States Department of Agriculture (USDA) procedures implementing Executive Order 12291 and Departmental Regulation 1512–1 and has been classified as "not major." It has been determined that the provisions of this interim rule will not result in: (1) An annual effect on the economy of $100 million or more; (2) major increases in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete in domestic or export markets.

It has been determined by an environmental evaluation that this action will not have a significant impact on the quality of the human environment. Therefore, an Environmental Assessment and an Environmental Impact Statement are not necessary for this final rule.

The information collection requirements of this rule have been approved through October 31, 1994, by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35) and have been assigned OMB No. 0560–0138.

The program covered by this final rule is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115 (June 24, 1983).

Summary of the Modifications Made by This Final Rule

The interim rule amending 7 CFR part 1435, which was published at 56 FR 47351–47375 on September 19, 1991, set forth requirements for the monthly reporting by sugarcane and sugar beet processors and by cane sugar refiners of information on sugar imports and other receipts, processing operations, production, distribution, stocks, average recovery rates, and plant capacities. In addition, manufacturers of crystalline fructose were required to submit monthly reports of their imports, distributions, and stocks of crystalline fructose.

Section 1435.402(b)(1), as promulgated by the interim rule, currently provides as follows:

> (1) The initial month for which data are to be reported is October 1991, and the initial report must be received no later than November 21, 1991. Subsequent monthly reports must be received no later than 15 days after the end of the calendar month for which the data are reported.

At the time the interim rule was promulgated it was envisioned that CCC would be able to finalize the rule sufficiently in advance of November 21 to enable the processors, refiners, and manufacturers affected by the reporting and recordkeeping requirements to accommodate any changes made in response to comments received from interested parties. However, CCC received numerous oral and written comments on both the interim rule and the forms which were published at the same time.

In order that such comments may be fully and carefully considered and that appropriate modifications, if necessary may be made to the provisions promulgated by the interim rule prior to the start-up of information submissions, CCC has determined that it is necessary to postpone the due dates for receipt of the October, November, and December reports to January 31, 1992.

In addition, the due date for subsequent submissions will be changed from the 15th day after the end of the calendar month for which the data are reported to the third Friday of the month following the month for which the data are reported. This change will assure that persons affected by the reporting requirements will have at least two full weeks in each month in which to prepare and submit data in order that it be received by CCC by the due date and will avoid having the due date fall on a weekend day.

List of Subjects in 7 CFR Part 1435

Loan programs/agriculture, Price support programs, Reporting and recordkeeping requirements, Sugar, Crystalline fructose.

Accordingly, § 1435.402(b)(1) of 7 CFR part 1435 as added by the interim rule which was published at 56 FR 47351–47375 on September 19, 1991 is adopted as a final rule with the following change:

PART 1435—SUGAR

1. The authority citation for part 1435 continues to read as follows:

> **Authority:** 7 U.S.C. 1421 and 1446; 15 U S C. 714b and 714c.

2. Section 1435.402(b)(1) is revised to read as follows:

§ 1435.402 Duty to report.

* * * * *

(b) *Submission of reports.* (1) The initial month for which data are to be reported is October 1991, and the initial reports for the months of October, November, and December, 1991 must be received no later than January 31, 1992. Subsequent monthly reports must be received no later than the third Friday after the end of the calendar month for which the data are reported.

* * * * *

Signed this 20th day of November, 1991 in Washington, DC.

John A. Stevenson,

Acting Executive Vice President, Commodity Credit Corporation.

[FR Doc. 91–28334 Filed 11–21–91, 9:45 am]

BILLING CODE 3410–05–M

federal register

Friday
November 22, 1991

Part X

The President

Part X

The President

Federal Register
Vol. 56, No. 226
Friday November 22, 1991

Presidential Documents

Title 3—

The President

Proclamation 6377 of November 20, 1991

National Farm-City Week, 1991

By the President of the United States of America

A Proclamation

Each Thanksgiving, when we Americans count our many blessings, among the first to come to mind is the abundance of high-quality foods that we enjoy The quantity and variety of goods that fill our Nation's grocery stores are unparalleled—a shining testament to the ingenuity and productivity of the American farmer. Yet while U.S. farmers are the most enterprising and efficient in the world, millions of other people in both urban and rural communities play important roles in the production and distribution of U.S. agricultural goods. During National Farm-City Week, we salute all of these hardworking Americans.

Our Nation's farmers are assisted in their efforts by millions of people, many of whom work in urban areas—researchers who develop improved methods and tools for farming; meteorologists who chart climatic conditions and weather patterns; and the manufacturers and suppliers of equipment, seeds, and fertilizers. The miracle of American farming is also made possible by those who transport and process raw agricultural goods; by government inspectors who help ensure their quality; and by wholesalers who distribute and retailers who sell finished farm products to consumers. The concerted efforts of all of these Americans have enabled the United States to make the most of its God-given resources.

Today America's farms and cities are linked more closely than ever before, as more and more farmers supply not only food but also raw materials for industrial use. Advances in science and technology have enabled manufacturers to convert agricultural commodities into biodegradable plastics, alternative fuels, and fuel additives, as well as printing ink and newsprint. Industrial use of farm products is creating new opportunities for American agriculture to diversify and to enhance its productivity while boosting its competitive position in world commerce.

American agriculture has long been a source of strength and pride for the United States, and we owe a tremendous debt of gratitude to all those who help bring forth food and fiber from the rich, fertile land with which we have been blessed. Thus, it is fitting that our celebration of National Farm-City Week take place during the 7-day period that ends on Thanksgiving.

NOW, THEREFORE, I, GEORGE BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim the week of November 22 through November 28, 1991, as National Farm-City Week. I encourage all Americans, in rural and urban communities alike, to join in recognizing the accomplishments of our farmers and all those hardworking individuals who cooperate in producing the abundance of agricultural goods that strengthen and enrich the United States.

IN WITNESS WHEREOF, I have hereunto set my hand this twentieth day of November, in the year of our Lord nineteen hundred and ninety-one, and of the Independence of the United States of America the two hundred and sixteenth.

George Bush

[FR Doc. 91-28369
Filed 11-21-91; 11:38 am]
Billing code 3195-01-M

Presidential Documents

Proclamation 6378 of November 20, 1991

National Family Week, 1991 and 1992

By the President of the United States of America

A Proclamation

When we count our blessings, most of us note with special gratitude the love and the support of our families. Thus, it is fitting that our celebration of National Family Week coincide with our traditional observance of Thanksgiving.

Family love brings light and warmth to our homes; it gives us strength when times are tough; and it makes good times even better by enabling us to share our joys with others. Through our experience as part of a family, we gain a sense of identity and purpose. Indeed, when we recall the generations who have gone before us, we are reminded of our personal links to the past and of our own place in history. When we think about generations to come, we are reminded of our obligation to help make this a better world.

Our ability to help make this a better world depends, in large part, on the kind of environment we create in our homes. Because a child's family life has such a powerful influence on the development of his or her personality and character, and because the family provides a model after which all other human relationships are fashioned, those of us who are parents and grandparents must ensure that the examples we set are positive ones. The daily course of our family lives should offer younger generations clear lessons about faith and duty, personal responsibility, and respect and concern for others.

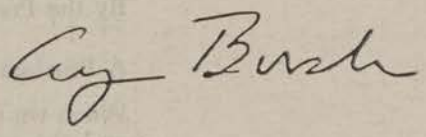
By definition, a family is a group of individuals who are related by blood, marriage, or adoption and who are united by their love and their lifelong commitment to one another. The family is the basic unit of society, and its well-being is vital to the success of our communities and Nation. In recent years, however, problems such as crime, drug abuse, child abuse, and teenage pregnancy have signalled a breakdown in traditional family life and values. While parents have primary responsibility for the well-being of their children, and while no arm of the state can replicate the divinely ordained embrace of the family, government can and should help preserve and support this institution and do nothing to harm it. America's future depends on it.

This week, as we acknowledge the blessings of family life and the importance of stable, loving families to the life of our Nation, let us reaffirm our commitment to policies and programs that affirm the rights of parents and protect the interests of children. Let us also resolve to ensure that our own families are communities in which each member is respected and cherished.

The Congress, by Public Law 102–112, has designated the weeks beginning November 24, 1991, and November 22, 1992, as "National Family Week" and has authorized and requested the President to issue a proclamation in observance of this week.

NOW, THEREFORE, I, GEORGE BUSH, President of the United States of America, do hereby proclaim the week of November 24 through November 30, 1991, and the week of November 22 through November 28, 1992, as National Family Week. I call upon all Americans to observe these weeks with appropriate programs and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twentieth day of November, in the year of our Lord nineteen hundred and ninety-one, and of the Independence of the United States of America the two hundred and sixteenth.



[FR Doc. 91-28370
Filed 11-21-91, 11:39 am]
Billing code 3195-01-M

Presidential Documents

Executive Order 12781 of November 20, 1991

Delegation of Functions and Authorities, Development of Requirements and Regulations, and Correction of Title

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 3603 of the Financial Reports Act of 1988 (22 U.S.C. 5351 *et seq.*), section 274A(d)(2) and (4) of the Immigration and Nationality Act ("Act"), as amended (8 U.S.C. 1324a(d)(2) and (4)), sections 4561, 6082, and 9561 of title 10 of the United States Code, the Act of June 14, 1987, ch. 2, 30 Stat. 11, 36 (16 U.S.C. 473), section 301 of title 3 of the United States Code, and in order to: (1) delegate functions concerning discussions with foreign governments to improve access by U.S. banking and financial organizations; (2) delegate authority concerning a national employment verification system; (3) delegate authority concerning the development of requirements and regulations for a uniform military ration; and (4) correct the title of the Nez Perce National Forest, it is hereby ordered as follows:

Section 1. *Functions Concerning Discussions with Foreign Governments to Improve Access by U.S. Banking and Financial Organizations.* The functions vested in the President by section 3603 of the Financial Reports Act of 1988 (22 U.S.C. 5353) are hereby delegated to the Secretary of the Treasury. This delegation is not in derogation of, and shall not affect, the existing authorities of the United States Trade Representative.

Sec. 2. *Authority Concerning the Employment Verification System.* The authority conferred upon the President by section 274A(d)(4) of the Act, to undertake demonstration projects of different changes in the requirements of the employment verification system, is delegated to the Attorney General. Demonstration projects shall be conducted consistent with the restrictions in section 274A(d)(2) of the Act and shall not extend for a period longer than 3 years. This authority may be redelegated.

Sec. 3. *Authority, Requirements, and Regulations Concerning a Uniform Military Ration.*

(a) *Authority.* The Secretary of Defense is hereby designated and empowered to exercise, without the approval, ratification, or other action by the President, the authority conferred upon the President by section 4561(a), sections 6082(a) and (d), and section 9561(a) of title 10 of the United States Code. Under this authority the Secretary may prescribe a uniform military ration applicable to the Army, Navy, and Air Force.

(b) *Requirements.* (1) *Components and Quantities.* The components and the quantities of the uniform military ration shall reflect military member preferences and satisfy nutritional requirements. (2) *Monetary Value.* The monetary value of the uniform military ration shall be equal to the monetary value of the ration in effect on the day before the effective date of this order. (3) *Index.* The Secretary of Defense shall establish, as of the effective date of this order, an index composed of a representative market basket of items equal in value to the ration value. Subsequent to the effective date of this order, and based upon the changing prices of food components in the index, the Secretaries of the military departments shall periodically redetermine the monetary value of the ration. The Secretary of Defense shall review the index periodically, but not less than once a year, to ensure that it reflects changes in food service technology, scientific advances in nutrition, the requirements of the Armed Forces of the United States, and the food preferences of the enlisted members.

Increases or decreases in the monetary value of the ration that result from changes in the composition of the food items making up the index shall not exceed 2 percent of the ration value annually.

(c) *Regulations.* Under regulations of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force are authorized, for their respective military departments, to prescribe the issue of special allowances and such special or supplemental rations, defined by component, quantity, or monetary value, as they may consider appropriate. Executive Order No. 11339 of March 28, 1967, is hereby revoked.

Sec. 4. *Correction of Title of the Nez Perce National Forest.* Executive Order No. 854 of June 26, 1908, is hereby amended by retitling the "Nezperce National Forest" the "Nez Perce National Forest."

Sec. 5. This order shall take effect immediately.

George Bush

THE WHITE HOUSE,
November 20, 1991.

[FR Doc. 91-28376
Filed 11-21-91; 11:51 am]
Billing code 3195-01-M

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H.J. Res. 140/Pub. L. 102-165

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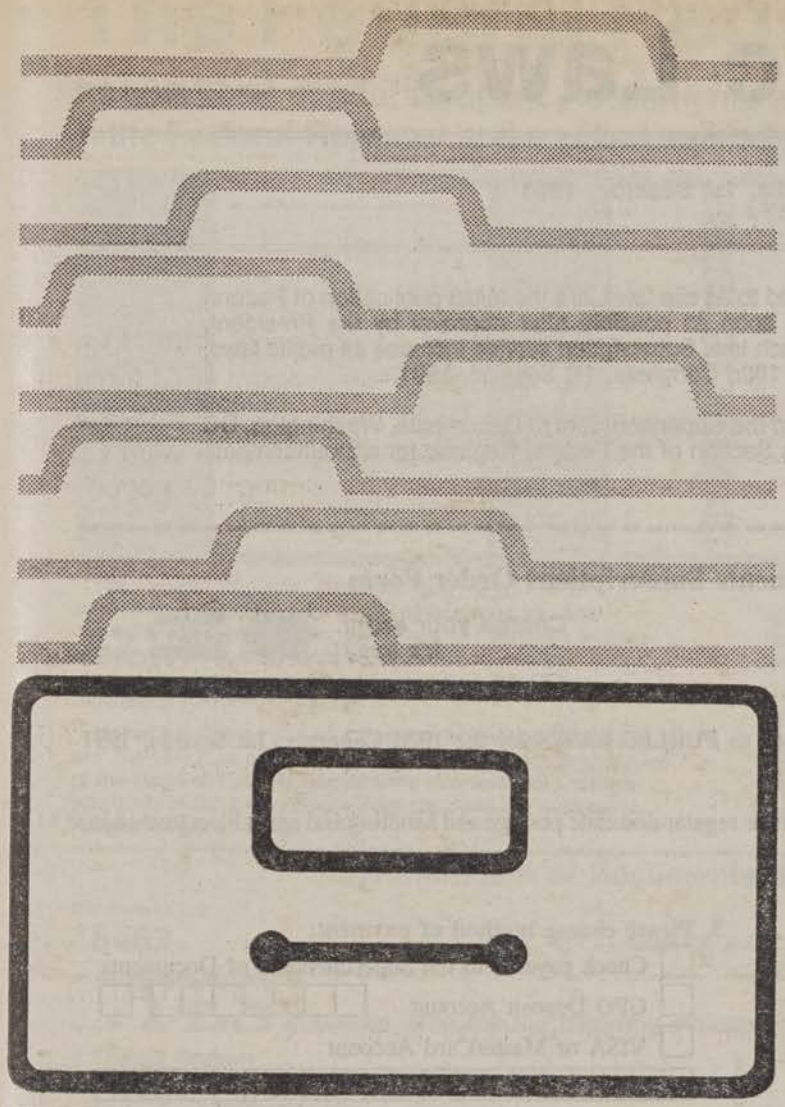

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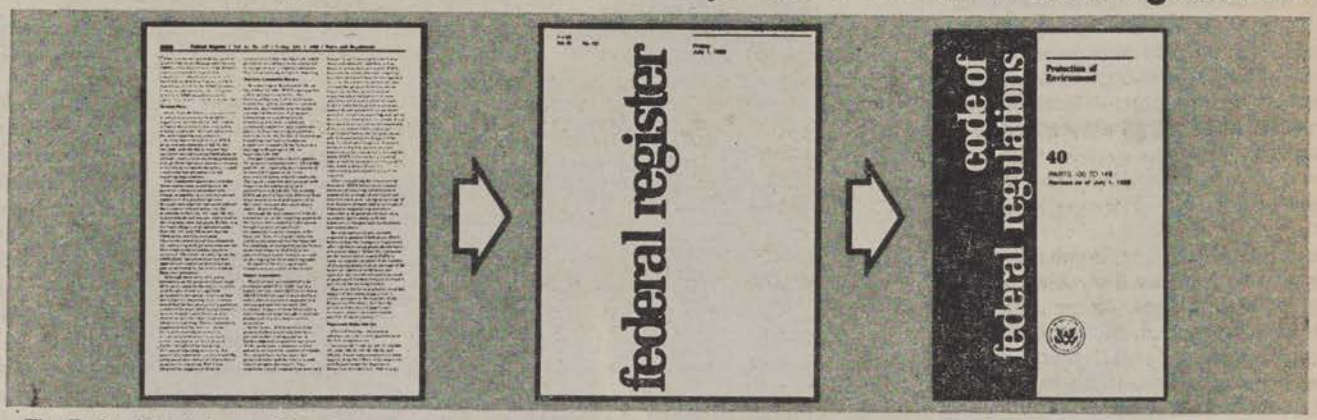

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