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Tuesday
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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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WHAT IT IS AND HOW TO USE IT

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

WHO: The Office of the Federal Register.

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

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

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

WASHINGTON, DC

WHEN: January 31, at 9:00 a.m.
WHERE: Office of the Federal Register, First Floor Conference Room, 1100 L Street NW., Washington, DC.
RESERVATIONS: 202–523–5240.
DIRECTIONS: North on 11th Street from Metro Center to southwest corner of 11th and L Streets

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Presidential Documents

Title 3—

The President

Executive Order 12788 of January 15, 1992

Defense Economic Adjustment Program

By the authority vested in me as President by the Constitution and the laws of the United States of America, including 10 U.S.C. 2391 and the Defense Economic Adjustment, Diversification, Conversion, and Stabilization Act of 1990, enacted as Division D, section 4001 *et seq.*, of the National Defense Authorization Act for Fiscal Year 1991, Public Law 101–510, and to provide coordinated Federal economic adjustment assistance necessitated by changes in Department of Defense activities, it is hereby ordered as follows:

Section 1. *Function of the Secretary of Defense.* The Secretary of Defense shall, through the Economic Adjustment Committee, design and establish a Defense Economic Adjustment Program.

Sec. 2. *Purpose of the Defense Economic Adjustment Program.* The Defense Economic Adjustment Program shall assist in the alleviation of serious community socioeconomic effects that result from major Defense base closures, realignments, and Defense contract-related adjustments, and the encroachment of the civilian community on the mission of military installations.

Sec. 3. *Functions of the Defense Economic Adjustment Program.* The Defense Economic Adjustment Program shall:

(a) Identify problems of States, regions, metropolitan areas, or communities that result from major Defense base closures, realignments, and Defense contract-related adjustments, and the encroachment of the civilian community on the mission of military installations and that require Federal assistance;

(b) Use and maintain a uniform socioeconomic impact analysis to justify the use of Federal economic adjustment resources, prior to particular realignments;

(c) Apply consistent policies, practices, and procedures in the administration of Federal programs that are used to assist Defense-affected States, regions, metropolitan areas, and communities;

(d) Identify and strengthen existing agency mechanisms to coordinate employment opportunities for displaced agency personnel;

(e) Identify and strengthen existing agency mechanisms to improve reemployment opportunities for dislocated Defense industry personnel;

(f) Assure timely consultation and cooperation with Federal, State, regional, metropolitan, and community officials concerning Defense-related impacts on Defense-affected communities' problems;

(g) Assure coordinated interagency and intergovernmental adjustment assistance concerning Defense impact problems;

(h) Prepare, facilitate, and implement cost-effective strategies and action plans to coordinate interagency and intergovernmental economic adjustment efforts;

(i) Encourage effective Federal, State, regional, metropolitan, and community cooperation and concerted involvement of public interest groups and private sector organizations in Defense economic adjustment activities;

(j) Serve as a clearinghouse to exchange information among Federal, State, regional, metropolitan, and community officials involved in the resolution of community economic adjustment problems. Such information may include, for

example, previous studies, technical information, and sources of public and private financing;

(k) Assist in the diversification of local economies to lessen dependence on Defense activities;

(l) Encourage and facilitate private sector interim use of lands and buildings to generate jobs as military activities diminish; and,

(m) Develop ways to streamline property disposal procedures to enable Defense-impacted communities to acquire base property to generate jobs as military activities diminish.

Sec. 4. *Economic Adjustment Committee.*

(a) *Membership.* The Economic Adjustment Committee ("Committee") shall be composed of the following individuals, or a designated principal deputy of these individuals, and such other individuals from the executive branch as the President may designate. Such individuals shall include the:

(1) Secretary of Agriculture;

(2) Attorney General;

(3) Secretary of Commerce;

(4) Secretary of Defense;

(5) Secretary of Education;

(6) Secretary of Energy;

(7) Secretary of Health and Human Services;

(8) Secretary of Housing and Urban Development;

(9) Secretary of the Interior;

(10) Secretary of Labor;

(11) Secretary of State;

(12) Secretary of Transportation;

(13) Secretary of the Treasury;

(14) Secretary of Veterans Affairs;

(15) Chairman, Council of Economic Advisers;

(16) Director of the Office of Management and Budget;

(17) Director of the Office of Personnel Management;

(18) Director of the United States Arms Control and Disarmament Agency;

(19) Administrator of the Environmental Protection Agency;

(20) Director of the Federal Emergency Management Agency;

(21) Administrator of General Services;

(22) Administrator of the Small Business Administration; and,

(23) Postmaster General.

(b) *Chairman.* The Secretaries of Defense, Commerce, and Labor shall rotate, on a yearly basis, as chairman of the Committee.

(c) *Vice Chairman.* The Assistant Secretary of Defense who oversees the Department of Defense's Office of Economic Adjustment shall serve as vice chairman of the Committee. The vice chairman shall chair the Committee in the absence of both the chairman and the chairman's designee and may also preside over meetings of designated representatives of the concerned executive agencies.

(d) *Executive Director.* The head of the Department of Defense's Office of Economic Adjustment shall provide all necessary policy and administrative support for the Committee and shall be responsible for coordinating the

application of the Defense Economic Adjustment Program to Department of Defense activities.

(e) *Duties.* The Committee shall:

(1) Advise, assist, and support the Defense Economic Adjustment Program;

(2) Develop procedures for ensuring that State, regional, and community officials and representatives of organized labor in those States, municipalities, localities, or labor organizations that are substantially and seriously affected by changes in Defense expenditures, realignments or closures, or cancellation or curtailment of major Defense contracts, are notified of available Federal economic adjustment programs; and,

(3) Report annually to the President and then to the Congress on the work of the Economic Adjustment Committee during the preceding fiscal year.

Sec. 5. *Responsibilities of Executive Agencies.*

(a) The head of each agency represented on the Committee shall designate an agency representative to:

(1) Serve as a liaison with the Secretary of Defense's economic adjustment staff;

(2) Coordinate agency support and participation in economic adjustment assistance projects; and,

(3) Assist in resolving Defense-related impacts on Defense-affected communities.

(b) All executive agencies shall:

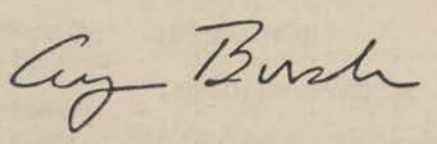
(1) Support, to the extent permitted by law, the economic adjustment assistance activities of the Secretary of Defense. Such support may include the use and application of personnel, technical expertise, legal authorities, and available financial resources. This support may be used, to the extent permitted by law, to provide a coordinated Federal response to the needs of individual States, regions, municipalities, and communities adversely affected by necessary Defense changes;

(2) Afford priority consideration to requests from Defense-affected communities for Federal technical assistance, financial resources, excess or surplus property, or other requirements, that are part of a comprehensive plan used by the Committee.

Sec. 6. *Judicial Review.* This order shall not be interpreted to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, its agents, or any person.

Sec. 7. *Construction.* (a) Nothing in this order shall be construed as subjecting any function vested by law in, or assigned pursuant to law to, any agency or head thereof to the authority of any other agency or officer or as abrogating or restricting any such function in any manner.

(b) This order shall be effective immediately and shall supersede Executive Order No. 12049.



THE WHITE HOUSE,
January 15, 1992.

[FR Doc. 92-1551
Filed 1-16-92; 2:01 pm]
Billing code 3195-01-M

Rules and Regulations

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DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 2

Revision of Delegations of Authority

AGENCY: Department of Agriculture.

ACTION: Final rule.

SUMMARY: This document revises the delegations of authority from the Secretary of Agriculture and general officers of the U.S. Department of Agriculture (USDA) to reflect the establishment of the Rural Development Administration.

EFFECTIVE DATE: January 21, 1992.

FOR FURTHER INFORMATION CONTACT: John H. Madding, Deputy Director, Community Facilities Division, Farmers Home Administration, United States Department of Agriculture, Washington, DC 20250, (202) 720–1490.

SUPPLEMENTARY INFORMATION: This document reflects the establishment of the Rural Development Administration. It revises the delegations of authority to the Under Secretary for Small Community and Rural Development and the Administrator of the Farmers Home Administration and adds delegations of authority to the Administrator of the Rural Development Administration.

This rule relates to internal agency management. Therefore, pursuant to 5 U.S.C. 553, notice of proposed rule making and opportunity for comment are not required, and this rule may be made effective less than 30 days after publication in the **Federal Register**. Further, since this rule relates to internal agency management, it is exempt from the provisions of Executive Order No. 12291. Finally, this action is not a rule as defined by Public Law 96–354, the Regulatory Flexibility Act, and thus is exempt from the provisions of that Act.

List of Subjects in 7 CFR Part 2

Authority delegations (Government agencies).

Accordingly, part 2, title 7, Code of Federal Regulations is amended as follows:

PART 2—DELEGATIONS OF AUTHORITY BY THE SECRETARY OF AGRICULTURE AND GENERAL OFFICERS OF THE DEPARTMENT

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

Authority: 5 U.S.C. 301 and Reorganization Plan No. 2 of 1953.

Subpart C—Delegations of Authority to the Deputy Secretary, the Under Secretary for International Affairs and Commodity Programs, the Under Secretary for Small Community and Rural Development, and Assistant Secretaries

2. Section 2.23 is amended by revising the section heading and the first sentence of paragraph (a)(1) and making the remaining text a concluding paragraph, and revising paragraph (a)(11), removing and reserving paragraph (a) (4), (5), (6), (10), (14), (16), (18), (20), and (21), and revising paragraph (b) to read as follows:

§ 2.23 Under Secretary for Small Community and Rural Development.

* * * * *

(a) *Related to farmers home activities.* (1) Administer the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.) except:

(i) The authority contained in section 342 of said act (7 U.S.C. 1013a);

(ii) The authority to administer all programs under Section 306 (7 U.S.C. 1926);

(iii) The authority in section 303(a) (2) and (3) (7 U.S.C. 1923(a) (2) and (3)) relating to real estate loan for recreation and non-Farm purposes;

(iv) The authority in section 304(b) (7 U.S.C. 1924(b)) relating to small business enterprise loans;

(v) Sections 309 (7 U.S.C. 1929) and 309A (7 U.S.C. 1929a) regarding assets and programs related to rural development;

(vi) The authority in section 310A (7 U.S.C. 1931) relating to watershed and resource conservation and development loans;

(vii) The authority in section 310B (7 U.S.C. 1932) regarding rural industrialization assistance;

(viii) The authority contained in section 312(a) (5) and (6) (7 U.S.C. 1942(a) (5) and (6)) relating to operating loans for recreation and non-Farm purposes;

(ix) The authority contained in section 312(b) (7 U.S.C. 1942(b)) relating to small business enterprises;

(x) The authority contained in section 306A (7 U.S.C. 1926a) and section 306B (7 U.S.C. 1926b) to administer the emergency community water assistance grant programs;

(xi) The authority contained in section 306C (7 U.S.C. 1926c) to administer the water and waste facility loans and grants to alleviate health risks; and

(xii) The authority in section 364 (7 U.S.C. 2006f), section 365 (7 U.S.C. 2008), section 366 (7 U.S.C. 2008a), section 367 (7 U.S.C. 2008b), and section 368 (7 U.S.C. 2008c) regarding assets and programs related to rural development. * * *

* * * * *

(4)–(6) [Reserved]

* * * * *

(10) [Reserved]

(11) Administer financial assistance programs under part A of title III and part D of title I and the necessarily related functions in title VI of the Economic Opportunity Act of 1964, as amended (42 U.S.C. 2763–2768, 2841–2855, 2942, 2943(b), 2961) delegated by the Director of the Office of Economic Opportunity to the Secretary of Agriculture by documents dated October 23, 1964 (29 FR 14764), and June 17, 1968 (33 FR 9850), respectively, except those relating to Economic Opportunity Loans to Cooperatives.

* * * * *

(14) [Reserved]

* * * * *

(16) [Reserved]

* * * * *

(18) [Reserved]

* * * * *

(20)–(21) [Reserved]

* * * * *

(b) *Related to rural development.* (1) Provide leadership and coordination within the executive branch of a nationwide rural development program utilizing the services of executive branch departments and agencies and the agencies, bureaus, offices, and

services of the Department of Agriculture in coordination with rural development programs of State and local governments (7 U.S.C. 2204).

(2) Coordinate activities relative to rural development among agencies under the Under Secretary for Small Community and Rural Development and, through appropriate channels, serve as the coordinating agency for other departmental agencies having primary responsibilities for specific titles of the Rural Development Act of 1972, and allied legislation.

(3) Administer a national program of economic, social, and environmental research and analysis, statistical programs, and associated service work related to rural people and the communities in which they live including rural industrialization; rural population and manpower; local government finance; income development strategies; housing; social services and utilization; adjustments to changing economic and technical forces; and other related matters.

(4) Work with Federal agencies in encouraging the creation of rural community development organizations.

(5) Assist other Federal agencies in making rural community development organizations aware of the Federal programs available to them.

(6) Advise rural community development organizations of the availability of Federal assistance programs.

(7) Advise other Federal agencies of the need for particular Federal programs.

(8) Assist rural community development organizations in making contact with Federal agencies whose assistance may be of benefit to them.

(9) Assist other Federal agencies and national organizations in developing means for extending their services effectively to rural areas.

(10) Assist other Federal agencies in designating pilot projects in rural areas.

(11) Conduct studies to determine how programs of the Department can be brought to bear on the economic development problems of the country and assure that local groups are receiving adequate technical assistance from Federal agencies or from local and State governments in formulating development programs and in carrying out planned development activities.

(12) Assist other Federal agencies in formulating manpower development and training policies.

(13) Authority to enter into contracts for the support of rural development.

(14) Except with respect to loans for rural telephone facilities and service and financing for community antenna television facilities and services delegated in paragraphs (c)(2) and (3) of this section, administer the following sections of the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq):

(i) Sections 303(a)(2) and (3) (7 U.S.C. 1923(a)(2) and (3)) relating to real estate loans for recreation and non-Farm purposes;

(ii) Section 304(b) (7 U.S.C. 1924(b)) relating to small business enterprises;

(iii) Section 306 (7 U.S.C. 1926);

(iv) Section 306A (7 U.S.C. 1926a);

(v) Section 306B (7 U.S.C. 1926b);

(vi) Section 306C (7 U.S.C. 1926c);

(vii) Sections 309 (7 U.S.C. 1929) and 309A (7 U.S.C. 1929a) relating to assets and programs related to rural development;

(viii) Section 310A (7 U.S.C. 1931) relating to watershed and resource conservation and development;

(ix) Section 310B (7 U.S.C. 1932) relating to rural industrialization assistance;

(x) Sections 312(a)(5) and (6) (7 U.S.C. 1942(a)(5) and (6)) relating to operating loans for recreation and non-Farm purposes;

(xi) Section 312(b) (7 U.S.C. 1942(b)) relating to small business enterprises;

(xii) Section 342 (7 U.S.C. 1013a);

(xiii) Administrative Provisions of Subtitle D of the Consolidated Farm and Rural Development Act relating to rural development activities;

(xiv) Section 364 (7 U.S.C. 2006f);

(xv) Section 365 (7 U.S.C. 2008);

(xvi) Section 366 (7 U.S.C. 2008a);

(xvii) Section 367 (7 U.S.C. 2008b); and

(xviii) Section 368 (7 U.S.C. 2008c).

(15) Administer section 1323 of the Food Security Act of 1985 (7 U.S.C. 1932 note).

(16) Administer section 8, and those functions with respect to repayment of obligations under section 4, of the Watershed Protection and Flood Prevention Act (16 U.S.C. 1006a, 1004) and administer the resource conservation and development program to assist in carrying out resource conservation and development projects in rural areas under section 32(e) of the Bankhead-Jones Farm Tenant Act (7 U.S.C. 1011(e)).

(17) Administer loan programs in the Appalachian region under sections 203 and 204 of the Applachian Regional Development Act of 1965 (40 U.S.C., App. 204).

(18) Administer loans to Indian tribes and tribal corporations (25 U.S.C. 488–492).

(19) Administer section 601 of the Powerplant and Industrial Fuel Use Act of 1978 (Pub. L. 95–620).

(20) Administer the Drought and Disaster Guaranteed Loan program under section 331 of the Disaster Assistance Act of 1988 (7 U.S.C. 1929a note).

(21) Administer the Disaster Assistance for Rural Business Enterprises Guaranteed Loan Program under section 401 of the Disaster Assistance Act of 1989 (7 U.S.C. 1929a note).

(22) Administer the Farms for the Future Act of 1990, as amended (7 U.S.C. 4201 note).

(23) Administer the Water and Waste Loan Program under Section 2322 of the Food, Agriculture, Conservation, and Trade Act of 1990 (7 U.S.C. 1926–1).

(24) Administer the Rural Wastewater Treatment Circuit Rider Program (7 U.S.C. 1926 note).

(25) Administer the Rural Economic Development Demonstration Grant Program (7 U.S.C. 2662a).

(26) Administer the Economically Disadvantaged Rural Community Loan program (7 U.S.C. 6616).

(27) Administer financial assistance programs relating to Economic Opportunity Loans to Cooperatives under part A of title III and part D of title I and the necessarily related functions in Title VI of the Economic Opportunity Act of 1964, as amended (42 U.S.C. 2763–2768, 2841–2855, 2942, 2943(b), 2961) delegated by the Director of the Office of Economic Opportunity to the Secretary of Agriculture by documents dated October 23, 1964 (29 FR 14764), and June 17, 1968 (33 FR 9850), respectively.

(28) The authority to collect, service, and liquidate loans made insured or guaranteed by the Rural Development Administration, Farmers Home Administration or its predecessor agencies.

(29) Administer the Federal Claims Collection Act of 1966 and joint regulations issued pursuant thereto by the Attorney General and the Comptroller General with respect to the claims of the Rural Development Administration (31 U.S.C. 951, 953; 4 CFR chapter II).

(30) Administer responsibilities and function assigned under the Defense Production Act of 1950, as amended (50 U.S.C. app. 2061 et seq.) and the Federal Civil Defense Act of 1950, as amended (50 U.S.C. app. 2251 et seq.) relating to rural development credit and financial assistance.

(31) Provide Department-wide operational support and coordination for loan and grant programs to foster and encourage the production of fuels from

agricultural and forestry products and by-products.

* * * * *

Subpart I—Delegations of Authority by the Under Secretary for Small Community and Rural Development

3. Section 2.70 is amended by revising the section heading and the first sentence of paragraph (a)(1) and making the remaining text a concluding paragraph, and revising paragraph (a)(11) and by removing and reserving paragraph (a)(4)–(a)(6), (a)(10), (a)(28), (a)(29), (a)(31), (a)(33), (a)(36), (a)(37), and (b)(2) as follows:

§ 2.70 Administrator, Farmers Home Administration.

(a) *Delegations.* * * *

(1) Administer the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.) except:

(i) The authority contained in section 342 of said act (7 U.S.C. 1013a);

(ii) The authority to administer all programs under section 306 (7 U.S.C. 1926);

(iii) The authority in section 303(a)(2) and (3) (7 U.S.C. 1923(a)(2) and (3) relating to loans for recreation and non-Farm purposes;

(iv) The authority in section 304(b) (7 U.S.C. 1924(b)) relating to small business enterprises;

(v) Sections 309 (7 U.S.C. 1929) and 309A (7 U.S.C. 1929a) regarding assets and programs related to rural development;

(vi) The authority in section 310A (7 U.S.C. 1931) relating to watershed and resource conservation and development loans;

(vii) The authority contained in section 312(a)(5) and (6) (7 U.S.C. 1942(a)) relating to pollution abatement loans and grants and certain operating loans to farmers delegated in section 2.71;

(viii) The authority in section 310B (7 U.S.C. 1932) regarding rural industrialization assistance;

(ix) The authority contained in section 312(b) (7 U.S.C. 1942(b)) relating to small business enterprises;

(x) The authority contained in section 306A (7 U.S.C. 1926a) and section 306B (7 U.S.C. 1926b) to administer the emergency community water assistance grant program;

(xi) The authority contained in section 306C (7 U.S.C. 1926c) to administer the water and waste facility loans and grants to alleviate health risk; and

(xii) The authority in section 364 (7 U.S.C. 2006f) section 365 (7 U.S.C. 2008), section 366 (7 U.S.C. 2008a), section 367 (7 U.S.C. 2008b), and section 368 (7 U.S.C. 2008c) regarding assets and programs regarding to rural development.* * *

* * * * *

(4)–(6) [Reserved]

* * * * *

(10) [Reserved]

(11) Administer financial assistance programs under part A of title III and part D of title I and the necessarily related functions in title VI of the Economic Opportunity Act of 1964, as amended (42 U.S.C. 2763–2768, 2841–2855, 2942, 2943(b), 2961) delegated by the Director of the Office of Economic Opportunity to the Secretary of Agriculture by documents dated October 23, 1964 (29 FR 14764, and June 17, 1968 (33 FR 9850), respectively, except those relating to Economic Opportunity Loans to Cooperatives.

* * * * *

(28)–(29) [Reserved]

* * * * *

(31) [Reserved]

* * * * *

(33) [Reserved]

* * * * *

(36)–(37) [Reserved]

(b) * * *

(2) [Reserved]

4. A new section 2.71 is added to read as follows:

§ 2.71 Administrator, Rural Development Administration.

(a) *Delegations.* Pursuant to § 2.23(b), (e) and (i), and subject to policy guidance and direction by the Under Secretary for Small Community and Rural Development, the following delegations are made by the Under Secretary for Small Community and Rural Development to the Administrator, Rural Development Administration:

(1) Provide leadership and coordination within the executive branch of a nationwide rural development program utilizing the services of executive branch departments and agencies and the agencies, bureaus, offices, and services of the Department of Agriculture in coordination with rural development programs of State and local governments (7 U.S.C. 2204).

(2) Coordinate activities relative to rural development among agencies under the Under Secretary for Small Community and Rural Development and, through appropriate channels, serve as the coordinating agency for other departmental agencies having primary responsibilities for specific titles of the Rural Development Act of 1972, and allied legislation.

(3)–(13) [Reserved]

(14) Administer the following sections of the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.), except with respect to financing for community antenna television services or facilities; or loans for rural electrification or telephone systems or facilities other than hydroelectric generating and related distribution systems and supplemental and supporting structures if they are not eligible for Rural Electrification Administration financing:

(i) Sections 303(a)(2) and (3) (7 U.S.C. 1923(a)(2) and (3)) relating to loans for recreation and non-Farm purposes;

(ii) Section 304(b) (7 U.S.C. 1924(b)) relating to small business enterprises;

(iii) Section 306 (7 U.S.C. 1926);

(iv) Section 306A (7 U.S.C. 1926a);

(v) Section 306B (7 U.S.C. 1926b);

(vi) Section 306C (7 U.S.C. 1926c);

(vii) Sections 309 (7 U.S.C. 1929) and 309A (7 U.S.C. 1929a) regarding assets and programs related to rural development;

(viii) Section 310A (7 U.S.C. 1931) relating to watershed and resource conservation and development;

(ix) Section 310B (7 U.S.C. 1932) relating to rural industrialization assistance;

(x) Sections 312(a)(5) and (6) (7 U.S.C. 1942(a)(50 and (6)) relating to land and water development, use and conservation; recreational enterprises; small business enterprises; and pollution abatement;

(xi) Section 312(b) (7 U.S.C. 1942(b)) relating to small business enterprises;

(xii) Section 342 (7 U.S.C. 1013a);

(xiii) Administrative Provisions of Subtitle D of the Consolidated Farm and Rural Development Act relating to rural development activities;

(xiv) Section 364 (7 U.S.C. 2006f);

(xv) Section 365 (7 U.S.C. 2008);

(xvi) Section 366 (7 U.S.C. 2008a);

(xvii) Section 367 (7 U.S.C. 2008b); and

(xviii) Section 368 (7 U.S.C. 2008c);

(15) Administer section 1323 of the Food Security Act of 1985 (7 U.S.C. 1932 note).

(16) Administer section 8, and those functions with respect to repayment of obligations under section 4, of the Watershed Protection and Flood Prevention Act (16 U.S.C. 1006a, 1004) and administer the resource conservation and development program to assist in carrying out resource conservation and development projects in rural areas under section 32(e) of the Bankhead-Jones Farm Tenant Act (7 U.S.C. 1011(e)).

(17) Administer loan programs in the Appalachian region under sections 203 and 204 of the Appalachian Regional

Development Act of 1965 (40 U.S.C., App. 204).

(18) Administer loans to Indian tribes and tribal corporations (25 U.S.C. 488–492).

(19) Administer section 601 of the Powerplant and Industrial Fuel Use Act of 1978 (Pub. L. 95–620).

(20) Administer the Drought and Disaster Guaranteed Loan program under section 331 of the Disaster Assistance Act of 1988 (7 U.S.C. 1929a note).

(21) Administer the Disaster Assistance for Rural Business Enterprises Guaranteed Loan Program under section 401 of the Disaster Assistance Act of 1989 (7 U.S.C. 1929a note).

(22) Administer the Farms for the Future Act of 1990, as amended (7 U.S.C. 4201 note).

(23) Administer the Water and Waste Loan Program under section 2322 of the Food, Agriculture, Conservation, and Trade Act of 1990 (7 U.S.C. 1926–1).

(24) Administer the Rural Wastewater Treatment Circuit Rider Program (7 U.S.C. 1926 note).

(25) Administer the Rural Economic Development Demonstration Grant Program (7 U.S.C. 2662a).

(26) Administer the Economically Disadvantaged Rural Community Loan Program (7 U.S.C. 6616).

(27) Administer financial assistance programs relating to Economic Opportunity Loans to Cooperatives under part A of title III and part D of title I and the necessarily related functions in title VI of the Economic Opportunity Act of 1964, as amended (42 U.S.C. 2763–2768, 2841–2855, 2942, 2943(b), 2961) delegated by the Director of the Office of Economic Opportunity to the Secretary of Agriculture by documents dated October 23, 1964 (29 FR 14764), and June 17, 1968 (33 FR 9850), respectively.

(28) The authority to collect, service, and liquidate loans made, insured or guaranteed by the Rural Development Administration, Farmers Home Administration or its predecessor agencies.

(29) Administer the Federal Claims Collection Act of 1966 and joint regulations issued pursuant thereto by the Attorney General and the Comptroller General with respect to the claims of the Rural Development Administration (31 U.S.C. 951, 953; 4 CFR Chapter II).

(30) Administer responsibilities and functions assigned under the Defense Production Act of 1950, as amended (50 U.S.C. App. 2061 et seq.) and the Federal Civil Defense Act of 1950, as amended (50 U.S.C. app. 2251 et seq.) relating to rural development credit and financial assistance.

(31) Provide Department-wide operational support and coordination for loan and grant programs to foster and encourage the production of fuels from agricultural and forestry products and by-products.

(32) With respect to land and facilities under the Administrator's authority, exercise the functions delegated to the Secretary by Executive Order No. 12580 under the following provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("the Act"), as amended:

(i) Sections 104(a), (b), and (c)(4) of the Act (42 U.S.C. 9604(a), (b), and (c)(4)) with respect to removal and other remedial action in the event of release or threatened release of a hazardous substance, pollutant, or contaminant into the environment.

(ii) Sections 104(e) through (h), with respect to information gathering and access; compliance order; compliance with Federal health and safety standards; rates for wages and labor standards applicable to covered work; and emergency procurement powers.

(iii) Section 104(i)(11) of the Act (42 U.S.C. 9604(i)(11)), with respect to the reduction of exposure to significant risk to human health.

(iv) Section 104(j) of the Act (42 U.S.C. 9604(j)), with respect to the acquisition of real property and interests in real property required to conduct a remedial action.

(v) Section 105(d) of the Act (42 U.S.C. 9605(d), with respect to petition for preliminary assessment of a release or threatened release.

(vi) Section 105(f) of the Act (42 U.S.C. 9605(f)), with respect to consideration of the availability of qualified minority firms in awarding contracts, but excluding that portion of section 105(f) pertaining to the annual report to Congress.

(vii) Section 109 of the Act (42 U.S.C. 9609), with respect to the assessment of civil penalties for violations and the granting of awards to individuals providing information.

(viii) Section 111(f) of the Act (42 U.S.C. 9611(f), with respect to the designation of officials who may obligate money in the Hazardous Substances Superfund.

(ix) Section 113(k) of the Act (42 U.S.C. 9613(k)), with respect to establishing an administrative record upon which to base the selection of a response action.

(x) Section 116(a) (42 U.S.C. 9616(a)), with respect to preliminary assessment and site inspection of facilities.

(xi) Sections 117(a) and (c) of the Act (42 U.S.C. 9617 (a) and (c)), with respect to public participation in the preparation of any plan for remedial action and explanation of variances from the final remedial action plan for any remedial action or enforcement action, including any settlement or consent decree entered into.

(xii) Section 119 of the Act (42 U.S.C. 9119), with respect to idemnifying response action contractors.

(xiii) Section 121 of the Act (42 U.S.C. 9621), with respect to selecting cleanup standards.

(xiv) Section 122 of the Act (42 U.S.C. 9622), with respect to entering into settlement agreements.

(b) *Reservations.* The following authorities are reserved to the Under Secretary for Small Community and Rural Development:

(1) Making and issuing notes to the Secretary of the Treasury for the purposes of the Agricultural Credit Insurance Fund and the Rural Development Insurance Fund as authorized by the Consolidated Farm and Rural Development Act (7 U.S.C. 1929, 1229a).

(2) Administering loans for rural telephone facilities and service in rural areas as authorized by the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.).

For Subpart C.
Dated: January 8, 1992.

Edward Madigan,
Secretary of Agriculture.

For Subpart I.
Dated: January 8, 1992.

Roland R. Vautour,
Under Secretary for Small Community and Rural Development.

[FR Doc. 92–1137 Filed 1–17–92; 8:45 am]
BILLING CODE 3410–07–M

Agricultural Marketing Service

7 CFR Part 58

[DA 91–003]

RIN: 0581–AA42

Grading and Inspection, General Specifications for Approved Plants and Standards for Grades of Dairy Products: Revision of User Fees

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Agricultural Marketing Service is increasing the fees charged for services provided under the dairy

grading program. The program is a voluntary, user-fee funded program conducted under the authority of the Agricultural Marketing Act of 1946, as amended. This action increases the hourly rate to $39.60 per hour for continuous resident services and $44.60 per hour for nonresident services between the hours of 6 a.m. and 6 p.m. These fees represent a $3.60 per hour increase for both resident and nonresident services. The fee for nonresident services between the hours of 6 p.m. and 6 a.m. is $49.00 per hour, which represents an increase of $4.00 per hour. The fees need to be increased to rebuild the required operating reserve, to provide the necessary funding to restore the supervision and training activities that have been curtailed because of funding problems, and to cover approved salary increases for 1992.

EFFECTIVE DATE: January 26, 1992.

FOR FURTHER INFORMATION CONTACT: Lynn G. Boerger, USDA/AMS/Dairy Division, Dairy Grading Branch, room 2750–South Building, P.O. Box 96456.00, Washington, DC 20090–6456, (202) 720–9381.

SUPPLEMENTARY INFORMATION: This final rule has been reviewed under USDA procedures implementing Executive Order 12291 and Departmental Regulation 1512–1 and has been classified a "non-major" rule under the criteria contained therein.

The final rule also has been reviewed in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, and the Administrator, Agricultural Marketing Service, has determined that it will not have a significant economic impact on a substantial number of small entities. The changes will not significantly affect the cost per unit for grading and inspection services. The Agricultural Marketing Service estimates that overall this rule will yield an additional $400,000 during 1992. The Agency does not believe the increases will affect competition. Furthermore, the dairy grading program is a voluntary program.

The Agricultural Marketing Act of 1946, as amended, authorizes the Secretary of Agriculture to provide Federal dairy grading and inspection services that facilitate marketing and help consumers obtain the quality of dairy products they desire. The Act provides that reasonable fees be collected from the users of the services and as nearly as may be to cover the cost of maintaining the program.

Since the costs of the grading program are covered by user fees, it is essential that fees be increased to cover the cost of maintaining a financially self-supporting program. During the early 1980's the dairy grading program was severely taxed in meeting the needs of the dairy price support program. Government purchases increased from 1.1 billion pounds milk equivalent in the 1978–79 marketing year to 16.6 billion pounds in 1982–83. To accommodate this increased workload, the Dairy Grading Branch had to expand its staff significantly.

Purchases remained high through 1986, and then dropped to 5.6 billion pounds during the 1986–87 marketing year. By 1988, the dairy grading workload associated with the price support program had dropped to the point that it was necessary to cut the grading staff by about half. Staff reductions were made both in Washington and in the field, and three of the four field offices were closed. By the time the grading program was totally restructured, the trust fund reserve had been depleted and a debt of about $1 million incurred. To deal with the funding problem, grading fees have been increased substantially since 1988—131 percent for the resident programs and 116 percent for the nonresident programs. The most recent fee increases became effective January 13, 1991.

On March 12, 1991, the Agricultural Marketing Service published in the **Federal Register** (56 FR 10382) a document proposing a $5.60 increase in the hourly fees for both the resident and nonresident programs. At that time, the grading program was still experiencing significant financial problems and, as set forth in that document, a substantial fee increase was considered necessary.

Prior to final action on the proposed fee increase, however, Congress authorized a $1.25 million appropriation for the dairy grading program for fiscal year 1992. Although this appropriation will help significantly in recapitalizing the program, additional funding is still needed. The funds are necessary to help rebuild a four-month operating reserve of about $1.9 million, to provide the necessary capital (about $450,000 annually) to restore the supervision and training activities that have been curtailed, and to cover salary increases of 4.2 percent that have been authorized for 1992. Accordingly, the program fees are being increased as set forth below.

Program Changes Adopted in the Final Rule

This document makes the following changes in the regulations implementing the dairy inspection and grading program:

1. Increases the hourly fee for nonresident services from $41.00 to $44.60 for services performed between 6 a.m. and 6 p.m. and from $45.00 to $49.00 for services performed between 6 p.m. and 6 a.m.

The nonresident hourly rate is charged to users who request an inspector or grader for particular dates and amounts of time to perform specific grading and inspection activities. These users of nonresident services are charged for the amount of time required to perform the task and undertake related travel, plus travel costs.

2. Increases the hourly fee for continuous resident services from $36.00 to $39.60.

The resident hourly rate is charged to those who are using grading and inspection services performed by an inspector or grader assigned to a plant on a continuous, year-round, resident basis.

Response to Industry Comments

As indicated earlier, a rulemaking document proposing changes in the fee structure was published in the **Federal Register**. A 30-day comment period was provided so that interested persons could submit comments on the proposed changes. The Agency received comments from five dairy cooperatives and two national dairy trade associations. The comments and the Agency's responses are set forth below.

All of the commenters focused on the general economic impact the proposed increases would have on processors of dairy products and milk producers. It was contended that the magnitude of the increases would make it difficult for processors to pass these additional costs along through the marketing chain. Processors claimed that they would have to absorb the fee increases or reduce the prices paid to the dairy farmers supplying the milk.

While the Agency understands the concerns of the commenters, the program's severe financial difficulties already described require implementation of a fee increase. The fee increase, though, is considerably less ($3.60 per hour versus the proposed increase of $5.60 per hour) than what had been proposed in the earlier notice. Even so, every effort will be made to operate the program as efficiently as possible and to seek cost-cutting measures that are consistent with the Agency's mission under this program.

Five of the commenters requested that the current "make allowance" provided under the dairy price support program be increased. The price support program is operated by the Commodity Credit Corporation (CCC). CCC establishes estimates of industry costs for

manufacturing butter, cheese and nonfat dry milk. These estimates, or "make allowances," are then used in setting the purchase prices under the support program for surplus dairy products. Since the price support program is administered by another Agency and is not a part of the grading program, the commenters' suggestion is outside the scope of this rulemaking proceeding.

Two of the commenters recommended increasing the productivity and efficiency of USDA graders by increasing the maximum lot size of products eligible for grading. The Dairy Division has long utilized 5,000 pounds of product as the maximum amount which can be represented by a sample. Advances in technology and plant efficiency now provide a production environment in which larger quantities of essentially homogeneous products can be manufactured. AMS reviewed the feasibility of increasing the maximum lot size consistent with statistically sound sampling procedures and has provided an opportunity for the industry to increase lot size to a maximum of 20,000 pounds.

Three commenters recommended that the Agency develop procedures to recognize the use of Hazard Analysis Critical Control Programs (HACCP) by processors that could serve as the basis for the acceptance of products and thereby lessen their costs under the grading program. Current requirements provide for a manufacturer who wishes to offer product for grading to subject the manufacturing facilities and equipment to inspection. Once the facilities and equipment are "approved" products made at the plant are eligible for grading and inspection services. The products offered for grading then undergo a random sample selection process, with strict sample integrity procedures. An official certificate which reflects the final grade of the product offered is then issued.

HACCP concepts, on the other hand, define an industry-operated total quality control program which places emphasis on continuous monitoring by the processor of all phases of production, especially critical areas, to assure that the end product is "within specifications." AMS is presently cooperating with the industry to investigate the HACCP concept and to evaluate its compatibility with the Agency's mission. However, this is a long-term activity and will not result in immediate alterations of dairy inspection and grading procedures.

One commenter stated that the general working relationship between the industry and the government has been strained. The commenter stated further that industry dissatisfaction stems from low USDA productivity and delayed reporting of laboratory results and issuance of grading certificates. The Dairy Grading Section and the Science Division laboratory have experienced a surge of inspection and grading service requests beginning in November 1990 and continuing to the present. The surge in requests was due to changing market conditions in the dairy industry as well as a dramatic increase for laboratory services to test Meals-Ready-to-Eat (MRE's) to supply Desert Shield and Desert Storm. The number of requests for service strained the ability of the available staff to respond in a timely manner. The Agency has taken actions to reduce or eliminate any unnecessary delays.

Pursuant to 5 U.S.C. 553, it is hereby found that good cause exists for not delaying the effective date of this action until 30 days after publication of this final rule in the **Federal Register**. A revenue shortfall warrants putting the higher rates into effect as quickly as possible. The increase in fees is essential for effective management and operation of the program and to satisfy the intent of the Agricultural Marketing Act of 1946. A proposed rule setting forth proposed fee increases was published in the **Federal Register** on March 12, 1991. Therefore, the provisions of this final rule are known to interested parties, except that the fee increases adopted are considerably less than had been proposed.

List of Subjects in 7 CFR Part 58

Food grades and standards, Dairy products, Food labeling, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 58, subpart A, is amended as follows:

PART 58—[AMENDED]

Subpart A—Regulations Governing the Inspection and Grading Services of Manufactured or Processed Dairy Products

1. The authority citation for part 58 continues to read as follows:

Authority: Secs. 202–208, 60 Stat. 1087, as amended; 7 U.S.C. 1621–1627, unless otherwise noted.

2. Section 58.43 is revised to read as follows:

§ 58.43 Fees for inspection, grading, and sampling.

Except as otherwise provided in § 58.43 and §§ 58.38 through 58.46, charges shall be made for inspection, grading, and sampling service at the hourly rate of $44.60 for service performed between 6 a.m. and 6 p.m., and $49.00 for service performed between 6 p.m. and 6 a.m., for the time required to perform the service calculated to the nearest 15-minute period, including the time required for preparation of certificates and reports and the travel time of the inspector and grader in connection with the performance of the service. A minimum charge of one-half hour shall be made for service pursuant to each request or certificate issued.

3. Section 58.45 is revised to read as follows:

§ 58.45 Fees for continuous resident service.

Irrespective of the fees and charges provided in §§ 58.39 and 58.43, charges for the inspector(s) and grader(s) assigned to a continuous resident program shall be made at the rate of $39.60 per hour for services performed during the assigned tour of duty. Charges for service performed in excess of the assigned tour of duty shall be made at a rate of 1½ times the rate stated in this section.

Signed at Washington, DC, on: January 15, 1992.

Daniel Haley,

Administrator.

[FR Doc. 92–1435 Filed 1–17–92; 8:45 am]

BILLING CODE 3410–02–M

DEPARTMENT OF COMMERCE

Economic Development Administration

13 CFR Part 301

[Docket No. 911203–1303]

Disclosure of Information to the Public

AGENCY: Economic Development Administration, Commerce.

ACTION: Final rule.

SUMMARY: The Economic Development Administration (EDA) is amending its rule at 13 CFR part 301 subpart D to repeal its existing guidelines for the disclosure of information to the Public, and to refer any subsequent inquiries to 15 CFR part 4. The purpose of this rulemaking notice is to implement updated policies and procedures for handling public requests for materials pursuant to the requirements of the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended.

EFFECTIVE DATE: January 21, 1992.

FOR FURTHER INFORMATION CONTACT: Joseph M. Levine, Chief Counsel,

Economic Development Administration, U.S. Department of Commerce, Herbert C. Hoover Building, 14th Street between Pennsylvania and Constitution Avenues NW., room 7001, Washington, DC 20230, (202) 377–4687.

SUPPLEMENTARY INFORMATION: 13 CFR part 301, subpart D contains outdated information. The information found in 15 CFR part 4, which is the Department of Commerce's (DOC) rules on FOIA procedures, provides a more updated explanation of the scope, purpose, policies, and guidelines for making publicly available certain records as specified in 5 U.S.C. 552(a)(2) and 5 U.S.C. 552(a)(3). 15 CFR part 4 is followed by EDA, since EDA is a part of the Department and follows Departmental procedures.

EDA finds good cause to dispense with the notice and comment and delayed effective date requirements of the Administrative Procedures Act (APA) for this rule. These APA requirements are unnecessary because EDA is deleting superseded regulations and substituting a cross reference for currently operating regulations.

Since a notice and an opportunity for comment are not required to be given for the rule under section 553 of the APA (5 U.S.C. 553) or any other law, under sections 603(a) and 604(a) of the Regulatory Flexibility Act (5 U.S.C. 603(a), 604(a)), no initial or final Regulatory Flexibility analysis has to be or will be prepared.

List of Subjects in 13 CFR Part 301

Freedom of information, Organization and functions (Government Agencies).

PART 301—ESTABLISHMENT AND ORGANIZATION

Subpart D—Disclosure of Information to the Public

1. The Authority citation is revised to read as follows:

Authority: Section 701, Pub. L. 89–136; 79 Stat. 570 (42 U.S.C. 3211); 5 U.S.C. 301, 552, 553, Department of Commerce Organization Order 10–4, as amended. (40 FR 56702, as amended).

2. Subpart D is amended by removing §§ 301.51 through 301.60, and by revising § 301.50 to read as follows:

§ 301.50 Public information.

The rules and procedures regarding public access to the records of the Economic Development Administration are found at 15 CFR part 4.

Dated: January 9, 1992.

L. Joyce Hampers,

Assistant Secretary for Economic Development.

[FR Doc. 92–1313 Filed 1–17–92; 8:45 am]

BILLING CODE 3510–24–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 21 and 23

[Docket No. 102CE, Special Condition 23–ACE–69]

Special Conditions; Twin Commander Model 690, 690A, and 690B Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are being issued to Alternative Aviation Services, Inc. for a Supplemental Type Certification (STC) on the Twin Commander Model 690 Series airplane. This airplane will have novel and unusual design features when compared to the state of technology envisaged in the applicable airworthiness standards. These novel and unusual design features include the installation of electronic displays for which the applicable regulations do not contain adequate or appropriate airworthiness standards for the protection of these systems from the effects of high intensity radiated fields (HIRF). These special conditions contain the additional safety standards which the Administrator considers necessary to establish a level of safety equivalent to the airworthiness standards applicable to these airplanes.

DATES: The effective date of these special conditions is February 18, 1992. Comments must be received on or before February 18, 1992.

ADDRESSES: Comments may be mailed in duplicate to: Federal Aviation Administration, Office of the Assistant Chief Counsel, ACE-7, Attention: Rules Docket Clerk, Docket No. 102CE, room 1558, 601 East 12th Street, Kansas City, Missouri 64106. All comments must be marked: Docket No. 102CE. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: J. Lowell Foster, Aerospace Engineer, Standards Office (ACE-110), Aircraft Certification Service, Central Region, Federal Aviation Administration, room 1544, 601 East 12th Street, Federal Office Building, Kansas City, Missouri 64106; telephone (816) 426–5688.

SUPPLEMENTARY INFORMATION

Comments Invited

The FAA has determined that good cause exists for making these special conditions effective 30 days after issuance; however, interested persons are invited to submit such written data, views, or arguments as they may desire. Communications should identify the regulatory docket and special conditions number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the Administrator. These special conditions may be changed in light of the comments received. All comments submitted will be available in the rules docket for examination by interested parties, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Persons wishing the FAA to acknowledge receipt of their comments submitted in response to this request must include a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 102CE." The postcard will be date stamped and returned to the commenter.

Background

On November 19, 1991, Alternative Aviation Services, Inc., 6544 Highland Road, Waterford, Michigan 40327, made an application to the FAA for a supplemental type certificate (STC) for the Twin Commander Model 690 airplane. The proposed modification incorporates a novel or unusual design feature such as digital avionics consisting of an electronic flight instrument system (EFIS) that is vulnerable to HIRF external to the airplane.

Type Certification Basis

The type certification basis for the Twin Commander Model 690, 690A, and 690B Series airplane is as follows: CAR 3, dated May 15, 1956, including paragraphs 3.197, 3.270, 3.395, and 3.396 of Amendment 3-2 dated August 12, 1957, and Amendment 3-3 dated May 17, 1958, 3-4 dated October 6, 1958, 3-6 dated September 13, 1961, paragraph 23.473, 23.479, 23.481, and 23.483 of FAR 23, Amendment 23-7, dated September 14, 1969, plus special conditions dated April 1, 1965, and August 12, 1970; Docket No. 10506, exemptions, if any,

and the special conditions adopted herein.

Discussion

Alternative Aviation Services, Inc., plans to incorporate certain novel and unusual design features into an airplane for which the airworthiness standards do not contain adequate or appropriate safety standards for protection from the effects of HIRF. These features include electronic systems, which are susceptible to the HIRF environment and that were not evisaged by the existing regulations, for this type of airplane.

Special conditions may be issued and amended, as necessary, as part of the type certification basis if the Administrator finds that the airworthiness standards designated in accordance with § 21.17(a)(1) do not contain adequate or appropriate safety standards because of novel or unusual design features of an airplane. Special conditions, as appropriate, are issued in accordance with § 11.49 after public notice, as required by §§ 11.28 and 11.29(b), effective October 14, 1980, and become a part of the type certification basis, as provided by § 2.17(a)(2).

Protection of System from High Intensity Radiated Fields (HIRF):

Recent advances in technology have given rise to the application in aircraft designs of advanced electrical and electronic systems that perform functions required for continued safe flight and landing. Due to the use of sensitive solid state components in analog and digital electronics circuits, these advanced systems are readily responsive to the transient effects of induced electrical current and voltage caused by the HIRF incident on the external surface of aircraft. These induced transient currents and voltages can degrade electronic systems performance by damaging components or upsetting system functions.

Furthermore, the electromagnetic environment has undergone a transformation that was not envisaged when the current requirements were developed. Higher energy levels are radiated from transmitters that are used for radar, radio, and television. Also, the population of transmitters has increased significantly.

The combined effect of the technological advances in airplane design and the changing environment has resulted in an increased level of vulnerability of electrical and electronic systems required for the continued safe flight and landing of the airplane. Effective measures against the effects of exposure to HIRF must be provided by the design and installation of these systems. The accepted maximum energy levels in which civilian airplane system installations must be capable of operating safely are based on surveys and analysis of existing radio frequency emitters. These special conditions require that the airplane be evaluated under these energy levels for the protection of the electronic system and its associated wiring harness. These external threat levels are believed to represent the worst case to which an airplane would be exposed in the operating environment.

These special conditions require qualification of systems that perform critical functions, as installed in aircraft, to the defined HIRF environment in paragraph 1 or, as an option to a fixed value using laboratory tests, in paragraph 2, as follows:

(1) The applicant may demonstrate that the operation and operational capability of the installed electrical and electronic systems that perform critical functions are not adversely affected when the aircraft is exposed to the HIRF environment, defined below:

TABLE I.—FIELD STRENGTH VOLTS/METER [1]

Frequency	Peak	Average
10 to 500 KHz	60	60
500 to 2,000	80	80
2 to 30 MHz	200	200
30 to 100	33	33
100 to 200	150	33
200 to 400	56	33
400 to 1,000	4,020	935
1 to 2 GHz	7,850	1,750
2 to 4	6,000	1,150
4 to 6	6,800	310
6 to 8	3,600	666
8 to 12	5,100	1,270
12 to 18	3,500	551
18 to 40	2,400	750

[1] NOTE: Since 1989, a concerted effort has been under way to review, verify, and validate the HIRF environment. This table represents the current estimate of the HIRF environment. The current values overall are lower than the previous values for the HIRF environment. Additional requirements will continue to be required for the certification of installed critical systems in aircraft approved for operation below 500 feet.

or:

(2) The applicant may demonstrate by a laboratory test that the electrical and electronic systems that perform critical functions can withstand a peak of electromagnetic field strength of 100 volts per meter (v/m) or the external HIRF environment, whichever is less, in a frequency range of 10KHz to 18GHz. When using a laboratory test to show compliance with the HIRF requirements, no credit is given for signal attenuation due to installation.

A preliminary hazard analysis must be performed by the applicant for approval by the FAA to identify electrical and/or electronic systems that perform critical functions. The term "critical" means those functions whose failure would contribute to, or cause, a failure condition that would prevent the continued safe flight and landing of the airplane. The systems identified by the hazard analysis that perform critical functions are candidates for the application of HIRF requirements. A system may perform both critical and non-critical functions. Primary electronic flight display systems, and their associated components, perform critical functions such as attitude, altitude, and airspeed indication. The HIRF requirements apply only to critical functions.

Compliance with HIRF requirements may be demonstrated by tests, analysis, models, similarity with existing systems, or a combination thereof. Service experience alone is not acceptable since such experience in normal flight operations may not include an exposure to the HIRF environment. Reliance on a system with similar design features for redundancy as a means of protection against the effects of external HIRF is generally insufficient since all elements of a redundant system are likely to be exposed to the fields concurrently.

Conclusion

In view of the design features discussed for the Twin Commander Model 690, 690A, and 690B Series airplane, the following special conditions are issued. This action is not a rule of general applicability and affects only those applicants who apply to the FAA for approval of these features on these airplanes.

The substance of these special conditions has been subject to the notice and public comment procedure in several prior instances. For example, the Piper PA–42 (51 FR 37711, October 24, 1986), the Dornier 228–200 (53 FR 14782, April 26, 1988), and the Cessna Model 525 (56 FR 49396, September 30, 1991). For this reason, and because a delay would significantly affect the applicant's installation of the system and certification of the airplane, which is imminent, the FAA has determined that good cause exists for adopting these special conditions without notice; therefore, special conditions are being issued without substantive changes for this airplane and made effective 30 days after issuance.

List of Subjects in 14 CFR Parts 21 and 23

Aircraft, Air transportation, Aviation safety, and Safety.

The authority citation for these special conditions is as follows:

Authority: Secs. 313(a), 601, and 603 of the Federal Aviation Act of 1958; as amended (49 U.S.C. 1354(a), 1421, and 1423); 49 U.S.C. 106(g); 14 CFR 21.16 and 21.101; and 14 CFR 11.28 and 11.49.

Adoption of Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the modified Twin Commander Model 690, 690A, and 690B Series airplane:

1. *Protection of Electrical and Electronic Systems from High Intensity Radiated Fields (HIRF).* Each system that performs critical functions must be designed and installed to ensure that the operation and operational capabilities of these systems to perform critical functions are not adversely affected when the airplane is exposed to high intensity radiated electromagnetic fields external to the airplane.

2. For the purpose of these special conditions, the following definitions apply: *Critical Functions.* Functions whose failure would contribute to or cause a failure condition that would prevent the continued safe flight and landing of the airplane.

Issued in Kansas City, Missouri on January 3, 1992.

Barry D. Clements,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 92-1363 Filed 1-17-92; 8:45 am]

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Inspector General

24 CFR Parts 2000, 2002, and 2004

[Docket No. R-92-1573; FR-3096-F-01]

Organizations, Functions, and Delegations of Authority; Availability of Information to the Public; Production in Response to Subpoenas or Demands of Courts or Other Authorities

AGENCY: Office of the Inspector General, HUD.

ACTION: Final rule.

SUMMARY: This rule updates the organization, functions and delegations of authority of the Office of Inspector General. The revisions are necessary to reflect the recent statutory amendments to the Inspector General Act of 1978 and other statutory changes involving the Office of Inspector General.

EFFECTIVE DATE: February 20, 1992.

FOR FURTHER INFORMATION CONTACT: Ronnie Ann Wainwright, Trial Attorney, Inspector General and Administrative Proceedings Division, Department of Housing and Urban Development, room 10266, 451 Seventh Street, SW., Washington, DC 20410, telephone (202) 708-3200. This is not a toll free number.

SUPPLEMENTARY INFORMATION: This rule amends the regulations of the Office of Inspector General (OIG) by correcting and updating the current regulations. It also reflects changes made by the Inspector General Act Amendments of 1988. The rule provides clarification of part 2002 by providing the exemptions permitted under the Freedom of Information Act.

Because this rule relates to internal agency organization and management, the Department is exempt from publishing a notice of proposed rulemaking as is normally required by the Administrative Procedure Act (5 U.S.C. 553(a)(2)) and HUD regulations at 24 CFR part 10.

Other Matters

Environmental Review. HUD regulations published at 24 CFR part 50, implementing section 102(2)(C) of the National Environmental Policy Act of 1969, contain categorical exclusions for certain actions, activities and programs specified in § 50.20. Since the amendments made by this final rule would fall within the categorical exclusions for internal administrative procedures set forth in paragraph (k) of § 50.20, the preparation of an Environmental Impact Statement or a Finding of No Significant Impact is not required for this rule.

Impact on Economy. This rule does not constitute a "major rule" as that term is defined in section 1(b) of the Executive Order on Federal Regulation issued by the President on February 17, 1981. Analysis of the rule indicates that it does not (1) have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government, 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.

Impact on Small Entities. 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. This rule only would affect the operations and functions of the HUD Office of Inspector General.

Executive Order 12612, Federalism. The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that the policies contained in this rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule only would affect the operations and functions of the HUD Office of Inspector General. As a result, the rule is not subject to review under this Order.

Executive Order 12606, The Family. The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that this rule does not have potential for significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under this Order.

Regulatory Agenda

This rule was listed as item 1488 in the Department's Semiannual Agenda of Regulations published on October 21, 1991 (56 FR 53380, 53425).

List of Subjects

24 CFR Part 2000

Organization and functions (Government agencies).

24 CFR Part 2002

Freedom of information.

24 CFR Part 2004

Administrative practice and procedures, Courts.

Accordingly, 24 CFR parts 2000, 2002, and 2004 are amended as follows:

PART 2000—ORGANIZATION, FUNCTIONS AND DELEGATIONS OF AUTHORITY

1. The authority citation for part 2000 continues to read as follows:

Authority: Inspector General Act of 1978, as amended (5 U.S.C. app.); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

2. In § 2000.1, paragraphs (a) and (b) are revised to read as follows:

§ 2000.1 General statement.

(a) The Inspector General Act of 1978 (the Act) (Pub. L. 95–452, 5 U.S.C. app.) established an Office of Inspector General (OIG) in various executive branch departments and agencies, including the Department of Housing and Urban Development (HUD). The Act provided an explicit statutory basis for the Office of Inspector General, which was created by the Secretary of HUD (Secretary) in 1972. The Act was substantially amended in 1988 by the Inspector General Act Amendments of 1988 (Pub. L. 100–504).

(b) The function of the OIG is to conduct and supervise audits and investigations relating to HUD programs and activities. The audits and investigations are designed to determine the efficiency and effectiveness of HUD's programs and to prevent and detect fraud and abuse. The OIG is also charged with the responsibility of keeping the Secretary and the Congress fully and currently informed about problems and deficiencies relating to the operation of HUD programs and the necessity for and progress of corrective action.

* * * * *

3. In § 2000.2, paragraph (a)(3) is revised to read as follows:

§ 2000.2 Duties.

(a) * * *

(3) To recommend policies for and conduct activities designed to promote economy and efficiency in HUD programs and to prevent and detect fraud and abuse in such programs;

* * * * *

4. In § 2000.3, paragraph (a) is amended by redesignating paragraphs (a)(4) through (8) as (a)(6) through (10); by adding new paragraphs (a)(4) and (5); by revising newly designated (a)(8); and by adding new paragraphs (b)(8) and (b)(9), to read as follows:

§ 2000.3 Authorities.

(a) * * *

(4) Request such information or assistance as may be necessary for carrying out the duties and responsibilities provided by the Inspector General Act from any federal, state, or local governmental agency or unit thereof;

(5) Administer or take from any person an oath, affirmation, or affidavit, whenever necessary in the performance of the functions of the OIG, that shall have the same force and effect as if administered by an officer having a seal;

* * * * *

(8) Select, appoint, and employ necessary officers and employees in OIG, including those in the senior executive service, such as a Deputy Inspector General, an Assistant Inspector General for Audit (AIGA), an Assistant Inspector General for Investigation (AIGI), and an Assistant Inspector General for Management and Policy (AIG–OMAP), in accordance with laws and regulations governing the civil service;

* * * * *

(b) * * *

(8) To initiate administrative actions and to impose sanctions, such as debarments, suspensions, determinations of ineligibility and voluntary exclusions, of contractors and participants, in accordance with 24 CFR part 24.

(9) To provide recertifications for the senior executive service employees in OIG, pursuant to section 506 of the Ethics Reform Act of 1989 (Pub. L. 101–194).

* * * * *

5. Section 2000.4 is revised to read as follows:

§ 2000.4 Semiannual reports.

(a) In addition to the duties enumerated in § 2000.2, the IG shall prepare a semiannual report no later than April 30 and October 31 of each year. Each report shall summarize the activities of the OIG for the preceding six-month period ending March 31 and September 30 and shall include, but is not limited to:

(1) A description of significant problems, abuses and deficiencies relating to the administration of HUD programs and operations during the reporting period and a description of the recommendations made to correct such problems;

(2) An identification of each significant recommendation described in previous semiannual reports on which corrective action has not yet been completed;

(3) A summary of matters referred to prosecutive authorities and the prosecutions and convictions which have resulted;

(4) A summary of each report, regarding information unreasonably refused or not provided, made during the reporting period to the Secretary under section 6(b)(2) of the Act;

(5) A list of each audit report issued by the OIG during the reporting period and, where applicable, the total dollar value of questioned costs and the dollar value of recommendations that funds be put to better use, with summaries of each significant audit report;

(6) Statistical tables showing the total number of audit reports and, for various defined categories of audit reports, the total dollar value of questioned costs and the dollar value of recommendations that funds be put to better use by management;

(7) A summary of each audit report issued before the commencement of the reporting period for which no management decision has been made by the end of the reporting period, with an explanation of the reasons the decision has not been made and a statement concerning the desired timetable for achieving a decision;

(8) A description and explanation of the reasons for any significant revised management decision made during the reporting period; and

(9) Information concerning any significant management decision with which the IG is in disagreement.

(b) The semiannual report shall be transmitted to the Secretary no later than April 30 and October 31 of each year and shall be submitted by the Secretary to the appropriate Congressional committees or subcommittees within thirty calendar days after receipt of the report, together with a report by the Secretary that contains the following:

(1) Any comments that the Secretary considers appropriate;

(2) Statistical tables showing the total number of audit reports and, for various defined categories of audit reports, the dollar value of disallowed costs and of recommendations agreed to in a management decision that funds be put to better use by management; and

(3) A statement containing information with regard to certain audit reports on which management decisions have been made but final action has not been taken.

(c) Within 60 days of the transmission of a semiannual report to Congress, the Secretary will make the report available to the public upon request and at a reasonable cost, unless particular information included in the report is protected from disclosure by law or by an executive order, or is part of an ongoing criminal investigation;

(d) Notwithstanding the responsibility of the IG to prepare semiannual reports, the IG will report immediately to the Secretary when the IG becomes aware of serious or flagrant problems, abuses, or deficiencies relating to the programs and operations of HUD. The Secretary will transmit any such report to the appropriate congressional committees or subcommittees within seven calendar days, together with a report by the

Secretary containing any comments that the Secretary considers appropriate.

6. Section 2000.5 is revised to read as follows:

§ 2000.5 Headquarters organization.

(a) The IG has a Headquarters office in Washington, DC and Regional offices throughout the Nation. The Headquarters office consists of the immediate office of the Inspector General and three operational units, the Office of Audit, the Office of Investigation, and the Office of Management and Policy. The immediate office of the Inspector General consists of the Inspector General, a Deputy Inspector General, and support staff. The function of the Deputy IG is to assist the Inspector General in the performance of the duties and responsibilities of the IG and to assume those duties and responsibilities when the IG is absent.

(b) *Operational units.* (1) The Office of Audit is headed by the Assistant Inspector General for Audit (AIGA). The AIGA is responsible to the IG primarily for supervising and coordinating the performance of all OIG auditing activities relating to the Department's programs and operations and recommending corrective action concerning abuses and deficiencies. Two divisions assist in carrying out these functions: the Audit Operations Division and the Audit Planning and Oversight Division.

(2) The Office of Investigation is headed by the Assistant Inspector General for Investigation (AIGI). The AIGI is responsible to the IG for supervising the performance of all OIG investigations and investigative activities relating to the Department's programs and operations. Two divisions assist in carrying out these functions: the Headquarters Operations Division and the Field Operations Division.

(3) The Office of Management and Policy is headed by the Assistant Inspector General for Management and Policy (AIG–OMAP). The AIG–OMAP is responsible to the IG for carrying out OIG's programs concerning the prevention and detection of fraud, waste, and mismanagement; for implementing certain administrative activities in support of internal OIG operations and the Act; for writing the IG's semiannual report to Congress; and for conducting evaluations of trends and patterns in program deficiencies and controls. Four divisions assist in carrying out these functions: The Program Integrity Division, the Publications and Awareness Division, the ADP Technology and Assistance Division, and the Budget and Administrative Services Division.

7. In § 2000.6, paragraph (b) is amended by removing, "Area Field Managers, and Service Office Supervisors." and adding, "and Field Office Managers."; and paragraph (d) is revised to read as follows:

§ 2000.6 Regional organization.

* * * * *

(b) * * * and Field Office Managers.

* * * * * *

(d) *Regional offices and territories served:*

Region	Territory
Boston Regional Office, Region I, Department of Housing and Urban Development, Thomas P. O'Neill Jr. Federal Building, 10 Causeway Street, Boston, MA 02222–1092.	Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont.
New York Regional Office, Region II, Department of Housing and Urban Development, 26 Federal Plaza, New York, NY 10278–0068.	New Jersey, New York.
Philadelphia Regional Office, Region III, Department of Housing and Urban Development, Liberty Square Bldg., 4th Fl., 105 So. 7th St., Philadelphia, PA 19106–3392.	Delaware, Maryland, Pennsylvania, Virginia, Washington, DC, West Virginia.
Atlanta Regional Office, Region IV, Department of Housing and Urban Development, 75 Spring St., S.W., Atlanta, GA 30303–3388.	Alabama, Florida, Kentucky, Mississippi, North Carolina, Puerto Rico and the Virgin Islands, South Carolina, Tennessee.
Chicago Regional Office, Region V, Department of Housing and Urban Development, 77 West Jackson Blvd., Rm. 2603, Chicago, IL 60604–3507.	Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin.
Fort Worth Regional Office, Region VI, Department of Housing and Urban Development, 1600 Throckmorton, P.O. Box 2905, Fort Worth, TX 76113–2905.	Arkansas, Louisiana, New Mexico, Oklahoma, Texas.
Kansas City Regional Office, Region VII, Department of Housing and Urban Development, Gateway Tower II, 5th Fl., 400 State Ave., Kansas City, KN 66101–2406.	Iowa, Kansas, Missouri, Nebraska.
Denver Regional Office, Region VIII, Department of Housing and Urban Development, Executive Tower Building, 30th Floor, 1405 Curtis Street, Denver, CO 80202–2349.	Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming.
San Francisco Regional Office, Region IX, Department of Housing and Urban Development, 1375 Sutter St., Suite 320, San Francisco, CA 94109.	Arizona, California, Hawaii, Nevada.
Seattle Regional Office, Region X, Department of Housing and Urban Development, Arcade Plaza Building, Rm. 7320, 1321 Second Avenue, Seattle, WA 98101–2058.	Alaska, Idaho, Oregon, Washington.

8. Section 2000.9 is revised to read as follows:

§ 2000.9 Succession of authority.

In the absence or temporary incapacity of the Inspector General, the following individuals, successively, according to availability, shall act in the capacity of the Inspector General: Deputy Inspector General, Assistant Inspector General for Audit, Assistant Inspector General for Investigation, and Assistant Inspector General for Management and Policy.

PART 2002—AVAILABILITY OF INFORMATION TO THE PUBLIC

9. The authority citation for part 2002 is revised to read as follows:

Authority: Freedom of Information Act, as amended (5 U.S.C. 552); Inspector General Act of 1978, as amended (5 U.S.C. app.); sec. 7(d) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

§ 2002.1 [Amended]

10. In § 2002.1, paragraph (a) is amended by removing the entry "§ 15.21" in the list of sections, and paragraph (c) is amended by removing "and § 15.21" and adding "and" between "§ 15.3" and "§ 15.11".

11. In § 2002.3, paragraph (a) is amended by revising the first sentence to read as follows:

§ 2002.3 Request for records.

(a) A request for Office of Inspector General records may be made in person during normal business hours at the Regional Offices listed in § 2000.6(d) of this chapter. * * *

* * * * * *

§ 2002.17 [Amended]

12. In § 2002.17(e), the reference to "the Inspector General of HUD" is changed to read "any of the Assistant Inspectors General listed in § 2000.5 of this chapter."

13. Section 2002.21 is revised to read as follows:

§ 2002.21 Authority to deny requests for records and form of denial.

(a) The Assistant Inspectors General described in § 2000.5 of this chapter may deny a request for a record. Any denial will:

(1) Be in writing;

(2) State simply the reasons for the denial;

(3) State that review of the denial by the Inspector General of HUD may be requested;

(4) Set forth the steps for obtaining review consistent with § 2002.25; and

(5) Be signed by the Assistant Inspector General responsible for the denial.

(b) The classes of records authorized to be exempted from disclosure by the Freedom of Information Act (5 U.S.C. 552) are those which concern matters that are:

(1)(i) Specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy; and

(ii) Are in fact properly classified under the cited executive order;

(2) Related solely to the internal personnel rules and practices of HUD;

(3) Specifically exempted from disclosure by statute (other than section 552b of title 5), provided that the statute either:

(i) Requires that the matters be withheld from the public in a manner that leaves no discretion on the issue; or

(ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) Trade secrets and commercial or financial information that are obtained from a person and are privileged or confidential;

(5) Inter-agency or intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with HUD;

(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority, or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if the disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual;

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

(c) With regard to a request for commercial or financial information, predisclosure notification to business submitters is required by Executive Order 12600 (3 CFR, 1987 Comp., p. 235) to afford the business submitter an opportunity to object to disclosure of the requested information.

(d) Any reasonably segregable portion of a record shall be provided to any person requesting the record, after deletion of the portions that are exempt under this section.

PART 2004—PRODUCTION IN RESPONSE TO SUBPOENAS OR DEMANDS OF COURTS OR OTHER AUTHORITIES

14. The authority citation for part 2004 is revised to read as follows:

Authority: Inspector General Act of 1978, as amended (5 U.S.C. app.); sec. 7(d) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

15. Section 2004.1 is revised to read as follows:

§ 2004.1 Purpose and scope.

This part contains provisions for service of a subpoena issued by the Inspector General and procedures with regard to demands of courts or other authorities for Office of Inspector General (OIG) documents or testimony by employees of the OIG. For purposes of this part, the term "employees of the Office of Inspector General" includes all officers and employees of the United States appointed by, or subject to the supervision of, the Inspector General.

16. A new § 2004.2 is added, to read as follows:

§ 2004.2 Service of an Inspector General subpoena.

Service of a subpoena issued by the Inspector General may be accomplished as follows:

(a) *Personal service.* Service may be made by delivering the subpoena to the person to whom it is addressed. If the subpoena is addressed to a corporation or other business entity, it may be served upon an employee of the corporation or entity. Service made to an employee, agent or legal representative of the addressee shall constitute service upon the addressee.

(b) *Service by mail.* Service may also be made by mailing the subpoena, certified mail—return receipt requested, to the addressee at his or her last known business or personal address.

17. Section 2004.3 is revised to read as follows:

§ 2004.3 Production or disclosure prohibited unless approved by the Inspector General.

(a) The rules and procedures in paragraphs (b) and (c) of this section shall be followed when a subpoena, order or other demand (hereinafter referred to as a "demand") of a court or other authority is issued for the production of documents or disclosure of testimony concerning:

(1) Any material contained in the files of the Office of Inspector General;

(2) Any information relating to material contained in the files of the Office of Inspector General; or

(3) Any information or material which an individual acquired while an employee of the Office of Inspector General as a part of the performance of official duties or because of his or her official status.

(b) Without prior approval of the Inspector General, no employee or former employee of the Office of Inspector General shall, in response to a demand of a court or other authority, produce any material contained in the files of the Office of Inspector General, or disclose any information relating to material contained in the files of the Office of Inspector General, or disclose any information or produce any material acquired as a part of the performance of official duties or because of official status.

(c) With regard to a request for testimony of a present or former OIG employee as an expert or opinion witness, the employee may not be called to testify as an expert or opinion

witness by any party other than the United States.

§ 2004.7 [Amended]

18. In § 2004.7, the reference to § 2004.3(c) is revised to read "§ 2004.5(c)".

Dated: January 8, 1992.

Paul A. Adams,

Inspector General.

[FR Doc. 92-1115 Filed 1-17-92; 8:45 am]

BILLING CODE 4210-01-M

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 1

RIN 2900-AD09

Predisclosure Notification Procedures for Confidential Commercial Information

AGENCY: Department of Veterans Affairs.

ACTION: Final regulations.

SUMMARY: The Department of Veterans Affairs (VA) is adding a new section to the regulation that repeats the statutory exemption which authorizes withholding of certain business records requested under the Freedom of Information Act (FOIA) if disclosure of such records could reasonably be expected to cause substantial competitive harm. The new section sets out the Department's predisclosure procedures of notifying the submitters of such records which may contain confidential commercial information, as required by Executive Order 12600. Such notice enables submitters to object to any release which would cause them substantial competitive harm, and to demonstrate that such harm would result, prior to a disclosure decision. The section simply sets out and standardizes Departmental procedures for providing such notice.

EFFECTIVE DATE: February 20, 1992.

FOR FURTHER INFORMATION CONTACT: Marjorie M. Leandri, Records Management Service (723), Office of Information Resources Policies and Oversight, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 233-2454.

SUPPLEMENTARY INFORMATION: On pages 45944 through 45946 of the **Federal Register** of November 15, 1988, the Department of Veterans Affairs, formerly the Veterans Administration, published proposed regulatory changes concerning predisclosure notification procedures for confidential commercial information. Interested persons were given 30 days in which to submit written comments, suggestions, or objections to the proposed changes. Since no written comments were received, the proposed regulations are hereby adopted without change as set forth below. Executive Order 12600 dated June 23, 1987, entitled Predisclosure Notification Procedures for Confidential Commercial Information, requires each executive department and agency subject to the FOIA to establish mandatory and uniform procedures for handling requests for records which may contain confidential commercial information protected by FOIA exemption (b)(4), 5 U.S.C. 552(b)(4). The statutory exemption is repeated in VA regulations at 38 CFR 1.554(a)(4). Accordingly, a new section, 38 CFR 1.554a, is being added to spell out procedures for notifying submitters of records containing confidential commercial information that such records have been requested and may be released. The notification will give submitters an opportunity, prior to a disclosure decision, to object to the disclosure and to state all grounds upon which a disclosure is opposed.

The Executive Order also requires that procedures be established whereby submitters may designate any information, which they reasonably believe may cause substantial competitive harm if it were released, at the time they submit such information to the Department. Such designations will assist the Department in identifying sensitive information, and considering whether it qualifies for protection under FOIA exemption (b)(4).

The Secretary hereby certifies that these final regulations will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. Pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604. The reason for this certification is that the new section simply repeats, and incorporates into VA regulations, the procedures required by Executive Order 12600. These procedures standardize the method by which submitters are given the opportunity to contribute to Department disclosure decisions concerning certain requested records. This section primarily concerns procedures followed by Department employees; no significant new administrative or regulatory burdens are imposed on others. Therefore, this regulation will not have a significant economic impact on small entities (i.e., small business, small private and non-profit organizations, and small governmental jurisdictions).

The Department of Veterans Affairs has determined that these final regulations are non-major as that term is defined by Executive Order 12291, entitled Federal Regulation. It will not have a $100 million annual effect on the economy, and will not cause a major increase in costs or prices. It will have no significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic export markets.

The information collection requirement contained in this final rule has been approved by the Office of Management and Budget (OMB) under OMB control number 2900-0393.

There is no Catalog of Federal Domestic Assistance number.

List of Subjects in 38 CFR Part 1

Administrative practice and procedures, Claims, Employment, Freedom of Information Act, Government employees, Government property, and Privacy.

Approved: November 26, 1991.

Edward J. Derwinski,

Secretary of Veterans Affairs.

For the reasons set out in the preamble, 38 CFR part 1 is amended as set forth below:

PART 1—GENERAL PROVISIONS

1. The Authority citation for part 1, §§ 1.500 to 1.559 continues to read as follows:

Authority: Sections 1.550 to 1.559 issued under 72 Stat. 1114; 38 U.S.C. 210.

2. Section 1.554a is added to read as follows:

§ 1.554a Predisclosure notification procedures for confidential commercial information.

(a) *General.* During the conduct of its business the Department of Veterans Affairs (VA) may acquire records which contain confidential commercial information, as defined in paragraph (b) of this section. Such records will not be released in response to a Freedom of Information Act (FOIA) request, except under the provisions of this section. This section establishes uniform VA procedures for giving submitters predisclosure notice of requests for their records which contain confidential commercial information that may be exempt from disclosure under 38 CFR 1.554(a)(4). These procedures are required by Executive Order 12600,

Predisclosure Notification Procedures for Confidential Commercial Information, dated June 23, 1987.

(b) *Definitions.* (1) *Confidential commercial information* means records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the FOIA, 5 U.S.C. 552 (b)(4), as implemented by § 1.554 of this part, because disclosure could reasonably be expected to cause substantial competitive harm.

(2) *Submitter* means any person or entity who provides confidential commercial information to the government. The term "submitter" includes, but is not limited to corporations, State governments, and foreign governments.

(c) *Notification to submitters of confidential commercial information.* When a request is received, for a submitter's record(s), or information which contains confidential commercial information, and the request is being processed under the FOIA, 5 U.S.C. 552, the submitter will be promptly notified in writing of the request when required by paragraph (d) of this section. The notification will advise the submitter that a request for its record(s) has been received and is being processed under the FOIA. The notice will describe the exact nature of the record(s) requested or will provide to the submitter copies of the record(s) or portions thereof containing the requested confidential commercial information. It will also inform the submitter of the opportunity to object to the disclosure in writing within 10 working days, and of the requirements for such a written objection, as described in paragraph (f) of this section. The notification will be sent by certified mail, return receipt requested.

(d) *When notification is required.* (1) For confidential commercial information submitted to VA prior to January 1, 1988, notification to submitters is required whenever:

(i) The records are less than 10 years old and the requested information has been designated by the submitter as confidential commercial information; or

(ii) VA facility, administration, or staff office which has custody of the requested records has reason to believe that disclosure of the requested information could reasonably be expected to cause substantial competitive harm.

(2) For confidential commercial information submitted to VA on or after January, 1, 1988, notification is required whenever:

(i) The submitter has in good faith designated the requested records as confidential information in accordance with paragraph (e) of this section; or

(ii) VA facility, administration, or staff office which has custody of the requested records has reason to believe that disclosure could reasonably be expected to cause substantial competitive harm.

(e) *Designation by submitters of information as confidential commercial information.* (1) When business records are provided to VA, the submitter may appropriately designate any records or portions thereof which contain confidential commercial information, the disclosure of which could reasonably be expected to cause substantial competitive harm. This designation may be made at the time the information or record is given to VA or within a reasonable period of time thereafter, but not later than 60 days after receipt of the information by VA. Information so designated will be clearly identified by marking it with the words "confidential commercial information" or by an accompanying detailed written description of the specific kinds of information that is designated. If a complete document or record is designated, the cover page of the document or record will be clearly marked "This entire (document, record, etc.) consists of confidential commercial information." If only portions of documents are designated, only those specific designated portions will be conspicuously annotated as "confidential commercial information."

(2) A designation described in paragraph (e)(1) of this section will remain in effect for a period of not more than 10 years after submission to VA, unless the submitter provides acceptable justification for a longer specific period. If a shorter designation period is adequate, the submitter's designation should include the earlier expiration date. Whenever possible, the submitter's designation should be supported by a statement or certification by an officer or authorized representative of the submitter that the records are in fact confidential commercial information and have not been published or made available to the public.

(f) *Opportunity to object to disclosure.* (1) When notification to a submitter is made pursuant to paragraph (c) of this section, the submitter or designee may object to the disclosure of any specified portion of the record(s). Such objection will be in writing, will be addressed to the VA official who provided notice, will identify the specific record(s) or portion(s) of records that should not be disclosed, will specify all grounds upon which disclosure is opposed, and will explain in detail why the information is considered to be a trade secret or confidential commercial information, i.e., why disclosure of the specified records could reasonably be expected to cause substantial competitive harm. Information provided by a submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA.

(2) Any objection to disclosure must be submitted within 10 working days after receipt by the submitter of notification as provided for in paragraph (c) of this section.

(3) If an objection to disclosure is received within the 10 working day time period, careful consideration will be given to all specified grounds for nondisclosure prior to making an administrative determination whether to disclose the record. When it is determined to disclose the requested record(s) or portions of records which are the subject of an objection, the submitter will be provided a written statement of the VA decision, the reason(s) that the submitter's objections to disclosure were overruled, a description or copy of the exact information or record(s) to be disclosed which were the subject of an objection, and the specified date of disclosure. The date of disclosure will not be less than 10 working days from the date this notice is placed into mail delivery channels.

(g) *Notices to requester.* (1) When a request is received for records that may contain confidential commercial information protected by FOIA exemption (b)(4), 5 U.S.C. 552(B)(4), the requester will be notified that the request is being processed under the provisions of this regulation and, as a consequence, there may be a delay in receiving a response.

(2) Whenever a submitter is notified, pursuant to paragraph (c) of this section, that VA has received a request for records which had been provided by such submitter, and that such request was being processed under the FOIA, the requester will be notified that the submitter is being provided an opportunity to comment on the request. The notice to the requester should not include any of the specific information contained in the records being requested.

(3) Whenever VA notifies a submitter of a final decision, the requester will also be notified by separate correspondence. This notification to the requester may be contained in VA's FOIA decision.

(h) *Notices of lawsuit.* Whenever a FOIA requester brings suit seeking to compel disclosure of confidential

commercial information, the submitter of the information will be promptly notified.

(i) *Exceptions to the notification requirements.* The predisclosure notification requirements in paragraph (c) of this section need not be followed if:

(1) It is determined that the record(s) or information should not be disclosed;

(2) The record(s) requested have been published or have been officially made available to the public;

(3) Disclosure of the record(s) or information is required by law (other than the FOIA, 5 U.S.C. 552);

(4) Disclosure is required by an Agency rule that:

(i) Was adopted pursuant to notice and public comment;

(ii) Specifies narrow classes of records submitted to VA that are to be released under the FOIA; and

(iii) Provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm;

(5) The record(s) requested are not designated by the submitter as exempt from disclosure in accordance with paragraph (e) of this section, and the submitter had an opportunity to do so at the time of submission of the record(s) or a reasonable time thereafter, and VA does not have substantial reason to believe that disclosure of the information would result in competitive harm; or

(6) The designation made by the submitter in accordance with paragraph (e) of this section appears obviously frivolous, except that, in such case, VA must still provide the submitter with advance written notice of any final administrative disclosure determination not less than 10 working days prior to the specified disclosure date.

(Authority: 38 U.S.C. 210(c); 5 U.S.C. 552(b)(4); E.O. 12600 (52 FR 23781))

Approved by the Office of Management and Budget under control number 2900-0393.)

[FR Doc. 92-1353 Filed 1-17-92; 8:45 am]

BILLING CODE 8320-01-M

Proposed Rules

Federal Register
Vol. 57, No. 13
Tuesday, January 21, 1992

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

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Part 400

[Document No. 0361s]

General Administrative Regulations; Appeal Procedure

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Notice of correction.

On Monday, December 30, 1991, the Federal Crop Insurance Corporation (FCIC) published a proposed rule in the **Federal Register** beginning on 56 FR 67228 (FR Doc. 91-31033), 7 CFR part 400, Subpart J, the General Administrative Regulations; Appeal Procedure.

The proposed rule contains a misspelled word on page 67229, column 2, in § 400.81, paragraph (f) Decision, the last sentence, beginning with the word "Al" is corrected to read "All". This notice is published to correct that error.

Done in Washington, DC on January 3, 1992.

James E. Cason,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 92-1332 Filed 1-17-92; 8:45 am]

BILLING CODE 3410-08-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 91-CE-94-AD]

Airworthiness Directives; Aerostar Aircraft Corporation PA-60-600 and PA-60-700 Series (Formerly Piper) Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes to adopt a new airworthiness directive (AD) that would be applicable to Aerostar Aircraft Corporation PA-60-600 and PA-60-700 series airplanes. The proposed action would require inspection of the nose landing gear drag brace assembly for corrosion, replacement of any corroded components, and replacement of the spring and piston with new corrosion resistant parts. The Federal Aviation Administration (FAA) has received several reports of corrosion in the spring and piston in the lower drag link of the nose landing gear drag brace assembly. The actions specified by the proposed AD are intended to prevent failure of the nose landing gear, which could lead to nose gear collapse and damage to the airplane.

DATES: Comments must be received on or before April 3, 1992.

ADDRESSES: Service information that is applicable to this AD may be obtained from the Aerostar Aircraft Corporation, Customer Service Department, South 3608 Davison Boulevard, Spokane, Washington 99204; Telephone (509) 455-8872. This information also may be examined at the Rules Docket at the address below. Send comments on the proposal in triplicate to the FAA, Central Region, Office of the Assistant Chief Counsel, Attention: Rules Docket No. 91-CE-94-AD, room 1558, 601 E. 12th Street, Kansas City, Missouri 64106. Comments may be inspected at this location between 8 a.m. and 4 p.m., Monday through Friday, holidays excepted.

FOR FURTHER INFORMATION CONTACT: Mr. William A. Swope, Aerospace Engineer, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; Telephone (206) 227-2589.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

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

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Central Region, Office of the Assistant Chief Counsel, Attention: Rules Docket No. 91-CE-94-AD, room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Discussion

The FAA has received several reports of corroded nose landing gear drag brace assemblies on certain Aerostar Aircraft Corporation PA-60-600 and PA-60-700 series airplanes. In particular, the spring and piston in the lower drag link are corroding. Failure of the spring or the piston can prevent the nose landing gear from retracting, which could lead to nose gear collapse and damage to the airplane. The manufacturer (Aerostar Aircraft Corporation) has developed new corrosion resistant springs and pistons for the nose landing gear drag brace assemblies on the affected airplanes.

The Aerostar Aircraft Corporation has issued Aerostar Service Bulletin (SB) No. 600-121, dated September 12, 1991, which specifies procedures for inspecting the nose landing gear drag brace assemblies for corrosion and replacing the existing spring and piston with new corrosion resistant parts.

The FAA has reviewed all the available information related to the incidents described above, including the referenced service information, and has determined that AD action should be taken to continue to assure the airworthiness of the affected airplanes.

Since the condition described is likely to exist or develop in other Aerostar Aircraft Corporation PA-60-600 and PA-60-700 series airplanes of the same type design, the proposed AD would require an inspection of the nose landing

gear drag brace assembly for cracks, replacement of any corroded components, and the replacement of the existing spring and piston with new corrosion resistant parts. The actions would be done in accordance with Aerostar SB No. 600–121, dated September 12, 1991.

The manufacturing rights of the affected model airplanes were previously owned by the Piper Aircraft Corporation, but these manufacturing rights were recently transferred to the Aerostar Aircraft Corporation.

It is estimated that 375 airplanes in the U.S. registry would be affected by the proposed AD, that it would take approximately 4 hours per airplane to accomplish the proposed action, and that the average labor rate is approximately $55 an hour. Parts cost approximately $96 per airplane. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $118,500.

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

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

Aerostar Aircraft Corporation: Docket No. 91–CE–94–AD.

Applicability: The following model and serial numbered airplanes, certificated in any category.

Model	Serial Nos.
* PA–60–600	60–0001–003 through 60–0608–7961195.
* PA–60–600	60–0614–7961196 through 60–0933–8164262.
* PA–60–601	61–0001–004 through 60–0605–7962136.
* PA–60–601	61–0611–7962137 through 61–0880–8162157.
* PA–60–601P	61P–0157–001 through 61P–0610–7963274.
* PA–60–601P	61P–0612–7963275 through 61P–0859–8163455.
* PA–60–602P	62P–0750–8165001 through 60–8365021.
* PA–60–700P	60–8423001 through 60–8423025.

*=that have been converted to Wiebel nose gear system (Option No. 199).

Note: The manufacturing rights of the affected model airplanes were previously owned by the Piper Aircraft Corporation, but these manufacturing rights were recently transferred to the Aerostar Aircraft Corporation.

Compliance: Required within the next 100 hours time-in-service after the effective date of this AD, unless already accomplished.

To prevent failure of the nose landing gear, which could lead to nose gear collapse and damage to the airplane, accomplish the following:

(a) Inspect the nose landing gear drag brace assembly for corrosion in accordance with the Instructions in Aerostar Service Bulletin No. 600–121, dated September 12, 1991. Replace any corroded component in accordance with the Aerostar Maintenance Manual, and replace the existing spring and piston with a new corrosion resistant spring and piston in accordance with the Instructions in Aerostar Service Bulletin No. 600–121, dated September 12, 1991.

(b) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

(c) An alternative method of compliance or adjustment of the compliance time that provides an equivalent level of safety may be approved by the Manager, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. The request should be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Seattle Aircraft Certification Office.

(d) All persons affected by this directive may obtain copies of the documents referred to herein upon request to the Aerostar Aircraft Corporation, Customer Service Department, South 3608 Davison Boulevard, Spokane, Washington 99204; or may examine these documents at the FAA, Central Region, Office of the Assistant Chief Counsel, room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Issued in Kansas City, Missouri, on January 13, 1992.

Barry D. Clements,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 92–1360 Filed 1–17–92; 8:45 am]

BILLING CODE 4910–13–M

14 CFR Part 39

[Docket No. 91–CE–91–AD]

Airworthiness Directives; Aerostar Aircraft Corporation Models PA–60–600 and PA–60–700 Series (Formerly Piper) Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes to adopt a new airworthiness directive (AD) that would supersede AD 80–02–09, which currently requires repetitive dye penetrant inspections of the main landing gear torque links for cracks unless a certain replacement part is installed on certain Aerostar Aircraft Corporation PA–60–600 and PA–60–700 series (formerly Piper) airplanes. The proposed action would require the replacement or upgrade of the main landing gear torque links. The Federal Aviation Administration (FAA) has received several reports of main landing gear torque links cracking or collapsing. Upgrade and replacement kits have been designed and manufactured that will help prevent cracking and eliminate the need for the repetitive inspections currently required. The actions specified by this AD are intended to prevent loss of directional control of the airplane during ground operation caused by torque link failure.

DATES: Comments must be received on or before April 3, 1992.

ADDRESSES: Service information that is applicable to this AD may be obtained from the Aerostar Aircraft Corporation, Customer Service Department, South 3608 Davison Boulevard, Spokane, Washington 99204; Telephone (509) 455–8872. This information also may be examined at the Rules Docket at the

address below. Send comments on the proposal in triplicate to the FAA, Central Region, Office of the Assistant Chief Counsel, Attention: Rules Docket No. 91–CE–91–AD, room 1558, 601 E. 12th Street, Kansas City, Missouri 64106. Comments may be inspected at this location between 8 a.m. and 4 p.m., Monday through Friday, holidays excepted.

FOR FURTHER INFORMATION CONTACT: Mr. William A. Swope, Aerospace Engineer, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; Telephone (206) 227–2589.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

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

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Central Region, Office of the Assistant Chief Counsel, Attention: Rules Docket No. 91–CE–91–AD, room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Discussion

Airworthiness Directive (AD) 80–02–09, Amendment 39–3991, currently requires repetitive dye penetrant inspections of the main landing gear torque links for cracks unless a replacement part number (P/N) 400076–501 is installed on certain Aerostar Aircraft Corporation Models PA–60–600, PA–60–601, PA–60–601P, PA–60–602P, and PA–60–700P (formerly Piper) airplanes. This action is accomplished in accordance with the instructions in Piper Service Bulletin (SB) 600–75, dated July 14, 1978. The manufacturing rights of the affected model airplanes were owned by the Piper Aircraft Corporation at the time AD 80–02–09 was issued, but these manufacturing rights have now been transferred to the Aerostar Aircraft Corporation (Aerostar).

The FAA has received several reports of main landing gear torque links cracking or collapsing since the issuance of AD 80–02–09. Aerostar has designed and manufactured upgrade and replacement kits that will help prevent cracking and eliminate the need for the repetitive inspections currently required by AD 80–02–09.

Aerostar has also issued Service Bulletin No. 746B, dated June 11, 1991, which presents inspection procedures for determining whether the main landing gear torque links are both single lug links or are a single lug link fitting into a dual lug link, and installation procedures for a main landing gear torque link upgrade kit. This service bulletin also specifies the installation of a main landing gear torque link replacement kit in accordance with the instructions in Aerostar Drawing No. 88030 Rev F, which is contained in the Main Landing Gear Torque Link Replacement Kit, P/N 765–155 Rev F.

After examining the circumstances and reviewing all available information related to the incidents described above, the FAA has determined that AD action should be taken to prevent loss of directional control of the airplane during ground operation caused by torque link failure.

Since the condition described in likely to exist or develop in other Aerostar Models PA–60–600, PA–60–601, PA–60–601P, PA–60–602P, and PA–60–700P airplanes of the same type design, the proposed AD would require an inspection to determine whether the main landing gear torque links are both single lug links or are a single lug link fitting into a dual lug link. It also would require either the installation of a main landing gear torque link upgrade kit or a main landing gear torque link replacement kit depending on the result of the inspection. The proposed actions would be accomplished in accordance with the instructions in Aerostar SB No. 746B, dated June 11, 1991, or in accordance with the instructions in the Main Landing Gear Torque Link Replacement Kit, P/N 765–155 Rev F, which is referenced in Aerostar SB No. 746B. AD 80–02–09 would be superseded by the proposed action.

It is estimated that 400 airplanes in the U.S. registry would be affected by the proposed AD, that it would take approximately 2 hours per airplane to accomplish the proposed action, and that the average labor rate is approximately $55 an hour. Parts cost approximately $550 per airplane. Based on these figures, the total cost impact of the Ad on U.S. operators is estimated to be $264,000. AD 80–02–09, which would be superseded by the proposed action, requires repetitive inspection of the main landing gear torque links. The cost of AD 80–02–09 is $22,000 (1 hour times $55 times 400). The proposed AD would pose an additional cost impact of $242,000 than that already required by AD 80–02–09. In addition, since the proposed action would eliminate the need for the repetitive inspections required by AD 80–02–09, the ongoing cost impact required by AD 80–02–09 action would be eliminated.

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

For the reasons discussed below, I certify that this action (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action has been placed in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption "**ADDRESSES**".

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVE

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

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49, U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by removing AD 80–02–09, Amendment 3991, and adding the following new AD.

Aerostar Aircraft, Inc.: Docket No. 91–CE–91–AD.

Applicability: The following model and serial number airplanes, certificated in any category.

Models	Serial Nos.
PA–60–600 Aerostar 600.	60–0001–003 through 60–0933–8161262.
PA–60–601 Aerostar 601.	60–0001–004 through 61–0880–8162157.
PA–60–601P Aerostar 601P.	61–0157–001 through 61P–0860–8163455.
PA–60–602P Aerostar 602P.	62P–0750–8165001 through 60–8365021.
PA–60–700P Aerostar 700P.	60–8223001 through 60–8423025.

Note: The manufacturing rights of the affected model airplanes were previously owned by the Piper Aircraft Corporation, but these manufacturing rights were recently transferred to the Aerostar Aircraft Corporation.

Compliance: Required within the next 100 hours time-in-service (TIS) after the effective date of this AD, unless already accomplished.

To prevent loss of directional control of the airplane during ground operation caused by torque link failure, accomplish the following:

(a) Visually inspect the main landing gear scissors assemblies to determine if the torque links on each main landing gear are both single lug links or are a single lug link fitting into a dual link in accordance with paragraph 1, of the Instructions in Aerostar Aircraft Corporation Service Bulletin (SB) No. 746B, dated June 11, 1991.

(1) If the torque links are both single lug links, prior to further flight, install the main landing gear torque link upgrade kit, Kit No. 765–155A–B Rev N/C in accordance with steps a through e of the Instructions in Aerostar Aircraft Corporation SB No. 746B, dated June 11, 1991.

(2) If the torque links are a single lug link fitting into a dual lug link, prior to further flight, replace the torque links by installing Aerostar Main Landing Gear Torque Link Replacement Kit, Part Number (P/N) 765–155 Rev F, in accordance with the instructions on Aerostar Drawing No. 88030 Rev F. This drawing is contained in the Aerostar Main Landing Gear Torque Link Replacement Kit, P/N 765–155 Rev F, and is referenced in Aerostar Aircraft Corporation SB No. 746B, dated June 11, 1991.

(b) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

(c) An alternative method of compliance or adjustment of the compliance time that provides an equivalent level of safety may be approved by the Manager, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. The request should be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Seattle Aircraft Certification Office.

(d) All persons affected by this directive may obtain copies of the documents referred to herein upon request to the Aerostar Aircraft Corporation, Customer Service Department, South 3608 Davison Boulevard, Spokane, Washington 99204; or may examine these documents at the FAA, Central Region, Office of the Assistant Chief Counsel, room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

(e) This amendment supersedes AD 80–02–09, Amendment 3991.

Issued in Kansas City, Missouri, on January 14, 1992.

Barry D. Clements

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 92–1359 Filed 1–17–92; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 816 and 817

RIN 1029–AB33

Surface Coal Mining and Reclamation Operations; Underground Mining Activities; Temporary Cessation of Operations

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

ACTION: Proposed rule; extension of public comment period.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) of the U.S. Department of the Interior (DOI) is announcing the extension, until February 26, 1992, of the public comment period on the proposed rule published in the November 26, 1991, **Federal Register** (56 FR 60012). The proposed rule would amend the regulations governing surface coal mining operations and underground mining activities that cease operations on a temporary basis under an approved permit.

DATES: OSM will accept written comments on the proposed rule until 5 p.m. eastern time on February 26, 1992. Comments received after the close of the comment period may not be considered or included in the Administrative Record for the final rule.

ADDRESSES: Hand deliver to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, room 5131, 1100 L Street, NW., Washington, DC or mail to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, room 5131, 1100 L Street, NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Daniel Stocker, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: (202) 208–2550 (Commercial), 268–2550 (FTS).

SUPPLEMENTARY INFORMATION: OSM published a proposed rule on November 26, 1991 (56 FR 60012), that would amend its permanent program regulations governing surface coal mining operations and underground mining activities which cease operations on a temporary basis under an approved permit. The proposed rule would require permittees to submit an application to the regulatory authority before temporarily ceasing operations for a period of more than 30 days. The proposed rule establishes minimum information requirements for applicants; criteria and timeframes for the regulatory authority's decision to approve or disapprove applications; pre-approval inspections to determine compliance with the regulatory program and procedures for periodic review of temporary cessation status. This rule is necessary to ensure that reclamation of mined land is not unnecessarily delayed, and that any operation for which temporary cessation is requested is in compliance with applicable environmental performance standards and to ensure that hazards to the public health and safety will be eliminated during the period of temporary cessation.

The comment period was scheduled to close on January 27, 1992. In response to a request for more time to submit public comments on this proposal, OSM is extending the comment period by 30 days. Comments will not be accepted until 5 p.m. local time on February 26, 1992.

Dated: January 14, 1992.

Brent Wahlquist,

Assistant Director, Reclamation and Regulatory Policy, Office of Surface Mining Reclamation and Enforcement.

[FR Doc. 92–1417 Filed 1–17–92; 8:45 am]

BILLING CODE 4310–05–M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 150

[CGD 91-057]

Louisiana Offshore Oil Port: Expansion of Safety Zone to Include Excursion Zone

AGENCY: Coast Guard, DOT.

ACTION: Notice of petition for rulemaking and request for comments.

SUMMARY: In this petition for rulemaking, Louisiana Offshore Oil Port (LOOP) asks the Coast Guard to expand the existing "safety zone." The petitioner wants the Coast Guard to enlarge the safety zone that surrounds the deepwater port by adding to that zone both of two "excursion zones." A safety zone constitutes an area within which no exploration for or extraction of oil or gas may occur.

DATES: Comments must arrive on or before March 23, 1992.

ADDRESSES: Comments must go to: Executive Secretary, Marine Safety Council (G-LRA-2, room 3406) [CGD 91-057], U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593-0001. They may be mailed, or delivered to room 3406, Coast Guard Headquarters, between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is 202-267-1477.

The Executive Secretary maintains the public docket for this petition. Comments will become part of this docket and will be available to inspect or copy at room 3406, U.S. Coast Guard Headquarters.

FOR FURTHER INFORMATION CONTACT: Direct inquiries to ENS Claudia C. Gelzer, USCGR, Office of Marine Safety, Security, and Environmental Protection (202) 267-6714).

SUPPLEMENTARY INFORMATION:

Request for Comments

By publishing the substance of the petition, the Coast Guard invites the assistance of the public in determining the need, if any, for the Coast Guard to enlarge the safety zone that surrounds the deepwater port by adding to that zone two excursion zones. Interested persons may participate by reviewing the substance of the petition and submitting what written data, views, and arguments they wish. Comments that furnish factual bases for these views and arguments are particularly conducive to reasoned regulatory choices.

This Notice and Request does not propose a rulemaking, represent a policy of the Coast Guard, or otherwise commit the Coast Guard on the merits of the petition. The Coast Guard intends to consider the petition under applicable law, and to act on it after evaluating it with care in light of comments and other pertinent matter. If the Coast Guard finds that a rule is due, it will publish a Notice of Proposed Rulemaking; if not, it will issue a denial of the petition.

Drafting Information

The principal persons involved in drafting this Notice and Request are ENS Claudia C. Gelzer, USCGR, Office of Marine Safety, Security, and Environmental Protection, Project Manager, and Patrick J. Murray, Office of Chief Counsel, Project Counsel.

Background and Purpose

On 29 December 1980 (45 FR 85649) the Coast Guard established a safety zone to protect six single-point moorings for LOOP. On 13 May 1982 (46 FR 20581) the Coast Guard established a safety fairway to serve the safety zone. On 16 January 1984, LOOP submitted to the Coast Guard a Chart 11359 showing two shaded areas called excursion zones; later, deviations from the safety fairway into these zones came to be known as "excursions." On 20 February 1987, the Acting Chief of the Office of Marine Safety, Security, and Environmental Protection granted for one year a waiver of the requirement that tankers enter and leave the safety zone by the safety fairway. Since then the Coast Guard has renewed the waiver a year at a time.

On 30 December 1987, LOOP asked the Coast Guard to make the waiver permanent. On 8 February 1988, the Chief of the Office of Marine Safety, Security, and Environmental Protection refused the request, noting that someday exploration for or extraction of oil or gas might occur within one or both excursion zones. If such activity took place, the Coast Guard might have to revoke the waiver for the sake of safety. (The waiver has never meant—and the Coast Guard has never implied—priority of importing oil over finding it.) In August 1990, LOOP notified the Coast Guard that Conoco intended to drill under authority of Lease OCS-G 9678 within Grande Isle Block 59, about 500 yards outside of the safety zone and of the safety fairway and inside of the southerly excursion zone.

The Coast Guard is examining several possibilities for resolving this conflict. Among them are: Adding to the safety zone both current excursion zones (granting the request of LOOP); revoking one or both current excursion zones; rendering one or both current excursion zones permanent; altering the size or shape of either or both current excursion zones; altering the size or shape of the anchorage area; adding new requirements to operations at the LOOP facility, such as tug-escorts for vessels using the facility (these requirements could coexist with one or more of the previous possibilities or could stand alone); and leaving the situation as it is.

LOOP has asked the Coast Guard to enlarge the safety zone, by adding to that zone the two temporary excursion zones. These excursion zones broaden the entrance to the deepwater port, thereby reducing the number of required vessel maneuverings and possibly the risk of accidents. However, a safety zone constitutes a fairway, and no exploration for or extraction of oil or gas may occur within a fairway. Rulemaking is necessary to establish a new safety zone. The Coast Guard holds safety the paramount value. But it would appreciate help from persons in determining which of these courses—or which other course—would best serve the value here.

Dated: January 7, 1992.

A.E. Henn,

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

[FR Doc. 92-1427 Filed 1-17-92; 8:45 am]

BILLING CODE 4910-14-M

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900-AF57

Claims Based on Exposure to Herbicides Containing Dioxin (Peripheral Neuropathy/Lung Cancer)

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) is proposing to amend its rules governing the adjudication of claims for service-connected compensation based on exposure to herbicides containing dioxin. The amendments are necessary to implement a determination by the Secretary of Veterans Affairs that a significant statistical association exists between exposure to herbicides containing dioxin and the subsequent development of peripheral neuropathy, and that there is no significant statistical association between exposure to herbicides containing dioxin and lung

cancer. The intended effect is to establish a regulation governing determinations regarding service connection for peripheral neuropathy and lung cancer for all veterans who claim that these disabilities resulted from exposure to herbicides containing dioxin during military service.

DATES: Comments must be received on or before February 20, 1992. Comments will be available for public inspection until March 2, 1992. The amendments are proposed to be effective September 25, 1985.

ADDRESSES: Interested persons are invited to submit written comments, suggestions, or objections regarding this amendment to the Secretary of Veterans Affairs (271A), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. All written comments will be available for public inspection only in the Veterans Services Unit, room 170, at the above address, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays), until March 2, 1992.

FOR FURTHER INFORMATION CONTACT: Steven Thornberry, Consultant, Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, 810 Vermont Avenue, NW., Washington, DC 20420, telephone (202) 233–3005.

SUPPLEMENTARY INFORMATION: The Veterans' Advisory Committee on Environmental Hazards (VACEH, or "the Committee") held a public meeting on May 23, 1991, in Washington, DC. At that meeting, the Committee evaluated numerous scientific and medical studies and made recommendations to the Secretary of Veterans Affairs to assist him in determining whether significant statistical associations exist between exposure to herbicides containing dioxin and the subsequent development of peripheral neuropathy or lung cancer.

Under 38 CFR 1.17(c), when VA determines that a significant statistical association exists between exposure to a herbicide containing dioxin and any disease(s), it amends 38 CFR 3.311a to provide guidelines for the establishment of service connection for the disease(s). The regulation stipulates that determinations be based upon evaluations of scientific or medical studies, and that they be made after receiving the advice of the VACEH. A significant statistical association is held to exist when the relative weights of valid positive and negative studies permit the conclusion that it is at least as likely as not that a relationship exists between exposure to dioxin and a specific disease (38 CFR 1.17(d)(1)). The criteria for "valid positive and negative studies" are in 38 CFR 1.17(d)(2)–(4).

In its consideration of peripheral neuropathy, the Committee reviewed 11 valid studies. It noted that three of these studies demonstrate positive findings relative to peripheral neuropathy. One study found a very high prevalence of peripheral neuropathy among study subjects who had experienced a heavy exposure to dioxin, as measured by the presence of chloracne or raised serum hepatic enzyme levels. Another study reported peripheral neuropathy among individuals exposed to polychlorinated phenols as a consequence of a tank car accident. The Ranch Hand study, which involved comparatively low exposure levels, presented mild evidence of a sustained neurologic effect.

On May 23, 1991, the Committee recommended that the evidence supports the finding of a significant statistical association between exposure to herbicides containing dioxin and peripheral neuropathy. In making its recommendation, however, the Committee indicated that peripheral neuropathy related to dioxin exposure normally would occur shortly after exposure, but no later than 10 years thereafter. It also cautioned that the effects of certain confounding factors, such as aging, alcoholism, diabetes, and exposure to other toxic agents, must be taken into account, and hence that peripheral neuropathy resulting from exposure to dioxin should be a diagnosis of exclusion.

After VA's review of the studies and the recommendations of the VACEH, the Secretary determined on June 27, 1991, that there is a significant statistical association between exposure to herbicides containing dioxin and peripheral neuropathy. Accordingly, we are proposing to amend 38 CFR 3.311a(c) to add peripheral neuropathy to the list of diseases for which service connection may be granted on the basis of exposure to herbicides containing dioxin. The proposed amendment stipulates that two requirements deriving from application of sound scientific and medical principles be addressed in all decisions: First, that peripheral neuropathy must appear within 10 years of exposure; and second, that before service connection under § 3.311a may be established, certain confounding factors must be ruled out as causes, including the effects of aging, alcohol abuse, trauma, diseases known to be associated with peripheral neuropathy (e.g., diabetes, Guillain-Barre syndrome, etc.), and exposure to substances other than dioxin that are known to produce peripheral neuropathy. This list of confounding factors is not intended to be all-inclusive.

On May 23, 1991, the Committee also considered approximately 40 studies dealing with lung cancer. It grouped the studies into the following types: Proportional mortality studies, standardized mortality ratio studies, standardized incidence studies, one case control study, and one cohort mortality study with internal controls. It noted that the results of the proportional mortality studies are consistent with a null result, and that the standardized mortality ratio studies are also essentially negative. The standardized incidence studies present no consistent conclusions.

The Committee observed that most of the studies fail to deal adequately with documentation of exposure and potential confounding factors, particularly smoking. The Committee agreed that a study which did not adequately address the confounder of smoking should be considered invalid, and it noted that the only study to address the factor of smoking, the Ranch Hand study, was negative in regard to lung cancer.

On May 23, 1991, the Committee recommended that, on the basis of currently available epidemiological data, there is no evidence of a significant statistical association between exposure to herbicides containing dioxin and lung cancer. Thereafter, VA carefully reviewed the evidence and the Committee's findings and recommendation, and the Secretary determined on June 27, 1991, that sound scientific and medical evidence does not establish the required association. Accordingly, we are proposing to amend § 3.311a(d) to include lung cancer as a disease for which service connection may not be granted on the basis of exposure to herbicides containing dioxin.

In *Nehmer* v. *United States Veterans Administration*, 712 F. Supp. 1404 (N.D. Cal. 1989), the court concluded that VA incorrectly required that, in determining whether diseases would be service connected based on dioxin exposure, scientific evidence demonstrate a cause-and-effect relationship between the disease and exposure, rather than only a significant statistical association. This decision had the effect of invalidating VA's original determinations on service connection *ab initio*. Because those determinations were made under the regulations mandated by section 5(a)(1) of Public Law 98–542, we are proposing to make our current amendments to § 3.311a effective September 25, 1985, the original effective date of this section.

We believe that this effective date is appropriate because the new regulations required as a consequence of the Nehmer decision are remedial in nature and serve as a substitute for the invalidated regulations.

The Secretary hereby certifies that these regulatory amendments will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. The reason for this certification is that these amendments would not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), these amendments are exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

In accordance with Executive Order 12291, Federal Regulation, the Secretary has determined that these regulatory amendments are non-major for the following reasons:

(1) They will not have an annual effect on the economy of $100 million or more;

(2) They will not cause a major increase in costs or prices;

(3) They will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Catalog of Federal Domestic Assistance program numbers are 64.101, 64.109, and 64.110.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Handicapped, Health care, Pensions, Veterans.

Approved: November 21, 1991.

Edward J. Derwinski,

Secretary of Veterans Affairs.

For the reasons set forth in the preamble, 38 CFR part 3, Adjudication, is proposed to be amended as follows:

PART 3—[AMENDED]

Subpart A—Pension, Compensation, Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 72 Stat. 1114; 38 U.S.C. 501(a), unless otherwise noted.

2. In § 3.311a, paragraph (c) is revised by adding a new paragraph (c)(3) prior to the parenthetical phrase following paragraph (c)(2), and paragraph (d) is revised to read as follows:

§ 3.311a Claims based on exposure to herbicides containing dioxin.

* * * * *

(c) * * *

(3) Peripheral neuropathy manifested not later than 10 years following the date of exposure, provided that the condition cannot be related to a supervening condition or event, including, but not limited to, the effects of aging, alcohol abuse, trauma, diseases known to be associated with peripheral neuropathy, and exposure to substances other than dioxin known to produce peripheral neuropathy (see § 3.311a(e) on supervening causes or events).

* * * * *

(d) *Diseases not associated with exposure to herbicides containing dioxin.* Sound scientific and medical evidence does not establish a significant statistical association between exposure to herbicides containing dioxin and the following diseases:

(1) porphyria cutanea tarda;

(2) lung cancer.

(Authority: 38 U.S.C. 501(a))

* * * * *

[FR Doc. 92–1354 Filed 1–17–92; 8:45 am]

BILLING CODE 8320–01–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 414

[FRL–4094–9]

Organic Chemicals, Plastics and Synthetic Fibers Category; Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Extention of comment period; notice of public hearing.

SUMMARY: On December 6, 1991, EPA proposed a regulation under the Clean Water Act to amend the effluent limitations guidelines, pretreatment standards and new source performances standards for the organic chemicals, plastics, and synthetic fibers (OCPSF) point source category (56 FR 63897). The Agency has received several requests from the OCPSF industry for an extension to the comment period due to the complexity and size of the supporting record for the proposal and because the comment period extended through the holiday season when many facilities were closed and personnel were not available to review the proposal. Also, in reviewing the supporting document ("Supplement to the OCPSF Development Document for Effluent Limitations Guidelines, and New Source Performance Standards for the Organic Chemicals, Plastics and Synthetic Fibers Point Source Category", EPA 440/1–91/009a), EPA has found several errors that may affect a reviewer's ability to adequately evaluate information related to the December 6, 1991 proposal. In order to correct errors that appeared in the support document and allow the industry adequate time to fully comment and to supply data to support their comments, EPA is extending the period for comment on this proposed regulation from January 21 to March 6, 1992.

Additionally, notice is hereby given of a hearing open to the public, pursuant to the Clean Water Act, section 307(b), to discuss and receive comments on the pretreatment standards proposed in the December 6, 1991 **Federal Register** notice. The public hearing has been scheduled for February 26, 1992 at the following address: U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460 in the north conference room number 9 of the EPA Conference Center located on the first floor of the Waterside Mall.

Registration for the hearing will be held from 8:30 to 9:00 a.m. The hearing will start at 9 a.m. Following the registration period there will be a brief presentation by an EPA official on the development of these pretreatment standards. Opportunity will also be given throughout the session for the audience to submit written questions to the presiding officer and for members of the audience to present oral statements. For those people making an oral presentation, it is requested that a written transcript of their presentation as well as correct spellings of names, affiliations and addresses, be sumitted to the presiding officer.

The Agency requests that persons intending to attend the pretreatment hearing please contact Mr. George M. Jett by February 19, 1992 so EPA can arrange to have adequate facilities available for all the parties attending.

DATES: Comments on the proposed regulation for the organic chemicals, plastics and synthetic fibers category (56 FR 63897) must be submitted to EPA by March 6, 1992.

ADDRESSES: Send comments on the proposed regulation and notification of intention to attend the pretreatment hearing to Mr. George M. Jett, Engineering and Analysis Division (WH–552), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, Attention: EAD Docket Clerk.

Organic Chemicals, Plastics and Synthetic Fibers Industry. The supporting information and all comments will be available for inspection and copying at the EPA Public Information Reference Unit (PIRU), Waterside Mall, 401 M Street, SW., Washington, DC 20460, room 2404 (EPA Library).

The EPA Information Regulation (40 CFR part 2) provides that a reasonable fee may be charged for copying. The PIRU is open between the hours of 9 a.m. and 4:30 p.m.

FOR ADDITIONAL INFORMATION CONTACT: George M. Jett, (202) 260–7151, for information regarding the errata sheets. Copies of the supplemental development document errata sheets and supplemental economic analysis errata sheets may be obtained by writing or calling Mr. George Jett, Engineering and Analysis Division (WH–552), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460 between 8 a.m. and 4 p.m.

Dated: January 15, 1992.

Martha G. Prothro,

Acting Assistant Administrator for Water.

[FR Doc. 92–1529 Filed 1–17–92; 8:45 am]

BILLING CODE 6560–50–M

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40 CFR Part 764

[OPPTS–62089B; FRL–4044–3]

Proposed Ban on Acrylamide and N-methylolacrylamide Grouts

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of comment period.

SUMMARY: Notice is hereby given that the period for filing public comment on the proposed regulation of acrylamide and N-methylolacrylamide (NMA) grouts (56 FR 49863, October 2, 1991) is extended.

DATES: Public comments must be received on or before January 30, 1992.

ADDRESSES: Submit nonconfidential written comments, in triplicate, identified by the docket number OPPTS–62089B, by mail to: TSCA Public Docket Office (TS–793), Rm. NE–G004, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Nonconfidential comments will be placed in the rulemaking record for public inspection. See **SUPPLEMENTARY INFORMATION** for information on submitting comments containing confidential business information (CBI).

FOR FURTHER INFORMATION CONTACT: David J. Kling, Acting Director, Environmental Assistance Division (TS–799), Office of Pollution Prevention and Toxics, Environmental Protection Agency, rm. E–543, 401 M St., SW., Washington, DC 20460, Telephone: (202) 554–1404, TDD: (202) 554–0551.

SUPPLEMENTARY INFORMATION: On October 2, 1991, EPA issued a Notice of Proposed Rulemaking on acrylamide and N-methylolacrylamide (NMA) grouts (56 FR 49863). Written comments on the proposed rule were to be received on or before December 2, 1991. On November 25, 1991, after a request by Avanti International, EPA extended the public comment period through January 16, 1992 (56 FR 59239). On January 8, 1992, on behalf of their client, the National Association of Sewer Service Companies (NASSCO), the law firm of Weinberg, Bergeson & Neuman requested an additional 2–week extension of the public comment period because of difficulties encountered while trying to access certain key documents in the public record. The irregularities with the public record have subsequently been remedied; however, EPA hereby grants an extension of time for submission of public comments on the proposed rule.

Written comments must be received on or before January 30, 1992. Any person who submits written comments containing confidential business information (CBI) must mark the comments as "Confidential Business Information." Comments not claimed as confidential at the time of submission will be placed in the public file. Any comments marked as "Confidential Business Information" will be treated in accordance with the procedures in 40 CFR part 2. Any party submitting comments claimed to be CBI must prepare and separately submit a public version of the comments that EPA can place in the public file. CBI comments should be submitted in triplicate to: Document Control Office (TS–790), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. CBI comments should be mailed in a double envelope with "CBI" and the docket number OPPTS–62089B marked on the inner envelope, and the comments should be marked with docket number OPPTS–62089B.

List of Subjects in 40 CFR Part 764

Acrylamide, Environmental protection, N-methylolacrylamide, Recordkeeping and reporting requirements.

Dated: January 14, 1992.

Joseph A. Cara,

Acting Director, Office of Pollution Prevention and Toxics.

[FR Doc. 92–1411 Filed 1–17–92; 8:45 am]

BILLING CODE 6560–50–F

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AB38

Endangered and Threatened Wildlife and Plants; Withdrawal of the Proposed Rule To List the Prairie Mole Cricket (Gryllatalpa Major) as Threatened

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Withdrawal of proposal rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service) is withdrawing the proposed rule (April 25, 1990; 55 FR 17465) to list the prairie mole cricket (*Gryllotalpa major*) as a threatened species under the Endangered Species Act of 1973, as amended (Act). Data received as a result of additional field surveys in the spring of 1991 in Kansas and Oklahoma reveal that the species is more abundant and widespread than previously thought and is found in types of native grass cover that are not under immediate threat of destruction or modification. Because of the number and extent of occurrences and the fact that the species is now known to occur in a wider range of vegetation types that are less threatened with destruction, the Service has determined that the species is not likely to become endangered throughout all or a significant portion of its range in the foreseeable future.

ADDRESSES: The complete file for this notice is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service Regional Office, Federal Building, Fort Snelling, Twin Cities, Minnesota 55111.

FOR FURTHER INFORMATION CONTACT: Mr. Craig Johnson, Endangered Species Coordinator, at the above address (612/725–3276 or FTS 725–3276).

SUPPLEMENTARY INFORMATION:

Background

The presettlement tallgrass prairie extended from Canada to Oklahoma and from Nebraska to Indiana. Based on historic records, the prairie mole cricket was presumed to be distributed evenly throughout the southwest portion of the

tallgrass prairie, encompassing an area about the size of the States of Indiana and Oklahoma. The present distribution of the species has been reduced to small remaining prairie segments in the southwest one-fourth of Missouri, eastern Kansas, northwest and central Arkansas, and eastern Oklahoma. Most of these extant populations are found on small fragmented remnant prairie or native grass areas. Wilcove (1987) estimates that less than 0.5 percent of Missouri's presettlement prairie remains.

The earliest records of *Gryllotalpa major* are dated from the 1870's from eastern Kansas and southwest Missouri. Saussure described the first specimen from Illinois in 1874. Historical records indicate that specimens were collected from Arkansas, Illinois, Oklahoma, and Mississippi, in addition to Kansas and Missouri. Collecting continued until the 1930's when it seemed to decline significantly (Figg and Calvert 1987). At the time of the Service's 1984 Invertebrate Species Notice of Review (49 FR 21664), the prairie mole cricket was thought to be extinct. The closest relative to the prairie mole cricket is an African species *Gryllotalpa gryllotalpa* (Dennis Figg, Missouri Department of Conservation, *in litt.* 1989).

Adult prairie mole crickets are among the largest insects in North America and may measure up to 6 cm (2.5 inches) from end to end, including the antennae (Figg and Calvert 1987). The prairie mole cricket can sometimes be distinguished from the normally smaller northern mole cricket (*Gryllotalpa hexadactyla* by its size. The northern mole cricket measures 20–35 mm (.75–1.4 inches). Walker (pers. comm. in Figg and Calvert 1987) reports the prairie mole cricket may weigh up to 2.6 grams. Figg (*in litt.* 1989) suggests that a simple field method to distinguish these species is to observe the process on the trochanter of the foreleg, which is knife-shaped on the prairie mole cricket and more circular on the common northern mole cricket. The northern mole cricket is found in marshes, wetlands, and along rivers and lakes.

Adult mole crickets become active in the soil surface twice during the year, most notably during the spring, for courtship and reproduction (Figg and Calvert 1987). Males and females are identical externally, except for modified forewings that males use to attract sexually responsive females (Alexander 1975). Male prairie mole crickets construct specially designed burrow systems several inches below the soil surface that contain a bulb-like resonant chamber to increase acoustical output when the male calls to attract females during courtship. Males commence calling in late April and continue through May (Figg and Calvert 1987). Calling begins 5 to 10 minutes after sunset and ends at dark. Conditions need to be conducive for the females to fly; warm, dry and still. Calls at one Missouri prairie in 1987 could be heard over a quarter of a mile away (Figg and Calvert 1987). After courtship, the females disperse into the sorrounding habitat, dig a tunnel, and lay their eggs (Figg and Calvert 1987). The eggs then hatch in the soil and the young are miniature versions of the adults except they lack wings. They require two to three years before they grow into adults and are ready for spring courtship.

The habitat preference of the prairie mole cricket is the tallgrass prairie or, at a minimum, native grass areas with little or no disturbance. Communities where the species are found vary within the prairie ecosystem (Figg and Calvert 1987). Observations by Figg and Calvert indicate that most prairie mole cricket populations occur on silty to sandy loam prairies that are well drained. However, it is not unusual to find population sites on ridges with shallow soils. The species has not been found on wet prairies, marshes, dolomite glades, and dry loess prairies. It is difficult to accurately count individual burrows due to vegetative cover and the intensity of calling crickets. Busby (*in litt.* 1989) reports that larger Kansas populations support 24–30 males. At several locations in Arkansas, Shepherd (pers. comm. 1989) estimated approximately 150 prairie mole crickets.

Field work in Arkansas (Harold Grimmett, pers. comm. 1991) reveals counts as high as 296 males on 28 acres.

The proposed rule to list the prairie mole cricket (*Gryllotalpa major*) as a threatened species under the Act was published in the **Federal Register** on April 25, 1990 (55 FR 17465). This proposal was supported by biological information (Figg and Calvert 1987) indicating that the species was limited in distribution to small segments within the tallgrass prairies of southwestern Missouri, eastern Kansas, northeastern Oklahoma, and northwest and central Arkansas. At the time of the proposal, the prairie mole cricket was known from approximately 95 locations in the above four states. The species was thought to be in peril because of the destruction and alteration of its prairie habitat for agricultural and other uses.

Newspaper notices inviting general public comment on the proposal were published in 14 daily newspapers within the current range of the prairie mole cricket in Missouri, Kansas, Oklahoma, and Arkansas. Copies of the **Federal Register** proposal were furnished to landowners, other government agencies, and various interested parties.

Three comments were received during the comment period, which extended from April 25, 1990, until June 11, 1990. The Kansas Department of Wildlife and Parks did not have additional species information to provide and had no recommendation with regard to the proposal. The Kansas Association of Wheat Growers (Association) expressed concerns about how the presence of *Gryllotalpa major* on privately owned lands would affect farming practices if the species were to be placed on the endangered species list and given protection under the Act. Discussions with the Association revealed that the document they had received about the proposal was incomplete. Once the Association was provided with complete information about the prairie mole cricket, how it would be protected, and what the expected impacts upon cultivation practices might be, they had no further questions or comments.

Questions were raised within the Service about the adequacy of surveys that had been conducted and the types of microhabitat that the species requires. The Service debated whether the various types of habitat where the prairie mole cricket might be found had been adequately searched. Concern was expressed that additional surveys should be conducted in other types of grasslands, particularly within the "continuous prairies" of Kansas and Oklahoma, before a final listing decision was to be made.

As a result of these comments, the Service, under section 4(b)(6)(B)(i) of the Act, extended for 6 months the 1-year deadline for the final decision on the proposal to list *Gryllotalpa major* (April 11, 1991; 56 FR 14677). A new comment period opened June 17, 1991, and closed July 16, 1991. Notification of the rule extension was sent to all the parties that had previously received a copy of the proposed rule.

The Service contracted with Dr. William H. Busby, of the Kansas Biological Survey, to coordinate an intensive survey for the prairie mole cricket in the Flint Hills of Kansas. Concurrently, expanded survey efforts were conducted in Oklahoma by the Oklahoma Natural Heritage Inventory and the Service. These surveys revealed that, although the current range of *Gryllotalpa major* remains restricted from its historic range, the occurrences of the species within its current range are more abundant than previously believed. These surveys also revealed

that the species not only occurs in "tallgrass" prairies but in areas that have suffered some form of disturbance and where at least some native grasses remain. As a result of the 1991 surveys, the Service can now document approximately 290 extant occurrences of the prairie mole cricket in 49 counties in southwestern Missouri, eastern Kansas, eastern Oklahoma, and northwest and central Arkansas.

Seven comments were received during the extended comment period from the following: Missouri Department of Conservation, Arkansas Game and Fish Commission, Arkansas Natural Heritage Commission, Kansas Department of Wildlife and Parks, Oklahoma Natural Heritage Inventory, Kansas Biological Survey, and the Service's Tulsa Field Office. All of the respondents recommended that *Gryllotalpa major* not be placed on the Federal list of endangered and threatened species.

Finding and Withdrawal

Data collected by Busby (1991) and information contained in the comments received indicate that *Gryllotalpa major* is more widespread and abundant than previously believed and is found in types of habitat not considered before. It appears that the species does not face the degree of threats previously believed and is able to survive in a wider range of habitats. The known number of species' occurrences has increased from 95 at the time of the proposed rule (55 FR 17465) in 1989 to 290 in 1991. The number of counties where occurrences are recorded has increased from 30 to 49. All comments received by the Service during the reopened comment period in June and July 1991 recommended that the Service withdraw the listing proposal and place the species in category 2 of the Animal Notice of Review. Placing the species in this category will enable the Service to continue funding for additional population surveys and monitoring. If future data reveal a stable and increasing range-wide population, the Service will consider placing the species in the 3C category in a subsequent Animal Notice of Review. Taxa placed in the 3C category are those that have proven to be more abundant or widespread than previously believed and/or those that are not subject to any identifiable threat. Therefore, in compliance with section 4(b)(6)(B)(ii) of the Endangered Species Act of 1973, as amended, the Service withdraws its proposed rule of April 25, 1990 (55 FR 17465), to list *Gryllotalpa major* (prairie mole cricket) as threatened.

References Cited

Alexander, R.D. 1975. Natural Selection and Specialized Chorusing Behavior in Acoustical Insects. In D. Pimental, ed., Insects, Science and Society. Academic Press, New York.

Busby, W.H. 1991. Prairie Mole Cricket Report for Kansas, 1991. Unpublished report. 15 pp.

Figg, D.E., and P.D. Calvert. 1987. Status, Distribution, and Life History of the Prairie Mole Cricket (*Gryllotalpa major*). Sassurre. Unpublished report. 39 pp.

Wilcove, D.S. 1987. From Fragmentation to Extinction. Natural Areas Journal 7(1):23–29.

The author of this notice is William F. Harrison (see **ADDRESSES** section).

The authority for this action is 16 U.S.C. 1531–1544.

List of Subjects in 50 CFR Part 17

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

Dated: January 9, 1992.

Richard N. Smith,

Acting Director, Fish and Wildlife Service.

[FR Doc. 92–1415 Filed 1–17–92; 8:45 am]

BILLING CODE 4310–55–M

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50 CFR Part 17

RIN 1018–AB75

Endangered and Threatened Wildlife and Plants; Proposed Endangered Status for the Karner Blue Butterfly

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The U.S. Fish and Wildlife Service proposes to determine the Karner blue butterfly (*Lycaeides melissa samuelis*) to be an endangered species pursuant to the Endangered Species Act of 1973 (Act), as amended. Historically, the Karner blue butterfly occurred in a rather narrow band extending from eastern Minnesota, across portions of Wisconsin, Illinois, Indiana, Michigan, Ohio, Canada (Ontario), Pennsylvania, New York, Massachusetts, and New Hampshire. It is now extirpated from Illinois, Ohio, Ontario, Pennsylvania, and Massachusetts. This action is being taken because of constriction of the species' range and the declining size of remaining populations. The primary cause of past and threatened losses is habitat modification and destruction due to development, succession in the absence of natural disturbances, silviculture, and fragmentation of remaining habitat. This proposal, if made final, would extend the Federal protection and recovery provisions afforded by the Act to *Lycaeides melissa samuelis*. The Service seeks data and comments from the public on this proposal.

DATES: Comments from all interested parties must be received by March 23, 1992. Public hearing requests must be received by March 6, 1992.

ADDRESSES: Comments and materials concerning this proposal should be sent to the New York Field Office, U.S. Fish and Wildlife Service, 100 Grange Place, room 202, Cortland, New York 13045. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Mark W. Clough at the above address, telephone (607) 753–9334.

SUPPLEMENTARY INFORMATION:

Background

The Karner blue butterfly has been known for more than a century. When W. H. Edwards first described this butterfly in 1861 in Karner, New York, it was considered to be the same species as the Scudder's blue. In the 1940's, Nabokov revised the taxonomy of the group and renamed the Karner blue as a subspecies of the more common Melissa blue. The current scientific name is *Lycaeides melissa samuelis*, Nabokov. Some lepidopterists consider the Karner blue butterfly to be a separate species (D. Schweitzer, The Nature Conservancy, *in litt.*, 1987). However, this change has not been published and the Karner blue butterfly will be considered a subspecies for the purposes of listing.

Karner blues have a wingspan of 22–32 mm (0.87–1.26 in.). The dorsal side of the male is silvery blue or dark blue with narrow black margins. The females are grayish brown, dorsally, with irregular bands of orange inside the narrow black border on the upper wings. Both sexes are slate gray on the ventral side with the orange bands showing more regularity, and black spots circled with white (Shull 1987).

The habitat of the Karner blue butterfly is characterized by the presence of wild lupine (*Lupinus perennis*), a member of the pea family. Wild lupine is the only known larval host food plant for the Karner blue butterfly and is, therefore, closely tied to the butterfly's ecology and distribution. In eastern New York and New Hampshire, the habitat is typically grassy openings within very dry, sandy pitch pine/scrub oak barrens. In the

Midwest, the habitat is dry and sandy, but more prairie-like, including oak savanna and jack pine areas. It is believed that the Karner blue butterfly originally occurred as shifting clusters of populations, or metapopulations, across a vast fire-swept landscape covering thousands of acres. While the fires resulted in localized extinction, post-fire vegetational succession promoted colonization and rapid population buildups (Schweitzer 1989). Periodic disturbance is necessary to maintain openings in the canopy for wild lupine to thrive. A variety of other understory plants associated with the habitat serve as nectar sources for the adult butterflies.

The Karner blue butterfly usually has two broods each year. Eggs that have overwintered from the previous year hatch in April. The larvae feed on the upper surface of wild lupine leaves and mature rapidly. Near the end of May, they pupate and adult butterflies emerge very late in May in most years. The adults are typically in flight for the first 10 to 15 days of June, when the wild lupine is in bloom. Females lay eggs on or near the wild lupine plants. The eggs hatch in about one week and the larvae feed for about three weeks. They then pupate and the second brood adults appear in the second or third week of July. This time, the eggs are laid among plant litter at the base of the lupines, or on lupine pods or stems. By early August, no adults remain, and these eggs do not hatch until the following spring (Schweitzer 1989, Dirig 1979).

The distribution of the Karner blue butterfly is very discontinuous and generally follows the northern limits of wild lupine. Eight population clusters of the Karner blue butterfly were known historically from portions of Wisconsin, Michigan, Minnesota, Indiana, Illinois, Ohio, Massachusetts, New Hampshire, Pennsylvania, New York, and Ontario. Over the past 100 years, Karner blue butterfly numbers have apparently declined rangewide by 99 percent or more. Over 90 percent of the decline occurred in the last 10 to 15 years. It is now extirpated from Illinois, Massachusetts, Pennsylvania, Ohio, and Ontario (Schweitzer 1989; *in litt.*, 1990).

The New York Natural Heritage Program maintains a state list of approximately 50 individual Karner blue butterfly sites, comprising about ten population clusters, all found in the area known as the Albany Pine Bush and at several scattered locations within about 40 miles to the north. Once the site of a massive Karner blue population, the Albany Pine Bush is the locality from which the Karner blue butterfly was first scientifically described. There are unverified records of Karner blues in Manhattan and Brooklyn from the mid-1800's. Givnish *et al.* (1988) noted a decline of Karner blue butterflies in the Albany Pine Bush of 85 to 98 percent over the past decade, exclusive of one site which has remained stable. Schweitzer (1990) described the decline in the Pine Bush population as dropping from numbers of around 80,000 in 1979, to around 1,000 in 1987, to 100–200 in 1990. North of the Albany Pine Bush, one disturbed site located at an airport has persisted with numbers estimated around 14,000 in 1990. This population, which is now the largest left anywhere, may account for over half of the Karner blue butterflies throughout their range, and is several times larger than all the other New York sites combined (Schweitzer 1990). The majority of extant Karner blue sites in New York are in municpal and private ownership. Other landowners include a State Park, The Nature Conservancy, and Saratoga County.

In New Hampshire, the Concord Pine Barrens along the Merrimack River support the only remaining occurrence of the Karner blue butterfly in New England. The sole population is extremely low in numbers and occurs on a privately owned, two- to three-acre site within a power line right-of-way bordering an industrial park, and on the grounds of a nearby airport. The results of 1990 surveys reported by The Nature Conservancy (1990) showed a decline in the population size from an estimated 2,000 to 3,000 individuals in 1983 to an estimated 250 to 400 individuals in 1990. During that survey, Karner blue butterflies were not found at two other sites in the Concord Pine Barrens where the subspecies had been documented in 1983.

In Wisconsin, 33 of 36 historical occurrence sites were surveyed during 1990. Survey results reported by Blesser (1990) revealed that Karner blue butterflies were found at only 11 of the 33 historical sites visited. Although 23 previously unknown populations were discovered, Blesser noted that numbers of Karner blue butterflies were very small at most sites. Only three sites had 50 or more individuals, with none greater than 100. Most of the remnant populations in Wisconsin are also widely scattered, occurring in isolated patches of habitat along roadsides, power line clearings, and on abandoned agricultural fields. Over half of the Wisconsin sites are on publicly administered lands, including Necedah National Wildlife Refuge, Department of Defense, Wisconsin Department of Natural Resources, and County Forest.

The Karner blue butterfly has declined throughout its range in Michigan. It still occurs in six of seven counties from which it was known historically, but the existing populations are greatly reduced and have become highly fragmented within expanses of unsuitable habitat (Wilsmann 1990). The Michigan Natural Features Inventory includes over two dozen historical locations for the Karner blue butterfly. Five of these no longer support populations of Karner blue butterflies, and many of the remainder are ranked as poor quality sites. Information on exact historical locations is lacking, but many general areas reported to have Karner blue butterflies in the 1950's have become unsuitable due to succession or conversion to plantations (L. Wilsmann, Michigan Department of Natural Resources, pers. comm., 1991). In his analysis of recent population studies in the Allegan State Game Area, Michigan's only remaining sizable population, Schweitzer (*in litt.*, 1989) noted that the results indicate a decline to fragmented remnants with dangerously low numbers, which is characteristic of a collapsing Karner blue butterfly population. Other Michigan sites occur on the Manistee National Forest (intermixed with private inholdings), on power company rights-of-way, and on other private lands.

The results of surveys during 1990 in Indiana were summarized by C. Hedge (Indiana Department of Natural Resources, pers. com., 1991). Karner blue butterflies were reconfirmed at one known site, and they were also rediscovered on three of seven historical sites. Searches at 24 sites identified as potentially suitable for the species yielded six new locations for the species. However, all extant sites in Indiana are in two population clusters within three counties. Six sites are located on Indiana Dunes National Lakeshore, and other landowners include a county park, a school district, and The Nature Conservancy. Shull (1977) indicated eight Indiana counties in the historic range of the Karner blue, although some of these records are based on sightings that are not supported with voucher specimens. The species is no longer found at one area where Shull reported observing dozens of individuals in 1980.

Cuthrell (1990) reported the results of 1990 surveys conducted in Minnesota. There are two historical records for Minnesota. During the 1990 surveys of 50 potentially suitable sites, two areas with Karner blue butterflies were located.

Both sites are on a State Wildlife Management Area, in the vicinity of one of the historical locations. Karner blue butterflies were not found at the other historical site.

Karner blues frequently occur with other rare butterfly species such as the persius duskywing (*Erynnis persius*) and the frosted elfin (*Incisalia irus*), which are being listed by states where they occur (D. Schweitzer, pers. comm., 1991). Wild lupine is also the host plant for these species in parts of their range.

The Karner blue butterfly was first recognized by the Federal government in the **Federal Register** Notice of Review published on May 22, 1984 (49 FR 21664). That notice, which covered invertebrate wildlife under consideration for endangered or threatened status, included the Karner blue butterfly as a Category 2 species. Category 2 includes those taxa for which proposing to list as endangered or threatened is possibly appropriate, but for which substantial data on biological vulnerability and threats are not currently available to support proposed rules. In the **Federal Register** Animan Notice of Review published on January 6, 1989 (54 FR 554), the Karner blue butterfly was retained as a Category 2 species. Although the decline of the Karner blue butterfly in the Northeast was documented during the 1980's, it was believed that populations in the Midwest were relative secure, particularly in Wisconsin and Michigan. Surveys conducted during 1989 and 1990 in the Midwest revealed that the butterfly is in decline there also. Based on the recent status reviews, the Service's Northeast and North Central Regions recommended in the fall of 1990 that the Karner blue butterfly be included in the next **Federal Register** Notice of Review as a Category 1 species, indicating that the Service now possesses sufficient information to support the appropriateness of proposing to list this butterfly.

Summary of Factors Affecting the Species

Section 4(a)(1) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and regulations (50 CFR part 424) promulgated to implement the listing provisions of the Act set forth the procedures for adding species to the Federal Lists. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1). These factors and their application to the Karner blue butterfly (*Lycaeides melissa samuelis*) are as follows:

A. The Present or Threatened Destruction, Modification or Curtailment of its Habitat or Range

Throughout its range, changes in the habitat occupied by the Karner blue butterfly resulting from the declining frequency of wildfires, silviculture, and urbanization are largely the reasons for its decline (D. Schweitzer, *in litt.*, 1991). Modification and destruction of habitat and fragmentation of remaining areas are continuing threats to the survival of this butterfly. In addition to direct destruction of suitable habitat, urbanization has led to fire suppression on interspersed habitat; in the absence of fire, vegetational succession has made this habitat unsuitable. The threats due to fire suppression are discussed in more detail under Factor E.

In New York, the decline of the Karner blue butterfly resulting from loss and alteration of habitat is largely due to industrial, commercial, and residential development, fire suppression, vegetational succession, and habitat fragmentation. The Albany Pine Bush, which once covered as much as 40,000 acres, has been reduced to 2,000 acres. Zaremba (1991) noted that in addition to habitat loss, dissection of metapopulations by development such as buildings and roads is a major threat to the Karner blue butterfly in New York, along with detrimental management of lupine stands and habitat disturbance due to off-road vehicles and horseback riding.

Habitat fragmentation and loss of habitat through development, combined with the extremely small size of the remaining population (discussed under Factor E), are the greatest threats to the Karner blue butterfly's continued existence in New England. The pine barrens in New Hampshire have largely been destroyed as a result of industrial, commercial, and residential development; road and airport construction; and gravel and sand mining. A major retail mall, recently completed on the outer edges of Concord's pine barrens, will encourage additional commercial development and further encroachments into pine barren habitat. A recent proposal to spread and stockpile sewage sludge on airport lands in New Hampshire would, if implemented, alter or eliminate pine barren habitat. Remaining fragments of this natural community are threatened by continued development pressures, vegetational succession in the absence of periodic fires, airport expansion, and degradation due to off-road vehicular use. Sperduto (New Hampshire Natural Heritage Inventory, pers. comm., 1991) estimated that 90 to 95+ percent of the historic pine barrens in the Merrimack system have disappeared.

Most of the remnant populations of the Karner blue butterfly in Wisconsin are small and widely scattered, occurring in isolated patches of habitat along roadsides, power line clearings, and on abandoned agricultural fields. These areas are threatened primarily by encroachment of adjacent forests, conversion to pine plantations, and incompatible management practices including improper application of burning and mowing (Bleser 1990).

In Michigan, the major cause for the butterfly's decline has been the degradation and loss of habitat as a result of succession and development. The habitat has been affected by fire suppression, agriculture, silviculture, and off-road vehicles. Remaining Karner blue butterfly populations continue to be threatened by the decline and loss of wild lupine populations resulting from these factors (Wilsmann 1990).

The two major threats in Indiana identified by C. Hedge (pers. comm., 1991) are destruction of habitat by development, and succession resulting from fire suppression.

Cuthrell (1990) identified fire suppression, development, and other human disturbance as causes for the loss of Karner blue butterfly habitat in Minnesota. The major threat to the two extant sites is succession, but potential logging of the oak savannas also poses a threat (R. Baker, Minnesota Department of Natural Resources, pers. comm., 1991).

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

There have been large scientific collections of Karner blues in the past (R. Zaremba, The Nature Conservancy, pers. comm., 1991), although past collecting is not considered to have been a significant factor in the butterfly's decline to its present condition. However, the Karner blue butterfly's rarity and distinctively beautiful coloration may make it a desirable addition to private collections. Because the Karner blue butterfly's numbers are so low throughout its range, additional taking or collecting for any purpose other than part of a carefully planned recovery action may eliminate some populations and hamper recovery efforts.

C. Disease or Predation

Disease and predation have not been documented as factors in the decline of this species.

D. The Inadequacy of Existing Regulatory Mechanisms

The Karner blue butterfly is listed as endangered or threatened by several states:

In New York, the Karner blue butterfly is listed as endangered and the animals and parts thereof, including eggs and larvae, are protected from unauthorized take, import, transport, possession, or sale.

The State of Minnesota lists the Karner blue butterfly as a threatened species. Minnesota law protects state listed animals from take, import, transport, or sale.

In New Hampshire, the Karner blue butterfly is listed as endangered and is protected from unauthorized taking. While New Hampshire law directs other State agencies to avoid funding, carrying out, or authorizing actions that result in the destruction of essential habitat, it has not prevented the loss of habitat through development of private property. Wild lupine is listed by New Hampshire as an endangered plant species. It is protected by the New Hampshire Native Plant Protection Act of 1987, which is implemented by the New Hampshire Natural Heritage Inventory within the Department of Resources and Economic Development. However, this legislation does not prevent alteration of wild lupine habitat on private land, with the landowner's permission.

In Wisconsin, the Karner blue butterfly has been recommended for addition to the State list as threatened, but listing may take one to two years (C. Bleser, Wisconsin Department of Natural Resources, pers. comm., 1991). If listed, in addition to protection from take at occupied sites, Wisconsin law provides for protection and management of habitat on public lands, where a significant proportion of Wisconsin Karner blue occurrences are found.

In Michigan, the Karner blue butterfly has been proposed for addition to the State list as a threatened species. Michigan law prevents taking of listed animals and protects occupied habitat, and would thereby afford protection for eggs and larvae at known sites.

The State of Indiana currently does not have an official State list for insects.

While most states with extant Karner blue butterfly populations have legislation which protects the animals, provisions for protection and management of the habitat are incomplete to non-existent. Destruction and alteration of habitat are major reasons for the butterfly's decline.

Some populations of Karner blue butterflies occur on Federal, State, or privately owned parks, wildlife refuges, or preserves and are thereby recognized and protected. However, this protection has not prevented the range-wide declines of the Karner blue and its habitat due to the reasons discussed in section A above, and section E below.

The pine barrens and oak savannas where the Karner blue butterfly occurs are uplands underlain by extremely well-drained sandy soils and are thus afforded no protection by Federal or State wetland regulations. Should the Karner blue butterfly be federally listed, there will be additional protection provided from take or transport of the species, and from habitat alteration carried out, funded, or authorized by Federal agencies. The Endangered Species Act would also provide for needed habitat management through the recovery process.

E. Other Natural or Manmade Factors Affecting its Continued Existence

The presence of wild lupine is essential to the occurrence and survival of the Karner blue butterfly. Unaltered by humans, a pine barren ecosystem is likely to be a mosiac of interspersed woody vegetation, such as pitch pine (*Pinus rigida*) and scrub oak (*Quercus ilicifolia*) and more open areas characterized by wild lupine, grasses, and other plants such as spreading dogbane (*Apocynum androsaemfolium*) and New Jersey tea (*Ceanothus americana*) which serve as nectar sources for adult butterflies (The Nature Conservancy 1990).

Historically, the pine barren and oak savanna communities were maintained by naturally occurring, periodic fires that released nutrients and created openings favorable for wild lupine and other low growing plants. Residential and commercial development in and adjacent to these areas has lead to fire suppression. Without fire, vegetational succession to unsuitable habitat occurs on interspersed undeveloped areas. In the absence of fire, many areas once dotted with openings and wild lupine are now dominated by forest, with little or no understory. Fire suppression has affected habitat throughout the range of the Karner blue butterfly.

Since no life stage of the Karner blue butterfly is completely resistant to fire, recently burned lupine sites must be colonized by Karner blue butterflies from nearby unburned sites (Schweitzer 1989). Maintenance of the Karner blue butterfly depends on its ability to disperse to newly expanded wild lupine sites (Zaremba 1991). Fragmentation of remaining habitat prevents dispersal and results in small isolated populations.

With small, isolated and declining populations, the subspecies is highly vulnerable to extinction. Extreme isolation, whether by geographic distance, ecological factors, or reproductive strategy, will prevent the influx of new genetic material and can result in a highly inbred population with low viability and/or fecundity (Chesser 1983). Natural fluctuations in rainfall, host plant vigor, or predation may weaken a population to such an extent that recovery to a viable level would be impossible. Isolation prevents recolonization by butterflies from other metapopulations, resulting in extinction.

Small remnant populations are highly vulnerable to a variety of factors. Weather events can eliminate such populations, as exemplified by the failure of the Ontario, Canada remnant to survive the impacts of drought in 1988, followed by unusually cold weather in May and June of 1989 (D. Schweitzer, *in litt.*, 1991). Improper management of existing wild lupine habitat including untimely mowing, the use of herbicides along highways and power line rights-of-way, and poorly timed and/or configured burns also threaten remnant populations (D. Schweitzer, *in litt.*, 1991, Bleser 1990, Zaremba 1991). Browsing of wild lupine by deer, rabbits and/or woodchucks also poses a threat (D. Sperduto, pers. comm., 1991; D. Schweitzer and D. Savignano, pers. comm., in Givnish *et al.* 1988). A relationship between the scarcity of adult nectar sources and Karner blue butterfly abundance has also been observed (Bleser 1990; D. Sperduto, pers. comm., 1991).

The Service has carefully assessed the best scientific information available regarding the past, present, and future threats faced by this subspecies in determining to propose this rule. Based on this evaluation, the preferred action is to list the Karner blue butterfly as endangered. It has been extirpated from Canada and from four states in the U.S., and has undergone significant decline in the six states with remaining populations. Due to the magnitude of the range-wide decline of the Karner blue butterfly, particularly within the past decade, and the continuing threats from destruction, alteration, and fragmentation of its habitat, this butterfly is in need of Federal protection if it is to continue to survive. These factors support listing the Karner blue butterfly as an endangered species.

Critical Habitat

Section 4(a)(3) of the Act as amended, requires that, to the maximum extent prudent and determinable, the Secretary

propose critical habitat at the time the species is proposed for listing as endangered or threatened. Section 3 of the Act defines critical habitat as, "(i) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection, and (ii) specific areas outside the geographical area occupied by a species at the time it is listed, upon determination that such areas are essential for the conservation of the species." Designation of critical habitat is prudent unless: (1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or (2) such designation of critical habitat would not be beneficial to the species (50 CFR 424.12(a)(1)). Designation of critical habitat is determinable unless: (1) information sufficient to perform the required analyses of the impacts of the designation is lacking, or (2) the biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat (50 CFR 424.12(a)(2)).

The Service finds that designation of critical habitat for the Karner blue butterfly is not presently determinable. Most existing populations of this butterfly are located on highly fragmented habitat of declining suitability. The size, spatial configuration, and juxtaposition of habitat areas required to provide for the long-term survival of existing populations have not been identified. Range-wide conservation of the Karner blue butterfly may also require protection and/or restoration of habitat in areas where the species is now extirpated. In addition, information needed to analyze the impacts of critical habitat designation is unavailable at this time.

The Service will be initiating a concerted effort to obtain the information needed to determine critical habitat for the Karner blue butterfly. When the Service finds that critical habitat is not determinable at the time of listing, regulations (50 CFR 424.17(b)(2)) provide that the designation of critical habitat be completed within two years of the date of the proposed rule to list the species. A proposed rule for critical habitat designation must be published in the **Federal Register**, and the notification process and public comment provisions parallel those for a species listing. In addition, the Service will evaluate the economic and other relevant impacts of the critical habitat designation, as required under section 4(b)(2) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Endangered Species Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all species. The protection required of Federal agencies and the prohibitions against taking and harm are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) requires Federal agencies to confer informally with the Service on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service. Federal involvement under section 7 is expected for management and other land use activities on Federal lands with Karner blue butterfly populations. Present locations include U.S. Forest Service lands in Michigan, National Park Service lands in Indiana, and U.S. Fish and Wildlife Service National Wildlife Refuge lands and Department of Defense lands in Wisconsin. Activities which are funded, regulated or carried out by the Federal Aviation Administration involving the airport lands in New York and New Hampshire where Karner blue butterflies occur would require section 7 consultation. A proposed airport expansion in New York, and a proposal to stockpile sewage sludge at an airport in New Hampshire could affect the Karner blue butterfly and may require Federal Aviation Administration approval. Some development projects involving Karner blue butterfly sites could require authorization from the U.S. Army Corps of Engineers (Corps) for certain project related activities in regulated waters or wetlands of the United States. Corps' authorization of such projects would require section 7 consultation; however, upland development by itself is not regulated by the Corps. The Service is not aware of any such development proposals at this time.

Listing the Karner blue butterfly would encourage additional research and provide for the development of needed habitat protection and management strategies through the recovery process. Additional information is needed on specific habitat characteristics such as plant community species and structure, soil dryness, shading, and other factors that may affect the suitability of the habitat for Karner blue butterflies. Likely recovery activities would also include continued monitoring, evaluation of habitat management techniques, development of site-specific protection and management plans, and investigations into re-establishing populations.

The Act and implementing regulations found at 50 CFR 17.21 set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take, import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving endangered wildlife species under certain circumstances. Regulations governing permits are at 50 CFR 17.22 and 17.23. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, and/or for incidental take in connection with otherwise lawful activities.

Public Comments Solicited

The Service intends that any final action resulting from this proposal will

be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. Comments particularly are sought concerning:

(1) Biological, commercial trade, or other relevant data concerning any threat (or lack thereof) to the Karner blue butterfly;

(2) The location of any additional populations of the Karner blue butterfly and the reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act;

(3) Additional information concerning the range, distribution, and population size of the Karner blue butterfly;

(4) Current or planned activities in the subject area and their possible impacts on the Karner blue butterfly.

Final promulgation of the regulation on the Karner blue butterfly will take into consideration the comments and any additional information received by the Service, and such communications may lead to a final regulation that differs from this prposal.

The Endangered Species Act provides for a public hearing on this proposal, if requested. Requests must be received within 45 days of the date of publication of the proposal. Such requests must be made in writing and addressed to Field Supervisor, New York Field Office, U.S. Fish and Wildlife Service (see **ADDRESSES** section).

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

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Author

The primary author of this proposed rule is Mark W. Clough (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

Accordingly, it is hereby proposed to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

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

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

2. It is proposed to amend § 17.11(h) by adding the following, in alphabetical order, to the List of Endangered and Threatened Wildlife, under "INSECTS".

§ 17.11(h) Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
Insects							
*	*	*	*	*	*	*	
Butterfly, Karner blue	*Lycaeides melissa samuelis*	U.S.A. (IL, IN, MA, MI, MN, NH, NY, OH, PA, WI), Canada (Ont.).	NA	E		NA	NA
*	*	*	*	*	*	*	

Dated: January 8, 1992.
Richard N. Smith,
Acting Director, Fish and Wildlife Service.
[FR Doc. 92-1416 Filed 1-17-92; 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; extension of comment period.

SUMMARY: Due to a request for a pubic hearing on the proposal of NMFS to remove the eastern North Pacific stock of gray whale from the Endangered Species Act's (ESA) List of Endangered and Threatened Species, the comment period on the proposed rule is hereby extended.

DATES: The comment period is extended until March 6, 1992.

FOR FURTHER INFORMATION CONTACT: Dr. Charles Karnella, NMFS, at (301) 713-2322 or Mr. James Lecky, Southwest Region, NMFS, at (213) 514-6664.

SUPPLEMENTARY INFORMATION: On November 22, 1991 (56 FR 58869), NMFS published a proposed determination that the eastern North Pacific (California) stock of gray whale should be removed from the ESA's 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 become endangered again 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.

In the November 22, 1991 proposed rule, NMFS gave notice that the comment period would close on January 21, 1992. However, as provided under section 4(b)(5)(E) of the ESA, a request for a public hearing on the determination has been received and granted. With the intent to hold a public hearing, this comment period will be extended for 45 days in order to allow the public sufficient time to attend the hearing and complete their written comments. A separate notice will be published in the **Federal Register** shortly, notifying the public of the time and dates of the hearing.

Date: January 14, 1992.
Michael F. Tillman,
Deputy Assistant Administrator for Fisheries
[FR Doc. 92-1369 Filed 1-17-92; 8:45 am]
BILLING CODE 3510-22-M

50 CFR Part 675

Receipt of Petition for Rulemaking; Central Bering Sea Fishermen's Association

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.
ACTION: Notice of receipt of petition for rulemaking and request for comments.

SUMMARY: NMFS announces receipt of a petition for rulemaking on issues related to fishery management regulations promulgated under the Magnuson Fishery Conservation and Management Act (Magnuson Act). The Central Bering Sea Fishermen's Association (CBSFA) has petitioned the Secretary of Commerce (Secretary) to amend the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP) to allocate to the CBSFA 8 percent of the total allowable catch (TAC) for pollock in the Bering Sea and Aleutian Islands (BSAI) area from the reserve established by 50 CFR 675.20(a)(3). The CBSFA also has petitioned the Secretary to issue an interpretive rule indicating that the Fur Seal Act Amendments of 1983 (FSAA) created in the Secretary fiduciary obligations to the Aleut Natives of the Pribilof Islands to transition the economy of St. George and St. Paul Islands from one based on commercial fur sealing to one based on fisheries. Furthermore, CBSFA has petitioned the Secretary to issue a finding that the Community Development Quota (CDQ) system proposed by the North Pacific Fishery Management Council (NPFMC) cannot result in an allocation to the Pribilof Islands that will be timely and sufficient in size and duration to encourage serious investment in fishery related enterprise based on the Pribilof Islands.

DATES: Comments are requested through March 6, 1992.

ADDRESSES: Comments on the need for rulemaking described in the petition should be sent to William W. Fox, Jr., Assistant Administrator for Fisheries, NOAA, NMFS, Silver Spring Metro Center #1, room 9246, 1335 East-West Highway, Silver Spring, MD 20910, telephone (301) 713-2231.

FOR FURTHER INFORMATION CONTACT: Copies of the petition are available and may be obtained from Lauren M. Rogerson, NOAA Office of General Counsel, Silver Spring Metro Center #1, room 9246, 1335 East-West Highway, Silver Spring, MD 20910, telephone (301) 713-2231.

SUPPLEMENTARY INFORMATION:

Description of Request

As stated in their petition, CBSFA represents the vested interest of Aleut Natives of the Pribilof Islands, Alaska, in the creation of a fisheries-based economy on the Pribilof Islands. The CBSFA requested publication of, and action on, the petition concurrent with public notice and review of Amendment 18 to the FMP. Amendment 18 to the FMP was prepared by the NPFMC and has been submitted to the Secretary for review under the provisions of the Magnuson Act. The proposed rule implementing proposed Amendment 18 was published in the **Federal Register** December 20, 1991 (56 FR 66009). Public comments on the proposed regulations are invited through February 3, 1992.

The CBSFA has petitioned the Secretary to amend the FMP to allocate to the CBSFA 8 percent of the TAC of pollock for the BSAI. The 8 percent allocation would be taken from the 15 percent reserve established by 50 CFR 675.20(a)(3). Fifteen percent of the TAC for each target species and the "other species" category is automatically placed in a reserve. The reserve is not designated by species or species group and any amount of the reserve may be apportioned to a target species or the "other species" category provided that such apportionments are consistent with paragraph (a)(2)(i) of § 675.20 and do not result in overfishing of a target species or the "other species" category. The CBSFA has provided proposed regulatory language.

The CBSFA has also petitioned the Secretary to issue an interpretive rule that the FSAA created in the Secretary fiduciary obligations to the Aleut Natives of the Pribilof Islands to transition the economy of St. George and St. Paul Islands, Alaska, from one based on commercial fursealing to one based on fisheries.

The CBSFA has petitioned the Secretary to issue a finding that the CDQ system proposed by the NPFMC cannot result in an allocation to the Pribilof Islands that will be timely and sufficient in size and duration to

encourage serious investment in fishery related enterprise based on the Pribilof Islands. The CBSFA has determined that the CDQ allocation system, as presently conceived, cannot meet the needs in quantity, duration or dependability of the communities of the Pribilof Islands.

Information Requested

NMFS requests interested persons to submit comments, information, and suggestions concerning the proposals as set forth in the petition and the structure and content of regulations necessary to implement the request. NMFS will consider this information in determining whether to proceed with the development of regulations suggested by the petition. Upon determining whether to open the rulemaking suggested by this petition, the Assistant Administrator for Fisheries will publish a notice of NMFS' decision in the **Federal Register.**

Dated: January 13, 1992.

Michael F. Tillman,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 92–1226 Filed 1–17–92; 8:45 am]

BILLING CODE 3510–22–M

Notices

Federal Register
Vol. 57, No. 13
Tuesday, January 21, 1992

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.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

Meetings

AGENCY: Advisory Council on Historic Preservation.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given that the Advisory Council on Historic Preservation will meet on Monday, February 3, 1992. The meeting will be held in the Peraux Room at the St. Anthony Hotel, 300 E. Travis Street, San Antonio, Texas, beginning at 8:30 a.m.

The Council was established by the National Historic Preservation Act of 1966 (16 U.S.C. 470) to advise the President and the Congress on matters relating to historic preservation and to comment upon Federal, federally assisted, and federally licensed undertakings having an effect upon properties listed in or eligible for inclusion in the National Register of Historic Places. The Council's members are the Architect of the Capitol; the Secretaries of the Interior, Agriculture, Housing and Urban Development, Treasury, and Transportation; the Director, Office of Administration; the Chairman of the National Trust for Historic Preservation; the President of the National Conference of State Historic Preservation Officers; a Governor; a Mayor; and eight non-Federal members appointed by the President.

The agenda for the meeting includes the following:

I. Chairman's Welcome/Opening.
II. Report of the Federal Energy Regulatory Commission Task Force.
III. Executive Director's Report.
IV. Implementation of the Theme: Federal Property Management and Historic Preservation in the Local Community.
V. New Business.
VI. Adjourn.

Note: The meetings of the Council are open to the public. If you need special accommodations due to a disability, please contact the Advisory Council on Historic Preservation, 1100 Pennsylvania Ave., NW., room 809, Washington, DC, 202–786–0503, at least seven (7) days prior to the meeting.

FOR FURTHER INFORMATION CONTACT: Additional information concerning the meeting is available from the Executive Director, Advisory Council on Historic Preservation, 1100 Pennsylvania Ave., NW., #809, Washington, DC 20004.

Dated: January 15, 1992.

Robert D. Bush,

Executive Director.

[FR Doc. 92–1347 Filed 1–17–92; 8:45 am]

BILLING CODE 4310–10–M

DEPARTMENT OF AGRICULTURE

Office of the Secretary

[Docket No. 91–182]

Declaration of Emergency Because of Mediterranean, Mexican, and Oriental Fruit Flies

A serious outbreak of three fruit flies is occurring in California: the Oriental fruit fly (*Bactrocera dorsalis* [Hendel]) in Los Angeles, San Bernardino, and Riverside Counties; the Mediterranean fruit fly (*Ceratitis capitata* [Wiedemann]) and the Mexican fruit fly (*Anastrepha ludens* [Loew]), both in portions of Los Angeles County.

The Mediterranean, Mexican, and Oriental fruit flies are among the world's most destructive pests, affecting more than 200 species of fruits, nuts, and vegetables, incluidng citrus, avocado, peaches, apples, and plums. These pests can develop rapidly and spread easily, causing severe damage to entire citrus and other fruit and vegetable growing areas. Agricultural losses would be great if Mediterranean, Mexican, and Oriental fruit flies were to become established in the United States.

By itself, the economic impact of Mediterranean fruit fly establishment in the United States would be approximately $1 billion per year. This estimated value is based on consideration of the field loss value of crops affected, costs of field treatment, losses in export revenue, quarantine treatment damage, costs of export quarantine compliance treatments, and the costs of eradicating spot infestations in States on the edge of the Mediterranean fruit fly's preferred ecoclimatic zone. The cumulative economic effect of establishment of the three fruit flies could exceed the $1 billion estimated for the Mediterranean fruit fly alone.

California produces more than one-half of the Nation's fruit and one-third of its vegetables, so it can be estimated that the cost of infestation by the three pests to that State alone would be in the realm of $400 million per year.

In September, October, and November 1991, infestations of each of the three pests were detected in California. As of January 3, 1992, 26 Mediterranean fruit flies, 14 Mexican fruit flies, and 76 Oriental fruit flies had been found.

In cooperation with the State of California, the Animal and Plant Health Inspection Service (APHIS) has initiated a program to eradicate these fruit fly infestations. The State of California is funding approximately one half of the total program costs. However, continuing efforts to eradicate fruit flies in different areas and to facilitate the early detection of fruit fly infestations have substantially increased program costs. APHIS resources are insufficient to regulate these multiple and concurrent fruit fly eradication projects, and additional funding is needed.

Therefore, in accordance with the provisions of the Act of September 25, 1981, 95 Stat. 953 (7 U.S.C. 147b), I declare that there is an emergency which threatens the citrus and other fruit and vegetable growing industries of this country, and I authorize the transfer and use of such sums as I may deem necessary from appropriations or other funds available to the agencies or corporations of the Department of Agriculture for the conduct of a program to detect and identify Mexican, Oriental, and Mediterranean fruit fly-infested areas, to control and prevent the spread of Mexican, Oriental, and Mediterranean fruit flies to noninfested areas in the United States, and to eradicate the Mexican, Oriental, and Mediterranean fruit flies wherever they may be found in the continental United States.

Effective Date: This declaration of emergency shall become effective January 3d, 1992.

Edward R. Madigan,

Secretary of Agriculture.

[FR Doc. 92-1520 Filed 1-16-92; 11:44 am]

BILLING CODE 3410-34-M

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 85-91]

Proposed Foreign-Trade Zone; Palmdale, CA; Application Filed

An application has been submitted to the Foreign-Trade Zones Board (the board) by the City of Palmdale, California, requesting authority to establish a general-purpose foreign-trade zone in Palmdale, adjacent to the Los Angeles-Long Beach Customs port of entry. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR Part 400). It was formally filed on November 6, 1991. The applicant is authorized to make the proposal under chapter 4, section 6300, of the California Government Code.

The proposed Palmdale project would be the second general-purpose zone in the Los Angeles-Long Beach Customs port of entry area. The first zone, FTZ 50, was approved in 1979 (Grantee: Port of Long Beach, Board Order 147, 44 FR 55919). It currently involves sites in Long Beach, Santa Ana and Ontario.

The proposed foreign-trade zone consists of 8 industrial/business park sites (1,315 acres) all of which are located to the east of State Highway 14 and within one-mile of the Palmdale Regional Airport, in the City of Palmdale (60 miles northeast of downtown Los Angeles): 1. Lockheed Advanced Development Company Project (800 acres); 2. Antelope Valley Business Park (120 acres); 3. Freeway Business Center (30 acres); 4. Antelope Valley Auto Center (70 acres); 5. Antelope Valley Country Club Business/Industrial Center (120 acres); 6. Sierra Gateway Center (140 acres); 7. Pacific Business Park (15 acres); and, 8. Winnell Industrial Park (20 acres).

The application indicates there is a need for zone services in the Palmdale area, adjacent to the Los Angeles Customs port of entry. The zone project is designed to provide zone services particularly for companies requiring an airport location. It involves sites which would be available for warehousing/distribution activity for items such as electronics, optical products and hardware.

Specific manufacturing approvals are not being sought at this time. Such requests would be made to the Board on a case-by-case basis.

In accordance with the Board's regulations, an examiners committee has been appointed to investigate the application and report to the Board. The committee consists of Dennis Puccinelli (Chairman), Foreign-Trade Zones Staff, U.S. Department of Commerce, Washington, DC 20230; John H. Heinrich, District Director, U.S. Customs Service, Pacific Region, 300 South Ferry Street, room 2017, Terminal Island, San Pedro, CA 90731; and Colonel Charles S. Thomas, District Engineer, U.S. Army Engineer District Los Angeles, P.O. Box 2711, Los Angeles, California 90053–2325.

Comments concerning the proposed zone are invited in writing from interested parties. They should be addressed to the Board's Executive Secretary at the address below and postmarked on or before March 20, 1992. While no local public hearing has been scheduled for the FTZ Board, consideration will be given to such a hearing during the review.

A copy of the application is available for public inspection at each of the following locations:

U.S. Department of Commerce, District Office, 11000 Wilshire Boulevard, room 9200, Los Angeles, California 90024

Office of the Executive Secretary, Foreign-Trade Zones Board, U.S. Department of Commerce, room 3716, 14th and Pennsylvania Avenue, NW, Washington, DC 20230

Dated: January 13, 1991.

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 92-1429 Filed 1-17-92; 8:45 am]

BILLING CODE 3510-DS-M

[Order No. 559]

Resolution and Order Approving the Application of The Puerto Rico Industrial Development Co. for Special-Purpose Subzone Status at the Pharmaceutical Manufacturing Plants of the Bristol-Myers Squibb Co. in Humacao and Barceloneta, PR

Proceedings of the Foreign-Trade Zones Board, Washington, D.C.

Resolution and Order

Pursuant to the authority granted in the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Resolution and Order:

The Board, having considered the matter, hereby orders:

After consideration of the application of the Puerto Rico Industrial Development Company, grantee of FTZ 7, filed with the Foreign-Trade Zones Board (the Board) on January 28, 1991, requesting special-purpose subzone status at the pharmaceutical manufacturing plants of the Bristol-Myers Squibb Company, in Humacao and Barceloneta, Puerto Rico, the Board, finding that the requirements of the Foreign-Trade Zones Act, as amended, and the FTZ Board's regulations are satisfied, and that the proposal is in the public interest, approves the application.

Approval is subject to the FTZ Act and the FTZ Board's regulations (as revised, 56 FR 50790–50808, 10/8/91), including Sec. § 400.28. The Secretary of Commerce, as Chairman and Executive Officer of the Board, is hereby authorized to issue a grant of authority and appropriate Board Order.

Grant of Authority for Subzone Status

Whereas, By an Act of Congress approved June 18, 1934, an Act "To provide for the establishment * * * of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes," as amended (19 U.S.C. 81a–81u) (the Act), the Foreign-Trade Zones Board (the Board) is authorized to grant to corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs ports of entry;

Whereas, The Board's regulations (15 CFR part 400) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and where a significant public benefit will result;

Whereas, The Puerto Rico Industrial Development Company, grantee of FTZ 7, has made application (filed 1–28–91, FTZ Docket 5–91, 56 FR 4973, 2–14–91) to the Board for authority to establish special-purpose subzones at the Bristol-Myers Squibb Company plants in Humacao and Barceloneta, Puerto Rico;

Whereas, Notice of said application has been given and published, and full opportunity has been afforded all interested parties to be heard; and,

Whereas, The Board has found that the requirements of the Act and the Board's regulations are satisfied;

Now, Therefore, The Board hereby authorizes the establishment of two subzones at the Bristol-Myers Squibb Company plants in Humacao and Barceloneta, Puerto Rico, designated on the records of the Board as Foreign-Trade Subzones 7C and 7D, at the locations described in the application, subject to the Act and the Board's

Regulations (as revised, 56 FR 50790–50808, 10/8/91), including § 400.28.

Signed at Washington, DC, this 13th day of January 1992, pursuant to Order of the Board.

Alan M. Dunn,

Assistant Secretary of Commerce for Import Administration Chairman, Committee of Alternates Foreign-Trade Zones Board.

Attest:

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 92–1430 Filed 1–17–92; 8:45 am]

BILLING CODE 3510-DS-M

International Trade Administration

[A-588–020]

Titanium Sponge From Japan; Preliminary Results of Antidumping Duty Administrative Review

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

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

SUMMARY: In response to a request by the petitioner, the Department of Commerce has conducted an administrative review of the antidumping duty order on titanium sponge from Japan. The review covers two manufacturers/exporters of this merchandise to the United States and the period November 1, 1989 through October 31, 1990. The review indicates the existence of no dumping margins for both manufacturers/exporters during the period.

EFFECTIVE DATE: January 21, 1992.

FOR FURTHER INFORMATION CONTACT: Elizabeth Levy or Michael Rolling, Office of Countervailing Compliance, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 377–2786.

SUPPLEMENTARY INFORMATION:

Background

On November 13, 1990, the Department published in the **Federal Register** a notice of "Opportunity to Request Administrative Review" (55 FR 47370) of the antidumping duty order on titanium sponge from Japan for the period November 1, 1989 through October 31, 1990. On November 30, 1990, the petitioner, RMI Titanium Company, requested an administrative review of Osaka Titanium Co. Ltd. (Osaka), Showa Denko K.K. (Showa), and Toho Titanium Co. Ltd. (Toho) for the period November 1, 1989 through October 31, 1990. We initiated the review on December 17, 1990 (55 FR 51742). However, since initiating this review, the Department has revoked the order as it pertains to Osaka (57 FR 557, December 7, 1991). Consequently, Osaka is no longer subject to this order and will no longer be addressed in this review. The Department has now conducted this administrative review in accordance with section 751 of the Tariff Act of 1930 as amended (the Tariff Act).

Scope of Review

Imports covered by the review are shipments of unwrought titanium sponge. Titanium sponge is a porous, brittle metal which has a high strength-to-weight ratio and is highly ductile. It is an intermediate product used to produce titanium ingots, slabs, billets, plates, and sheets. During the review period, such merchandise was classified under subheading 8108.10.50.10 of the Harmonized Tariff Schedule (HTS).

The HTS number is provided for convenience and customs purposes. The written description remains dispositive.

The review covers two manufacturers/exporters to the United States of the subject merchandise, Toho Titanium Co., Ltd. and Showa Denko K.K. for the period November 1, 1989 through October 31, 1990.

United States Price

In calculating United States price, the Department used purchase price, as defined in section 772(b) of the Tariff Act. For those sales made directly to unrelated parties prior to importation into the United States, we based the United States price on purchase price, in accordance with section 772(b) of the Tariff Act. In those cases where sales were made through a related sales agent in the United States to an unrelated purchaser prior to the date of importation, we also used purchase price as the basis for determining United States price. For the latter sales, the Department determined that purchase price was the appropriate determinant of United States price because the merchandise was shipped directly from the manufacturer to the unrelated buyers, without being introduced into the inventory of the related selling agent. Moreover, direct shipment from the manufacturers to the unrelated buyers was the customary commercial channel for sales of this merchandise between the parties involved. Finally, the unrelated sellling agent located in the United States acted only as a processor of sales-related documentation and as a communication link with the unrelated U.S. buyers.

Purchase price sales were based on the packed, f.o.b price to unrelated purchasers in the United States. We adjusted Showa's price for post-sale price adjustments. We recalculated the credit expenses by multiplying the differences between the reported pay-date and inventory date by the unit price (adjusted unit price for Showa) and then multiplying by the company's reported interest rate. This was then divided by 365 days to determine the credit expense for each sale. We made adjustments, where applicable for foreign and U.S. brokerage, foreign inland freight and insurance, ocean freight and insurance, U.S. freight and insurance, packing, commissions, direct and indirect selling expenses, Japanese consumption tax and U.S. Customs duties as reported.

Foreign Market Value

In calculating foreign market value, the Department used home market price, as defined in section 773 of the Tariff Act, when sufficient quantities of merchandise were sold in the home market, at or above the cost of production, to provide a basis for comparison. Home market price was based on the packed, exfactory or delivered price to unrelated purchasers in the home market. We adjusted Showa's price for post-sale price adjustments. We recalcuated the credit expenses by multiplying the difference between the reported pay-date and inventory date by the unit price (adjusted unit price for Showa) and then multiplying by the company's reported interest rate. This was then divided by 365 days to determine the credit expense for each sale. We made adjustments, where applicable for inland freight, packing, credit and, for Showa, the Japanese consumption tax. We made further adjustments, where applicable, for indirect selling expenses to offset U.S. and home market commissions.

Preliminary Results of the Review

As a result of this review, we preliminarily determine the dumping margins to be:

Manufacturer/ exporter	Time period	Margin (per-cent)
Showa Denko K.K	11/1/89–10/31/90	(0)
Toho Titanium Co	11/1/89–10/31/90	(0)
All others	11/1/89–10/31/90	(0)

Parties to the proceeding may request disclosure and interested parties may request a hearing not later than 10 days after 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 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 353.38(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 are due.

The Department will publish the final results of the administrative review including the results of its analysis of issues raised in any case or rebuttal briefs.

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Individual differences between United States price and foreign market value may vary from the percentages stated above. The Department will issue appraisement instructions directly to the Customs Service.

Further, the following deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(1) of the Tariff Act: (1) The cash deposit rate for the reviewed companies will be that established in the final results of this administrative review; (2) for merchandise exported by manufacturers or exporters not covered in this review, but covered in previous reviews or the original less-than-fair-value investigation, the cash deposit rate will continue to be the company-specific rate published in the final results or final determination covering the most recent period; (3) if the exporter is not a firm covered in this review, previous reviews, or the original investigation, but the manufacturer is, the cash deposit rate will be that established for the manufacturer of the merchandise in the final results of this review, or if not covered in this review, the most recent period or the original investigation; and (4) the cash deposit rate for any future entries from all other manufacturers or exporters who are not covered in this or prior administrative reviews, and who are unrelated to the reviewed firm or any previously reviewed firm, will be the "all other" rate established in the final results of this administrative review. This rate represents the highest rate for any firm in this administrative review (whose shipments to the United States were reviewed), other than those firms receiving a rate based entirely on best information available. These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.22.

Dated: January 9, 1992.

Alan M. Dunn,

Assistant Secretary for Import Administration.

[FR Doc. 92-1431 Filed 1-17-92; 8:45 am]

BILLING CODE 3510-DS-M

[C-351-504]

Certain Heavy Iron Construction Castings From Brazil; Final Results of Countervailing Duty Administrative Review and Determination Not To Revoke the Countervailing Duty Order

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

ACTION: Notice of determination not to revoke countervailing duty order and final results of countervailing duty administrative review.

SUMMARY: The Department of Commerce is notifying the public of its determination not to revoke the countervailing duty order on certain heavy iron construction castings from Brazil.

Furthermore, on November 22, 1991, the Department of Commerce (the Department) published the preliminary results of its administrative review of the countervailing duty order on certain heavy iron construction castings from Brazil. We have now completed this review and 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*.

EFFECTIVE DATE: January 21, 1992.

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: On May 6, 1991, the Department published in the **Federal Register** (56 FR 20596) its intent to revoke the countervailing duty order on certain heavy iron construction castings from Brazil in accordance with 19 CFR 355.25(d)(4). We had not received a request for an administrative review of the order for the last four consecutive annual anniversary months.

On May 13, 1991, Collier, Shannon & Scott, on behalf of the petitioners, the Municipal Castings Fair Trade Council, objected to our intent to revoke the order. Following this objection, the Government of Brazil made a timely request for an administrative review of the period January 1, 1990 through December 31, 1990. We initiated the review on June 18, 1991 (56 FR 27943). Pursuant to 19 CFR 355.25(d)(4)(iii), we have determined not to revoke the order.

Background

On November 22, 1991, the Department published in the **Federal Register** (56 FR 58879) the preliminary results of its administrative review of the countervailing duty order on certain heavy iron construction castings from Brazil (51 FR 17786; May 15, 1986). The Department has now completed this administrative 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 proceedings 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 classified 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: (1) Income Tax Reduction for Export Earnings; (2) CACEX Preferential Working Capital Financing for Exports; (3) Preferential Export Financing Under CIC-OPCRE of the Banco do Brasil; (4) Financing for the Storage of Merchandise Destined for Export; (5) Exemption of IPI and Customs Duties on Imported Equipment (CDI); (6) Preferential Financing under Resolution 68 and 509 through FINEX. Three companies produced and

exported the subject merchandise to the United States during the review period.

Analysis of Comments Received

We gave interested parties an opportunity to comment on the preliminary results. We received no comments.

Final Results of Review

As a result of our review, we 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*.

Therefore, the Department will 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.

Due to the Government of Brazil's termination of all of the programs found countervailable during the period of investigation, the Department will instruct the Customs Service to waive the collection of cash deposits of estimated countervailing duties on all shipments of the subject merchandise from Brazil entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review.

This administrative review and notice are in accordance with section 19 CFR 355.25(d), 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)), and 19 CFR 355.22.

Dated: January 10, 1992.

Alan M. Dunn,

Assistant Secretary for Import Administration

[FR Doc. 92-1432 Filed 1-17-92; 8:45 am]

BILLING CODE 3510-DS-M

COUNCIL ON ENVIRONMENTAL QUALITY

President's Commission on Environmental Quality; Meeting

AGENCY: Council on Environmental Quality, Executive Office of the President, President's Commission on Environmental Quality.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, notice is being provided for a meeting of the President's Commission on Environmental Quality. This meeting is open to the public and there will be an opportunity for public comment.

DATES: The meeting will be held on February 5, 1992.

ADDRESSES: The meeting will be held from 9 a.m. to 3:30 p.m. on Wednesday, February 5, 1992, at room 474 (Indian Treaty Room), Old Executive Office Building, 17th & Pennsylvania Avenue, NW., Washington, DC.

Persons attending the meeting will need to provide their names and dates of birth to Ms. Kim Chastain (telephone: (202) 395-5750) by Friday, January 31, 1992, at 5 p.m. for clearance into the Old Executive Office Building. Space in the Indian Treaty Room is limited and persons interested in attending will be accommodated on a first-come, first-served basis.

AGENDA:

Wednesday, February 5, 1992

Old Executive Office Building, 17th & Pennsylvania Avenue, NW., room 474 (Indian Treaty Room), Washington, DC

9 a.m.-9:10 a.m.—Opening Remarks & Agenda.
9:10 a.m.-9:30 a.m.—General Overview.
9:30 a.m.-12 p.m.—Proposed Project Presentations.
12 p.m.-1:30 p.m.—Break.
1:30 p.m.-3 p.m.—Review & Discussion of Additional Proposed Projects and Wrap-Up.
3 p.m.-3:15 p.m.—Public Comment.
3:15 p.m.-3:30 p.m.—Conclusion.
3:30 p.m.—Adjourn.

FOR FURTHER INFORMATION CONTACT: Ms. Kim Chastain, Staff Assistant, President's Commission on Environmental Quality (telephone: (202) 395-5750).

SUPPLEMENTARY INFORMATION: The President's Commission on Environmental Quality was established by Executive Order No. 12737 on December 12, 1990. The Commission has 25 members and is chaired by the Chairman of the Council on Environmental Quality. The function of the Commission is to advise the President on matters involving environmental quality.

David Struhs,

Chief of Staff, Council on Environmental Quality.

[FR Doc. 92-1444 Filed 1-17-92; 8:45 am]

BILLING CODE 3125-01-M

DEPARTMENT OF DEFENSE

Department of the Air Force

Notice of Intent To Prepare an Environmental Impact Statement on Proposed Force Structure Changes at Moody AFB

The United States Air Force intends to prepare an Environmental Impact Statement (EIS) on proposed force structure changes at Moody AFB, GA.

This EIS will focus on the potential environmental impacts associated with various proposed force structure options. The wing would be composed of A/OA-10 and F-16 aircraft. Other aircraft may also be considered. The mission of the wing would be to provide Close Air Support (CAS) for the Army battlefield commander. The Air Force plans to complete the EIS in early 1993.

The Air Force will conduct public scoping meetings to determine the issues and concerns that should be addressed in the EIS. Notice of the time and place of the scoping meetings will be made available to public officials and announced in the local news media in the areas where the meetings will be held. To ensure the Air Force will have sufficient time to consider public input on issues to be included in the EIS, comments should be forwarded to the addressee listed below by March 16, 1992. However, the Air Force will accept comments to the addressee below at any time during the environmental impact analysis process.

For further information concerning the proposed actions at Moody AFB, GA, contact: Ms. Stephanie Stevenson, HQ TAC/DEVE, Langley AFB, VA 23665, (804) 764-7844.

Patsy J. Conner,

Air Force Federal Register, Liaison Officer.

[FR Doc. 92-1374 Filed 1-17-92; 8:45 am]

BILLING CODE 3910-01-M

Notice of Intent To Prepare an Environmental Impact Statement for the Beddown of a Composite Wing at Pope AFB, NC

The United States Air Force will prepare an Environmental Impact Statement (EIS) to assess the potential environmental impact of operating a composite wing at Pope AFB, NC. Pope AFB is proposed as the home of the Air Force's second composite wing. The proposed composite wing at Pope AFB would support the 82nd Airborne Division at nearby Fort Bragg. The Environmental Impact Analysis Process (EIAP) will look at a variety of aircraft and their associated missions, including A/OA-10s, C-130s, and F-16s. Other aircraft may also be considered.

The Air Force will conduct public scoping meetings to determine the issues and concerns that should be addressed in the EIS. Notice of the time and place of the scoping meetings will be made available to public officials and announced in the local news media in the areas where the meetings will be

held. To ensure the Air Force will have sufficient time to consider pubic input on issues to be included in the EIS, comments should be forwarded to the addressee listed below by March 9, 1992. However, the Air Force will accept comments to the addressee below at any time during the EIAP.

For further information concerning the proposed beddown of a composite wing at Pope AFB, contact: Staff Sergeant Tony Cecchi, HQ TAC/DEVE, Langley AFB, VA 23665, (804) 764–7844.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 92–1373 Filed 1–17–92; 8:45 am]

BILLING CODE 3910–01–M

USAF Scientific Advisory Board; Meeting

The USAF Scientific Advisory Board of the Space and C³I Panel of 1992 Summer Study on Global Reach/Global Power will meet on 6–7 Feb. 1992 from 8 a.m. to 5:00 p.m. at Space System Division, Los Angeles AFB, CA.

The purpose of this meeting is to receive briefings and hold discussions on projects related to Space and C³I in support of Global Reach/Global Power. This meeting will involve discussions of classified defense matters listed in section 552b(c) of title 5, United States Code, specifically subparagraph (1) thereof, and accordingly will be closed to the public.

For further information, contact the Scientific Advisory Board Secretariat at (703) 697–4648.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 92–1325 Filed 1–17–92; 8:45 am]

BILLING CODE 3910–01–M

USAF Scientific Advisory Board; Meeting

The USAF Scientific Advisory Board's Committee on Technology Options for Global Reach—Global Power: 1995–2020 (Mobility Panel) will meet on 4–5 February 1992, at The ANSER Corporation, 1215 Jefferson Davis Highway Arlington, VA from 8 a.m. to 5 p.m.

The purpose of this meeting is to receive briefings and gather information for the study.

The meeting will be closed to the public in accordance with section 552b(c) of title 5, United States Code, specifically subparagraphs (1) and (4) thereof.

For further information, contact the Scientific Advisory Board Secretariat at (703) 697–4811.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 92–1326 Filed 1–17–92; 8:45 am]

BILLING CODE 3910–01–M

DEPARTMENT OF EDUCATION

National Assessment Governing Board; Teleconference Meeting

AGENCY: National Assessment Governing Board; Education.

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the Executive Committee of the National Assessment Governing Board. Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify the general public of their opportunity to attend.

DATE: February 20, 1992.

TIME: 11 a.m. (e.t.)

PLACE: National Assessment Governing Board, suite 7322, 1100 L Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Roy Truby, Executive Director, National Assessment Governing Board, suite 7322, 1100 L Street, NW., Washington, DC, 20005–4013, Telephone: (202) 357–6938.

SUPPLEMENTARY INFORMATION: The National Assessment Governing Board is established under section 406(i) of the General Education Provisions Act (GEPA) as amended by section 3403 of the National Assessment of Educational Progress Improvement Act (NAEP Improvement Act), title III–C of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (Pub. L. 100–297), (20 U.S.C. 1221e–1).

The Board is established to advise the Commissioner of the National Center for Educational Statistics on policies and actions needed to improve the form and use of the National Assessment of Educational Progress, and to develop specifications for the design, methodology, analysis, and reporting of test results. The Board also is responsible for selecting subject areas to be assessed, identifying the objectives for each age and grade tested, and establishing standards and procedures for interstate and national comparisons. The Executive Committee of the National Assessment Governing Board will meet via teleconference on February 20, 1992. Approval of the agenda for the March 1992 meeting of the Board is the business that will be conducted.

Because this is a teleconference meeting, facilities will be provided so the public will have access to the Committee's deliberations. Records are kept of all Board proceedings and are available for public inspection at the U.S. Department of Education, National Assessment Governing Board, suite 7322, 1100 L Street, NW., Washington, DC, from 8:30 a.m. to 5 p.m.

Dated: January 14, 1992.

Diane Ravitch,

Assistant Secretary and Counselor to the Secretary.

[FR Doc. 92–1335 Filed 1–17–92; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Financial Assistance Award to the Yakima Indian Nation

AGENCY: U.S. Department of Energy (DOE), Richland Field Office.

ACTION: Notice of Intent to make a noncompetitive financial assistance award.

SUMMARY: The DOE Richland Field Office, Environmental Restoration Division, in accordance with 10 CFR 600.7(b)(2), gives notice of its plan to renew a noncompetitive grant to the Yakima Indian Nation (YIN). Under the terms of the award, the YIN will continue to conduct activities related to the protection of YIN treaty rights which may be impacted by activities associated with DOE's environmental restoration activities at the Hanford Site. This award implements elements of the DOE Five-Year Plan recognizing DOE's commitment to the participation of affected Indian tribes in the planning and implementation of the Five-Year Plan.

DOE has determined that the renewal on a noncompetitive basis is appropriate because the recipient is a unit of government and the activities to be supported are related to the performance of governmental functions within the jurisdiction of that unit of government, thereby precluding DOE provision of support to another entity. Since the award relates to agreements and treaties already made between the United State Government and YIN, it would clearly be inappropriate for DOE to consider funding any other entity to be responsible for carrying out these activities. DOE and the YIN will negotiate the final amount of the grant.

The funding level is not expected to be significantly higher than the current level.

FOR FURTHER INFORMATION CONTACT: Marji W. Parker, U.S. Department of Energy, Richland Field Office, P.O. Box 550, Richland, WA 99352, Telephone: (509) 376–2029.

Dated: January 10, 1992.

Robert D. Larson,

Director, Procurement Division, Richland Operations Office.

[FR Doc. 92–1419 Filed 1–17–92; 8:45 am]

BILLING CODE 6450–01–M

The Secretary's Hydrogen Technical Advisory Panel; Open Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770, as amended), notice is hereby given of the following advisory committee meeting:

Name: Hydrogen Technical Advisory Panel.

Date and Time: Thursday, February 13, 1992, 8:30 a.m.–1:00 p.m.

Place: Loews L'Enfant Plaza Hotel, Monet IV Room, 480 L'Enfant Plaza, Washington, DC 20585.

Contact: Russell Eaton, Designated Federal Official, 1000 Independence Avenue SW, Washington, DC 20585, Telephone: (202) 586–1506.

Purpose: The Hydrogen Technical Advisory Panel (HTAP) will advise the Secretary of Energy who has the overall management responsibility for carrying out the programs under the Matsunaga Hydrogen Research, Development, and Demonstration Program Act of 1990, Public Law 101–566. The Panel will review and make any necessary recommendations to the Secretary on the following items: (1) the implementation and conduct of programs required by the Act, (2) the economic, technological, and environmental consequences of the deployment of hydrogen production and use systems, and (3) the contents of the comprehensive 5-year program required by the Act.

Tentative Schedule

Thursday, February 13, 1992

8:30 a.m.—Welcome and Opening Remarks, J. Michael Davis, Assistant Secretary for Conservation and Renewable Energy, and Robert L. San Martin, Deputy Assistant Secretary for Utility Technologies
9:00 a.m.—Panel Introductions and Election of Panel Chairman, Russell Eaton, Designated Federal Official
9:30 a.m.—Discussion of the Hydrogen 5-year Program Plan, Kurt W. Klunder, Director, Office of Energy Management
10:00 a.m.—HTAP Discussions Regarding the Hydrogen 5-year Program Plan
10:45 a.m.—Break
11:00 a.m.—HTAP Discussions Regarding the Hydrogen 5-year Program Plan
1:00 p.m.—Public Comments Regarding the Hydrogen 5-year Program Plan
1:30 p.m.—Adjournment

PUBLIC PARTICIPATION: The meeting is open to the public. The Chairman of the HTAP is empowered to conduct the meeting in a fashion that will, in the Chairman's judgment, facilitate the orderly conduct of business.

Any member of the public who wishes to make an oral statement pertaining to agenda items should contact the Designated Federal Official at the address or telephone number listed above. Requests must receive before 3 p.m. (E.S.T.) Friday, February 7, 1992, and reasonable provision will be made to include the presentation during the public comment period. It is requested that oral presenters provide 15 copies of their statements at the time of their presentations.

Written testimony pertaining to agenda items may be submitted prior to the meeting. Written testimony must be received by the Designated Federal Official at the address shown above before 5 p.m. (e.s.t.) Friday, February 7, 1992, to assure that it is considered by Panel members during the meeting.

MINUTES: A transcript of the open, public meeting will be available for public review and copying approximately 30 days following the meeting at the Public Reading Room 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC between 9 a.m. and 4 p.m., Monday through Friday except Federal holidays.

Issued: Washington, DC, on: January 14, 1992.

Marcia L. Morris,

Deputy Advisory Committee Management Officer.

[FR Doc. 92–1420 Filed 1–17–92; 8:45 am]

BILLING CODE 6450–01–M

Federal Energy Regulatory Commission

[Docket Nos. ER92–244–000, et al.]

Madison Gas & Electric Co., et al., Electric Rate, Small Power Production, and Interlocking Directorate Filings

Take notice that the following filings have been made with the Commission:

1. Madison Gas & Electric Co.

[Docket No. ER92–244–000]

January 9, 1992.

Take noitice that on December 27, 1991, Madison Gas and Electric Company (MGE) tendered for filing with the Federal Energy Regulatory Commission an Agreement between it and Wisconsin Electric Power Company (WEPCO). MGE and WEPO request waiver of the notice requirements to permit the Agreement to become effective January 1, 1992.

MGE states that a copy of the filing has been provided to WEPCO and also to the Public Service Commission of Wisconsin.

Comment date: January 23, 1992, in accordance with Standard Paragraph E at the end of this notice.

2. El Paso Electric Co.

[Docket No. ER92–254–000]

January 9, 1992.

Take notice that on December 30, 1991, El Paso Electric Company (EPE) tendered for filing its Established Transmission Service Rate under the provision of the November 23, 1983 Revised Inland Power Pool Agreement (EPE requests that its Established Transmission Service Rate Become effective February 29 1992, sixty (60) days from filing.

Comment date: January 23, 1992, in accordance with Standard Paragraph E at the end of this notice.

3. Southwestern Electric Power Co.

[Docket No. ER92–247–000]

January 9, 1992.

Take notice that on Decembe 30, 1991, Southwestern Electric Power Company ("SWEPCO"), tendered for filing a Letter Agreement dated December 19, 1991, between SWEPCO and the City of Bentonville, Arkansas ("City").

The Letter Agreement amends the Power Supply Agreement between SWEPCO and the City dated December 28, 1990. Section 10.7 of the Power Supply Agreement contemplated that by December 31, 1991, SWEPCO and the City would have completed that by December 31, 1991, SWEPCO and the City would have completed negotiation of an amendment to the Power Supply Agreement that would have provided the City additional power supply planning flexibility and extended the primary term of the Power Supply Agreement. The Letter Agreement merely extends to January 31, 1992, the time in which the City and SWEPCO may complete negotiation of such an amendment.

Copies of the filing have been served upon the City and the Arkansas Public Service Commission.

Comment date: January 23, 1992, in accordance with Standard Paragraph E at the end of this notice.

4. Ohio Valley Electric Corp.

[Docket No. ER92-258-000]

January 9, 1992.

Take notice that on January 2, 1992, Ohio Valley Electric Corporation ("OVEC") tendered for filing a Transmission Agreement and a Transmission Scheduling Agreement, both between Louisville Gas and Electric Company ("Lousiville") and OVEC, along with its wholly-owned subsidiary, Indiana-Kentucky Electric Corporation, (together "Transmitting Companies").

The Transmission Agreement is an agreement under which Transmitting Companies could supply to Louisville, at hourly, daily, weekly or monthly rates, transmission service over Transmitting Companies' facilities. This transmission service would be provided between certain interconnection and delivery points. The Transmission Scheduling Agreement provides that, whenever Louisville arranges for certain sales of power and associated energy by means of a particular interconnection, Louisville must utilize the Transmission Agreement for a specified portion of the power and associated energy involved in the transmission.

OVEC has requested an effective date of January 1, 1992.

Copies of the filing were served upon Louisville, the Public Service Commission of Kentucky, The Cincinnati Gas & Electric Company and Indiana Michigan Power Company.

Comment date: January 23, 1992, in accordance with Standard Paragraph E at the end of this notice.

5. GEO East Mesa Limited Partnership (GEM 1 and GEM 2 Facilities)

[Docket Nos. QF88-202-003 and QF88-203-003]

January 9, 1992.

Take notice that on December 30, 1991, GEO East Mesa Limited Partnership submitted for filing its compliance report pursuant to the Commission's order dated May 22, 1991.

Comment date: January 22, 1992, in accordance with Standard Paragraph E at the end of this notice.

6. Duke Power Co.

[Docket No. ER92-250-000]

January 9, 1992.

Take notice that Duke Power Company (Duke Power) tendered for filing on December 30, 1991, a supplement to the Company's Electric Power Contract with the Commissioners of Public Works of the City of Greenwood. Duke Power states that this contract is on file with the commission and has been designated Duke Power Company Rate Schedule FERC No. 10.

Duke Power further states that the Company's contract supplement, made at the request of the customer and with agreement obtained from the customer, provides for reduced contract capacity as follows: Delivery Point No. 3 with a contracted demand of 8500 kW.

Duke Power indicates that this supplement also includes an estimate of sales and revenue for twelve months immediately succeeding the effective date. Duke Power proposes an effecive date of January 22, 1991.

According to Duke Power, copies of this filing were mailed to Mr. Steve D. Reeves, Jr., Manager, Commissioners of Public Works, P.O. Box 549, Greenwood, SC 29648 and the S.C. Public Service Commission.

Comment date: January 23, 1992, in accordance with Standard Paragraph E at the end of this notice.

7. The Washington Water Power Co.

[Docket No. ER92-238-000]

January 9, 1992.

Take notice that on December 12, 1991, The Washington Water Power Company (WWP), tendered for filing with the Federal Energy Regulatory Commission pursuant to 18 CFR part 35, a Capacity Sale Agreement between The Washington Water Power Company (WWP) and Portland General Electric (PGE). WWP states that under the terms of the Agreement, WWP will sell PGE 100 MW of capacity for the period March 1, 1992 to October 31, 1994. WWP requests that the Commission accept the Agreement for filing, effective as of March 1, 1992.

A copy of the filing was served upon Portland General Electric.

Comment date: January 23, 1992, in accordance with Standard Paragraph E end of this notice.

8. Arkansas Power & Light Co.

[Docket No. ER92-246-000]

January 9, 1992.

Take notice that Arkansas Power & Light Company (AP&L) tendered for filing on December 30, 1991, a proposed Agreement (Agreement) between AP&L and The City of Campbell, MO (City). The proposed Agreement modifies existing Agreements for the City's power requirements. The proposed Agreement provides Off-Season demand, incorporates a minimum protection service billing demand and extends the term of peaking power service until December 31, 2000.

The proposed Agreement will increase revenue to AP&L in early years and effect a savings for the city over its term on a net present-value basis compared to assumed alternatives.

Comment date: January 23, 1992, in accordance with Standard Paragraph E at the end of this notice.

9. Entergy Power, Inc.

[Docket No. ER92-255-000]

January 9, 1992.

Take notice that Entergy Power, Inc. (Entergy Power), on December 30, 1991, tendered for filing a Notice of Cancellation for the sale of replacement energy to the Tennessee Valley Authority.

Entergy Power requests an effective date of August 31, 1991 for the Notice of Cancellation. Entergy Power requests waiver of the Commission's notice requirements under § 35.15 of the Commission's Regulations.

Comment date: January 23, 1992, in accordance with Standard Paragraph E at the end of this notice.

10. Pennsylvania Power & Light Co.

[Docket No. ER91-600-000]

January 9, 1992.

Take notice that Pennsylvania Power & Light Company (PP&L) on December 31, 1991, tendered for filing an executed Second Supplement to System Power Purchase Agreement, dated as of December 19, 1991, between PP&L and Long Island Lighting Company (LILCO). (Second Supplement). The System Power Purchase Agreement was previously submitted for Commission approval in this docket on August 22, 1991. The System Power Purchase Agreement sets forth the terms and conditions under which PP&L will sell short-term, interruptible electric power from PP&L's electric generating system to LILCO. The Second Supplement reduces the maximum hourly Energy Reservation Charge for system power scheduled by LILCO, and also provides for maximum daily and weekly total Energy Reservation Charges.

PP&L requests waiver of the notice requirements of section 205 of the Federal Power Act and § 35.3 of the Commission's Regulations so that the proposed rate schedule can be made effective as of August 26, 1991.

Comment date: January 23, 1992, in accordance with Standard Paragraph E at the end of this notice.

11. Wisconsin Public Service Co.

[Docket No. EL92-12-000]

January 9, 1992.

Take notice that Wisconsin Public Service Company ("WPSC") on December 31, 1991 tendered for filing a petition for permission to amend its fuel

adjustment clause for customers under its W–1, W–2 and W–3 rates and the proposed fuel clause amendments.

The customers affected by WPSC's filing are:

Customer	Rate category	Rate schedule or tariff designation
Alger Delta Electric Assoc	W–1	Tariff, Original Vol 2 Service Agreement #8
Washington Island Electric	W–1	Tariff, Original Vol 2 Service Agreement #5
Village of Daggett	W–1	Tariff, Original Vol 2 Service Agreement #3
City of Stephenson	W–1	Tariff, Original Vol 2 Service Agreement #4
Village of Stratford	W–1	Tariff, Original Vol 2 Service Agreement #6
Wisconsin Public Power, Inc. System	W–1	Tariff, Original Vol 2 Service Agreement #1
City of Wisconsin Rapids	W–1	Tariff, Original Vol 2 Service Agreement #7
Consolidated Water Power Co	W–3	Tariff, Original Vol 3 Service Agreement #1
City of Manitowoc	W–2	Tariff, Original Vol 1 Service Agreement #5
City of Marshfiled	W–1	Tariff, Original Vol 2 Service Agreement #9

The Alger Delta Electric Association, the Village of Daggett and the City of Stephenson are located in Michigan. The other customers are located in Wisconsin.

WPSC requests that the Commission waive the provisions of 18 CFR 35.14 of its regulations to the extent necessary to permit recovery of the buyout costs through the fuel clause and that it waive its notice requirements to allow the change to become effective on January 1, 1992. Alternatively, WPSC requests that the Commission allow the change to become effective on March 1, 1992, 60 days from the date of filing. WPSC states that the filing has been served on the affected customers and on the public service commissions of Michigan and Wisconsin and that the filing has been posted as required by the Commission's regulations.

Comment date: January 28, 1992, in accordance with Standard Paragraph E at the end of this notice.

12. Duke Power Co.

[Docket No. ER92–253–000]

January 9, 1992.

Take notice that Duke Power Company (Duke Power) tendered for filing on December 30, 1991, a supplement to the Company's Electric Power Contract with the city of Seneca—Seneca Light and Water. Duke Power states that this contract is on file with the Commission and has been designated Duke Power Company Rate Schedule FERC No. 10.

Duke Power further states that the Company's contract supplement, made at the request of the customer and with agreement obtained from the customer, provides for the following additional delivery: Delivery Point No. 2 with a contracted demand of 12,000 kW.

Duke Power indicates that this supplement also includes an estimate of sales and revenue for twelve months immediately succeeding the effective date. Duke Power proposes an effective date of April 24, 1991.

According to Duke Power, copies of this filing were mailed to Mr. Tommy D. Grant, Director of Utilities, Seneca Light and Water Plant, Seneca, SC 29679; and the S. C. Public Utilities Commission.

Comment date: January 23, 1992, in accordance with Standard Paragraph E at the end of this notice.

13. Duke Power Co.

[Docket No. ER92–249–000]

January 9, 1992.

Take notice that Duke Power Company (Duke Power) tendered for filing on December 30, 1991, a supplement to the Company's Electric Power Contract with the Commissioners of Public Works of the City of Greenwood. Duke Power states that this contract is on file with the Commision and has been designated Duke Power Company Rate Schedule FERC No. 10.

Duke Power further states that the Company's contract supplement, made at the request of the customer's and with agreement obtained from the customer, provides for increased capacity as follows: Delivery Point No. 4 with a contacted demand of 13,000 kW.

Duke Power indicates that this supplement also incudes an estimate of sales and revenue for twelve months immediately succeeding the effective date. Duke Power proposes an effective date of May 22, 1991.

According to Duke Power, copies of this filing were mailed to Mr. Steve D. Reeves, Jr., Manager, Commissioners of Public Works, P.O. Box 549, Greenwood, SC 29648 and the S. C. Public Service Commission.

Comment date: January 23, 1992, in accordance with Standard Paragraph E at the end of the notice.

14. Indiana-Kentucky Electric Corp.

[Docket No. EC92–7–000]

January 8, 1992.

Take notice that on January 2, 1992, Indiana-Kentucky Electric Corporation ("IKEC") filed an application for an order under section 203 of the Federal Power Act authorizing IKEC to lease certain facilities to Louisville Gas and Electric Company ("Louisville"). The facilities that IKEC would lease to Louisville consist of a portion of a bus, along with associated hardware, located in the switchyard of IKEC's Clifty Creek Plant. The proposed lease would be on the terms set forth in a lease Agreement dated December 30, 1991 between IKEC and Louisville.

IKEC submitted with, and in support of, the application the information that part 33 of the Commission's regulations requires.

Comment date: January 27, 1992, in accordance with Standard Paragraph E at the end of the notice.

15. Duke Power Co.

[Docket No. ER92–252–000]

Januray 9, 1992.

Take notice that Duke Power Company (Duke Power) tendered for

filing on December 30, 1991, a supplement ot the Company's Electric Power Contract with the City of Seneca-Seneca Light and Water, Seneca, SC. Duke Power states that this contract is on file with the Commission and has been designated Duke Power Company Rate Schedule FERC No. 10.

Duke Power further states that the Company's contract supplement, made at the request of the customer and with agreement obtained from the customer, provides for reduced contract capacity as follows: Delivery Point No. 1 with a contracted demand of 14,000 kW.

Duke Power indicates that this supplement also includes an estimate of sales and revenue for twelve months immediately succeding the effective date. Duke Power proposes an effective date of May 22, 1991.

According to Duke Power, copies of this filing were mailed to Mr. Tommy D. Grant, Director of Utilities, Seneca Light and Water Plant, Seneca, SC 29679; and the S.C. Public Service Commission.

Comment date: January 23, 1992, in accordance with Standard Paragraph E end of this notice.

16. Ultrapower-Malaga Fresno

[Docket No. QF86-372-003]

January 8, 1992.

On January 3, 1991, Ultrapower-Malaga Fresno tendered for filing an amendment to its filing in this docket.

The amendment clarifies the ownership structure of the small power production facility.

Comment date: January 22, 1992, in accordance with Standard Paragraph E at the end of this notice.

17. Public Service Company of New Mexico

[Docket No. ER92-260-000]

January 10, 1992.

Take notice that on January 6, 1992, Public Service Company of New Mexico (PNM) tendered for filing an Interconnection (including associated Service Schedules C, E and F) between PNM and the City of Anaheim, California (Anaheim). The Interconnection Agreement is entered into in connection with the proposed purchase by Anaheim from PNM of an interest in Unit 4 of the San Juan Generating Station. It provides for the indirect interconnection of PNM's and Anaheim's electric systems, for the exchange of power and energy between the Parties' systems and for the transmission of Anaheim's power and energy associated with its purchase of the interest in San Juan Unit 4.

PNM requests as effective date of May 28, 1992 and any required waiver of applicable notice requirements.

Copies of the filing have been served upon Anaheim and the New Mexico Public Service Commission.

Comment date: January 24, 1992, in accordance with Standard Paragraph E at the end of this notice.

18. Felton J. Capel

[Docket No. ID-2659-000]

January 10, 1992.

Take notice that on December 23, 1991, Felton J. Capel (Applicant) tendered for filing an application under section 305(b) of the Federal Power Act to hold the following positions:

Director—Carolina Power & Light Company
Director—Wachovia Corporation of North Carolina
Director—Wachovia Bank of North Carolina, National Association

Comment date: January 28, 1992, in accordance with Standard Paragraph E at the end of this notice.

19. Estelle C. Lee

[Docket No. ID-2660-000]

January 10, 1992.

Take notice that on December 23, 1991, Estelle C. Lee (Applicant) tendered for filing an application under section 305(b) of the Federal Power Act to hold the following positions:

Director—Carolina Power & Light Company
Director—Wachovia Corporation of North Carolina
Director—Wachovia Bank of North Carolina, National Association

Comment date: January 28, 1992, in accordance with Standard Paragraph E at the end of this notice.

20. Canal Electric Co.

[Docket No. ER92-256-000]

January 10, 1992.

Take notice that on December 31, 1991 Canal Electric Company (Canal) tendered for filing, pursuant to § 35.13 of the Commission's regulations, certain revisions to a Power Contract, as amended, by and between itself and Cambridge Electric Light Company (Cambridge) and Commonwealth Electric Company (Commonwealth) which revise section 4(b)(xvi) Decommissioning Expense. Said revisions are in accordance with a Partial Offer of Settlement approved by the Commission on November 13, 1991 and are filed herewith in the Fourth Amendment to the Power Contract, dated December 19, 1991.

Canal further states that copies of the tendered filing have been served upon the Massachusetts Department of Public Utilities, the Municipal Light Department of the Town of Belmont and the Massachusetts Attorney General.

Comment date: January 24, 1992, in accordance with Standard Paragraph E at the end of this notice.

21. Madison Gas & Electric Co.

[Docket No. ER92-131-000]

January 10, 1992.

Take notice that December 20, 1991, Madison Gas & Electric Company (Madison) tendered for filing an amendment in the above-referenced docket.

Comment date: January 24, 1992, in accordance with Standard Paragraph E at the end of this notice.

22. Duke Power Co.

[Docket No. ER92-251-000]

January 10, 1992.

Take notice that Duke Power Company (Duke Power) tendered for filing on December 30, 1991, a supplement to the Company's Electric Power Contract with the Town of Due West, SC. Duke Power states that this contract is on file with the Commission and has been designated Duke Power Company Rate Schedule FERC No. 10.

Duke Power further states that the Company's contract supplement, made at the request of the customer and with agreement obtained from the customer, provides for increased capacity as follows: Delivery Point No. 1 with a contracted demand of 2,600 kW.

Duke Power indicates that this supplement also includes an estimate of sales and revenue for twelve months immediately succeeding the effective date. Duke Power proposes an effective date of October 23, 1991.

According to Duke Power, copies of this filing were mailed to Mr. John A. Simpson, Mayor, Town of Due West, Due West, SC 29639 and the South Carolina Public Service Commission.

Comment date: January 24, 1992, in accordance with Standard Paragraph E at the end of this notice.

23. Canal Electric Co.

[Docket No. ER90-245-000]

January 10, 1992.

Take notice that on December 6, 1991, Canal Electric Company (Canal) submitted for filing a third amendment to the Seabrook Power Contract and a compose conformed copy of the Seabrook Power Contract. Such amendment has been executed pursuant to the Commission's letter order dated

November 13, 1991 approving an Offer of Settlement between Canal and the Town of Belmont. Canal is complying with said letter order by revising the Seabrook Power Contract to conform to the language approved in the Offer of Settlement.

Copies of the tendered filing have been served by Canal upon the Commission's staff, the Massachusetts Attorney General, the Town of Belmont and the Department of Public Utilities.

Comment date: January 21, 1992, in accordance with Standard Paragraph E at the end of this notice.

24. Western Systems Power Pool

[Docket No. ER91-195-003]

January 10, 1992.

Take notice that on January 6, 1992, Western Systems Power Pool tendered for filing its compliance filing in compliance with the Commission's order issued June 27, 1991.

Comment date: January 24, 1992, in accordance with Standard Paragraph E at the end of this notice.

25. Cogentrix Eastern Carolina Corp.

[Docket No. QF83-278-005]

January 10, 1992.

On December 26, 1991, Cogentrix Eastern Carolina Corporation (Applicant), of 9405 Arrowpoint Boulevard, Charlotte, North Carolina 28273-8110, submitted for filing an application for recertification of a facility as a qualifying cogeneration facility pursuant to § 292.207 of the Commissions' Regulations. No determination has been made that the submittal constitutes a complete filing.

The topping-cycle cogeneration facility is located in Lumberton, North Carolina. The facility consists of two stoker-type boilers and an extraction/condensing steam turbine generator. Thermal energy recovered from the facility is sold to West Point Pepperell textile plant for process use. The primary energy source is coal. The maximum net electric power production capacity of the facility is approximately 31.7 MW. Commercial operation of the facility commenced in the first quarter of 1986.

The certification of the facility was originally issued on December 9, 1983 [25 FERC ¶ 62,335 (1983)] and a recertification was issued on December 11, 1985 [33 FERC ¶ 62,347 (1985)]. The instant recertification is requested by the Applicant to reflect the termination of the sale/leaseback arrangement and related change in the ownership of the facility. All other facility characteristics remain unchanged as described in the previous recertification.

Comment date: February 20, 1992, in accordance with Standard Paragraph E at the end of this notice.

26. Grayling Generating Station Limited Partnership

[Docket No. QF87-277-003]

January 10, 1992.

On December 19, 1991, Grayling Generating Station Limited Partnership (Applicant), c/o CMS Generation Grayling Company, 330 Town Center Drive, Suite 1000, Dearborn, Michigan 48126, submitted for filing an application for recertification of a facility as a qualifying small power production facility pursuant to § 292.207 of the Commission's Regulations. No determination has been made that the submittal constitutes a complete filing.

The small power production facility will be located in the Township of Grayling, Crawford County, Michigan. The facility will consist of a stoker-type boiler and a steam turbine generator. The primary energy source will be biomass in the form of wood and wood waste. The net electric power production capacity of the facility will be approximately 34 MW. Installation was scheduled to begin in October, 1990.

The certification of the facility was originally issued on July 17, 1987 [40 FERC ¶ 62,042 (1987)] and a recertification was issued on February 26, 1990 [50 FERC ¶ 62,117 (1990)]. The instant recertification is requested by the Applicant to reflect changes in the partnership agreement of the Applicant which affect the "stream of benefits" of the respective partners. All other facility characteristics remain unchanged as described in the previous recertification.

Comment date: February 20, 1992, in accordance with Standard Paragraph E at the end of this notice.

27. The Toledo Edison Co.

[Docket No. ER92-243-000]

January 9, 1992.

Take notice that on December 26, 1991, The Toledo Edison Company ("Toledo Edison") tendered for filing a Resale Service Rate Agreement effective as of January 1, 1992 between Toledo Edison and Southeastern Michigan Rural Electric Cooperative ("Southeastern Michigan").

Toledo Edison states that Southeastern Michigan presently purchases firm power under its FERC Electric Tariff No. 32 which terminates under its own provisions on December 31, 1991. Under the Resale Service Rate Agreement, Toledo Edison will continue to sell to Southeastern Michigan all of the power and energy needed by Southeastern Michigan to serve its requirements.

Toledo Edison states that the rate set forth in the Resale Service Rate Agreement is a negotiated rate betwen Toledo Edison and Southeastern Michigan. The charges under the Resale Service Rate Agreement reflect a monthly minimum bill of 700 KVA in the first two years of the Agreement. Toledo Edison states that the Resale Service Rate Agreement will help Southeastern Michigan become competitive in its source of power.

Toledo Edison has requested waiver of certain provisions of the Commission's regulations in order to permit the Resale Service Rate Agreement without suspension or modification to be made effective on January 1, 1992.

Comment date: January 23, 1992, in accordance with Standard Paragraph E at the end of this notice.

28. Ultrapower-Rocklin

[Docket No. QF86-373-003]

January 8, 1992.

On January 3, 1991, Ultrapower-Rocklin tendered for filing an amendment to its filing in this docket.

The amendment clarifies the ownership structure of the small power production facility.

Comment date: January 22, 1992, in accordance with Standard Paragraph E at the end of this notice.

29. Atlantic City Electric Co.

[Docket No. ER91-335-001]

January 8, 1992.

Take notice that on January 3, 1992, Atlantic City Electric Company tendered for filing its refund compliance report in the above-referenced docket.

Comment date: January 22, 1992, in accordance with Standard Paragraph E at the end of this notice.

30. Entergy Services, Inc.

[Docket No. ER92-225-000]

January 8, 1992.

Take notice that Entergy Services, Inc. (ESI), as agent for Arkansas Power & Light Company (AP&L), Louisiana Power & Light Company (LP&L), Mississippi Power & Light Company (MP&L), and New Orleans Public Service Inc. (NOPSI), on December 16, 1991 tendered for filing a contract for Purchases of Economic Energy with Jacksonville Electric Authority (JEA).

ESI requests an effective date of November 19, 1991 for the contract for Purchasing of Economic Energy. ESI requests waiver of the Commission's

notice requirements under § 35.11 of the Commission's regulations.

Comment date: January 22, 1992, in accordance with Standard Paragraph E at the end of this notice.

31. Newport Electric Corp.

[Docket No. ER91-301-000]

January 8, 1992.

Take notice that on December 31, 1991, Montaup Electric Company ("Montaup") filed a correction to its original filing in this docket to its M-11, M-12 and M-13 fuel adjustment clauses incorporating the allocation method required by the Staff effective as of May 1, 1990. Montaup requests that the single set of fuel clause revisions tendered with the original filing be disregarded and that the three sets of enclosed rate schedules be made effective for the M-11, M-12 and M-13 effective periods beginning May 1, 1990, August 19, 1990 and May 7, 1991, respectively.

Comment date: January 22, 1992, in accordance with Standard Paragraph E at the end of this notice.

32. Alabama Power Co.

[Docket No. ER92-257-000]

January 8, 1992.

Take notice that on December 31, 1991, Alabama Power Company tendered for filing proposed changes to the Billing and Payment provision of its FERC Electric Tariff, Original Volume No. 1, pertaining to full-requirements cooperative customers. The effect of this change is to make reference to the applicable agreement between Alabama Power Company and the Southeastern Power Administration for purposes of determining the customers' proper amount of capacity from SEPA. The Company has requested an effective date of February 1, 1992. Copies of the filing were served upon the affected cooperative customers, the Alabama Public Service Commission and the Southeastern Power Administration.

Comment date: January 22, 1992, in accordance with Standard Paragraph E at the end of this notice.

33. Niagara Mohawk Power Corp.

[Docket No. ER92-184-000]

January 8, 1992.

Take notice that on December 24, 1991, Niagara Mohawk Power Corporation ("Niagara Mohawk"), tendered for filing an amendment to its filing dated November 4, 1991 regarding a proposed change to Niagara Mohawk Rate Schedule No. 178, an agreement between Niagara Mohawk and Lake View, Inc. ("Lake View").

Comment date: January 22, 1992, in accordance with Standard Paragraph E at the end of this notice.

34. Northern States Power Co. (Minnesota)

[Docket No. ER92-226-000]

January 8, 1992.

Take notice that on December 16, 1991, Northern States Power Company (Minnesota) and Northern States Power Company (Wisconsin) jointly tendered for filing revised Exhibits VII, VIII and IX to the Agreement to Coordinate Planning and Operations and Interchange Power and Energy Between Northern States Power Company (Minnesota) and Northern States Power Company (Wisconsin).

Exhibit VII sets forth the specification of the rate of return on common equity to determine the overall cost of capital. The return on common equity for calendar year 1992 is the FERC generic rate of return effective November 1, 1991. A statement of the impact of the return on common equity on each Company has been filed.

Exhibit VIII sets forth the specification of average monthly coincident peak demands for calendar year 1992 for each of the Companies. A statement of the impacts of these coincident peak demands on each Company has been filed. These coincident peak demands were determined upon three year data consisting of 18 months actual and 18 months projected. The change from the use of the average of the 12 monthly peak demand allocation method to the use of the 36 months was approved in Docket No. ER87-279-000.

Exhibit IX sets forth a specification of depreciation rates certified by the Minnesota Public Utilities Commission and the Wisconsin Public Service Commission for NSP (Minnesota) and NSP (Wisconsin). A statement of the impact of the depreciation rates of each company has been filed.

The NSP Companies request an effective date of January 1, 1992, for this filing. Copies of the filing letter and revised Exhibits VII, VIII and IX have been served upon the wholesale and wheeling customers of the Companies. Copies of the filing have been mailed to the State Commissions of Michigan, Minnesota, North Dakota, South Dakota and Wisconsin.

Comment date: January 22, 1992, in accordance with Standard Paragraph E at the 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 party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92-1389 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

[Project Nos. 2422-004, et al.]

Hydroelectric Applications (James River-New Hampshire Electric, Inc., et al.); Notice of Applications

Take notice that the following hydroelectric applications have been filed with the Commission and are available for public inspection:

1a. *Type of application:* New Major License.

b. *Project No.:* 2422-004.

c. *Date filed:* October 11, 1991.

d. *Applicant:* James River-New Hampshire Electric, Inc.

e. *Name of project:* Sawmill Project.

f. *Location:* On the Androscoggin River, Coos County, New Hampshire.

g. *Filed pursuant to:* Federal Power Act 16 U.S.C. 791(a)-825(r).

h. *Applicant contact:* Mr. George W. Hill, James River-New Hampshire Electric, Inc., 650 Main Street, Berlin, NH 03570-2489, (603) 752-4600.

i. *FERC contact:* Mary Golato (202) 219-2804.

j. *Deadline date:* March 3, 1992.

k. *Status of environmental analysis:* This application is not ready for environmental analysis at this time—see attached paragraph E.

1. *Description of project:* The proposed project's principal features consist of the following: (1) an existing 720-foot-long dam; (2) an existing impoundment with a surface area of about 72.5 acres, a storage capacity of about 620 acre-feet, and a normal pool elevation of 1,094.5 feet mean sea level (msl); (3) an existing powerhouse equipped with four turbine-generators having a total rated capacity of 3,174 kilowatts; (4) an existing tailrace

channel; (5) an existing transmission line of about 1,800 feet long; and (6) appurtenant facilities. The owner of the dam is the James River-New Hampshire Electric Company.

The applicant is not proposing any changes to the existing project works as licensed. The applicant estimates the average annual generation would be 17.85 gigawatthours 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 December 31, 1993, the applicant's estimated net investment in the project would amount to $2,158,000.00.

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:* B1 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) 219–1371. A copy is also available for inspection and reproduction at Mr. George W. Hill, James River-New Hampshire Electric, Inc., 650 Main Street, Berlin, NH 03570–2489, (603) 752–4600.

2a. *Type of filing:* Report on Barrier Net Effectiveness and Plan for Mitigation of Fish Mortality.

b. *Project No:* 2680–017 & –018.

c. *Date filed:* December 26, 1991.

d. *Licensee:* Consumers Power Co. and Detroit Edison Co.

e. *Name of project:* Ludington Pumped Storage Project.

f. *Location:* The eastern shore of Lake Michigan in the City of Ludington, Mason County, Michigan.

g. *Filed pursuant to:* FERC Order Requiring the Installation and Monitoring of Temporary Barrier Nets, issued September 30, 1988.

h. *Licensee contact:* Mr. William M. Lange, Assistant General Counsel, Consumers Power Corp., 1016 16th Street, NW., Washington, DC 20036, (202) 376–1759.

i. *FERC contact:* Dr. John M. Mudre, (202) 219–1208.

j. *Comment date:* February 26, 1992.

k. *Description of filing:* Consumers Power Company and Detroit Edison Company filed this report on the effectiveness of a barrier net for reducing entrainment mortality of fishes at the Ludington Pumped Storage Project. This report describes the effectiveness of the net during 1991, the third year of a three-year study aimed at optimizing and documenting the performance of the barrier net in excluding fishes from the vicinity of the project intakes.

The filing also contains the licensees' updated recommendations for permanent mitigative measures at the project. The licensee previously filed (on February 1, 1989) mitigation recommendations pursuant to the FERC Order Modifying a Mitigative Plan for Turbine Mortality, issued August 11, 1987. The recommendations contained in the instant filing are based on information gained from the three-year study of net effectiveness and constitute the licensees' current plan for mitigation of fish losses at the project.

1. *This notice also consists of the following standard paragraphs:* B, C, and D2.

3a. *Type of application:* Surrender of License.

b. *Project No.:* 9920–009.

c. *Date filed:* November 12, 1991.

d. *Applicant:* The Village of St. Johnsville.

e. *Name of project:* Scudder Falls.

f. *Location:* On Zimmerman Creek in Mongomery County, New York.

g. *Filed pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant contact:* Brian R. Haak, 16 Washington Street, St. Johnsville, NY 13452, (518) 568–2221.

i. *FERC contact:* Charles T. Raabe (202) 219–2811.

j. *Comment date:* February 27, 1992.

k. *Description of project:* The proposed project would have consisted of: (1) a 1-foot-high diversion structure across ¾ of Zimmerman Creek, 30 feet from the edge of the top of a ledge rock falls; (2) a 300-foot-long, 30-inch-diameter steel penstock; (3) a 12-foot by 12-foot masonry powerhouse housing one semi-axial flow turbine with a 150-kW generator, and located 160 feet from the base of the falls; (4) the 0.48-kV generator leads; (5) the 0.48/13.2-kV transformer; (6) the 1,320-foot-long, 13.2-kV transmission line; and (7) appurtenant facilities.

Licensee states that it has determined to abandon this project due to its financial feasibility. The license was issued November 27, 1987, and would have expired October 31, 2027. License states that no construction has occurred and the proposed site remains unaltered.

1. *This notice also consists of the following standard paragraphs:* B, C and D2.

4a. *Type of application:* Preliminary permit.

b. *Project No.:* 11092–000.

c. *Date filed:* February 21, 1991.

d. *Applicant:* Sacramento Municipal Utility District.

e. *Name of project:* Upper American River Project Expansion.

f. *Location:* On South Fork American River, Silver Fork American River, and Silver Creek, a tributary of the South Fork American River; in El Dorado County, California. Sections 33 & 34, T12N, R14E; Sections 1, 2, 3, 10 & 11, T11N, R14E; Sections 3, 4, 17, 21, 22, & 24–28, T10 & 11N, R16E; Section 9, 10, 15–18, 22–24, T11N, R15 & 16E; Sections 19 & 30, T11N, R12E.

g. *Filed pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant contact:* Mr. S. David Freeman, Sacramento Municipal District, 6201 S Street, P.O. Box 15830, Sacramento, CA 95819, (916) 452–3211.

i. *FERC contact:* Mr. Surender M. Yepuri, P.E., (202) 219–2847.

j. *Comment date:* March 5, 1992.

k. *Competing application:* Project No. 11017–000, filed October 3, 1991.

l. *Description of project:* The proposed multipurpose project, consisting of the four interrelated components, would collectively enhance applicants's licensed Upper American River Project No. 2101—expand the water supply, operational flexibility, power regulation capabilities, and load following capabilities.

(i) Jones Fork Pump-Back Facility—This component of the proposed project would use applicant's existing Union Valley dam and reservoir and Ice House dam and reservoir and would consist of: (1) a new Lower Ice House dam and reservoir; (2) a 18,507-foot-long water conductor system; (3) an underground powerhouse containing three generating/pumping units with a total rated capacity of 400 MW; (4) a 20,000-foot-long, 230-kV transmission line connecting to the applicant's existing line; and (5) appurtenant structures.

(ii) Lower Ice House Reservoir Addition—This component of the proposed project, an alternate to the existing Ice House dam and reservoir, would consist of: (1) a 270-foot-high concrete-faced rockfill main dam, with a crest elevation of 5,460 feet msl; (2) a 60-foot-high saddle dam, with a crest elevation of 5,460 feet msl; (3) a spillway section with two 65-foot-wide, 10-foot-high radial gates; (4) a 221,200 acre-foot reservoir at elevation 5,450 feet msl; and (5) appurtenant structures.

(iii) South Fork Diversion—This component of the proposed project, diverting water from the South Fork of American River and the Silver Fork of South Fork American River and their tributaries and conveying it into the Ice House Reservoir, would consist of: (1) a

80-foot-high dam (Sherman Diversion) on Silver Fork with a crest elevation of 5,580 feet msl; (2) a 9-foot-diameter, 2.5-mile long pipeline conveying water from the Sherman Diversion to Forni Diversion; (3) a 13.5-foot-diameter, 5.3-mile-long tunnel (Forni Tunnel) (4) a 60-foot-high concrete dam (Forni Diversion) on South Fork American River with a crest elevation of 5,555 feet msl; and (5) appurtenant structures.

(iv) Iowa Hill Pumped Storage Facility—This component of the proposed project would use the existing Slab Creek dam and reservoir and would consist of: (1) an earthfill ring dam, with spillway; (2) a 4,200-foot-long water conductor system; (3) an underground powerhouse containing three generator/motor units with a total rated capacity of 400 MW; (4) a 7,000-foot-long, 230-kV transmission line connecting to the applicant's existing line; and (5) appurtenant structures.

The applicant estimates an increase in the average annual generation from the Jones Fork Pump-Back Facility and/or the Iowa Hill Pumped Storage Facility of 520 GWh, and the cost of the work to be performed under the permit to be $5,000,000.

m. *This notice also consists of the following standard paragraphs:* A8, A10, B, C, and D2.

5a. *Type of application:* Preliminary permit.

b. *Project No.:* 11205–000.

c. *Date filed:* November 19, 1991.

d. *Applicant:* Century Energy Corp.

e. *Name of project:* David D. Terry Lock and Dam.

f. *Location:* On the Arkansas River, near Little Rock, Pulaski County, Arkansas.

g. *Filed pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant contact:* Mr. Gene N. Washburn, 406 West South Street, Benton, Arkansas 72015, (501) 778–0786.

i. *FERC contact:* Michael Dees (202) 219–2807.

j. *Comment date:* February 28, 1992.

k. *Description of project:* The proposed project would utilize the existing Corps of Engineers' David D. Terry Lock and Dam and reservoir and would consist of: (1) an approach channel; (2) a proposed powerhouse 240 feet by 154 feet housing hydropower units with a total capacity of 33.4 MW; (3) a proposed tailrace (4) a proposed 115-kV transmission line three miles long; and (5) appurtenant facilities. The estimated annual energy production is 155 GWh. Project power would be sold to Arkansas Power and Light Company. Applicant estimates that the cost of the work to be performed under the preliminary permit would be $1,030,000.

l. *This notice also consists of the following standard paragraphs:* A5, A7, A9, A10, B, C, and D2.

6a. *Type of application:* Preliminary permit.

b. *Project No.:* 11206–000.

c. *Date filed:* November 19, 1991.

d. *Applicant:* Century Energy Corp.

e. *Name of project:* Lock and Dam No. 5.

f. *Location:* On the Arkansas River, near Pine Bluff, Jefferson County, Arkansas.

g. *Filed pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant contact:* Mr. Gene N. Washburn, 406 West South Street, Benton, Arkansas 72015, (501) 778–0786.

i. *FERC contact:* Michael Dees (202) 219–2807.

j. *Comment date:* February 24, 1992.

k. *Description of project:* The proposed project would utilize the existing Corps of Engineers' Lock and Dam No. 5 and reservoir and would consist of: (1) an approach channel; (2) a proposed powerhouse 234 feet by 147 feet housing hydropower units with a total capacity of 33.4 MW; (3) a proposed tailrace (4) a proposed 115-kV transmission line five miles long; and (5) appurtenant facilities. The estimated annual energy production is 123 GWh. Project power would be sold to Arkansas Power and Light Company. Applicant estimates that the cost of the work to be performed under the preliminary permit would be $1,030,000.

l. *This notice also consists of the following standard paragraphs:* A5, A7, A9, A10, B, C, and D2.

7a. *Type of application:* Preliminary permit.

b. *Project No.:* 11207–000.

c. *Date filed:* November 19, 1991.

d. *Applicant:* Century Energy Corp.

e. *Name of project:* Emmet Sanders.

f. *Location:* Four miles east of Pine Bluff, Arkansas, at mile 66.0 of the McClellan-Kerr Arkansas River Navigation System, Jefferson County, Arkansas.

g. *Filed pursuant to:* Federal Power Act 16 U.S.C. 791 (a)–825(r).

h. *Applicant contact:* Mr. Gene N. Washburn, Century Energy Corp., 406 West South Street, Benton, AR 72015, (501) 778–0786.

i. *FERC contact:* Mary Golato (dt) (202) 219–2804.

j. *Comment date:* February 24, 1992.

k. *Description of projects:* The proposed project would utilize the existing U.S. Corps of Engineers dam and would consist of: (1) an existing approach channel; (2) a proposed powerhouse containing four bulb-type units with an installed capacity of 26,800 kilowatts; (3) a proposed tailrace; (4) a proposed 5-mile-long transmission line; and (5) appurtenant facilities. The proposed project would have an average annual generation of 123,000,000 kilowatthours. The applicant estimates that the cost of the studies under permit would be $1,030,000.

l. *This notice also consists of the following standard paragraphs:* A3, A7, A9, A10, B, C, & D2.

8a. *Type of application:* Preliminary permit.

b. *Project No.:* 11211–000.

c. *Date filed:* November 29, 1991.

d. *Applicant:* Logway Land Corp.

e. *Name of project:* J.J. Rogers.

f. *Location:* On the West Branch of the AuSable River in the Town of Jay, Essex County, New York.

g. *Filed pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant contact:* Rodney Estes, Green Street, Au Sable Forks, NY 12912, (518) 647–5889.

i. *FERC contact:* Charles Raabe tag (202) 219–2811.

j. *Comment date:* March 4, 1992.

k. *Description of projects:* The proposed project would consist of: (1) an existing 40-foot-high, 180-foot-long concrete dam having a 100-foot-long Ogee-type spillway section and having intake structures at each abutment; (2) a reservoir having an 8-acre surface area and a 56-acre-foot storage capacity at spillway crest elevation 660; (3) a reconditioned intake structure at the south abutment; (4) a new concrete powerhouse containing a generating unit having an installed capacity of 100-kW operated at a 30-foot head; (5) a tailrace at the toe of the dam; (6) a 4,500-foot-long, 13.8-kV transmission line; and (7) appurtenant facilities.

The applicant estimates that the average annual generation would be 3,500,000 kWh and that the cost of the studies under the permit would be $20,500. Project energy would be sold to Niagara Mohawk Power Corporation. The existing dam is owned by the Applicant.

l. *This notice also consists of the following standard paragraphs:* A7, A5, A9, A10, B, C, and D2.

9a. *Type of Application:* Preliminary permit.

b. *Project No.:* 11215–000.

c. *Date filed:* December 2, 1991.

d. *Applicant:* Hydropower, Inc.

e. *Name of project:* Lake Nockamixon Hydro Project.

f. *Location:* On the Tohickon Creek in Bucks County, Pennsylvania.

g. *Filed pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant contact:* Mr. Mark Labant, Hydropower, Inc., 109 Apache Drive, Indiana, PA 15701, (412) 463–0737.

i. *FERC contact:* Mary Golato (dt) (202) 219–2804.

j. *Comment date:* February 28, 1992.

k. *Description of project:* The proposed project would consist of the following facilities: (1) an existing dam 1,511 feet long and 112 feet high; (2) an existing reservoir that has a surface area of 1,450 acres, and impounds 40,000 acre-feet of water at a pool elevation of 395 feet mean sea level; (3) an existing 6-foot-diameter penstock; (4) a proposed reinforced, concrete powerhouse consisting of a turbine-generating unit rated at 1,500 kilowatts; (5) existing transmission lines running approximately 350 feet long; and (6) appurtenant facilities. The dam is owned by the Commonwealth of Pennsylvania. The average annual generation would be approximately 3,000,000 kilowatthours and the cost of the studies is about $100,000.

l. *This notice also consists of the following standard paragraphs:* A3, A5, A7, A10, B, C, & D2.

10a. *Type of applications:* Preliminary permit.

b. *Project No.:* 11216–000.

c. *Date filed:* December 13, 1991.

d. *Applicant:* Tacoma Public Utilities.

e. *Name of project:* Sunset Falls Hydroelectric 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:* Mark Crisson, Tacoma Public Utilities, 3628 South 35th Street, P.O. Box 11007, Tacoma, Washington 98411, (206) 593–8203.

i. *FERC contact:* Mr. Michael Strzelecki, (202) 219–2827.

j. *Comment date:* March 18, 1992.

k. *Competing application:* Sunset Falls Water Power Project (FERC No. 11195–000), Sunset Falls Limited Partnership.

l. *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 South 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.

m. *This notice also consists of the following standard paragraphs:* A5, A7, A9, A10, B, C, and D2.

11a. *Type of application:* Declaration of intention.

b. *Docket No.:* EL92–8–000.

c. *Date filed:* December 27, 1991.

d. *Applicant:* Town of Lake Lure, NC.

e. *Name of project:* Lake Lure Hydro Project (NC).

f. *Location:* Lake Lure, Rutherford County, NC.

g. *Filed pursuant to:* Section 23(b) of the Federal Power Act, 16 U.S.C. 817(b).

h. *Applicant contact:* Hugo J. Moirano, P.O. Box 255, Lake Lure, NC 28746, (704) 625–9396.

i. *FERC contact:* Hank Ecton, (202) 219–2678.

j. *Comment date:* February 27, 1992.

k. *Description of project:* The proposed Lake Lure Hydro Project would consist of: (1) a reservoir with a storage area of 1,400 acre feet; (2) an existing 100-foot-high, 630-foot-long concrete dam; (3) a 10-foot-diameter, 100-foot-long penstock; (4) a concrete powerhouse, containing two vertical turbines/generators, producing 1,200 kilowatts (kW) and 2,200 kW; (5) a concrete tailrace; and (6) 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 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-1935 design or operation.

l. *Purpose of project:* Applicant intends to sell energy produced to the Duke Power Company.

m. *This notice also consists of the following standard paragraphs:* B, C, and D2.

12a. *Type of application:* Declaration of intention.

b. *Docket No:* EL92–9.

c. *Date filed:* December 27, 1991.

d. *Applicant:* The University of Michigan-Dearborn.

e. *Name of project:* Henry Ford Estate.

f. *Location:* On the Rouge River in Dearborn, Michigan, T. 2 S., R. 10 E., Michigan Meridian.

g. *Filed pursuant to:* Section 23(b) of the Federal Power Act, 16 U.S.C. 817(b).

h. *Applicant contact:* Robert J. West, Director of Facilities Management, The University of Michigan-Dearborn, 4901 Evergreen Road, Dearborn, MI 48128–1491, (313) 593–5380.

i. *FERC contact:* Diane M. Scire, (202) 219–2682.

j. *Comment date:* February 27, 1992.

k. *Description of project:* The proposed project will consist of: (1) a 60-acre-foot reservoir; (2) a 12-foot-high, 200-foot-long dam; (3) a powerhouse containing one generator with an installed capacity of 55 kilowatts; 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-1935 design or operation.

l. *Purpose of project:* All energy produced will be used within the University of Michigan's campus.

m. *This notice also consists of the following standard paragraphs:* B, C, and D2.

13a. *Type of application:* Declaration of intention.

b. *Docket No:* EL92–11.

c. *Date filed:* 12/31/91.

d. *Applicant:* Wisconsin Electric Power Co.

e. *Name of project:* Weyauwega Project.

f. *Location:* On the Waupaca River in the City of Waupaca, Waupaca County, Wisconsin.

g. *Filed pursuant to:* Section 23(b) of the Federal Power Act, 16 U.S.C. 817(b).

h. *Applicant contact:* James D. Zakrajsheck, Counsel, Wisconsin Electric Power Co., 231 West Michigan Street, P439, P.O. Box 2046, Milwaukee, WI 53201–2046, (414) 221–2715.

i. *FERC contact:* Diane M. Scire, (202) 219–2682.

j. *Comment date:* February 26, 1992.

k. *Description of project:* The existing project consists of: (1) a gravity dam 240 feet long in four sections, including earth

sections of 71 and 90 feet, a 29-foot intake section, and a 50-foot spillway section with three tainter gates; (2) a reservoir with a surface area of 286 acres; (3) a brick powerhouse integral with the intake section housing a 400-kilowatt generator; 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-1935 design or operation.

1. *Purpose of project:* The project is connected with and generates power for the Applicant's interconnected transmission system located in both Wisconsin and Michigan.

m. *This notice also consists of the following standard paragraphs:* B, C, and D2.

Standard Paragraphs

A3. Development Application—Any qualified development applicant desiring to file a competing application must submit to the Commission, on or before the specified comment 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 comment 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 4.20(b)(1) and (9) and 4.36.

A8. Preliminary Permit— Public notice of the filing of the initial preliminary permit application, which has already been given, established the due date for filing competing preliminary permit applications or notices of intent. Any competing preliminary permit or development application or notice of intent to file a competing preliminary permit or development application must be filed in response to and in compliance with the public notice of the initial preliminary permit application. No competing applications or notices of intent to file competing applications may be filed in response to this notice. 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 any 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 filing 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 Director, Division of Project Review, Federal Energy Regulatory Commission, Room 1027, 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.

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: January 14, 1992, Washington, DC.

Lois D. Cashell,

Secretary.

[FR Doc. 92-1342 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP92-284-000, et al.]

Northern Natural Gas Co., et al.; Natural Gas Certificate Filings

Take notice that the following filings have been made with the Commission:

1. Northern Natural Gas Co.

[Docket No. CP92-284-000]

January 9, 1992.

Take notice that on January 7, 1992, Northern Natural Gas Company (Northern), 1111 South 103rd Street, Omaha, Nebraska 68124-1000, filed in Docket No. CP92-284-000 a request pursuant to §§ 157.205 and 157.212 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.212) for authorization to reassign certain volumes of natural gas for Wisconsin Gas Company (Wisconsin Gas) and Wisconsin Power and Light Company (WP&L) under Northern's blanket certificate issued in Docket No. CP82-401-000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Northern proposes to reassign CD-1 firm sales service of 1,000 Mcf per day for Wisconsin Gas and 100 Mcf per day for WP&L as shown in the attached appendix. Northern explains that Wisconsin Gas and WP&L have requested this reassignment of volumes to provide more flexibility in serving their customers. Northern states that this reassignment of natural gas volumes would not result in an increase in Northern's total peak day and total annual deliveries.

Comment date: February 24, 1992, in accordance with Standard Paragraph G at the end of this notice.

NORTHERN NATURAL GAS COMPANY—REASSIGNMENT OF SALES ENTITLEMENTS

CD-1 Volumes in Mcf per day

Community	Present	Proposed	Net effect
Wisconsin Gas:			
Eagle, WI	0	1,000	1,000
Monroe, WI	2,651	1,651	(1,000)
Total	2,651	2,651	0
WP&L:			
Janesville/Beloit, WI	0	100	100
Portage, WI	1,480	1,380	(100)
Total	1,480	1,480	0

2. Northwest Pipeline Corp.

[Docket No. CP92-277-000]

January 9, 1992.

Take notice that on January 2, 1992, Northwest Pipeline Corporation (Northwest), 295 Chipeta Way, Salt Lake City, Utah 84158-0900, filed in Docket No. CP92-277-000 an application pursuant to section 7(b) of the Natural Gas Act for permission and approval to abandon the interruptible gas gathering and transportation services provided for Williams Natural Gas Company (Williams) pursuant to agreements originally certificated in Docket No. CP79-115, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Northwest states that it is requesting authorization to abandon the interruptible gathering and transportation services it is authorized to provide for Williams pursuant to Rate Schedules X-47 and X-48 of Northwest's FERC Gas Tariff, Original Volume No. 2, which incorporate a gas gathering agreement and a gas transportation agreement, respectively, both dated September 20, 1978, as amended. The gathering agreement was for a primary term of twenty years with evergreen provisions, while the transportation agreement was for a term of three years with evergreen provisions. Northwest has neither gathered nor transported any gas for Williams since June 1989. Northwest further states that pursuant to termination agreements dated July 1, 1991, Northwest and Williams agreed to terminate these agreements effective July 1, 1991, subject to resolving any imbalances. Northwest indicates that no abandonment of facilities is proposed in conjunction with the abandonment of these services.

Comment date: January 30, 1992, in accordance with Standard Paragraph F at the end of this notice.

3. Tennessee Gas Pipeline Co.

[Docket No. CP92-280-000]

January 9, 1992.

Take notice that on January 6, 1992, Tennessee Gas Pipeline Company (Tennessee), P.O. Box 2511, Houston, Texas 77252, filed in Docket No. CP92-280-000 a request pursuant to §§ 157.205 and 157.211 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.211) for authorization to construct and operate a new delivery point for Ford Motor Company (Ford), an end-user, under Tennessee's blanket certificate issued in Docket No. CP82-413-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Tennessee states that it has entered into a natural gas transportation agreement dated June 1, 1991, with Ford to transport 10,000 Dekatherms equivalent per day on a firm basis under Tennessee's Rate Schedule FT-A. Tennessee explains that, in order to effectuate delivery of the gas, the contract provides for a new delivery point to be constructed in Davidson County, Tennessee. Tennessee further states that the delivery facilities would consist of a 4-inch hot tap assembly, interconnecting pipe, and measurement facilities. Tennessee advises that all costs (estimated to be $115,565) associated with the construction of the proposed new delivery point would be borne by Ford.

Comment date: February 24, 1992, in accordance with Standard Paragraph G at the end of this notice.

4. Tennessee Gas Pipeline Co.

[Docket No. CP92-279-000]

January 9, 1992.

Take notice that on January 3, 1992, Tennessee Gas Pipeline Company (Tennessee), P.O. Box 2511, Houston, Texas 77252, filed in Docket No. CP92-279-000, a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to substitute a new delivery point for a gas transportation service presently provided by Tennessee for Flagg Energy Development Corporation (Flagg Energy), an end-user, under the authorization issued in Docket No. CP82-413-000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Tennessee states that pursuant to authorization granted in Docket Nos. CP88-171-000, *et al.*, 51 FERC ¶ 61,113 (1990), it is now serving Flagg Energy under the terms of a firm gas transportation agreement dated April 8, 1991. It is stated that the agreement provides for the transportation by Tennessee of a daily volume of 4,140 Mcf of natural gas from receipt points located in the U.S. Gulf Coast region to a delivery point at the interconnection of the facilities of Tennessee and Connecticut Natural Gas Corporation (Connecticut Natural) near Bloomfield, Connecticut (Tennessee's Meter No. 020205, located at Tennessee's Valve 347A-122 + 9.39). Tennessee states that the gas is then redelivered to the Flagg Energy cogeneration project in Hartford, Connecticut.

Tennessee states that Flagg Energy has requested that the transportation agreement be amended to provide for the termination of deliveries to Connecticut Natural and the commencement of deliveries at Tennessee's existing interconnection with Algonquin Gas Transmission Company near Mahwah, New Jersey (Tennessee's Meter No. 020207 at Valve 328A-101.1 + 4.22). It is stated that Tennessee is willing to make such change in delivery point.

According to Tennessee, no additional facilities are to be constructed and the total quantities of natural gas to be delivered will not exceed presently authorized quantities. Tennessee states that it has sufficient authorized capacity in its system to accomplish delivery of the gas to the proposed delivery point without detriment or disadvantage to any other customer.

Comment date: February 24, 1992, in accordance with Standard Paragraph G at the end of this notice.

5. ANR Pipeline Co.

[Docket No. CP92-274-000]

January 9, 1992.

Take notice that on December 31, 1991, ANR Pipeline Company (ANR), 500 Renaissance Center, Detroit, Michigan 48243, filed an application with the Commission in Docket No. CP92-274-000 pursuant to section 7(b) of the Natural Gas Act (NGA) for permission and approval to abandon transportation services for Mid Louisiana Gas Company (MidLa), all as more fully set forth in the application which is open to public inspection.

ANR proposes to abandon the firm transportation services it provides for MidLa under ANR's FERC Rate Schedules X-112 and X-141, effective January 1, 1992. The Commission authorized on August 25, 1980, ANR's daily firm transportation service of up to 10,000 Mcf of natural gas under Rate Schedule X-112 in Docket No. CP80-384-000 (12 FERC ¶ 61,202). ANR receives the gas for MidLa's account in West Cameron Block 281, offshore Louisiana, and delivers the gas to Texas Eastern Transmission Corporation (Texas Eastern) in West Cameron Block 280, offshore Louisiana, for further transportation for MidLa's account onshore.

The Commission authorized on April 17, 1984, ANR's daily firm transportation service of up to 25,000 Mcf of natural gas under Rate Schedule X-141 in Docket No. CP83-532-000 (27 FERC ¶ 62,052). The Commission amended the daily volumes that ANR transports under this rate schedule to 22,000 Mcf by the order issued July 11, 1991 in Docket No. CP91-1936-000 (56 FERC ¶ 62,024). ANR receives the gas for MidLa's account in Eugene Island Block 34, offshore Louisiana, and delivers the gas to MidLa at an interconnection of their pipeline systems near Gilbert, Franklin Parish, Louisiana, and a meter station in Tensas Parish, Louisiana.

ANR states that MidLa has requested ANR to terminate transportation services under Rate Schedules X-112 and X-141, effective January 1, 1992, and that there would be no adverse effect on MidLa's customers as a result of the proposed abandonments. The abandonments are being requested as part of an agreement with MidLa in a settlement in ANR's Docket No. RP89-161-000, *et al.* No facilities would be abandoned in this proposal.

Comment date: January 30, 1992, in accordance with Standard Paragraph F at the end of this notice.

6. Sumas International Pipeline Inc.

[Docket No. CP92-259-000]

January 9, 1992.

Take notice that on December 20, 1991, pursuant to section 3 of the Natural Gas Act (NGA), 15 U.S.C. 717(b); § 153.1 *et seq.* and 153.10 *et seq.* of the Commission's Regulations, 18 CFR 153.1; Executive Order No. 10485, as amended by Executive Order No. 12038; and Delegation Order No. 0204-112 of the Secretary of Energy, Sumas International Pipeline Inc. (SIPI) a wholly-owned subsidiary of BC Gas Inc (BC Gas), seeks authority from the Federal Energy Regulatory Commission (FERC) for a Presidential Permit for the point of entry for the importation of natural gas and authority to construct, operate, maintain and connect a natural gas pipeline interconnect from Canadian pipeline facilities at the Canadian border to a Tap and Meter connection with Northwest Pipeline Corporation (NWP) within its Sumas Compressor Station near Sumas, Washington. SIPI also filed pursuant to section 7(c) of the Natural Gas Act and § 157.7(a) of the Federal Energy Regulatory Commission's Regulations thereunder for a certificate of public convenience and necessity authorizing the construction and operation of SIPI's Interconnect Pipeline Facilities, in Whatcom County, Washington; all as more fully set forth in the application which is on file with the Commission and open to public inspection.

SIPI will consist of 205 feet of 24-inch O.D. pipeline extending from two interconnections with Huntingdon International Pipeline Corporation (HIPCO) at the Canadian border near Sumas, Washington to the interconnection with NWP near Sumas, Washington. NWP will construct and operate tap, pipe and meter facilities in the United States. The design capacity of the natural gas interconnect facilities will be approximately 350 MMCF/d with an estimated cost of $68,500. SIPI will provide an interconnect delivery service for gas to and from facilities owned or operated by BC Gas for approximately 23 billion cubic feet of gas per year.

It is said that BC Gas is a Canadian Local Distribution Utility serving over 600,000 residential, commercial and industrial customers or 95% of the province of British Columbia and provided sales and transportation of some 175 trillion Btu's in 1990. BC Gas holds an existing authorization to import and re-export gas under the Department

of Energy, Office of Fossil Energy (DOE/FE) Opinion and Order No. 285–A for storage at the Jackson Prairie Storage Facility (JPS) in Chehalis, Washington. As certain Canadian Transportation and Exchange Arrangements terminate during 1992, BC Gas has applied to the DOE/FE to use SIPI facilities for delivery and re-delivery of JPS gas from and to Canadian facilities for these volumes and incremental volumes approved by DOE/FE Opinion and Order No. 285–B.

SIPI's affiliate, Inland Gas & Oil Corporation (IGOC) applied to the Commission on December 2, 1991, under sections 4 and 7 of the NGA, for an unlimited term blanket certificate with pregranted abandonment authorizing sales for resale in interstate commerce of natural gas. This Application was Noticed in Docket No. CI92–13–000. IGOC has an existing blanket authority to import and export gas under DOE/FE Opinion and Order No. 517. IGOC has also applied for permission to add SIPI import and export points to its authorization as existing facilities at the Canada/U.S. Border cannot suitably handle these incremental volumes.

Comment date: January 30, 1992, in accordance with Standard Paragraph F at the end of the notice.

7. Northwest Pipeline Corp.

[Docket No. CP92–281–000]

January 9, 1992.

Take notice that on January 6, 1992, Northwest Pipeline Corporation (Northwest), 295 Chipeta Way, Salt Lake City, Utah 84158, filed in Docket No. CP92–281–000 an application pursuant to section 7(b) of the Natural Gas Act for permission and approval to abandon an interruptible transportation service for Questar Pipeline Company (Questar) which was performed pursuant to authorization received in Docket No. CP84–79, all as more fully set forth in the application on file with the Commission and open to public inspection.

Northwest seeks authorization to abandon the transportation service it has provided to Questar under a gas gathering and transportation agreement (Y70 agreement) dated August 19, 1983. Northwest states that this agreement covers the gathering and transportation of up to 3,000 MMBtu's of equivalent gas per day from the Jefferson receipt point on Northwest's Big Piney Gathering system to the Crossover 16 mainline interconnect with Questar in Sweetwater County, Wyoming. It is stated that pursuant to a letter agreement dated March 22, 1991, Northwest and Questar agreed to terminate the subject agreement effective as of April 1, 1991. It is further stated that no abandonment of facilities is proposed in conjunction with the abandonment of service.

Comment date: January 30, 1992, in accordance with Standard Paragraph F at the end of this notice.

8. Northwest Pipeline Corp.

[Docket No. CP92–282–000]

January 10, 1992.

Take notice that on January 6, 1992, Northwest Pipeline Corporation (Northwest) 295 Chipeta Way, Salt Lake City, Utah 84158.0900, filed in Docket No. CP92–282–000 an application pursuant to section 7(B) of the Natural Gas Act for permission and approval to abandon a transportation service it provides for Pacific Gas Transmission Company (PGT), all as more fully set forth in the request which is on file with the Commission and open to the public inspection.

Northwest state that it is requesting approval to abandon the interruptible transportation service it provides for PGT pursuant to Rate Schedule X–38, of Northwest's FERC Gas Tariff, Original Volume No. 2. By letter dated April 5, 1991, Northwest provided PGT with six months written notice that it intends to terminate the Agreement.

Northwest further states that no facilities will be abandoned in conjunction with the abandonment of this service

Northwest states that abandonment of the transportation service is contingent upon retention of the existing Rate Schedule X–38 priority of service date for service under a replacement open-access transportation agreement with PGT dated January 1, 1992. Northwest further requests any necessary waivers of the first-come first-serve provisions of its tariff to allow Janaury 4, 1977, to be the initial prority of service date for the corresponding transportation service under the replacement open-access transportation agreement.

Comment date: January 31, 1992, in accordance with Standard Paragraph F at the end of the notice.

9. Trunkline Gas Co.

[Docket No. CP92–278–000]

January 10, 1992.

Take notice that on January 3, 1992, Trunkline Gas Company (Trunkline), P.O. Box 1642, Houston, Texas 77251–1642, filed in Docket No. CP92–278–000 an application pursuant to section 7(b) of the Natural Gas Act for permission and approval to partially abandon a transportation service provided to Northern Natural Gas Company (Northern) effective December 3, 1988, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Trunkline requests authorization to reduce the firm transportation service it provides Northern under Trunkline's Rate Schedule T–81 from 15,000 Mcf per day to 7,500 Mcf per day. Trunkline states that it provides firm transportation service of up to 15,000 Mcf per day for Northern from a point of receipt on Trunkline's Terrebonne System in Grand Isle 82, Offshore Louisiana, to Trunkline's interconnects with United Gas Pipe Line Company at Olla, Centerville, and Garden City, Louisiana, Trunkline states that pursuant to an amendment dated December 3, 1988, Northern and Trunkline agreed to reduce Northern's daily demand level by 50 percent (15,000 Mcf to 7,500 Mcf).

Comment date: January 31, 1992, in accordance with Standard Paragraph F at the end of the notice.

10. West Texas Gas, Inc.

[Docket No. CP92–273–000]

January 10, 1992.

Take notice that on December 31, 1991, West Texas Gas, Inc. (WTG), 211 North Colorado, Midland, Texas 79701, filed in Docket No. CP92–273–000 a request pursuant to section 7(c) of the Natural Gas Act (NGA) and subpart F of part 157 of the Commission's Regulations under the NGA for a blanket certificate of public convenience and necessity authorizing WTG to engage in any of the activities specified in subpart F of part 157 of the Commission's Regulations, as may be amended from time to time, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

It is stated that WTG is a "natural gas company" within the meaning of the NGA and as determined by the Commission in Docket No. CP83–377–000. It is explained that WTG operates both interstate and intrastate pipeline systems in West Texas and the Texas Panhandle area, serving small residential, commercial and irrigation users in Texas and resale customers in New Mexico and Oklahoma. It is asserted that WTG does not have any currently effective sales or storage rate schedules or outstanding budget-type certificates.

WTG also requests that the Commission waive the applicable regulations in order to authorize under the proposed blanket certificate certain existing facilities. It is asserted that these facilities constitute an interconnection between WTG's 22-inch pipeline and the facilities of Westar Pipeline Company (Westar) for the purpose of purchasing system supply gas from Westar. It is stated that these facilities were installed between April and July, 1991, in order to take advantage of WTG's 1991 peak operating season.

Comment date: January 31, 1992, in accordance with Standard Paragraph F at the end of this notice.

11. Florida Gas Transmission Co.

[Docket No. CP92-275-000]

January 10, 1992.

Take notice that on December 31, 1991, Florida Gas Transmission Company (FGT), 1400 Smith Street, P.O. Box 1188, Houston, Texas 77251-1188, filed in Docket No. CP92-275-000 a request pursuant to §§ 157.205 and 157.216 of the Commission's Regulations under the National Gas Act (18 CFR 157.205, 157.216) for authorization to abandon and transfer by sale to Florida Public Utilities Company (FPU) minor pipeline facilities located in Palm Beach County, Florida, under FGT's blanket certificate issued in Docket No. CP82-553-000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

FGT proposes to abandon and transfer by sale to FPU approximately 1.7 miles of the 6.2 mile Lake Worth 4-inch lateral located in Palm Beach County, Florida. FGT states that FPU would use this segment of pipeline as part of its existing distribution system. FGT also states that it would not terminate any services nor take any other facilities out of service as a result of this proposal. Additionally, FGT states that the existing Lake Worth 8-inch looping facilities has sufficient capacity to meet FGT's contractual obligations to FPU. Further, FGT states that FPU's certificated entitlements would not be affected by this request.

Comment date: February 24, 1992, 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. 92-1390 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. JD92-02504T Texas-15 Addition 4]

State of Texas; NGPA Notice of Determination by Jurisdictional Agency Designating Tight Formation

January 13, 1992.

Take notice that on December 23, 1991, as supplemented on January 9, 1992, the Railroad Commission of Texas (Texas) submitted the above-referenced notice of determination pursuant to § 271.703(c)(3) of the Commission's regulations, that portions of the Lower Vicksburg Formation underlying portions of Hidalgo and Starr Counties qualify as a tight formation under section 107(b) of the Natural Gas Policy Act of 1978 (NGPA). The designated area includes approximately 20,000 acres in Hidalgo and Starr Counties, Texas and consists of the acreage listed in the attached appendix.

The notice of determination also contains Texas' findings that the referenced portion of the Lower Vicksburg Formation meets the requirements of the Commission's regulations set forth in 18 CFR part 271.

The application for determination is available for inspection, except for material which is confidential under 18 CFR 275.206, at the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington DC 20426. Persons objecting to the determination may file a protest, in accordance with 18 CFR 275.203 and 275.204, within 20 days after the date this notice is issued by the Commission.

Lois D. Cashell,

Secretary.

Appendix

Lower Vicksburg Formation in Hidalgo and Starr Counties, Texas Railroad Commission District 4.

1. "Los Guajes" Segundo Flores Survey #27, A-83 and A-697
2. Hidalgo County School Land Survey #553, A-227, league 1, sections 3 and 4, league 2, w/2 section 1 and sections 2-8 and league 3, sections 5 and 6
3. J.M. Vela Survey #200, A-640
4. Tex. Mex. R.R. Survey #201, A-123
5. E.B. Pue Survey #202, A-162
6. E.B. Pue Survey #204, A-636
7. Tex. Mex. R.R. Survey #205, A-125
8. E.B. Pue Survey #208, A-638
9. Tex. Mex. R.R. Survey #209, A-127
10. Tex. Mex. R.R. Survey #199, A-122
11. "Santa Anita" Manuel Comez Survey, A-63, Valley Farms Subdivision, w/2 lots 90 and 91

[FR Doc. 92-1339 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. JD92-02507T Texas-9 Addition 10]

State of Texas; NGPA Notice of Determination by Jurisdictional Agency Designating Tight Formation

January 13, 1992.

Take notice that on December 23, 1991, as supplemented on January 9, 1992, the Railroad Commission of Texas (Texas) submitted the above-referenced notice of determination pursuant to § 271.703(c)(3) of the Commission's regulations, that the Travis Peak Formation underlying portions of Robertson County qualifies as a tight formation under section 107(b) of the Natural Gas Policy Act of 1978 (NGPA). The designated area includes approximately 17,000 acres in Robertson County, Texas and consists of the acreage listed in the attached appendix.

The notice of determination also contains Texas' findings that the referenced portion of the Travis Peak Formation meets the requirements of the Commission's regulations set forth in 18 CFR part 271.

The application for determination is available for inspection, except for material which is confidential under 18 CFR 275.206, at the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington DC 20426. Persons objecting to the determination may file a protest, in accordance with 18 CFR 275.203 and 275.204, within 20 days after the date this notice is issued by the Commission.

Lois D. Cashell,

Secretary.

Appendix

Travis Peak Formation in Robertson County, Texas.

1. James Farris, A-147
2. Owen Maynard, A-260
3. James Patterson, A-300
4. Wm. J. Kyle, A-206
5. Jackson Hensley, A-174
6. O'Connor Denson, A-126
7. Wm. Owens, A-279
8. Ezra Corry, A-102
9. Joel Bogguss, A-64
10. Wm. B. Ball, A-76
11. John Copeland, A-92
12. John McNeese, A-231
13. N. McCuistion, A-264
14. Maria DeLa Concepcion Marques, A-25
15. Robert M. Williamson, A-362
16. Clinton A. Rice, A-316
17. G.W. McGrew, A-232

[FR Doc. 92-1340 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. JD92-02503T Texas-10 Addition 12]

State of Texas; NGPA Notice of Determination by Jurisdictional Agency Designating Tight Formation

January 14, 1992.

Take notice that on December 23, 1991, as supplemented on January 13, 1992, the Railroad Commission of Texas (Texas) submitted the above-referenced notice of determination pursuant to § 271.703(c)(3) of the Commission's regulations, that the Edwards Limestone Formation in portions of Webb County, Texas, qualifies as a tight formation under section 107(b) of the Natural Gas Policy Act of 1978 (NGPA). The designated area includes approximately 72,290 acres in Webb County, Texas and consists of the acreage listed in the attached appendix.

The notice of determination also contains Texas' findings that the referenced portion of the Edwards Limestone Formation meets the requirements of the Commission's regulations set forth in 18 CFR part 271.

The application for determination is available for inspection, except for material which is confidential under 18 CFR 275.206, at the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426. Persons objecting to the determination may file a protest, in accordance with 18 CFR 275.203 and 275.204, within 20 days after the date this notice is issued by the Commission.

Lois D. Cashell,

Secretary.

Appendix

Edwards Limestone Formation in Webb County, Texas Railroad Commission District 4.

Survey	Section No.	Approximate acreage
Full Section Within Application Area:		
L.M. McClendon A-851	1839	1156
Hugh P. Sutton A-582	1837	1280
C. Vergara A-2677	31	317.3
C. Vergara A-2949	12	544
W.H. Thaxton A-2675	11	640
L.T. & B. A-2336	10	640
L.T. & B. A-2335	9	640
Z. Villareal A-2805	44	640
Z. Villareal A-2804	43	640
P. Cisneros A-2708	41	640
C. Ortiz A-3145	111	1280
F. Ortiz A-3148	112	1047.5
M. Grandapo A-3146	107	1275.5
M. Grandapo A-3147	109	640
E. Ramos A-3149	106	632.25
Will H. Hearne A-3143	108	1210
C.C. Tribble A-3306	876	378.1
W. Brown A-3157	110	94.5
B.S. & F. A-3155	875	378.1
L. Vergara A-2951	39	640
R.W. Roberson A-2865	38	642
R.W. Roberson A-2784	35	642
M.G. DeGarza A-2731	36	640
M.G. DeGarza A-2730	34	642
B.S. & F. A-29	977	640
Portion of Section Within Application Area:		
Joaquin Galan A-65 Webb Co.	2182	32,362
Joaquin Galan A-3226	2292	20,844
L. Vergara A-2952	40	374
M. Martinez A-794	2289	133
Mrs. M.M. Nichols A-557	1900	659
Total acreage		72,290

[FR Doc. 92-1387 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. JD92-02812T West Virginia-10]

State of West Virginia; NGPA Notice of Determination by Jurisdictional Agency Designating Tight Formation

January 14, 1992.

Take notice that on January 6, 1992, the West Virginia Department of Commerce, Labor and Environmental Resources (West Virginia) submitted the above-referenced notice of determination pursuant to § 271.703(c)(3) of the Commission's regulations, that the Maxton/Maxon Sandstone of the Appalachian Plateau of Southern West Virginia qualifies as a tight formation under section 107(b) of the Natural Gas Policy Act of 1978 (NGPA). The notice covers approximately 66 square miles in the Davy, Pineville and Welch Quads in McDowell and Wyoming Counties, West Virginia.

The notice of determination also contains West Virginia's findings that the referenced portion of the Maxton/Maxon Sandstone meets the requirements of the Commission's regulations set forth in 18 CFR part 271.

The application for determination is available for inspection, except for material which is confidential under 18 CFR 275.206, at the Federal Energy Regulatory Commission, 825 North Capitol Street, NW., Washington, DC 20426. Persons objecting to the determination may file a protest, in accordance with 18 CFR 275.203 and 275.204, within 20 days after the date this notice is issued by the Commission.

Lois D. Cashell,

Secretary.

[FR Doc. 92-1388 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. PR92-6-000]

Delhi Gas Pipeline Corp.; Petition for Rate Approval

January 14, 1992.

Take notice that on December 30, 1991, Delhi Gas Pipeline Corporation (Delhi) filed pursuant to § 284.123(b)(2) of the Commission's regulations, a petition for rate approval requesting that the Commission approve as fair and equitable a maximum rate of 30.54 cents per MMBtu for transportation of natural gas under section 311(a)(2) of the Natural Gas Policy Act of 1978 (NGPA).

Delhi states that it is an intrastate pipeline within the meaning of section 2(16) of the NGPA and currently operates intrastate facilities in several states. The subject of this petition is its intrastate system in North Louisiana. Delhi states in its petition that it intends to seek an opinion letter from the Officer of General Counsel that its facilities in North Louisiana qualify as non-jurisdictional gathering and it requests that this petition be made subject to that filing. Delhi's previous maximum interruptible transportation rate of 21 cents MMBtu for section 311(a)(2) service was approved by a Commission order issued June 21, 1990 in Docket No. ST84-773-000 *et al.*

Pursuant to § 284.123(b)(2)(ii), if the Commission does not act within 150 days of the filing date, the rate will be deemed to be fair and equitable and not in excess of an amount which interstate pipelines would be permitted to charge for similar transportation service. The Commission may, prior to the expiration of the 150 day period, extend the time for action or institute a proceeding to afford parties an opportunity for written comments and for the oral presentation of views, data and arguments.

Any person desiring to participate in this rate proceeding must file a motion to intervene in accordance with §§ 385.211 and 385.214 of the Commission's Rules of Practice and Procedures. All motions must be filed with the Secretary of the Commission on or before January 30, 1992. The petition for rate approval is on file with the Commission and is available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92-1385 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP91-2448-000, and RP91-187-000]

Florida Gas Transmission Co.; Notice Reconvening Informal Settlement Conference and Notice Canceling Separate Informal Settlement Conference

January 13, 1992.

Take notice that the informal settlement conference previously scheduled to be convened on January 14-15, 1992, has been rescheduled to be held on February 11-12, 1992, at 10 a.m., on each day, at the offices of the Federal Energy Regulatory Commission, 810 First Street, NE., Washington, DC, for the purpose of exploring the possible settlement of the issues in this proceeding.

Any party, as defined by 18 CFR 385.102(c), or any participant, as defined by 18 CFR 385.102(b), is invited to attend. Persons wishing to become a party must move to intervene and receive intervenor status pursuant to the Commission's regulations (18 CFR 385.214) (1991).

Take notice that the separate informal settlement conference previously scheduled to be convened on February 18-19, 1992, has been canceled and will be rescheduled at a later date.

For further information, please contact Warren C. Wood at (202) 208-2091 or Donald Williams at (202) 208-0743.

Lois D. Cashell,

Secretary.

[FR Doc. 92-1341 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP91-143-010]

Great Lakes Gas Transmission Limited Partnership; Proposed Changes in FERC Gas Tariff

January 14, 1992.

Take notice that Great Lakes Gas Transmission Limited Partnership ("Great Lakes"), on January 10, 1992, tendered to the Federal Energy Regulatory Commission (Commission) for filing as part of its FERC Gas Tariff, First Revised Volume No. 1 and Original Volumes Nos. 2 and 3, the following tariff sheets, proposed to be effective as of November 1, 1991:

First Revised Volume No. 1

Fourth Substitute Twenty-Fourth Revised Sheet No. 4
Fourth Substitute Fortieth Revised Sheet No. 57(i)

Original Volume No. 2

Sixth Revised Sheet No. 3-A
Fourth Substitute Twenty-Sixth Revised Sheet No. 53
Substitute Sixth Revised Sheet No. 53-G
Fourth Substitute Eighteenth Revised Sheet No. 77
Substitute Fourth Revised Sheet No. 78
Fourth Substitute Fourteenth Revised Sheet No. 151
Fourth Substitute Eleventh Revised Sheet Nos. 223 and 245
Fourth Substitute Fifth Revised Sheet No. 269
Fourth Substitute Eleventh Revised Sheet No. 294
Fourth Substitute Sixth Revised Sheet No. 603
Second Substitute Third Revised Sheet No. 604
Fourth Substitute Fourth Revised Sheet Nos. 865 and 866
Fourth Substitute Third Revised Sheet No. 905
Fourth Substitute Fourth Revised Sheet No. 906
Second Substitute First Revised Sheet No. 1008

Original Volume No. 3

Fifth Substitute Fourth Revised Sheet No. 2
Substitute Original Sheet No. 2-A
Fourth Substitute Fourth Revised Sheet No. 3

Great Lakes states that the purpose of the instant filing is to comply with Ordering Paragraph (B) of the "Order On Compliance Filing" issued by the Federal Energy Regulatory Commission ("Commission") on December 20, 1991, in Docket Nos. RP91-143-006, *et al.* (Order). In this regard, the Order directed Great Lakes to file revised tariff sheets to reflect the elimination of costs, in the design of its interruptible and overrun rates, associated with its incrementally-priced, expansion facilities. In addition, Great Lakes is to reflect, in the design of its rates for non-incremental customers, a credit for anticipated revenue from the projected levels of interruptible and overrun services.

Great Lakes further states that its filing includes workpapers setting forth the calculation of projected fuel usage.

Great Lakes states that its filing is being submitted under protest and without prejudice to Great Lakes' request for rehearing filed in response to Opinion Nos. 367 and 368 or the request for rehearing which Great Lakes will file concerning the Commission's December 20, 1991 order herein.

Great Lakes states that copies of this filing were posted and served on all of its customers, upon the Public Service Commissions of the States of Minnesota, Michigan, and Wisconsin, and upon all parties listed on the service list maintained by the Commission's Secretary in this proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance

with Rule 211 of the Commission's Rules of Practice and Procedure 18 CFR 385.211. All such protests should be filed on or before January 22, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92-1382 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. PR92-7-000]

Louisiana Intrastate Gas Corporation; Petition for Rate Approval

January 14, 1992.

Take notice that on January 6, 1992, Louisiana Intrastate Gas Corporation (LIG) filed pursuant to § 284.123(b)(2) of the Commission's regulations, a petition for rate approval requesting that the Commission approve as fair and equitable a maximum rate of 21 cents per MMBtu for transportation of natural gas under section 311(a)(2) of the Natural Gas Policy Act of 1978 (NGPA) through its Eloi Bay Facility.

LIG states that it is an intrastate pipeline within the meaning of section 2(16) of the NGPA and currently operates intrastate facilities in Louisiana. The subject of this petition is its Eloi Bay Facility. LIG states that the Eloi Bay Facility was the subject of prior orders of the Commission in Docket Nos. ST89-1708-000, *et al.* which determined an incremental rate of 3.37 cents per MMBtu for section 311(a)(2) transportation through this facility. These orders are pending review in *Louisiana Intrastate Gas Corp.* v. *FERC*, DC Cir. Nos. 89-1479, 90-1050 and 90-1476. LIG states that it is filing this petition to have its general system-wide rate of 21 cents currently pending in Docket No. PR91-12-000 apply to section 311(a)(2) transportation using the Eloi Bay Facility.

Pursuant to § 284.123(b)(2)(ii), if the Commission does not act within 150 days of the filing date, the rate will be deemed to be fair and equitable and not in excess of an amount which interstate pipelines would be permitted to charge for similar transportation service. The Commission may, prior to the expiration of the 150 day period, extend the time for action or institute a proceeding to afford parties an opportunity for written comments and for the oral presentation of views, data and arguments.

Any person desiring to participate in this rate proceeding must file a motion to intervene in accordance with §§ 385.211 and 385.214 of the Commission's Rules of Practice and Procedures. All motions must be filed with the Secretary of the Commission on or before January 30, 1992. The petition for rate approval is on file with the Commission and is available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92-1386 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP92-88-000]

Pacific Gas Transmission Co.; Change in FERC Gas Tariff

January 14, 1992.

Take notice that on January 10, 1992, Pacific Gas Transmission Company (PGT) tendered for filing and acceptance the following tariff sheets:

Second Revised Volume No. 1

First Revised Sheet No. 12

Original Volume No. 1-A

Sixth Revised Sheet No. 4
Second Revised Sheet Nos. 5 and 14
Second Revised Sheet Nos. 72 and 73
Second Revised Sheet Nos. 74 and 75
Second Revised Sheet Nos. 78, 82, 83 and 84

The purpose of this filing is to revise the billing demand under Rate Schedule PL-1 of Second Revised Volume No. 1 coincident with a partial conversion from sales service under Rate Schedule PL-1 to transportation service under Rate Schedule FTS-1 for Pacific Gas and Electric Company (PG&E), and to make certain minor changes to Rate Schedule FTS-1, the form of service agreements for Rate Schedules FTS-1 and ITS-1, and to the format of the Statement of Rates of PGT's FERC Gas Tariff, Original Volume No. 1-A.

PGT has requested an effective date of January 10, 1992 for First Revised Sheet No. 12 of Second Revised Volume No. 1 and February 9, 1992 for all other tariff revisions. A copy of this filing is being served on PGT's jurisdictional customers and affected state regulatory commissions.

Any person desiring to be heard or protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.214 and 385.211 of the Comission's Rules of Practice and Procedure. All such motions or protests should be filed on or before January 22, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 92-1383 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP91-212-003]

Stingray Pipeline Co.; Supplemental Compliance Filing

January 14, 1992.

Take notice that Stingray Pipeline Company (Stingray), on January 10, 1992, filed certain revised tariff sheets in its FERC Gas Tariff, First Revised Volume No. 1, to correct an earlier compliance filing that it made on October 15, 1991 pursuant to an order of the Federal Energy Regulatory Commission (Commission) issued on September 10, 1991 in Docket No. RP91-212-000, 56 FERC ¶ 61,462 (1991). The proposed tariff sheets, which pertain to § 6.3(d) of Stingray's FTS and ITS Rate Schedules, are as follows:

Revised Second Substitute Original Sheet No. 59
Revised Second Substitute Original Sheet No. 60
Original Sheet No. 60A
Revised Second Substitute Original Sheet No. 97
Original Sheet No. 97A

Stingray requests that the tendered tariff sheets be accepted in lieu of those filed in the October 15 compliance filing to be effective October 1, 1991.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure 18 CFR 385.211. All such protests should be filed on or before January 22, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92-1384 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

Office of Energy Research

Special Research Grant Program Notice 92-7: Advanced Heterogeneous Catalysts for Energy Applications

AGENCY: Department of Energy (DOE).

ACTION: Notice inviting grant applications.

SUMMARY: The Office of Program Analysis, Office of Energy Research of the Department of Energy, hereby announces its interest in receiving applications for Special Research Grants that seek support for conducting a research needs assessment in the area of advanced heterogeneous catalysts for energy applications. The purpose of this activity is to identify and disseminate priority research needs for achieving high efficiency utilization of state of the art developments in heterogeneous catalysts with superior economic, environmental, and performance potential. This project should focus on topics in heterogeneous catalysis that have a significant impact on energy issues such as energy conservation through process improvement, uses in alternate fuel development or alternate feedstock utilization, and applications to alleviate pollutants from energy processes. The study shall not address electrochemical, photochemical, biochemical, or homogeneous catalysts.

Applicants must include a description of the planned methodology that will be used in assessing long term (up to 20 years) research directions, opportunities, priorities, and degrees of difficulty in accomplishing identified research opportunities.

Applicants must enlist the aid of experts from acdemia and industry to identify, describe, and assess on a worldwide basis, the most promising new (i.e., beyond state of the art) developments, applications, and opportunities in science and technology to facilitate the future utilization of heterogeneous catalysts in energy related areas.

APPLICATION INFORMATION: Information about submission of applications, eligibility, limitations, evaluation, selection processes, and other policies and procedures may be found in the Application and Guide for the Special Research Grant Program. The application kit and guide and copies of 10 CFR Part 605 are available from Paul Maupin, Office of Program Analysis, Office of Energy Research, U.S. Department of Energy, ER-33, Washington, DC 20585. Instructions for preparation of an application are included in the application kit. Telephone requests may be made by calling (301) 903-4355 or FTS 233-4355. The Catalog of Federal Domestic Assistance number for this program is 81.049.

DATES: Formal applications submitted in response to this notice should be received by March 3, 1992.

ADDRESSES: Formal applications sent by U.S. Mail should be addressed to: U.S. Department of Energy, Office of Energy Research, Division of Acquisition and Assistance Management, ER-64, Washington, DC 20585, ATTN: Program Notice 92-7. The following address must be used when submitting applications by U.S. Postal Service Express, any commercial mail delivery service, or when handcarried by the applicant: U.S. Department of Energy, Office of Energy Reserch, Division of Acquisition and Assistance Mangement, ER-64/GTN, 19901 Germantown Road, Germantown, MD 20874.

SUPPLEMENTARY INFORMATION: Heterogeneous catalysts are central to our current technology in the production and consumption of fuels, the manufacture and processing of chemical feedstocks, and the manufacture of plastics. They are of wide use in industry since they are easily separated from the product stream by physical means. Another aspect of catalysts is that they often permit transformations that are impractical or unknown by other means. When processes such as this are found, they can significantly impact upon the energy field by changing the basis for comparison. A classic example in the field of heterogeneous catalysis was the advent of cracking catalysts for liquid fuels. The more recent refinements of this technology are represented by the zeolites. It has been estimate that the introduction of this technology has permitted savings of more than 400 million barrels of oil each year. This translates to 2.4 Quads each year. A shift of 1% in the efficiency of oil conversion to liquid fuel is estimated to result in a savings of more than 22 million barrels of oil each year. Aside from the savings in feedstocks, a reduction in processing energy requirements also occurs when the catalyst is more effective. The zeolite type of heterogeneous catalyst has also proven capable of converting unconventional feedstocks such as natural gas, coal gases, wood alcohol, grain alcohol, plant oils, or terpenes from grasses and other plants to liquid fuels. Refinements to heterogeneous catalysts for their application to renewable or domestic resources could make a significant impact on the U.S. balance of payments, standard of living, and energy security.

Advances in the sciences have progressed to the point where it is now possible to design heterogeneous catalysts by rational design. Heretofore, these advances have been mostly the result of trial and error. The development of heterogeneous catalysis have long been the domain of the petrochemical industry. As such, the current types of heterogeneous catalysts are tailored to the needs and requirements of this industry. The applicability of these catalysts to alternate feedstocks is in large part coincidental and may not represent the full potential possible in converting from petroleum dependence to alternate feedstocks.

In performing a research needs assessment for heterogeneous catalysts, the grantee shall assemble a panel of experts in the rational design, preparation, modification, characterization, and utilization of heterogeneous catalysts to review, analyze, evaluate, and prioritize the long term (5 to 20 years) research needs and opportunities for application of heterogeneous catalysts to energy applications. The energy applications of heterogeneous catalysts considered should include energy conservation through process improvement, uses in alternate fuel development or alternate feedstock utilization, and applications to alleviate pollutants from energy processes. Specific examples of appropriate technological applications would include heterogeneous catalysts in coal liquefaction, coal gasification, flue gas cleanup, biomass conversion to gaseous and liquid fuels, use of non-petroleum feedstocks in chemical manufacturing, and conversion of natural gas to liquid fuels.

The overall emphasis should primarily address the mutual technologies employed in heterogeneous catalyst research in relation to energy applications. Mutual technologies such as support development, support-catalyst interactions, factors underlying catalyst activity, selectivity, or resistance to poisoning, and unique, innovative catalyst developments are appropriate focal points. The study shall not address electrochemical, photochemical, biochemical, or homogeneous catalysis in order to adequately address the subject of heterogeneous catalysts in detail.

To address the objectives discussed above, the Office of Program Analysis of the Office of Energy Research has coordinated with the DOE Office of Conservation and Renewable Energy

and the Office of Fossil Energy, and is planning to award a grant for a research needs assessment for advanced heterogeneous catalysts in energy applications. The Office of Program Analysis plans to publicly disseminate the results and findings of this research needs assessment in a report. Specific information concerning requirements for the application follow.

The principal investigator of the assessment must be an individual who is competent and accomplished in appropriate scientific and technical areas. Competence and accomplishments shall be described in the application which shall address industrial or academic experience, research publications, contributions while serving as an expert, consultant services, honors and awards, and education, including advanced degrees and other academic qualifications. The principal investigator also shall be an individual with demonstrated ability to conduct research needs assessments for heterogeneous catalysts and their energy related applications and to manage individual experts and groups of experts in the timely and successful identification, analysis, distillation and documentation of scientific and technical information. These demonstrated abilities shall be documented in the application.

The applicant, in order to address adequately and competently the full scope of this endeavor at sufficient technical depths in all major topical areas, must enlist the aid of other scientific/technical experts. The application shall provide tentative identification of all proposed experts and their present affiliation. All experts, both foreign and domestic, are to be individuals who are competent and accomplished in a scientific or technical discipline directly related to the research assessment. Technical competence and accomplishments of each expert shall be described in the application, and should include the individual's experience, research publications, consultant services, contributions while serving as an expert with other groups, honors and awards, professional experience, and education, including advanced degrees and other academic qualifications. The expected contribution of each expert to the assessment's objectives should be identified. The overall technical expertise of the group of experts, when combined with the technical expertise of the principal investigator, should be shown to be adequate to cover the various scientific and technical disciplines involved in the assessment.

These experts will assist the principal investigator in accomplishment of the assessment's objectives, especially in writing major sections of the required final report. They are also expected to conduct technical discussions with other experts, specialists, researchers, and research program managers in the scientific and technical areas; conduct site visits to laboratories and other facilities where research and development directly related to the subject area is conducted and managed; and review and evaluate recent and relevant research including scientific and technical literature.

The initial composition of a group of experts, other consultants, and any subsequent changes must be approved by the Program Manager and Contracting Officer.

Applications also should include the following: a schedule of the assessment's major activities including the tentative content of meetings of various teams of the experts, a description of anticipated site visits to publicly and privately funded facilities, a description of all conferences to be attended as a part of assessment activities, and a description of the methodology for obtaining a peer review of the assessment results.

The applicant is expected to supply the personnel, facilities, and materials necessary to accomplish the objectives of the assessment as described in this notice.

APPLICATION REVIEW AND AWARD INFORMATION: Applications will be reviewed in accordance with the Energy Research Merit Review System, published in the **Federal Register**, March 11, 1991 (56 FR 10244). Subject to the availability of appropriated FY 1992 funds, one grant award at approximately $300,000 is planned. The grant award will be for a 1-year period.

Issued in Washington, DC, on January 10, 1992.

D.D. Mayhew,

Deputy Director for Management, Office of Energy Research.

[FR Doc. 92-1418 Filed 1-17-92; 8:45 am]

BILLING CODE 6450-01-M

Office of Fossil Energy

[Docket No. FE C&E 92-01; Certification Notice—94]

Notice of Filing Certification of Compliance: Coal Capability of New Electric Powerplant Pursuant to Provisions of the Powerplant and Industrial Fuel Use Act, as Amended

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Notice of filing.

SUMMARY: Title II of the Powerplant and Industrial Fuel Use Act of 1978 (FUA), as amended (42 U.S.C. 8301 *et seq.*), provides that no new electric powerplant may be constructed or operated as a base load powerplant without the capability to use coal or another alternate fuel as a primary energy source (FUA section 201(a), 42 U.S.C. 8311 (a), Supp. V, 1987). In order to meet the requirement of coal capability, the owner or operator of any new electric powerplant to be operated as a base loan powerplant proposing to use natural gas or petroleum as its primary energy source may certify, pursuant to FUA section 201(d), to the Secretary of Energy prior to construction, or prior to operation as a base load powerplant, that such powerplant has the capability to use coal or another alternate fuel. Such certification establishes compliance with section 201(a) as of the date it is filed with the Secretary. The Secretary is required to publish in the **Federal Register** a notice reciting that the certification has been filed. Three owners and operators of proposed new electric base load powerplants have filed self-certifications in accordance with section 201(d).

Further information is provided in the **SUPPLEMENTARY INFORMATION** section below.

SUPPLEMENTARY INFORMATION: The following companies have filed self-certifications:

Name	Dated received	Type of facility	Megawatt capacity	Location
EEA I, L.P., Washington, DC	1-6-92	Combined cycle	150	Union County, NJ.
EEA II, L.P., Washington, DC	1-6-92	Combined cycle	150	Bergen County, NJ.
Selkirk Cogen Partners, L.P., Boston, MA	1-7-92	Topping cycle	[1] 340	Selkirk, NY.

[1] On 1-5-90 Selkirk filed a certification for a 79.9 MW topping cycle facility (phase I) which was published in the **Federal Register** on 1-26-90 (55 FR 2680). Phase II of the facility is being built and, when completed, the total capacity of the facility will be 340 MW.

Amendments to the FUA on May 21, 1987 (Pub. L. 100-42), altered the general prohibitions to include only new electric base load powerplants and to provide for the self-certification procedure.

Copies of these self-certifications may be reviewed in the Office of Fuels Programs, Fossil Energy, room 3F-056, FE-52, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, or for further information call Myra Couch as (202) 586-6769.

Issued in Washington, DC on January 14, 1992.

Anthony J. Comb,

Director, Office of Coal & Electricity, Office of Fuels Programs Fossil Energy.

[FR Doc. 92-1421 Filed 1-17-92; 8:45 am]

BILLING CODE 6450-01-M

ENVIRONMENTAL PROTECTION AGENCY

[FRL-4094-6]

Withdrawal of No Migration Petition Reissuance Request

AGENCY: Region 6, EPA.

ACTION: Informational Notice.

SUMMARY: Notice is hereby given that E.I. du Pont de Nemours & Co., Inc. (Dupont), which owns and operates 3 Class I hazardous waste injection wells in Beaumont, Texas, has withdrawn a "no migration" exemption reissuance request it submitted to EPA Region 5 on July 3, 1991. Accordingly, the EPA will take no further action on that reissuance.

FOR FURTHER INFORMATION CONTACT: Minnie Howard (6W-SU) of the EPA Region 6 Office at the address shown below or by calling (214) 655-7165: EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202.

SUPPLEMENTARY INFORMATION: Section 3004 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6924, bans disposal of certain restricted hazardous wastes into an injection well unless the owner/operator of the well demonstrates to the EPA that there will be no migration of hazardous constituents from the injection zone for as long as the waste remains hazardous. Injection well operators seeking approval of such demonstrations file "no migration" petitions with the Agency. The EPA promulgated regulations, now codified at 40 CFR Part 148, setting minimum standards for no migration demonstrations at 53 FR 28118 (July 26, 1988). In relevant part, those regulations allow injection well operators to demonstrate no migration through appropriate mathematical modeling using site specific geological data or, if such data are unavailable, conservative assumptions. Dupont demonstrated no migration for the 3 Class injection wells at the Beaumont site and received an exemption to the land disposal restrictions on July 10, 1990. A condition of that exemption required that Dupont limit the specific gravity of injected wastes to 1.055.

In letter dated July 3, 1991, Dupont requested that the EPA modify its exemption to allow injection of wastes falling within a range of specific gravities into the Lower Oakville Formation. As part of its request, Dupont provided the Agency with additional information, including modeling of the waste plume based on specific gravities at each end of the requested range. Based on a technical review of Dupont's reissuance request, on October 3, 1991, the EPA proposed to reissue the no migration exemption, soliciting public comment on all aspects of Dupont's original petition and reissuance request. As proposed, the reissued exemption would have allowed injection of wastes within a specific gravity range of 1.055 to 1.085.

In comments on the proposed reissuance, Dupont contended the EPA should allow it to inject fluids outside that specific gravity range as long as the average specific gravity of the injected fluids remained within that range. Because neither Dupont's original petition nor its reissuance request contained a no migration demonstration for wastes of specific gravity beyond the proposed range, however, the EPA informed Dupont it did not agree with that comment. Subsequently, Dupont withdrew its reissuance request in a letter dated December 2, 1991. Accordingly, the EPA will taken no further action on that request and Dupont will remain subject to the conditions of the exemption the EPA granted on July 10, 1990.

Dated: January 13, 1992.

Myron O. Knudson,

Director, Water Management Division, EPA Region 6.

[FR Doc. 92-1414 Filed 1-17-92; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

Agency Information Collection Submitted to the Office of Management and Budget for Clearance

The Federal Emergency Management Agency (FEMA) has submitted to the Office of Management and Budget the following information collection package for clearance in accordance with the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Type: Extension of 3067-0189.

Title: State/Local Exercise Data.

Abstract: The State/local exercise annex of the Comprehensive Cooperative Agreement contains reporting requirements for exercises documented on each State's 5-year exercise plan. FEMA Form 95-16, Exercise Data, is used to confirm projected exercise activities and document valuable data which may indicate the need for remedial actions at the local level. Collectively, the data also provides FEMA with an indication of the country's state of national preparedness.

Type of Respondents: State and local goverments.

Estimate of Total Annual Reporting and Recordkeeping Burden: 960 Hours.

Number of Respondents: 3,200.

Estimated Average Burden Hours Per Response: 18 minutes.

Frequency of Response: Annually.

Copies of the above information collection request and supporting documentation can be obtained by calling or writing the FEMA Clearance Officer, Linda Borror, (202) 646-2624, 500 C Street, SW., Washington, DC 20472.

Direct comments regarding the burden estimate or any aspect of this information collection, including suggestions for reducing this burden, to: the FEMA Clearance Officer at the above address; and to Gary Waxman, (202) 395-7340, Office of Management and Budget, 3235 New Executive Office Building, Washington, DC 20503 within eight weeks of this notice.

Dated: January 13, 1992.

Wesley C. Moore,

Director, Office of Administrative Support.

[FR Doc. 92-1408 Filed 1-17-92; 8:45 am]

BILLING CODE 6718-01-M

[FEMA-929-DR]

Minnesota; Amendment to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Minnesota (FEMA-929-DR), data December 26, 1991, and related determinations.

DATED: January 10, 1992.

FOR FURTHER INFORMATION CONTACT: Pauline C. Campbell, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472 (202) 646-3606.

NOTICE: The notice of a major disaster for the State of Minnesota, dated December 26, 1991, is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of December 26, 1991:

The counties of Faribault, Fillmore, and Martin for Public Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

Grant C. Peterson,

Associate Director, State and Local Programs and Support, Federal Emergency Management Agency.

[FR Doc. 92-1410 Filed 1-17-92; 8:45 am]

BILLING CODE 6718-02-M

[FEMA-930-DR]

Texas; Amendment to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Texas (FEMA-930-DR), dated December 26, 1991, and related determinations.

DATED: January 11, 1992.

FOR FURTHER INFORMATION CONTACT: Pauline C. Campbell, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-3606.

NOTICE: The notice of a major disaster for the State of Texas, dated December 26, 1991, is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of December 26, 1991:

The counties of Brazos, Johnson, and Williamson for Individual Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

Grant C. Peterson,

Associate Director, State and Local Programs and Support, Federal Emergency Management Agency.

[FR Doc. 92-1409 Filed 1-17-92; 8:45 am]

BILLING CODE 6718-02-M

FEDERAL MARITIME COMMISSION

Agreement(s) Filed; Jugolinija, et al.

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 217-011364.

Title: Jugolinija/KESCO Space Charter Agreement.

Parties:

Jugolinija,
Kuwait Eastern Shipping Company ("KESCO").

Synopsis: The proposed Agreement would authorize KESCO to charter space from Jugolinija in the trade between United States ports and ports on the Arabian Gulf incluing Kuwait and Red Sea Ports of Saudi Arabia.

Dated: January 14, 1992.

By Order of the Federal Maritime Commission.

Ronald D. Murphy,

Assistant Secretary.

[FR Doc. 92-1328 Filed 1-17-92; 8:45 am]

BILLING CODE 6730-01-M

FEDERAL RESERVE SYSTEM

Federal Open Market Committee; Domestic Policy Directive of November 5, 1991

In accordance with § 271.5 of its rules regarding availability of information, there is set forth below the domestic policy directive issued by the Federal Open Market Committee at its meeting held on November 5, 1991.[1] The Directive was issued to the Federal Reserve Bank of New York as follows:

The information reviewed at this meeting portrays a sluggish economy and a marked deterioration in business and consumer confidence. Total nonfarm payroll employment was unchanged in October after rising slightly over the third quarter, and the civilian unemployment rate edged back up to 6.8 percent. Industrial production has been flat in recent months. Consumer spending increased considerably through the summer, in part because of a sizable rise in expenditures on motor vehicles; sales of motor vehicles slowed in October, however. Real outlays for business equipment—especially for computers—have been rising, but nonresidential construction has continued to decline. Housing starts and home sales have weakened recently. The nominal U.S. merchandise trade deficit in July-August was significantly above its average rate in the second quarter. Wage and price increases have continued to trend downward.

Short-term interest rates have declined somewhat further since the Committee meeting on October 1, while bond yields are about unchanged to slightly higher on balance. The trade-weighted value of the dollar in terms of the other G-10 currencies declined on balance over the intermeeting period.

Expansion in M2 and M3 resumed in October, albeit at a slow pace. For the year through October, expansion of both M2 and M3 is estimated to have been at the lower ends of the Committee's ranges.

The Federal Open Market Committee seeks monetary and financial conditions that will foster price stability and promote sustainable growth in output. In furtherance of these objectives, the Committee at its meeting in July reaffirmed the ranges it had established in February for growth of M2 and M3 of 2-1/2 to 6-1/2 percent and 1 to 5 percent, respectively, measured from the fourth quarter of 1990 to the fourth quarter of 1991. The monitoring range for growth of total domestic nonfinancial debt also was maintained at 4-1/2 to 8-1/2 percent for the year. For 1992, on a tentative basis, the Committee agreed in July to use the same

[1] Copies of the Record of policy actions of the Committee for the meeting of November 5, 1991, are available upon request to The Board of Governors of the Federal Reserve System, Washington, D.C. 20551.

ranges as in 1991 for growth in each of the monetary aggregates and debt, measured from the fourth quarter of 1991 to the fourth quarter of 1992. With regard to M3, the Committee anticipated that the ongoing restructuring of thrift depository institutions would continue to depress the growth of this aggregate relative to spending and total credit. The behavior of the monetary aggregates will continue to be evaluated in the light of progress toward price level stability, movements in their velocities, and developments in the economy and financial markets.

In the implementation of policy for the immediate future, the Committee seeks to decrease somewhat the existing degree of pressure on reserve positions. Depending upon progress toward price stability, trends in economic activity, the behavior of the monetary aggregates, and developments in foreign exchange and domestic financial markets, slightly greater reserve restraint might or slightly lesser reserve restraint would be acceptable in the intermeeting period. The contemplated reserve conditions are expected to be consistent with growth of M2 and M3 over the period from September through December at annual rates of about 3 and 1 percent, respectively.

By order of the Federal Open Market Committee, January 3, 1992.

Normand Bernard,

Deputy Secretary, Federal Open Market Committee.

[FR Doc. 92–1357 Filed 1–17–92; 8:45 am]

BILLING CODE 6210–01–F

His Royal Highness Prince Alwaleed Bin Talal Bin Abduleziz Al Saud; 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 February 11, 1992.

A. Federal Reserve Bank of New York (William L. Rutledge, Vice President) 33 Liberty Street, New York, New York 10045:

1. His Royal Highness Prince Alwaleed Bin Talal Bin Abduleziz Al Saud, Riyadh, Saudi Arabia, and Kingdom 5-KR, Limited, Cayman Islands; to acquire 14.87 percent of the voting shares of Citicorp, New York, New York, and thereby indirectly acquire Citibank (NY State), Rochester, New York, and Citibank NA, New York, New York; Citicorp (Maine), South Portland, Maine, and thereby indirectly acquire Citibank (Maine) NA, South Portland, Maine; Citicorp Holdings Inc., New Castle, Delaware, and thereby indirectly acquire Citibank (Delaware), New Castle, Delaware; Citibank (Florida) NA, Dania, Florida; Citibank (South Dakota) NA, Sioux Falls, South Dakota; Citibank (Arizona), Phoenix, Arizona; and Citibank (Nevada) NA, Las Vegas, Nevada; DeAnza Holding Co., Sunnyvale, California, and thereby indirectly acquire Citibank (Maryland) NA, Towson, Maryland; and DeAnza Bank, Sunnyvale, California.

B. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 400 South Akard Street, Dallas, Texas 75222:

1. Quinton E. Daniel and Kathryn S. Daniel, Alamogordo, New Mexico; to acquire an additional 6.09 percent of the voting shares of Western Bancshares of Alamogordo, Inc., Alamogordo, New Mexico, for a total of 11.61 percent, and thereby indirectly acquire Western Bank, Alamogordo, New Mexico.

Board of Governors of the Federal Reserve System, January 14, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92–1349 Filed 1–17–92; 8:45 am]

BILLING CODE 6210–01–F

KLT Bancshares, Inc.; Formation of, Acquisition by, or Merger of Bank Holding Companies

The company listed in this notice has applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that application or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Comments regarding this application must be received not later than February 11, 1992.

A. Federal Reserve Bank of Kansas City (John E. Yorke, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. KLT Bancshares, Inc., Kansas City, Missouri; to become a bank holding company by acquiring 100 percent of the voting shares of Farley Bancshares, Inc., Farley, Missouri, and thereby indirectly acquire Farley State Bank, Farley, Missouri.

Board of Governors of the Federal Reserve System, January 14, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92–1350 Filed 1–17–92; 8:45 am]

BILLING CODE 6210–01–F

National City Corporation; Formation of, Acquisition by, or Merger of Bank Holding Companies; and Acquisition of Nonbanking Company

The company listed in this notice has applied under § 225.14 of the Board's Regulation Y (12 CFR 225.14) for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) to become a bank holding company or to acquire voting securities of a bank or bank holding company. The listed company has also applied under § 225.23(a)(2) of Regulation Y (12 CFR 225.23(a)(2)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies, or to engage in such an activity. Unless otherwise noted, these activities will be conducted throughout the United States.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such

as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 11, 1992.

A. Federal Reserve Bank of Cleveland (John J. Wixted, Jr., Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101:

1. National City Corporation, Cleveland, Ohio, and NC Acquisition Corp., Cleveland, Ohio; to merge with Merchants National Corporation, Indianapolis, Indiana, and thereby indirectly acquire Merchants National Bank & Trust Company of Indianpolis, Indianapolis, Indiana; Farmers National Bank of Shelbyville, Shelbyville, Indiana; Central National Bank of Greencastle, Greencastle, Indiana; Hancock Bank & Trust, Greenfield, Indiana; Union State Bank, Carmel, Indiana; Mid State Bank of Hendricks County, Danville, Indiana; Mid State Bank, Zionsville, Indiana; Anderson Banking Company, Anderson, Indiana; The National Bank of Greenwood, Greenwood, Indiana; The Seymour National Bank, Seymour, Indiana; Citizens National Bank of Tipton, Tipton, Indiana; Fayette National Bank and Trust Company, Connersville, Indiana; Madison Bank & Trust Company, Madison, Indiana; Elston Bank & Trust Company, Crawfordsville, Indiana; Batesville State Bank, Batesville, Indiana; First National Bank of East Chicago, East Chicago, Indiana; and First National Bank of Indiana, Logansport, Indiana.

In connection with this application, Applicant also proposes to acquire Merchants Mortgage Corporation, Indianapolis, Indiana; Mortgage Company of Indiana, Inc., Indianapolis, Indiana; and Rothenfeld Financial Corporation, Indianapolis, Indiana, and thereby engage in mortgage banking pursuant to § 225.25(b)(1); Merchants Capital Management, Inc., Indianapolis, Indiana, and thereby engage in investment advisory services pursuant to § 225.25(b)(4); Circle Leasing Corporation and its subsidiaries, all of Indianapolis, Indiana, and thereby to engage in equipment lease financing pursuant to § 225.25(b)(5); and North Madison Insurance Agency, Inc., Indianpolis, Indiana, a wholly-owned subsidiary of Madison Bank & Trust Company, and thereby engage in general insurance agency activities pursuant to § 4(c)(8)(D) of the Bank Holding Company Act, as amended. All activities will be conducted throughout the United States with the exception of the general insurance agency activities, which will be confined to the States of Indiana, Illinois, Michigan, Ohio and Kentucky.

Board of Governors of the Federal Reserve System, January 14, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92–1351 Filed 1–17–92; 8:45 am]

BILLING CODE 6210–01–F

Second Bancorp, Inc.; Notice of Application to Engage de novo in Permissible Nonbanking Activities

The company listed in this notice has 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.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 11, 1992.

A. Federal Reserve Bank of Cleveland (John J. Wixted, Jr., Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101:

1. Second Bancorp, Inc., Warren, Ohio; to engage *de novo* through its subsidiary, Aurora Federal Savings Bank, Aurora, Ohio, in owning and operating a savings institution pursuant to § 225.25(b)(9) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, January 14, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92–1352 Filed 1–17–92; 8:45 am]

BILLING CODE 6210–01–F

GENERAL ACCOUNTING OFFICE

Federal Accounting Standards Advisory Board; Hearing

AGENCY: General Accounting Office.

ACTION: Notice.

SUMMARY: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. No. 92–463), as amended, notice is hereby given that a public hearing of the Federal Accounting Standards Advisory Board will be held on Friday, Februrary 28, 1992, from 9 a.m. to 4 p.m. in room 121, National Building Museum, 401 F St., NW., Washington, DC.

The Board will hears views and testimony of interested parties on the Board's first Exposure Draft, entitled Financial Resources, Funded Liabilities, and Net Financial Resources of Federal Entities. The Board is also interested in hearing views on the timing for the implementation of standards. That is, should standards be issued and implemented as they are decided or should implementation be delayed until there is a broad range of standards completed? Views on other issues such as the Board's agenda and user needs may also be provided. Persons interested in providing either written or oral testimony should notify the Staff Director by Monday, February 3, 1992. Written comments, position papers, and outlines of oral presentations should be submitted to the Board by Wednesday, February 19. The Board will schedule those desiring to give oral testimony who have made timely requests, subject to available time. Copies of any written material submitted to the Board will be

distributed to members of the Board and made a part of its public file. Any interested person may attend the hearing as an observer. Board hearings are open to the public.

FOR FURTHER INFORMATION CONTACT: Ronald S. Young, Staff Director, 401 F St., NW., room 302, Washington, DC 20001, or call (202) 504–3336.

Authority: Federal Advisory Committee Act. Pub. L. No. 92–463, Section 10(a)(2), 86 Stat. 770, 774 (1972) (current version at 5 U.S.C. app. section 10(a)(2) (1988); 41 CFR 101–6.1015 (1990).

Dated: January 14, 1992.

Ronald S. Young,

Staff Director.

[FR Doc. 92–1337 Filed 1–17–92; 8:45 am]

BILLING CODE 1610-01-M

Federal Accounting Standards Advisory Board; Meeting

AGENCY: General Accounting Office.

ACTION: Notice.

SUMMARY: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. No. 92–463), as amended, notice is hereby given that a two-day meeting of the Federal Accounting Standards Advisory Board will be held on Wednesday, February 19 and Thursday, February 20, 1992, from 9 a.m. to 4 p.m. in room 7313 of the General Accounting Office, 441 G St., NW., Washington, DC. No meeting will be held in January.

The agenda for the meeting will consist of a review of the minutes of the December 3 meeting, discussion of the staff work plan, review of a draft document on inventory accounting, review of a draft document on accounting for direct loans and loan guarantees, and a discussion on unfunded liabilities. We advise that other items may be added to the agenda; interested parties should contact the Staff Director for more specific information.

Any interested person may attend the meeting as an observer. Board discussions and reviews are open to the public.

FOR FURTHER INFORMATION CONTACT: Ronald S. Young, Staff Director, 401 F St., NW., room 302, Washington, DC 20001, or call (202) 504–3336.

Authority: Federal Advisory Committee Act. Pub. L. No. 92–463, Section 10(a)(2), 86 Stat. 770, 774 (1972) (current version at 5 U.S.C. app. section 10(a)(2) (1988); 41 CFR 101–6.1015 (1990).

Dated: January 14, 1992.

Ronald S. Young,

Staff Director.

[FR Doc. 92–1338 Filed 1–17–92; 8:45 am]

BILLING CODE 1610-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Runaway and Homeless Youth; Final Priorities for Fiscal Year 1992

AGENCY: Administration for Children and Families (ACF), Department of Health and Human Services (DHHS).

ACTION: Notice of Final Fiscal Year 1992 Runaway and Homeless Youth Program Priorities for the Administration for Children and Families.

SUMMARY: The Runaway and Homeless Youth Act requires the Department to publish annually for public comment a proposed plan specifying priorities the Department will follow in awarding grants and contracts under title III Of the Juvenile Justice and Delinquency Prevention Act of 1974, as amended. The proposed plan for fiscal year 1992 was published in the **Federal Register** on October 9, 1991. The final priorities, as presented below, take into consideration the comments and recommendations received from the field in response to that notice.

In implementing the final priorities, the actual solicitations for grant applications will be published separately at a later date in the **Federal Register**. Solicitations for contracts will be published in the "Commerce Business Daily." No proposals, concept papers or other forms of application should be submitted at this time.

FOR FURTHER INFORMATION CONTACT: Wade F. Horn, Ph.D., Commissioner, Administration on Children, Youth and Families, P.O. Box 1182, Washington, DC 20013, telephone: (202) 245–0102.

SUPPLEMENTARY INFORMATION:

I. Purposes and Background

The purposes of the Runaway and Homeless Youth Act (the Act) are to improve services for and increase knowledge about runaway and homeless youth and their families. This Act is administered by the Family and Youth Services Bureau (FYSB) of the Administration on Children, Youth and Families (ACYF).

The Act authorizes financial assistance to establish or strengthen community-based projects (Basic Centers) designed to address the immediate service needs of runaway and homeless youth and their families through providing temporary shelter, counseling, aftercare, and related services. Currently, 369 such projects are being supported. The Act also authorizes support for transitional living projects that provide long-term (up to 18 months) shelter and training for homeless youth ages 16 through 21 who are at risk of long-term dependency on the public welfare system. Currently, 77 such projects are being supported.

The Act also authorizes financial support for:

- A national communication system (a toll-free 24-hour National Runaway Switchboard which serves as a neutral channel of communication between at-risk youth and their families and as a source of referral to needed services);
- Grants to statewide and regional non-profit organizations for the provision of training and technical assistance to agencies and organizations eligible to establish and operate runaway and homeless youth centers; and
- Grants for research, demonstration, evaluation, and service projects.

II. Proposed Priorities and Comments

Section 364 of the Act requires that a notice of final program priorities be published each year after taking into consideration comments received from a public notice of proposed priorities. On October 9, 1991, The Department published a notice of proposed priorities for fiscal year 1992 in the **Federal Register** (56 FR 50916–19) and requested comments and recommendations from the field. Comments on topics not covered in that notice, but which were timely and related to the specific needs of runaway and homeless youth, were also solicited.

As indicated in the earlier **Federal Register** notice, no acknowledgement is being made of specific comments. All comments received by the deadline have been considered in preparing the final runaway and homeless youth funding priorities. Thirty-five comments from individuals and organizations were received in response to the proposed priorities published in October. In general, the comments were supportive of the proposed priorities. The following summarizes the major issues raised by a number of respondents.

Expansion Awards

Most respondents, in general recognition of the need to bring equity among Runaway and Homeless Youth Basic Center grantees, supported the policy of allowing expansion awards to

grantees receiving less than $75,000. Several commentors suggested, however, that the policy, as stated, disadvantages grantees who receive more than $75,000, but who divide their awards among two or more sites. The consequence of the policy, they suggested, is that expansion funds are available to single-site grantees receiving less than $75,000, but are not available to individual sites receiving less than this amount if the umbrella grantee receives more than $75,000. In effect, they maintained, the expansion policy penalizes individual sites of umbrella grantees for their collaborative efforts, and could foster a competition for grant funds that would undermine current networking activities. The Administration on Children, Youth and Families is aware of this situation and will continue to review it. In fiscal year 1992, we will continue the policy of allowing smaller continuation grantees to compete for expansion awards as a partial short-term resolution of the issue of perceived inequity among grantees. Further, during review of competitive new-start grant applications, the proposed number of sites and the proposed number of youth to be served will be taken into account as a first step in the long-term resolution of equity issues.

Homeless Youth

Several respondents expressed concern that "truly" homeless youth often do not have access to the Basic Centers and other shelters supported by the Runaway and Homeless Youth Program (RHYP). In part they attributed this to current funding limitations for all social programs. They suggested further, however, that a second, and perhaps the main, cause is the "closed intake" procedures of some shelters, under which all of the bedspace is contracted out to Government agencies, such as child welfare agencies. The result is that street youth are turned away when they try to access these shelters. This "closed intake" system, some respondents fear, is becoming more common across the country, and is shifting some Basic Centers away from their crisis-resolving responsibilities as envisaged in the legislation establishing the program. The Administration on Children, Youth and Families concurs that a "closed intake" system, as described, is inconsistent with the intent of the establishing legislation, and will take this matter into account in establishing the review criteria for applications to be submitted in fiscal year 1992.

Peer Reviews of Basic Centers

A number of respondents suggested ways to design the proposed peer review system. Some indicated that, while it is appropriate for both Federal officials and peers to participate in training and technical assistance (T&TA) activities, it could be counterproductive to have peers participate in official monitoring activities. This latter activity, it was suggested, is better left to Federal officials or to outside, independent evaluators. Allowing peers to judge or rank others could undermine the rapport needed for provision of T&TA. Other respondents noted that, in spite of the potential nagative consequences, successful monitoring by peers is ongoing in several parts of the country. It was recommended that the ACYF system take these ongoing projects into consideration and complement, rather than try to replace them. Respondents further noted that a key to success in this area is allowing the program operators to be involved in the development and implementation of the system.

The Administration of Children, Youth and Families recognizes the sensitive nature of the peer review process and will ensure that the monitoring system addresses these concerns and builds on existing successful practices in this area. In addition, all official monitoring will continue to be conducted by a Federal staff person, either individually or as the peer review team leader.

Related Services

A number of related activities authorized by the Act and proposed by ACYF for new or ongoing support, including the National Communications System, training and technical assistance activities, evaluations, and the proposed Runaway and Homeless Youth Clearinghouse, received broad based support by respondents. No significant changes in these proposed priorities have been made, and the suggestions offered by respondents to strengthen these efforts will be taken into account as the projects are implemented.

III. Final Program Priorities for Fiscal Year 1992

A. Priorities for Runaway and Homeless Youth Basic Centers

Part A, section 311 of the Act authorizes the Department to make grants to public and private entities to establish and operate local runaway and homeless youth Basic Centers. These centers provide services in support of the immediate needs (temporary shelter, food, clothing, counseling, and related services) of runaway or otherwise homeless youth and their families in a manner which is outside the law enforcement structure and the juvenile justice system.

Approximately 370 grants, of which about one-third will be competitive new awards, will be funded in FY 1992 to support organizations which provide services to fulfill the four major goals of the Runaway and Homeless Youth Program. These goals are to:

1. Alleviate the problems of runaway and homeless youth;
2. Reunite youth with their families and encourage the resolution of intrafamily problems through counseling and other services;
3. Strengthen family relationships and encourage stable living conditions for youth; and
4. Help youth decide upon a future course of action.

An announcement of the availability of funds for the Basic Centers, along with the instructions and forms needed to prepare and submit applications, will be published in a **Federal Register** announcement later in FY 1992.

Funds for Basic Center grants are allotted annually among the States and other qualifying jurisdictions on the basis of their relative populations of individuals who are less than 18 years of age. For the past several years, Basic Center grants have been awarded for three-year project periods. Approximately two-thirds of the Basic Center grants receive non-competitive continuation awards. The remaining one-third of the Basic Center grants expire each year, requiring these agencies to compete for new awards. Grantees with project periods expiring in FY 1992 will be required to submit new competitive applications. Readers should note that all other eligible youth-serving agencies not holding current awards may also apply for these new competitive funds.

As in FY 1991, if sufficient funds are available, an opportunity to compete for an expansion grant will be offered to continuation grantees receiving less than the average national award. In FY 1992, the threshold amount for eligibility to compete for an expansion grant will be $75,000 or less, the same as in FY 1991. The purposes of this policy are to strengthen programs and to increase equity among Basic Center grantees.

A total of $32,175,900 will be awarded to Basic Center grantees in FY 1992. This includes approximately $21,000,000, which will be awarded in the form of non-competing continuation grants, and approximately $11,175,900, which will be

available for competitive new start and expansion grants.

B. Priorities for a National Communications System

Part A, section 313 of the Runaway and Homeless Youth Act, as amended, mandates support for a National Communications System to assist runaway and homeless youth in communicating with their families and with service providers. In FY 1991, a three-year grant was awarded to Metro Help, Inc., of Chicago to operate the system. It is anticipated that $750,000 in second-year continuation funds will be awarded to the grantee in FY 1992.

C. Priorities for Transitional Living Grants

Part B, section 321 of the Runaway and Homeless Youth Act, as amended, authorizes grants to establish and operate Transitional Living projects for homeless youth. This program is structured to help older homeless youth achieve self-sufficiency and avoid long-term dependency on social services. Transitional Living projects provide shelter, skills training, and support services to homeless youth ages 16 through 21 for a continuous period not exceeding 18 months.

The first 45 Transitional Living grants were awarded in September 1990, for three-year project periods. An addition 32 grants were awarded in FY 1991, also for three-year project periods. Approximately $10,000,000 is available in this program in FY 1992 for non-competitive continuation awards to the current grantees. In additional, because the appropriation for the Transitional Living Program increased from $9.9 million in FY 1991 to $12.0 million in FY 1992, approximately $2,000,000 will also be awarded in the form of new starts. These new starts will be selected from meritorious applicants who could not be funded in FY 1991 due to insufficient funds. There will not be a new solicitation for Transitional Living Program applications in FY 1992.

D. Enhancing the Proficiency of Youth Service Workers and Providers

Both the Runaway and Homeless Youth Act, Section 314, and the Drug Abuse Prevention Program for Runaway and Homeless Youth section 3511 of the Anti-Drug Abuse Act of 1988, also administered by FYSB, authorize support to nonprofit organizations for the purpose of providing training and technical assistance (T&TA) to runaway and homeless youth service providers. This T&TA is a valuable mechanism to strengthen programs and to enhance the knowledge and skills of youth service workers.

In FY 1991, ten Cooperative Agreements were awarded, one in each of the ten Federal Regions, to provide training and technical assistance. Each of these Cooperative Agreements has a three-year project period, and it is anticipated that all funds available for services in this area in FY 1992 will be awarded through non-competing continuations to the current grantees.

To strengthen programs and to promote integration of services, the Cooperative Agreements are designed to include the provision of training and technical assistance to organizations receiving grants under the three Federal runaway and homeless youth programs administered by the Family and Youth Services Bureau: The Runaway and Homeless Youth Basic Center Program (RHYP), the Transitional Living Program (TLP), and the Drug Abuse Prevention Program (DAPP).

E. Priorities of Research, Demonstration, and Service Projects

Section 315 of the Act authorizes the Department to make grants to States, localities, and private entities to carry out research, demonstration, and service projects designed to increase knowledge concerning, and to improve services for, runaway and homeless youth. These activities are important in order to identify emerging issues and to develop and test models which address such issues.

1. Grants for Research, Demonstration, and Service Projects

In FY 1991, through the Coordinated Discretionary Funds Program (CDP) of the former Office of Human Development Services (now the Administration for Children and Families (ACF)), new multi-year research and demonstration projects were funded in the areas of:

a. *Home-Based Services: An Alternative to Out-of-Home Shelter.* These projects are developing home-based intervention models, including mediation, designed to meet the needs of at-risk youth and their families.

b. *Transitional Living/Independent Living Collaborations.* These demonstrations are developing and testing models of interagency collaboration between projects funded under the Transitional Living Program for Homeless Youth and the Independent Living Initiatives Program for youth in foster care under title IV–E of the Social Security Act.

In FY 1992, all Runaway and Homeless Youth Program (RHYP) funds available for demonstration grants will be awarded in the form of second-year continuations to the projects funded under the CDP in FY 1991. Rather than initiate new demonstration projects this year, emphasis will be given to collecting, analyzing and disseminating existing research, information, products and materials that will be of use to the runaway and homeless youth field.

2. Contracts for Research, Demonstration, Evaluation and Service Projects

A number of activities will be carried out to improve the information base on which the runaway and homeless youth programs are founded and to collect and disseminate information to youth-serving organizations. The following projects, which will be funded through new contracts, will be initiated in FY 1992 as proposed in the Federal Register on October 9, 1991:

a. *National Evaluation of the Home-Based Services Programs for Runaway and Homeless Youth.* Three demonstration grants under the home-based services initiative of the Runaway and Homeless Youth Program were awarded in FY 1991. This evaluation, to be conducted over a two year period, will provide descriptive information about the programs and outcome information regarding their impact on runaway and homeless youth. The contractor will compare outcomes of youth receiving shelter-based services with those receiving home-based services.

b. *Management Information System Implementation.* This project, with an initial funding period of up to five years, will implement a FYSB Management Information System (MIS) across all three types of RHYP grantees; will provide software, user documentation of the system, and technical assistance to bring grantees on-line; will make updates and system changes; and will produce local and national reports. It is anticipated that all RHYP grantees will have access to and will participate in this national data collection effort by the beginning of FY 1993. Ongoing training and technical assistance for operation of the MIS will be available to grantees.

c. *Clearinghouse on Runaway and Homeless Youth.* This project, with an initial funding period of up to five years, will establish a Clearinghouse for the dissemination of materials to agencies providing services to runaway and homeless youth. Activities will include the collection, analysis, synthesis, packaging, and dissemination of findings and products of past and current FYSB research and

demonstration projects and other information on runaway and homeless youth. Additional efforts to be undertaken by the Clearinghouse will include the identification of issues on which new or additional information, materials and products are needed and the development of such products; and activities to provide the field with the information needed to improve services to runaway and homeless youth.

d. *Monitoring Support for Runaway and Homeless Youth Grantees (Basic Centers, Transitional Living Projects, and Drug Abuse Prevention Projects).* This project, of which the initial phase is to be completed in one year, will develop monitoring tools and site visit protocols for the three target programs, leading to a comprehensive monitoring system that utilizes a peer review model. The peer review model will involve a programmatic and administrative on-site assessment, conducted by a team led by a Federal staff person. Support for full-scale implementation of this peer review monitoring system will be provided in future years upon successful completion of the project's initial phase.

It is anticipated that incremental or continuation funding will be provided to continue the following activities:

e. *Evaluation of the Transitional Living Program (TLP) for Homeless Youth.* The contractor for this study is evaluating the effects of the TLP grants funded in FYs 1990 and 1991 on the youth served. This evaluation is studying who is involved in these projects, how the projects have been organized, the role of community based organizations in meeting the needs of homeless youth, and the relationship of these projects to similar programs.

f. *National Evaluation of the Runaway and Homeless Youth Centers—A Follow-Up Study.* The contractor for this study is evaluating the impact of the Runaway and Homeless Youth Basic Center Program on the youth served. This study will also determine the policy, program, and service delivery issues that impede or facilitate the Runaway and Homeless Youth Program goals.

3. Interagency Agreement for a Research, Demonstration, and Service Project

As discussed in the proposed priorities published on October 9, 1991, the Administration on Children, Youth and Families is continuing to discuss the possibility of a collaborative effort with the Centers for Disease Control to develop and support efforts to prevent HIV infection among runaway and homeless youth.

(Catalog of Federal Domestic Assistance, Program Number 93.623, Runaway and Homeless Youth)

Dated: December 20, 1991.

Wade F. Horn,

Commissioner, Administration on Children, Youth and Families.

Approved: January 14, 1992.

Jo Anne B. Barnhart,

Assistant Secretary for Children and Families.

[FR Doc. 92-1379 Filed 1-17-92; 8:45 am]

BILLING CODE 4130-01-M

Food and Drug Administration

[Docket No. 91N-0429]

Alpha Therapeutic Corp.; Opportunity for Hearing on Intent To Revoke U.S. License No. 744-071

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for hearing on a proposal to revoke the establishment license (U.S. License No. 744-071) and product license issued to Alpha Therapeutic Corp. (doing business as Alpha Plasma Center) for the manufacture of Source Plasma. The proposed revocation is based on significant noncompliance with certain provisions of the biologics regulations specified in this document. Alpha Therapeutic Corp. has several Centers at various locations under their licenses. Only the Alpha Plasma Center is affected by this proposed revocation.

DATES: The firm may submit a written request for a hearing to the Dockets Management Branch by February 20, 1992, and any data justifying a hearing must be submitted by March 23, 1992. Other interested persons may submit written comments on the proposed revocation by March 23, 1992.

ADDRESSES: Submit written requests for a hearing, any data justifying a hearing, and any written comments on the proposed revocation to the Dockets Management Branch (HFA-305), Food and Drug Administration, rm. 1-23, 12420 Parklawn Dr., Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: JoAnn M. Minor, Center for Biologics Evaluation and Research (HFB-132), Food and Drug Administration, 8800 Rockville Pike, Bethesda, MD 20857, 301-295-8188.

SUPPLEMENTARY INFORMATION: FDA is proposing to revoke the establishment license (U.S. License No. 744-071) and the product license issued to Alpha Therapeutic Corp., 2100 Andrews Hwy., Odessa, TX 79761, for the manufacture of Source Plasma. Other locations under the Alpha Therapeutic Corp. license are not affected by this proposed revocation. The proposed revocation is based on the failure of the Alpha Plasma Center and its responsible management to conform to the applicable standards and conditions established in its license and the requirements in 21 CFR parts 600, 601, 606, and 640.

FDA inspections and investigation of the Alpha Plasma Center, conducted from February 4 through 8 and February 12 through 20, 1991, respectively, documented numerous and significant deficiencies from applicable standards in mayor areas of the operation.

An investigation conducted concurrently with the February 1991 inspections showed that the Alpha Plasma Center repeatedly failed to adequately determine donor suitability. The Alpha Plasma Center's failure to adequately determine donor suitability represents serious noncompliance with those standards designed to assure the safety, purity, identity, and quality of plasma, as well as the standards for donor protection, which are intended to assure a continuous and healthy donor population. The following are examples of the Alpha Plasma Center's inadequate performance of donor suitability determination: (1) The Alpha Plasma Center abbreviated or omitted donor screening procedures, such as questioning of donors regarding their medical history (21 CFR 640.63); (2) the Alpha Plasma Center abbreviated or omitted predonation examinations; i.e., temperature, blood pressure, and hematocrit (21 CFR 640.63 (c)(1) through (c)(4)); (3) the Alpha Plasma Center completed donor records giving the appearance that proper screening had been conducted, although not all required screening procedures were conducted (21 CFR 640.72(a)(4)); (4) the Alpha Plasma Center failed to carefully examine donors for needle marks and scars indicative of narcotic addiction (21 CFR 640.63(c)(10)); and (5) the Alpha Plasma Center accepted donors under the infuence of alcohol or drugs, and donors who engaged in activities that put them at risk of human immunodeficiency virus type-1 (HIV-1) infection, with the knowledge of management (21 CFR 640.63(d)).

FDA's investigation also determined that management has not exercised sufficient control over the Alpha Plasma Center's daily operations. The inadequate training of the employees and the management's disregard for the applicable regulations and standards in

the operation of the Alpha Plasma Center clearly contributed to the acceptance of three self-admitted intravenous drug users as donors (21 CFR 600.10)

By letter dated February 27, 1991, FDA notified and Alpha Therapeutic Corp. that it establishment and product licenses located in Odessa, TX had been suspended and that the licenses would be revoked unless the Alpha Therapeutic Corp. contacted FDA within 10 days.

In its letters dated March 4 and 8, 1991, the Alpha Therapeutic Corp. requested that the revocation of their license be held in abeyance, and outlined proposed corrective actions. The Alpha Therapeutic Corp. acknowledged problems associated with the management of the facility and reported that an internal audit in December 1990 revealed deficiencies in donor suitability determination. In considering the Alpha Therapeutic Corp.'s request, FDA comprehensively reviewed the Alpha Plasma Center's recent inspection history, including the February 1991 inspections and investigation and the corrective actions proposed by the Alpha Therapeutic Corp. FDA's investigation determined that the problems at the Alpha Plasma Center were neither promptly nor adequately addressed, in that unsuitable donors continued to be accepted for plasma donation after the Alpha Plasma Center's December 1990 audit. FDA's review showed that the Alpha Plasma Center's personnel were inadequately trained and supervised to effectively and properly perform their assigned duties. The information obtained during the agency's investigation and inspections of the Alpha Plasma Center demonstrates willfulness on the part of on-site management in that management did not initiate appropriate and necessary control over the Alpha Plasma Center to address and correct known, serious, and ongoing problems at the firm. FDA found significant and continued noncompliance with the applicable Federal regulations and the provisions of the establishment's license. Because the violations at the Alpha Plasma Center were significant and willful, FDA concluded that the firm's request that license revocation be held in abeyance must be denied.

In a letter dated April 26, 1991, pursuant to 21 CFR 601.5(b), FDA notified the Alpha Therapeutic Corp. and its responsible head of the agency's intent to revoke U.S. License No. 0744–071 and announced its intent to offer an opportunity for hearing. In a letter dated May 8, 1991 the Alpha Therapeutic Corp. advised FDA that the firm did not wish to waive its opportunity for a hearing.

Accordingly, FDA is now issuing a notice of opportunity for hearing pursuant to 21 CFR 12.21(b) on a proposal to revoke the licenses for the Alpha Therapeutic Corp., Odessa, TX.

By letter dated August 7, 1991, the Alpha Therapeutic Corp. submitted a citizen petition requesting reconsideration of the proposed revocation of U.S. License No. 744–071. FDA is currently reviewing this petition separately under 21 CFR 10.20, 10.25, 10.30 and 10.33.

FDA has placed copies of documents supporting the proposed license revocation on file with the Dockets Management Branch (address above). These documents, which are filed under the docket number found in brackets in the heading of this notice, include the List of Observations (Form FDA–483's) from the inspections of February 4 through 8 and 12 through 20, 1991; FDA letters of February 27 and April 26, 1991; and the firm's letters of March 4, March 8, and May 8, 1991. The documents are available for public examination in the Docket Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

The Alpha Therapeutic Corp. may submit a written request for a hearing to the Docket Management Branch by February 20, 1992, and any data justifying a hearing must be submitted by March 23, 1992. Other interested persons may submit comments on the proposed license revocation to the Dockets Management Branch by March 23, 1992. The failure of a licensee to file a timely written request for a hearing constitutes an election by the licensee not to avail itself of the opportunity for hearing concerning the proposed license revocation.

FDA procedures and requirements governing a notice of opportunity for hearing, notice of appearance and request for hearing, grant or denial of hearing, and submission of data and information to justify a hearing, are contained in 21 CFR parts 12 and 601. A request for a hearing may not rest upon mere allegations or denials, but must set forth a genuine and substantial issue of fact that requires a hearing. If it conclusively appears from the face of the data, information, and factual analyses submitted in support of the request for a hearing that there is no genuine and substantial issue of fact for resolution at a hearing, or if a request for hearing is not made within the specified time, the Commissioner of Food and Drugs will deny the hearing request, making findings and conclusions that justify the denial.

Two copies of any submissions are to be provided to FDA, except that individuals may submit one copy. Submissions are to be identified with the docket number found in brackets in the heading of this document. Such submissions, except for data and information prohibited from public disclosure under 21 CFR 10.20(j)(2)(i), 21 U.S.C. 331(j), or 18 U.S.C. 1905, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

This notice is issued under the Public Health Service Act (sec. 351, (42 U.S.C. 262)) and the Federal Food, Drug, and Cosmetic Act (secs. 201, 501, 502, 505, 701 (21 U.S.C. 321, 351, 352, 355, 371) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Director and Deputy Director, Center for Biologics Evaluation and Research (21 CFR 5.67)).

Dated: January 2, 1992.

Janet Woodcock,

Acting Director, Center for Biologics Evaluation and Research.

[FR Doc. 92–1366 Filed 1–17–92; 8:45 am]

BILLING CODE 4160–01–M

Health Resources and Services Administration

Health Education Assistance Loan Program; Maximum Interest Rates for Quarter Ending March 31, 1992

Section 727 of the Public Health Service Act (42 U.S.C. 294) authorizes the Secretary of Health and Human Services to establish a Federal program of student loan insurance for graduate students in health professions schools.

Section 60.13(a)(4) of the program's implementing regulations (42 CFR part 60, previously 45 CFR part 126) provides that the Secretary will announce the interest rate in effect on a quarterly basis.

The Secretary announces that for the period ending March 31, 1992, three interest rates are in effect for loans executed through the Health Education Assistance Loan (HEAL) program.

1. For loans made before January 27, 1981, the variable interest rate is 8¼ percent. Using the regulatory formula (45 CFR 126.13(a)), in effect prior to January 27, 1981, the Secretary would normally compute the variable rate for this quarter by finding the sum of the fixed annual rate (7 percent) and a variable component calculated by substracting 3.50 percent from the average bond equivalent rate of 91-day U.S. Treasury bills for the preceding calendar quarter

(4.66 percent), and rounding the result (8.16 percent) upward to the nearest ⅛ percent (8¼ percent).

However, the regulatory formula also provides that the annual rate of the variable interest rate for a 3-month period shall be reduced to the highest one-eighth of 1 percent which would result in an average annual rate not in excess of 12 percent for the 12-month period concluded by those 3 months. Because the average rate of the 4 quarters ending March 31, 1992, is not in excess of 12 percent, there is no necessity for reducing the interest rate. For the previous 3 quarters the variable interest at the annual rate was as follows: 9¾ percent for the quarter ending June 30, 1991; 9⅜ percent for the quarter ending September 30, 1991; 9⅛ percent for the quarter ending December 31, 1991.

2. For variable rate loans executed during the period of January 27, 1981 through October 21, 1985, the interest rate is 8¼ percent. Using the regulatory formula (42 CFR 60.13(a)) in effect for that time period, the Secretary computes the maximum interest rate at the beginning of each calendar quarter by determining the average bond equivalent rate for the 91-day U.S. Treasury bills during the preceding quarter (4.66 percent); adding 3.50 percent (8.16 percent) and rounding that figure to the next higher one-eighth of one percent (8¼ percent).

3. For fixed rate loans executed during the period of January 1, 1992 through March 31, 1992, and for variable rate loans executed on or after October 22, 1985, the interest rate is 7¾ percent. The Health Professions Training Assistance Act of 1985 (Pub. L. 99–129), enacted October 22, 1985, amended the formula for calculating the interest rate by changing 3.5 percent to 3 percent. Using the regulatory formula (42 CFR 60.13(a)), the Secretary computes the maximum interest rate at the beginning of each calendar quarter by determining the average bond equivalent rate for the 91-day U.S. Treasury bills during the preceding quarter (4.66 percent); adding 3.0 percent (7.66 percent) and rounding that figure to the next higher one-eighth of one percent (7¾ percent).

(Catalog of Federal Domestic Assistance No. 13.108, Health Education Assistance Loans)

Dated: January 14, 1992.

Robert G. Harmon,

Administrator.

[FR Doc. 92–1434 Filed 1–17–92; 8:45 am]

BILLING CODE 4160–15–M

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Wind River Irrigation Project, WY; Irrigation Project

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Public notice.

PURPOSE: Proposed increase to the Wind River Irrigation Project Operation and Maintenance Rates.

SUMMARY: The Bureau of Indian Affairs is proposing to increase the operation and maintenance rate of the Wind River Irrigation Project from $10.90 to $12.00 per assessable acre. The cost to operate and maintain the irrigation project has increased since the last operation and maintenance rate increase. The cost to operate and maintain the project are anticipated to increase in Fiscal Year 1992.

The project's annual operation and maintenance charges are based on the estimated normal operating cost of the project for one fiscal year. Copies of the proposed Fiscal Year 1992 budget may be acquired from the Superintendent of the Wind River Agency, Bureau of Indian Affairs, Fort Washakie, Wyoming 82514. A self addressed manila envelop with postage must be included when making your request.

The Wind River Irrigation Project manager held meetings with the Crow Heart, Ray, Coolidge, and Arapahoe Water Usage Committees December 31, 1991, January 7 and 8, 1992, respectively on the proposed operation and maintenance rate increase.

The due date for all operation and maintenance charges will be May 1 of each calendar year.

Interest and/or penalty fees will be assessed on all (trust and fee assessed lands) delinquent operation and maintenance charges as prescribed in the 42 Bureau of Indian Affairs Manual and the Code of Federal Regulations, Chapter 4, Part 102. Government agencies, such as Federal, State, and tribal Governments are exempted from interest and/or penalty fees.

This notice will be published and posted at the following locations:

	Newspaper
U.S. Post Offices: Fort Washakie, WY 82514; Lander, WY 82520; Riverton, WY 82501.	Wyoming State Journal, Lander, WY 82520.
Bureau of Indian Affairs: Wind River Agency, Fort Washakie, WY 82514.	Riverton Ranger, Riverton, WY 82501.

COMMENT PERIOD: All comments concerning the proposed Fiscal Year 1992 operating and maintenance rate for the Wind River irrigation project must be in writing and addressed to the Superintendent of the Wind River Agency, Fort Washakie, Wyoming, 82514. All written comments will be accepted on or after January 17, 1992, but no later than the close of business of February 21, 1992.

SUPPLEMENTARY INFORMATION: This notice is issued pursuant to the Code of Federal Regulations, chapter 25, part 171 under the authority delegated to the Area Director, by the Assistant Secretary of Indian Affairs and the Deputy Assistant Secretary of the Interior (Departmental Manual, chapter 3, part 230, (3.1 & 3.2)).

Norris Cole,

Acting Billings Area Director.

[FR Doc. 92–1334 Filed 1–17–92; 8:45 am]

BILLING CODE 4310–02–M

Bureau of Land Management

[ID–010–02–4350–08]

Critical Environmental Concern Designation, Bruneau Resource Area

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability of proposed management framework plan amendment; and proposed area of critical environmental concern designations.

SUMMARY: Pursuant to the BLM Planning Regulations (43 CFR part 1600) and the National Environmental Policy Act (NEPA, section 102(2)(C)) the Boise District, BLM has prepared a proposed amendment to the Bruneau Management Framework Plan to designate three sites within the Bruneau Resource Area as areas of critical environmental concern (ACECs). The proposed plan amendment is now available for a 30-day protest period under provisions in the BLM Planning regulations found at 43 CFR 1610.5–2.

DATES: The protest period for the proposed plan amendment will begin on January 17, 1992 and close on February 18, 1992. Written protests to the Director must be received or postmarked no later than the closing date.

ADDRESSES: Protests should be sent to the Director at the following address: Director (760), Department of the Interior, Bureau of Land Management, 18th and C Streets NW., Washington, DC 20240. Any protest should include: (1) Name, address, telephone number

and interest of protesting party, (2) identification of the issue being protested, (3) a statement on the parts of the plan being protested, (4) a copy of all documents addressing the issue that were submitted during the planning process, and (5) a concise statement why the State Director's decision is believed to be wrong.

FOR FURTHER INFORMATION CONTACT: Dennis Hoyem, Bruneau Area Manager or Fred Minckler, Environmental Specialist at the Bureau of Land Management, 3984 Development Avenue, Boise, ID 83705, telephone (208) 384–3300.

SUPPLEMENTARY INFORMATION: The Bruneau Management Framework Plan (MFP) is a land use plan for public lands within the Bruneau Resource Area administered by BLM in southwest Idaho. The Boise District has prepared a proposed amendment to that plan which addresses special management actions and designation of three sites ranging in size from five to 346 acres as research natural area (RNA) ACECs to recognize their value and protect rare and undisturbed plant populations and other resource values. The three proposed sites are: Mud Flat Oolite RNA, five acres; Triplet Butte RNA, 322 acres; and Cottonwood Creek RNA, 346 acres. Resource use limitations proposed for these areas address: Livestock grazing; motorized vehicle use; rights-of-way; mineral leasing, location and disposal; water developments and fire suppression and rehabilitation.

Review of the environmental assessment (EA) prepared on the Proposed Amendment has resulted in a finding that no significant impact on the human environment would result from implementing the proposal and that an environmental impact statement (EIS) need not be prepared.

Dated: January 9, 1992.

J. David Brunner,

District Manager.

[FR Doc. 92–1362 Filed 1–17–92; 8:45 am]

BILLING CODE 4310–GG–M

[MT–060–02–4320–ADVB]

Lewiston District Grazing Advisory Board; Meeting

AGENCY: Bureau of Land Management, Lewistown District Office.

ACTION: Notice of Grazing Advisory Board Meeting.

SUMMARY: The Lewistown District Grazing Advisory Board will meet February 20, 1992. The agenda will be:

10 a.m.—Judith Valley Phillips Resource Management Plan

12 noon—Lunch

1 p.m.—Judith Valley Phillips Resource Management Plan

3 pm.—Adjourn

Public comment will be sought at the end of each issue discussion.

LOCATION: Lewistown BLM District Office, Lewistown, Montana.

FOR FURTHER INFORMATION CONTACT: David L. Mari, District Manager, Bureau of Land Management, P.O. Box 1160, Lewistown, MT 59457.

SUPPLEMENTARY INFORMATION: The Lewistown District Grazing Advisory Board is authorized under the Federal Advisory Committee Act, 5 U.S.C., appendix 1. The board advises the Lewistown District Manager concerning the development of allotment management plans and the utilization of range betterment funds.

Dated: January 10, 1992.

David L. Mari,

District Manager.

[FR Doc. 92–1329 Filed 1–17–92; 8:45 am]

BILLING CODE 4310–DN–M

[AK–919–02–4830–02–ADVB]

Northern Alaska Advisory Council; Meeting

The Northern Alaska Advisory Council will hold a public meeting Thursday, February 20, 1992, at the training rooms of the Bureau of Land Management's Fairbanks Office Building in Fairbanks, Alaska. The public meeting will start at 8:30 a.m. and end at 5 p.m. Public comment will be taken from 2 p.m. to 3 p.m.; written comments may be submitted.

The council will hear BLM reports on: (1) The status of Federal mining claims on State- and Native-selected lands, (2) the budget for 1992 and future program direction, (3) the status of the downsizing of BLM's Washington, DC, office, (4) 638 contracting, and (5) BLM Alaska Fire Service programs.

For information, contact the Public Affairs Office, Bureau of Land Management, 1150 University Avenue, Fairbanks, Alaska 99709, telephone (907) 474–2231.

Dated: January 13, 1992.

Helen M. Hankins,

Designated District Manager.

[FR Doc. 92–1361 Filed 1–17–92; 8:45 am]

BILLING CODE 4310–JA–M

Fish and Wildlife Service

Availability of the Draft Environmental Assessment and Land Protection Plan; Proposed Established of Grand Bay National Wildlife Refuge Jackson County, MS and Mobile County, AL

AGENCY: Fish and Wildlife, Interior.

ACTION: Notice of availability of the draft environmental assessment and land protection plan for the proposed establishment of Grand Bay National Wildlife Refuge.

SUMMARY: This notice advises the public that the U.S. Fish and Wildlife Service, Southeast Region, proposes to establish a national wildlife refuge in the vicinity of Jackson County, Mississippi and Mobile County, Alabama. The purpose of the proposed refuge is to protect and manage approximately 12,940 acres of nationally significant Gulf Coast savanna and associated wetland habitats for the benefit of the endangered Mississippi sandhill crane, wintering waterfowl, and other wildlife. A Draft Environmental Assessment and Land Protection Plan has been developed by Service biologists in coordination with the Mississippi Department of Wildlife, Fishers and Parks, the Alabama Department of Conservation and Natural Resources, and The Nature Conservancy. The assessment considers the biological, environmental, and socioeconomic effects of establishing the refuge. The assessment also evaluates three alternative actions and their potential impacts on the environment. Written comments or recommendations concerning the proposal are welcomed, and should be sent to the address below.

DATES: Land acquisition planning for the project is currently underway. The draft assessment will be available to the public for review and comment on February 12, 1992. Written comments must be received no later than March 30, 1992 to be considered.

ADDRESSES: Comments and requests for copies of the assessment and further information should be addressed to Mr. Charles R. Danner, Chief, Project Development Branch, Office of Refuges and Wildlife, U.S. Fish and Wildlife Service, 75 Spring Street SW., room 1240, Atlanta, Georgia 30303.

SUPPLEMENTARY INFORMATION: The primary objectives of the proposed refuge are to (1) protect one of the most important remaining examples of undisturbed savanna habitat in the Gulf

Coastal Plain region, (2) provide habitat suitable for the establishment of a second breeding flock of endangered Mississippi sandhill cranes, and (3) benefit a diversity of native plants and animals, many of national importance, through the acquisition and protection of a unique ecosystem.

The proposed refuge area is located about 10 miles east of Pascagoula, Mississippi, and 20 miles southwest of Mobile, Alabama. The area is bordered on the north by the community of Franklin Creek, on the west generally by the Bayou Cumbist, and to the east by the Grand Bay Swamp.

On September 22, 1989, the Small Business Administration transferred 3,489 acres of land along the Mississippi-Alabama coast to the U.S. Fish and Wildlife Service for wildlife conservation purposes. This tract comprises the southern portion of the proposed refuge and consists of relatively undisturbed salt and brackish water marshes and forested wetlands. The remaining lands for the proposed refuge lie adjacent to the northern boundary of the tract and encompass a total of 9,451 acres. These lands are currently in private ownership and contain a diversity of vegetation types, including savannas, swamps, pine forests, and pond cypress. Wild orchids and several types of rare insectivorous plants grow throughout the area.

The 3,489-acre southern tract is currently being protected and managed by the Service as part of the Mississippi Sandhill Crane National Wildlife Refuge, located approximately 15 miles northwest. The Service proposes to establish Grand Bay as a new, separate national wildlife refuge by acquiring fee title or less-than-free interest to about 9,451 acres of additional lands north of the tract. These additional lands, if acquired, would greatly increase the proposed refuge's habitat diversity for the benefit of migratory birds and other wildlife.

The draft environmental assessment was developed by the Service in consultation with representatives from the Mississippi Department of Wildlife, Fisheries and Parks, the Alabama Department of Conservation and Natural Resources, and The Nature Conservancy. The biological, environmental, and socioeconomic effects of acquiring approximately 9,451 acres of savanna and other associated wetland habitats for the establishment of the refuge have been considered. Three alternatives and their potential impacts on the environment are presented and evaluated. The Service believes the preferred alternative, Protection and Management by the U.S. Fish and Wildlife Service, is a positive step in preventing the further loss of a nationally significant Gulf Coast savanna ecosystem for the benefit of the endangered Mississippi sandhill crane, migratory birds, waterfowl, and other native wildlife.

Dated: January 14, 1992.

Harold W. Benson,

Acting Regional Director.

[FR Doc. 92-1370 Filed 1-17-92; 8:45 am]

BILLING CODE 4310-55-M

National Park Service

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before January 11, 1992. Puruant to § 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, DC 20013-7127. Written comments should be submitted by February 5, 1992.

Carol D. Shull,

Chief of Registration, National Register.

FLORIDA

Lee County

Dubar, Paul Lawrence, School 1857 High St., Fort Myers, 92000025

NEW YORK

Wayne County

Smith—Ely Mansion, 39 W. Genesee St., Clyde, 92000032

Westchester County

The Woodpile, Jct. of Croton Lake and Wood Rds., Mt. Kisco vicinity, 92000030

Wyoming County

Gates, Seth M., House, 15 Perry Ave., Warsaw, 92000031

SOUTH CAROLINA

Anderson County

Ramer, Ralph John, House, 402 Boulevard, Anderson, 92000023

Berkeley County

Pineville Historic District, Rd. S-8-204 S of jct. with SC 45, Pineville, 92000024

TEXAS

Dallas County

Interstate Forwarding Company Warehouse, 3200 Main St., Dallas, 92000021

Nacogdoches County

Blount, Eugene H., House (Nacogdoches MPS), 1801 North St., Nacogdoches, 92000014

Cotton Exchange Building, Old (Nacogdoches MPS), 305 E. Commerce St., Nacogdoches, 92000008

Davidson, Maria A., Apartments (Nacogdoches MPS), 112 E. Main St., Nacogdoches, 92000009

Hayter Office Building (Nacogdoches MPS), 112 E. Main St., Nacogdoches, 92000010

Hoya Land Office Building (Nacogdoches MPS), 120 E. Pilar St., Nacogdoches, 92000015

Jones, Roland, House (Nacogdoches MPS), 141 N. Church St., Nacogdoches, 92000007

Post Office Building, Old (Nacogdoches MPS), 206 E. Main St., Nacogdoches, 92000011

Roberts Building (Nacogdoches MPS), 216 E. Pilar St., Nacogdoches, 92000016

Suthern Pacific Railroads Depot (Nacogdoches MPS), 500 W. Main St., Nocogdoches, 92000013

Sterne—Hoya Historic Disticts (Nacogdoches MPS), 100-200 blocks of S. Lanana St., 500 block of E. Main St. (S side), 500 block of E. Pilar St., Nacogdoches, 92000017

Virginia Avenue Historic District (Nacogdoches MPS), 500 block of Bremond (W side), 500-1800 blocks of Virginia Ave., 521 Weaver, Nacogdoches, 92000018

Washington Square Historic District (Nacogdoches MPS), Roughly bounded by Houston, Logansport, N. Lanana, E., Hospital and N. Fredonia Sts., Nacogdoches, 92000019

Woodmen of the World Building (Nacogdoches MPS), 412 E. Main St., Nacogdoches, 92000012

VIRGINIA

King George County

Powhatan Rural Historic District, Jct. of VA 607 and VA 610, King George, 92000020

WISCONSIN

Langlade County

Antigo Depot, 522 Morse St., Antigo, 92000029

Marinette County

Dunlap Square Building, 1821 Hall St., Marinette, 92000026

Laureman Brothers Department Store, 1701-1721 Dunlap Sq., Marinette, 92000027

Sheboygan County

Baizer, John, Wagon Works Complex, 818-820, 820A Pennsylvania Ave., Sheboygan, 92000028

[FR Doc. 92-1428 Filed 1-17-92; 8:45am]

BILLING CODE 4310-70-M

Brandy Station Battlefield; Determination of Eligibility for the National Register of Historic Places

ACTION: Request for comments.

On February 28, 1991, the historic site of Brandy Station Battlefield and

Related Locations was determined eligible for listing in the National Register of Historic Places. The property was determined to meet National Register Criterion A (associated with important events), Criterion B (associated with important persons), and Criterion D (likely to yield important information). This finding was based upon the extensive primary and secondary source documentation contained in the Virginia State Historic Landmark form, a review of this form by National Park Service historians, and several onsite inspections of selected sites within the area. The State Landmark documentation was prepared by the Virginia Department of Historic Resources, the State agency designated to implement the national historic preservation program in Virginia.

This property was determined eligible for the National Register in the area of military history as the site of the June 9, 1863, Battle of Brandy Station, the largest cavalry battle of the Civil War and in North America. It was also determined eligible as a turning point in the Union Cavalry's effectiveness in the Eastern Theater of the Civil War. Brandy Station Battlefield and Related Locations was also determined eligible for its association with the military career of the noted Southern cavalry commander, James Ewell Brown (J.E.B.) Stuart. Finally, the property was determined eligible for the potential of an archeological study of human remains and historic artifacts on the battlefield to provide historical information not available elsewhere.

Since the determination of eligibility was made, property owners within the boundaries of the determined eligible area and individuals nationwide have written to us either endorsing or disagreeing with the eligibility of the property. In order to accommodate those who wish to provide new information on whether or not this property meets the National Register Criteria for Evaluation, the National Park Service is providing a 60 day comment period on this issue.

Anyone wishing to submit additional information bearing on either the historic significance or the location of the June 9, 1863 event for review should do so within 60 days of the date of this notice. A written statement on the determination of eligibility will be issued within 30 days of the close of the comment period.

The determination of eligibility remains in effect pending review of responses submitted during the comment period. To determine that the property is not eligible or to revise to the boundary, the National Park Service will need to receive authoritative information, which when evaluated in conjunction with documentation already on file, results in a finding that the property does not meet the National Register Criteria or that the boundary does not accurately delineate the battlefield in accordance with established National Register standards.

Comments should be addressed to the National Register of Historic Places, National Park Service, P.O. Box 37127, Washington, DC 20013–7127.

Carol D. Shull,

Chief of Registration, National Register of Historic Places, Interagency Resources Division.

National Register Criteria for Evaluation

National Register criteria define, for the nation as a whole, the scope and nature of historic and archeological properties that are considered for listing in the National Register of Historic Places.

The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and:

A. That are associated with events that have made a significant contribution to the broad patterns of our history; or

B. That are associated with the lives of persons significant in our past; or

C. That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

D. That have yielded, or may be likely to yield, information important to prehistory or history.

Ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years shall not be considered eligible for the National Register. However, such properties will qualify if they are integral parts of districts that do meet the criteria or if they fall within the following categories:

A. A religious property deriving primary significance from architectural or artistic distinction or historical importance; or

B. A building or structure removed from its original location but which is significant primarily for architectural value, or which is the surviving structure most importantly associated with a historic person or event; or

C. A birthplace or grave of a historical figure of outstanding importance if there is no other appropriate site or building directly associated with his productive life; or

D. A cemetery that derives its primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events; or

E. A reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other building or structure with the same association has survived; or

F. A property primarily commemorative in intent if design, age, traditional, or symbolic value has invested it with its own historical significance; or

G. A property achieving significance within the past 50 years if it is of exceptional importance.

[FR Doc. 92–1295 Filed 1–17–92; 8:45 am]

BILLING CODE 4310–70–M

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 31970]

Grand Trunk Western Railroad Company—Trackage Rights Exemption—the Belt Railway Company of Chicago

Grand Trunk Western Railroad Company (GTW) has agreed to grant overhead trackage rights to The Belt Railway Company of Chicago (BRC) over 5.8 miles of rail line in Chicago, IL, extending between milepost 11.8, at Hayford, and a connection with Consolidated Rail Corporation near 43rd Street and the north end of GTW's Railport complex. The exemption became effective on Janaury 10, 1992.

This notice is filed under 49 CFR 1180.2(d)(7). Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction. Pleadings must be filed with the Commission and served on: Woodrow M. Cunningham, The Belt Railway Company of Chicago, 6900

South Central Avenue, Chicago, IL 60638.

As a condition to the use of this exemption, any employees affected by the trackage rights will be protected pursuant to *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast RY., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

Dated: January 14, 1992.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92-1372 Filed 1-17-92; 8:45 am]

BILLING CODE 7035-01-M

[Finance Docket No. 31994]

Kyle Railways, Inc.—Continuance In Control Exemption—San Joaquin Valley Railroad Co.

Kyle Railways, Inc. (Kyle), a noncarrier in control of several affiliated railroad companies, has filed a notice of exemption to continue to control San Joaquin Valley Railroad Co. (SJVR), upon the latter's becoming a carrier.

SJVR, a noncarrier subsidiary of Kyle, has concurrently filed a notice of exemption in Finance Docket No. 31993, San Joaquin Valley Railroad Co.—Lease and Operation Exemption—Southern Pacific Transportation Company and Visalia Electric Railroad Company, to operate as a railroad common carrier in California. The proposed transaction was expected to be consummated on or after December 31, 1991.

Kyle indicates that: (1) The properties operated by the affiliated railroads will not connect with each other; (2) the continuance in control is not a part of a series of anticipated transactions that would connect the railroads with each other or any railroad in their corporate family; and (3) the transaction does not involve a class I carrier. The transaction therefore is exempt from the prior approval requirements of 49 U.S.C. 11343. See 49 CFR 1180.2(d)(2).

As a condition to use of this exemption, any employees affected by the transaction will be protected by the conditions set forth in *New York Dock Ry.—Control—Brooklyn Eastern District.*, 360 I.C.C. 60 (1979).

Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction. Pleadings must be filed with the Commission and served on: Fritz R. Kahn, Verner, Liipfert, Bernhard, McPherson and Hand, suite 700, The McPherson Building, 901 15th Street, NW., Washington, DC 20005-2301.

Decided: January 14, 1992.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92-1371 Filed 1-17-92; 8:45 am]

BILLING CODE 7035-01-M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (92-01)]

NASA Advisory Council (NAC), Space Science and Applications Advisory Committee (SSAAC), Space Physics Subcommittee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the NASA Advisory Council, Space Science and Applications Advisory Committee, Space Physics Subcommittee.

DATES: January 29, 1992, 8:30 a.m. to 5:30 p.m.; January 30, 1992, 8:30 a.m. to 5:30 p.m.; January 31, 1992, 8:30 a.m. to 5:30 p.m.

ADDRESSES: The Holiday Inn Capitol, 550 C Street, SW., Columbia North Room, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Dr. George L. Withbroe, Code SS, National Aeronautics and Space Administration, Washington, DC 20546 (202/453-1544).

SUPPLEMENTARY INFORMATION: The Space Science and Applications Advisory Committee (SSAAC) consults with and advises the NASA Office of Space Science and Applications (OSSA) on long-range plans for, work in progress on, and accomplishments of NASA's Space Science and Applications programs. The Space Physics Subcommittee provides advice to the Space Physics Division and to the SSAAC on operation of the space physics program and on formulation and implementation of the space physics research strategy. On Wednesday, January 29, 1992, the Subcommittee will hold an Executive Committee Session followed by plenary sessions on Thursday, January 30, 1992, and Friday, January 31, 1992. The Subcommittee will meet to discuss divisional overviews, intermediate missions, results of the Solar Physics Workshop, supporting research and technology (SR&T) program reviews, solar radiative output, and preparation for the SSAAC meeting. The Acting Chairman of the Subcommittee is Dr. Glenn M. Mason. The Subcommittee is composed of 25 members. The meeting will be open to the public up to the capacity of the room (approximately 50 persons including Subcommittee members). It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants.

Type of Meeting: Open.

Agenda

Wednesday, January 29

8:30 a.m.—Opening Remarks.
8:45 a.m.—Division Strategic Planning Issues.
11 a.m.—Long-Range Planning Activities: SPS Involvements.
1 p.m.—Long-Range Planning Activities: SSAAC Interfaces.
5:30 p.m.—Adjourn.

Thursday, January 30

8:30 a.m.—Opening Remarks.
8:45 a.m.—Division Overview: Budget and Future Opportunities.
10:30 a.m.—Intermediate Missions: Science Programs and Mission Status.
2:30 p.m.—Results of the Solar Physics Workshop.
3:45 p.m.—Active Missions Presentation.
4:45 p.m.—Discussion and Writing Assignments.
5:30 p.m.—Adjourn.

Friday, January 31

8:30 a.m.—SR&T Program Reviews.
11:15 a.m.—Solar Radiative Output: A Terrestrial Perspective.
1 p.m.—Discussion and Writing Groups.
3:45 p.m.—Preparation for SSAAC Meeting.
4:45 p.m.—Critique or Write-ups.
5:30 p.m.—Adjourn.

Dated: January 14, 1992.

John W. Geff,

Director, Management Operations Division, National Aeronautics and Space Administration.

[FR Doc. 92-1380 Filed 1-17-92; 8:45 am]

BILLING CODE 7510-01-M

[Notice (92-02)]

NASA Advisory Council (NAC), Space Science and Applications Advisory Committee (SSAAC), Astrophysics Subcommittee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the

NASA Advisory Council, Space Science and Applications Advisory Committee, Astrophysics Subcommittee.

DATES: January 30, 1992, 9 a.m. to 4:15 p.m.

ADDRESSES: The National Aeronautics and Space Administration, 600 Independence Avenue, SW., room 226A, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Ms. Lia LaPiana, Code SZ, National Aeronautics and Space Administration, Washington, DC 20546 (202/453–1433).

SUPPLEMENTARY INFORMATION: The Space Science and Application Advisory Committee (SSAAC) consults with and advises the NASA Office of Space Science and Applications (OSSA) on long-range plans for, work in progress on, and accomplishments of NASA's Space Science and Applications programs. The Astrophysics Subcommittee provides advice to the Astrophysics Division and to the SSAAC on operation of the Astrophysics Program and on the formulation and implementation of the Astrophysics strategy. The Subcommittee will meet to discuss the developments since the November 1991 Astrophysics meeting, the Hubble Space Telescope (HST) Outreach Effort, the Astrophysics Lunar Program Update, New Education and Outreach Efforts, International Flight-of-Opportunity Missions and new meeting planning. The Subcommittee is chaired by Dr. Irwin Shapiro and is composed of 28 members. The meeting will be open to the public up to the capacity of the room (approximately 50 people including Subcommittee members). It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

Type of Meeting: Open.

Agenda

Thursday, January 30

9 a.m.—Introduction, Developments Since November 1991 Meeting.
10:30 a.m.—HST Outreach Effort.
11:30 a.m.—Astrophysics Lunar Program Update.
Noon—Space Exploration Initiative.
1:30 p.m.—Overview of Ultraviolet/Visible and Gravity Physics Strategic Plans.
1:45 p.m.—X-ray Timing Explorer Productivity Effort.
2 p.m.—New Education and Outreach Efforts.
2:15 p.m.—International Flight-of-Opportunity Missions.
3:15 p.m.—Mission Operations Update.
3:30 p.m.—Issues and Concerns for the Upcoming SSAAC Meeting.
3:45 p.m.—Astrophysics Subcommittee Membership.
4 p.m.—Future Meeting Planning.
4:15 p.m.—Adjourn.

Dated: January 14, 1992.

John W. Gaff,

Director, Management Operations Division, National Aeronautics and Space Administration.

[FR Doc. 92–1381 Filed 1–17–92; 8:45 am]

BILLING CODE 7510–01–M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Humanities Panel Advisory Committee; Renewal

The Humanities Panel Advisory Committee is being renewed for an additional two years.

The Chairman, National Endowment for the Humanities, has determined that the renewal of this committee is necessary and in the public interest in connection with the performance of duties imposed upon the National Endowment for the Humanities by law. This determination follows consultation with the Committee Management Secretariat, General Services Administration.

Dated: January 14, 1992.

David C. Fisher, Jr.,

Advisory Committee Management Officer.

[FR Doc. 92–1405 Filed 1–17–92; 8:45 am]

BILLING CODE 7536–01–M

Humanities Panel; Meeting

AGENCY: National Endowment for the Humanities.

ACTION: Notice of meetings.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Public Law 92–463, as amended), notice is hereby given that the following meetings of the Humanities Panel will be held at the Old Post Office, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: David C. Fisher, Advisory Committee Management Officer, National Endowment for the Humanities, Washington, DC 20506; telephone 202/786–0322. Hearing-impaired individuals are advised that information on this matter may be obtained by contacting the Endowment's TDD terminal on 202/786–0282.

SUPPLEMENTARY INFORMATION: The proposed meetings are for the purpose of panel review, discussion, evaluation and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the agency by grant applicants. Because the proposed meetings will consider information that is likely to disclose: (1) Trade secrets and commercial or financial information obtained from a person and privileged or confidential; or (2) information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, pursuant to authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee meetings, dated September 9, 1991, I have determined that these meetings will be closed to the public pursuant to subsections (c)(4), and (6) of section 552b of Title 5, United States Code.

1. *Date:* February 3, 1992.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications to the Collaborative Projects Program for projects in New World Archaeology, submitted to the Division of Research Programs, for projects beginning after July 1, 1992.

2. *Date:* February 3, 1992.
Time: 9 a.m. to 5 p.m.
Room: 430.
Program: This meeting will review applications for Elementary and Secondary Education, submitted to the Division of Education Programs, for projects beginning after September 1, 1992.

3. *Date:* February 4, 1992.
Time: 8:30 a.m. to 5 p.m.
Room: 415.
Program: This meeting will review applications for Preservation and Access Program, submitted to the Division of Preservation and Access Programs, for projects beginning after July 1, 1992.

4. *Date:* February 5, 1992.
Time: 9 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Elementary and Secondary Education, submitted to the Division of Education Programs, for projects beginning after September 1, 1992.

5. *Date:* February 6, 1992.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications to the Collaborative Projects and Humanities, Science, and Technology Programs for projects in Anthropology and Sociology, submitted to the Division of Research Programs, for projects beginning after July 1, 1992.

6. *Date:* February 6–7, 1992.
Time: 8:30 a.m. to 5 p.m.
Room: 415.
Program: This meeting will review applications submitted to the

Humanities Project in Museums and Historical Organizations, submitted to the Division of Public Programs, for projects beginning after July 1, 1992.

7. *Date:* February 7, 1992.
Time: 9 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review Reference Materials Tools and Guides and Interpretive Research applications in Music, Theater and Dance, submitted to the Division of Research Programs, for projects beginning after July 1, 1992.

8. *Date:* February 7, 1992.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications to the Collaborative Projects Program for projects in Musicology, submitted to the Division of Research Programs, for projects beginning after July 1, 1992.

9. *Date:* February 7, 1992.
Time: 9 a.m. to 5 p.m.
Room: 430.
Program: This meeting will review applications in Elementary and Secondary Education, submitted to the Division of Education Programs, for projects beginning after September 1, 1992.

10. *Date:* February 10, 1992.
Time: 8:30 a.m. to 5 p.m.
Room: 415.
Program: This meeting will review applications submitted to the Humanities Projects in Museums an Historical Organizations program received during the December 6, 1991 deadline, submitted to the Division of Public Programs, for projects beginning after July 1, 1992.

11. *Date:* February 10, 1992.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications to the Collaborative Projects Program for projects in History, submitted to the Division of Research Programs, for projects beginning after after July 1, 1992.

12. *Date:* February 11, 1992.
Time: 9 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications in Elementary and Secondary Education, submitted to the Division of Education Programs, for projects beginning after September 1, 1992.

13. *Date:* February 11, 1992.
Time: 8:30 a.m. to 5 p.m.
Room: 415.
Program: This meeting will review applications in Preservation and Access Program, submitted to the Division of Preservation and Access Programs, for projects beginning after July 1, 1992.

14. *Date:* February 17, 1992.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications to the Collaborative Projects Program for projects in Interdisciplinary Studies, submitted to the Division of Research Programs, for projects beginning after July 1, 1992.

15. *Date:* February 21, 1992.
Time: 8:30 a.m. to 5 p.m.
Room: 430.
Program: This meeting will review applications for Preservation and Access, submitted to the Division of Preservation and Access Programs, for projects beginning after July 1, 1992.

David C. Fisher,
Advisory Committee Management Officer.

[FR Doc. 92-1404 Filed 1-17-92; 8:45 am]
BILLING CODE 7536-01-M

National Council on the Humanities; Meeting

January 13, 1992.

Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92-463, as amended), notice is hereby given that a meeting of the National Council on the Humanities will be held in Washington, DC on February 13-14, 1992.

The purpose of the meeting is to advise the Chairman of the National Council on the Humanities with respect to policies, programs, and procedures for carrying out her functions, and to review applications for financial support and gifts offered to the Endowment and to make recommendations thereon to the Chairman.

The meeting will be held in the Old Post Office Building, 1100 Pennsylvania Avenue NW., Washington, DC. A portion of the morning and afternoon sessions on February 13-14, 1992, will not be open to the public pursuant to subsections (c)(4), (6) and (9)(B) of section 552b of title 5, United States Code because the Council will consider information that may disclose: Trade secrets and commercial or financial information obtained from a person and privileged or confidential; information of a personal nature the disclosure of which will constitute a clearly unwarranted invasion of personal privacy; and information the disclosure of which would significantly frustrate implementation of proposed agency action. I have made this determination under the authority granted me by the Chairman's Delegation of Authority dated September 9, 1991.

The agenda for the sessions on February 13, 1992, will be as follows:

Committee Meetings

8:30-9 a.m.—Coffee for Council Members—Room 526

(Open to the Public)

9-10 a.m.—Committee Meetings—Policy Discussion
- Education Programs—Room M-14
- Fellowships Programs—Room 316-2
- Public Programs—Room 415
- Research Programs/Preservation and Access—Room 315
- State Programs and Office of Outreach—Room M-07

10 a.m. until adjourned—(Closed to the Public for the reasons stated above)—Consideration of specific applications

(Closed to the Public)

3 p.m. until adjourned—Jefferson Lecture Committee to review Jefferson Lecture nominees—Room 430

The morning session on February 14, 1992, will convene at 9 a.m., in the 1st Floor Council Room, M-09, and will be open to the public. The agenda for the morning session will be as follows:

(Coffee for Council Members from 8:30-9 a.m.)

Minutes of the Previous Meeting; Reports

A. Introductory Remarks.
B. Conflict of Interest Resolution.
C. Introduction of New Staff.
D. Contracts Awarded in the Prev Quarter.
E. Status of Fiscal Year 1992 Funds.
F. Legislative Report.
G. Committee Reports on Policy and General Matters Overview.
   1. Education Programs.
   2. Fellowships Programs.
   3. Research Programs.
   4. Public Programs.
   5. State Programs and Office of Outreach.
   6. Preservation and Access Programs.
   7. Jefferson Lecture.

The remainder of the proposed meeting will be given to the consideration of future budget requests and specific applications (closed to the public for the reasons stated above).

Further information about this meeting can be obtained from Mr. David C. Fisher, Advisory Committee Management Officer, Washington, DC 20506, or call area code (202) 786-0322, TDD (202) 786-0282. Advance notice of any special needs or accommodations is appreciated.

David C. Fisher,
Advisory Committee Management Officer.

[FR Doc. 92-1406 Filed 1-17-92; 8:45 am]
BILLING CODE 7536-01-M

NUCLEAR REGULATORY COMMISSION

Connecticut Yankee Atomic Power Co.; Environmental Assessment and Finding of No Significant Impact

[Docket No. 50-213]

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of permanent exemptions from the requirements of Appendix K to 10 CFR Part 50 to Connecticut Yankee Atomic Power Company (CYAPCO or the licensee) for the Haddam Neck Plant, located at the licensee's site in Middlesex County, Connecticut.

Environmental Assessment

Identification of the Proposed Action

The proposed action would grant exemptions from sections I.D.3, I.D.4, and I.D.5 of appendix K of 10 CFR part 50 for the Haddam Neck Plant. The proposed action is in accordance with the licensee's request for exemptions dated September 26, 1990.

The Need for the Proposed Action

The proposed exemptions are needed to support the conversion of the Haddam Neck Plant to Zircaloy-clad fuel. The conversion required that the licensee reperform all their loss-of-coolant-accident (LOCA) analyses including the large break to show compliance with 10 CFR 50.46 and appendix K. These exemptions are necessary as the licensee has developed new large break LOCA models which are not in compliance with appendix K, sections I.D.3, I.D.4, and I.D.5 because of the design differences between the Haddam Neck Plant and the model pressurized water reactor (PWR) assumed for 10 CFR part 50, appendix K. The new models make provisions to meet the intent of appendix K and literal compliance with the sections I.D.3, I.D.4, and I.D.5 are not required as these sections are not applicable to the Haddam Neck Plant.

Environmental Impacts of the Proposed Action

The staff has reviewed and approved all the LOCA models used for the compliance with 10 CFR 50.46 and appendix K. The staff has determined that Sections I.D.3, I.D.4, and I.D.5 are not applicable to the Haddam Neck Plant and that the provisions made to the large break LOCA model to reflect the actual plant configuration meet the intent of appendix K. As the proposed exemptions have provided analyses which have been determined to be in compliance with 10 CFR 50.46 and appendix K, the consequences of LOCAs has not been increased and the radiological releases will not be greater than previously determined, nor does the proposed exemptions otherwise affect radiological plant effluents. Therefore, the Commission concludes that there are no significant radiological environmental impacts associated with the proposed exemptions.

With regard to potential nonradiological impacts, the proposed exemptions involve features located entirely within the restricted area as defined in 10 CFR part 20. They do not affect nonradiological plant effluents and have no other environmental impact. Therefore, the Commission concludes that there are no significant nonradiological environmental impacts associated with the proposed exemptions.

Alternatives to the Proposed Action

Since the Commission has concluded there is no measurable environmental impact associated with the proposed exemptions, any alternatives with equal or greater environmental impact need not be evaluated. The principal alternative to the exemptions would be to deny the exemption requests. Such action would not enhance the protection of the environment and would result in unjustified cost to the licensee.

Alternative Use of Resources

This action does not involve the use of resources not considered previously in the Final Environmental Statement for Haddam Neck.

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

Based on the foregoing environmental assessment, the Commission concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordinlgy, the Commission has determined not to prepare an environmental impact statement for the proposed exemptions.

For further details with respect to this proposed action, see the licensee's letter dated September 26, 1990. This letter is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555, and at the local public document room located at the Russell Library, 123 Broad Street, Middletown, Connecticut 06547.

Dated at Rockville, Maryland this 13th day of January 1992.

For the Nuclear Regulatory Commission.

John F. Stolz,

Director, Project Directorate I-4, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 92-1391 Filed 1-17-92; 8:45 am]

BILLING CODE 7590-01-M

All Nuclear Power Reactors; Receipt and Denial of Petition for Director's Decision

Notice is hereby given that by Petition dated November 25, 1991, Richard P. Grill requested the Executive Director for Operations to institute a proceeding, pursuant to 10 CFR 2.202, "to suspend the operating license of any nuclear power plant licensed by the Commission whose license is not supported by: (a) A thorough analysis of the effects of lightning induced and other electrical transients on nuclear safety related electrical or electronic systems; (b) a determination of potential accident scenarios and their consequences resulting from electrical and electronic system failures; (c) the consequences to both the plant and to public health and safety from such accidents; (d) the specific design features incorporated to prevent system failures from electrical transients; (e) the technical specifications and maintenance features to assure safe operability of these design features and the systems they protect and (f) a thorough licensing review of the above by competent NRC staff."

The Petitioner asserts as grounds for this request that the safety related control and monitoring systems in nuclear power plants are complex and sophisticated with designs based on transistors and solid state integrated logic systems which can be disrupted by "small fluctuations of current", that the NRC has not critically evaluated the effect of electrical transients induced by lightning, switching surges or other sources on the electrical and electronic monitoring and control designs of any "single U.S. nuclear power plant", and recent lightning related and electrical surge incidents have compromised both NRC and DOE facilities. The Office of Nuclear Reactor Regulation (NRR) has evaluated the Petition and concluded that it does not provide any basis for

immediate suspension of the operating licenses of any NRC-licensed nuclear power plants. In view of this lack of a sufficient basis for immediate action and since the same issues are being treated in a rulemaking requested by the Petitioner on August 16, 1991, which has been docketed by the Commission (notice of that action was published on December 23, 1991 in the **Federal Register** (56 FR 66377)), the Petition has been denied by letter to the Petitioner, dated January 10, 1992.

Dated at Rockville, Maryland this 10th day of January 1992.

For the Nuclear Regulatory Commission.

Thomas E. Murley,

Director, Office of Nuclear Reactor Regulation.

[FR Doc. 92-1392 Filed 1-17-92; 8:45 am]

BILLING CODE 7590-01-M

[Docket Nos. 50-390 and 50-391]

Tennessee Valley Authority; Availability of Safety Evaluation Report Related to the Operation of Watts Bar Nuclear Plant, Units 1 and 2

The U.S. Nuclear Regulatory Commission has published Safety Evaluation Report, Supplement 8 (NUREG-0847, Supp. 8) related to the operation of Watts Bar Nuclear Plant, Units 1 and 2, Docket Nos. 50-390 and 50-391.

Copies of the report have been placed in the NRC's Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC 20555, and in the Local Public Document Room, Chattanooga-Hamilton County Library, 1001 Broad Street, Chattanooga, Tennessee 37402, for review by interested persons. Copies of the report may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Post Office Box 37082, Washington, DC 20013-7082. GPO deposit account holders may charge orders by calling 202-275-2060. Copies are also available from the National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161.

Dated at Rockville, Maryland this 8th day of January, 1992.

For the Nuclear Regulatory Commission.

Frederick J. Hebdon,

Director, Project Directorate II-4, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 92-1323 Filed 1-17-92; 8:45 am]

BILLING CODE 7590-01-M

Virginia Electric and Power Co.; Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. NPF-4, issued to Virginia Electric and Power Company (the licensee) for operation of the North Anna Power Station, Unit No. 1 (NA-1), located in Louisa County, Virginia.

The proposed change would revise the NA-1 Technical Specifications (TS) by changing the minimum measured reactor coolant system (RCS) flow from a value of greater than or equal to 284,000 gallons per minute (gpm), to a reduced value of 275,300 gpm. NA-1 is currently involved in a mid-cycle steam generator inspection outage. An extensive eddy current inspection of the NA-1 steam generator tubes is being performed using very conservative analysis guidelines and plugging criteria. As such, a substantially increased number of tubes are expected to be plugged. As required by TS 3.2.5 and 4.2.5.2, NA-1 performs RCS flow rate measurements once per fuel cycle. NA-1 safety analyses are based, in part, on verifying, via the TS surveillance, that the RCS total flow rate is greater than or equal to 284,000 gpm. The additional steam generator tube plugging anticipated during the current mid-cycle inspection outage increases the likelihood of violating this TS requirement. Therefore, safety analyses and evaluations have been performed which support an approximate 3% reduction in the RCS total flow rate limit to 275,300 gpm.

The propsed TS change implements a reduced total flow rate requirement which is inteded to bound future measured flow values and any required steam generator tube plugging until steam generator replacement. The changes will allow the unit to continue to operate with the expected increase in RCS loop resistance caused by increased steam generator tube plugging levels and ensure that the required safety margins for core cooling and accident analysis presented in the NA-1 Updated Final Safety Analysis Report (UFSAR) are maintained.

In summary, the review has demonstrated that a reduction in minimum measured flowrate for NA-1 to 275,300 gpm is accomodated by current analysis margins or by the assessment of a penalty against available retained departure from nucleate boiling ratio (DNBR) margin for all accidents. Explicit reanalyses were performed for the following events to confirm the adequacy of current analysis margins: (1) Loss of normal feedwater, (2) loss of external electrical load, (3) uncontrolled control rod bank withdrawal at power, (4) complete loss of reactor coolant flow, and (5) locked reactor coolant pump rotor.

The analyses showed that all of the acceptance criteria previously established in the UFSAR continue to be met for each reanalyzed event. This conclusion is reinforced by continued verification that core physics characteristics for operation with a reduced RCS flow rate remain with the envelope established by the current reload safety evaluation. The current Engineered Safety Features and Reactor Protection System setpoints set forth in the NA-1 TS have been demonstrated to provide adequate plant protection at the reduced flow condition. Also, the current core thermal limits have been verified to remain bounding for operation with the reduced minimum RCS flow rate.

A review of the nuclear steam supply system (NSSS) design transients, NSS fluid and control systems, reactor control and protection systems, NSSS primary components (including thermal and structural effects), and steam generator thermal/hydraulic performance has been performed. It was concluded that the NSSS systems and components will continue to meet applicable acceptance criteria for operation with the reduced design flow rates and the associated steam generator tube plugging levels.

An engineering evaluation has also been performed to assess the impact of the reduced flow and tube plugging on the existing containment integrity analyses (including the impact on net positive suction head of the engineered safeguards pumps) and containment subcompartment integrity analyses. The existing analyses were shown to reamain bounding.

In addition, a balance of plant systems review shows continued acceptable performance under the reduced RCS flow/extended tube plugging condition.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards considerations. Under the Commission's regulations in 10 CFR 50.92, this means

that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. [The proposed change] does not involve a significant increase in the probability or consequences of an accident previously evaluated. The impact of the reduced minimum measured RCS flow rate on operating characteristics, and accident analyses which support [NA–1] operation, have been fully assessed and documented in the attached safety evaluation. The proposed reduction to the [TS] minimum measured RCS flow rate does not impact either equipment or operating conditions that are considered in determining the probability of occurrence for any of the UFSAR Chapter 15 accident analyses. The proposed reduction of minimum measured RCS flow rate has the potential to increase accident analysis consequences. However, the results of the reanalyses show that the design limits are met. Therefore, the consequences of an accident previously evaluated remain unchanged.

2. [The proposed change] does not create the possibility of a new or different kind of accident from an accident previously evaluated. The proposed change to the [NA–1 TS] does not involve modifications to any of the existing equipment. The impact of the proposed reduced minimum measured RCS flow rate on [NA–1] operating characteristics, and accident analyses which support [NA–1] operation, have been fully assessed and documented in the attached safety evaluation. The proposed reduction to the [TS] minimum measured RCS flow rate does not create any new or different accident initiators, so no unique accident possibility is created. Therefore, the proposed [TS] change would not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. [The proposed change] does not involve a significant reduction in a margin of safety. The proposed amendment has been analyzed and the [TS] continue to ensure that adequate [RCS] total flow is maintained. The impact of proposed reduced minimum measured RCS flow rate on [NA–1] operating characteristics, and an accident analyses which support [NA–1] operation, have been fully assessed and documented in the attached safety evaluation. The analyses and equipment evaluations show that the applicable design limits are met. Therefore, there is no significant reduction in the marign of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within thirty (30) days after the date of publication of this notice will be considered in making any final determination. The Commission will not normally make a final determination unless it receives a request for a hearing.

Written comments may be submitted by mail to the Regulatory Publications Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to room P–223, Phillips Building, 7920 Norfolk Avenue, Bethesda, Maryland, from 7:30 a.m. to 4:15 p.m. Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555. The filing of requests for hearing and petitions for leave to intervene is discussed below.

By February 18, 1992, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555 and at the local public document room located at the Alderman Library, Special Collections Department, University of Virginia, Charlottesville, Virginia 22903–2498. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board Panel, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board Panel will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish in the **Federal Register** a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Services Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commisison by a toll-free telephone call to Western Union at 1-(800) 325-6000 (in Missouri 1-(800) 342-6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to Herbert N. Berkow: petitioner's name and telephone number, date petition was mailed, plant name, and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Michael W. Maupin, Esq., Hunton and Williams, P.O. Box 1535, Richmond, Virginia 23212, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board Panel that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1) (i)-(v) and 2.714(d).

For further details with respect to this action, see the application for amendment dated January 8, 1992, which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555 and at the local public document room located at the Alderman Library, Special Collections Department, University of Virginia, Charlottesville, Virginia 22903-2498.

Dated at Rockville, Maryland, this 13th day of January 1992.

For the Nuclear Regulatory Commission.

Leon B. Engle,

Project Manager, Project Directorate II-2, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 92-1324 Filed 1-17-92; 8:45 am]

BILLING CODE 7590-01-M

OFFICE OF MANAGEMENT AND BUDGET

Circular A-25, "User Charges"

AGENCY: Office of Management and Budget, Executive Office of the President.

ACTION: Draft revision of Circular No. A-25, "User Charges, Request For Public Comment."

SUMMARY: Circular No. A-25 establishes guidelines for Federal agencies to assess fees for Government services and for the sale or use of Government property or resources. The authority for charging such fees is provided by Title V of the Independent Office Appropriations Act of 1952 (IOAA). Circular No. A-25 was last issued in 1959. This draft revision is consistent with the authority provided in Title V of the IOAA, as interpreted by the courts, and is not intended to expand this authority. Rather the draft seeks only to clarify Federal policy in light of thirty years of experience and to update the procedures by which agencies are to institute charges.

Notice of the proposed draft revision was last published for comment in the **Federal Register** on July 1, 1987 (52 FR 24890). The current request for public comment is pursuant to the OMB reform of Executive Branch directives announced in September.

With the printing of this Circular in final form, the Office of Management and Budget (OMB) will expect agencies to develop regulations and/or legislation, as appropriate, to implement its guidance in setting new user fees or revising existing fees. The Circular describes in section 7 when legislation is necessary to institute fees. In all other cases, agencies should implement fees through the issuance of regulations. Agencies are also directed to review charges annually and update them as necessary.

The draft revised Circular requires OMB approval of exceptions to its guidelines. For agencies subject to OMB regulatory review, OMB approval of exceptions to proposed fees will be granted through that process. In all other cases, requests for exceptions should be made through the OMB examiner responsible for the agency's budget estimates. OMB's involvement in this process is designed to ensure a better and more consistent management of user-fee policy across Federal agencies.

DATES: Comments from the public should be submitted by February 15, 1992.

ADDRESSES: Comments from the public should be addressed to: Mike ter Maat, Budget Analysis Branch, room 6025, New Executive Office Building, Office of Management and Budget, Washington, DC 20503.

COMMENTS RECEIVED: In response to the request for public comment in 1987, OMB received sixteen comments from Federal agencies, interest groups, nonprofit organizations, and a congressional committee. A careful review of comments received suggests some misunderstanding about the scope of the Circular. Comments generally discussed specific fees contained in other laws, as well as the disposition of collections. Circular No. A-25 itself cannot change user fees that are statutorily mandated; nor can the Circular affect the disposition of collections when fees are implemented pursuant to the generic authority of the IOAA, as that Act requires that they be deposited in the general fund of the

Treasury. Thus these concerns about fees set by statute or the disposition of receipts can only be addressed through legislation. Comments received concerning specific agency fees are best submitted during the public comment period associated with the implementing regulations proposed by the agency involved.

OMB received a comment that questioned whether the revised Circular would require agencies to establish new cost accounting systems. The 1959 Circular stated that agencies did not need to develop new accounting procedures for determining the cost of providing a service. The draft omitted this language, but it was not OMB's intent that agencies should create new cost accounting systems. To clarify its position, OMB has added language to the revision stating that no new cost accounting procedures are required solely for fulfilling the requirements of the Circular.

Finally, it should be noted that the revision contains some examples of user charges, such as the fee for receiving a patent, that are not controlled currently by the Circular because they are set by specific statutes. In another example, a fee for processing new drug applications is used, even though it is currently not being collected due to a temporary congressional prohibition. These examples, nevertheless, appear in the revision because they offer well-known illustrations of the type of activities that are subject to fees under the Circular and thus help to clarify the intent and scope of the Circular.

Barrett B. Anderson,

Assistant Director for Budget, Office of Management and Budget

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: User Charges

1. **Purpose.** The Circular establishes Federal policy regarding fees assessed for Government services and for sale or use of Government property or resources. It provides information on the scope and types of activities subject to user charges and on the bases upon which user charges are to be set. Finally, it provides guidance for agency implementation of charges and the disposition of receipts.

2. **Rescission.** This rescinds Office of Management and Budget Circular No. A–25, dated September 23, 1959, and Transmittal Memoranda 1 and 2.

3. **Authority.** Title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. 9701).

4. **Coverage.** The provisions of this Circular cover all Federal activities that convey special benefits to recipients beyond those accruing to the general public, except where the imposition of user charges is prohibited by law or regulated by executive order, or where specific statutes provide authority for the assessment and imposition of user charges. In such cases, the statute or executive order shall take precedence over this Circular (e.g., sale or disposal under Federal surplus property statutes; or fringe benefits for military personnel and civilian employees). In any case where an Office of Management and Budget circular provides guidance concerning a specific user charge area, the guidance of that circular shall be deemed to meet the requirements of this Circular. Examples of such guidance include the following: OMB Circular No. A–45, concerning charges for rental quarters; OMB Circular No. A–130, concerning costs of disseminating information products and services; and OMB Circular No. A–97, concerning providing services to State and local governments. This Circular applies to all agencies, as that term is used in 31 U.S.C. 9701, but does not apply to activities of the legislative and judicial branches or to mixed-ownership Government corporations, as defined in 31 U.S.C. 9701.

5. **Objectives.** It is the objective of the United States Government to:

a. Ensure that each service, sale, or use of Government property or resources provided by an agency to specific recipients be self-sustaining;

b. Promote efficient allocation of the Nation's resources by establishing charges for special benefits provided to the recipient that are at least as great as costs to the Government of providing the special benefits; and

c. Allow the private sector to compete with the Government without disadvantage in supplying comparable services, resources, or property where appropriate.

6. **General policy.** A user charge, as described below, will be assessed against each identifiable recipient for benefits derived from Federal activities beyond those received by the general public. When the imposition of user charges is prohibited or restricted by existing law, agencies will review activities periodically and recommend legislative changes when appropriate. section 7 gives guidance on drafting legislation to implement user charges.

a. Special benefits

(1) Determining when special benefits exist. When a service (or privilege) provides special benefits to an identifiable recipient beyond those that accrue to the general public, a charge will be imposed to recover the full cost to the Federal Government for providing the special benefit. For example, a special benefit will be considered to accrue and a user charge will be imposed when a Government service:

(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those that accrue to the general public (e.g., receiving a patent, insurance, or guarantee provision, or a license to carry on a specific activity or business or various kinds of public land use); or

(b) Provides business stability or contributes to public confidence in the business activity of the beneficiary (e.g., inspection and grading of farm products, or insuring deposits in commercial banks); or

(c) Is performed at the request of or for the convenience of the recipient, and is beyond the services regularly received by other members of the same industry or group or by the general public (e.g., receiving a passport, visa, airman's certificate, or a Custom's inspection after regular duty hours).

(2) Determining the amount of user charges to assess.

(a) Except as provided in section 6c, user charges will be sufficient to recover the full cost (as defined in section 6d) of providing the service, resource, or property.

(b) User charges will be based on market prices (as defined in section 6d) when the Government, not acting in its capacity as sovereign, is leasing or selling property or resources, or is providing a service (e.g., leasing space in federally owned buildings). Under these business-type conditions, user charges need not be limited to the recovery of full cost and may yield net revenues.

(c) User charges will normally be collected in advance of, or simultaneously with, the rendering of services.

(d) Whenever possible, charges should be set as rates rather than fixed dollar amounts in order to automatically reflect inflation in costs to the Government or changes in market prices of the property, resource, or service provided (as defined in section 6d).

(3) In cases where the Government is supplying services, property, or resources that provide a special benefit to an identifiable recipient and that also provide a benefit to the general public (e.g., processing a new drug application or inspecting farm products), charges should generally be set in accordance with paragraph (2) of section 6a. Therefore, when the public obtains benefits as a necessary consequence of an agency's provision of special benefits to an identifiable recipient (i.e., the

public benefits are not independent of, but merely incidental to, the special benefits), an agency need not allocate any costs to the public and should seek to recover the full cost of providing the special benefit from the identifiable recipient.

(4) No charge should be made for a service when the identification of the specific beneficiary is obscure, and the service can be considered primarily as benefiting broadly the general public.

b. Charges to the direct recipient. Charges will be made to the direct recipient of the special benefit even though all or part of the special benefits may then be passed to others.

c. Exceptions

(1) Agency heads or their designee may make exceptions to the general policy in the following cases:

(a) The provision of a free service is an appropriate courtesy to a foreign government or international organization; or comparable fees are set on a reciprocal basis with a foreign country; or

(b) The recipient of a special benefit is entitled by law to receive such benefits free or at a subsidized rate. However, if the Administration does not agree with the exception, legislation to change the law should be proposed.

(2) Agency heads or their designee may recommend to the Office of Management and Budget that exceptions to the general policy be made when:

(a) The cost of collecting the fees would represent an unduly large part of the fee for the activity; or

(b) Any other condition exists that, in the opinion of the agency head or his designee, justifies an exception.

(3) All exceptions shall be for a period of no more than four years unless renewed by the agency heads or their designee for exceptions granted under section 6c(1) or the Office of Management and Budget for exceptions granted under section 6c(2) after a review to determine whether conditions warrant their continuation.

(4) Requests for exceptions and extensions under paragraphs (2) and (3) of section 6c shall be submitted to the Director of the Office of Management and Budget.

d. Determining full cost and market price

(1) "Full cost" includes all direct and indirect costs of providing a property, resource, or service. These costs include, but are not limited to, an appropriate share of:

(a) Direct and indirect personnel costs, including salaries and fringe benefits such as medical insurance and retirement (including all costs not covered by employee contributions).

(b) Physical overhead, consulting, and other indirect costs including material and supply costs, utilities, insurance, travel, and rents or imputed rents on land, buildings, and equipment. If imputed rental costs are applied, they should include:

(i) Depreciation of structures and equipment, based on official Internal Revenue Service depreciation guidelines unless better estimates are available; and

(ii) An annual rate of return (equal to the average long-term Treasury bond rate) on land and other capital resources used.

(c) The agency's management and supervisory costs.

(d) The costs of enforcement, collection, research, establishment of standards, and regulation, including any required environmental impact statements.

(e) Full cost shall be determined or estimated from the best available records of the agency, and new cost accounting systems need not be established solely for this purpose.

(2) "Market price" means the price for a unit of property, resource, or service that is based on competition in open markets, and creates neither a shortage nor a surplus of the property, resource, or service.

(a) When a substantial competitive demand exists for a property, resource, or service, its market price will be determined using commercial practices, for example:

(i) By competitive bidding; or

(ii) By reference to prevailing prices in competitive markets for property, resources, or services that are the same or similar to those provided by the Government (e.g., campsites or grazing lands in the general vicinity of private ones) with adjustments as appropriate that reflect demand, level of service, and quality of the good or service.

(b) In the absence of substantial competitive demand, market price will be determined by taking into account the prevailing prices for property, resources, or services that are the same or substantially similar to those provided by the Government, and then adjusting the supply made available and/or price of the property, resource, or service so that there will be neither a shortage nor a surplus (e.g., campsites in remote areas).

7. **Implementation**

a. The general policy is that, unless there are statutory prohibitions or limitations, user charges will be instituted through the promulgation of regulations.

b. When there are statutory prohibitions or limitations on charges, legislation to permit charges to be established should be proposed. In general, legislation should seek to remove restraints on user charges and permit their establishment under the guidelines provided in this Circular. When passage of this general authority seems unlikely, more restrictive authority should be sought. The level of charges proposed should be based on the guidelines in section 6. When necessary, legislation should:

(1) Define in general terms the services for which charges will be assessed and the pricing mechanism that will be used;

(2) Specify that receipts will be collected in advance of or simultaneously with the provision of service; and

(3) Specify where receipts will be credited (see section 9). Legislative proposals should not normally specify precise charges. The user charge schedule should be set by regulation. This will allow administrative updating of fees to reflect changing costs and market values. Where it is not considered feasible to collect charges at a level specified in section 6, charges should be set as close to that level as is practical.

c. Excise taxes are another means of charging specific beneficiaries for the Government services they receive. New user charges should not be proposed in cases where an excise tax currently finances the Government services that benefit specific individuals. Agencies may consider proposing a new excise tax when it would be significantly cheaper to administer than other types of fees, and the burden of the excise tax would rest almost entirely on the user population (e.g., gasoline tax to finance highway construction). Excise taxes cannot be imposed through administrative action but rather require legislation. Legislation should meet the same criteria as in section 7b, although it may be appropriate to state explicitly the level of the tax. Agency review of these taxes must be performed periodically and new legislation should be proposed, as appropriate, to update the tax based on changes in cost.

d. When developing options to institute user charges administratively, agencies should review all sources of statutory authority in addition to the Independent Offices Appropriations Act that may authorize implementation of such charges.

e. In proposing new charges or modifications to existing ones, managers of other programs that provide special benefits to the same or similar user populations should be consulted. Joint

legislative proposals should be made, and joint collection efforts designed to ease the burden on the users should be used, whenever possible.

f. Every effort should be made to keep the costs of collection to a minimum. The principles embodied in Circular No. A–76 (Performance of Commercial Activities) should be considered in designing the collection effort.

g. Legislative proposals must be submitted to the Office of Management and Budget in accordance with the requirements of Circular No. A–19. To ensure the proper placement of user fee initiatives in the budget account structure, agencies are encouraged to discuss proposals with OMB at an early stage of development.

8. Agency responsibility. Agencies are responsible for the initiation and adoption of user charge schedules consistent with the policies in this Circular. Each agency will:

a. Identify the services and activities covered by this Circular;

b. Determine the extent of the special benefits provided;

c. Apply the principles specified in section 6 in determining full cost or market price, as appropriate;

d. Apply the guidance in section 7 either to institute charges through the promulgation of regulations or submit legislation as appropriate;

e. Review charges annually and adjust them to reflect changing costs or market values;

f. Ensure that the requirements of OMB Circular No. A–123 (Internal Control Systems) and appropriate audit standards are applied to collection;

g. Maintain readily accessible records of:

(1) The services or activities covered by this Circular;

(2) The extent of special benefits provided;

(3) The exceptions to the general policy of this Circular;

(4) The information used to establish charges and the specific method(s) used to determine them; and

(5) The receipts from each user charge imposed; and

h. Maintain adequate records of the information used to establish charges and provide them upon request to OMB for the evaluation of the schedules.

9. Disposition of receipts

a. If user fees are implemented solely under the authority of this Circular, collections will be credited to the general fund of the Treasury as miscellaneous receipts, as required by 31 U.S.C. 3302.

b. Legislative proposals to permit the collections to be retained by the agency may be appropriate in certain circumstances. Proposals should meet the guidelines in section 7b.

(1) Proposals that allow agency retention of receipts may be appropriate when a fee is levied in order to finance a service that is intended to be provided on a substantially self-sustaining basis and thus is dependent upon the collection of adequate receipts.

(a) Generally, the authority to use fees credited to an agency's appropriations should be subject to limits set in annual appropriations language. However, it may be appropriate to request exemption from annual appropriations control, if provision of the service is dependent on demand that is irregular or unpredictable (e.g., a fee to reimburse an agency for the cost of overtime pay of inspectors for services performed after regular duty hours).

(b) As a normal rule, legislative proposals that permit fees to be credited to accounts should also be consistent with the full-cost recovery guidelines contained in this Circular. Any fees in excess of full-cost recovery should be credited to the general fund.

10. New activities. Whenever agencies prepare legislative proposals for new or expanded Federal activities that would provide special benefits, the policies and criteria set forth in this Circular will apply.

11. Inquiries. For information concerning this Circular, consult the Office of Management and Budget examiner responsible for the agency's budget estimates.

By direction of the President:

Richard G. Darman,

Director, Office of Management and Budget

[FRDoc. 92–1394 Filed 1–17–92; 8:45 am]

BILLING CODE 3110–01–F

PRESIDENT'S COMMISSION ON WHITE HOUSE FELLOWSHIPS

Mid-Year Meeting of Commissioners

AGENCY: President's Commission on White House Fellowships.

ACTION: Notice of mid-year meeting of the President's Commission on White House Fellowships, closed to the public.

SUMMARY: Notice is hereby given that the mid-year meeting of the President's Commission on White House Fellowships will be held at the Hay Adams Hotel, Washington, DC, on February 3, 1992, beginning at 9:30 a.m.

The mid-year meeting is convened for one day to review the overall operation of the program, including budgetary, recruitment and publicity issues, and to provide the Commissioners an opportunity to discuss new initiatives that will further improve the program.

It has been determined by the Director of the Office of Personnel Management that because of the confidential nature of the meeting, where criteria for the selection of future candidates is discussed, as well as the progress of members of the current class of White House Fellows, which, if revealed to the public would constitute a clear invasion of the individual's professional privacy, the content of this meeting falls within the provisions of seciton 552b(c) of title 5 of the United States Code. Accordingly, this meeting is closed to the public.

DATES: The date of the mid-year meeting of the President's Commission on White House Fellowships, which is closed to the public, is February 3, 1992.

FOR FURTHER INFORMATION CONTACT: Janet Kelliher, Administrative Officer, President's Commission on White House Fellowships, 712 Jackson Place, NW., Washington, DC 20503, (202) 395–4522.

Dated: December 18, 1991.

Marcy L. Head,

Director, President's Commission on White House Fellowships.

[FR Doc. 92–1346 Filed 1–17–92; 8:45 am]

BILLING CODE 6325–01–M

SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC–18485; 812–7807]

Mariner Mutual Funds Trust, et al.; Notice of Application

January 14, 1992.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for exemption under the Investment Company Act of 1940 (the "Act").

APPLICANTS: Mariner Mutual Funds Trust and Mariner Funds Trust.

RELEVANT ACT SECTIONS: Exemption requested under section 6(c) from the provisions of section 12(d)(3) of the Act.

SUMMARY OF APPLICATION: Applicants, on their own behalf and on behalf of their future-formed portfolios, seek a conditional order under section 6(c) of the Investment Company Act of 1940 exempting applicants from the provisions of section 12(d)(3) of the Act to the extent necessary to permit applicants' underlying portfolios to invest in equity securities issued by foreign companies that, in each of their

most recent fiscal years, derived more than 15% of their gross revenues from their activities as brokers, dealers, underwriters or investment advisers, provided such investments meet the conditions in the proposed amendments to rule 12d3–1.

FILING DATE: The Application was filed on October 22, 1991 and amended on December 31, 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 February 10, 1992, and should be accompanied by proof of service on 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, 700 West Hillsboro Boulevard, Deerfield Beach, Florida 33441.

FOR FURTHER INFORMATION CONTACT: Nicholas Thomas, Staff Attorney, at (202) 504–2263 or Max Berueffy, Branch Chief, at (202) 272–3016 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicants' Representations

1. Applicants are Massachusetts business trusts and are diversified open-end management investment companies registered under the Act. Mariner Funds Trust presently consists of five separate investment portfolios and Mariner Mutual Funds Trust presently consists of six portfolios.

2. Applicants' investment adviser is Marivest Inc., a registered investment adviser owned by two wholly-owned subsidiaries of The Hongkong and Shanghai Banking Corporation Limited. Applicants' sub-adviser is James Capel Fund Managers, also a registered investment adviser and also owned by a wholly owned subsidiary of The Hongkong and Shanghai Banking Corporation Limited.

3. Applicants seeks relief from section 12(d)(3) of the Act to permit investments in the equity securities of foreign issuers that in their most recent fiscal year derived more than 15% of their gross revenues from activities as brokers, dealers, underwriters or investment advisers ("Foreign Securities Companies").

Applicants' Legal Analysis

1. Section 12(d)(3) of the Act generally prohibits an investment company from acquiring any security issued by any person who is a broker, dealer, underwriter or investment adviser. Rule 12d3–1 provides an exemption from section 12(d)(3) of the Act for investment companies acquiring securities of an issuer that, in its most recent fiscal year, derived more than 15% of its gross revenues from securities-related activities, provided the acquisitions satisfy certain conditions set forth in the rule.

2. Subparagraph (b)(4) of rule 12d3–1 provides that "any equity security of the issuer * * * (must be) a 'margin security' as defined in Regulation T promulgated by the Board of Governors of the Federal Reserve System." "Margin Security" status is generally available only to securities traded in the United States, and to a limited number of "foreign margin stocks" identified by the Board of Governors of the Federal Reserve System. See 12 CFR 220.2(i) and (q)(6). Because applicants propose to invest in the equity securities of Foreign Securities Companies that are neither "margin stocks" nor "foreign margin stocks" within the meaning of Regulation T, applicants are unable to take advantage of the exemption provided by rule 12d3–1.

3. Under the proposed amendments to rule 12d3–1, an investment company would be permitted to acquire the equity securities of a Foreign Securities Company that are not "margin securities" if the company meets certain size, quality and operating history criteria. The criteria, as set forth in the proposed amendments "are based particularly on the policies that underlie the requirements for inclusion on the list of over-the-counter margin stocks." Investment Company Act Release No. 17096 (Aug. 3, 1989).

Applicants' Condition

If the requested exemptive relief is granted, applicants will comply with the proposed amendments to rule 12d3–1 as they are currently proposed, or as they may be re-proposed, adopted or amended.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 92–1397 Filed 1–17–92; 8:45 am]

BILLING CODE 8010–01–M

[Release No. IC–18486; 811–3408]

Pilgrim Money Market Fund; Notice of Deregistration

January 14, 1992.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: Pilgrim Money Market Fund.

RELEVANT ACT SECTIONS: Order requested under section 8(f) of the Act.

SUMMARY OF APPLICATION: Applicant seeks an order declaring that it has ceased to be an investment company.

FILING DATE: The application was filed on November 5, 1991.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on February 11, 1992, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549; Applicant, 183 East Main Street, Rochester, New York 14604.

FOR FURTHER INFORMATION CONTACT: Thomas G. Sheehan, Staff Attorney, at (202) 272–7324, or Nancy M. Rappa, Branch Chief, at (202) 272–3030 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicant's Representataions

1. Applicant is an open-end, diversified management investment

company. Applicant was organized as a corporation under California law in February 1982 under the name R.C. Brown Money Market Fund. In February 1987, applicant changed its name to Pilgrim Money Market Fund.

2. On March 2, 1982, applicant registered as an investment company under the Act, and filed a registration statement pursuant to section 8(b) of the Act. Applicant filed a registration statement under the Securities Act of 1933 ("1933 Act") on March 3, 1982. The 1933 Act registration became effective on May 28, 1982, and the initial public offering of applicant's shares commenced on June 7, 1982.

3. On November 19, 1990, applicant's Board of Directors unanimously approved an Agreement and Plan of Reorganization (the "Agreement") by and between applicant and Cortland General Money Market Fund, an open-end diversified series portfolio of Cortland Trust, Inc. ("Cortland Trust"). Cortland Trust is a Maryland corporation and is a registered open-end management company. Applicant's securityholders approved the Agreement, which provided for a tax-free exchange whereby applicant's securityholders became securityholders of Cortland Trust, and for applicant's subsequent dissolution, at a special meeting of securityholders held on March 15, 1991.

4. Pursuant to the Agreement, on April 1, 1991 Cortland Trust acquired the assets of applicant. All of applicant's assets were distributed to Cortland Trust in return for equivalent interests in shares of Cortland Trust, which were issued to owners of applicant. The exchange of applicant's assets for the equivalent interest in Cortland Trust constituted an even exchange at fair-market value. No brokerage fee were paid in connection with the reorganization.

5. As of March 31, 1991, the date immediately preceding the date of the merger, there were approximately 23,337,088 shares of applicant outstanding, with a per share net asset value of $1.00 per share and an aggregate net asset value of approximately $23,337,088.

6. The total expenses incurred in connection with the transfer of applicant's assets and liquidation of applicant, consisting of legal fees, accounting fees, and printing and mailing costs for the proxy solicitation, were $5,000, $750, and $4,445 respectively. All such expenses were paid by applicant.

7. Applicant states that the principal purpose of the transfer of assets is to allow applicant's securityholders to benefit from the reduced overhead costs and economies of scale as securityholders of Cortland Trust, which has a substantially larger asset base that applicant.

8. Applicant retains no securityholders, assets, or liabilities. Applicant is not a party to any litigation or administrative proceeding. Applicant is not now engaged in, nor does it intend to engage in, any business activities other than those necessary for the winding up of its affairs. Applicant intends to file a Certificate of Dissolution with the California Department of State.

For the SEC, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 92-1396 Filed 1-17-92; 8:45 am]

BILLING CODE 8010-01-M

DEPARTMENT OF STATE

[Public Notice 1556]

Organization for the International Telegraph and Telephone Consultative Committee (CCITT) Study Group D Meeting

The Department of State announces that Study Group D of the U.S. Organization for the International Telegraph and Telephone Consultative Committee (CCITT) and the Message Handling Service-Management Domain (MHS-MD) Ad Hoc Group, will meet on February 20 and 21, 1992, at the American National Standards Institute, 11 West 42nd Street, N.Y.C. from 9 a.m. to 5 p.m. Those expecting to attend this meeting should notify Beth Sommerville at (202) 642-4976. The Group will also meet on June 3, 4, and 5 at the U.S. Department of State: Room 1408 on June 3, 1992, from 8 a.m. to 5 p.m. and room 1207 on June 4 and 5, from 9 a.m. to 5 p.m.

The purpose of the February meeting will be to review Documentation on Registration Requirements and procedures, begin work on drafting and behavioral document for registered U.S. management domains, and to consider any other business within the scope of US Study Group D.

The June 3, 4, and 5 meetings will concentrate on continuing work on the Behavioral Requirements for registered MD's and report on the results of the April meeting of CCITT Study Group VII.

Members of the general public may attend the meetings and join in the discussion, subject to the instructions of the Chairman. Admittance of public members will be limited to the seating available. In that regard, entrance to the Department of State building is controlled and entry will be facilitated if arrangements are made in advance of the meetings. Prior to the June meeting persons who plan to attend should so advise the Office of Gary Fereno, Department of State, 202-647-0201, (fax 202-647-7407). The above includes government and non-government attendees. Notification should include Date of Birth and Social Security Number. All attendees must use the C Street entrance.

Dated: January 10, 1992.

Earl S. Barbely,

Director, Telecommunications and Information Standards, Chairman U.S. CCITT National Committee.

[FR Doc. 92-1331 Filed 1-17-92; 8:45 am]

BILLING CODE 4710-01-M

Office of the Secretary

[Public Notice 1555]

Delegation of Authority No. 193; Management and Other Matters Concerning United States Foreign Relations

Delegation of Authority

By virtue of the authority vested in me as Secretary of State, including the authority of section 4 of the Act of May 26, 1949 (22 U.S.C. 2658), I hereby delegate the following functions as indicated.

Section 1. Functions Delegated to the Under Secretary for Political Affairs

The functions vested in the Secretary of State by the following provisions of the Foreign Relations Authorization Act for Fiscal Years 1992-1993 (Pub. L. 102-138): Sections 170, 181, 192, 356 and 362.

Section 2. Functions Delegated to the Under Secretary for Political Affairs, in consultation with the Under Secretary for Management

The functions vested in the Secretary of State by the following provisions of the Foreign Relations Authorization Act for Fiscal Years 1992-1993 (Pub. L. 102-138): Sections 127 and 175.

Section 3. Functions Delegated to the Under Secretary for Economic and Agricultural Affairs

The function vested in the Secretary of State by section 197 of the Foreign Relations Authorization Act for Fiscal Years 1992-1993 (Pub. L. 102-138).

Section 4. Functions Delegated to the Under Secretary for Management

a. The functions vested in the Secretary of State by the following provisions of the Foreign Relations Authorization Act for Fiscal Years 1992–1993 (Pub. L. 102–138): Sections 115, 116, 117, 118, 119, 122(e), 128, 132 (except 132(f)(2)), 133, 134, 136, 144, 145, 147(d), 149, 174, and 198 (except for that part of 198 which adds a new section 406(a) to the State Department's Basic Authorities Act).

b. The function vested in the Secretary of State in the paragraph headed "Salaries and Expenses" in the Department of State and Related Agencies Appropriations Act, Fiscal Year 1992 (Pub. L. 102–140) to notify Congress concerning certain facts about the Diplomatic Telecommunications Service and the Diplomatic Telecommunications Service Program Office and the report on an enhanced presence in the Baltics requested from the Secretary of the House Report accompanying that Act (H. Rep. 102–106 at 75–76).

c. The function vested in the Secretary of State by 22 CFR 10.735–402(c).

Section 5. Function Delegated to the Assistant Secretary for Public Affairs

The function vested in the Secretary of State by new section 406(a) of the State Department's Basic Authorities Act added by section 198 of the Foreign Relations Authorization Act for Fiscal Years 1992–1993 (Pub. L. 102–138.)

Section 6. Functions Reserved to the Secretary of State

The functions vested in the Secretary of State by the following provisions of the Foreign Relations Authorization Act for Fiscal years 1992–1993 (Pub. L. 102–138): 129, 132(f)(2), 150, 180 and 196.

Section 7. Department of State Delegation No. 148, as amended, is amended further by adding the following new paragraph (d) under General Provisions

(d) Any reference in this delegation of authority to any act, order, determination, delegation of authority, regulation, or procedure shall be deemed to be a reference to such act, order, determination, delegation of authority, regulation, or procedure as amended from time to time.

Section 8. General Provisions

a. Notwithstanding this delegation of authority, the Secretary of State and the Deputy Secretary of State may exercise any function delegated or reserved by this delegation of authority.

b. Any officer to whom functions are delegated by this delegation of authority may, to the extent consistent with law:

(1) Redelegate such functions and authorize their successive redelegation; and

(2) Promulgate such rules and regulations as may be necessary to carry out such functions.

c. Any reference in this delegation of authority to any act, order, determination, delegation of authority, regulation, or procedure shall be deemed to be a reference to such act, order, determination, delegation of authority, regulation, or procedure as amended from time to time.

Dated: January 7, 1992.

James A. Baker, III,

Secretary of State.

[FR Doc. 92–1356 Filed 1–17–92; 8:45 am]

BILLING CODE 4710–10–M

DEPARTMENT OF TRANSPORTATION

Fitness Determination of L & H Aviation, Inc. d/b/a Keene Airways

AGENCY: Department of Transportation.

ACTION: Notice of Commuter Air Carrier Fitness Determination—Order 91–1–21, Order to Show Cause.

SUMMARY: The Department of Transportation is proposing to find that L & H Aviation, Inc., d/b/a Keene Airways is fit, willing, and able to provide commuter air service under section 419(e) of the Federal Aviation Act.

RESPONSES: All interested persons wishing to respond to the Department of Transportation's tentative fitness determination should file their responses with the Air Carrier Fitness Division, P–56, room 6401, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, and serve them on all persons listed in Attachment A to the order. Responses shall be filed no later than January 29, 1992.

FOR FURTHER INFORMATION CONTACT: Mrs. Barbara P. Dunnigan, Air Carrier Fitness Division, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366–2342.

Dated: January 14, 1992.

Patrick V. Murphy, Jr.,

Deputy Assistant Secretary for Policy and International Affairs.

[FR Doc. 92–1422 Filed 1–17–92; 8:45 am]

BILLING CODE 4910–62–M

Federal Aviation Administration

[AC No. 91–XX]

Proposed Advisory Circular on Pilot Qualification and Operation of All Surplus Military Turbine-Powered Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Request for comments on proposed Advisory Circular.

SUMMARY: The proposed AC provides information and guidance to pilots who desire to qualify to operate surplus military turbine-powered airplanes under a Letter of Authorization.

COMMENTS INVITED: Comments are invited on all aspects of the proposed AC. Commentators must identify file number AC 91–XX.

DATES: Comments must be received on or before February 20, 1992.

ADDRESSES: Send all comments and requests for copies of the proposed AC to: Federal Aviation Administration, Flight Standards National Field Office (Attention: AFS–550), Advisory Circular Program Manager, P.O. Box 20034, Gateway Building, Suite 110, Dulles International Airport, Washington, DC 20041–2034.

FOR FURTHER INFORMATION CONTACT: Wayne C. Nutsch, AFS–550, at the above address; telephone: (703) 661–0204 (8 a.m. to 4:30 p.m. est).

SUPPLEMENTARY INFORMATION: The proposed AC provides information and guidance to pilots who desire to qualify to operate surplus military turbine-powered airplanes under a Letter of Authorization. Eligibility, qualifications, application procedures, and general training requirements and practical test procedures are described in the proposed AC. Procedures are described for single-place and other than single-place airplanes. Examples of limitations consistent with FAR parts 61 and 91 are included.

Issued in Washington, DC, on January 14, 1992.

Ron Myres,

Acting Manager, General Aviation and Commercial Division.

[FR Doc. 92–1367 Filed 1–17–92; 8:45 am]

BILLING CODE 4910–13–M

Index of Administrator's Decisions and Orders in Civil Penalty Actions; Publication

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of publication.

SUMMARY: This notice constitutes the required quarterly publication of an index of the Administrator's decisions and orders in civil penalty cases. The FAA is publishing an index by order number, a subject-matter index, and case digests that contain identifying information about the final decisions and orders issued by the Administrator. These indexes and digests will increase the public's awareness of the Administrator's decisions and orders and will assist litigants and practitioners in their research and review of decisions and orders that may have precedential value in a particular civil penalty action. Publication of the index order number ensures that the agency is in compliance with statutory indexing requirements.

FOR FURTHER INFORMATION CONTACT: James S. Dillman, Assistant Chief Counsel for Litigation (AGC-400), Federal Aviation Administration, 701 Pennsylvania Avenue NW., suite 925, Washington, DC 20004: telephone (202) 376-6441.

SUPPLEMENTARY INFORMATION: The Administrative Procedure Act requires Federal agencies to maintain and make available for public inspection and copying current indexes that contain identifying information as to those materials required to be made available or published. 5 U.S.C. 552(a)(2). In a notice issued on July 11, 1990, and published in the **Federal Register** (55 FR 29148; July 17, 1990), the FAA announced the public availability of several indexes and summaries that provide identifying information about the final decisions and orders issued by the Administrator pursuant to the FAA's civil penalty assessment authority and the rules of practice governing hearings and appeals of civil penalty actions. 14 CFR part 13, subpart G. The FAA maintains an index of the Administrator's decisions and orders in civil penalty actions organized by order number and containing identifying information about each decision or order. The FAA also maintains a subject-matter index, and digests organized by order number of the Administrator's final decisions and orders in civil penalty cases. In a notice issued on October 26, 1990, the FAA published the indexes and digests herein described for all decisions and orders issued by the Administrator through September 30, 1990. 55 FR 45984; October 31, 1990. The FAA announced in that notice that it would publish supplements to these indexes and digests on a quarterly basis (i.e., in January, April, July, and October of each year). Only the subject-matter index will be published cumulatively. Both the order number index and the digests will be non-cumulative.

In a notice issued on January 25, 1991, the FAA published the first supplement to the indexes and digests herein described, which included the decisions and orders issued by the Administrator from October 1 through December 31, 1990. 56 FR 4886; February 6, 1991. In a notice issued on May 1, 1991, the FAA published the second supplement, which included decisions and orders issued by the Administrator from January 1, 1991 through March 31, 1991. 56 FR 20250; May 2, 1991. In a notice issued on July 3, 1991, the FAA published the third supplement, which included decisions and orders issued by the Administrator from April 1, 1991 through June 30, 1991. 56 FR 31984; July 12, 1991. In a notice issued on October 8, 1991, the FAA published the fourth supplement, which included decisions and orders issued by the Administrator between July 1, 1991 and September 30, 1991. 56 FR 51735; October 15, 1991.

As noted at the beginning of each of these documents, these indexes and digests do not constitute legal authority, and should not be cited or relied upon as such. The indexes and digests are not intended to serve as a substitute for proper legal research. Parties, attorneys, and other interested persons should always consult the full text of the Administrator's decisions before citing them in any context. The Administrator's final decisions and orders, indexes, and digests are available for public inspection and copying at all FAA legal offices. (The addresses of the FAA legal offices are listed at the end of this notice.)

Civil Penalty Actions—Decisions and Orders Issued By Administrator

Index By Order Number

(This supplement includes decisions and orders issued by the Administrator from October 1, 1991 through December 31, 1991.)

This index does not constitute legal authority, and should not be cited or relied upon as such. This index is not intended to serve as a substitute for proper legal research. Parties, attorneys, and other interested persons should always consult the full text of the Administrator's decisions before citing them in any context.

Order No. (service date)	Name and docket No.	Regulations discussed (14 CFR)
91-41 (10/31/91)	[Airport Operator] CP90**0343	107.13(a)(1), (b)
91-48 (10/4/91)	Michael Edward Wendt, CP89GL0084	13.233(c)(1)
91-49 (10/8/91)	Lydia Shields, CP90SO0276	
91-50 (10/9/91)	Michael J. Costello, CP89WP0351	13.233(a) & (c)
91-51 (10/9/91)	Troy R. Hagwood, CP91EA0105	13.16(f); 13.208(a)
91-52 (10/28/91)	KDS Aviation Corp., CP91WP0222, EAJA210005, (CP90WP0196).	13.233(f); 14.04(a); 14.20(c); 14.20(c)(4); 14.26(a); 135.5
91-53 (10/28/91)	Norbert G. Kolfer, CP89EA0338	13.233(j)(1); 107.21(a)(1)
91-54 (11/6/91)	Alaska Airlines, CP89NM0296, CP89NM0299, CP89NM0307, CP89NM0470.	13.205(b); 13.219(c); 13.220(j) & (n); 108.5(a)
91-55 (12/6/91)	Continental Airlines, CP89**0300, CP89**0361, CP89**0362	108.5(a)(1)
91-56 (12/3/91)	Patricia L. Mayhan, CP91NM0294	
91-57 (12/4/91)	Britt Airways, CP89SW0475	
91-58 (12/13/91)	[Airport Operator] CP90**0151, CP90**0157, CP90**0158, CP90**0186.	107.1(a)(3); 107.1(b)(2); 107.13(a)(1); 107.13(b)
91-59 (12/24/91)	William R. Griffin, CP90SO0349	
91-60 (12/26/91)	James F. Brinton, CP91NM0452	

Civil Penalty Actions—Decisions and Orders Issued By the Administrator

Subject Matter Index

(This cumulative index includes all decisions and orders issued by the Administrator as of December 31, 1991.)

This index does not constitute legal authority, and should not be cited or relied upon as such. This index is not intended to serve as a substitute for proper legal research. Parties, attorneys, and other interested persons should always consult the full text of the Administrator's decisions before citing them in any context.

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Civil Penalty Actions—Decisions and Orders Issued by the Administrator

Digests

(This supplement includes decisions and orders issued by the Administrator from October 1, 1991 through December 31, 1991.)

These digests do not constitute legal authority, and should not be cited or relied upon as such. These digests are not intended to serve as a substitute for proper legal research. Parties, attorneys, and other interested persons should always consult the full text of the Administrator's decisions before citing them in any context.

The digests of the Administrator's final decisions and orders are arranged by order number, and briefly summarize key points of the decision. The following compilation of digests includes all final decisions and orders issued by the Administrator from October 1, 1991 through December 31, 1991. The FAA will publish noncumulative supplements to this compilation on a quarterly basis (e.g. April, July, October, and January of each year).

In the Matter of [Airport Operator]

Order No. 91–41 (10/31/91)

Unauthorized Access to AOA—responsibility of airport operator. Contrary to Respondent's assertion, this is not a case of liability without fault. It is clear that the two special agents were able to enter the AOA unchallenged in this case because the tenant's employee failed to challenge them. Respondent is responsible for that failure. The fact that respondent properly instructed the tenant with regard to proper security procedures does not relieve Respondent of its responsibility for that breach. Unless otherwise formally agreed, in the context of airport security, airport tenants and their employees must be treated as agents of the airport authority.

Corrective Action. There is no evidence in the record that Respondent's corrective actions were considered by Complainant in determining what sanction to seek in this case. Nonetheless, the failure of FAA investigative reports to document the corrective action taken by Respondent neither exonerates Respondent nor justifies the imposition of no civil penalty. Citing, Order No. 91–18.

Notice to Respondent. The Federal Aviation Act and its implementing regulations provided Respondent with adequate notice that a violation of the FAR could result in a civil penlty. Citing, Order No. 91–18.

Prosecutorial Discretion. The law judge was correct not to address Respondent's challenge to the FAA's exercise of its prosecutorial discretion. It is well-established that an agency's decision not to prosecute or enforce is a decision generally committed to the agency's absolute discretion, and should be presumed immune from review.

Reduction in Sanction. Respondent's corrective action alone does not warrant a reduction in sanction in this case because Respondent merely reminded tenants of their existing responsibilities. Nonetheless, I will defer to the law judge's assessment of Respondent's positive compliance disposition and, as a result, I will not disturb the law judge's modification of the civil penalty.

In the Matter of Michael Wendt

Order No. 91–48 (10/4/91)

Timeliness of Brief. Although the four-day uncontested extension of time was not officially granted in this case, it likely would have been if Respondent's letter (confirming Complainant's agreement to the extension) had been received by the Appellate Docket Clerk, as Respondent apparently thought it had. Accordingly, good cause exists for accepting Respondent's appeal brief as properly filed.

In the Matter of Lydia Shields

Order No. 91–49 (10/8/91)

Withdrawal of Appeal. Complainant withdrew its notice of appeal from the law judge's oral initial decision. Complainant's appeal is dismissed.

In the Matter of Michael Costello

Order No. 91–50 (10/9/91)

Timeliness of Notice of Appeal and Appeal Brief. Respondent's notice of appeal and appeal brief were filed late. The Administrator held that under the circumstances of this case, in which a genuine question appears to exist regarding whether the settlement agreement entered into by the parties truly reflects a meeting of the minds of the parties, good cause exists to excuse the lateness of the notice of appeal and the appeal brief. The Administrator denied Complainant's motion to dismiss, and granted Respondent an extension of time in which to file its reply brief.

Settlement Agreement. The Administrator suggested that in the future, when parties settle their case at a hearing, they reduce their agreement into written consent order, and that law judges not dismiss such a case until a written consent order is agreed upon.

In the Matter of Troy R. Hagwood

Order No. 91–51 (10/9/91)

Request for Hearing. Although it appears that Respondent wanted a formal hearing on the charges contained in the Final Notice of Civil Penalty, it is clear he failed to properly request one. Complainant could have issued an order assessing civil penalty pursuant to 14 CFR 13.16(b)(2). Instead, however, it appears that the agency attorney decided to waive Respondent's mistake by filing a document which was unequivocally labeled as a complaint.

Timeliness of Complaint. Since Respondent never filed a request for a hearing with the Hearing Docket, the period of limitations for filing a complaint was never triggered. But by waiving Respondent's failure to file a proper request for a hearing Complainant did not also waive its right to file a complaint. In this case, the time within which to file a complaint should logically be counted from the time of the waiver. The law judge's Order Dismissing Complaint is reversed and this case is remanded to the law judge for a hearing on the merits of the complaint.

In the Matter of KDS Aviation Corp.

Order No. 91–52 (10/28/91)

EAJA—prevailing party. KDS could not have filed its application before the case was dismissed because it would not yet have been a prevailing party. It is clear, however, that after the Order of Dismissal, KDS was the prevailing party within the meaning of the EAJA. The agency's rules implementing the EAJA obviously contemplate voluntary dismissal as a basis for an EAJA claim. 14 CFR 14.20(c)(4).

EAJA—substantial justification. The burden of proving substantial justification is on agency counsel, who may avoid an award only by showing that the agency's position was reasonable in law and fact. 14 CFR 14.04(a). Without an evidentiary record in this case, it would be difficult, if not impossible, for agency counsel to meet that burden. Unsworn assertions in the agency's brief do not sustain its burden of proof. The case is remanded to the law judge for further proceedings to determine whether the agency was substantially justified in initiating and continuing this enforcement action and to determine what fees and expenses, if any, should be paid by the agency.

In the Matter of Norbert G. Koller

Order No. 91–53 (10/28/91)

The law judge dismissed the complaint based on his finding that Respondent had intended to declare the disassembled pistol in his luggage to security personnel at the security screening checkpoint, before it was discovered inside the x-ray screening compartment.

Intent to declare a weapon. The Administrator held that Respondent violated 14 CFR 107.21(a)(1) despite Respondent's unsuccessful attempt to declare his gun to security personnel at the security checkpoint before his luggage containing the gun entered the x-ray screening compartment. Respondent's intent to declare his gun to security personnel was not relevant to the determination of whether he violated this section. In no case should he have submitted the bags containing the gun for screening at the security checkpoint for passengers with carry-on bags. By waiting to declare his gun until he submitted his luggage to screening at the security checkpoint, Respondent, at the very least, impermissibly assumed the risk that his declaration would not be heard or understood by the security personnel. It was Respondent's responsibility to declare and check his gun. See 14 CFR 108.11(d).

Submission of Briefs on a New Issue. The Administrator reversed the law judge's decision, and provided the parties, pursuant to 14 CFR 13.233(j)(1), with 30 days in which to submit briefs on the previously unaddressed issue of whether the near maximum penalty of $975 sought by Complainant under section 901(a) of the Federal Aviation Act, 49 U.S.C. 1471(a)(1), was merited by the facts of the case. Review of this issue was necessary because Complainant only charged Respondent with having violated Section 107.21(a)(1), which subjects the violator to a maximum penalty of $1000 under Section 901(a) of the Act. Citing, FAA Order No. 90–10.

In the Matter of Alaska Airlines, Inc.

Order No. 91–54 (11/6/91)

Complainant filed a Notice of Interlocutory Appeal as of Right under 14 CFR 13.219(c), challenging an order of the law judge. The law judge had denied Complainant's motion to quash the subpoena of Raymond Salazar, the former Director of FAA's Office of Civil Aviation Security, to provide testimony by oral deposition. Based upon the law judge's finding that Complainant had obstructed the taking of the deposition, the law judge ordered Complainant to produce Mr. Salazar for a deposition at a place, time and date set by and convenient to Respondent. Under the law judge's order, Respondent did not have to obtian another subpoena or issue another notice of deposition. Complainant was ordered to bear the costs of the deposition, including the cost of expedited copy.

Interlocutory Appeal of Right. Under 14 CFR 13.219(c), the only issue to be decided in this case is whether this sanction is permissible under the Rules of Practice.

Sanction Authority. The Administrator held that the law judge had exceeded his authority. Law judges cannot exercise powers that exceed the authority of the agency. Since the Administrator does not have the authority to impose this sanction, then the law judge also lacks this authority. Moreover, 14 CFR 13.205(b) specifically provides that the law judge does not have the authority to "* * * award costs to any party or impose any sanction not specified in this subpart." By ordering Complainant to pay for the cost of the deposition, including the cost of expedited copy, and by ordering Complainant to produce Mr. Salazar at a place set by, and convenient to Respondent, the law judge acted contrary to this prohibition. The law judge's decision that Respondent did not have to re-notice the deposition was not inconsistent with 14 CFR 13.220(j)(3), but the issuance of a new notice would be both courteous and prudent.

In the Matter of Continental Airlines

Order No. 91–55 (12/6/91)

The law judge held that Respondent violated 14 CFR 108.5(a)(1) by failing to carry out a provision of the SSP, which Respondent adopted, by not detecting FAA-approved test objects at specified security checkpoints at the same airport on three separate occasions. Respondent's arguments on appeal have been addressed in these FAA orders: No. 90–12 (4/25/90); No. 90–18 (8/22/90); No. 90–19 (11/7/90); No. 91–9 (4/12/91). In light of the fact that there are no new issues, and the facts are similar, Respondent's appeal is denied.

In the Matter of Patricia L. Mayhan

Order No. 91–56 (12/3/91)

Withdrawal of Appeal. Complainant withdrew its notice of appeal from the law judge's oral initial decision. Complainant's appeal is dismissed.

In the Matter of Britt Airways

Order No. 91–57 (12/4/91)

Withdrawal of Appeal. Respondent withdrew its notice of appeal from the law judge's oral initial decision. Respondent's appeal is dismissed.

In the Matter of [Airport Operator]

Order No. 91–58 (12/31/91)

Unauthorized Access to AOA—Responsibility of Airport Operator. Respondent argues that it should not be held liable for the errors or omissions of independent third parties. However, for airport security purposes, independent contractors hired by either the airport operator or by an airport tenant must be treated as agents of the airport operator.

In three of the four incidents forming the basis for this appeal, specific provisions in Respondent's security program were shown to have been violated, demonstrating fault on the part of Respondent. However, in the incident occurring at a FBO terminal, the provision in the airport security program that Complainant claims was violated applies only to air carriers and not to FBO's. Because Complainant did not cite, and the Administrator could not find any other provision in the airport security program which would apply to this incident, the Administrator reversed the law judge's finding of a violation of § 107.13(a)(1).

Unauthorized Persons. Although the FAA special agents who entered the AOA had been issued identification badges and were fully authorized to enter the AOA, this does not require reversal of the law judge's findings of violations. A person need not be actually unauthorized in order to demonstrate a violation of the regulation.

In the Matter of William R. Griffin

Order No. 91–59 (12/24/91)

Withdrawal of Appeal. Complainant withdrew its notice of appeal of the oral initial decision. Complainant's appeal is dismissed.

In the Matter of James F. Brinton

Order No. 91–60 (12/26/91)

Withdrawal of Appeal. Complainant withdrew its notice of appeal of the oral initial decision. Complainant's appeal is dismissed.

The Administrator's final decisions and orders, indexes, and digests are available for public inspection and copying at the following location in FAA headquarters:

FAA Hearing Docket, Federal Aviation Administration, 800

Independence Avenue, SW., room 924A, Washington, DC 20591; (202) 267–3641.

In addition, these materials are available at all FAA regional and center legal offices at the following locations:

Office of the Assistant Chief Counsel for the Aeronautical Center (AAC–7), Mike Monroney Aeronautical Center, 6500 South MacArthur, Oklahoma City, OK 73125; (405) 680–3296.

Office of the Assistant Chief Counsel for the Alaskan Region (AAL–7), Alaskan Region Headquarters, 222 West 7th Avenue, Anchorage, AL 99513; (907) 271–5269.

Office of the Assistant Chief Counsel for the Central Region (ACE–7), Central Region Headquarters, 601 East 12th Street, Federal Building, Kansas City, MO 64106; (816) 426–5446.

Office of the Assistant Chief Counsel for the Eastern Region (AEA–7), Eastern Region Headquarters, JFK International Airport, Fitzgerald Federal Building, Jamaica, NY 11430; (718) 917–1035.

Office of the Assistant Chief Cousel for the Great Lakes Region (AGL–7), Great Lakes Region Headquarters, O'Hare Lake Office Center, 2300 East Devon Avenue, Des Plaines, IL 60018; (312) 694–7108.

Office of the Assistant Chief Counsel for the New England Region (ANE–7), New England Region Headquarters, 12 New England Executive Park, Burlington, MA 01803; (617) 273–7310.

Office of the Assistant Chief Counsel for the Northwest Mountain Region (ANM–7), Northwest Mountain Region Headquarters, 18000 Pacific Highway South, Seattle, WA 98188; (206) 227–2007.

Office of the Assistant Chief Counsel for the Southern Region (ASO–7), Southern Region Headquarters, 3400 Norman Berry Drive, East Point, GA 30344; (404) 763–7204.

Office of the Assistant Chief Counsel for the Southwest Region (ASW–7), Southwest Region Headquarter, 4400 Blue Mound Road, Forth Worth, TX 76193; (817) 624–5707.

Office of the Assistant Chief Counsel for the Technical Center (ACT–7), Federal Aviation Administration Technical Center, Atlantic City International Airport, Atlantic City, NJ 08405; (609) 484–6605.

Office of the Assistant Chief Counsel for the Western-Pacific Region (AWP–7), Western-Pacific Region Headquarters, 15000 Aviation Boulevard, Hawthorne, CA 90261; (213) 297–1270.

The FAA still is pursuing means by which the Administrator's decisions and orders, and the indexes and digests of those decisions, could be published and offered for sale by subscription through a reporting service. The FAA intends to provide further notice regarding such publication and sale in the **Federal Register** when the necessary arrangements are completed. The FAA may discontinue publication of the subject-matter index and the digests at such time as a commercial reporting service publishes similar information and provides it to the public in a timely and accurate manner.

Issued in Washington, DC, on January 13, 1992.

Kenneth P. Quinn,

Chief Counsel.

[FR Doc. 92–1364 Filed 1–17–92; 8:45 am]

BILLING CODE 4910–13–M

Federal Highway Administration

[FHWA Docket No. MC–92–5]

Parts and Accessories Necessary for Safe Operation; Limited Waiver for Domino's Pizza Distribution Corp.

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of petition; request for public comment.

SUMMARY: The Domino's Pizza Distribution Corporation has requested, and the FHWA proposes to grant in part, a petition for a waiver from the requirements of 49 CFR 393.25(e) of the Federal Motor Carrier Safety Regulations (FMCSRs). Domino's Pizza Distribution Corporation requests a waiver to § 393.25(e), Lighting devices to be steady-burning, to allow for the use of a strobe warning lamp, a non-steady-burning lighting device, on the rear of its semi-trailers, which would be activated when the vehicle is being driven in reverse and when the vehicle is being unloaded. The FHWA proposes to grant the waiver to the extent that Domino's Pizza will be permitted to use the strobe lamps on certain of its semi-trailer fleet during a 3-year trial period, subject to the conditions imposed by the FHWA in this notice.

DATES: Written comments must be received on or before February 20, 1992.

ADDRESSES: Submit written, signed comments to FHWA Docket No. MC–92–5, room 4232, HCC–10, Office of the Chief Counsel, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590. Commenters may, in addition to submitting "hard copies" of their comments, submit a floppy disk in standard or high density formats containing files compatible with either WordPerfect or WordStar for IBM systems or Microsoft Word or WordPerfect or WordStar for Apple MacIntosh systems. Commenters should clearly label submitted disk with the software format used (e.g., WordPerfect 5.0 (IBM) or Microsoft Word 4.0 (Mac)). All comments received will be available for examination at the above address from 8:30 a.m. to 3:30 p.m., e.t., Monday through Friday, except legal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard.

FOR FURTHER INFORMATION CONTACT: Mr. Larry W. Minor, Office of Motor Carrier Standards, HCS–10, (202) 366–2981; or Mr. Paul L. Brennan, Office of the Chief Counsel, HCC–20, (202) 366–0834, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except legal holidays.

SUPPLEMENTARY INFORMATION: Domino's Pizza Distribution Corporation uses tractor-semi-trailer combination vehicles to distribute supplies to its stores. Approximately 65 to 75 percent of the trailers in the Domino's fleet are navy blue, and most deliveries are made during night-time, non-business hours. Delivery locations are within or in close proximity to "highly marqueed" strip malls. Domino's Pizza has indicated that the vehicles are equipped with all lighting and reflective devices required under the Federal Motor Vehicle Safety Standards (FMVSSs) and the FMCSRs. However, Domino's Pizza has a problem with front-to-rear collisions; motorists are driving into the rear of the semi-trailers. Domino's Pizza believes that the vehicles' conspicuity is adversely impacted by the merchants' advertising methods and further reduced by weather conditions. The advertising methods include signs and lights which, depending on the position of the Domino's vehicle and the time of day, may decrease motorists' ability to recognize the presence of the semi-trailers. To address this problem, Domino's Pizza began studying the possibility of using auxiliary non-steady-burning lamps on the rear of its semi-trailers.

The proposed lighting system is a "non-projecting lighting device" that will be mounted on the vertical centerline of the rear of the trailer, at a height approximately 40 inches above the surface of the road. The diameter of the lens is 4 inches, and the color of the lamp to be used is amber. The flash rate for the strobe warning lamp is 70 to 80 flashes per minute with a luminous intensity of 150 candela (measured through a clear lens). The system has been designed in compliance with 49 CFR 393.25, except paragraph (e);

§ 393.27, Wiring specifications; § 393.29, Grounds; § 393.31, Overload protective devices, and § 393.33, Wiring, installation.

Section 393.25(e) of the FMCSRs requires, in part, that all exterior lighting devices be steady-burning, except turn signals and stop lamps when used as turn signals. The use of "strobe-type backup warning lights" used in "conjunction with the current backup lights" is not in compliance with the requirements of § 393.25(e). Strobe lamps are not included among the lighting devices which are excepted from the steady-burning requirement (i.e., turn signals, warning lamps on service vehicles authorized by State and local authorities, or vehicular hazard warning flashers as required by § 392.22 or permitted by § 392.18). The noncompliance of the proposed lighting devices is acknowledged in the request for waiver. The petition for a waiver is being considered under section 206(f) of the Motor Carrier Safety Act of 1984 (Pub. L. 98–554, 98 Stat. 2829, 2835, 49 U.S.C. app. 2505(f)) which authorizes waivers of any regulation issued under the authority of that Act upon a determination that the waiver is not contrary to the public interest and is consistent with the safe operation of commercial motor vehicles.

Conditions of the Waiver

I. Effective Intensity of the Strobe

In the strobe light manufacturer's specifications (included with the petition), it is stated that the intensity is 150 candela. Although the intensity of a strobe is typically expressed as "effective intensity," the manufacturer did not specifically state the effective intensity. Effective intensity depends on factors such as duration of the flash, peak intensity and flash rate and can vary by a factor of at least ten, depending on the values of these parameters. As a condition of the waiver, the FHWA proposes limiting the maximum effective intensity of the strobe lamp to no more than 165 candela. The 165 candela limit for the strobe lamp allows for manufacturing tolerances in the production of the 150 candela strobe lamp. The FHWA believes the 165 candela limitation is necessary to prevent the strobe lamp from distracing motorists. This limit is less than the maximum allowable candle power for stop lamps and red turn signals (300 candela) and for yellow rear turn signals (750 candela). A measurement of effective intensity would be made using the proposed strobe lamp under operational conditions and the measurement procedure in "Emergency Vehicle Warning Lights: State of the Art," U.S. Department of Commerce, National Bureau of Standards, Special Publication 480–16, September 1978, pp. 100–105. Domino's Pizza Distribution Corporation would be required to ensure that the effective intensity of the proposed strobe lamp is measured using the method prescribed or by comparable measurement procedures or obtain a written statement from the manufacturer of the strobe lamp indicating the lamp had been tested using comparable measurement procedures. The voltage to be used for the testing of the strobe lamp would be equal to the maximum voltage to be used when the strobe lamp is mounted on the vehicle. Also, the strobe lamp's effective intensity would be measured using the proposed amber lens. The effective color of the light emitted by the strobe lamp would be required to conform to the definition of yellow (amber) found in the Society of Automotive Engineers (SAE) standard J578, *Color Specification*, May 1988. Domino's Pizza would provide written notification to the FHWA that the measurement of the effective intensity of the proposed strobe lamp was made under operational conditions. Domino's Pizza would also provide: The date(s) the measurement was performed; the location of the measurement; certification that the effective color of the strobe lamp conforms to the definition of yellow (amber) in SAE J578; the voltage used during testing and the effective intensity determined at that voltage; the individual(s) or company performing the measurement; and the measurement procedure used.

II. Installation of the Strobe

The strobe lamp would be required to be installed in such a way that it can only be activated when the transmision of the tractor is in reverse or when the vehicle is parked. The strobe lamp would be required to be mounted approximatley on the vertical centerline of the rear of the trailer, at a height between 35 and 60 inches above the surface of the road (measured with the vehicle unloaded). Domino's Pizza would be required to obtain the approval of the FHWA for the installation of the lamp in other locations on the rear of the trailer. The diameter of the lens would be required not to exceed 4 inches, and the color of the lens would be restricted to amber. The flash rate for the strobe would be limited to not exceed 80 flashes per minute.

III. Compliance With Lighting and Wiring Requirements of the FMCSRs

The installation of the strobe lights would be required to be in compliance with §393.25, except paragraph (e); §393.27, Wiring specifications; §393.29, Grounds; §393.31, Overload protective devices; and §393.33, Wiring, installation.

IV. Duration of Waiver; Accident History Monitoring

The FHWA proposes to grant the waiver for a 3-year period. The 3-year period would begin when the FHWA publishes the final conditions of the waiver in the **Federal Register**. Domino's Pizza would be required to provide the FHWA with an annual report on the results of the use of the strobe lamps so that the accident history of the vehicles equipped with the strobe lamp and those vehicles which are not equipped with the lamp can be closely monitored. Domino's Pizza will be required to report accident information and data on all accidents that occur to the vehicles equipped with the strobe lamp, including those which do not involve front-to-rear collisions with Domino's vehicles. In addition, all motor vehicle accidents that occur within 150 feet of Domino's vehicles equipped with the strobe lamp, but not necessarily involving the Domino's vehicles, would be reported. All front-to-rear collisions with Domino's vehicles which are not equipped with the strobe lamp would also be reported. Three copies of the information listed below shall be forwarded to the Office of Motor Carriers on a monthly basis:

1. The position of the vehicles engaged in the accident (description and diagram of the accident scene).

2. Color photographs of the surrounding environment.

3. Environmental conditions (i.e., background environment, time of day, light conditions, weather, roadway type).

4. Interview information with the driver/occupants of the striking vehicle (specifically what the driver/occupants saw).

5. Copy of police report for the accident. In the case of an accident within 150 feet but not necessarily involving the Domino's vehicle, the police report is not required.

6. Copy of motor carrier accident report (MCS–50–T), if required by §394.9.

7. Cost of damage to each of the involved vehicles. In the case of an accident within 150 feet but not necessarily involving the Domino's

vehicle, the cost of damage is not required.

8. Description of injuries/fatalities.

V. Maintenance History

As part of the periodic review of this waiver, Domino's Pizza Distribution Corporation would be required to develop a test and maintenance program to ensure that the operation of the strobes is consistent with the conditions of the waiver, and to keep a maintenance history of the strobe lamps. A copy of the maintenance history would be forwarded to the Office of Motor Carrier Standards on a quarterly basis, each year, for the duration of the waiver. In addition, the maintenance history for the strobe lamps would be maintained at the location at which the vehicles are garaged or maintained, or the principal place of business.

VI. State and Local Laws

The use of the strobe lamps must be in compliance with State and local safety regulations or must be approved by the State or local authorities in the jurisdictions in which the strobe lamp will be used. A list of States in which the vehicles will be operated and copies of State approvals would be required to be provided to the FHWA. The FHWA strongly encourages State and local authorities with safety regulations which would prohibit the use of the proposed lamps to accept the terms of the waiver. It is not the intention of the FHWA to preempt State or local requirements which would preclude the use of the strobe lamps. For jurisdictions in which the safety regulations preclude the use of the strobe lamps, a copy of the approval granted by the States or local authorities shall be provided to the FHWA by Domino's Pizza, if such approval or acceptance of the terms of this waiver is not provided by the jurisdictions in response to this notice.

VII. Number of Vehicles To Be Equipped With Strobe Lights

The number of semi-trailers that may be equipped with the strobe lamps shall not exceed 50 percent of the number of semi-trailers per Domino's Pizza Distribution Corporation terminal. The total number of semi-trailers per terminal, along with the total number of vehicles equipped with the strobe lights, would be provided to the FHWA.

VIII. Termination of Waiver

Domino's Pizza would be required to discontinue the use of the strobe lamps (1) upon the completion of the 3-year trial period or (2) when instructed to do so by the FHWA at either the completion of an annual review or at any time it is determined by the FHWA that the continued use of the strobe lamps decreases the safety of operation of the vehicles on which the lamps are used.

Request for Public Comments

The FHWA requests public comment on this waiver. The FHWA is particularly interested in obtaining technical information which would indicate the need for additional terms of this waiver. Comments are also sought from State and local enforcement officials relating to their experiences investigating accidents involving Domino's Pizza tractor-semi-trailer combination vehicles. Comments should include details on the type of accident and a general description of the accident scene.

The FHWA would also be interested in comments on the projected impacts on safety if the waiver expanded to other regulatees.

Authority: 49 U.S.C. 3102; 49 U.S.C. App. 2505; 49 CFR 1.48.

Issued on: January 10, 1992.

T.D. Larson,

Administrator.

[FR Doc. 92-1365 Filed 1-17-92; 8:45 am]

BILLING CODE 4910-22-M

National Highway Traffic Safety Administration

[Docket No. 90-13; Notice 4]

Takata-Gerico Corp.; Denial of a Petition for Reconsideration of the Denial of Petition for Inconsequential Noncompliance

This notice denies a petition by Takata-Gerico Corporation, of Denver, Colorado, for reconsideration of the denial of its petition to be exempted from the notification and remedy requirements of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. 1381 *et seq.*) for noncompliance with 49 CFR 571.213, Federal Motor Vehicle Safety Standard No. 213, Child Restraint Systems. The basis of the original petition was that the noncompliance is inconsequential as it relates to motor vehicle safety.

The original was denied on July 30, 1991 (56 FR 36075). Notice of the petition for reconsideration was published on September 16, 1991 (56 FR 46819).

Paragraph S5.4.3.5(a) of Standard No. 213 states that any buckle in a child restraint system belt assembly designed to restrain a child using the system shall: When tested in accordance with S6.2.1 prior to the dynamic test of S6.1, not release when a force of less than nine pounds is applied and shall release when a force of less than nine pounds is applied and shall release when a force of not more than fourteen pounds is applied.

Takata-Gerico Corporation petitioned the agency on June 14, 1990, for a determination of inconsequential noncompliance with the above mentioned requirement of Standard No. 213. Takata-Gerico reported that it estimated that approximately 26,257 buckles that could release with less than nine pounds of pressure were incorporated in Guardian car seats between January 31, 1990 and May 3, 1990. Takata-Gerico supported its petition for inconsequential noncompliance on the basis of the results of the Yellowstone Environmental Science study entitled, Cognitive Skill Based Child-Resistant Safety Belt Buckle [March 1990]. Takata-Gerico claimed that:

1. Excessive force requirements, such as those required under Standard 213, can "impede" rescue in an emergency situation. Id. at 79.

2. The upper limit of thumb opposability strength of two to four year olds is forty pounds. Id. at 45. (Takata-Gerico stated that studies show that children under three years of age are likely to use the Guardian car seat and children in this age group are physically incapable of releasing a belt buckle at seven pounds.)

3. A study of 1500 children, whose car seat habits were studied, revealed that children escape from car seats through means other than releasing the belt buckle. Id. at 16.

4. A car seat design in which the child is denied access to the car seat buckle is more important in ensuring that the child remains restrained while in the car seat than the pounds of pressure needed to release the belt buckle. Id. at 46.

5. Push-button buckle release mechanisms with force requirements less than nine pounds were acceptable to parents. Id. at 32.

6. An excessive force requirement is above the strength abilities of older people, *e.g.*, grandparents, thus discouraging or making impossible the use of child car seats by older persons. Id. at 37, 45 (stating that the lower limit of thumb opposability strength of 61 to 94 years olds is thirteen pounds).

On July 30, 1991, the agency denied Takata-Gerico's petition.

The bases for the denial were:

1. The Yellowstone Study's conclusion regarding an ideal buckle release pressure of 5 lbs. must be viewed in conjunction with other "ideal" child

safety seat attributes and not in isolation.

2. The seats in question can be used by children weighing up to 40 lbs., and not just children three years of age or younger, as the petitioner claimed. (The average child weighing 40 lbs. is older than three years, and children of this age are capable of releasing a buckle that requires only 8 lbs. of pressure).

3. The 9 lbs. force requirement is not excessive and will not impede rescue of a restrained child in an emergency.

4. Maintenance and enforcement of the 9 lbs. minimum reduces the likelihood that a child will be able to release the buckles.

In a petition dated August 30, 1991, Takata-Gerico asked the agency to reconsider its denial. The company bases its new petition on the following claims:

1. The denial incorrectly states that Takata-Gerico claimed the ideal minimum release tension should be 5 lbs.

2. The agency improperly rejected the findings of the Yellowstone study.

3. There is no evidence that the 9 lbs. standard will reduce inadvertent deployment, and children escape from child safety seats by means other than releasing the belt buckle.

4. The agency failed to show how the level of noncompliance poses an unreasonable risk to safety.

5. No instances of injury have been brough to the petitioner's attention in the 19 months the seats have been in the field.

6. The seats in question are used 99.9 percent of the time by children 3 years of age and younger who are incapable of releasing an 8 lbs. buckle.

No comments were received in response to the notice of September 16, 1991.

The agency has carefully reviewed the six new arguments made by the petitioner in its appeal, and responds as follows.

1. NHTSA did not state in the denial notice that the petitioner claimed the ideal minimum release tension should be 5 pounds. What NHTSA said was that the Yellowstone Study had reached this conclusion.

2. NHTSA is unable to understand the petitioner's argument that it improperly rejected the results of the Yellowstone Study as the petitioner did not offer any evidence in support of its argument. The agency continues to support its analysis in the denial notice.

3. To refute petitioner's claim that NHTSA has no evidence that a value of 9 lbs. will reduce inadvertent deployment, the agency calls petitioner's attention to the "Child Restraint Systems" study conducted in 1975 by Peter W. Arnberg for the National Swedish Road and Traffic Research Institute. This study presented evidence that 4-year old children would not be able to release a buckle with a minimum of 9 lbs of pressure on the buckle release.

As for petitioner's contention that children escape from child safety seats by means other than releasing the belt buckle, this in a *non sequitur* as to the appropriations of a 9 lbs. value. If a child is mined to escape a child safety seat, lowering the value will only make it easier to accomplish. The safety standards attempt to reduce safety problems; no standard can entirely eliminate them.

4. The burden is upon the petitioner, not NHTSA, to demonstrate that the level of noncompliance does not pose an unreasonable risk to safety. The 9 lbs. requirement exists because NHTSA, after a public rulemaking procedure, determined that it represents the minimum level of performance required for the safety of children.

5. The fact that the petitioner is unaware of injuries resulting from the noncompliance does not mean that they have not occurred and remain unreported, or that they will not occur in the future. These seats may be in use for an additional 5 to 10 years.

6. While petitoner's survey of 198 purchasers is the basis for its argument that the seats are used by children 3 years of age or younger, who are incapable of applying a pressure of 8 lbs. to the buckle release, the survey did not ask the purchaser the length of time the purchaser intended to use the seat. NHTSA believes it likely that the children for whom the seats were purchased are likely to use them until they outgrew the need for them, around the age of 4. At that age, a child can apply a release pressure of 8 lbs.

In addition, Takata-Gerico submitted further arguments in support of its position by letter dated October 11, 1991. While they were not submitted in a timely fashion, and hence, subject to reveiw by the public, NHTSA has not found them any more persuasive than petitioner's earlier arguments. These arguments and NHTSA's responses are:

1. Petitioner contacted 19 of 102 Guardian car seat purchasers who had gotten in touch with its customer service department. Of these, 17 stated that the car seat was being used by a child 3 years old or younger.

NHTSA notes that the remaining two users were children 3½ and 4 years old. Further, the 17 purchasers with younger children did not state that their children would cease using the seat by the time they were 3½ years old. It is the safety of the older child that is at issue, and petitioner has presented no evidence that older children will not use the seat.

2. Available data indicate that the average weight at which a child is no longer comfortable using the Guardian is 26.18 lbs., which correlates with a child who is 2 to 2½ years old. A child this age is incapable of releasing a buckle that requires seven pounds of pressure.

NHTSA notes that the petitioner derived its age figure from an anthropomorphic study of U.S infants and children, rather than from the actual ages of the children whose parents reported that they no longer were comfortable in the Guardian seat. This argument is not sufficient to show that children who are capable of releasing a buckle with 8 lbs. pressure do not use the Guardian seat, especially since the manufacturer itself declares that the seat is designed for older children.

3. There are only 10 inches between the foam padded wings in a Guardian seat. An average 3-year old child has a shoulder breadth between 9.7 inches and 11.4 inches. Clothing will increase to breadth, making it more difficult for the child to fit in the seat.

Although the average 4-year old child might have difficulty fitting into the Guardian seat, that does not mean that *all* 4-year olds will have this difficulty. Petitioner's study showed that the minimum shoulder breadth for a 4-year old was 8.1 inches. Thus, children at the lower end of the breadth range would be able to fit into the seat. In addition, there are times such as during warm weather, when a child is dressed with very little clothing. This argument of petitioner is not sufficient to convince NHTSA that there is no potential problem of the safety of the older child.

4. The buckle of the Guardian is placed at the center base of the car seat and is not in plain view of the child. Petitioner conducted a study with six children ranging from 2 to 4 years of age. As part of a study, the children were encouraged to escape from the seat. Those who escaped did so by means other than releasing the buckle. Thus, petitioner argues that it is unlikely that children will attempt to escape the seat by releasing the buckle.

It may be unlikely, but it is not impossible. The design of the seat is such that a child can reach under the shield and release the buckle. Petitioner's test was not necessarily indicative of the performance of all children in real life situations. Children are often in safety seats for relatively long periods of time, and under those

conditions may not look for the quickest way to escape.

In consideration of the foregoing, it is hereby found that petitioner has failed to meet its burden of persuasion that the denial of its petition for inconsequential noncompliance should be reversed and its petition is denied. Therefore, NHTSA expects the petitioner to proceed expeditiously to conduct a notification and remedy campaign in accordance with statutory requirements.

Authority: 15 U.S.C. 1417; delegation of authority at 49 CFR 1.50.

Issued on: January 14, 1992.

Jerry Ralph Curry,

Administrator.

[FR Doc. 92-1343 Filed 1-17-92; 8:45 am]

BILLING CODE 4910-59-M

[Docket No. 91-44, Notice 2]

Thomas Built Buses, Inc. Grant of Petition for Determination of Inconsequential Noncompliance

This notice grants the petition by Thomas Built Buses, Inc. (Thomas Built) of High Point, North Carolina, to be exempted from the notification and remedy requirements of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. 1381 *et seq.*) for an apparent noncompliance with 49 CFR 571.208, Federal Motor Vehicle Safety Standard No. 208, Occupant Crash Protection. The basis of the petition was that the noncompliance is inconsequential as it relates to motor vehicle safety.

Notice of receipt of a petition was published on September 19, 1991 and an opportunity afforded for comment (56 FR 47519).

Paragraph S7.2 of Standard No. 208 specifies that a seat belt assembly installed in any vehicle, except an automatic belt assembly, shall have a latch mechanism that releases at a single point by push button action.

Thomas Built produced 29 type A school buses (under 10,000 pounds GVWR) between September 1990 and October 1990 which do not comply with the above mentioned requirements. The seat belts do not have a push button release. Instead they have a lift lever release. Thomas Built supported its petition for inconsequential noncompliance with the following:

The seat belts installed in these units, although not of the push button release type, meet all other applicable requirements of Standard Nos. 208 and 209.

On the units involved, the seat belts have the same type of release throughout the bus. There was no mixing of push button and lift lever belts.

This type of release (lift lever) has been used on seat belts in school buses for years and the lack of the push button release on a few buses built one month after the required date will have no detectable impact on belt usage or passenger familiarity with the new release.

No comments were received on the petition.

In the pertinent rulemaking notices leading to amendment of Standard No. 208, NHTSA made it clear that data were insufficient to show that push button release buckles had any marked safety advantage over the lever, or flap-type, release buckles. The agency made its decision primarily to standardize the method of buckle operation. Thus, it cannot be said that Thomas, which used a previously complying release buckle for a period of only 20 days after the effective date of the requirement for push button releases, and for a production volume of only 29 vehicles, has failed to comply in a manner that has a consequential effect on motor vehicle safety.

Accordingly, in consideration of the foregoing, it is hereby found that the petitioner has met its burden of persuasion that the noncompliance herein described is inconsequential as it relates to motor vehicle safety, and its petition is granted.

Authority: 15 U.S.C. 1417; delegation of authority at 49 CFR 1.50 and 49 CFR 501.8.

Issued: January 14, 1992.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 92-1423 Filed 1-17-92; 8:45 am]

BILLING CODE 4910-59-M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

Date: January 14, 1992.

The Department of the Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, room 3171, Treasury Annex, 1500 Pennsylvania Avenue NW., Washington, DC 20220.

Departmental Offices

OMB Number: 1505-0080.
Form Number: None.
Type of Review: Extension.
Title: Post-Contract Award Information.
Description: Information requested of contractors is specific to each contract and is required for Treasury to evaluate properly the progress made and/or management controls used by contractors providing supplies or services to the Government and to determine contractors' compliance with the contracts, in order to protect the Government's interest.
Respondents: Businesses or other for-profit, Non-profit institutions, Small businesses or organizations.
Estimated Number of Respondents: 5,565.
Estimated Burden Hours Per Response: 15 hours, 32 minutes.
Frequency of Response: On occasion (as specified in contract).
Estimated Total Reporting Burden: 86,421 hours.

OMB Number: 1505-0081.
Form Number: None.
Type of Review: Extension.
Title: Solicitation of Proposal Information for Award of Public Contracts.
Description: Information requested of offerors is specific to each procurement solicitation, and is required for Treasury to evaluate properly the capabilities and experience of potential contractors who desire to provide the supplies or services to be acquired. Evaluation will be used to determine which proposals are most advantageous to the Government, price and other factors considered.
Respondents: Businesses or other for-profit, Non-profit institutions, Small businesses or organizations.
Estimated Number of Respondents: 29,183.
Estimated Burden Hours Per Response: 34 hours, 27 minutes.
Frequency of Response: Other (one-time response).
Estimated Total Reporting Burden: 1,005,241 hours.

OMB Number: 1505-0107.
Form Number: None.
Type of Review: Extension.
Title: Regulation on Agency Protests.
Description: Information is requested of contractors so that the Government will be able to evaluate protests effectively and provide prompt resolution of issues in dispute when contractors file agency-level protests.

Respondents: Businesses or other for-profit, Non-profit institutions, Small businesses or organizations.
Estimated Number of Respondents: 17.
Estimated Burden Hours Per Response: 2 hours.
Frequency of Response: On occasion.
Estimated Total Reporting Burden: 34 hours.
Clearance Officer: Lois K. Holland, (202) 566-6579, Departmental Offices, room 3171, Treasury Annex, 1500 Pennsylvania Avenue NW., Washington, DC 20220.
OMB Reviewer: Milo Sunderhauf, (202) 395-6880, Office of Management and Budget, room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 92-1375 Filed 1-17-92; 8:45 am]

BILLING CODE 4810-25-M

Public Information Collection Requirements Submitted to OMB for Review

Date: January 14, 1992.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, room 3171, Treasury Annex, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

Internal Revenue Service

OMB Number: 1545-0002.
Form Number: IRS Form CT-2.
Type of Review: Extension.
Title: Employee Representative's Quarterly Railroad Tax Return.
Description: Employee representatives file Form CT-2 quarterly to report compensation on which railroad retirement and railroad unemployment repayment taxes are dues. IRS uses this information to ensure that employee representatives have paid the correct tax. Form CT-2 also transmits the tax payment.
Respondents: Individuals or households.
Estimated Number of Respondents/ Recordkeepers: 112.
Estimated Burden Hours Per Respondent/Recordkeeper:
Recordkeeping—28 minutes.
Learning about the law or the form—13 minutes.
Preparing the form—34 minutes.
Copying, assembling, and sending the form to the IRS—17 minutes.
Frequency of Response: Quarterly.
Estimated Total Reporting Burden: 169 hours.

OMB Number: 1545-0732.
Regulation ID Number: LR-236-81 Final (T.D. 8251).
Type of Review: Extension.
Title: Credit for Increasing Research Activity.
Description: This information is necessary to comply with requirements of Code section 41 (section 44F before change by TRA (Tax Reform Act) 1984 and section 30 before change by TRA 1986) which describes the situations in which a taxpayer is entitled to an income tax credit for increases in research activity.
Respondents: Individuals or households, Businesses or other for-profit, Small businesses or organizations.
Estimated Number of Respondents: 250.
Estimated Burden Hours Per Respondent: 15 minutes.
Frequency of Response: On occasion.
Estimated Total Reporting Burden: 63 hours.
Clearance Officer: Garrick Shear (202) 535-4297, Internal Revenue Service, room 5571, 1111 Constitution Avenue, NW., Washington, DC 20224.
OMB Reviewer: Milo Sunderhauf (202) 395-6880, Office of Management and Budget, room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 92-1376 Filed 1-17-92; 8:45 am]

BILLING CODE 4830-01-M

Public Information Collection Requirements Submitted to OMB for Review

Date: January 14, 1992.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, room 3171 Treasury Annex, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

Bureau of Alcohol, Tobacco and Firearms

OMB Number: 1512-0198.
Form Number: ATF REC 5110/03 and ATF F 5110.28.
Type of Review: Extension.
Title: Distilled Spirits Plant (DSP) Processing Records and Reports.
Description: The information collected is necessary to account for and verify the processing of distilled spirits in bond. It is used to audit plant operations, monitor industry activities for the efficient allocation of personnel resources and the compilation of statistics.
Respondents: Businesses or other for-profit.
Estimated Number of Respondents/ Recordkeepers: 121.
Estimated Burden Hours Per Respondent/Recordkeeper: 2 hours.
Frequency of response: Monthly.
Estimated Total Reporting/ Recordkeeping Burden: 3,509 hours.

OMB Number: 1512-0207.
Form Number: ATF REC 5110/04 and ATF F 5110.43.
Type of Review: Extension.
Title: Distilled Spirits Plant (DSP) Denaturation Records and Reports.
Description: The information collected is necessary to account for and verify the denaturation of distilled spirits. It is used to audit plant operations, monitor the industry activities for the efficient allocation of personnel resources, and compile statistics for government economic planning.
Respondents: Businesses or other for-profit.
Estimated Number of Respondents/ Recordkeepers: 99.
Estimated Burden Hours Per Respondent/Recordkeeper: 1 hour.
Frequency of response: Monthly.
Estimated Total Reporting/ Recordkeeping Burden: 1,188 hours.
Clearance Officer: Robert N. Hogarth (202) 927-8930, Bureau of Alcohol, Tobacco and Firearms, room 3200, 650 Massachusetts Avenue, NW., Washington, DC 20226.
OMB Reviewer: Milo Sunderhauf (202) 395-6880, Office of Management and Budget, room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports, Management Officer.

[FR Doc. 92-1377 Filed 1-17-92; 8:45 am]

BILLING CODE 4810-31-M

Office of Thrift Supervision

Investors Federal Savings Bank; Appointment of Conservator

Notice is hereby given that, pursuant to the authority contained in section 5(d)(2)(B) and (H) of the Home Owners' Loan Act, the Office of Thrift Supervision has duly appointed the Resolution Trust Corporation as sole Conservator for Investors Federal Savings Bank, Richmond, Virginia, on December 12, 1991.

Dated: January 14, 1992.

By the Office of Thrift Supervision.

Nadine Y. Washington,

Corporate Secretary.

[FR Doc. 92-1402 Filed 1-17-92; 8:45 am]

BILLING CODE 6720-01-M

Investors Savings Bank, F.S.B.; Notice of Appointment of Receiver

Notice is hereby given that, pursuant to the authority contained in section 5(d)(2)(A) of the Home Owners' Loan Act, the Office of Thrift Supervision has duly appointed the Resolution Trust Corporation as sole Receiver for Investors Savings Bank, F.S.B., Richmond, Virginia, OTS No. 7385, on December 12, 1991.

Dated: January 14, 1992.

By the Office of Thrift Supervision.

Nadine Y. Washington,

Corporate Secretary.

[FR Doc. 92-1403 Filed 1-17-92; 8:45 am]

BILLING CODE 6720-01-M

[No. 92-9]

Proposed Elimination of the Monthly Thrift Financial Report Data Collection

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Notice; request for comment.

SUMMARY: The Office of Thrift Supervision ("OTS") requests public comment from all interested parties on a proposal to eliminate the monthly Thrift Financial Report ("TFR") data collection. The final monthly data collection would be for December 1992.

DATES: Comments must be received on or before February 20, 1992.

ADDRESSES: Comments should be directed to: Director, Information Services Division, Office of Communication, 1700 G Street NW., Washington, DC 20552. Comments will be available for public inspection at 1776 G Street NW., Street Level.

FOR FURTHER INFORMATION CONTACT: Stephen T. Zabrenski, Program Manager for Financial Reporting, (202) 906-6780; Office of Thrift Supervision, 1700 G Street NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: The OTS has continued the monthly TFR data collection of the predecessor agency, the Federal Home Loan Bank Board ("FHLBB"). That data collection by the FHLBB was designed to support the full range of programs conducted by the Federal Home Loan Bank System, including the housing finance programs of the Federal Home Loan Banks. In addition, other government agencies have supplemented their statistical publications with data from the monthly TFR.

With the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), the mission of the OTS was limited to the supervision of savings associations. The quarterly TFR data collection, in conjunction with examinations and other supervisory reports required on a case by case basis, provides the OTS with sufficient financial data to assess the condition of those savings associations. Those quarterly reports are more extensive than the comparable data collection of the quarterly commercial bank call report.

Furthermore, the monthly TFR data collection represents a significant cost to both the OTS and the thrift industry. Those organizations that compile statistics on housing finance, monetary and credit conditions, and macroeconomic trends would assume the full cost of those data collections as a consequence of this proposal to eliminate the monthly TFR. Since most of those data collections would be conducted through surveys based on sampling procedures, many thrift institutions would be relieved of the reporting burden associated with those surveys.

Therefore, the OTS proposes to eliminate the collection of monthly TFR data. The final collection of the monthly data would be for December 1992.

The OTS estimates that the elimination of the montly TFR data collection would reduce annual expenses to the OTS by more than $500,000. This reduction includes expenses associated with report validation, systems maintenance, and printing and mailing.

Similarly, the OTS estimates the annual savings to saving associations to be in excess of $4,000,000, reflecting reductions in report preparation and validation expenses.

Monthly TFR information has been utilized for a variety of purposes other than monitoring the safety and soundness of savings associations. The OTS has identified four such governmental usages that may be affected by this proposal.

The OTS publishes the monthly median cost of funds for all SAIF-insured savings associations for use as an index for certain adjustable rate mortgage loans.

The Department of Housing and Urban Development utilizes selected mortgage data items in its monthly data collection and publication of "Gross Mortgage Flow" information.

The Board of Governors of the Federal Reserve System utilizes selected balance sheet information, deposit balances, and interest rate data, as well as the mortgage data. These items are used to monitor, calculate, and estimate the money stock, money demand, and monetary and credit aggregates.

The Office of Management and Budget has designated the OTS monthly press release, "Monthly Thrift Data", as a principal Federal economic indicator (i.e., major statistical series that describes the current condition of the economy). The release contains a majority of the 180 monthly TFR data items collected.

The OTS invites comments on all aspects of the proposed elimination of the collection of monthly TFR data. Comments from the data users noted above as well as other users should focus on the impact of the proposal on their programs. Specific comments should address such issues as the statutory requirement for OTS data collection, the availability of such information from other sources, the suitability of less frequent data availability, the alternative ways to collect the data that would be borne by the end users rather than the OTS and the proposed implementation date. Comments from savings associations should specifically address the potential savings resulting from the proposed reduction in the reporting burden.

Dated: January 15, 1992.

By the Office of Thrift Supervision.

Timothy Ryan,

Director.

[FR Doc. 92-1401 Filed 1-17-92; 8:45 am]

BILLING CODE 6720-01-M

DEPARTMENT OF VETERANS AFFAIRS

Summary of Precedent Opinions of the General Counsel

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Department of Veterans Affairs (VA) is publishing a summary of legal interpretations issued by the Department's General Counsel involving veterans's benefits under laws administered by VA. These interpretations are considered precedential by VA and will be followed by VA officials and employees in future claim matters. It is being published to provide in public, and, in particular, veterans' benefit claimants and their representatives, with notice of VA's interpretation regarding the legal matter at issue.

FOR FURTHER INFORMATION CONTACT: Mr. Jay D. Farris, Chief, Law Library, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 523–3826.

SUPPLEMENTARY INFORMATION: VA regulations at 38 CFR 12.6(e)(9) and 14.507 authorize the Department's General Counsel to issue written legal opinions having precedential effect in adjudications and appeals involving veterans' benefits under laws administered by VA. The General Counsel's interpretations on legal matters, contained in such opinions, are conclusive as to all VA officials and employees not only in the matter at issue but also in future adjudications and appeals, in the absence of a change in controlling statute or regulation or a superseding written legal opinion of the General Counsel.

VA published summaries of such opinions in order to provide the public with notice of those interpretations of the General Counsel which must be followed in future benefit matters and to assist veterans' benefit claimants and their representatives in the prosecution of benefit claims. The full text of such opinions, with personal identifiers deleted, may be obtained by contacting the VA official named above.

O.G.C. Precedent Opinion 68–91

Questions Presented

a. Where service connection for a veteran's disability is protected under 38 U.S.C. 1159 (formerly 38 U.S.C. 359) and the disability is based on an erroneous diagnosis, should the veteran's rating be increased retroactively based on clear and unmistakable error if the original rating was below the minimum rating provided for the disability under the VA Rating Schedule?

b. If a veteran's rating is increased retroactively based on a finding a of clear and unmistakable error, does that rating become protected under the provisions of 38 U.S.C. 110 and 38 CFR 3.951, if more than 20 years have passed since the retroactive effective date of the rating?

Held

a. Provided that the medical evidence then of record supported a finding of disability, VA's failure to assign the minimum rating required for a service-connected disability under the Rating Schedule is clear and unmistakable error warranting a retroactive correction of the rating.

b. Because protection of a disability pursuant to 38 U.S.C. 110 requires that such a rating be the basis for compensation for twenty years, where a disability rating is retroactively increased and the effective date of such increase is more than twenty years in the past, the revised disability percentage is protected under 38 U.S.C. 110 and 38 CFR 3.951.

Effective Date: September 26, 1991.

O.G.C. Precedent Opinion 69–91

Questions Presented

In 1990, VA promulgated 38 CFR 3.313, a regulation which provides that, effective August 5, 1964, a person who served in Vietnam during the Vietnam era and who subsequently developed non-Hodgkin's lymphoma (NHL) shall be deemed to have service connection for that disease. Assume that a veteran died in 1976 as the result of NHL and that subsequent to the issuance of the mentioned regulation VA rated the death of the veteran from NHL as being service connected:

a. May a child of the veteran be awarded chapter 35 educational benefits retroactive to 1988 if the child first applied in 1990, at age 19, following the issuance of section 3.313 and the service-connected death rating based thereon?

b. May a surviving spouse of the veteran, who also first applies at that time for chapter 35 benefits, elect a beginning date for his or her period of eligibility, under 38 U.S.C. 3512(b)(3), (formerly section 1712(b)(3)), which is retroactive to any date on or after the date of the veteran's death?

c. If the surviving spouse filed a claim for death benefits and was denied in 1976, and a child of the veteran was age 19 on that date, may the child be accorded chapter 35 benefits retroactively for training between his or her 18th and 26th birthdays if the child files an orginal claim for chapter 35 benefits in 1990, at age 33, following the issuance of the regulation and rating?

d. In the example described in (c), may the surviving spouse be awarded chapter 35 benefits retroactively for any period beginning on or after the date of the veteran's death based upon original application in 1990?

Held

a. Concerning the first example presented here, we find the child's eligibility period for chapter 35 extends from age 18 to age 26 (1989–1997), but the child is entitled to receive benefits under that chapter only for training pursued during the period beginning no earlier than 1 year prior to the date of original application in 1990.

b. In the second example, the surviving spouse of the veteran is eligible under chapter 35 during the 10-year period beginning on such date as the spouse selects between 1976 and the date of rating establishing entitlement under that chapter. However, as in the previous example, an award cannot be effective more than 1 year prior to date of application.

c. In the third example, the facts are unclear as to whether the child filed a claim in 1976 for chapter 35 at the same time as the surviving spouse. If not, the child's period of eligibility, from 1976 to 1984, would have expired more than 1 year prior to filing the initial chapter 35 application in 1990. Thus, no chapter 35 benefits could be awarded. If, however, an application had been filed in 1976, benefits could be awarded for the period beginning on the later of the date of the veteran's death or 1 year prior to the date of application. No benefits would be payable beyond the date in 1984, 8 years after the veteran's death (unless the child qualifies for an extension as provided in other provisions of section 3512).

Note: In the first part of the foregoing third example, the fact that the child was age 33 when the original application was filed in 1990 is not relevant in determining the period of eligibility in a death case under section 3512(a)(3). The age 31 limitation only applies in the case of a child seeking to extend the basic eligibility period under subsections 3512 (a)(4), (a)(5), or (c). Thus, on the facts presented by the example, the award based on an application in 1990 at age 33 would be barred as untimely under 38 CFR 21.4131(a), but not due to the child's age at the time of application.

d. Finally, as to the fourth example, the same period of eligibility applies to the surviving spouse as in paragraph 2 above, except that, since the initial chapter 35 application was filed in 1990, no award could be made for any period earlier than 1989. Further, an award back to 1989 could only be made if the surviving spouse elects a delimiting period under section 3512(b)(3) which includes the period from 1989 to the end of the award period. Note that, if the

surviving spouse's death benefit claim in 1976 had included a claim for chapter 35 benefits and he or she now selects a delimiting period beginning on the date of the veteran's death, benefits could be paid for pursuit of an approved program of education during the 10-year period thereafter, due to the retroactivity accorded awards under 38 U.S.C. 5110(g) (formerly 3010(g)) as interpreted by O.G.C. Advisory Opinion 28–90.

Effective Date: September 27, 1991.

O.G.C. Precedent Opinion 70–91

Questions Presented:

1. If there has been a change in the statutory or regulatory standard applicable to a particular case, should a reconsideration section apply the law as it was at the time of the original decision or should it apply current legal standards?

2. To what extent, if any, do the provisions of 38 U.S.C. 5110(g) (formerly section 3010(g)) and 38 CFR 3.114 apply with respect to establishing an effective date for the award of benefits through the use of the liberalized reconsideration procedure, established in the Veterans' Judicial Review Act and recognized in G.C. Precedent Opinion 89–90?

3. When reconsideration has been ordered, is the evidence received since the date of the original decision considered received within the appeal period or prior to the appellate decision, within the meaning of 38 CFR 3.400(q)(1)?

Held

Reconsideration by the Board of Veterans' Appeals under 38 U.S.C. 7103 (formerly section 4003) vacates the original decision and benefits awarded upon reconsideration should be assigned as effective date pursuant to general effective date rules. The reconsideration section should employ current legal standards during its review unless to do so would result in a manifest unjustice, and, within the meaning of 38 CFR 3.400(q)(1), should consider all evidence received since the agency of original jurisdiction decision which was appealed to the BVA as having been received prior to the appellate decision.

Effective Date: October 15, 1991.

O.G.C. Precedent Opinion 71–91

Question Presented

Does 38 CFR 3.105(e) apply to all proposed reductions in evaluation of individual disabilities or only those reductions which result in reduction or discontinuance of compensation payments currently being made?

Held

38 CFR 3.105(e) does not apply where there is no reduction in the amount of compensation payable. It is only applicable where there is both a reduction in evaluation and a reduction or discontinuance of compensation payable. Therefore, where the evaluation of a specific disability is reduced but the amount of compensation is not reduced because of a simultaneous increase in the evaluation of one or more other disabilities, section 3.105(e) is not applicable.

Effective Date: November 7, 1991.

O.G.C. Precedent Opinion 72–91

Question Presented

May VA authorize education benefits to active duty servicemembers for pursuit of courses during "nonduty" time if the individual receives tuition assistance from the Armed Forces for the same courses or training?

Held

A person on "active duty" in the Armed Forces, as defined by 38 U.S.C. 101(21), who is pursuing a course of education paid for by the Armed Forces is barred from receiving education benefits from VA under the programs enumerated in 38 U.S.C. 3681(a) (formerly 1781(a)) for the same training. This bar applies regardless of whether the course is pursued during periods of the day when the individual has no specifically assigned military duties. Even during such periods, the individual is on "active duty" and, thus, subject to the bar.

Effective Date: November 26, 1991.

O.G.G. Precedent Opinion 73–91

Questions Presented

(a) Would proceeds from a life-insurance policy received by a veteran and shares of stock inherited by a veteran, which are placed into a valid irrevocable trust for the benefit of the veteran's grandchildren with the veteran as trustee, be counted as income of the veteran for purposes of determining entitlement to improved-pension benefits?

(b) Would these assets be considered in determining the veteran's net worth for improved-pension purposes?

Held

(a) Where a veteran in receipt of improved pension inherits marketable shares of stock and receives the proceeds of life-insurance policies, the value of the stock and life-insurance proceeds must be counted as income of the veteran in the year in which they are received, regardless of whether they are subsequently placed in trust for the benefit of another. If such income causes termination of pension, the effective day of discontinuance is the end of the month in which the income was received.

(b) Generally, where a veteran places assets into a valid irrevocable trust for the benefit of the veteran's grandchildren, with the veteran named as trustee, and where the veteran, in an individual capacity, has retained no right or interest in the property or the income therefrom and cannot exert control over these assets for the veteran's own benefit, the trust assets would not be counted in determining the veteran's net worth for improved-pension purposes, and trust income would not be considered income of the veteran.

(c) If the beneficiaries of the trust are residing in the veteran's household and the veteran is receiving benefit from expenditures from the trust, a determination must be made under the facts of the particular case whether the veteran is exercising such control and use of the trust assets that the trust may be considered invalid for purposes of determining pension eligibility.

Effective Date: December 17, 1991.

O.G.C. Precedent Opinion 74–91

Questions Presented

A. Whether VA has authority to diclose information concerning veterans and their spouses to their employers in order to obtain health insurance benefit coverage information on those individuals?

B. Whether a patient's refusal to provide health insurance information at the time of admission may have any effect on the patient's entitlement to the medical care?

Held

A. Information to be disclosed to employers which is retrieved by the veterans' names is protected by the Privacy Act (PA), 5 U.S.C. 552a and, as a result, the information may be disclosd outside the VA only with the subject's consent or where the PA expressly authorizes the disclosure. Also, veterans' names and addresses are protected by 38 U.S.C. 5701 (formerly section 3301), and may be disclosed only as authorized by that statute.

B. A veteran who is otherwise eligible for health care from VA is not rendered ineligible by virtue of his or her refusal to provide VA with health insurance information.

Effective Date: December 26, 1991.

O.G.C. Precedent Opinion 75–91

Questions Presented

a. Are "unemployability" and inability to "secure and follow a substantially gainful occupation" interchangeable concepts within the context of 38 CFR 3.340, 3.341, 4.16, 4.18, and 4.19?

b. What are the specific applications and interrelationships of the cited regulations, and how should the inconsistencies therein, as perceived by the Court of Veterans Appeals, be resolved?

Held

a. The term "unemployability," as used in VA regulations governing total-disability ratings for compensation purposes, is synonymous with inability to secure and follow a substantially gainful occupation.

b. VA regulations governing determinations of total disability for compensation purposes based on individual unemployability generally provide that all veterans who, in light of their individual circumstances, but without regard to age, are unable to secure and follow a substantially gainful occupation as a result of service-connected disability shall be rated totally disabled, without regard to whether an average person would be rendered unemployable under the circumstances.

Effective Date: December 27, 1991.

By Direction of The Secretary:

James A. Endicott, Jr.,

General Counsel.

[FR Doc. 92–1355 Filed 1–17–92; 8:45 am]

BILLING CODE 8320–01–M

Advisory Committee on Women Veterans; Meeting

The Department of Veterans Affairs gives notice under Public Law 92–463 that a meeting of the Advisory Committee on Women Veterans will be held February 5–7, 1992, room 401, 801 I Street, NW., Washington, DC. The purpose of the Advisory Committee on Women Veterans is to advise the Secretary regarding the needs of women veterans with respect to health care, rehabilitation, compensation, outreach and other programs administered by the Department of Veterans Affairs, and the activities of the Department of Veterans Affairs designed to meet such needs. The Committee will make recommendations to the Secretary regarding such activities.

The session will convene on February 5 from 9 a.m.–4:30 p.m. The Committee will divide into subcommittees on February 5 from 1 p.m.–4:30 p.m. and February 6 from 9 a.m.–4:30 p.m. The Subcommittees will address such issues as health, outreach and legislation in preparation for producing the 1992 Report. The full Committee will reconvene at 9 a.m.–12 noon on February 7 in room 401, 801 I Street, NW. All sessions will be open to the public up to the seating capacity of the room. Because this capacity is limited, it will be necessary for those wishing to attend to contact Mrs. Barbara Brandau, Committee Coordinator, Department of Veterans Affairs (phone 202/535–7182) prior to January 30, 1992.

Dated: January 7, 1992.

By Direction of the Secretary.

Diane H. Landis,

Committee Management Officer.

[FR Doc. 92–1358 Filed 1–17–92; 8:45 am]

BILLING CODE 8320–01–M

Sunshine Act Meetings

Federal Register
Vol. 57, No. 13
Tuesday, January 21, 1992

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).

COMMISSION ON NATIONAL AND COMMUNITY SERVICE

Notice of Meetings

AGENCY: Commission on National and Community Service.

ACTION: Notice of Meetings.

SUMMARY: In accordance with the National and Community Service Act of 1990, (P.L. 101–610, as amended by P.L. 102–10) the Commission on National and Community Service will hold technical assistance meetings to aid States (including Indian tribes, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and Palau, until such time as the Compact of Free Association is ratified) and local entities eligible to receive funds under the National and Community Service State Grant Program. The meetings will beheld in Washington, DC, Dallas, TX, and San Francisco, CA. The meetings will be from 9:00 a.m. until 3:30 p.m. with registration beginning at 8:15 a.m. (There is no registration fee.) There will be presentations to assist prospective applicants' comprehension of each of the following sections of the Act and their application procedures: Serve-America (Subtitle B, Part I), Higher Education Innovative Projects for Community Service (Subtitle B, Part II), American Conservation and Youth Service Corps (Subtitle C), National and Community Service Program (Subtitle D), and the Administrative Provisions (Subtitle F). Following each presentation there will be a question and answer session. Written material will be provided at the meetings; for those unable to attend, written material will be provided upon a written request to the Commission at the address listed below. Please call the Commission at (202) 724–0600 if you plan to attend any of the meetings.

DATES: The meeting in Washington will be held on Monday, January 27, 1992; the meeting in Dallas will be held on Wednesday, January 29, 1992; and the meeting in San Francisco will be held on Thursday, January 30, 1992.

ADDRESSES: The Washington meeting will be held at the J.W. Marriott Hotel at National Place in Salon IV. The hotel is located at 1331 Pennsylvania Avenue, NW., Washington, DC 20004. Phone: (202) 393–2000. The Dallas meeting will be held at the Holiday Inn Dallas-Fort Worth North. The hotel is located at 4441 Highway 114 and Esters, Irving, TX 75063. Phone: (214) 929–8181. The San Francisco meeting will occur at the Sheraton San Francisco Airport Hotel. The hotel is located at 1177 Airport Boulevard, Burlingame, CA 94010. Phone: (415) 342–9200.

FOR FURTHER INFORMATION CONTACT: Ms. Annmarie Emmet. The Commission on National and Community Service, National Press Building, 529 14th Street, NW., 4th Floor, Washington, DC 20045. Phone: (202) 724–0600; FAX: (202) 724–0608.

Catherine Milton,

Executive Director, Commission on National and Community Service.

[FR Doc. 92–1542 Filed 1–16–92; 2:21 pm]

BILLING CODE 6820-BA-M<

CONSUMER PRODUCT SAFETY COMMISSION

TIME AND DATE: Commission Meeting, Wednesday, January 22, 1992, 10:00 a.m.

LOCATION: Room 556, Westwood Towers, 5401 Westbard Avenue, Bethesda, Maryland.

STATUS: Open to the Public.

MATTERS TO BE CONSIDERED:

Choking Hazards Associated with Marbles

The staff will brief the Commission on options for action with regard to a rulemaking proceeding to address choking hazards associated with marbles.

FOR A RECORDED MESSAGE CONTAINING THE LATEST AGENDA INFORMATION, CALL: (301) 504–0709.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Sheldon D. Butts, Office of the Secretary, 5401 Westbard Ave., Bethesda, Md. 20207 (301) 504–0800.

Date January 15, 1992.

Sheldon D. Butts,

Deputy Secretary.

[FR Doc. 92–1535 Filed 1–16–92; 2:20 am]

BILLING CODE 6355-01-M

INTERSTATE COMMERCE COMMISSION

Commission Conference

TIME AND DATE: 10:00 a.m., Tuesday, January 28, 1992.

PLACE: Hearing Room A, Interstate Commerce Commission, 12th and Constitution Avenue, NW., Washington, DC 20423.

STATUS: The Commission will meet to discuss among themselves the following agenda item. Although the conference is open for the public observation, no public participation is permitted.

MATTERS TO BE DISCUSSED:

Docket No. AB–33 (Sub-No. 70), *Union Pacific Railroad Company—Abandonment—Wallace Branch, ID.*

Docket No. 40169, *National Grain and Feed Association v. Burlington Northern Railroad Company, Et Al.*

Finance Docket 31862, *International Brotherhood of Electrical Workers, Local Union 465—Petition for Declaratory Order—San Diego Trolley, Inc.*

CONTACT PERSONS FOR MORE INFORMATION: Alvin H. Brown or A. Dennis Watson, Office of External Affairs, Telephone: (202) 927–5350, TDD: (202) 927–5721.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92–1508 Filed 1–16–92; 10:53 am]

BILLING CODE 7035-01-M

Corrections

Federal Register
Vol. 57, No. 13
Tuesday, January 21, 1992

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

Foreign-Trade Zones Board

15 CFR Part 400

[Order No. 530; Docket No. 21222-1208]

RIN 0625-AA04

Foreign-Trade Zones in the United States

Correction

In rule document 91-24130, beginning on page 50790, in the issue of Tuesday, October 8, 1991, make the following corrections:

1. On page 50798, in the first column, under *Section 400.45*, in the seventh line, "in" should read "to".

§ 400.45 [Corrected]

2. On page 50807, in the second column, in § 400.45(a), in the first line, insert "trade" after "Retail".

BILLING CODE 1505-01-D

Commodity Futures Trading Commission

Chicago Mercantile Exchange Proposed Futures and Futures Option Contracts

Correction

In notice document 92-700 appearing on page 1258 in the issue of Monday, January 13, 1992, make the following correction:

In the second column, in the **DATES:** paragraph, in the second line, "January 14" should read "February 12".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

DEPARTMENT OF AGRICULTURE

Maternal and Child Assistance Programs; Model Application Form

Correction

In notice document 91-29364, beginning on page 64454 in the issue of Monday, December 9, 1991, make the following corrections:

1. On page 64454, in the first column, under **AGENCIES:** "Financial" should read "Financing".

2. On page 64457, in the first column, in the last paragraph, seventh line, insert "a" after "of".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Chapter 1

[Docket No. 91N-0300]

Withdrawal of Certain Pre-1986 Proposed Rules; Final Action

Correction

In proposed rule document 91-30780, beginning on page 67440, in the issue of Monday, December 30, 1991, make the following corrections:

1. On page 67440, in the third column, in the first full paragraph, in the ninth line, "proposals, the" should read "proposals. Additionally, because of the age of these proposals, the".

2. On page 67446, in the table, in the 2d column, under Docket No., in the 36th line, "Aug. 16, 1977, 42 FR 41301." should appear in the 3rd column, under FR Publication date and cite.

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Office of Hearings and Appeals

43 CFR Part 4

RIN 1094-AA40

White Earth Reservation Land Settlement Act of 1985

Correction

In the issue of Wednesday, December 18, 1991, on page 65782, in the third column, in the correction to rule document 91-28904, in correction 4. of § 4.351, in the third line, "including" should read "succession".

BILLING CODE 1505-01-D

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 122

RIN 1515-AA95

Proposed Amendments to the Customs Regulations Regarding International, Landing Rights and User Fee Airports

Correction

In proposed rule document 91-30770 beginning on page 66814 in the issue of Thursday, December 26, 1991, make the following correction:

1. On page 66815, in the third column, in the sixth line, after the word "rights", "of" should read "at".

§ 122.14 [Corrected]

2. On page 66817, in the first column, in § 122.14(d)(1), in the second line, "no" should read "not".

BILLING CODE 1505-01-D

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900-AE42

Finality of Decisions

Correction

In rule document 91-30277 beginning on page 65845 in the issue of Thursday, December 19, 1991, make the following correction:

On page 65845, in the 3d column, in the 2d complete paragraph, in the 12th line, insert "or" after "error".

BILLING CODE 1505-01-D

federal register

Tuesday
January 21, 1992

Part II

Department of Transportation

Research and Special Programs Administration

Hazardous Materials Transportation Enforcement Cases; Notice of Decisions of Appeal Under the Hazardous Materials Transportation Act

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

Appeals in Hazardous Materials Transportation Enforcement Cases

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice of decisions on appeal in enforcement cases under the Hazardous Materials Transportation Act.

SUMMARY: This Notice publishes the decisions on appeal issued by the Administrator of the Research and Special Programs Administration (RSPA) in hazardous materials transportation enforcement cases that were initiated between 1983 and the present. These appellate decisions were issued in cases initiated under the Hazardous Materials Transportation Act (HMTA), 49 app. U.S.C. 1801 *et seq.*, and the Hazardous Materials Regulations (HMR), 49 CFR parts 171–180. The purpose of this Notice is to increase public awareness and understanding of hazardous materials transportation enforcement cases.

FOR FURTHER INFORMATION CONTACT: Edward H. Bonekemper, III, Assistant Chief Counsel for Hazardous Materials Safety, Office of the Chief Counsel (DCC–10), Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590 [Tel. (202) 366–4400].

SUPPLEMENTARY INFORMATION: Section 105 of the HMTA, 49 app. U.S.C. 1804(a), provides that, "The Secretary shall issue regulations for the safe transportation of hazardous materials in intrastate, interstate, and foreign commerce. The regulations issued under this section shall govern any aspect of hazardous materials transportation safety which the Secretary deems necessary or appropriate." Under this authority, RSPA has issued the HMR, a comprehensive set of regulations concerning the transportation of hazardous materials.

The HMR govern the shipping and transporting of hazardous materials by aircraft, rail car, vessel and motor vehicle. The HMR also prescribe requirements governing "the manufacture, fabrication, marking, maintenance, reconditioning, repairing, or testing of a packaging or container which is represented, marked, certified, or sold for use" in transportation of hazardous materials in commerce.

In addition to the HMR, RSPA has issued other regulations (49 CFR parts 106–7) implementing the HMTA. All of these hazardous materials transportation regulations are enforced by RSPA, the U.S. Coast Guard, the Federal Aviation Administration, the Federal Highway Administration, and the Federal Railroad Administration.

Within RSPA, the Office of Hazardous Materials Enforcement (OHME) and Office of Chief Counsel enforce the HMR and parts 106 and 107. RSPA's enforcement regulations are in subpart D of part 107. When a person violates the HMTA or the regulations, the Office of the Chief Counsel may institute an enforcement action. That office may issue a notice of probable violation (notice), in which a respondent is charged with the probable violation(s) and a civil penalty is proposed. In addition, the notice may contain a proposed compliance order.

Generally, under 49 CFR 107.313(a), a respondent must respond to a notice within 30 days of its receipt. The respondent may respond by admitting the violation(s) and accepting the proposed penalty amount (or the proposed compliance order), or may contest the notice. A notice may be challenged through a written response, a telephonic or in-person conference, or a hearing on the record before an administrative law judge.

If the respondent makes no response within the prescribed period, the Chief Counsel may enter an order finding that the alleged violation(s) were committed and imposing the proposed penalty or compliance order. The same result follows if the respondent admits to the violation(s). When the respondent requests a conference, the Office of the Chief Counsel conducts the conference, following which the Chief Counsel reviews the proceeding and considers all relevant evidence, including all submissions of the respondent. The Chief Counsel then issues an order, which may include a finding of violation and imposition of a civil penalty and a compliance order.

In assessing civil penalties, the Chief Counsel considers the nature and circumstances of the violations, their extent and gravity, the respondent's culpability, the respondent's lack of prior offenses, the respondent's ability to pay, the effect of the civil penalty on the respondent's ability to continue in business and any other relevant factors (especially respondent's corrective actions).

Where a hearing is requested, the Office of the Chief Counsel submits the matter to the Department's Office of Hearings. An administrative law judge is assigned to the case and conducts pre-hearing and hearing procedures. The administrative law judge issues an appropriate order.

Following issuance of an order by either the Chief Counsel or an administrative law judge, a respondent must either comply with the order or file an appeal with the Administrator of RSPA. The appeal must be filed within 20 days of respondent's receipt of the order. The appeal must state, with particularity, the findings in the order that the respondent is challenging, and it must include any and all relevant information and arguments. The filing of an appeal stays enforcement of the order.

In a decision on appeal, the Administrator determines whether to affirm or dismiss violations and whether to affirm or modify civil penalty assessments and compliance orders. The Administrator's decision on appeal is the final step in the administrative process.

A respondent has 30 days from the date of issuance of the decision on appeal in which to comply with its terms. Failure to timely comply results in assessment of interest, penalty and administrative charges where a civil penalty has been affirmed in the decision on appeal.

The following is a chronological index of decisions on appeal issued by the Administrator in hazardous materials transportation enforcement cases between 1983 and the present, followed by the full text of those decisions.

Issued in Washington, DC, on December 12, 1991, under the authority delegated in 49 CFR part 106, appendix A.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

INDEX—DECISIONS ON APPEAL ISSUED BY THE ADMINISTRATOR OF RSPA IN HAZARDOUS MATERIALS TRANSPORTATION ENFORCEMENT CASES

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[Ref. No. 83-07-SE]

Grant of Partial Relief

In the Matter of: Air Capital Wholesale Fireworks, Respondent

Background

On September 21, 1984, the Associate Director for Operations and Enforcement (OOE) assessed a $5,000 civil penalty against Air Capital Wholesale Fireworks (Air Capital) for violation of 49 CFR 171.12(a); i.e., failure to "provide the shipper and the forwarding agent at the place of entry into the United States timely and complete information as to the requirements" of subchapter C, 49 CFR parts 177–178. Air Capital submitted an appeal by a one-page letter dated October 2, 1984.

Discussion

In the appeal, Air Capital offered the amount of $1,000 to compromise the civil penalty. Air Capital states in support of mitigation of the penalty amount that it has "never been able to obtain timely and complete information on these regulations." It also claims to have suffered financial loss as a result of the transaction leading to the violation and is "still not financially stable."

Air Capital's concise statement about its lack of knowledge appears to mean that it did not know about the requirements of § 171.12(a). However, once it began its business of importing hazardous materials it had an affirmative duty to acquaint itself with those regulations. There is no evidence in the record to suggest that Air Capital requested information regarding its regulatory responsibilities from the Materials Transportation Bureau or any other Federal entity nor, any indication that "timely" or "complete" information was denied to Air Capital at any time.

With regard to Air Capital's financial condition, there is no new information in the appeal evidencing a deterioration of Air Capital's financial stability since the date of the order assessing the penalty (September 21, 1984). However, the record does reflect a seizure by the U.S. Customs Service of a substantial amount of goods consigned to Air Capital at the time of OOE's investigation. Accordingly, there is some basis for mitigation under 49 CFR 107.331 (e) and (f).

Findings and Order

In consideration of the foregoing, I affirm the finding of the Associate Director for OOE that Air Capital violated 49 CFR 171.12(a). However, sufficient basis exists to mitigate the civil penalty amount from $5,000 to $3,500. Therefore, Air Capital is hereby assessed a civil penalty in the amount of $3,500.

The civil penalty assessed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court. Also failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717. That same authority also provides for a penalty charge of six percent (6%) per annum, which will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order, payable to the Department of Transportation, and sent to the Office of the Chief Counsel, Research and Special Programs Administration, room 8420, 400 7th Street, SW., Washington, DC 20590.

Issued May 28, 1985.

L.D. Santman,

Director, Materials Transportation Bureau

Certified mail—Return receipt requested

[Ref No. 84-02-CM]

Grant of Partial Relief

In the Matter of: Worthington Cylinders Corporation, Respondent.

Background

On September 21, 1984, the Associate Director for the Office of Operations and Enforcement (OOE) issued a five-part compliance order to Respondent, Worthington Cylinder Corporation (Worthington). Worthington submitted a timely appeal to challenge only one of the findings contained in the order, namely a violation of 49 CFR 178.51–11(a) for failing to uniformly and properly heat treat its DOT specification cylinders. The Associate Director's order dated September 21, 1984 is incorporated herein by reference.

The basis of Worthington's appeal is as follows:

First, there is no reasonable basis, in the regulations or otherwise, for the Associate Director's finding that Worthington has violated § 178.51–11(a) with respect to heat treatment. Second, the finding and order is inconsistent with past DOT interpretations of § 178.51–11(a) and represents a sudden, arbitrary and unreasonable departure from past DOT interpretations. Third, even if there were any legitimate basis to support the Associate Director's finding and order, if the order were affirmed without modifying the prescribed time for compliance, the order as written, in conjunction with 49 CFR 107.325(b), would require the completion by Worthington of a major change in its

manufacturing processes within twenty days of the decision and would have a devastating competitive and economic impact on Worthington.

Definition of Heat Treatment

No facts are disputed with regard to the contested finding. Worthington acknowledges that its heat treating procedures does not heat the entire cylinder to a temperature in excess of 1100° F. Worthington's primary argument centers on its own interpretation of the intent and purpose of heat treatment i.e., "to remove the stress induced in drawing and to return the material to a more ductile state."

Worthington contends that "uniform mechanical properties" are achieved throughout the cylinder because most of the "work hardening" is done on the sidewalls, concluding that the top and bottom do not need as much heat treatment.

The purpose of heat treatment is not limited to stress relief as described by Worthington. The function of heat treatment is also to obtain desired "properties." Worthington's description addresses itself only to achieving a desired "condition;" i.e., removing stress itself. The American Society for Metals defines heat treatment and stress relieving as follows:

"Heat Treatment. Heating and cooling a solid metal or alloy in such a way as to obtain desired conditions or properties. Heating for the sole purpose of hot working is excluded from the meaning of this definition."

and

"Stress Relieving. Heating to a suitable temperature, holding long enough to reduce residual stresses and then cooling slowly enough to minimize the development of new residual stresses." (*Metals Handbook*. Vol. 1, American Society for Metals (1985)).

While relief of cold work stresses, if present, is accomplished during heat treatment, it is not the exclusive purpose and function of heat treatment. The intent of the regulation is to assure that the entire cylinder is heat treated, not just that portion of the cylinder considered to have stresses induced in drawing. The heating applied by Worthington wherein the sidewalls reach a temperature of 1350° while the top of the heads and the bottoms of each cylinder reached a temperature below 1100°, could in itself induce harmful residual stresses. Therefore, I affirm the decision of the Associate Director that the regulation requires heat treating the entire cylinder.

Previous MTB Interpretations

Worthington contends that the Associated Director's decision and his interpretation of the regulation are inconsistent with a previous "interpretation" made in 1980 by a memorandum from the Office of Hazardous Materials Regulation (OHMR) to OOE. The OHMR memo responded to a memo from OOE. The OOE memo specifically referred to the induction coil heating process which heats "the sidewall of the cylinder and virtually leaves the ends of the cylinder unaffected." While the OHMR memo was accurately cited by Worthington in its appeal (p.6), that memo did not specifically address the "precise question involved in the current proceeding," which is whether the entire cylinder must be heat treated.

The 1980 dialog between OOE and OHMR concerned failed test results involving coupons from the "crowns" of a cylinder. Had the OHMR memo concluded that a cylinder was properly heat treated if coupons from its crown passed the tests, then Worthington's reliance on that memo would be well-founded. It did not.

Additionally, a review of the paragraph in the OHMR memo dealing with Table I of appendix A, part 178, shows that the requirement to "satisfactorily pass all tests prescribed in 178.51" is joined to the requirement to heat treat in conformance with the specific requirements of Table I of appendix A, part 178 by the conjunctive "and", rather than the disjunctive "or". The ultimate logic of Worthington's argument leads to the erroneous conclusion that if the coupons (not cylinders) pass the required tests the cylinder does not have to be heat treated at all. Accordingly, Worthington's interpretation of the OHMR memo is emphatically rejected.

Uniform and Proper Heat Treatment

The interpretational debate between OOE and Worthington throughout this proceeding has focused on the two essential elements of heat treatment: that it be (1) uniform and (2) proper. Worthington is correct in asserting that the meaning given these two words is not consistent among OOE, OHMR and the Compressed Gas Association (CGA) publication cited by Worthington in its appeal, *Basic Considerations of Cylinder Design*. The regulation uses the two words together, "uniformly and properly." However, in each of the references to heat treatment all parties as well as the regulation have used one word in common, "cylinder." None of the authorities relied upon has used the words, "stress relief" or "coupon," or "portion of the cylinder." Both the HMR and plain English usage of the word "cylinder" without using adjectives implies the entire cylinder. The Associate Director in his compliance order did not interpret the words, "uniform" and "proper" as independent adjectives for "heat treatment." Instead, he joined them together and emphasized their application to the entire cylinder. Thus, the Associate Director's conclusion that the entire cylinder must be heat treated is sound and comports with the intent of the HMR.

Worthington relies upon the CGA's reference to heat treatment in its industry publication. However, it is not unusual for Federal regulations to differ with industry codes, by establishing more stringent standards, while simultaneously incorporating by reference much of the pre-existing industry standard. (Note that 49 CFR 178.51–11 does not incorporate by reference an authority outside of the regulation.)

Rulemaking

Because the interpretation described herein is not novel, there is no basis to require a rulemaking initiative on the part of MTB. In our view, the existing rule is a lawfully promulgated and technically sound regulation based upon sound safety concerns. As stated by the Associate Director in his order, the administrative record of this case alone does not justify additional rulemaking.

Findings and Order

Notwithstanding my affirmation of the Associate Director's findings, it is evident to me that Worthington's reliance on its own interpretation of this regulation was made in good faith. Therefore, some mitigation is warranted with respect to the time period within which compliance must be accomplished.

Having reviewed the administrative record in this case, I hereby affirm the finding of the Associate Director that Worthington violated 49 CFR 178.51–11(a). However, the compliance order is amended by deleting Item 1 thereof, and substituting the following:

1. Worthington shall uniformly and properly heat treat its DOT specification cylinders in accordance with 49 CFR 178.51–11(a) so that the entire cylinder is heated to a temperature above 1100° F. Compliance with this requirement shall be accomplished within 120 days of receipt of this order, provided however that the time period for compliance may be extended beyond 120 days by the Associate Director for Operations and Enforcement if Worthington demonstrates to the satisfaction of the Associate Director that compliance cannot be accomplished within the 120 days. Any request for extension of the 120 day period must be written and received by the Associate Director no later than 45 days prior to termination of the 120 day period.

The Order of September 21, 1984, except as modified herein, continues in full force and effect.

Issued: February 11, 1988.

L.D. Santman,

Director, Materials Transportation Bureau.

Certified mail—Return receipt requested

[Ref No. 84-03-CM]

Grant of Partial Relief

In the Matter of: Kargard Industries, Inc., Respondent.

Background

On October 19, 1984, the Associate Director for Operations and Enforcement (OOE) issued a seven part compliance order to Respondent, Kargard Industries, Inc. (Kargard). Kargard submitted a timely appeal to challenge only the first finding contained in the order, i.e., a violation of 49 CFR 178.61-11(a) for failing to uniformly and properly heat treat its DOT specification cylinders. The Associate Director's order dated October 19, 1984 is incorporated herein by reference. In its appeal Kargard submitted additional arguments by written correspondence and documentation dated November 10, 1984 and February 14, 1985.

Discussion

In its appeal Kargard embellished its previous argument with additional technical information regarding the manufacturing of its 4BW cylinders. Kargard continues to argue that its "three-step" process of heat treating the cylinders produces a product which is safe and "meets the letter and spirit of the code." Additionally, Kargard seems to be defending the induction heat treatment method.

The Office of Operations and Enforcement (OOE) does not contend that inductive heat treatment cannot be "proper." The objection to Kargard's head treating method concerns the "three-step" approach proposed as a remedy to the "uniform and proper" standard which is lacking for compliance under 49 CFR 178.61-11(a). As stated in the Associate Director's order, the cylinder must be heat treated "in its entirety" whether by induction method or furnace method. Also, the heat treatment must be performed after all welding and forming operations. Kargard's system performs localized heat treatment after some welding but also prior to some welding.

Kargard's contention that the multiple stage heat treatment satisfies the safety designs of the heat treatment process relies heavily on Kargard's construction that the purpose of heat treatment is to stress relieve. Stress relief achieves a desired "condition," i.e., removing stress itself. However, the function of heat treatment is also to obtain desired "properties." The American Society for Metals defines heat treatment and stress relieving as follows:

"Heat treatment. Heating and cooling a solid metal or alloy in such a way as to obtain desired conditions or properties. Heating for the sole purpose of hot working is excluded from the meaning of this definition."

and

"Stress Relieving. Heating to a suitable temperature holding long enough to reduce residual stresses and then cooling slowly enough to minimize the development of new residual stresses." *Metals Handbook, Vol. 1,* American Society for Metals (1985).

While relief of cold work stresses, if present, is accomplished during heat treatment, it is not the exclusive purpose and function of heat treatment. The intent of the regulation is to assure that the entire cylinder is heat treated not just that portion of the cylinder considered to have stresses induced in drawing. I agree therefore, with the Associate Director's finding that the regulation at issue does not permit Kargard to heat treat the heads before assembly and the sidewalls after assembly.

Findings and Order

Accordingly, I affirm the finding of the Associate Director for OOE that Kargard violated 49 CFR 178.61-11(a) for failing to uniformly and properly heat treat its DOT specification cylinders. However, his order dated October 19, 1984 in item 1 requires immediate compliance. This portion of the order fails to recognize the potential transition problems if Kargard must modify its heat treatment facilities.

While this order does not forbid the use of heat treatment by induction, there is reason to believe that Kargard's current facilities may not permit the use of induction heat treatment to comply with this order. Kargard's analysis as presented in the administrative record implies that some conversion of its physical plant may be necessary, such as conversion to a furnace heat treating method. Because the record reflects Kargard's good faith desire to comply with DOT regulations, some mitigation with respect to a time period for compliance is warranted. Therefore, the compliance order is amended by deleting Item 1 thereof, and substituting the following:

1. Kargard shall uniformly and properly heat treat its DOT specification cylinders in accordance with 49 CFR 178.61-11(a) so that the entire cylinder is heated to a tempertature above 1100°F. Compliance with this requirement shall be accomplished within 120 days of receipt of this order, provided however that the time period for compliance may be extended beyond 120 days by the Associate Director for Operations and Enforcement if Kargard demonstrates to the satisfaction of the Associate Director that compliance cannot be accomplished within the 120 days. Any request for extension of the 120 day period must be written and received by the Associate Director no later than 45 days prior to termination of the 120 day period."

The Order of October 19, 1984 except as modified herein continues in full force and effect.

Issued: May 2, 1985.

L.D. Santman,

Director, Materials Transportation Bureau.

Certified mail—Return receipt requested

[Ref No. 84-11-CD]

Grant of Partial Relief

In the Matter of: Select Drink, Inc., Respondent.

Background

On January 3, 1985, the Associate Director for the Office of Operations and Enforcement (OOE) issued an Order to Select Drink, Inc. (Respondent) assessing a penalty in the amount of $3,500 for violations of 49 CFR 171.2(c), 173.34(e) and 173.301(c). The Associate Director's Order dated January 3, 1985 is incorporated herein by reference.

Discussion

The basis of Respondent's appeal is that the assessed penalty is too high. In support of this it argued that the Department's goal of compliance has been met by the Respondent and they now comply with the regulations, having set up a retest program to ensure that the violations do not occur again. Other than the amount of the penalty, the Respondent has contested no other findings of the Order.

In the Notice of Probable Violation (NOPV), the Respondent was preliminarily assessed a $7,000 civil penalty. Based on Respondent's response to the NOPV and evidence submitted at the informal conference, the Order assessed a civil penalty of $3,500. The Respondent has now requested the civil penalty be abated further. Due to the nature of the violations and the potential risk posed, the assessment of a civil penalty is warranted. However, additional mitigation is granted based on the Respondent's positive actions in response to the NOPV.

Findings

The Order of January 3, 1985, and each finding made therein, is affirmed except that portion of the Order assessing a penalty of $3,500. The appeal of the Respondent has been considered and partial relief is warranted. Accordingly, Select Drink, Inc. is hereby assessed a civil penalty in the amount of $2,000.

This civil penalty must be paid within 20 days of your receipt of this decision. Failure to pay the civil penalty will result in referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court. Also, failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717. That same authority also provides for a penalty charge of six percent (6%) per annum, which will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order, payable to the Department of Transportation, and sent to the Office of the Chief Counsel, Research and Special Programs Administration, Room 8420, 400 7th Street, SW., Washington, DC 20590.

Issued: January 31, 1985.

L. D. Santman,

Director, Materials Transportation Bureau.

Certified mail—Return receipt requested

[Ref. No. 85-10-CEM]

Denial of Relief

In the Matter of: Europa, USA, Inc., Respondent.

Background

On December 10, 1985, the Acting Chief Counsel issued an Order to Respondent assessing a penalty in the amount of $12,000 for violations of 49 CFR 171.2(c), 172.200, 172.201(a)(4), 172.202 (a)(2) and (a)(3) and 173.306(c), (c)(4), (c)(5) and (c)(6), of the Hazardous Materials Regulations. Respondent submitted a timely appeal of the Order, challenging the findings of the Order. The Acting Chief Counsel's Order, dated December 10, 1985, is incorporated herein by reference.

Discussion

Respondent's basis for appeal is that the inspector did not understand the filling process Respondent was using to fill the halon blend fire extinguishers at issue in this proceeding. Respondent requested that another inspection be performed with an independent third party inspector, as well as DOT's inspector, to ensure a fair inspection. Respondent's assertion that its procedures were proper and in compliance with the Regulations, is not sufficiently substantiated to contradict the findings made in the Order or the evidence on which they were based.

Findings

The issue raised by Respondent in its appeal has been considered, and in the absence of any evidence to support it, the Order of December 10, 1985, assessing a $12,000 civil penalty is affirmed.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court. Also failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717. That same authority also provides for a penalty charge of six percent (6%) per annum, which will accrue, if payment is not made within 110 days of service. Payment should be made by certified check or money order, payable to the Department of Transportation, and sent to the Office of the Chief Counsel, Research and Special Programs Administration, Room 8420, 400 7th Street, SW., Washington, DC 20590.

Date Issued: March 24, 1986.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 85-14-SFE]

Denial of Relief

In the Matter of: American Security International, Inc., Respondent

Background

On January 22, 1986, the Acting Chief Counsel issued an Order to Respondent assessing a penalty in the amount of $5,000 for violations of 49 CFR 171.2(a), 172.101, 172.200(a), 172.204(a), 172.300(a), 172.301(a), 172.400(a), 172.400(b)(2), and 173.22a(b). The Respondent filed a timely appeal of the Order, requesting revaluation of the assessed civil penalty.

Discussion

Respondent's basis for appeal is financial hardship in paying the civil penalty. Respondent has expressed concern that if it is required to pay this penalty it may not be able to stay in business. As evidence of this, Respondent submitted a copy of its 1984 tax return, which showed that Respondent paid no income tax in 1984 because of a $15,000 loss. The return was certified as being accurate by Respondent's CPA. Although the tax return does show that Respondent sustained a $15,000 loss it does not support Respondent's position that the penalty would put Respondent out of business.

Findings

The issue raised by Respondent in its appeal has been considered, and in the absence of sufficient evidence to support it, the Order of January 22, 1986 is affirmed, including the $5,000 civil penalty assessed therein. In light of Respondent's financial difficulty Respondent will be allowed to pay the civil penalty in monthly installments of $500 per month for ten months. The first $500 must be paid within 20 days of its receipt of this decision. The remaining installments will be due on the first of each month beginning June 1, 1986.

Failure to pay the civil penalty will result in referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court. Also, failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717. That same authority also provides for a penalty charge of six percent (6%) per annum, which will accrue, if payment is not made within 110 days of service. Payment should be made by certified check or money order, payable to the Department of Transportation, and sent to the Office of the Chief Counsel, Research and Special Programs Administration, room 8420, 400 7th Street, SW., Washington, DC 20590.

Issued: April 17, 1986.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested

[Ref. No. 85-18-CRR]

Denial of Relief

In the Matter of: Indiana Propane Cylinder Corporation, Respondent.

Background

On February 4, 1986, the Acting Chief Counsel issued an Order to Respondent assessing a penalty in the amount of $14,000 for violations of 49 CFR 171.2(c) and 173.34(i). The Respondent submitted a timely appeal of the Order requesting the civil penalty be reduced to $5,000. The Acting Chief Counsel's Order, dated February 4, 1986, is incorporated herein by reference.

Discussion

Respondent's basis for appeal is financial hardship in paying the civil penalty assessed in the Order. Consequently, Respondent has made an offer in compromise of $5,000. Although claiming that the $5,000 would still pose a financial burden, Respondent states that it can pay that amount and still stay in business. To support its claim of financial hardship, Respondent relies on the income statement and balance sheet, submitted in its response to the Notice of Probable Violation, showing the company's status as of December 31, 1985. These financial statements were not certified by an independent accountant nor signed by the company official responsible for the accuracy of such statements; nor were they supported by independent verifiable documentation. Under these circumstances, and in light of the fact that the claim of financial hardship has already been taken into account in reducing the amount of the civil penalty in the Order, there is no additional evidence in the record to support Respondent's position.

Findings

The offer submitted by Respondent to pay a civil penalty of $5,000 is rejected, and the Order of February 4, 1986, assessing a $14,000 civil penalty is affirmed. Respondents offer to pay $5,000 is accepted as the first installment payment of the civil penalty, with the remaining $9,000 to be paid in consecutive monthly installments of $500.00 per month for the next eighteen months.

Payment of the $5,000 must be made within 20 days of your receipt of this decision. The installment payments of $500 per month are to begin on May 1, 1986, and continue to be paid on the first day of each month thereafter.

Failure to pay the civil penalty will result in referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court. Also failure to pay this civil penalty within 20 days of service will result in accrual of interest in accordance with the rate establishment pursuant to 31 U.S.C. 3717. That same authority also provides for a penalty charge of six percent (6%) per annum, which will accrue, if payment is not made within 110 days of service. Failure to pay an installment on time will result in acceleration of the remaining balance due as well as assessment of penalty and interest. Payment should be made by certified check or money order, payable to the Department of Transportation, and sent to the Office of the Chief Counsel, Research and Special Programs Administration, Room 8420, 400 7th Street, SW., Washington, DC. 20590.

March 24, 1986.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested

[Ref. No. 86-02-SB]

Denial of Relief

In the Matter of: J.T. Baker Chemical Company, Respondent.

Background

On March 10, 1987, the Chief Counsel, Research and Special Programs Administration, issued an Order to J.T. Baker Chemical Company (Respondent) assessing a penalty in the amount of $1,000 for a violation of 49 CFR 171.2(a), 172.101, and 173.119(a). The Respondent submitted a timely appeal of the Order, challenging it on four bases. The Chief Counsel's Order dated March 10, 1987 is incorporated herein by reference.

Discussion

The Respondent's bases for appeal are: (1) Respondent did not "knowingly" commit any acts which violated the regulations; (2) Respondent did purchase, receive, and ship DOT packages which complied with 49 CFR 178.211–6 in all respects except that the DOT specification marking was missing on some of the packages, and at no time was there any compromise of safety by virtue of a missing manufacturer's DOT marking on an otherwise compliant box; (3) Respondent attempted to purchase DOT specification containers for the shipment; and (4) the charges against Respondent should be dismissed and the matter reviewed on the merits concerning the failure to properly mark a package.

Respondent's first argument is that it did not "knowingly" violate the sections cited in the Notice of Probable Violation. 49 CFR 107.299 states that "knowingly" means:

> that a person who commits an act which is a violation of the Act or of the requirements of this subchapter * * * commits that act with knowledge or knowingly when that person (1) has actual knowledge of the facts that give rise to the violation, or (2) should have known of the facts that give rise to the violation. A person knowingly commits an act if the act is done voluntarily and intentionally. Knowledge or knowingly means that a person is presumed to be aware of the requirements of the Act and this subchapter * * * Knowledge and knowingly does not require that a person have an intent to violate the requirements of the Act or the requirements of this subchapter * * *

Given this definition, the Respondent in this case knowingly offered packages for transportation that were not properly marked. Even if the Respondent was not aware that the boxes were not properly marked, Respondent should have known that they were not. Further, Respondent voluntarily offered the packages for transportation. Therefore, the argument that the Respondent did not knowingly violate the regulations is without merit.

Respondent's second argument is that it did purchase, receive, and ship DOT packages which complied with 49 CFR 178.211–6 in all respects except for the absence of the DOT specification marking on some of the packages, and that at no time was there any compromise in safety by virtue of a missing manufacturer's DOT marking on an otherwise compliant box. This recitation of facts does not excuse the violation, but is an admission of it. Further, without the specification marking on the box there was no way for the Respondent to determine whether or not the box had been subjected to the testing required by the regulations and, therefore, was a safe and authorized container in which to ship the material. Thus, safety, in fact, was compromised by Respondent's actions.

Respondent's third argument is that it tried to obtain DOT specification boxes for the shipment. As the Order in this case states, this fact was taken into consideration prior to the issuance of the Order. Respondent had an obligation to check each box for the proper specification marking prior to its use. The fact that Respondent tried to obtain the appropriate boxes does not serve to excuse the violation, but was taken into account as a mitigating factor.

In its fourth argument, Respondent appears to be saying that the manufacturer should have marked the specification on the boxes. However, that argument is irrelevant to the violation at hand. 49 CFR 171.2(a) requires a person who offers or accepts a hazardous material for transportation in commerce to ensure that the package so offered or accepted is marked in accordance with the regulations. Prior to offering the material for transportation, the Respondent was required to make certain that the boxes were properly marked. Respondent did not do so.

Findings

Based on my review of the record, I find the following:

(1) Respondent knowingly offered packages for transportation that were not properly marked.

(2) The absence of DOT specification markings on some of the packages was a compromise of safety.

(3) The fact that Respondent tried to obtain the required specification boxes does not excuse the violation.

(4) Respondent failed to ensure that the packages were marked with the required specification prior to offering hazardous materials for transportation in those packages, and any separate violation by the package manufacturer is irrelevant.

(5) Consequently, the four issues raised by the Respondent in its appeal are found to be without merit.

(6) The civil penalty was mitigated in the Order by an appropriate amount, and no basis for further mitigation of the penalty exists.

Therefore, the Order of March 10, 1987, assessing a $1,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also, failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717 as well as a penalty charge of six percent (6%) per annum. Payment should be made by certified check or money order payable to the Department of Transportation, and set to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

Date Issued: October 19, 1987.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested

[Ref. No. 86–09–CR]

Partial Grant of Relief

In the Matter of: Brendle, Inc., Respondent.

Background

On November 24, 1987, the Chief Counsel, Research and Special Programs Administration, issued a Final Order to Respondent, assessing a penalty in the amount of $2,250 for violations of 49 CFR 173.34(e)(3) and 173.34(e)(5). By letter received January 26, 1988, Respondent submitted an appeal of the Order, challenging the occurrence of violations on two bases. The Chief Counsel's Final Order is incorporated by reference.

Discussion

With respect to Violation No. 1, performing retests on DOT specification cylinders using equipment not capable of being read to an accuracy of 1 percent, Respondent contends, as it did before issuance of the Final Order, that the employee who performed the retesting during the inspection was a trainee and generally did not perform retesting without supervision. Furthermore, Respondent asserts that its regular employees were qualified to retest, and such an employee could have correctly retested the cylinder during the inspection.

During the inspection, the inspector observed the testing of a DOT specification 3AA cylinder and inquired which burette was used to measure the total expansion of the cylinder. Respondent's employee indicated a burette that could not be read to an accuracy of 1 percent of the total expansion of this cylinder, and a photograph was taken to establish this fact.

Moreover, to confirm the first employee's response, the inspector asked Idus Brendle, Respondent's employee with six years of retest experience, if the previously indicated burette was used to retest that DOT 3AA cylinder; Mr. Brendle replied that use of the indicated burette was standard procedure. Thus, Respondent's regular retesting employee confirmed that the wrong burette was utilized for retesting the DOT 3AA cylinder. Consequently, Respondent's present contention is without merit in light of the direct evidence that the improper burette was utilized.

With respect to Violation No. 2, failing to maintain records listing the reinspection and retest results of DOT specification cylinders, Respondent contends that, while some of its reinspection and retest records were not dated or signed and failed to contain adequate descriptions of each cylinder retested, this required information was available from other business records generated by the Respondent. In response to the Notice of Probable Violation, Respondent had submitted a series of invoices and pressure charts which it claimed provided the information in question. However, these records did not identify the results of reinspection or the DOT specification of the cylinders and thus did not meet the regulatory records requirements. Furthermore, Respondent failed to submit additional information with this appeal that would rebut the finding on this issue contained in the Order. Consequently, Respondent's contention is not supported by evidence and is without merit.

I have considered the two issues raised by the Respondent in its appeal and find them to be without merit. However, based on the delay in processing this case, partial mitigation of $750 is warranted. Therefore, the Chief Counsel's Order of November 24, 1987 is modified to reduce the civil penalty to $1,500.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to that same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC. 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: September 7, 1988.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 86–13–CR]

Denial of Relief

In the Matter of: Sentry Fire & Welding Supply, Respondent.

Background

On April 9, 1987 the Chief Counsel, Research and Special Programs Administration, issued a Revised Order to Sentry Fire and Welding Supply (Respondent) assessing a penalty in the amount of $1,500 for violations of 49 CFR 173.34(e) (1)–(5). The Respondent submitted a timely appeal of the Order, challenging it on three bases. The Chief Counsel's Revised Order dated April 9, 1987 is incorporated by reference.

Discussion

The Respondent's bases for appeal are: (1) That the DOT inspection was conducted during an illegal raid upon Respondent's place of business; (2) that

the hydrostatic tests were performed but not immediately recorded; and (3) that regulations pertaining to hydrotesting or recordkeeping are not within 49 CFR part 107. Respondent's assertion that DOT participated in an illegal raid of its plant is without merit. 49 App. U.S.C. 1808 authorizes the Secretary of Transportation to conduct investigations to ensure compliance with the Hazardous Materials Transportation Act and the Hazardous Materials Regulations. The December 2, 1985 inspection by the DOT compliance inspector was conducted pursuant to this authority. Additionally, Respondent was informed that the DOT inspection was independent of the Arizona Department of Public Safety investigation. Consequently, the DOT compliance inspection was fully authorized by law.

Respondent's second basis of appeal is that hydrostatic tests were performed but not recorded. The Respondent proffered this same explanation in response to the May 1, 1986 Notice of Probable Violation. The Chief Counsel determined that Respondent's explanation, in combination with conducting retests and providing records of such retests, warranted the mitigation of the proposed penalty by $1,000. However, Respondent propounding this same justification at this point does not give grounds for further reduction in the assessed penalty.

Respondent's third basis of appeal is that 49 CFR part 107 does not impose hydrostatic testing or recordkeeping requirements. Section 107.299 is RSPA's interpretive regulation of the statutory term "knowingly". This section was cited to establish the basis on which the Chief Counsel based his determination that Respondent had acted with knowledge of the acts which constituted violations. Section 107.331 lists the factors that the Chief Counsel considered when assessing the civil penalty. Consequently, §§ 107.299 and 107.331 do not impose hydrostatic testing and recordkeeping requirements, but provide essential information for establishing Respondent's liability and imposing civil penalties.

Findings

The three issues raised by the Respondent in its appeal have been considered. I find that the inspection was conducted pursuant to valid statutory authority. Furthermore, I find that sufficient evidence has not been presented to warrant additional mitigation of the assessed civil penalty. Consequently, I affirm the civil penalty of $1,500 and the payment schedule outlined in the April 9, 1987 Revised Order.

The first monthly installment of the civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717, as well as a penalty charge of six percent (6%) per annum. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, Room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

Issued: September 14, 1987.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

[Ref. No. 86–20–CR]

Denial of Relief

In the Matter of: Andre Fire Equipment, Respondent

Background

On March 19, 1987, the Chief Counsel assessed a $2,000 civil penalty against Andre Fire Equipment (Respondent) for violations of 49 CFR 171.2(c) and 171.34 (e)(1) and (e)(2). Respondent submitted an appeal by letter dated April 13, 1987. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent had (1) knowingly represented and marked DOT specification cylinders as having been properly retested without performing a visual internal inspection, and (2) knowingly represented and marked DOT specification cylinders as having been properly retested without performing hydrostatic retesting with equipment capable of being read to an accuracy of one percent of the test pressure and one percent of total volumetric expansion or 0.1 cubic centimeter.

Respondent's bases for appeal are that: (1) Sommerfeld Welding Supply Inc. (Sommerfeld), not Respondent, owned the hydrostatic testing equipment and the building where the testing occurred, (2) Respondent's part-time employee, Mr. Zastrow, who did the testing, was trained and supervised by Sommerfeld, and (3) immediately after the inspection, Respondent notified Sommerfeld and closed the operation.

First, Respondent's contention that Sommerfeld owned the testing equipment and the building is irrelevant. Of relevance are the facts that Respondent's employee performed the cylinder retesting, that he did so in an incomplete manner, and that he did so without the required testing equipment. Use of another party's equipment and building does not absolve Respondent of responsibility for ensuring the correctness of the retesting it performs.

Second, Respondent's contention that its employee, Mr. Zastrow, was trained and supervised by Sommerfeld also is irrelevant. Mr. Zastrow performed the retesting of Coca-Cola cylinders at issue here, he was paid for that retesting by Respondent, and Respondent then billed Coca-Cola Co. of Sheyboygan, WI for those retesting services. In addition, Sommerfeld's President denies any involvement with retesting cylinders for Coca-Cola, and Respondent has provided no evidence to the contrary. Even if Mr. Zastrow was trained and supervised by Sommerfeld, Respondent is responsible for his retesting activities, which he carried out as Respondent's employee, for which Respondent billed a third party, and of which Sommerfeld claims no knowledge.

Third, Respondent's closing of its retesting operation after the inspection constitutes no defense to the violations. This action appears to be nothing more than termination of a retesting operation which never had received proper authorization in the first place.

Findings

Based on my review of the record, I find the following:

(1) Another party's ownership of the testing equipment and the building where testing occurred does not relieve Respondent of responsibility for cylinder retesting performed by its employee.

(2) Another party's alleged training and supervision of Respondent's employee/retester does not relieve Respondent of responsibility for cylinder retesting performed by its employee and billed for by Respondent.

(3) Respondent's termination of its retesting operations does not relieve it of responsibility for violations which occurred during such operations.

(4) Consequently, the three issues raised by the Respondent in its appeal are found to be without merit.

(5) The civil penalty was mitigated in the Order by an appropriate amount,

and no basis for further mitigation of the penalty exists.

Therefore, the Order of March 19, 1987, assessing a $2,000 civil penalty is affirmed, as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717 as well as a penalty charge of six percent (6%) per annum. Payment should be made by certified check or money order payable to the Department of Transportation, and sent to the Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

Date Issued: November 18, 1987.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested

[Ref. No. 86–23–RMS]

Denial of Relief

In the Matter of: Advanced Medical Systems, Inc., Respondent.

Background

On October 30, 1986, the Chief Counsel assessed a $2,000 civil penalty against Advanced Medical Systems, Inc. (Respondent) for violations of 49 CFR 171.2(a), 172.202(a)(3), and 173.476(b) of the Hazardous Materials Regulations (HMR). Respondent submitted an appeal by letter dated October 17, 1986, and supplemented it by letter dated November 18, 1986. The Chief Counsel's Superseding Order (superseding the Order dated October 3, 1986) is incorporated herein by reference.

Discussion

Respondent's bases for appeal are that: (1) Respondent did not "knowingly" commit acts which violated the HMR; and (2) Respondent believes that the civil penalty assessed is unjust and would cause Respondent financial difficulty.

Respondent contends that it did not "knowingly" commit acts which violated 49 CFR 173.476(b) because it did not realize that it was required to obtain an International Atomic Energy Commission (IAEA) Certificate of Competent Authority (CCA) for the special form material itself, in addition to obtaining NRC and DOT approval of the Type B package for export under 49 CFR 173.471. DOT has consistently interpreted the word "knowingly" in the Hazardous Materials Transportation Act (HMTA) and defined it in the HMR (49 CFR 107.299) to mean that a person is chargeable with a violation of the HMTA or regulations if the person (1) actually knew of the facts giving rise to the violation or (2) should have known of such facts. In other words, the Department takes non-criminal enforcement action when it can prove that a person, through that person's negligence, has violated the HMTA or the HMR. The definition further provides that a person is presumed to be aware of the requirements of the HMTA and the HMR. "Knowingly" does not require that a person have an intent to violate the requirements of the HMTA or the HMR. See 49 CFR 107.299. Certainly a shipper of hazardous materials is presumed to be aware of the requirements of the HMTA and HMR, and if any doubt or confusion exists, is expected to inquire further. Respondent's second basis for appeal is also without merit. Respondent has stated that the amount of the penalty under the circumstances is unjust and would present some financial difficulty. Although Respondent did not explain the circumstances involved, presumably it refers to the fact that Respondent filed for the required CCA on October 4, 1985, the day following the RSPA inspection. That fact already was taken into account in assessing the civil penalty, as stated in the Notice of Probable Violation dated August 5, 1986, and the Superseding Order dated October 30, 1986. Respondent also refers to some financial difficulty which the penalty would cause, without providing any specific information concerning the Respondent's ability to pay or the effect on the Respondent's ability to continue in business. Absent such information, no basis exists to mitigate the penalty.

Findings

Based on my review of the record, I find the following:

1. Respondent knowingly offered a hazardous material for transportation in commerce which was not properly described, in violation of 49 CFR 171.2(a) and 172.202(a)(3), by virtue of the fact that four shipping papers had listed on them incorrect identification numbers for shipments of radioactive material, special form, n.o.s. The assessment of a $150 penalty for each of the four violations (for a total of $600) is reasonable.

2. Respondent knowingly offered a hazardous material for transportation in commerce without obtaining proper authorization, in violation of 49 CFR 171.2(a) and 172.476(b), by virtue of the fact that it offered a special form radioactive material for export shipment on at least 14 occasions between December 1983 and June 1985 without obtaining an IAEA CCA for the specific material prior to the first export shipment. This constitutes a separate violation for each of the 14 shipments, and the assessment of a $100 penalty for each of the 14 violations is reasonable.

3. The two issues raised by the Respondent in its appeal are found to be without merit.

4. The civil penalty was assessed with due consideration of the factors listed in 49 CFR 107.331, and no basis exists for mitigation of the penalty.

Therefore, the Order of October 30, 1986, assessing a $2,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also, failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717 as well as a penalty charge of six percent (6%) per annum. Payment should be made by certified check or money order payable to the Department of Transportation, and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW, Washington, DC 20590.

Date Issued: July 31, 1987.

M. Cynthia Douglass

Administrator, Research and Special Programs Administration.

Certified Mail—Return receipt requested

[Ref. No. 86–24–FBB]

Denial of Relief

In the Matter of: Barkoff Container & Supply Co., Respondent.

Background

On February 12, 1987, the Chief Counsel of the Research and Special Programs Administration (RSPA) issued an Order to Barkoff Container and Supply Co. (Respondent) assessing a civil penalty of $2,500 for a violation of

49 CFR 171.2(c). The Order found that Respondent had sold to CHEMCENTRAL/San Francisco (Chemcentral) 278 DOT Specification 12B boxes which did not have abutting or overlapping inner flaps and which were not accompanied by fill-in pieces or pads to prevent an opening between the inside flaps. The Respondent submitted a timely appeal of the Order by letter dated February 20, 1987. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent's bases for appeal are that: (1) The purchaser of the boxes, rather than Respondent, was responsible for the violation and, therefore, Respondent did not "knowingly" violate the Hazardous Materials Regulations; and (2) since the July 25, 1986 warning letter from RSPA to Mercury Container Corporation (Mercury) stated that RSPA would not proceed with any enforcement action unless the violations recurred, and they have not, if any penalty is assessed it should be against Mercury, the manufacturer.

With respect to Respondent's first basis for appeal, Chemcentral's plant manager stated that Chemcentral had specifically requested Respondent to design a specification container in which to package and ship its flammable liquids, and that the boxes that were observed during the inspection of Chemcentral on December 5, 1985, represented the complete boxes received from Respondent. The plant manager stated that Chemcentral had requested by telephone that the boxes be supplied and that the marking DOT 12B30 be printed on them.

Respondent does not contest the fact that it knowingly represented, by sale to Chemcentral, that the fiberboard boxes met the requirements for a DOT Specification 12B box. The boxes supplied to Chemcentral were marked as DOT 12B30 boxes, and Respondent's name and address were printed just above the specification marking on the box. Further, Respondent's Invoice No. 00 0156159, recording the shipment of the boxes to Chemcentral, indicates that the boxes shipped were 12B30 boxes. Chemcentral, as a shipper of hazardous materials, is required to use the appropriate specification packagings to ship its goods, but it is not responsible for the actual manufacture of DOT specification packagings.

It was the responsibility of Respondent as the broker to ensure that the packaging met the Specification 12B fiberboard box specifications of 49 CFR 178.205–.4 before it represented, by sale to Chemcentral, that the fiberboard boxes met DOT specifications. In fact the boxes did not meet DOT specifications, and Respondent's sale of those boxes to Chemcentral as meeting the requirements of 49 CFR 178.205, constitutes a violation of 49 app. U.S.C. § 1804(c) and 49 CFR 171.2(c).

The Respondent's second basis for appeal concerns a July 25, 1986 warning letter which was sent to Mercury, the manufacturer of the boxes. This letter was sent to Mercury and applied only to that corporation, not to Respondent. Enforcement action may be taken against any person who represents, marks, certifies, sells, or offers a packaging or container as meeting the requirements of the HMR if the packaging is not manufactured, fabricated, marked, maintained, reconditioned, repaired or retested in accordance with the HMR. Thus, action may be taken against either the manufacturer or the broker, or both, and the action may be different in each case. The case against Respondent is outlined in the Notice of Probably Violation issued to Respondent on August 11, 1986, which is separate and distinct from the warning letter sent to Mercury.

Findings

Based on my review of the record, I find the following:

1. Respondent knowingly committed an act which violated 49 App. U.S.C. 1804(c) and 49 CFR 171.2(c).

2. The two issues raised by Respondent on appeal are without merit.

3. The civil penalty was assessed with due consideration of the factors listed in 49 app. U.S.C. 1809 and 49 CFR 107.331, and no basis exists for further mitigation of the penalty.

Therefore, the Order of February 12, 1987, assessing a $2,500 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 App. U.S.C. 1809 and 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also, failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717 as well as a penalty charge of six percent (6%) per annum. Payment should be made by certified check or money order payable to the Department of Transportation, and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

Date Issued: October 9, 1987.

M. Cynthia Douglas,
Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested.

[Enf. Case No. 86–30–CM]

Partial Grant of Relief

In the Matter of: Kargard Industries, Inc., Respondent.

Background

On October 22, 1987, the Chief Counsel, Research and Special Programs Administration (RSPA), issued an Order to Kargard Industries, Inc. (Respondent) assessing a penalty in the amount of $13,000 for violations of 49 CFR 178.51–15(a), 178.51–15(b), 178.61–3, 178.61–14(a), and 178.61–15(b). By letter dated November 13, 1987, Respondent submitted a timely appeal of the Order, challenging it on five bases. The Chief Counsel's Order is incorporated herein by reference. In addition, Respondent has alleged that it has taken four corrective actions which should be considered in determining an appropriate civil penalty.

Discussion

The Respondent's bases for appeal are:

(1) Respondent, instead of cutting two physical test specimens from a DOT 4BA cylinder, cut one specimen because of the cylinder's small size and because 49 CFR 178.61–15(a)(2) (applicable to DOT 4BW cylinders) allows one specimen to be taken from either head on a cylinder when both heads are made of the same material;

(2) The gauge length of physical test specimens for DOT 4 BA cylinders should be based on minimum wall thickness, rather than actual specimen thickness, which would have resulted in a gauge length of at least 24 times thickness;

(3) Respondent has made attempts to locate cylinders covered by Respondent's Inspection Report No. 482 so that a chemical analysis can be performed in the United States;

(4) Respondent's hydrostatic testing equipment did permit readings to an accuracy of 1% of the total expansion.

(5) The gauge length of physical test specimens for DOT 4BW cylinders should be based on minimum wall thickness, rather than actual specimen thickness, which would have resulted in a gauge length of at least 24 times thickness.

First Argument

Respondent's first argument is that, because of the cylinder's small size, it is difficult to obtain two physical test specimens from a single DOT 4BA cylinder. Hence, Respondent applied the test procedure for 4BW cylinders and cut only one specimen from a 4BA cylinder. Respondent states that 4BA cylinders are made of two drawn halves joined by a circumferential weld and that they are so small in size that it is difficult to cut two specimens from a single cylinder. Respondent asserts that, because 4BA cylinders are so small, the specification requirements for 4BW cylinders, allowing one test specimen, should apply. However, the small size of 4BA cylinders fails to justify application of the requirements of a different cylinder specification. In the absence of an exemption issued by the Office of Hazardous Materials Transportation, Respondent was without legal authority to conduct physical tests on a DOT 4BA cylinder using but one specimen.

Second Argument

Respondent's second argument is that, since the regulations do not contain a definition of thickness as it relates to sizing the gauge length for 4BA test specimens, it was justified in using minimum wall thickness rather than actual specimen thickness. Minimum wall thickness is a theoretical value which establishes a minimum material thickness in the cylinder and which is used in calculating wall stress in the worst case or thinnest wall scenario. Wall stress is a calculated value indicating the amount of stress placed on the wall of the cylinder by test pressure. If this stress exceeds the yield strength of the metal in the wall, the cylinder fails. Actual specimen thickness is used to determine the cross-sectional area for the required calculations of yield strength, ultimate tensile strength and reduction in area performed during physical testing. Consequently, the reference to thickness in the physical test requirements refers to actual specimen thickness. Moreover, during a 1984 enforcement conference on prior case against Kargard, gauge length was discussed and RSPA advised Respondent that gauge length must be 24 times the actual specimen thickness.

Third Argument

Respondent's third argument is that it is in the process of obtaining approval from the Office of Hazardous Materials Transportation (OHMT) of a foreign chemical analysis of materials used to manufacture DOT 4BW cylinders. 49 CFR § 178.61–3 requires that chemical analyses be performed in the United States unless otherwise approved by the Director of OHMT. Respondent also stated in its appeal that it is attempting to have a chemical analysis performed in the United States as soon as it locates any cylinder listed on its Inspection Report No. 482. Respondent has been given a sufficient amount of time in which to submit evidence of either approval of foreign chemical analysis or chemical analysis performed in the United States and has failed to do so.

Fourth Argument

Respondent's fourth argument is that a 250 cc burette was used to test DOT 4BW cylinders. However, Respondent's Quality Control Manager, Vincent M. Bahl, stated during the inspection that the 500 cc burette was used to test the cited DOT 4BW cylinders. The evidence concerning this violation was reviewed with Mr. Bahl and Mr. Baumann during the exit interview. Respondent's statement that its quality control people have subsequently reported that a 250 cc burette was used to test these cylinders is not persuasive. Respondent has provided no evidence to support this contention, and it is contradicted by the contemporaneous statement of Mr. Bahl. The incremental accuracy of the 500 cc burette is not adequate to permit reading the total expansion of the cited cylinders to an accuracy of 1 percent, or 0.1 cc's. Further, Respondent contends that their 2000 cc burette can be interpolated to ⅓ or ¼ of the calibration marks. However, Respondent did not use a 2000 cc burette to test the cited DOT 4BW cylinders. In addition, the regulation requires that the expansion gauge permit reading total expansion to an accuracy of 1 percent, or 0.1 cc's. The incremental accuracy of the 2000 cc burette is not adequate to permit reading the total expansion of the cited cylinders to an accuracy of 1 percent, or 0.1 cc's.

Fifth Argument

Respondent's fifth argument is the same, with respect to 4BW cylinders, as its second argument. For the reasons discussed above, I do not find Respondent's argument persuasive.

Summary of Corrective Actions Taken

In its appeal letter, Respondent listed and described four remedial measures it has taken to correct the circumstances leading to the four violations mentioned in the December 17, 1986 Notice of Probable Violation.

Action No. 1 concerns Respondent's failure to take two physical test specimens from a DOT 4BA test cylinder. Respondent claims that while disagreeing with the test requirements, it has changed its test procedure to include taking two specimens from its DOT 4BA test cylinder. Such corrective action warrants mitigation of $250, and the civil penalty assessed for this violation is reduced from $1000 to $750.

In Action No. 2, Respondent states that it has changed the sizing of its tests coupons to a gauge length of 24 times the actual specimen thickness. However, action had been mandated previously by an October 19, 1984 Compliance Order issued to Respondent relating to a prior enforcement action. Therefore, this corrective measure does not warrant mitigation of the civil penalty.

Action No. 3 relates to Respondent's alleged obtaining of chemical analyses of materials used to manufacture DOT 4BW cylinders in Milwaukee, Wisconsin. However, RSPA still has received no evidence from Respondent that it has executed arrangements for having its chemical analyses performed in the United States.

Action No. 4 deals with Respondent's testing of cylinders using a burette that does not permit reading the total expansion of the cylinder to an accuracy of 1 percent or 0.1 cc's. Respondent contends that it has purchased a 1000 cc burette with 5 cc gradations and, therefore, is no longer relying on midpoint interpolations to achieve reading accuracy on its cylinders. Obtaining burettes which would permit accurate expansion readings are corrective measures that warrant mitigation of the assessed civil penalty. Therefore, the civil penalty of $2,500 is reduced by $250 to $2,250.

Actions Nos. 1 and 4 are post-inspection remedial measures that constitute a basis for mitigation of the civil penalties assessed. Actions Nos. 2 and 3, however, provide no basis for mitigation.

Findings

Based on my review of the record, I find the following:

(1) Respondent was required to perform physical tests on two specimens cut from a DOT 4BA cylinder, and failed to do so.

(2) The gauge length of physical test specimens for DOT 4BA and 4BW cylinders is the actual specimen thickness.

(3) There is no evidence of Respondent obtaining a chemical analysis in the United States or approval of a foreign chemical analysis.

(4) There is no evidence that Respondent used a 250 cc burette on hydrostatic testing equipment capable of

being read to an accuracy of 1 percent or 0.1 cubic centimeter.

(5) Mitigation of the proposed civil penalty of $1,000 is granted due to the delay in processing the case. Mitigation of $500 is also granted based on corrective actions taken by Respondent, specifically its taking two test specimens from each DOT 4BA test cylinder and its acquiring burettes which permit expansion readings to an accuracy of 1 percent. There is basis for further mitigation of the penalty.

Therefore, the Order of October 22, 1987, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the $13,000 civil penalty assessed therein is hereby mitigated to $11,500.

Failure to pay the civil penalty assessed herein within 120 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, Room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: August 24, 1988.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Enf. Case No. 86–38–DM]

Denial of Relief

In the Matter of: JEHL Cooperage, Co., Inc., Respondent.

Background

On September 2, 1987, the Chief Counsel, Research and Special Programs Administration, issued an Order to Jehl Cooperage, Co., Inc. (Respondent), assessing a penalty in the amount of $4,000 for a violation of 49 CFR 178.0–2 and 178.116–12(a). The Respondent submitted a timely appeal of the Order, challenging it on one basis. The Chief Counsel's Order dated September 2, 1987 is incorporated herein by reference.

Discussion

The Respondent's basis for appeal is that it has suffered financial hardship for the past five years, thus making it difficult to pay the assessed civil penalty. In support of its argument, Respondent has submitted financial statements for the years 1985–1987, and a letter from its certified public accountant certifying that Respondent has operated at a loss for the period ending September 30, 1987.

Respondent's financial statements show a positive balance of approximately $300,000 between its current assets and current liabilities. Moreover, Respondent's documents show cash on hand of approximately $50,000. Therefore, the financial information submitted by Respondent indicates that it is financially able to pay the assessed civil penalty.

Findings

Based on my review of the record, I find the following:

(1) Respondent has not submitted any evidence which indicates that it is experiencing financial hardship warranting mitigation of the assessed civil penalty.

(2) Consequently, the argument raised by the Respondent in its appeal is found to be without merit.

(3) There is no basis for mitigation of the civil penalty.

Therefore, the Order of September 2, 1987, assessing a $4,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also, failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717 as well as a penalty charge of six percent (6%) per annum. Payment should be made by certified check or money order payable to the Department of Transportation, and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC. 20590.

Date Issued: June 20, 1988.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 86–39–FSE]

Denial of Relief

In the Matter of: Paulista Fireworks Company, Respondent.

Background

On August 14, 1987, the Chief Counsel, Research and Special Programs Administration, issued a Revised Order to Paulista Fireworks Company (Respondent) assessing a penalty in the amount of $8,000 for a violation of 49 CFR 171.2(a), 172.301(a), 173.91(a), and 173.86(b). The Respondent submitted a timely appeal of the Revised Order, challenging it on three bases. The Chief Counsel's Revised Order of August 14, 1987, is incorporated herein by reference.

Discussion

The Respondent's bases for appeal are: (1) Respondent did not "knowingly" commit any acts which violated the regulations; (2) the packaging requirements found in the Hazardous Materials Regulations are new; and (3) DOT required larger shells (6 inch) for testing when Respondent had already been approved for testing of smaller shells (3 inch).

Respondent's first argument is that it did not "knowingly" violate the sections cited in the Notice of Probable Violation. 49 CFR 107.299 states that "knowingly" means:

> That a person who commits an act which is a violation of the Act or of the requirements of this subchapter. . . . commits that act with knowledge or knowingly when that person (1) has actual knowledge of the facts that give rise to the violation, or (2) should have known of the facts that give rise to the violation. A person knowingly commits an act if the act is done voluntarily and intentionally. Knowledge or knowingly means that a person is presumed to be aware of the requirements of the Act and this subchapter . . . Knowledge or knowingly does not require that a person have an intent to violate the requirements of the Act or the requirements of this subchapter.

Given this definition, the Respondent in this case knowingly offered packages for transportation that were not properly marked and packaged. Even if the Respondent was not aware that the boxes were not properly marked, Respondent should have known that they were not. Further, Respondent voluntarily offered the packages for transportation. Therefore, the argument that the Respondent did not knowingly violate the regulations is without merit.

Respondent's second argument is that the requirements it violated are new, and that Respondent was not notified of them until after shipping the fireworks

from Brazil to the United States. Respondent contends that it received a copy of the "new procedures" from the American Pyrotechnics Association after it had already shipped the fireworks to Zambelli Internationale Fireworks Manufacturing Company, Inc., of New Castle, Pennsylvania. The American Pyrotechnics Association bulletin to which Respondent refers advised of new administrative procedures of the Bureau of Explosives following a period of uncertainty as to whether the Bureau would remain in operation. The requirement to submit the largest item (in this case, 6-inch shells) and have smaller ones (3-inch shells) approved by analogy is not a new requirement. The only "new" aspect of the process is that the location for submission of test samples was changed from New Jersey to Wisconsin. Hence, there are no new procedures or regulatory requirements, and Respondent is not excepted from compliance with those requirements.

Respondent's third argument is that it could rely upon DOT's earlier approval of its manufacturing 3-inch shells, but that DOT is now unfairly requiring it to obtain a separate approval to manufacture 6-inch shells. Respondent obtained approval to manufacture 3-inch shells under approval numbers EX–8310179 and EX–8310206. Respondent has improperly manufactured and offered for transportation 6-inch shells under these approval numbers. 49 CFR 173.86(b)(1) requires a new explosive to be approved by the Director of OHMT before it may be offered for transportation. Respondent was required to obtain approval prior to manufacturing and shipping of the 6-inch shells. Respondent failed to do so.

Findings

Based on my review of the record, I find the following:

(1) Respondent knowingly offered packages for transportation that were not properly marked.

(2) DOT specification markings were not affixed to any of the boxes, and the boxes inside the freight container did not qualify as DOT 12B specification boxes.

(3) Respondent offered a new explosive for transportation without obtaining approval from the Director of OHMT.

(4) Consequently, the three arguments raised by the Respondent in its appeal are found to be without merit.

(5) The civil penalty was assessed with due consideration of the factors listed in 49 App. U.S.C. § 1809 and 49 CFR § 107.331, and no basis exists for further mitigation of the penalty.

Therefore, the Revised Order of August 4, 1987, assessing an $8,000 civil penalty is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 app. U.S.C. 1809 and 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also, failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717 as well as a penalty charge of six percent (6%) per annum. Payment should be made by certified check or money order payable to the Department of Transportation, and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

Date Issued: November 18, 1987.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested

[Ref. No. 87–04–SC]

Action on Appeal

In the Matter of: Union Carbide Corporation, Respondent.

On September 3, 1987, the Chief Counsel of the Research and Special Programs Administration (RSPA) assessed a $10,000 civil penalty against Union Carbide Corporation (Respondent) for violations of 49 CFR 171.2(a) of the Hazardous Materials Regulations (HMR). Respondent, through counsel, submitted a timely appeal by letter dated November 23, 1987. The Chief Counsel's Order is incorporated herein by reference.

In its appeal, Respondent made several arguments which I will summarize and discuss. The Chief Counsel determined that Respondent, in four instances, had knowingly offered hazardous materials for transportation in commerce in cylinders which had not been retested in accordance with 49 CFR 173.34(e), in violation of 49 CFR 171.2(a).

The regulations at issue in this case are 49 CFR 173.34 (e)(9) and (e)(10). Subsection (e)(9) provides, in relevant part, that DOT 4BA and 4BW cylinders may be hydrostatically retested every 12 years, instead of every seven years, if used exclusively for the transport of certain hazardous materials.[1] Subsection (e)(10) provides that DOT 4BA and 4BW cylinders which are used exclusively for "fluorinated hydrocarbons and mixtures thereof which are commercially free from corroding components" may, in lieu of the periodic hydrostatic retest, be given a complete external visual inspection at the time the periodic retest becomes due.

The Chief Counsel's Order stated that subsection (e)(9) allows 12-year retesting for cylinders used for a mixture of listed materials with each other, but not a mixture of a listed material with one that is not listed. Consequently, the Chief Counsel found that the mixture contained in Respondent's cylinders, consisting of a listed material, dichlorodifluoromethane, and a nonlisted material, ethylene oxide, was not a mixture falling within the purview of subsection (e)(9).

Respondent argues that the Chief Counsel's interpretation of subsection (e)(9) is too narrow given the language of the subsection and its regulatory history, which indicates that the original intent and application were clearly more expansive than the current interpretation. Respondent contends that the language could logically be construed to allow mixtures of listed materials with non-listed materials. Moreover, Respondent argues that the history of this subsection indicates that its purpose was to provide an alternative method of retesting low pressure cylinders which are not subject to conditions causing corrosion, and that the initial regulation did not limit or restrict its application to any particular non-corrosive gas. Later revisions to the subsection to list specific non-corrosive gases, Respondent contends, were merely to clarify, not restrict, its application.

Respondent argues that the proper interpretation of the words "or mixture thereof" should include mixtures of one or more listed fluorocarbons with any other material, provided the mixture is commercially free from corroding components. Any more restrictive

[1] Subsection (e)(9) provides the 12-year retesting period for cylinders "which are used exclusively for anhydrous dimethylamine; anhydrous monomethylamine; anhydrous trimethylamine; methyl chloride; liquefied petroleum gas; methylacetylene-propadiene stabilized; or diclorodifluoromethane, difluoroethane, difluoromonochloroethane, monochlorodifluoromethane, monochlorotetrafluoroethane, monochlorotrifluor-ethylene, or mixture thereof, or mixtures of one or more with trichloromonofluoromethane; and which are commercially free from corroding components. . . ." 49 CFR 173.34(e)(9).

interpretation, Respondent contends, would compel the conclusion that the words "commercially free of corroding components" relate to the cylinders themselves, rather than the materials, and allow shipment of gases with corroding components in obvious contradiction of the purpose of the subsection.

Respondent also argues that the history of subsection (e)(10) supports its contentions because, of all the materials listed, only the fluorinated hydrocarbons refer to "and mixtures thereof." Since "liquefied petroleum gas" is a generic category of materials and mixtures of two or more such gases presumably would be allowed, Respondent argues, the use of the "mixture" language with "fluorinated hydrocarbons," also a generic category, must indicate the applicability of subsection (e)(10) to mixtures of fluorinated hydrocarbons with other materials. Respondent also notes that the docket file of the Interstate Commerce Commission (predecessor to DOT) pertaining to the adoption of language which resulted in subsection (e)(10) indicates that the external visual examination "is superior to the presently required hydrostatic test." Respondent asserts that upholding the Order would prohibit the use of a test recognized for over three decades as superior.

Finally, Respondent contends that the regulations are so confusing, and the Chief Counsel's interpretation renders them so vague, that the assessment of a penalty raises substantial questions of equity and due process.

Respondent refers repeatedly to the "Chief Counsel's interpretation" and the "present interpretation" when, in fact, the interpretation of 49 CFR 173.34 (e)(9) and (e)(10) in the Chief Counsel's Order has been the longstanding official agency interpretation of these subsections. Respondent's assertion that the purpose of listing specific non-corrosive gases was merely illustrative is without merit. The regulations, while not a model of good draftsmanship, do not include language suggesting that these gases are merely examples of non-corrosive gases that may be used. The only language which is arguably ambiguous is "mixture(s) thereof," and RSPA has consistently interpreted that language to mean mixtures of the listed materials with each other. Moreover, Respondent's other assertions concerning the meaning of prior ICC dockets, and the lack of notice and comment afforded during the 1969 rulemaking are irrelevant, untimely, or both. Respondent has an obligation to come forward and request an interpretation of the regulations if it believes they are unclear, and may not unilaterally follow its own interpretation. Accordingly, I find that Respondent has not submitted evidence of warrant dismissal of the Order and no mitigation is warranted on this basis.

Respondent asserts that if the Order is not dismissed, substantial mitigation of the penalty is warranted because of the lack of culpability or adverse effect on safety, the understandable confusion with respect to application of the regulations, Respondent's extraordinary record of transportation safety, and the adverse effect of the Order on Respondent's business.

The nature, circumstances, extent, and gravity of the violations, as well as Respondent's history of prior violations, were already taken into account in assessing the civil penalty. Furthermore, Respondent's ability to pay the penalty and its ability to continue in business were also considered. Respondent is clearly able, as it acknowledges, to pay the assessed penalty, and doing so will not adversely affect its ability to continue in business. Therefore, no mitigation is warranted on these bases.

Finally, Respondent argues that the Order represents an immediate and substantial threat to Respondent's ability to continue shipping Oxyfume-12, the hazardous material in question. Respondent asserts that Oxyfume-12 is the only product available for sterilizing certain medical equipment, and that denial of the appeal would result in Respondent having to file an immediate application for an emergency exemption.

Respondent's argument is not persuasive. Respondent is responsible for compliance with the Hazardous Materials Regulations (HMR). Respondent had several options available to it, including seeking an interpretation of the HMR (as stated above), filing a rulemaking petition under § 106.31, testing the cylinders at the appropriate interval, or applying for an exemption. Respondent, however, did none of the above, and no mitigation is warranted because Respondent now claims that compliance with § 173.34(e) may cause it problems.

However, I do find that mitigation of the assessed penalty is warranted due to the extensive delay in processing this case.

Therefore, the Chief Counsel's Order of September 3 1987, finding that Respondent knowingly violated 49 CFR 171.2(a), is modified by reducing the civil penalty from $10,000 to $6,000. The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate of seven percent (7%) in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: April 26, 1989.

Travis P. Dungan,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 87–08–RMC]

Denial of Relief

In the Matter of: A. J. Metler Hauling & Rigging, Inc., Respondent.

On March 10, 1988, the Chief Counsel issued an order assessing a $3,000 civil penalty against A. J. Metler Hauling & Rigging, Inc. for a violation of 49 CFR 177.825(b), transporting highway route controlled radioactive materials on a nonpreferred route, as alleged in an April 1, 1987 Notice of Probable Violation (Notice). Respondent submitted an appeal in a March 29, 1988 letter. The Chief Counsel's Order and the Notice are incorporated herein by reference.

Discussion

In its appeal, Respondent states that "we checked with the [S]tate of Illinois Department of Transportation on our designated routes of travel. We got a verbal commitment from them on this particular route." Respondent's contention, therefore, is that, when it left the Interstate Highway System, it used a State-designated alternative preferred route.

However, a February 24, 1988 letter from E. T. Crawford, Jr., Chief, Compliance Unit, Illinois Department of Transportation states: "To date, the State of Illinois has not designated any alternative preferred routes for the transportation of highway route controlled quantities of radioactive

materials." The existence of this letter was cited in the Chief Counsel's Order, and Respondent has not presented any specific probative evidence to rebut that statement. There is no statement as to who in the Illinois Department of Transportation allegedly made what statements on what dates to what specific employee of Respondent—let alone any contemporaneous document reflecting the occurrence of such a verbal statement.

Therefore, the preponderance of the evidence indicates that Respondent knowingly violated § 177.825(b) as alleged in the Notice.

Findings

Based on my review of the record, I find the following:

(1) Respondent transported highway route controlled quantities of radioactive materials on a nonpreferred route, in violation of § 177.825(b).

(2) Respondent's appeal is without merit.

(3) The $3,000 civil penalty is appropriate.

Therefore, the Order of March 10, 1988, assessing a $3,000 civil penalty is affirmed, as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717 as well as a penalty charge of six percent (6%) per annum. Payment should be made by certified check or money order payable to the Department of Transportation, and sent to the Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 7th Street SW., Washington, DC 20590.

Date Issued: May 10, 1988.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 87–09–CR]

Partial Grant of Relief

In the Matter of Consolidated Fire Control, Inc., Respondent.

Background

On March 14, 1988, the Chief Counsel assessed a $5,500 civil penalty against Consolidated Fire Control, Inc. (Respondent), for violations of 49 CFR 173.34(e) of the Hazardous Materials Regulations (HMR). Respondent submitted an appeal by letter dated May 17, 1988. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent had knowingly (1) performed hydrostatic testing of DOT specification cylinders without including an external visual examination in accordance with Compressed Gas Association Pamphlet C–6, in violation of 49 CFR 173.34(e)(1), (2) retested DOT specification cylinders without holding a current retester's identification number issued by the Research and Special Programs Administration (RSPA), in violation of 49 CFR 173.34(e)(1)(i), and (3) performed hydrostatic testing of DOT specification cylinders using a gauge indicating the total expansion of a cylinder which could not be read with an accuracy of one percent or to a reading of 0.1 cubic centimeter and a pressure gauge which could not be read to within one percent of the test pressure, in violation of 49 CFR 173.34(e)(3).

Respondent does not contest the occurrence of the violations. Respondent's sold basis for appeal is that the civil penalty assessment will work an economic hardship on Respondent. Respondent submitted certain financial information, including copies of its 1985 and 1986 tax returns, and requested a reduction of the penalty amount, or, in the alternative, a suitable payment plan. The Chief Counsel's Order noted that Respondent, despite two requests prior to issuance of that Order, had failed to submit financial information to substantiate its assertion of economic hardship. The Chief Counsel, therefore, determined that mitigation of the civil penalty was not warranted.

After reviewing Respondent's financial information submitted with the appeal, I have determined that partial mitigation is warranted.

Findings

Based on my review of the record, I find the following:

(1) The Chief Counsel correctly determined, based on the information then available to him, that mitigation of the civil penalty was not warranted.

(2) On appeal, Respondent has submitted sufficient evidence to show that payment of the $5,500 penalty will work a financial hardship and could adversely affect the Respondent's ability to continue in business.

Therefore, the Chief Counsel's Order of March 14, 1988, finding that Respondent knowingly violated 49 CFR 173.34(e), is modified by reducing the civil penalty from $5,500 to $4,000, and authorizing payment of the $4,000 civil penalty in 10 consecutive monthly payments of $400 each beginning on August 15, 1988, and due on the 15th day of each month thereafter until a total of $4,000 has been paid. If you default on any payment of the authorized payment schedule, the entire amount of the remaining civil penalty shall, without notice, immediately become due and payable. Your failure to pay this accelerated amount in full will result in referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court, and accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment of the accelerated amount is not made within 90 days of default.

Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: July 21, 1988.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 87–13–PM]

Denial of Relief

In the Matter of: Chicago Pail Manufacturing Co., Respondent.

Background

On May 23, 1988, the Chief Counsel of the Research and Special Programs Administration (RSPA) assessed an $8,000 civil penalty against Chicago Pail Manufacturing Co. (Respondent), for violations of 49 CFR 171.2(c), 178.115–12 (a)(1) and (a)(2), 178.116–6(a), 178.131–11 (a) and (b), and 178.132–11(a) of the Hazardous Materials Regulations (HMR). Respondent submitted an appeal by letter dated June 10, 1988, and supplemented the appeal by letter dated August 11, 1988. The Chief Counsel's

Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent had knowingly: (1) Manufactured and marked steel pails as DOT specification 17E pails when they were manufactured with 28 gauge steel instead of the required 24 gauge steel; (2) manufactured and distributed DOT specification 17C steel pails without conducting required hydrostatic tests; (3) manufactured and distributed Dock specification 17C steel pails without conducting required drop tests; (4) manufactured and distributed DOT specification 37A60 steel pails without conducting required drop tests; and (5) manufactured and distributed DOT specification 37B60 steel pails without conducting required drop tests.

Respondent does not contest the occurrence of the violations. Respondent's bases for appeal are that (1) the imposition of any civil penalty would work a severe hardship, and (2) Respondent operates in an enterprise zone in the City of Chicago in which approximately 90% of its work force consists of minorities.

With respect to Respondent's first contention, the Chief Counsel's Order noted that, despite two requests prior to issuance of that Order, Respondent had failed to submit financial information and thus failed to substantiate its assertion of economic hardship. Respondent submitted with its appeal uncertified financial statements for the years 1985, 1986, and 1987 showing income and expenses. By letter of July 29, 1988, Respondent was requested to provide a certified balance sheet or financial statement identifying its current assets and liabilities. By letter dated August 11, 1988, Respondent submitted an uncertified balance sheet (dated January 20, 1988) for the years ended November 30, 1987, 1986 and 1985 prepared by Cohen & Pollack, Certified Public Accountants. The balance sheet includes a statement by the accounting firm that "Management has elected to omit substantially all of the disclosures required by generally accepted accounting principles." With these limitations in mind, I have reviewed the financial information submitted by Respondent. The balance sheet shows losses for the years 1986 and 1987. However, these losses were created by a transfer of funds to Respondent's parent corporation, American Steel Container Company. Furthermore, these transfers reflect only the Respondent's tax position, not its ability to pay. In addition, Respondent's liquidity, as evidenced by the ratio of current assets to current liabilities, is good. The ratios for the three years are 2.8, 2.75, and 2.5 for 1985, 1986, 1987, respectively. Finally, the most current data supplied showed a cash balance of $9,615. The information provided by Respondent thus does not support its contention that payment of a civil penalty would affect its ability to pay or its ability to continue in business.

With respect to Respondent's second contention, Respondent was asked by letter dated July 29, 1988, to explain the relevance of its assertion and provide information to substantiate it. Respondent provided a statement from the Department of Economic Development, City of Chicago, to the effect that Respondent is located in Chicago's Enterprise Zone I. Respondent also stated that:

> "Both the City of Chicago and the State of Illinois have recognized the obstacles Chicago Pail must overcome to continue to operate in an economically depressed, crime-ravaged area while employing those not necessarily otherwise employable. In recognition of these obstacles, the City and State have assisted Chicago Pail's continued viability through the enterprise program.

I am not persuaded as to the relevance of this argument. While it may be laudable that Respondent operates in an economically depressed area and employs persons who might otherwise not be employed, Respondent has failed to show that this assertion alone warrants mitigation of the civil penalty. Moreover, Respondent's statement that it has received assistance, from Chicago and the State of Illinois, suggests that its continued operation in the enterprise zone is economically advantageous.

Findings

Based on my review of the record, I find the following:

(1) The issues raised by Respondent are without merit.

(2) The Chief Counsel mitigated the amount of the civil penalty by $1,000.

(3) The civil penalty assessed by the Chief Counsel was appropriate, and no further mitigation is warranted.

Therefore, the Chief Counsel's Order of May 23, 1988, finding that Respondent knowingly violated 49 CFR 171.2(c), 178.115–12 (a)(1) and (a)(2), 178.116–6(a), 178.131–11(a) and (b), and 178.132–11(a), and assessing an $8,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria in 49 CFR 107.331. The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to that same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service.

Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: October 17, 1988.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 87–14–SPT]

Denial of Relief

In the Matter of: Reliance Universal Inc., Respondent.

Background

On July 14, 1987, the Chief Counsel assessed a $10,000 civil penalty against Reliance Universal Inc. (Respondent) for violations of 49 CFR 173.32(e)(1)(ii), 171.2(a), 173.128(a)(3), 172.326(a)(1), and 172.326(a)(2) of the Hazardous Materials Regulations (HMR). Respondent submitted an appeal by letter dated July 26, 1987. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent's bases for appeal are that: (1) The violations were merely recordkeeping in nature, with no accident involved and no injury to persons, property, or the environment; and (2) the recordkeeping problems have been solved with the installation of a computerized retest program.

Respondent contends that the violations were merely recordkeeping in nature. Failure to retest DOT Specification 57 portable tanks in accordance with 49 CFR 173.32(e)(1)(ii) is not a mere recordkeeping violation, but a violation of substantive safety requirements. Similarly, offering a hazardous material, in this case flammable liquid, paint, for transportation in commerce in DOT Specification 57 portable tanks which have not been properly retested is a violation of the substantive requirements of 49 CFR 171.2(a) and 173.128(a)(3).

Finally, offering for transportation in commerce DOT Specification 57 portable tanks containing a hazardous material, which tanks have not been properly marked, is a violation of the substantive marking requirements of 49 CFR 172.326(a)(1) and (a)(2). The fact that there has been no known injury to persons or property was already taken into account in considering the gravity of the violation when the civil penalty was assessed. Despite the fact that Respondent had been warned in 1982 about its lack of retest procedures, Respondent failed to comply with the regulations.

Respondent's second basis for appeal is also without merit. Respondent's corrective actions in retesting all DOT 57 portable tanks and installing a computerized retest program were already considered in the Order, and the proposed assessment accordingly was reduced by $1,000 to the $10,000 assessment in the Order. Substantial mitigation is not appropriate merely because Respondent brought its operation into compliance with the law.

Findings

Based on my review of the record, I find the following:

1. Respondent knowingly committed acts which violated 49 CFR 173.32(e)(1)(ii), 171.2(a), 173.128(a)(3), 172.326(a)(1) and 172.326(a)(2).

2. The two issues raised by the Respondent in its appeal are without merit.

3. The civil penalty was assessed with due consideration of the factors listed in 49 app. U.S.C. 1809 and 49 CFR 107.331, and no basis exists for further mitigation of the penalty.

Therefore, the Order of July 14, 1987, assessing a $10,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 app. U.S.C. 1809 and 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also, failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717 as well as a penalty charge of six percent (6%) per annum. Payment should be made by certified check or money order payable to the Department of Transportation, and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street SW., Washington, DC 20590.

Date Issued: September 1, 1987.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested

[Enf. Case No. 81–17–CM]

Revised Partial Denial of Relief

In the Matter of: General Fire Extinguisher Corp., Respondent.

Background

On November 3, 1987, the Chief Counsel, Research and Special Programs Administration, issued an Order to General Fire Extinguisher Corp. (Respondent) assessing a penalty in the amount of $2,000 for a violation of 49 CFR 171.2(c) and 178.37–14(a). The Respondent submitted a timely appeal of the Order, challenging it on six bases. The Chief Counsel's Order dated November 3, 1987 is incorporated herein by reference.

Discussion

The Respondent's bases for appeal are:

(1) Respondent did not "knowingly" commit any acts which violated the regulations;

(2) Respondent's representatives did not accompany Inspector Henderson during this June 19, 1986 compliance inspection of their facility, and Inspector Henderson failed to notify anyone in Respondent's employ of his findings;

(3) Respondent, instead of replacing the expansion gauge at issue, installed a new computer on its hydrostatic equipment to increase testing, increase reliability, and decrease maintenance;

(4) Pittsburgh Testing Laboratories (PTL), not Respondent, is responsible for ensuring that Respondent's hydrostatic equipment complies with the Hazardous Materials Regulations;

(5) The electronic expansion gauge on Respondent's hydrostatic equipment can be read by using a midpoint interpolation; and

(6) Respondent is allowed a 10 percent ratio of expansion when testing cylinders.

First Argument

Repondent's first argument is that it did not "knowingly" violate the Sections cited in the Notice of Probable Violation. 49 CFR 107.299 states that "knowingly" means:

> That a person who commits an act which is a violation of the Act or of the requirements of this subchapter . . . commits that act with knowledge or knowingly when that person (1) has actual knowledge of the facts that give rise to the violation. A person knowingly commits an act if the act is done voluntarily and intentionally. Knowledge or knowingly means that a person is presumed to be aware of the requirements of the Act and this subchapter . . . Knowledge or knowingly does not require that a person have an intent to violate the requirements of the Act or the requirements of this subchapter. . . .

Given this definition, the Respondent in this case knowingly performed hydrostatic tests on DOT specification 3AA cylinders with equipment having an expansion gauge that could not be read to an accuracy of 1 percent. Even if Respondent did not know that the expansion gauge on its hydrostatic equipment was not capable of being read to an accuracy of 1 percent, Respondent should have known that the gauge could not be read to the required accuracy. Further, Respondent has been a cylinder manufacturer since 1903 and thus is factually as well as legally presumed to be aware of the hydrostatic testing requirements. Therefore, the argument that the Respondent did not knowingly violate the regulations is without merit.

Second Argument

Respondent's second argument is that Inspector Henderson was not accompanied by Respondent's representatives during his June 19, 1986 compliance inspection. Respondent further alleges that Inspector Henderson failed to speak to anyone in Respondent's employ. Respondent has submitted three affidavits of company officials stating that they did not accompany Inspector Henderson during his inspection. Respondent Quality Control Manager, Neil MacLean, states in his affidavit that he "guided (Inspectors Henderson and Abis) to the hydrotest area where I left them." Obviously this indicates that Inspector Henderson was accompanied by one of Respondent's representatives during his inspection. Respondent's argument that Inspector Henderson failed to speak with anyone in Respondent's employ is not true since, during the inspection, Mr. MacLean provided Inspector Henderson with copies of pertinent inspection reports. Also, Donald Schneckloth, in his affidavit, stated that he talked briefly with Inspectors Henderson and Abis, and delivered various cylinder reports from Respondent's files for their examination. In her affidavit, Beverly Burden states that she met with both DOT inspectors in her office. Hence, Inspector Henderson did speak to individuals in Respondent's employ and was accompanied on his inspection by at least one of Respondent's representatives. Furthermore, the

relevance of this argument is questionable at best since Respondent's officials were aware of the inspectors' presence and free to accompany them throughout the entire inspection, but chose not to do so.

Third Argument

Respondent's third argument is that instead of merely replacing the expansion gauge, it installed a new computer on its hydrostatic equipment to increase testing, increase reliability, and decrease maintenance. The Chief Counsel mitigated the proposed civil penalty, in part, because of Respondent's installation of new equipment. Further mitigation on that basis is not justified.

Fourth Argument

In its fourth argument, Respondent claims that PTL, as an independent inspector, is solely responsible for ensuring that Respondent's hydrostatic equipment complies with the Hazardous Materials Regulations. Both Respondent and PTL had a dual responsibility to ensure compliance with the regulations. While separate enforcement action has been taken against PTL regarding inadequate testing at Respondent's facility, Respondent also was responsible for ensuring that its cylinders were tested in accordance with the Hazardous Materials Regulations. Respondent failed to do so. In addition, the Chief Counsel's partial mitigation of the proposed civil penalty took into account the dual responsibility of PTL and Respondent. Further mitigation on that basis is not justified.

Fifth Argument

Respondent, in its fifth argument, claims that the electronic expansion gauge on its hydrostatic equipment can be read by using a midpoint interpolation. RSPA's engineering staff has studied this contention, and found it to be valid. However, as noted in the Notice of Probable Violation dated July 9, 1987, five attempts at calibration were made with calibrated cylinder S/N 26768Y. The calibrated expansion at 3000 psi is 31.0 cc's. 49 CFR 178.37–14(a) allows a total expansion rate of 1 percent or 0.1 cubic centimeters. The acceptance range is ±0.31 cc's or 30.69 to 31.31 cc's. The five successive attempts at calibration yielded results of 31.5 to 32.5 cc's. The calibration attempt at precisely 3000 psi yielded a total expansion of 31.5 cc's. During the subsequent attempt, the test pressure only reached 2980 psi. However, the total expansion recorded was still 31.5 cc's, which is not within 1 percent or 0.1 cubic centimeters of the required total expansion rate. Therefore, even though Respondent's hydrostatic equipment can be read by using a midpoint interpolation, the preponderance of the evidence nevertheless indicates that Respondent failed to perform hydrostatic tests on cylinders with equipment having an expansion gauge permitting a reading of total expansion to an accuracy of either one percent or 0.1 cubic centimeters.

Sixth Argument

Finally, Respondent argues that it is allowed a 10 percent ratio of expansion when testing cylinders. However, this argument is irrelevant to the alleged violation of failing to produce a reading of total expansion to an accuracy of 1 percent. The section of the regulations to which Respondent refers in its argument is 49 CFR §178.37–14(c). Respondent, however, is being cited for an alleged violation of 49 CFR 178.37–14(a), which mentions nothing about an allowable 10 percent expansion ratio when testing cylinders. Therefore, Respondent's last argument is irrelevant to the alleged violation.

Findings

Based on my review of the record, I find the following:

(1) Respondent knowingly performed hydrostatic tests on DOT specification cylinders with equipment having an expansion gauge that could not be read to an accuracy of 1 percent.

(2) Inspector Henderson spoke with and was accompanied by representatives of Respondent during his June 19, 1986 compliance inspection of Respondent's facility.

(3) The Chief Counsel mitigated the proposed civil penalty, in part, because of Respondent's installation of a new computer on its hydrostatic equipment.

(4) Respondent was responsible for ensuring that its hydrostatic equipment complied with the Hazardous Materials Regulations and already has benefitted from partial mitigation because of the dual responsibilities of Respondent and PTL.

(5) The electronic gauge on Respondent's hydrostatic equipment can be read by using a midpoint interpolation. However, this does not explain Respondent's observed failure to calibrate its equipment to 1 percent.

(6) Respondent is not allowed a 10 percent ratio of expansion when testing cylinders. The 10 percent ratio is not applicable to the violation at issue here.

(7) Consequently, five of the six arguments raised by the Respondent in its appeal are found to be without merit.

(8) The proposed civil penalty was mitigated in the Order by an appropriate amount. Further mitigation of $500 is granted due to the delay in processing the case, specifically the time period between the date of inspection and the date of the NOPV. No basis for further mitigation of the penalty exists.

Therefore, the Order of November 3, 1987, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR § 107.331, except that the $2,000 civil penalty assessed therein is hereby mitigated to $1,500.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also, failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. § 3717 as well as a penalty charge of six percent (6) per annum. Payment should be made by certified check or money order payable to the Department of Transportation, and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Dated Issued: March 5, 1988.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested

[Ref. No. 87–25–CR]

Denial of Relief

In the Matter of: All Fire Equipment, Inc. Respondent

Background

On November 16, 1987, the Chief Counsel assessed a $5,000 civil penalty against All Fire Equipment, Inc. (Respondent) for violations of 49 CFR 173.34(e), 173.34(e)(1)(i), 173.34(e)(3), and 173.34(e)(5) of the Hazardous Materials Regulations. Respondent submitted an appeal by letter dated January 13, 1988. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent had knowingly (1) failed to retest Department of Transportation (DOT) 3AA cylinders at a minimum retest pressure of 5/3 times service pressure, in violation of 49 CFR

173.34(e); (2) represented to be performing retests on DOT specification cylinders by test date stamping them without holding a retester's identification number issued by the Research and Special Programs Administration (RSPA) in violation of 49 CFR 173.34(e)(1)(i); (3) performed hydrostatic testing on DOT specification cylinders using equipment which did not have a gauge indicating the total expansion of the cylinder such that the total expansion could be read with an accuracy of 1% or to a reading of 0.1 cc, and did not have a pressure gauge that could be read to an accuracy of within 1% of the test pressure, in violation of 49 CFR 173.34(e)(3); and (4) failed to keep records showing the results of reinspection and retest of cylinders, in violation of 49 CFR 173.34(e)(5).

Respondent asserts two bases for its appeal. First, Respondent asserts that it has made subtantial efforts to ensure compliance with the DOT regulations, as evidenced by (a) its initiation of contact with the Department for the purpose of meeting any and all standards for hydrostatic testing, (b) its consultation, at the Department's suggestion, with the Robert Hunt Company, an independent inspection agency, to learn how to properly perform hydrostatic testing, and (c) the Hunt Company's issuance to Respondent of a five-year approval rating and statement that Respondent is in strict conformance with the Department's regulations. Second, Respondent contends that, because of its corrective efforts, the $5,500 proposed civil penalty should have been mitigated by more than $500, and that the $5,000 assessed penalty is excessive and will effect a substantial and undue hardship on Respondent.

With respect to Respondent's first contention, in June 1986 Respondent requested and received from the Department an application for registration of its cylinder requalification facility, with instructions for contacting an independent inspection agency. However, it was not until October 8, 1986, the day after the Department's inspection of Respondent's facility, that Respondent authorized the Hunt Company to conduct a survey of its facility. Furthermore, contrary to Respondent's statement, RSPA's Office of Hazardous Materials Transportation, not the Hunt Company, issued Respondent a registration number valid for a five-year period, and the Hunt Company's recommendation did not contain a statement that Respondent was "in strict conformance" with Department regulations. Only the Department can determine whether a facility is in compliance with the Department's regulations. An inspection agency can only recommend that a facility be approved by the Department.

With respect to Respondent's second contention, the Chief Counsel reduced the civil penalty by only $500 from the proposed assessment because Respondent initiated efforts to obtain a survey by the inspection agency and a retester's identification number only after the Department's inspection. The record does not contain any evidence, nor did Respondent submit any information to support its contention that the penalty would impose an undue financial burden.

Findings

Based on my review of the record, I find the following:

(1) Respondent's efforts to ensure compliance were taken after RSPA's inspection, and were, in any event, no more than the minimum necessary to be in compliance.

(2) There is no evidence that the Respondent is unable to pay the penalty or that the penalty assessment will adversely affect the Respondent's ability to continue in business.

(3) Consequently, the issues raised by Respondent on appeal are without merit.

(4) The civil penalty was mitigated in the Order by an appropriate amount, and no basis exists for further mitigation of the penalty.

Therefore, the Chief Counsel's Order of November 16, 1987, finding that Respondent knowingly violated 49 CFR 173.34(e), 173.34(e)(1)(i), 173.34(e)(3), and 173.34(e)(5), and assessing a $5,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717 as well as a penalty charge of six percent (6%) per annum. Payment should be made by certified check or money order payable to the Department of Transporation, and sent to the Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW, Washington, DC 20590.

Date Issued: March 14, 1988.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 87-26-CR]

Denial of Relief

In the Matter of: Aurora Beverage Distributors, Inc., Respondent

Background

On March 16, 1988, the Chief Counsel assessed a $2,000 civil penalty against Aurora Beverage Distributors, Inc. (Respondent), for violations of 49 CFR 173.34(e)(1)(i) and 173.34(e)(3) of the Hazardous Materials Regulations (HMR). Respondent submitted an appeal by letter dated April 5, 1988. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent had knowingly (1) represented to have retested DOT specification cylinders by marking them with a test date without holding a current retester's identification number issued by the Research and Special Programs Administration (RSPA) in violation of 49 CFR 173.34(e)(1)(i), and (2) used a gauge indicating the total expansion of a cylinder which could not be read with an accuracy of one percent or to a reading of 0.1 cc, to perform hydrostatic testing of DOT specification cylinders, in violation of 49 CFR 173.34(e)(3).

Respondent asserts two bases for its appeal. First, Respondent asserts that the penalty imposed "was not commensurate with the minor infraction alleged." In support of this contention, Respondent stated that its machine, while old, was functioning correctly, has since been checked and certified to be accurate, and no testing has been performed since the Notice of Probable Violation was received. Respondent also contends that it was licensed by the Bureau of Explosives and when that function was transferred to the Department of Transportation, no notice was provided to Respondent. Second, Respondent asserts that the financial information it submitted clearly shows an inability to pay the penalty. In support of its assertion, Respondent noted that its tax returns for 1985 and 1986 show a net operating loss, while its most recent financial statement (June 1987) shows a net profit of $2,783.

With respect to Respondent's first contention, the RSPA inspector observed and the Chief Counsel determined that Respondent's retest operator tested DOT specification

cylinders using a burrette incapable of being read to the required accuracy. The violation was not for malfunctioning equipment, but for testing procedures not in compliance with the regulations. The fact that Respondent once held a license from the Bureau of Explosives does not excuse Respondent's failure to obtain a current retester's identification number from RSPA. Respondent has a legal responsibility to comply with the Hazardous Materials Transportation Act and the HMR and is presumed to be aware of the requirements. Further, Respondent was informed during the informal conference that notice was published in the Federal Register in 1978 stating that all undated registrations expired on December 31, 1979. Finally, the Chief Counsel took into consideration Respondent's statement that it no longer retests cylinders and mitigated the amount of penalty.

With respect to Respondent's second contention, the Chief Counsel reduced the amount of the penalty initially assessed after considering the financial information submitted by Respondent. Respondent's financial statement shows a bank balance of $1,944 and a current asset/current liabilities ratio of approximately 1.1. There is no justification at this point for any further reduction of the assessed penalty.

Findings

Based on my review of the record, I find the following:

(1) Respondent has not submitted sufficient evidence to show that it is unable to pay the penalty or that the penalty assessment will adversely affect the Respondent's ability to continue in business.

(2) The civil penalty was mitigated in the Order by an appropriate amount, and no basis exists for further mitigation of the penalty.

(3) Consequently, the issues raised by Respondent on appeal are without merit.

Therefore, the Chief Counsel's Order of March 16, 1988, finding that Respondent knowingly violated 49 CFR §§ 173.34(e)(1)(i) and 173.34(e)(3), and assessing a $2,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR § 107.331.

In view of Respondent's assertions concerning its financial status, I hereby authorize payment of the $2,000 civil penalty in 10 consecutive monthly payments of $200 each beginning on June 15, 1988, and due on the 15th day of each month thereafter until a total of $2,000 has been paid. If you default on any payment of the authorized payment schedule, the entire amount of the remaining civil penalty shall, without notice, immediately become due and payable. Your failure to pay this accelerated amount in full also will result in referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court, and accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2226, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: May 31, 1988.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested

[Ref. No. 87–34–CM]

Denial of Relief

In the Matter of: Catalina Cylinders Corporation, Respondent.

Background

On March 31, 1988, the Chief Counsel of the Research and Special Programs Administration (RSPA) assessed a $2,500 civil penalty against Catalina Cylinders Corporation (Respondent), for violations of 49 CFR 178.46–11(a) and 178.46–12(e) of the Hazardous Materials Regulations (HMR). Respondent submitted an appeal by letter dated April 19, 1988. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent had knowingly (1) performed hydrostatic tests on DOT specification 3AL cylinders on equipment which had a pressure gauge which could not be read to an accuracy of one percent, and an expansion gauge indicating the total expansion of cylinder which could not be read with an accuracy of one percent or to a reading of 0.1 cc, in violation of 49 CFR 178.46–11(a), and (2) performed the alternate bend test on specimens cut from DOT 3AL cylinders without have them bent inward around a mandrel until the interior edges were at a distance apart not greater than the diameter of the mandrel, in violation of 49 CFR 178.46–12(e).

Respondent asserts two bases for its appeal. With respect to the first violation, Respondent asserts that its hydrostatic testing equipment was performing at the required accuracy level at the start of the testing shift as verified by calibration at the start of the test day. However, this assertion is contradicted by the evidence discussed in the Chief Counsel's Order. The RSPA inspector observed DOT specification 3AL cylinders being tested on Respondent's equipment, and witnessed eight unsuccessful attempts by Respondent to calibrate this equipment.

With respect to the second violation, Respondent asserts that the finding of violation was based on an erroneous interpretation of the ASTM (American Society for Testing and Materials) bend test procedure. The requirement that a flattening test be performed on DOT 3AL cylinders authorizes an alternate bend test in accordance with ASTM E 290–77. However, 49 CFR 178.46–12(e) further requires that "when the alternate bend test is used, the test specimens shall remain uncracked when bent inward around a mandrel in the direction of curvature of the cylinder wall until the interior edges are at a distance apart not greater than the diameter of the mandrel." The RSPA inspector observed, and the Chief Counsel determined, that Respondent failed to perform the bend test so that the inside edges of the DOT cylinder were bent to a separation distance of 3½" (the diameter of the mandrel used in the test).

In addition, Respondent stated that Steigerwalt Associates, its independent inspector, had provided a detailed explanation of both these violations in its own response to Notice of Probable Violation No. 87–38–HA, and requested a meeting with the Administrator and Steigerwalt Associates after review of the appeal. Respondent has already been afforded the opportunity for an informal conference or for a formal administrative hearing before an Administrative Law Judge. Respondent did not avail itself of either opportunity and accordingly has waived its right to a hearing. The non-hearing appeal proceeding which Respondent elected by filing a written appeal does not include any further opportunity for a conference or meeting.

Findings

Based on my review of the record, I find the following:

(1) The issues raised by Respondent on appeal are without merit.

(2) The civil penalty assessed in the Order was appropriate, and no basis exists for mitigation of the penalty.

Therefore, the Chief Counsel's Order of March 31, 1988, finding that Respondent knowingly violated 49 CFR 174.46–11(a) and 178.46–12(e) and assessing a $2,500 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in (1) referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court, and (2) accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: May 31, 1988.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 87–38–IIA]

Denial of Relief

In the Matter of: Steigerwalt Associates, Respondent.

Background

On May 4, 1988, the Chief Counsel of the Research and Special Programs Administration (RSPA) assessed a $6,000 civil penalty against Steigerwalt Associates (Respondent), for violations of 49 CFR 178.46–4(d), 178.46–4(d)(11) and 178.46–4(d)(12) of the Hazardous Materials Regulations (HMR). Respondent submitted an appeal by letter dated May 27, 1988, and supplemented that appeal by letters dated June 16 and 29, 1988. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order dismissed Violation No 1 and determined that Respondent had knowingly (1) failed to witness and ensure that hydrostatic testing on Department of Transportation (DOT) specification 3AL cylinders was conducted with equipment that could be calibrated to one percent accuracy, in violation of 49 CFR 178.46–4(d) (Violation No. 2), (2) failed to witness and ensure that bend tests of DOT 3AL cylinders were properly conducted, in violation of 49 CFR 178.46–4(d) (Violation No. 3), (3) failed to ensure that DOT 3AL cylinders are marked in compliance with the specifications, in violation of 49 CFR 178.46–4(d)(11) (Violation No. 4), and (4) failed to provide complete test records to the manufacturer of DOT 3AL cylinders, in violation of 49 CFR 178.46–4(d)(12) (Violation No. 5).

With respect to Violation No. 2, Respondent asserts that the test equipment was properly calibrated before the DOT inspector arrived at the plant, was worked on during the day by a third party, and would not calibrate at the end of the day. Respondent further asserts that no testing was performed that day because the DOT inspector and Respondent's inspector were away from the plant witnessing other tests. Respondent's assertion that the equipment was properly calibrated before the DOT inspector arrived is contradicted by its own inspector's contemporaneous statement, made to the DOT inspectors, that the equipment had not been calibrated on the day of the inspection, and that it was only checked once a week. Respondent's assertion that no testing was performed that day is contradicted by the observations of the DOT inspectors, who actually witnessed hydrostatic testing and made copies of computer printouts showing the test results. Moreover, Respondent's assertion that no testing was conducted is contradicted by its own earlier statement (in response to the Notice of Probable Violation) that "the test data from earlier that day was accurate and properly obtained." Respondent cannot now be heard to claim that no testing was conducted.

With respect to Violation No. 3, Respondent contends that the bend test was performed properly and that the violation is a result of an incorrect interpretation by the DOT inspector. The requirement that a flattening test be performed on DOT 3AL cylinders authorizes an alternate bend test. However, 49 CFR 178.46–12(e) further requires that "when the alternate bend test is used, the test specimens shall remain uncracked when bent inward around a mandrel in the direction of curvature of the cylinder wall until the interior edges are at a distance apart not greater than the diameter of the mandrel." The RSPA inspector observed, and the Chief Counsel determined, that Respondent failed to perform the bend test so that the inside edges of the DOT cylinder were bent to a separation distance of 3.5 inches (the diameter of the mandrel used in the test). The DOT inspector observed an alternate bend test in which the specimen was bent around a 3.5 inch diameter mandrel until the inside edges were approximately 4 inches apart. Mr. Robert Lyddon, Division Manager of Advanced Testing Services, confirmed that this was the standard testing procedure. Respondent's inspector, Mr. Kayser, was present and did not correct or contradict this statement in any way.

With respect to Violation No. 4, Respondent asserts that the DOT inspector must have observed the markings on a cylinder prior to final inspection, whereas Respondent inspects markings on finished, painted cylinders. Respondent also contends that it has never seen any of DOT's evidence and thus is unable to determine what the photographs show. The photographs taken by the DOT inspector are of a DOT 3AL cylinder, painted yellow, serial number A5306, stamped as having been inspected in 8/86 with Respondent's partially legible identification number IA11. Furthermore, Respondent was given specific notice of all of DOT's evidence and could have reviewed any or all of DOT's evidence by requesting an informal conference or a formal hearing, or by simply requesting copies of the evidence referred to in the Notice of Probable Violation.

With respect to Violation No. 5, Respondent asserts that the HMR do not specify a time limit within which test records are to be prepared and provided to the container manufacturer, and contends that a six-month limit is an arbitrary interpretation of the regulations. Respondent claims that it had the records available in its Pennsylvania home office and could have provided them to the California facility had it been requested to do so. The Chief Counsel determined that while 49 CFR 178.46–4(d)(12) does not specify a tme limit, Respondent must prepare and furnish records within a reasonable time period.

The Chief Counsel further determined that a six-month period without test records was not reasonable. Respondent's operations are subject to inspection at any time and the DOT inspectors must have sufficient current information available to conduct such

inspections. Respondent's contention that it could have provided the required reports had it been requested to do so is irrelevant. Resondent is required by 49 CFR 178.46–4(d)(12) to furnish complete test records to the cylinder manufacturer. Neither the cylinder manufacturer nor Mr. Kayser, Respondent's plant inspector, had copies of any test records for the entire period during which the cylinders had been manufactured.

In its June 16, 1988 letter, Respondent stated that the asessed civil penalty would severely impact on its ability to continue in buisness. Respondent was requested to provide a certified financial statement or other information to substantiate this claim. By letter dated June 29, 1988, Respondent submitted copies of Schedule C (Form 1040) for tax years 1985, 1986, and 1987 showing Mr. Ernest E. Steigerwalt's profit from operation of Steigerwalt Associates, a sole proprietorship. On June 14, 1988, Respondent was again asked to provide a certified balance sheet showing its current assets and liabilities, rather than the individual tax returns of Mr. Steigerwalt. Respondent did not choose to provide such information, and therefore I have relied on the information Respondent provided with its June 29 letter. By his failure to respond to requests for pertinent financial information, Mr. Steigerwalt effectively failed to substantiate his assertion that the assessed civil penalty would, in fact, severely impact the ability of Steigerwalt Associates to continue in business. The tax returns provided show that Mr. Steigerwalt had a net profit from operation of Steigerwalt Associates of $7,431 for 1985, $15,999 for 1986, and $13,628 for 1987, after deductions for payment of wages to an unidentified recipient of $15,000 for 1985, $14,600 for 1986, and $12,900 for 1987. This information not only does not support Respondent's claim that payment of a $6,000 penalty would severely impact its ability to continue in business, but on the contrary, reflects that Respondent is able to pay the penalty and still show a profit.

Finally, Respondent requested a meeting with the Administrator after review of the appeal. Respondent has already been afforded the opportunity for an informal conference or for a formal administrative hearing before an Administrative Law Judge. Respondent did not avail itself of either opportunity and accordingly has waived its right to a conference or a hearing. This appeal proceeding does not include any further opportunity for a conference or meeting.

Findings

Based on my review of the record, I find the following:

(1) The issues raised by Respondent on appeal are without merit.

(2) The civil penalty assessed in the Order was appropriate, and no basis exists for mitigation of the penalty.

Therefore, the Chief Counsel's Order of May 4, 1988, finding that Respondent knowingly violated 49 CFR 178.46–4(d), 178.46–4(d)(11), and 178.46–4(d)(12), and assessing a $6,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717.

Pursuant to that same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW, Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: August 24, 1988.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 87–43–SC]

Denial of Relief

In the Matter of: G.C. Industries, Inc., Respondent.

Background

On December 4, 1987, the Chief Counsel issued an order assessing a $2,000 civil penalty against G.C. Industries, Inc. (Respondent) for violations of 49 CFR 171.2(a) and 173.304(a) of the Hazardous Materials Regulations, as alleged in the Notice of Probable Violation of August 3, 1987. Respondent submitted an appeal by letters of December 16, 1987, and February 3, 1988. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent's bases for appeal are: (1) The permeation devices shipped by Respondent are entirely different from gas cylinders, and thus the gas cylinder regulations cannot be applied to them; (2) Respondent's competitors ignore the regulations and ship similar products by regular mail; (3) on November 16, 1987, Respondent applied for an exemption from the Department's packaging requirements; and (4) during the year ended December 31, 1986, Respondent lost $72,000, with an accumulated loss of $218,000.

I will discuss each of those issues in the order indicated above. First, a party shipping hazardous materials has a legal responsibility to ensure that those shipments comply either with the Hazardous Materials Regulations (49 CFR parts 171–179) or with an exemption from those regulations; the alleged inapplicability of the gas cylinder regulations to Respondent's shipments is irrelevant. Because Respondent elected to ship hazardous materials not in accordance with the regulations, it had no alternative but to obtain an exemption prior to shipping those materials.

Second, the alleged practices of Respondent's competitors are irrelevant to Respondent's legal responsibility to comply with the regulations. Any specific allegations of violations on the part of other parties would be investigated by the Office of Hazardous Materials Transportation.

Third, the fact that Respondent belatedly has applied for an exemption from the Hazardous Materials Regulations does not merit mitigation of the civil penalty for Respondent's violation.

Fourth, the financial information submitted by Respondent reflects cash on hand of over $38,000 and a current assets/current liabilities ratio of about 2.5 ($182,000/$74,000). That information indicates neither an inability to pay a $2,000 civil penalty nor any adverse effect of such a penalty on Respondent's ability to remain in business.

Findings

Based on my review of the record, I find the following:

(1) Respondent offered a hazardous material, hydrogen sulfide, for transportation in commerce in a non-specification packaging, in violation of 49 CFR §§ 171.2(a) and 173.304(a)(2).

(2) The issues raised on appeal by Respondent are without merit.

(3) There is no basis for mitigation of the civil penalty set forth in the Order.

Therefore, the Order of December 4, 1987, assessing a $2,000 civil penalty is affirmed, as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717 as well as a penalty charge of six percent (6%) per annum. Payment should be made by certified check or money order payable to the Department of Transportation, and sent to the Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW, Washington, DC 20590.

Date Issued: May 10, 1988.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Enf. Case No. 87–50–CR]

Denial of Relief

In the Matter of: Bennett Welding Supply Corp., Respondent.

Background

On January 21, 1988, the Chief Counsel, Research and Special Programs Administration (RSPA), issued an Order to Bennett Welding Supply Corp. (Respondent) assessing a penalty in the amount of $3,000 for violations of 49 CFR 171.2(c), 173.34(e)(1) and 173.34(e)(3). By letter dated February 26, 1988, the Respondent submitted a timely appeal of the Order, challenging it on two bases. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Respondent's bases for appeal are:

(1) Respondent contends that the results of the hydrostatic testing performed during the January 8, 1987 inspection are identical to the results shown in Respondent's records;

(2) Although Respondent's employee did not know which burette to use for retesting when questioned by the RSPA inspector, this is not a violation of 49 CFR 173.34(e)(3).

First Argument

Respondent's first argument is that the results of hydrostatic testing performed for the RSPA inspector on January 8, 1987, matches the results shown in Respondent's hydrostatic test records, and, therefore, there is no violation. However, Violation No. 1 is based on Respondent's failure to conduct an internal visual examination of the cylinder under § 173.34(e)(1), not the adequacy of its hydrostatic testing.

During the inspection, the RSPA inspector examined the inside of the cylinder and observed an excessive amount of iron oxide deposits caused by internal corrosion. Such an excessive buildup of iron oxide deposits creates a rebuttable presumption that Respondent failed to perform an internal visual examination of the cylinder. Respondent has failed to rebut this presumption. Moreover, Respondent's Vice President of Operations, Thomas J. Bennett, examined photographs of the cylinder during the December 9, 1987 informal conference and agreed that such a buildup would indicate that an internal visual examination was not performed.

Second Argument

Respondent's second argument is that it should not be cited for using hydrostatic equipment that could not be read to an accuracy of 1 percent simply because its employee, David Flight, selected an incorrect burette for retesting. Respondent argues that this evidence shows only that Mr. Flight misunderstood the RSPA inspector's question concerning which burette was to be used for retesting. However, there is sufficient evidence to show that Respondent violated § 173.34(e)(3). First, Mr. Flight stated that he has been retesting cylinders for Respondent for two years. When asked by the RSPA inspector which burette was used to test a cylinder (ICC 3AA 1800, Serial No. 36450) located near the retest equipment, Mr. Flight replied that the middle burette with 0.5 cc increments was used to test the cylinder. The retest record provided by Respondent indicated that this cylinder had been retested by Mr. Flight on January 7, 1987, the day before the inspection. The test report showed a total expansion of 9 cc's. Performing retesting on a cylinder of this size using a burette with 0.5 cc increments will not result in an expansion reading of within 1 percent or 0.1 cc as required by the regulations.

Findings

Based on my review of the record, I find the following:

(1) Respondent failed to conduct an internal examination on a cylinder that had been marked as properly inspected.

(2) Respondent, by marking a DOT specification cylinder, represented it as having been tested on hydrostatic equipment which had an expansion gauge that could not be read to an accuracy of 1 percent of total expansion or 0.1 cc.

Therefore, the Order of January 21, 1988, assessing a $3,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in (1) referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court, and (2) accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M.86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: August 9, 1988.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested

[Ref. No. 87–60–DM]

Denial of Relief

In the Matter of: Myers Container Corporation; Respondent.

Background

On April 5, 1988, the Chief Counsel assessed a $7,600 civil penalty against Myers Container Corporation (Respndent), for violations of 49 CFR 178.116–12(a)(1), 178.116–12(a)(2), and 178.131–11(a) of the Hazardous Materials Regulations (HMR). Respondent submitted an appeal by letter dated April 20, 1988. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent had knowingly (1) failed to conduct periodic drop tests and retain drop test samples on 20 gauge, 30-gallon DOT specification 17E drums, (2) failed to conduct periodic drop tests and retain drop test samples on 18/16 gaug

55-gallon DOT specification 17E drums, (3) failed to conduct hydrostatic pressure tests and retain hydrostatic test samples on 18/16 gauge, 55-gallon DOT specification 17E drums, and (4) failed to successfully pass a periodic drop test on 22 gauge, 55-gallon DOT specification 37A480 steel drums.

Respondent asserts three bases for appeal. First, Respondent states with respect to violation 1 that what "the original inspection report" [i.e., the Notice of Probable Violation] failed to state was that the drop test sample was located in the DOT retain area, was full of water, and was marked with the date dropped, the DOT specification, and "4 Foot Drop Test".

Respondent contends that the drum was intended to be dropped but that the operator was probably interrupted and failed to get back to it. The fact that Respondent's failure to conduct the required drop test may have been inadvertent does not excuse the occurrence of the violation. Furthermore, Respondent has already admitted, in an August 10, 1987 letter, that due to an oversight the retain sample had not been dropped, and stated that corrective action had been taken. The Chief Counsel mitigated the amount of the proposed penalty for this violation by $300 to reflect the corrective action, and no further mitigation is warranted.

Second, Respondent states, with respect to violations 2 and 3, that it conducted drop and hydrostatic tests for 20/18 gauge and 18 gauge 55-gallon DOT 17E drums. Respondent asserts that these drums are the same type and size as 18/16 gauge 55-gallon DOT 17E drums, and therefore it was not in violation of 49 CFR 178.116–12 which requires that each packaging design type must successfully pass the tests. Contrary to Respondent's contention, 49 CFR 178.116–12(a) provides that a "packaging design type" is defined by the design, size, material, thickness, and manner of construction. "Thickness" means gauge. Moreover, a different thickness would also require a change in the manner of construction because the seamer would have to be adjusted to accommodate a different gauge. Respondent's 18/16 gauge 55-gallon DOT 17E drums are separate packaging design types requiring testing as specified in 49 CFR § 178.116–12.

Finally, Respondent contends that the Chief Counsel's Order erred in stating that prior enforcement actions have been taken against Respondent. Respondent asserts that it is a new corporation formed in 1984, and that it is not a successor in interest to Myers Drum Company, but acquired "only certain assets" of Myers Drum Company, not the corporation itself. The Chief Counsel was responding to Respondent's argument that "other manufacturing" facilities of the same company have recently experienced the same investigation without any noted violations." The Chief Counsel countered this argument by noting that prior enforcement actions had been taken for violations at Respondent's Portland, Oregon and Oakland, California plants, and that a warning letter had been issued to Respondent's San Pablo, California plant.

In considering Respondent's contention concerning its relationship to Myers Drum Company, I observe the following:

(1) A January 4, 1985 letter from John W. Cutt, President of IMACC Corporation (of which Respondent is a division) stating that IMACC had "recently acquired the assets of Myers Drum Company's three steel drum manufacturing plants located in Portland, Oregon; Richmond, and Los Angeles, California."

(2) Respondent's corporate officers responsible for operation and compliance performed similar functions for Myers Drum Company, e.g., John W. Cutt, President of IMACC, was president of Myers Drum Company, and Roger C. Stavig, IMACC's Vice President-Manufacturing, was the manager of Myers Drum Company's Portland, Oregon plant.

(3) Respondent, Myers Container Corp., has continued to manufacture steel drums at the same plants and in the same locations as did Myers Drum Company.

Therefore, I conclude that while Respondent may have acquired only certain assets of Myers Drum, the two entities are so closely aligned that for enforcement purposes Myers Container Corporation may be considered the successor in interest to Myers Drum Company.

Findings

Based on my review of the record, I find the following:

(1) The issues raised by Respondent on appeal are without merit.

(2) The civil penalty was mitigated in the Order by an appropriate amount, and no basis exists for further mitigation of the penalty.

Therefore, the Chief Counsel's Order of April 5, 1988, finding that Respondent knowingly violated 49 CFR 178.116–12(a)(1), 178.116–12(a)(2), and 178.131–11(a), and assessing a $7,600 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in (1) referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court, and (2) accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: August 1, 1988.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested

[Enf. Case No. 87–63–RNC]

Denial of Relief

In the Matter of: Contract Courier Services, Inc., Respondent.

Background

On February 8, 1988, the Chief Counsel, Research and Special Programs Administration (RSPA), issued an Order to Contract Courier Services, Inc. (Respondent), assessing a penalty in the amount of $18,000 for violations of 49 CFR 171.2(b) and 177.942(b). By letter dated March 2, 1988, Respondent submitted a timely appeal of the Order, challenging in on four bases. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent asserts four bases for its appeal:

(1) Respondent did not "knowingly" commit any acts which violated the regulations;

(2) Respondent's method of stowing radioactive materials does not violate 49 CFR 177.842(b);

(3) The February 8, 1988 Order failed to give appropriate weight to the unusual circumstances which led to the storage violation;

(4) The proposed civil penalties are excessive in view of the level of fines established in the Sentencing Guidelines for United States Courts for criminal

violations of the Hazardous Materials Regulations (regulations) under 49 U.S.C. 1809(b).

First Argument

Respondent's first argument is that the standard for a knowing violation within the meaning of 49 U.S.C. 1809(a)(1) does not permit imposition of a penalty on persons who "should have known" facts giving rise to the violation. Respondent argues that although 49 CFR 107.299 provides that a violation is committed when a person should have known of facts giving rise to a violation, the legislative history of 49 U.S.C. 1809(a)(1) suggests that civil penalties may be imposed only in the event that a defendant knowingly commits an act which is a violation. RSPA considered the legislative history of 49 U.S.C. 1809(a)(1) in lawfully promulgating 49 CFR 107.299 which states that "knowingly" means:

> that a person who commits an act which is a violation of the Act or of the requirements of this subchapter . . . commits that act with knowledge or knowingly when that person (1) has actual knowledge of the facts that give rise to the violation, or (2) should have known of the facts that give rise to the violation. A person knowingly commits an act if the act is done voluntarily and intentionally. Knowledge or knowingly means that a person is presumed to be aware of the requirements of the Act and this subchapter. . . . Knowledge or knowingly does not require that a person have an intent to violate the requirements of the Act or the requirements of this subchapter. . . .

Under this definition, Respondent knowingly placed packages of radioactive material closer than the allowable distances in an area occupied by employees. Even if Respondent did not know that the packages in question were closer than the allowable distance, Respondent should have known this. Therefore, the argument that the Respondent did not knowingly violate the regulations is without merit.

Second Argument

Respondent's second argument is that its method of stowing radioactive materials does not constitute a violation of the regulations. Respondent contends that its normal stowage method involves placement of radioactive packages at least 20 feet apart from each other. Respondent's contention does not address the crux of the storage violation. Respondent is being cited for a storage violation on the date of the inspection, not for its "normal stowage method." During his inspection, Inspector Shuler photographed radioactive packages at Respondent's facility that were closer than a distance of 20 feet apart.

Respondent also contends that it physically painted and marked the storage areas. Inspector Shuler's photographs refute this claim. Moreover, Respondent, in its appeal, admits to the storage violation by stating that incoming materials may have remained together for a short time as part of the vehicle unloading process. Respondent further admitted that a group of radioactive packages were stored together on the date of the inspection in question. Based on these two admissions found in Respondent's appeal and the photographs taken by Inspector Shuler of Respondent's facility, Respondent did violate the regulations by storing radioactive packages at its facility at a distance of closer than 20 feet.

Third Argument

In its third argument, Respondent claims that the February 8, 1988 Order failed to give appropriate weight to the unusual circumstances and desire to avoid exposure to the public which led to the storage violation. Respondent describes the unusual circumstances as a "significant possibility" that a dissatisfied former employee of Respondent who knew of the inspection in question may have removed a padlock from one of the storage bins in order to disrupt Respondent's storage process. Respondent has not produced any evidence of a former employee having notice of Inspector Shuler's inspection leading to removal of the padlock. Respondent further contends that the storage of radioactive packages in one location was a direct result of the missing padlock and was intended to reduce public safety risks by returning the radioactive packages to the bin with the remaining padlock. Respondent has not produced any evidence of a former disgruntled employee's intentional removal of a padlock from one of the storage bins. Even if this were true, this does not excuse Respondent from the storage violation. Similarly, Respondent's professed intent to avoid public exposure does not excuse the violation. The Chief Counsel mitigated the amount of penalty by $1,000 for corrective actions taken and no further mitigation is warranted.

Fourth Argument

Respondent, in its fourth argument, claims that the penalties assessed in the February 8, 1988 Order are excessive in view of the Sentencing Guidelines established for United States Courts for criminal violations of the Hazardous Materials Regulations. First, the Sentencing Guidelines to which Respondent refers apply solely to Federal courts, not Federal agencies. Further, the guidelines apply to criminal cases, not civil ones. The case in question is neither in Federal court, nor is it a criminal proceeding. This is a civil enforcement action brought by a Federal agency which has assessed a civil penalty against Respondent for violations of the Hazardous Materials Regulations. Therefore, the Sentencing Guidelines are not applicable to this case. Moreover, the Chief Counsel mitigated the proposed civil penalties for each of the three violations in the February 8, 1988 Order based on corrective actions taken by Respondent. No basis for further mitigation exists.

Findings

Based on my review of the record, I find the following:

(1) Respondent knowingly committed acts which violated 49 CFR 171.2(b) and 177.842(b).

(2) Respondent violated 49 CFR 177.842(b) by storing packages of radioactive materials at a distance of less than 20 feet apart.

(3) The February 8, 1988 Order gave appropriate weight to the factors involved in Respondent's case involving the storage violation.

(4) The proposed civil penalties are not excessive, and the Sentencing Guidelines for United States Courts do not apply to this case because it is not a criminal proceeding.

(5) The civil penalty was mitigated in the Order by an appropriate amount, and no basis for further mitigation of the penalty exists.

Therefore, the Chief Counsel's Order of February 8, 1988, finding that Respondent knowingly violated 49 CFR 171.2(b) and 178.842(b) and assessing an $18,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in (1) referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court, and (2) accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations

Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: August 9, 1988.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested

[Ref. No. 87-67-EXR]

Denial of Relief

In the Matter of: Seradyn, Inc., Respondent.

Background

On December 21, 1987, the Chief Counsel, Research and Special Programs Administration (RSPA), issued a Final Order to Respondent, assessing a penalty in the amount of $4,000 for violations of 49 CFR 171.2(a), 173.242(a) and 173.286(c). By letter dated January 6, 1988, the Respondent submitted a timely appeal of the Order, challenging the amount of the penalty assessment on four bases. The Chief Counsel's Final Order is incorporated by reference.

Discussion

The Respondent's bases for appeal are: (1) Respondent did not "intentionally" commit acts that violated the Hazardous Materials Regulations (49 CFR Parts 171-179) (HMR); (2) Respondent's Exemption DOT-E 6702 would have been routinely renewed if the renewal application had been filed in a timely manner; (3) Respondent, to the best of its knowledge, had not committed any prior hazardous materials violations; and (4) the amount of the assessed civil penalty was excessive.

Respondent's first assertion, that it did not "intentionally" commit violations of the HMR, is irrelevant. Under 49 CFR 107.299, a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts; there is no requirement that the person actually knew of, or intended to violate, the legal requirements. Consequently, Respondent's contention that it did not "intentionally" violate the regulations is without merit.

Respondent's second basis for appeal is that, based on its operating experience under DOT-E 6702, the exemption renewal would have been routinely granted. The probability of exemption DOT-E 6702 being renewed does not alter the fact that Respondent was transporting a large volume of hazardous materials under an expired exemption. Respondent admits that it transported 45,500 hazardous materials packages between January 1986 and August 1987 after expiration of the exemption authorizing such transportation. The probability of exemption renewal does not obviate the necessity for timely application for renewal or authorize continued transportation after the exemption expires.

Respondent's third basis for appeal is that it has not been cited for any previous hazardous materials violations. Respondent's compliance record was taken into account in establishing the proposed penalty in this case, and no further mitigation is warranted.

Finally, Respondent has asserted that imposition of a $4,000 civil penalty would have an adverse effect upon its financial viability. However, Respondent failed to submit any financial information or documents supporting this contention. Without such information or documents substantiating Respondent's contention of economic hardship, inability to pay the penalty being imposed, or adverse effect of such a penalty on its ability to continue in business, there is no basis on which to provide mitigation.

Findings

The four issues raised by the Respondent in its appeal have been considered. I find that sufficient evidence has not been presented to warrant mitigation of the assessed civil penalty. Therefore, the Chief Counsel's Order of December 21, 1987, finding that Respondent knowingly violated 49 CFR 171.2(a), 173.242(a) and 173.286(c), and assessing a $4,000 civil penalty is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in (1) referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court, and (2) accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M-86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: August 10, 1988.

M. Cynthia Douglass,

Administrator Research and Special Programs Administration.

Certified mail—Return receipt requested

[Enf. Case No. 87-71-SD]

Denial of Relief

In the Matter of: Twin Terminal Services, Inc., Respondent.

Background

On February 16, 1988, the Chief Counsel, Research and Special Programs Administration (RSPA), issued an Order to Twin Terminal Services, Inc. (Respondent) assessing a penalty in the amount of $8,000 for violations of 49 CFR 171.2(a), 172.202(a)(1), 172.202(a)(3), 172.202(a)(4), 172.204(a), 173.30, and 176.83(d)(1). By letter dated March 17, 1988, Respondent submitted a timely appeal of the Order, challenging it on two bases. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Respondent's bases for appeal are:

(1) Respondent has had no history of prior violations in the 20 years it has been in operation. Respondent admits that it made mistakes which led to the alleged violations and that corrective action has been taken; and

(2) Respondent is financially unable to pay the proposed civil penalty.

First Argument

Respondent's first argument is that it has been in business for 20 years and has no history of prior violations. During this period, Respondent states that it has always handled its cargo with utmost care and has never experienced problems. However, it is clear that Respondent has failed to appreciate the potential level of danger involved in the incorrect intermodal transportation of hazardous materials. Respondent placed into a single freight container for ocean transportation two corrosive materials, one flammable liquid, a flammable solid, and an oxidizer totalling 10,671 pounds. As all of these classes of materials are required to be segregated and not loaded into the same freight container as required by 49 CFR 173.30, 176.83(b), and 176.83(d)(1), Respondent can hardly assert that it is exercising a high degree of care in its day-to-day operations.

Respondent further asserts that it was relying on Marine Cargo Management to

identify the hazardous material contents of the containers in question. Respondent is unjustified in relying on Marine Cargo Management to inform it of the contents of the container. Respondent physically loaded and offered this incompatible freight container for ocean transportation, and it was Respondent's responsibility to ensure that the materials were in proper condition for transportation. Respondent also failed to provide shipping papers with hazardous materials shipping descriptions and shipper's certifications. Moreover, Respondent admitted that it made mistakes which led to the violations and takes full responsibility for their occurrences.

Second argument

Respondent's second argument is that it is financially unable to pay the proposed civil penalty. Respondent submitted copies of its financial statements for the years 1985 through 1987, and bank statements for the period October 1987 through February 1988. However, the bank statements show an average balance on hand of over $24,000. This indicates that Respondent is able to pay the assessed civil penalty. Respondent's financial statements show a total depreciation of $909,000. This does not affect Respondent's current ability to pay because depreciation has no effect on cash flow. Therefore, I find that the financial data provided by Respondent indicates its ability to pay the proposed penalty, and its assertion of financial difficulty is without merit.

Findings

Based on my review of the record, I find the following:

(1) Respondent offered for transportation in commerce hazardous materials without placing the proper shipping names, identification numbers, and quantities on the shipping papers.

(2) Respondent offered for transportation in commerce hazardous materials without placing a shipper's certification on the shipping papers.

(3) Respondent loaded in a single freight container hazardous materials which are required to be segregated, and offered it for ocean transportation.

(4) The proposed civil penalty was mitigated in the Order by an appropriate amount, and no basis for further mitigation of the penalty exists.

Therefore, the Order of February 16, 1988, assessing an $8,000 civil penalty is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in (1) referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court, and (2) accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation," and sent to the Chief, Accounting Branch Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW, Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: July 21, 1988.

M. Cynthia Douglass.

Administrator.

Certified mail—Return receipt requested

[Enf. Case No. 87–76–SD]

Partial Grant of Relief

In the Matter of: Nuodex, Inc., Respondent.

Background

On February 12, 1988, the Chief Counsel, Research and Special Programs Administration, issued an Order to Nuodex, Inc., (Respondent) assessing a penalty in the amount of $5,000 for violations of 49 CFR §§ 171.2(a), 172.301(a) and 173.346(a). By letter dated March 28, 1988, Respondent submitted a timely appeal of the Order, challenging it on two bases. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Respondent's bases for appeal are:

(1) The drums used by Respondent to transport hazardous materials met or exceeded DOT packaging standards; and

(2) Respondent marked the drums with the proper international and domestic shipping name.

First Argument

Respondent's first argument is that the drums in which it transported hazardous materials met or exceeded DOT standards. Respondent also maintains that the marking "GDH" is on file with DOT and therefore verifies compliance insofar as materials used. GDH is a DOT registered symbol which serves only to identify the container manufacturer. Marking a drum in such a manner does not qualify it as a DOT specification drum. In order to make it a DOT specification drum, the DOT specification marking must be placed on the container.

That marking acts as the manufacturer's certification to the user that the container complies with the specification requirements. Therefore, Respondent's drums are not DOT specification packages even though they were marked with the GDH marking. Finally, Respondent contends that the packaging is superior and posed no greater safety hazard than if the drums had been marked in accordance with DOT standards. This argument is irrelevant to Respondent's obligation to mark the drums with the DOT specification marking.

Second Argument

In its second argument, Respondent contends that it marked its drums with the proper international and domestic shipping name. Respondent also claims that toxicological and other precautionary information were included on the label. Respondent submitted a copy of a product label representative of the type used on the drums in question. Although the international description is incorrect (Class B poison, UN 2290), the DOT shipping description is correct (Poison B liquid, n.o.s. UN 2810). Since the product labels submitted by Respondent were marked with the proper DOT shipping name and since there is insufficient evidence that the drums observed during the July 28, 1987 inspection were not properly marked, Violation No. 2 is dismissed and the civil penalty of $2,000 for this violation is eliminated. Respondent is advised, however, that it must discontinue its practice of labeling its drums containing Class B poison as "Isophorine Diisocyanate" and label them under 49 CFR 172.102 as "Isophorone Diisocyanate."

Findings

Based on my review of the record, I find the following:

(1) Respondent offered for transportation hazardous materials in packaging not authorized under the regulations.

(2) There is insufficient evidence to support a finding that Respondent improperly marked its drums. Therefore, elimination of the $2,000 civil penalty for this violation is granted.

Therefore, the Chief Counsel's Order of February 12, 1988, is modified by dismissing Violation No. 2 and reducing the assessed civil penalty to $3,000.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in (1) referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court, and (2) accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: August 9, 1988.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested

[Ref. No. 88–01–CR]

Denial of Relief

In the Matter of: Atlantic Fire Systems, Inc., Respondent.

Background

On July 28, 1988, the Chief Counsel of the Research and Special Programs Administration (RSPA) assessed a $4,500 civil penalty against H & M Fire Company, predecessor to Atlantic Fire Systems, Inc. (Respondent) for violations of 49 CFR 173.34(e)(1), 173.34(e)(l)(i), and 173.34(e)(3) of the Hazardous Materials Regulations (HMR). Respondent submitted an appeal by letter dated August 26, 1988. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent had knowingly: (1) Represented that it had retested DOT specification cylinders by marking them with a retester's identification number (RIN) that had not been issued by RSPA to the Respondent; (2) performed periodic retests on DOT specification cylinders with equipment that had a pressure gauge which could not be read to 1 percent of test pressure and an expansion gauge that could not be read to 1 percent of total expansion; and (3) performed periodic retests on DOT specification cylinders without properly conducting external visual inspections in accordance with CGA Pamphlet C–6.

With respect to Violation No. 1, Respondent stated that it had purchased Sun Jan Fire Equipment on December 31, 1986, and understood from representations by the seller that the seller could assign the RIN to Respondent, to be used until Respondent obtained its own RIN. Respondent stated that it had continued to use the same personnel as had performed services for the seller, and contended that 49 CFR 173.34(e)(1)(i) allows assignment of a RIN to remain valid with the use of the same personnel and equipment. Finally, Respondent stated that after acquiring Sun Jan Fire Equipment it had undertaken to obtain its own RIN, and in fact was inspected for that purpose by an independent inspection agency shortly after the RSPA inspection.

Despite what Respondent may have understood from the seller, the Hazardous Materials Regulations at 49 CFR 173.34(e)(1)(i) provide that no person may represent that he has retested a DOT specification cylinder unless that person holds a current RIN issued by RSPA. There is no provision in the regulations authorizing the transfer or assignment of a RIN from one person to another. Respondent's contention that assignment of a RIN is allowed provided the same personnel and equipment are used is incorrect. The regulation to which Respondent apparently refers is 49 CFR 173.34(e)(l)(v), which provides that the "authority to perform retesting under this section, as reflected by assignment of a current retester identification number, remains valid as long as the level of personnel qualifications, and equipment used, is maintained at least equivalent to the level observed at the time of inspection by the independent inspection agency." This regulation does not authorize assignment of a RIN from one person to another, but, in fact, circumscribes RSPA's assignment of a RIN. Therefore, whether Respondent continued to use the same personnel and equipment is irrelevant; Respondent had not been issued a RIN by RSPA and accordingly lacked authority to retest DOT specification cylinders.

Respondent, however, did undertake to obtain its own RIN, as evidenced by an application filed with RSPA on June 24, 1987. Although the application was not made until after the June 2, 1987 RSPA inspection, Respondent had made the necessary arrangements with an independent inspection agency prior to that date. In view of Respondent's efforts to obtain a RIN, I find that mitigation of $500 for Violation No. 1 is appropriate.

With respect to Violation No. 2, Respondent contends that within a few days after the RSPA inspection, the pressure gauge was inspected by the independent inspection agency and certified to be accurate, and, therefore, "any problem with the gauge is inexplicable to the Respondent."

The report of the independent inspection agency includes on page 7, "Note: For this inspection Calibrated cylinder from fayettville [sic] was used." In addition, on page 6 of the report, the primary test gauge is identified as having increments of 20 pounds per square inch (psi). The gauge examined and photographed by the RSPA inspector had 25 psi increments. Based on this evidence, it appears that a different calibrated cylinder and gauge were used for the June 8, 1987 inspection by the independent inspection agency. Respondent has not presented any information to contradict the evidence in the record that the gauge inspected and photographed by RSPA on June 2, 1987, could not be read with the required accuracy and that Respondent did not have any method of calibrating its hydrostatic testing equipment.

With respect to Violation No. 3, Respondent denied that it had failed to conduct external visual inspections, and stated that the duct tape on the side of the cylinder was there "merely to record the owner of the tank and was no more than a decal placed on a CO2 fire extinguisher by the manufacturer."

The cylinder in question was photographed by the RSPA inspector. The tape on the cylinder's lower sidewall was neither duct tape nor a manufacturer's label, but an abrasive tape used to keep the cylinder (a dive tank) from moving around in a backpack. Respondent's shop foreman, Mr. Donald Bradshaw, stated that the black tape was not removed when the cylinder was retested. Regardless of the purpose of the tape, anything which prevents the inspector from examining the entire external surface of the cylinder, including manufacturer's labels and tape, must be removed prior to inspection.

Respondent also disputed the statement atrributed to Mr. Bradshaw that he failed to remove metal bands from DOT specification cylinders prior to retest and reinspection. Respondent stated that it had observed Mr. Bradshaw's retesting on numerous occasions and the bands were always removed. Respondent also suggested that Mr. Bradshaw "was a friend of the Seller and any such statement if made

by him must have been made with malicious intent." Respondent asserted as a general matter that a dispute had arisen between Respondent and the seller, that the seller had threatened to wreck Respondent's business, and that Respondent believes that RSPA inspection was initiated by the seller.

Mr. Bradshaw told the RSPA inspector during the June 2, 1987 inspection, in response to a direct question, that he did not remove the bands to check for corrosion. Mr. Bradshaw's contemporaneous statement has not since been contradicted by an affidavit or other evidence. Moreover, I am not persuaded by Respondent's statements concerning an alleged dispute with the seller that Mr. Bradshaw had any reason to make a false statement. At the time the statement was made, Mr. Bradshaw was in Respondent's employ and would have had no incentive to jeopardize his position with Respondent. Furthermore, the RSPA inspection was not initiated based on a complaint by the seller. The decision to inspect Respondent was not made by the RSPA inspector until June 1, 1987, when he heard that Respondent was retesting but Respondent did not appear on his list of registered retesters.

Finally, Respondent requested an informal telephone conference. Respondent was already afforded the opportunity to request an informal conference or a formal hearing before an Administrative Law Judge. Respondent failed to avail itself of either opportunity and accordingly has waived its rights to a conference or hearing. This administrative review proceeding does not include any further opportunity for a conference or hearing of any kind.

Findings

Based on my review of the record, I find the following:

(1) Respondent has provided information sufficient to warrant mitigation of $500 for Violation No. 1.

(2) Respondent did not provide any information to warrant mitigation of the civil penalties assessed for Violation Nos. 2 and 3.

Therefore, the Chief Counsel's Order of July 28, 1988, finding that Respondent knowingly violated 49 CFR 173.34(e)(1), 173.34(e)(1)(i), and 173.34(e)(3) is modified by reducing the civil penalty from $4,500 to $4,000. The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to that same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: November 18, 1988.

M. Cynthia Douglass.

Certified mail—Return receipt requested

[Enf. Case. No. 88–05–CM]

Action on Appeal

In the Matter of: General Processing Corp., Respondent.

Background

On December 14, 1988, the Chief Counsel, Research and Special Programs Administration (RSPA), issued an Order to General Processing Corporation (Respondent) assessing a penalty in the amount of $15,000 for violations of 49 CFR 171.2(c), 178.51–4(d), 178.51–14(a), 178.51–19(c)(1), 178.61–4(d), 178.61–14(a), 178.61–14(d)(2), 178.61–15(a) and 178.61–15(b). By letter dated January 16, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent contends that, with respect to Violation No. 5, it took steps to ensure that none of the 205 involved cylinders were used until the required testing had been completed. Its March 16, 1989 letter clarified and reaffirmed this pont. This remedial action to correct the absence of prior physical testing of the cylinders merits mitigation of the $3,000 civil penalty for Violation No. 5 to $2,000.

With respect to Violation No. 7, Respondent argues that the civil penalty is unfair because it had been misled by a 1982 OHMT inspection and OHMT's failure to respond to its 1983 letter explaining its stamping procedures. Respondent made this same argument in response to the original Notice, and, in recognition thereof, the Chief Counsel's Order reduced the $1,000 proposed penalty to $500. No new information has been presented, and no additional mitigation is warranted.

Findings

Based on my review of the record, I find the following:

(1) Mitigation of $1,000 is warranted for remedial action taken by Respondent with respect to Violation No. 5.

(2) No additional mitigation is appropriate with respect to Violation No. 7 or any other violations.

Therefore, the Order of December 14, 1988, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the $15,000 civil penalty assessed therein is hereby mitigated to $14,000.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate of seven percent (7%) in accordance with 31 U.S.C. § 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: April 24, 1989.

Travis P. Dungan,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 88–10–CR]

Denial of Relief

In the Matter of: Fire Foe Corporation, Respondent.

Background

On October 12, 1988, the Chief Counsel of the Research and Special Programs Administration (RSPA) assessed a $3,000 civil penalty against Fire Foe Corporation (Respondent) for violations of 49 CFR 173.34(e)(1) and 173.34(e)(3) of the Hazardous Materials Regulations (HMR). Respondent submitted an appeal by letter dated November 7, 1988. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent had knowingly: (1) Performed periodic retests on DOT specification cylinders without properly conducting internal visual inspections in accordance with the Compressed Gas Association (CGA) Pamphlet C–6 by failing to use an inspection light of sufficient intensity to clearly illuminate the interior walls of the cylinder; and (2) performed periodic retests on DOT specification cylinders with equipment that had a pressure gauge which could not be read to one percent (1%) of test pressure and an expansion gauge that could not be read to one percent (1%) of total expansion or 0.1 cubic centimeter (cc).

In its November 7 appeal, Respondent stated that it had not been provided with certain information it had requested earlier to enable it to respond to the Notice of Probable Violation issued on April 22, 1988. Respondent also asserted that the RSPA attorney then assigned to the case had acted unethically. By letter dated December 7, 1988, Respondent was provided with a complete copy of the enforcement file and the other information it had requested, and was given 45 days from receipt to submit any additional information it desired the Administrator to consider. Respondent was also advised that in order for the Administrator to consider the allegation concerning unethical conduct, Respondent would need to provide specific, factual information to support it. Respondent did not reply to RSPA's December 7, 1988 letter, although Respondent received it on December 13, 1988, as evidenced by return of the certified mail receipt. Accordingly, I find that Respondent's allegations concerning a lack of information necessary to its defense and the conduct of the RSPA attorney are without merit.

With respect to Violation No. 1, Respondent stated that it has four different types of inspection lights available, including two "mini" lights, which the hydrotest stand operators can choose to use based on their belief as to which will best illuminate the interior of a cylinder. Respondent stated that the RSPA inspectors were advised that the "overall hydrotest supervisor" was not available that day, but that the RSPA inspectors refused to delay the inspection until the next day when the supervisor would be available. Respondent alleged that the RSPA inspectors waited more than two hours after observing the inspection of cylinders before requesting that Respondent show them the available inspection lights. Respondent asserted that the test stand operator had already left for the day and the remaining office personnel were unable to locate the small lights which presumably would have illuminated the interior of the cylinders. Respondent also alleged that the light used by the test stand operator provides "the same or greater field of view inside the cylinder as the mini light."

The evidence in the record includes a statement from Mr. Daniel Marino, Respondent's retest operator, to the effect that when he could not see the interior walls of a cylinder he relied on the hydrostatic test to reveal any weakened areas. The RSPA inspectors asked Mr. Marino at the time of the inspection to show them the light he used to inspect five-pound cylinders of that type. Mr. Marino showed the inspectors the inspection light, which they photographed and which did not fit inside the cylinder or clearly illuminate the interior walls as required for a proper visual inspection. Respondent's assertion that other inspection lights were available is irrelevant. The violation which occurred in this instance occurred because Mr. Marino chose to conduct a visual inspection using an inadequate inspection light. Respondent's other assertions are erroneous, irrelevant or both.

With respect to Violation No. 2, Respondent stated that it closed its hydrotest operations for nine days, from September 11, 1987, through September 20, 1987, while its principal operator was on vacation. Respondent stated that on September 21, 1987, when it resumed operations, it placed a new gauge on the machine, conducted a calibration test which was observed by three people, and then, at lunch time, began to have difficulties with leaks. Respondent stated that it had stopped operations to determine the problem and had decided to bring a second test stand into operation when the RSPA inspectors arrived. Respondent alleged that, despite its request that the RSPA inspectors return in the morning, the inspectors stated that they were pressed for time and requested that Respondent hydrotest cylinders so that they could observe Respondent's operation.

Respondent stated that after it had tested a number of cylinders, the RSPA inspectors requested a calibration test. Respondent alleged that each time it raised the pressure in order to locate the leaks it had discovered in the morning, the RSPA inspectors called it an attempt at calibration, which Respondent asserts it was not. Respondent stated that it discovered a screw on the back of the pressure gauge was not seated properly and that the following day it corrected this problem by removing the gauge and reseating the screw. Respondent contends that the gauge was accurate with the screw in the correct position and that the RSPA inspectors' "lack of time to properly inspect our facility resulted in allegations that are without merit."

The inspection report, with which Respondent was provided a copy, states that Mr. Kenneth Foerster, Respondent's Operations Manager, was unable to provide any explanation of why the equipment could not be calibrated. At no time during the inspection did the RSPA inspectors observe, nor did Respondent mention, that a second hydrotest stand existed or was being brought into operation. It is standard practice for RSPA inspectors to inspect each and every hydrotest stand. Respondent did not tell the RSPA inspectors at the time of the inspection that the leaks had recently developed. In fact, the RSPA inspectors observed that testing was being conducted on the test stand in question when they arrived. Several DOT specification cylinders had already been stamped as having been successfully retested on the test stand in question despite the fact that Respondent was unable to calibrate the equipment. Furthermore, even when all the leaks had been located and all pressure released from the system, the pressure gauge still indicated 100 psi. The fact that Respondent may have corrected the problem the following day does not excuse retesting DOT specification cylinders on equipment which could not be read to the required accuracy. The information provided by Respondent in its appeal is insufficient to overcome the preponderance of the evidence obtained at the time of the inspection which indicates that Respondent was in violation of 49 CFR 173.34(e)(3).

Finally, Respondent alleged that throughout the RSPA inspection "there was a constant state of confusion," and that it "looked like a teacher-student situation," with one inspector appearing "to be constantly distracted by questions from the other inspector." The RSPA inspectors informed Mr. Foerster at the beginning of the inspection that Inspector Henderson would be instructing Inspector LaMagdelaine and that all questions should be directed to Inspector Henderson. The RSPA inspectors noted that Mr.. Neil Crowley, who appealed on behalf of Respondent, did not appear until more than half the RSPA inspection had been completed. Furthermore, the RSPA inspectors

advised both Mr. Foerster and Mr. Crowley at the exit interview of the probable violations they had observed and the possible enforcement actions which might be taken. Neither Mr. Foerster nor Mr. Crowley made any contemporaneous statements to attempt to explain, excuse, or deny the probable violations. Respondent's version of events, as presented in its appeal, is simply not persuasive when measured against the evidence in the record.

Findings

Based on my review of the record, I find the following:

(1) Respondent's assertions are without merit.

(2) Respondent did not provide any information to warrant mitigation of the civil penalties assessed for the violations cited in the Order.

Therefore, the Chief Counsel's Order of October 12, 1988, finding that Respondent knowingly violated 49 CFR 173.34(e)(1) and 173.34(e)(3), and assessing a civil penalty of $3,000, is affirmed as being substantiated on the record and in accordance with the assessment criteria prescribed in 49 CFR 107.331. The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operation Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to that same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: February 17, 1988.

M. Cynthia Douglass.

Certified mail—Return receipt requested

[Ref. No. 88–22–PTM]

Action on Appeal

In the Matter of: Rotational Molding Inc., Respondent.

Background

On February 7, 1990, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Rotational Molding Inc. (Respondent), assessing a civil penalty for violations with respect to its DOT–E 9503 exemption to manufacture 300-gallon polyethylene portable tanks. Respondent was found to have knowingly: (1) manufactured, marked, and sold these tanks without conducting the periodic hydrostatic pressure, cold drop, and ambient drop tests; (2) manufactured and marked these tanks with a minimum wall thickness less than 0.224 inches; (3) manufactured and marked these tanks without a pressure relief device that would not open at less than 10 psig or more than 15 psig; (4) manufactured and sold these tanks without embossing the serial number on the tanks; and (5) manufactured, marked, and sold these tanks without including the month that the tanks were manufactured, in violation of 49 CFR 171.2(c) and 178.19–7, and DOT–E 9503, paragraphs 7.a.ii., 7.a.iv., 7.a.v., 7.b.(ii) and 7.c. In the Order, the Acting Chief Counsel waived the civil penalty proposed for violation 5 and assessed a civil penalty of $12,500, reduced from the $20,000 civil penalty originally proposed in the July 22, 1988 Notice of Probable Violation (Notice). The Acting Chief Counsel's Order is incorporated by reference. By letter dated February 21, 1990, Respondent submitted a timely appeal of the Order.

Discussion

In its appeal, Respondent accepts the civil penalties assessed for violations 1 and 3, totalling $6,000. Respondent requests that the civil penalties for violations 2 and 4, totalling $6,500, be dismissed.

Concerning violation 2, Respondent argues that it had established the minimum wall thickness of .224 inches for its exemption, DOT–E 9503, using its own testing methods and equipment. Even though it admits that the ultrasonic tester revealed "spot" inconsistencies in thickness, Respondent avers that it is "highly unlikely that these reflect actual wall thickness." Its basis for this declaration is that if any of the specified number of conditions had been present during testing, the ultrasonic device would have presented a false reading. Not only does Respondent fail to state, let alone demonstrate, that any of those conditions was present, it neglects to mention that the wall thickness measurements of less than .224 inches obtained during the inspection had been taken by Respondent using its own ultrasonic testing device. Moreover, the appeal implies that Respondent had used the same device in its testing when it established the minimum wall thickness of .224 inches.

Respondent also asserts that its violation was not "knowingly" and refers to an argument it had made in response to the Notice, i.e., that it had mistakenly specified minimum wall thickness instead of average wall thickness in its original application for exemption. The Acting Chief Counsel's Order stated that "[i]f Respondent determined that the Exemption issued to it did not read as it intended, Respondent's remedy was to request a correction to the Exemption." The Order then admonished Respondent that "[i]t was not to disregard the plain language of the Exemption." In its appeal, Respondent claims that it did not disregard that language; it implies that it did not realize what the exemption required until after the November 3, 1987 inspection. Respondent knew that it had an exemption and that it was responsible for complying with it. Respondent's failure to read the exemption does not excuse Respondent from complying with its terms. A knowing violation occurs when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts; there is no requirement that the person actually know of, or intend to violate the legal requirements. Respondent's conduct thus met the definition of a "knowing" violation.

Respondent's final argument regarding violation 2 is that wall thickness is determined by charging a specific amount of resin to cover a specific number of square inches. Respondent contends that because the charge weights were correct, the tanks weighed the correct amounts, and the mold size had not changed, it could not selectively alter or control wall thickness. Respondent appears to be saying that, given this manufacturing process, it is not possible to obtain wide variations in wall thickness. Nevertheless, the inspection revealed wall thickness readings as low as .187 inches and as high as .261 inches. It is simply not a credible argument to state that something that did occur—wide variations in wall thickness readings—could not have occurred.

Violation 4 cited Respondent for failing to emboss the serial number on its exemption tanks. Following its receipt of the Notice, Respondent had argued that it engraved the serial number into each tank, thereby

satisfying the embossing requirement. The Acting Chief Counsel's Order stated that embossing required raising the surfaces of the tanks, rather than cutting into them. In its appeal, Respondent agrees with the Acting Chief Counsel. Respondent claims, however, that its original interpretation of the definition of "emboss" is understandable and that it, therefore, did not commit a "knowing" violation. Respondent also maintains that engraving serial numbers is a common practice in the industry for marking tanks, further indication that it did not commit a knowing violation.

The requirement to emboss is not vague, and Respondent's misinterpretation does not excuse the violation. The Acting Chief Counsel did not consider the requirement "ambiguous in any way." In light of Respondent's own admission of its error, I concur with the Acting Chief Counsel. Moreover, even if Respondent had presented any specific evidence that its method of engraving the serial number into the tank is a pervasive industry method, this would not excuse Respondent from complying with the requirements of its exemption. Respondent engraved serial numbers into its tanks and thus had knowledge of the facts giving rise to the violation.

The Acting Chief Counsel, in noting that Respondent had been found in violation of minimum wall thickness requirements, stated that "Respondent's procedure of engraving serial numbers into the tanks is all the more serious, since it further reduces wall thickness." In its appeal, Respondent protests that the places in which it engraved the serial numbers were of sufficient thickness to not be adversely affected by the procedure. This argument is not persuasive. The integrity of a polyethylene tank is compromised whenever a cut is made in it, irrespective of wall thickness.

Finally, Respondent counters the Acting Chief Counsel's contention that, in assessing the civil penalty, she had considered Respondent's ability to pay. Respondent maintains that the total number of tanks that it sells is evidence that it is a very small producer. Respondent's argument is misleading. The record shows that Respondent's manufacturing of 55 exemption portable polyethylene tanks each month represents only about one-tenth of one percent of its production. In fact, a Dun & Bradstreet, Inc. report, indicates that Respondent's controller projected annual sales to be $10,000,000 as of April 19, 1989.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $12,500 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of February 7, 1990, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331. The $12,500 civil penalty is due and payable upon receipt of this Action on Appeal. If the civil penalty is paid within 30 days of the date of issuance of this Action on Appeal, no interest will be charged. If, however, the civil penalty is not paid by that date, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will assess interest and administrative charges and initiate collection activities on the debt and those charges. Interest on the debt will accrue from the date of issuance of this Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR 102.13, and 49 CFR 89.23. Pursuant to those same authorities, a late-payment penalty of six percent (6%) per year will be charged on any portion of the debt that is more than 90 days past due. This penalty will accrue from the date this Action on Appeal is received.

Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: September 5, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 88–23–CR]

Action on Appeal

In the Matter of: Buddy's Fire Protection Service, Inc., Respondent.

Background

On March 13, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Buddy's Fire Protection Service, Inc. (Respondent), assessing a civil penalty in the amount of $3,000 for having knowingly retested DOT specification cylinders on improper equipment, failed to maintain proper DOT specification cylinder reinspection and retest records, and failed to mark retested cylinders with its DOT retester ID number, in violation of 49 CFR 173.34(e)(3), (5) and (6) and DOT Exemption DOT–E 7235. The Order assessed a $3,000 civil penalty, reflecting mitigation of the $4,000 civil penalty originally proposed in the August 23, 1988 Notice of Probable Violation. By an undated letter received March 31, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent's major contention is that it was misled by a DOT-approved independent inspector, Professional Services Industries, Inc. (PSI), which allegedly had approved all of Respondent's practices at issue in this case. As to Violation No. 1, improper testing, DOT's inspectors observed that the expansion gauge on Respondent's hydrostatic test equipment was not being adjusted to compensate for the change in the column weight of water. To determine whether PSI observed and approved that improper procedure, a DOT inspector asked Respondent's President, Charles Stevens, whether he was present during the PSI inspection. He said that he was not present and that his sons, Victor and Cory Stevens, were the operators during that inspection. Both of them have provided written statements indicating that during that inspection they properly adjusted the testing equipment to compensate for the weight of the water column. Therefore, PSI observed proper procedures and cannot be held accountable for Respondent's later use of improper procedures. Thus, no mitigation is appropriate for Violation No. 1 because of alleged reliance on the independent inspector.

Respondent also contends that it relied upon PSI with respect to Violation No. 2, improper recordkeeping, and Violation No. 3, improper marking. Because Respondent itself is responsible for compliance with the Federal regulations, alleged reliance on an independent inspector is not an

appropriate basis for dismissal of a violation but instead may be considered as a matter in mitigation. The Chief Counsel's Order already mitigated the proposed penalty for Violation No. 3 due, in part, to Respondent's reliance on PSI; thus, further mitigation of that penalty is inappropriate. However, mitigation of $250 is appropriate for Respondent's alleged reliance on PSI with respect to Violation No. 2, an issue not previously raised by Respondent.

Respondent further states that the State Fire Marshal had inspected its facility without finding any violations. Inspections by officials responsible for enforcing other statutes and regulations are irrelevant to enforcement actions under the Hazardous Materials Transportation Act.

In addition, Respondent alleges that other companies follow incorrect procedures similar to those of Respondent. If so, those other companies may be subject to similar enforcement actions. However, their alleged practices are irrelevant to a proper disposition concerning Respondent's violations.

Respondent's final argument is that its violations were unintentional and not done with any intent to violate the law. Respondent itself recognized that the lack of intent is not a valid defense: "You will probably say Ignorance is no excuse but you learn from mistakes." Respondent has been found to have committed a civil violation under a "knowing" standard, not a criminal violation under a "willful" standard. As Respondent was advised in the August 23, 1988 Notice, 49 CFR 107.299 provides that a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts, and that there is no requirement that the person actually knew of, or intended to violate, the legal requirements. Respondent met this standard, and its violations thus were "knowing."

In its summation, Respondent stated that civil penalties of $500 for each violation would be reasonable and that it would take legal action against PSI to recover the amount of any civil penalties. Any potential private litigation is irrelevant to an appropriate decision in this proceeding. Respondent has provided no information justifying reduction of the civil penalties of $500 for each violation.

A Dun & Bradstreet report on Respondent indicates that as of March 31, 1987, Respondent had $4,348 cash on hand, current assets of $19,580 and current liabilities of 17,054.

Findings

Respondent has presented sufficient evidence to justify mitigation of the civil penalty assessment for Violation No. 2 from $1,500 to $1,250. It has not justified mitigation of the $1,000 penalty for Violation No. 1 or the $500 penalty for Violation No. 3. Respondent's other arguments are without merit.

I find that a total civil penalty mitigated to $2,750 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability (reduced by some reliance on the independent inspector), the absence of prior offenses, Respondent's ability to pay, the effect of civil penalty on Respondent's ability to continue in business, and all other relevant circumstances.

Therefore, the Order of March 13, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR § 107.331, except that the $3,000 civil penalty assessed therein is hereby mitigated to $2,750.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR Part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: June 6, 1989.

Travis P. Dungan,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 88–45–EXR]

Denial of Relief

In the Matter of: Pointer, Inc., Respondent.

Background

On May 25, 1988, the Chief Counsel, Research and Special Programs Administration (RSPA) U.S. Department of Transportation, issued a Final Order to Respondent, assessing a penalty in the amount of $1,500 for offering lithium batteries for transportation in commerce not violations of 49 CFR §§ 171.2(a) and 173.206 of the Hazardous Materials Regulations (HMR). By letter dated July 10, 1988, Respondent submitted a timely appeal of the Order, challenging the amount of the civil penalty assessment on two bases. The Chief Counsel's Order is incorporated by reference.

Discussion

The Chief Counsel's Order found that Respondent knowingly offerered lithium batteries for transportation in commerce not packaged in accordance with 49 CFR 173.206 after expiration of an exemption from compliance therewith. The Order assessed the $1,500 civil penalty originally proposed in the April 13, 1988 Notice of Probable Violation.

Respondents makes two arguments, each of which I will summarize and discuss.

The Respondent states that it inadvertently received a copy of the 17th Revision of DOT–E 7052, and such copy listed the individuals granted party status to the exemption and the dates their renewal applications were received by RSPA. Respondent contends its renewal application was received by RSPA at the same time as the other applications but that RSPA failed to process Respondent's application in a timely manner.

Respondent is mistaken concerning the time when RSPA received Respondent's exemption renewal application. Of the individuals granted party status to the 17th Revision of DOT–E 7052, the latest renewal application was received by RSPA on September 2, 1987—over 100 days prior to the expiration of DOT–E 7052. However, Respondent's renewal application was received on February 4, 1988—approximately 50 days after its party status to DOT–E 7052 expired. Consequently, Respondent's contention that RSPA failed to timely process its renewal application is without merit.

In addition, Respondent explains it is a small company that provides maintenance and replacement parts for an emergency transmitter it manufactured and installed on a majority of the U.S. Air Force's transport fleet. Accordingly, Respondent asserts that its shipments subsequent to the expiration of DOT–E 7052 were

necessary to maintain these aircraft in "Mission Ready" status. While Respondent's commitment to ensure the U.S. Air Force fleet is in operable condition is commendable, it does not excuse its non-compliance with the requirements of the HMR. The national defense nature of a shipment does not excuse non-compliance with the HMR. Respondent could have applied for an emergency exemption to continue its shipments in accordance with the law. Consequently, Respondent's contention is without merit.

Findings

The two issues raised by the Respondent in its appeal have been considered. I find that sufficient evidence has not been presented to warrant mitigation of the assessed civil penalty. Therefore, the Chief Counsel's Order of May 25, 1988, finding that Respondent knowingly violated 49 CFR 171.2(a) and 173.206, and assessing a $1,500 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to this same authority, a penalty charge of six percent (7%) per annum will accrue if payment is not made within 110 days of service. Filing an appeal within 20 days stays the effectiveness of this order, the accrual of interest, and administrative and penalty charges.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: March 6, 1989.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 88-45-EXR]

Addendum to Amended Denial of Relief

In the Matter of: Pointer, Inc., Respondent.

On March 27, 1989, the Administrator of the Research and Special Programs Administration (RSPA) issued an Amended Denial of Relief (incorporated herein by reference) to Pointer, Inc. affirming the May 25, 1988 Order of the Chief Counsel assessing a $1,500 civil penalty for knowing violation of 49 CFR 171.2(a) and 173.206. The Amended Denial of Relief provided that the penalty must be paid within 20 days of receipt by Respondent.

By letter dated April 21, 1989, Respondent submitted a check in the amount of $250 in partial payment of the assessed penalty. The Department of Transportation hereby accepts this partial payment and authorizes the remaining $1,250 to be paid in four consecutive monthly installments. The first payment of $300 shall be due on or before June 15, 1989; the second payment of $300 shall be due on or before July 15, 1989; the third payment of $300 shall be due on or before August 15, 1989; and the fourth and final payment of $350 shall be due on or before September 15, 1989.

If Respondent defaults on any payment of the authorized payment schedule, the entire amount of the remaining civil penalty shall, without notice, immediately become due and payable. Respondent's failure to pay this accelerated amount in full will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment of the accelerated amount is not made within 90 days of default. Each payment must be made by certified check or money order (Containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M-86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of each check or money order to the Office of Chief Counsel (DCC-1), RSPA, room 8405, at the same street address.

Date Issued: May 3, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Enf. Case No. 88-49-NVO]

Denial of Relief

In the Matter of: Gulf Carrier Corporation, Respondent.

Background

On November 3, 1988, the Chief Counsel, Research and Special Programs Administration (RSPA), issued an Order to Gulf Carrier Corporation (Respondent) assessing a penalty in the amount of $13,000 for violations of 49 171.2(a), 172.201(a), 172.201(c), 172.204(a) and 176.83(d)(1). By letter dated November 25, 1988, Respondent submitted a timely appeal of the Order. The Chief Councel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent had knowingly: (1) Offered for transportation by vessel in commerce, in a single freight container, hazardous materials of different hazard classes not authorized to be loaded together in the same freight container; (2) offered hazardous materials for transportation in commerce without properly describing them on a shipping paper; and (3) offered hazardous materials for transportation in commerce without certifying the compliance of the shipment on the shipping paper.

Respondent's bases for appeal are:

(1) Respondent was improperly refused a hearing to develop a proper record in the proceeding.

(2) Respondent was improperly denied an independent and neutral decisionmaker.

(3) There was no violation of 49 CFR 176.83(d)(1) because Respondent's container was not a "freight container."

(4) The finding of a violation of 49 CFR 176.83(d)(1) was based upon an improper assumption of critical facts.

(5) 49 CFR § 176.83(d)(1) conflicts with 49 CFR 172.504(b) and, therefore, is unenforceable.

I will address each of those arguments in the order described above.

Respondent's first argument is that it was improperly denied a hearing. Respondent states that on June 20, 1988, it filed correspondence offering a settlement; that the settlement was rejected by RSPA in a July 6, 1988 letter; that on July 25, 1988, Respondent submitted a request for a hearing; and that its request for a hearing was denied in a July 29, 1988 letter, which concluded that Respondent had waived its right to a hearing by not having requested a hearing within the timeframe provided in 49 CFR 107.313(b). Respondent contests this determination and cites the Administrative Procedure Act and three court cases in support of its contention that charging time expended in "settlement" negotiations against Respondent's deadline for requesting a hearing violates Respondent's right to due process.

The fallacy in Respondent's argument is that it had waived its right to a hearing before it initiated any

compromise or settlement negotiations. The Notice of Probable Violation (Notice) in this case was issued on May 4, 1988, and received by Respondent (via certified mail return receipt requested) on May 6, 1988. Because 49 CFR 107.313 provides that requests for a hearing must be made within 30 days of receipt of the Notice or otherwise are waived, Respondent had until June 6, 1988, to request a hearing. As evidenced by its June 1, 1988 letter, Respondent requested and received an extension to June 20, 1988, to respond to the Notice, thereby extending to June 20, 1988, Respondent's right to request a hearing. However, by its letter of June 20, 1988, which was received by RSPA on June 22, 1988, Respondent did not request a hearing; instead it made a compromise offer. It was not until July 25, 1988, 19 days after its compromise offer had been rejected, that Respondent finally requested a hearing. By failing to request a hearing on or before June 20, 1988, Respondent waived its right to request such a hearing.

Respondent's second argument is that it was denied its right to an independent and neutral decisionmaker. It argues that the Administrative Procedure Act (APA) applies and requires a separation between prosecutor and fact-finder. It contends that the RSPA procedures violated this principle because the "involved claims were brought by, and in the first instance, have been determined by the Office of General [*sic*] Counsel."

The facts are as follows. The alleged violations were investigated by the Enforcement Division Office of Hazardous Materials Transportation and referred by that Division to the RSPA Chief Counsel's Office. The Notice was issued by Mary M. Crouter, a senior attorney in the Office of Chief Counsel of RSPA. The Order in this case was issued by George W. Tenley, Jr., Chief Counsel of RSPA. This appeal is being decided by the undersigned Administrator of RSPA. Initial legal advice on this appeal has been provided by Edward H. Bonekemper, III, a senior attorney in the Office of the Chief Counsel of RSPA. All of Respondent's arguments have been given exhaustive consideration.

Respondent cites no specific APA provison and no caselaw in support of its proposition that it has been denied due process under the APA by these procedures. The APA provision which comes closest to being relevant is 5 U.S.C. § 554(d), which addresses the separation of investigative/prosecuting and decisionmaking functions in "adjudications." However, § 554 applies only "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. . . ." (Emphasis added.) With respect to this proceeding, Section 110 of the HMTA (49 App. U.S.C. § 1890) provides only for civil penalty violation determinations "after notice and an opportunity for a hearing."

Therefore, in accordance with a March 8, 1976 opinion of the General Counsel of the Department of Transportation (DOT), it has been DOT's official position that the APA's requirement for a formal adjudicatory hearing is inapplicable to HMTA civil penalty cases because of the absence of an explicit statutory requirement that decisions in those cases be made on the record. That approach is supported by *United States* v. *Independent Bulk Transport, Inc.*, 480 F. Supp. 474 (S.D.N.Y. 1979), where the APA was held not to apply to a Coast Guard proceeding assessing a civil penalty under the Federal Water Pollution Control Act Amendments of 1972. In this case, therefore, Respondent was not entitled to rights enumerated under the APA, but only those provided in the HMTA, i.e., notice and an opportunity for a hearing. It received that notice, as well as an opportunity for a hearing; however, despite receiving an extension of time to exercise-its rights, Respondent failed to make a timely request for a hearing. In summary, Respondent has not been deprived of any procedural rights to which it is entitled.

Respondent's third argument is that there was no violation of 49 CFR § 176.83(d)(1) because that section applies only to "freight containers," not to Respondent's "container," which was affixed to a trailer chassis. Respondent asserts that the Chief Counsel's Order incorrectly assumed that Respondent's equipment was detached from its chassis; it states that this did not occur because its equipment simply was driven on and off a "roll-on/roll-off" (RO/RO) vessel and is never detached from its chassis. In addition, Respondent cites Interstate Commerce Commission (ICC) cases stating that transportation of the type of equipment shipped by Respondent is a movement "in trailers," not a movement "in containers." In essence, Respondent contends that its consolidation and offering for transportation of an oxidizer, a corrosive, and a poison B in a single container did not violate § 176.83(d)(1) because that container is never removed from its chassis and is regarded by the ICC as a "trailer."

Respondent's contention is invalid. The Chief Counsel's Order neither stated nor assumed that Respondent's container was detached from its chassis. The applicable definition of "freight container" is in 49 CFR § 171.8: "a reusable container having a volume of 64 cubic feet or more, designed and constructed to permit being lifted with its contents intact and intended primarily for containment of packages (in unit form) during transportation." Respondent has neither argued nor shown that this definition is inapplicable to the container involved here. In fact, Respondent's appeal itself states that the "involved equipment, trailer GULF 603367, was comprised of a container and the container was affixed to a trailer chassis." The facts that Respondent's container is a RO/RO container and is never detached from it chassis do not render it something other than a freight container. In addition, ICC container classifications for purposes of ICC economic regulation are irrelevant to the construction of the term "freight container" under a safety statute such as the HMTA. Safety statutes are broadly construed in order to carry out their remedial purposes. Therefore, I find that § 176.83(d)(1) applied to Respondent's container and prohibited incompatible stowage therein.

Fourth, Respondent contends that the Chief Counsel's finding of a violation of § 176.83(d)(1) was based on "improper" assumptions of critical facts. It alleges that the Chief Counsel erroneously concluded that Phenylhydrazine is a prohibited Poison B under § 172.101. It also alleges that the Chief Counsel erroneously assumed that the involved oxidizer, Zinc Nitrate, was shipped in a quantity greater than the authorized limited quantity of 25 pounds; it contends that only 17 pounds of Zinc Nitrate were consolidated and shipped. Respondent also contends that there was an unjustified assumption that the involved corrosive exceeded the legally permissible limited quantity amounts. It concluded by asserting that RSPA, therefore, has failed to meet its burden of proof on all the elements of the failure-to-segregate violation.

In fact, none of the alleged "improper" assumptions exists. Although Phenylhydrazine indeed is not a Poison B, the Notice and Order did not assert that it was, and the evidence shows that Respondent consolidated and shipped two Poison B materials, Potassium Cyanide (UN1680) and Mercuric Chloride (UN1624), in the freight container in question. With respect to both of its contentions regarding the possibility of the oxidizer and the corrosive having been shipped in limited quantities, Respondent overlooked the

regulatory requirement that shipments must be packaged in specific packaging configurations (49 CFR §§ 173.153(b)(1) (oxidizers) and 173.244(a) (corrosives)) and be identified on shipping papers as limited quantity shipments in order to qualify for the limited quantity exceptions. 49 CFR § 172.203(b). There is no evidence of compliance with the specific packaging requirements for the limited quantity exceptions. Also, neither the shipping papers for the shipments from Fisher Scientific (which Respondent then consolidated and shipped) nor those for Respondent's shipment identified any of the relevant hazardous materials as limited quantity shipments. Finally, in a March 15, 1988 telephone conversation with RSPA, Mr. Brady of Fisher Scientific stated that, since that Company's shipping papers did not state "LTD QTY," the shipments were not of limited quantities. Therefore, the 49 CFR § 176.80 limited quantity exception from the segregation requirements does not apply.

Respondent's fifth and final argument is that § 176.83(d)(1) conflicts with § 172.504 and, therefore, is unenforceable. Respondent describes § 172.504 as a "threshold" requirement and asserts that it permits the consolidation of two or more classes of materials in one container. However, § 172.504 is compatible with, and does not undermine the enforceability of § 176.83(d)(1). The former section merely specifies required placarding when two or more classes of hazardous materials are placed in a transport vehicle or freight vehicle. It does not authorize stowage deemed incompatible under other regulations. Additionally, the placarding exception for less than 1,000 pounds of hazardous materials contained in § 172.504(c) expressly does not apply to transportation by water (which transportation was involved in this case).

Findings

Based on my review of the record, I find the following:

(1) Respondent waived its rights to a hearing by failing to file a timely request for such a hearing.

(2) Respondent is not entitled, in these proceedings, to any rights under the Administrative Procedure Act.

(3) Respondent violated 49 CFR 173.83(d)(1) by consolidating and offering for transportation by vessel incompatible hazardous materials in a "freight container," as defined in 49 CFR 171.8.

(4) Respondent improperly offered for transportation two Poison B hazardous materials which were incompatible with other hazardous materials with which they were stowed.

(5) Respondent did not comply with the requirements for availing itself of the limited quantity exceptions under the Hazardous Materials Regulations and did not offer limited quantities for transportation.

(6) There is not conflict between the placarding requirements of 49 CFR 172.504(b) and the water transportation stowage requirements of 49 CFR 176.83(d)(1).

(7) there is no basis for mitigation of the proposed civil penalty.

Therefore, the Order of November 3, 1988, including the assessment of a $13,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to this same authority, a penalty charge of seven percent (7%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision of appeal constitutes the final administrative action in this proceeding.

Date Issued: February 28, 1989.

M. Cynthia Douglass.

Certified mail—Return receipt requested

[Ref. No. 88–52–HMI]

Partial Grant of Relief

In the Matter of: Boncosky Transportation, Inc., Respondent.

Background

On November 15, 1988, the Chief Counsel of the Research and Special Programs Administration (RSPA), issued an Order to Boncosky Transportation, Inc. (Respondent) assessing a penalty in the amount of $1,500 for violation of 49 CFR 171.16. By letter dated November 30, 1988, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent, a carrier transporting a hazardous material, failed to report on DOT Form 5800.1, within 15 days of its discovery, an unintentional release of Acid, Liquid N.O.S. , which occurred on May 20, 1987, in violation of 49 CFR 171.16.

In its appeal, Respondent argues that it did not "knowingly" violated the regulation. Respondent contends that it hired Ecology & Environment, Inc. (E&E) to provide emergency response, site clean-up, and hazard risk assessment. Respondent states that it verbally authorized E&E to make state and Federal governmental notifications and that it relied upon the following language in its agreement with E&E:

> E&E also has represented that it can provide appropriate documentation and testimony with regard to services which it furnishes, in administrative or court proceedings, as may be requested by the company.

In addition, Respondent quotes a definition from Black's Law Dictionary to the effect that "knowingly" requires actual, not merely constructive, knowledge.

There are many legal definitions of "knowing" and "knowingly." Respondent's reference to Black's Law Dictionary is unpersuasive and irrelevant. As Respondent was advised in the June 22, 1988 Notice of Probable Violation in this case, 49 CFR § 107.299 provides that a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts; there is no requirement that the person actually knew of, or intended to violate, the legal requirements. Thus, Respondent was legally required to be aware of the reporting requirement. It could not contract away its responsibility to file the report. In any event, its quoted contract language with E&E did not to this. If Respondent did verbally "delegate" this task to E&E, Respondent should have required a copy of the required report from E&E in order to ensure itself that E&E had performed Respondent's legal reporting obligation.

Finally, Respondent argues that it has submitted evidence warranting mitigation and that the civil penalty is excessive. It states that this is its first offense, it acted responsibly and adverted a possible crisis, its contractor provided immediate telephonic notification to the Missouri Department of Natural Resources and the National

Response Center, and Respondent—even if chargeable with constructive knowledge—neither knew nor should have known under these circumstances that the report was not timely field.

All of the cited factors previously were raised by Respondent and already considered in these proceedings. However, even though Respondent was legally responsible to ensure that the required written report was timely filed, its erroneous reliance on E&E is understandable. Therefore, I am mitigating the civil penalty by $250.

Findings

Based on my review of the record, I find the following:

(1) Respondent knowingly committed the violation, as alleged.

(2) Mitigation of the proposed civil penalty by $250 is granted due to the good faith, although erroneous, reliance by Respondent upon its contractor for performance of the report-filing requirement. There is no basis for further mitigation of the penalty.

Therefore, the Order of November 15, 1988, is affirmed as being substantiated on the record and in accordance with the assessment criteria prescribed in 49 CFR § 107.331, except that the $1,500 civil penalty assessed therein is hereby mitigated to $1,250.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717. Pursuant to that same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: February 10, 1989.

M. Cynthia Douglass.

Certified mail—Return receipt requested

[Ref. No. 88–57–CR]

Action on Appeal

In the Matter of: B & C Fire Safety, Inc., Respondent.

Background

On December 13, 1988, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to B & C Fire Safety, Inc. (Respondent) assessing a penalty in the amount of $4,500 for having knowingly committed the following acts in violation of 49 CFR 171.2(c), 173.34(e)(3), 173.34(e)(4), and 173.23(c): (1) representing DOT specification cylinders as meeting the requirements of the Hazardous Materials Regulations (HMR) when hydrostatic retesting was performed using equipment that was not capable of being read to an accuracy of one percent; (2) representing DOT specification cylinders as meeting the requirements of the HMR while failing to condemn a cylinder the permanent expansion of which exceeded 10 percent of the total expansion; and (3) representing a DOT specification cylinder as meeting the requirements of the HMR while failing to remark a cylinder manufactured in conformance with DOT Exemption E 6498 with the specification "3AL" at the time of retesting. By letter dated January 11, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Notice of Probable Violation (Notice), dated July 26, 1988, had originally proposed a total civil penalty of $7,500 for the three probable violations as follows: $1,500 for the first, $5,000 for the second, and $1,000 for the third.

Based upon corrective action taken by Respondent, the Chief Counsel reduced the penalty proposed in the Notice for the first violation from $1,500 to $1,000. In its appeal, Respondent states that further mitigation is warranted but presents no information or arguments not already considered by the Chief Counsel. After reviewing the record in this case, I have determined that the assessment of $1,000 for Violation No. 1 is appropriate.

In its appeal of the second violation, Respondent argues that the cylinder in question is no longer in service. However, the cylinder was not removed from service until after the inspector informed Respondent that the cylinder was required to be condemned because its permanent expansion exceeded 10 percent of total expansion. Even if there were an error in the test results and the cylinder's permanent expansion were actually less than 10 percent of total expansion, as Respondent claims, Respondent's records at the time of the inspection indicated that the cylinder should have been either condemned or retested in accordance with HMR. Respondent did neither. Moreover, the Chief Counsel already considered Respondent's argument about an error in the test results when he reduced the penalty proposed in the Notice for this violation from $5,000 to $2,500. After reviewing the record in this case, I have determined that the assessment of $2,500 for Violation No. 2 is appropriate.

In its appeal of the third violation, Respondent admits the violation but states that the corrective remarking of the "3AL" on the cylinder was done before the cylinder was placed back in use. Respondent also emphasizes that corrective steps have been taken to ensure that none of its personnel will make this mistake again. After reviewing the record in this case, I have determined that corrective action taken by Respondent warrants a partial mitigation of the civil penalty for Violation No. 3 from $1,000 to $500.

Respondent also argues that because it is a small business, it cannot afford to pay the administrative penalty that has been assessed. However, a January 25, 1989 Dun & Bradstreet report concerning Respondent as of December 31, 1987, states: "Current ratio is good. Cash and accounts receivable are sufficient to retire current debts. Condition regarded as good." Moreover, with its September 27, 1988 letter responding to the Notice, Respondent attached its own financial statement for the six months ended June 30, 1988. The statement shows Respondent's annual gross profit to be over $111,000, and its annual net income to be nearly $18,000. After reviewing the Dun and Bradstreet report and Respondent's own financial statement, I have determined that Respondent has the ability to pay the civil penalty, and payment will not adversely affect its ability to continue in business.

Findings

Therefore, the Order of December 13, 1988, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the $4,500 civil penalty assessed in the Order is hereby mitigated to $4,000.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven

percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, Room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: April 24, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 88–62–PPM]

Denial of Relief

In the Matter of: Bennett Industries, Respondent.

Background

On October 19, 1988, the Chief Counsel of the Research and Special Programs Administration (RSPA) issued an Order to Bennett Industries (Respondent) assessing a penalty in the amount of $10,000 for violations of 49 CFR 171.2(c), 178.16–13(a)(1), 178.16–16(a), 178.19–7(a)(1), 178.19–7(a)(3), and 178.19–7(d). By letter dated November 9, 1988, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent discusses certain procedural matters and urges that the $10,000 civil penalty be significantly reduced.

Respondent states that, during the September 15, 1988 telephonic informal conference, it advised RSPA that it would be submitting a compromise offer and that it was not aware that an order would be issued prior to RSPA's receipt and evaluation of such a compromise offer. Respondent's October 19 compromise offer and the Chief Counsel's October 19 Order crossed in the mail, and that offer was received on October 21.

During the conference, Respondent admitted the violations and was advised that, therefore, an Order would be issued. Respondent's Counsel stated that he would make a compromise offer and was advised to do so within a week or ten days. Having received no compromise offer by early October, RSPA's Counsel called Respondent's Counsel, Guy V. Croteau, and was told that he no longer was with the law firm and that there was no information concerning who was handling his cases. Although Respondent's compromise offer and appeal letters allege that another attorney, Richard Sanders, also participated in the September 15 telephonic conference, Mr. Sanders did not introduce himself during the conference, and RSPA personnel were unaware of his presence during that conference because Mr. Croteau acted as the sole attorney spokesman for Respondent. Under these circumstances, I find that it was appropriate for the Chief Counsel to issue an Order on October 19 without waiting any longer for a compromise offer.

In its appeal, Respondent asserts that the $10,000 civil penalty should be eliminated or significantly reduced because of Respondent's "good faith" decision to cease production of DOT–E 7802 polyethylene containers resulting in an alleged annual loss of approximately $2 million in annual sales and because of other factors described in the compromise offer letter. Those other factors were Respondent's past record of compliance, its standing policy to comply with regulatory requirements, its belief that RSPA's hydrostatic test pressure requirements are more stringent than necessary, and the good record in transportation of Respondent's containers.

Respondent has admitted seven violations involving failures to test properly, failures to test at all, and failures to maintain test records—all with respect to DOT exemption or specification containers. Respondent's compromise offer stated that it was ceasing production of DOT–E 7802 containers "until corrective action, by way of design change, exemption or rule change can be achieved." In summary, Respondent applied for a DOT Exemption, then knowingly failed to comply with the requirements of that Exemption, had its knowing non-compliance discovered by a RSPA inspector, and then made a business decision to cease production of those exemption containers instead of manufacturing in compliance with the Exemption. If Respondent could not or would not comply with the terms of the Exemption, it was its legal responsibility to stop production of those exemption containers, and I do not view that stoppage of production as a mitigating factor.

Respondent's belief that RSPA's hydrostatic test pressure requirements are too stringent likewise is not a mitigating factor. The implication is that Respondent was free to ignore RSPA's requirements rather than comply with them or seek to have them changed. All of the other mitigating factors raised by Respondent were considered and addressed in the Chief Counsel's Order and do not merit additional mitigation.

Findings

Based on my review of the record, I find the following:

(1) The Chief Counsel's Order in this matter was properly issued on October 19, 1988.

(2) Respondent has presented no valid basis for any further mitigation.

Therefore, the Order of October 19, 1988, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to that same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: January 3, 1989.

M. Cynthia Douglass.

Certified mail—Return receipt requested

[Enf. Case No. 88–66–EXR]

Denial of Relief

In the Matter of: Birko Corporation, Respondent.

Background

On September 6, 1988, the Chief Counsel, Research and Special Programs Administration (RSPA), issued an Order to Birko Corporation (Respondent) assessing a penalty in the amount of $2,500 for violations of 49 CFR 171.2(b)

and 177.834(1)(2)(i). By letter dated September 23, 1988, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent admits that it transported flammable liquids in motor vehicles equipped with combustion heaters not meeting regulatory requirements for about 1½ years after expiration of an exemption allowing such transportation. It contends, however, that the $2,500 civil penalty assessed against it should be reduced significantly because, it says, the violation was *de minimis*, Respondent has caused no injuries to health or the environment during its 30-year existence, Respondent had no prior offenses during that time, and Respondent is a small business upon which this $2,500 civil penalty would impose a hardship.

Notwithstanding Respondent's contentions, I find that no mitigation is warranted because, when measured against the $10,000 maximum penalty provided by the Hazardous Materials Transportation Act, the $2,500 civil penalty already reflects the nature of the violations and Respondent's compliance history. Furthermore, Respondent submitted no evidence to support its contention that the $2,500 would impose a hardship on it. In fact, Dun & Bradstreet reports indicate that Respondent has $6,000,000 in annual sales, a 1.9:1 ratio of current assets to current liabilities, and assets constituting 70.6 percent of sales (indicating assets of over $4,200,000).

Findings

Based on my review of the record, I find the following:

(1) Respondent has admitted the allegation described in the Chief Counsel's September 6, 1988 Order.

(2) Respondent's past record of compliance already is reflected in the $2,500 civil penalty in the Chief Counsel's Order.

(3) There is no evidence indicating that Respondent is unable to pay a $2,500 civil penalty or that such a penalty would adversely affect Respondent's ability to continue in business.

(4) There is no basis for mitigation of the $2,500 civil penalty.

Therefore, the Order of September 6, 1988, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR § 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: January 3, 1989.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 88–67–IMP]

Denial of Relief

In the Matter of: GLNIC Corporation of America, Respondent.

Background

By Order dated November 17, 1988, the Chief Counsel of the Research and Special Programs Administration (RSPA) assessed a $9,000 civil penalty against GLNIC Corporation of America (Respondent) for violations of 49 CFR 171.12(a) of the Hazardous Materials Regulations (HMR) (49 CFR parts 171–179). The Chief Counsel's Order is incorporated herein by reference. Respondent, through counsel, filed an appeal by letter dated December 23, 1988.

Discussion

The Chief Counsel's Order determined that Respondent had knowingly imported a hazardous material into the United States and failed to provide either the shipper or the forwarding agent at the place of entry into the United States with timely and complete information as to the requirements of the HMR that would apply to the shipment in the United States. In its appeal, Respondent does not contest the occurrence of the violation, only the amount of the civil penalty. The $10,000 civil penalty proposed in the Notice of Probable Violation (Notice) was mitigated to $9,000 by the Chief Counsel's Order.

Respondent argues that the assessment proposed in the Notice should have been in the $6,000 to $8,500 range because of Respondent's lack of experience in importing hazardous materials, its lack of knowledge of the HMR, its attempt to comply with regulations that were made known to it, and the fact that it has no history of HMR violations.

However, Respondent did not make these arguments until after the Notice was issued. When Respondent earlier was apprised that it was under investigation by OHMT to determine its compliance with 49 CFR 171.12(a), its March 9, 1988 response contained none of the arguments that it now claims should have been considered in issuing the Notice. Moreover, the Chief Counsel did consider these arguments when, on November 17, 1988, he concluded in his Order that partial mitigation of the civil penalty was warranted: "In view of the fact that Respondent has no prior history of violations and that it made some effort, albeit limited, to ascertain its responsibilities, I believe mitigation of $1,000 is warranted in this case." (Order, at 3.)

In its appeal, Respondent also states that it reviewed Office of Hazardous Materials Transportation (OHMT) files for other cases concerning violations of 49 CFR 171.12(a). It submitted copies of four cases, which it believes to be a representative sample of RSPA's administration of the HMR. It admits, however, that the violations in those cases were "not identical" to that in this case. It further admits that "[Respondent's] case differs from the four cases [it had] cited in that the merchandise involved was a Class A explosive. . . ." Since none of the other cases involved the shipment of an unclassified, forbidden, class A explosive, a comparison with those cases to determine a civil penalty would be inappropriate.

Nevertheless, Respondent argues that its case closely parallels one of the four "representative sample" cases that it had reviewed in OHMT files, and that, therefore, the mitigation should be similar. The case to which Respondent refers, Fire Art Corporation (83–08–SE), was a 1983–84 case concerning the violation of 49 CFR 171.12(a) with respect to the shipment of Class B and Class C explosives. Respondent cites RSPA's mitigation of a $5,000 proposed civil penalty to $2,500 in that case and contends that, since the mitigating factors in the two cases are similar, its own civil penalty should be reduced by 50 percent.

While there are some similarities between the two cases, the mitigating factors are not the same. One of the

mitigating factors in Fire Art was that the shipment of fireworks upon which the violation was based was the first shipment Fire Art had ordered directly from a Chinese manufacturer. Respondent contends that it too is a first-time importer of hazardous materials but, unlike Fire Art, had not previously purchased hazardous materials from domestic sources and so had no knowledge of the HMR, "despite its best efforts to learn of, and comply with, any applicable Federal regulations." However, the proposed civil penalty of $10,000 in this case already has been mitigated by $1,000 because Respondent made some effort to ascertain its responsibilities and because it had no prior history of violations (the latter being a necessary result of its not having previously purchased hazardous materials).

Another mitigating factor contained in Fire Art was that it had suffered severe financial loss as a result of its shipment's seizure by U.S. Customs officials. Respondent admits that it did not suffer a severe financial loss, but argues that there were "closely parallel" circumstances because it did not profit from the shipment in this case. Fire Art suffered a severe financial loss because it could not meet contracted holiday commitments since the seized shipment of fireworks was not returned to it until long after the Fourth of July. To attempt to draw a close parallel between Fire Art's circumstances and those of Respondent—where Respondent not only did not suffer a severe loss, but was paid for the merchandise before the shipment was detained—strains credibility.

Respondent next argues that, like Fire Art, it incurred legal fees as a result of the violation. Respondent ignores the fact that while both it and Fire Art hired lawyers, they did so for very different reasons. Fire Art hired legal counsel to seek release of the seized fireworks from Customs; the hiring was part of an unsuccessful effort to avert its severe financial loss. Respondent, on the other hand, hired legal counsel solely to request mitigation of the civil penalty. Respondent's hiring of counsel in an effort to mitigate the civil penalty cannot be considered as a reason for mitigation.

Furthermore, Fire Art had taken affirmative action to get all unapproved fireworks examined by the Bureau of Explosives and approved by the Department. Yet, Respondent admits that it did not take action to have the explosive in this shipment examined.

In a final effort to compare its case with that of Fire Art, Respondent notes that in mitigating Fire Art's civil penalty, RSPA had considered that Fire Art had provided labels, placards, and information on applicable hazardous materials regulations to the Chinese shipper for future imports. Although Respondent has not done this, it attempts to "parallel" the cases by stating that it has chosen not to import other hazardous materials; it argues that it has thereby demonstrated its desire to comply with the regulations. Curiously, Respondent states that it will not import hazardous materials "until it has found a way to comply with [the applicable regulations]." Fire Art, of course, demonstrated that it had found a way to comply. Unlike Respondent, it developed procedures and implemented them.

Of all the cumulative factors that were considered in mitigating Fire Art's civil penalty, the only comparable one in Respondent's case is the factor relating to the first importation of hazardous materials. That factor has already been considered by the Chief Counsel in mitigating the proposed civil penalty. Moreover, even if the factors in both cases were closely parallel, which they are not, the resolution of an enforcement case in 1984 would not constitute a binding precedent for resolving a similar case in 1989.

Respondent also tries to blame RSPA's "regulatory arrangement" for "many needless violations * * * in the case of inexperienced importers [who] cannot reasonably be expected to be *expert in transportation requirements* unless advised of them by their carriers, shipping agents, freight forwarders, customhouse brokers, or the Government." (Emphasis supplied.) Although Respondent acknowledges that there were "transportation requirements" to be discovered, it never sought information from the one source that could supply the expertise: the U.S. Department of Transportation!

As the Chief Counsel stated in his November 17 Order, "Respondent is responsible for compliance with the Hazardous Materials Regulations and should have known when it undertook to import explosives that a careful inquiry should be made to determine all Federal laws and regulations applicable to Respondent's business." (Order, at 2.) This does not imply, as Respondent claims, that inexperienced importers "should be engaging the services of attorneys *specializing in transportation* or customs law to advise them on such matters." (Emphasis supplied.) A careful inquiry by Respondent, knowing that it needed advice on transportation matters, would certainly have led it to the Department of Transportation.

Respondent argues that if the Customs Service and other Federal Agencies referenced RSPA's requirements in brochures and letters, or in connection with other regulations that Customs enforces, this HMR violation could have been avoided. Respondent cites regulations of the U.S. Customs Service and has submitted pamphlets issued by that Agency purportedly to demonstrate that since other agency regulations are referenced therein and RSPA's are not, the Government has not met its responsibility to inform the importing community of all requirements. Yet, of the six pamphlets Respondent submitted, five have nothing to do with importing requirements for businesses. Instead, they discuss personal importations, such as pets, cars, food, and gifts. The sixth, while including import requirements for businesses, lists other agencies only if Customs enforces their requirements. This same information is found in the regulations of the Customs Service, 19 CFR Part 161. Since Customs does not enforce RSPA's regulations, it is not reasonable for Respondent to have expected to discover in a pamphlet issued by the Customs Service or in Customs' regulations any reference to the transportation of hazardous materials. Moreover, even if such a reference were contained in the Customs pamphlet, Respondent would not have known about the reference since it did not contact Customs before the importation involved in this case. In its August 1, 1988 letter to the Office of Chief Counsel responding to the Notice, Respondent contended that since it had relied on the advice of its agents, it did not need to "independently contact a plethora of Federal and State agencies (including, *inter alia, * * * U.S. Customs Service). . . .*" *Finally, it was not the responsibility of BATF, which issued a permit to import ammunition, to inform Respondent of the existence of the HMR. The responsibility to inquire was Respondent's.*

Concerning its ability to pay the civil penalty, Respondent maintains that "[o]ther than [its] primary records, the [unaudited statement dated December 31, 1987] is currently the best evidence of [its] financial position. * * *" Yet, Respondent has not submitted its primary records, which it admits are the best evidence of its financial position. Counsel merely stated that he would be happy to *attempt* to obtain them for RSPA *if* RSPA requests. Again, Respondent attempts to put the onus on the Government. Respondent had the responsibility to either submit its primary records or an audited financial

statement. It chose to do neither. Thus, RSPA is unable to determine Respondent's true ability to pay the penalty or the effect of the penalty on its ability to continue in business. Finally, Respondent requests that, if RSPA does not further mitigate the penalty, arrangements be made to sign a note for its payment since a large majority of Respondent's assets are not liquid.

Findings

Based on my review of the record, I find the following:

(1) Respondent did not provide any information to warrant mitigation of the $9,000 civil penalty assessed for having knowingly violated 49 CFR 171.12(a) of the HMR.

Therefore, the civil penalty assessed by the Chief Counsel's Order of November 17, 1988, is not modified. However, I am persuaded that Respondent's request to make arrangements for payment was made in good faith. Therefore, I authorize payment of the penalty in nine monthly installments of $1,000 each. The first installment shall be due on April 17, 1989, and each succeeding payment shall be due on the seventeenth day of each month thereafter until a total of $9,000 has been paid. Respondent must pay each installment of the civil penalty by sending a certified check or money order payable to "Department of Transportation" to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. If Respondent defaults on any payment of the authorized payment schedule, the entire remaining amount of the civil penalty shall, without further notice, immediately become due and payable. Respondent's failure to pay any amount due will result in the initiation of collection activities by the Chief of the General Accounting Operations Branch, the assessment of administrative charges, and the accrual of interest at the current annual rate of seven percent (7%) in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 90 days of default.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: April 14, 1989.

M. Cynthia Douglass.

Certified mail—Return receipt requested

[Ref. No. 88–68–FSE]

Denial of Relief

In the Matter of: China North Industries Corporation, Respondent.

Background

On October 4, 1988, the Chief Counsel assessed a $14,000 civil penalty against China North Industries Corporation (Respondent) for violations of 49 CFR 171.2(a), 171.12(b), 172.400(a), 173.51(b), 173.64(d) and 173.86(b) of the Hazardous Materials Regulations (HMR). Respondent submitted an appeal by letter dated October 22, 1988. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent had knowingly: (1) Offered for transportation in commerce a new explosive which had not been examined, classed, and approved by the Research and Special Programs Administration (RSPA); (2) offered for transportation in commerce propellant explosives, Class A explosives, in packages not labeled in accordance with the HMR; and (3) offered for transportation in commerce propellant explosives, Class A explosives, in packages not properly marked as required by the regulations.

In its appeal, Respondent raises two issues. First, it continues to assert that its violation of the HMR was unintentional because it was unaware of the regulations at the time of shipment (November 1987). Second, it asserts that the party (GLNIC International Corporation of America) to whom Respondent shipped hazardous materials is responsible for the violations because that party (GLNIC) had obtained U.S. Government approval for the shipment.

The first issue, Respondent's alleged ignorance of the HMR, is both irrelevant and unsupported by the evidence. It is irrelevant because, as explained in the August 3, 1988 Notice of Probable Violation issued to Respondent, 49 CFR 107.299 specifically states that there is no requirement that the alleged violator actually knew of, or intended to violate, the legal requirements of the HMR.

In any event, the evidence does not support Respondent's contention that it had no prior knowledge concerning the HMR. The Chief Counsel's October 4, 1988 Order indicated that Respondent's statement that the violations were unintentional because it was unaware of the HMR is contradicted by a May 6, 1985 letter to Respondent from the Materials Transportation Bureau (MTB) (predecessor agency to RSPA) approving a new explosive for shipment based on documentation submitted by Respondent. That Order also stated that Respondent not only was aware of the HMR, but had on a previous occasion undertaken to obtain approval for shipment of a new explosive, pursuant to the same requirement that Respondent violated in this case. In its appeal, Respondent denies that it ever applied directly to MTB or RSPA for an approval and suggests that RSPA recheck its files. RSPA's files have been rechecked, and the following documents were found:

(1) April 23, 1985, letter from China North Industries Corporation (NORINCO) to the Office of Hazardous Materials (OHMT), U.S. Department of Transportation, requesting an official classification and Ex-number for certain NORINCO TNT.

(2) April 9, 1985 letter and laboratory report (both enclosed with (1) above) from the Bureau of Explosives of the Association of American Railroads to China North Industries Corp. (NORINCO) referring to a March 15, 1985 NORINCO request for examination and classification of certain TNT, recommending that the TNT be described as a High Explosive and classified as a Class A Explosive, Type 3, specifying applicable HMR packaging, marking and labelling requirements, and stating: "Section 173.86 requires that, except for shipments of sample quantities, the shipper has to submit the test report to the Department of Transportation to apply for approval before any new explosive device is offered for shipment."

(3) May 6, 1985 OHMT letter to China North Industries Corporation approving new explosive products (TNT) for shipment (EX–8505024).

(4) May 20, 1985 OHMT letter to China North Industries Corporation approving new explosive products (TNT) for shipment (EX–8505106).

These letters are attached to, and incorporated in, this Denial of Relief. They clearly demonstrate Respondent's knowledge of the HMR (which knowledge, as indicated above, is not a required element of the violation).

The second issue raised by Respondent is that GLNIC, not Respondent, is responsible for the violations. OHMT has taken enforcement action against GLNIC for its failure to comply with the HMR in this matter. However, any violations by GLNIC do not absolve Respondent of its responsiblility to comply with the HMR when shipping hazardous materials to the United States.

Findings

Based on my review of the record, I find the following:

(1) Respondent had knowledge of the HMR.

(2) Respondent's knowledge of the HMR is not an element of the violations.

(3) Any violations by GLNIC did not relieve Respondent its responsibility to comply with the HMR.

(4) Consequently, the issues raised on appeal by the Respondent are without merit.

Therefore, the Chief Counsel's Order of October 4, 1988, finding that Respondent knowingly violated 49 CFR 171.2(a), 171.12(b), 172.400(a), 173.51(b), 173.64(d) and 173.86(b), and assessing a $14,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in (1) referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court, and (2) accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M.86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Dated Issued: January 3, 1989.

M. Cynthia Douglass.

Registered mail—Return receipt requested

[Ref. No. 88-71-HMI]

Action on Appeal

In the Matter of: Donald Holland Trucking, Inc., Respondent.

Background

On March 2, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Donald Holland Trucking, Inc. (Respondent) assessing a penalty in the amount of $1,500 for having knowingly failed to file a written hazardous materials incident report, DOT Form 5800.1, within 15 days after discovering an incident involving its unintentional release of a hazardous material during transportation in commerce, in violation of 49 CFR 171.16. The Order assessed the $1,500 civil penalty originally proposed in the June 30, 1988 Notice of Probable Violation. By letter dated March 29, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent appeals the Chief Counsel's Order on several grounds, each of which is discussed herein.

First, Respondent contends that the $1,500 civil penalty is excessive because Respondent cooperated with state and Federal officials in cleanup of the hazardous materials spill and was commended by EPA authorities for its promptness in doing so and because: "Any report to the DOT would have been strictly statistic and is not consistent with the spirit of any statute passed for the protection of the public." Respondent overlooks the fact that it was required by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, to clean up its spill and would have been subject to a separate Federal enforcement action had it failed to so so. In addition, Respondent fails to recognize the purpose of RSPA's requirement for a written hazardous materials incident report: the ongoing compilation of a comprehensive data base concerning such incidents so that corrective actions (e.g., regulatory changes) can be taken to reduce their future occurrence and thereby enhance the safety of hazardous materials transportation. Therefore, Respondent's arguments are without merit.

Second, Respondent contends that the $1,500 penalty is excessive and a financial hardship for a small trucking company. It submitted no financial information. However, a Dun & Bradstreet report on Respondent indicates that on December 31, 1987, it had cash assets of $68,254, working capital of $48,572, and retained earnings of $259,395, and that during 1987 it had sales of $2,737,680 and a net income of $81,222. Therefore, Respondent's financial hardship argument is without merit.

Third, Respondent contents that there was no violation because there has been inadequate dissemination of the HMR. As a transporter of hazardous materials, Respondent should regularly obtain copies of the relevant volumes of the Code of Federal Regulations to ensure its compliance with those regulations. Publication of RSPA's regulations in the **Federal Register** and the Code of Federal Regulations constitutes legal notice to the world of their existence and, therefore, compliance with them is mandatory. As provided in 49 CFR 107.299, actual knowledge of the legal requirements is not a prerequisite to a finding of violation of the Hazardous Materials Regulations for purposes of imposition of a civil penalty.

Findings

(1) Respondent's arguments on appeal have no merit.

(2) In light of the nature and circumstances of the violation, the extent and gravity of the violation, the degree of Respondent's culpability, the absence of any prior offenses by Respondent, and such other matters as justice may require, I find the civil penalty of $1,500 to be appropriate.

(3) I also find that Respondent has the ability to pay such a civil penalty and that such a penalty will have no adverse effect on Repondent's ability to continue in business.

Therefore, the Order of March 2, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or many order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M-86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC-1), RSPA, Room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Dated Issued: May 31, 1989.

Travis P. Duncan,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 88–72–FF]

Action on Appeal

In the Matter of: Martin Brokerage Co., Respondent.

Background

On March 2, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Martin Brokerage Co. (Respondent) assessing a penalty in the amount of $7,500 for having knowingly offered hydrofluoric acid for transportation in commerce in unauthorized packages and offered hydrofluoric acid for transportation in commerce without listing the proper shipping name or identification number on the shipping paper, in violation of 49 CFR 171.2(a), 172.202(a)(1), 172.202(a)(3), and 173.264(a)(18). The Order assessed the $7,500 civil penalty originally proposed in the November 17, 1988 Notice of Probable Violation. By letter dated March 17, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent's first contention is that it had no way of knowing what was in the sealed containers because it relies on instructions from the Mexican shipper. Respondent stated that it prepares U.S. Customs documentation and bills of lading days in advance of importation based on information received from the Mexican shipper by telephone. Respondent stated that the Mexican shipper had previously made three shipments of ammonium bifluoride and there was no reason for Respondent to question the telephonic instructions in this particular instance. Respondent stated that it had no way of knowing what was in the containers because they are sealed before they enter the United States.

Respondent's argument is without merit. On April 17, 1989, Inspector William Wilkening of the Office of Hazardous Materials Transportation interviewed Respondent's Customs Broker and Traffic Manager, Mr. George Garcia. Mr. Garcia stated that in this case, as in all cases involving the Mexican shipper, one of Respondent's employees met the shipment at the border in El Paso to satisfy U.S. Customs regulations requiring a U.S. company to assume control of the goods while they are in bond and transit through the U.S. The Mexican truck driver normally has three copies of the shipping paper prepared by the Mexican shipper. One copy is provided to U.S. Customs, one copy is given to Respondent, and one copy continues with the truck to the rail yard. That procedure was followed on December 8, 1987, for the shipment in question. Respondent's employee, after completing U.S. Customs paperwork and securing a copy of the shipping paper, returned to the office. The shipping paper provided to Respondent by the Mexican shipper, identifies the shipment as hydrofluoric acid of 70 percent strength, contained in DOT 34–8 specification drums. Therefore, as of December 8, 1987, Respondent had actual knowledge that the shipment in question was hydrofluoric acid, not ammonium bifluoride, and that the hydrofluoric acid of 70 percent strength was packaged in DOT 34–8 drums, which are not authorized for that material. Nevertheless, Respondent offered this material to the Atchison, Topeka and Santa Fe Railway Company for transportation to Galveston and subsequent shipment to Holland via the Lykes Bros. Steamship Co., accompanied by shipping papers which incorrectly identified the material as ammonium bifluoride.

Respondent's second contention is that it did not knowingly violate the regulations and had no intent to violate any legal requirements. Respondent was advised in the Notice of Probable Violation that, under 49 CFR 107.299, a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts; there is no requirement that the person knew of, or intended to violate, the legal requirements. Respondent's conduct met the definition of "knowingly", and thus its contention is without merit.

Findings

I have determined that there is insufficient evidence to justify mitigation of the civil penalty assessment. I find that a civil penalty of $7,500 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, the absence of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant circumstances. Therefore, the Order of March 2, 1989, assessing a $7,500 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, Room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: June 26, 1989.

Travis P. Dungan,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 88–78–MSC]

Action on Appeal

In the Matter of: Falcon Safety Products, Inc., Respondent.

Background

On May 5, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Falcon Safety Products, Inc. (Respondent) assessing a civil penalty in the amount of $5,000 for having knowingly committed acts which violated 49 CFR 171.2(a), 171.2(c), 172.202(a)(2), 172.202(b), 173.25(a)(4), 173.304(e)(1), 178.65–4(c)(5), 178.65–14(b)(8) and 178.65–15(b) of the Hazardous Materials Regulations (HMR), as alleged in the Notice.

The Order assessed a $5,000 civil penalty, which reflected mitigation in the amount of $1,000 of the originally proposed $6,000 penalty set out in the December 15, 1988 Notice of Probable Violation. By letter dated June 1, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

In its June 1, 1989 Appeal, Respondent stated that it accepted the decisions in the Order as to Violations 1, 2 and 4 and was requesting reconsideration only as to Violations 3 and 5.

Violation 3 involved a finding that Respondent knowingly offered for transportation in commerce dichlorodifluoromethane, a nonflammable gas, accompanied by shipping papers with an incorrect hazard class and an identification number that was out of sequence, in violation of 49 CFR 171.2(c), 172.202(a)(2) and 172.202(b). Because Respondent had made an effort to come into compliance with the HMR, the Order mitigated the proposed $1,000 penalty and assessed a $750 penalty.

Respondent's appeal of Violation 3 is based upon its assertion that it acted in a timely manner to correct the errors in its bill of lading, and that the mistakes which it made were ". . . not of any magnitude . . . since our errors were in interpretation of the rules and every attempt was made to meet the standard."

The $750 penalty assessed for Violation 3 approximately reflects the magnitude of the violation. Respondent's unsuccessful efforts to comply with the HMR do not excuse its violation. As indicated in the Notice, 49 CFR 107.299 specifies that an intent to violate the HMR is not a prerequisite to a finding of violation. Further, although Respondent has updated its bill of lading, the revised document still contains an erroneous hazard class; it references "nonflammable *compressed* gas" (emphasis added) in lieu of the correct classification of "nonflammable gas."

In its appeal of Violation 5, Respondent appears to admit that it was not in compliance, but appeals *its* interpretation of the Chief's Counsel's order. It construes the Order as saying that Respondent took almost one year *following issuance of the NOPV* to achieve compliance with the regulation. In fact, the Order states that Respondent came into compliance ". . . almost one year *following the inspection* by the Office of Hazardous Materials Transportation." (Emphasis added.) Respondent did come into compliance four months after receipt of the NOPV; however, it is required to be in compliance at all times, not merely within a certain time period following receipt of an NOPV. Here, in fact, it was more than 11 months from the time of the inspection to the time of Respondent's achieving compliance. In any event, there was no penalty imposed for Violation 5, and thus the issue of penalty mitigation is moot.

Findings

With respect to the appeal of Violation 3, I have determined that there is no evidence presented in this appeal to warrant further mitigation of the penalty assessed for that violation. Because Respondent has presented no evidence denying Violation 5 and no penalty was assessed therefore, the Chief Counsel's Order as to that violation is affirmed.

Therefore, the order of May 5, 1989, which includes assessment of a civil penalty in the amount of $5,000, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331. Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing reference number of this case) payable to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, Room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Dated Issued: November 6, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 88–60–EXR]

Denial of Relief

In the Matter of: Copps Industries, Inc., Respondent.

Background

On October 31, 1988, the Chief Counsel, Research and Special Programs Administration (RSPA), issued an Order to Copps Industries, Inc. (Respondent) assessing a penalty in the amount of $2,000 for violations of 49 CFR 171.2(a), 173.245 and 173.249. By letter dated November 23, 1988, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order found that Respondent had knowingly: (1) offered for transportation in commerce alkaline corrosive liquid, n.o.s., in a DOT specification 37C80 steel drum not authorized by 49 CFR § 173.245 or 173.249, after expiration of an exemption from compliance therewith; and (2) offered for transportation in commerce alkaline corrosive liquid, n.o.s., in other packages not meeting the requirements of 49 CFR § 173.245 or 173.249, after expiration of an exemption from compliance therewith. That Order mitigated the $3,000 civil penalty originally proposed in the August 1, 1988 Notice of Probable Violation.

Respondent makes several arguments, each of which I will summarize and discuss.

First, Respondent asserts that it has not admitted the alleged violations. However, in a May 3, 1988 letter, Respondent's Vice President of Operations, Richard W. Burgess, stated: "From the time the exemption expired on January 31, 1988 until it was discovered in our office that renewal was not processed and shipments under the exemption (DOT–E 8747) stopped, 407 items were shipped in 14 different shipments." In a separate May 3, 1988 letter concerning the other exemption (DOT–E 8885), Mr. Burgess wrote: "From the time the exemption expired on February 29, 1988 until it was discovered in our office that a renewal was not processed and shipments under this exemption stopped, 100 items were shipped in one shipment." These admissions directly refute Respondent's assertion.

Second, Respondent disputes a statement in the Chief Counsel's Order that "Projected after-tax profits for 1988 would be $33,000." It states that its after-tax profits through October 31, 1988, are only $12,500. This assertion, unaccompanied by any supporting financial data or reports, presents an interesting contrast with the detailed financial statements submitted by Respondent on September 15, 1988, showing 1988 after-tax profits of $22,040.01 through August 31, 1988. In any event, neither profit amount justifies reduction of the $1,000 assessments for each of the two violations on the basis of Respondent's ability to pay or effect on Respondent's ability to remain in business.

Third, Respondent disagrees with a statement in the Chief Counsel's Order that it characterizes as stating "that whether the exemption packagings are safer than the required packagings is not relevant." The complete statements in the Order were:

> Respondent's contention that the exemption packagings are safer is not relevant to the issue of Respondent's continued operation under the terms of an expired exemption. Respondent offered hazardous materials for transportation in violation of the Hazardous Materials Regulations.

Respondent has not demonstrated that its use of unauthorized packagings for 15 shipments of 507 hazardous materials items were safer than authorized by the applicable regulations. In any event, Respondent misses the point that, in the absence of an effective exemption, those shipments were unauthorized and that the regulations, not shippers, determine packaging requirements.

Fourth, Respondent contends that the relevant exemptions never expired because they subsequently were renewed without any lapse. This argument is flawed. Respondent applied for, and received, emergency extensions of both exemptions on June 6, 1988. In addition, the letter forwarding those two extensions to Respondent contained the following language:

> Possible extension of the expiration dates of *DOT-E 3885 and E 8747* beyond the *August 1, 1988* date referenced herein will be considered separately upon the completion of proceedings by the Office of the Chief Counsel, Research and Special Programs Administration. Those proceedings will focus upon the operations identified in your *May 3, 1988* letters, which occurred after the respective *February 29, 1988 and January 31, 1988*, expiration dates. The reason for deferring final action on your request for renewal is that those proceedings are relevant to your company's compliance disposition, which is a key factor in making a final decision.

The language precludes any argument by Respondent that RSPA somehow was waiving Respondent's admitted violations through RSPA's granting of Respondent's requests for emergency extensions of its expired exemptions. Those extensions were effective when issued and had no retroactive legal effect. Therefore, when Respondent made its 15 shipments of 507 hazardous materials items, there were no exemptions in place authorizing such shipments.

Fifth, Respondent contends that it did not "knowingly" violate the regulations because it made no shipments after its discovery that the necessary exemptions had expired. However, as stated in the August 1, 1988 Notice issued to Respondent, under 49 CFR 107.299, a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts; there is no requirement that the person actually knew of, or intended to violate, the legal requirements. Respondent should have been aware that its exemptions had expired and that it, therefore, had no legal authority thereafter to make the hazardous materials shipments it did.

Sixth, Respondent contends that RSPA did not comply with its written request for a conference. In its August 15, 1988 letter, Respondent conditionally requested an informal conference. Subsequently, on August 29, 1988, Respondent's Mr. Burgess had an extended telephone conversation concerning this case with RSPA Senior Attorney Mary M. Crouter and agreed at the end of that conversation that no conference was necessary because all relevant information had been or would be provided by Respondent. Subsequent letters of September 15 and 16, 1988, between those two persons impliedly confirm Mr. Burgess' August 29 verbal withdrawal of the request for a conference.

Seventh, Respondent alleges that some of the 49 CFR § 107.331 penalty assessment criteria either were not considered or were misapplied. Respondent's arguments concerning application of those criteria are either redundant with earlier arguments or incorrect.

Findings

Based on my review of the record, I find the following:

(1) Respondent has admitted the two violations involving a total of 15 shipments of 507 hazardous materials items without authority after the expiration of two separate exemptions.

(2) Assessments of $1,000 for each of two violations adequately take into account Respondent's ability to pay and the effect thereof on Respondent's ability to remain in business.

(3) Respondent's repeated use of unauthorized packages for hazardous materials violated the Hazardous Materials Regulations regardless of Respondent's contention that its packagings were safer than the legally required packagings.

(4) The two exemptions at issue both expired before Respondent's unauthorized shipments, and the later emergency extensions of those exemptions had no retroactive effect.

(5) Respondent knowingly violated the regulations, as alleged in the Notice and as determined in the Chief Counsel's Order.

(6) Respondent withdrew its request for an informal conference.

(7) All of the required statutory and regulatory penalty assessment criteria have been properly applied, and there is no basis for further mitigation of the civil penalties for Respondent's two violations.

Therefore, the Order of October 31, 1988, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR § 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717. Pursuant to that same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, Room 2228, Department of Transportation, 400 Seventh Street, S.W., Washington, D.C. 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: February 16, 1989.

M. Cynthia Douglass.

Certified mail—Return receipt requested

[Ref. No. 88–86–CR]

Addendum To Denial of Relief

In the Matter of: Nardo Fire Equipment Company, Respondent.

On February 16, 1989, the Administrator of the Research and Special Programs Administration (RSPA) issued a Denial of Relief (incorporated herein by reference) to Nardo Fire Equipment Company (Respondent) affirming the September 8, 1988 Order of the Chief Counsel assessing a $3,000 civil penalty for knowing violation of 49 CFR 171.2(c), 173.34(e)(1)(i), and 173.34(e)(5). The Denial of Relief provided that the penalty must be paid within 20 days of receipt by Respondent.

By letter dated August 3, 1989, Respondent offered to pay $2,000 in four monthly installments in compromise of the penalty assessment because of its

financial problems. Respondent is a sole proprietorship, and, although the evidence in the record is not substantial on this point, I am persuaded that Respondent would have difficulty paying the $3,000 civil penalty assessment. Accordingly, the Department of Transportation hereby accepts Respondent's compromise offer and authorizes the $2,000 civil penalty to be paid in four consecutive monthly installments. The first payment of $500 shall be due on or before September 15, 1989, with each succeeding installment of $500 due on the fifteenth of each month thereafter.

If Respondent defaults on any payment of the authorized payment schedule, the entire amount of the remaining civil penalty shall, without notice, immediately become due and payable. Respondent's failure to pay this accelerated amount in full will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate of seven percent (7%) per annum in accordance with 31 U.S.C. § 3717 and 49 CFR Part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment of the accelerated amount is not made within 90 days of default.

Each payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of each check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

Date Issued: August 31, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 88–88–SC]

Action on Appeal

In the Matter of: Pemall Fire Extinguisher Corp., Respondent.

Background

On March 2, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Pemall Fire Extinguisher Corporation (Respondent) assessing a penalty in the amount of $2,500 for having knowingly offered hazardous materials for transportation in commerce without listing the proper shipping description for the material on the shipping paper and without properly marking the package, in violation of 49 CFR 172.202(a) and 173.306(c)(6). The Order dismissed probable Violation No. 1 and assessed the $2,500 civil penalty originally proposed in the December 15, 1988 Notice of Probable Violation for Violations 2 and 3. By letter dated March 23, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent stated that it is a small corporation that is going through a slow period and requested that the penalty amount be lowered and spread over a period of time so as not to hurt its cash flow. Respondent also stated that it had no idea that it was not conforming with the regulations, but began to do so as soon as the RSPA inspector told them what was required. Respondent did not submit any financial information to support its claims of economic hardship. I have reviewed a Dun & Bradstreet financial report on Respondent and do not find any evidence of an inability to pay the assessed penalty. However, in view of Respondent's assertion, I am authorizing payment of the civil penalty in five monthly installments of $500 each.

Findings

Therefore, the Order of March 2, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR § 107.331, except that the $2,500 civil penalty assessed therein is hereby authorized to be paid in five monthly installments of $500 each, beginning on June 1, 1989, and due on the first day of each month thereafter until a total of $2,500 has been paid.

If you default on any payment of the authorized payment schedule, the entire amount of the remaining civil penalty shall, without notice, immediately become due and payable. Your failure to pay this accelerated amount in full will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment of the accelerated amount is not made within 90 days of default. Payment must be made by certified check or money order (continuing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, Room 9112, Department of Transportation, 400 Seventh Street, S.W., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: May 5, 1989.

Travis P. Dungan

Certified mail—Return receipt requested

[Ref. No. 88–90–HMI]

Denial of Relief

In the Matter of: Wells Cargo, Inc. Respondent.

Background

On November 3, 1988, the Chief Counsel of the Research and Special Programs Administration (RSPA) assessed a $1,500 civil penalty against Wells Cargo, Inc. (Respondent) for a violation of 49 CFR 171.16 of the Hazardous Materials Regulations (HMR). Respondent submitted an appeal by letter dated November 14, 1988. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent had knowingly failed to file a written report (on DOT Form 5800.1) within 15 days of discovering an incident occurring during the course of transportation in which there was an unintentional release of hazardous materials.

Respondent contends that the $1,500 penalty is "extreme and severe" because the violation was not committed "knowingly." Respondent stated that it had misinterpreted the requirement to file a written report because it had understood that such a report was required only if property damage or the amount of material released exceeded certain levels. Respondent stated that it is now fully aware of the reporting procedure.

The Notice of Probable Violation alleged that Respondent had knowingly committed the act alleged. The meaning of "knowingly" was clearly set forth in paragraph four of the Notice. Respondent's conduct met that definition, and any assertion to the

contrary is without merit. Furthermore, Respondent's statement that it misinterpreted the requirement to file a written report was already considered in issuing the Notice, because Respondent made a similar statement to RSPA's inspector in a telephone conversation on July 7, 1988.

Respondent did not submit any other information to support its contention that the civil penalty is severe. The $1,500 civil penalty is an appropriate amount for a violation of this type, taking into account the nature, circumstances, extent and gravity of the violation, the degree of Respondent's culpability, and Respondent's history of no prior violations. Respondent did not contend that the amount of the civil penalty would adversely affect its ability to pay or continue in business, nor is there any evidence in the record to support such a conclusion.

Findings

Based on my review of the record, I find the following:

(1) Respondent's assertions on appeal are without merit.

(2) Respondent did not provide any information to warrant mitigation of the civil penalty assessed.

Therefore, the Chief Counsel's Order of November 3, 1988, finding that Respondent knowingly violated 49 CFR § 171.16, and assessing a $1,500 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria in 49 CFR 107.331. The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to that same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: January 17, 1989.

M. Cynthia Douglass.

Certified mail—Return receipt requested.

[Ref. No. 88–92–HMI]

Denial of Relief

In the Matter of: Fleet Transport-VA., Inc., Respondent.

Background

On September 22, 1988, the Chief Counsel, Research and Special Programs Administration, issued a Final Order to Respondent, assessing a penalty in the amount of $1,500 for a violation of 49 CFR 171.16, failure to file a written Hazardous Materials Incident Report. By an undated letter received October 9, 1988, Respondent submitted an appeal challenging the amount of the penalty assessment on six bases. The Chief Counsel's Final Order is incorporated by reference.

Discussion

The Respondent's bases for appeal are: (1) A telephonic report was made to the National Response Center; (2) state and local environmental protection agencies were advised of the spill; (3) the clean-up of the spill was conducted under the supervision of the local environmental authority; (4) Respondent incurred considerable clean-up expenses; (5) Respondent's policy is to adhere to all Federal, state and local regulations concerning Hazardous Materials Incident Reports; and (6) the filing of the Hazardous Materials Incident Report was inadvertently overlooked.

Respondent's first four bases for its appeal are irrelevant; each one concerns other required notices or corrective actions taken to eliminate or minimize the effects of the 6,800-gallon combustible liquid spill. Their performance and occurrence do not excuse Respondent's failure to file the required written report.

Respondent's fifth basis of appeal, its alleged general compliance with Federal requirements, constitutes nothing more than what is expected of all persons transporting hazardous materials. The relevant fact is that Respondent failed to file the required report in this particular case. What actions Respondent generally takes are not determinative of what actually transpired in this case. Consequently, Respondent's fifth basis for its appeal is without merit. Moreover, the fact that Respondent has committed no prior violations of the Hazardous Materials Regulations was considered in the original assessment of the civil penalty in this case.

Finally, Respondent admits in its sixth basis for appeal that it failed to file the required report. Whether this omission was advertent or inadvertent is not relevant to the occurrence of the regulatory violation. Respondent's contention does not negate its admission of violation, nor does it provide any basis for mitigation of the penalty.

Findings

I have considered the six issues raised by Respondent in its appeal and find them to be without merit. Furthermore, I find that sufficient evidence has not been presented to warrant mitigation of the assessed civil penalty. Therefore, the Chief Counsel's Order of September 22, 1988, finding that Respondent knowingly violated 49 CFR 171.16 and assessing a $1,500 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in (1) referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court, and (2) accrual of interests at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to this same authority, a penalty charge of seven percent (7%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: February 28, 1989.

M. Cynthia Douglass.

Certified mail—Return receipt requested

[Ref. No. 88–93–HMI]

Action on Appeal

In the Matter of: Spectrum Chemical Co., Respondent.

Background

On March 21, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Spectrum Chemical Co. (Respondent) assessing a penalty in the amount of $1,500 for having knowingly failed to file a DOT Form F 5800.1 report within 15 days of discovering an incident involving the unintentional release of a hazardous material during

transportation in commerce, in violation of 49 CFR 171.16.

The Order assessed the $1,500 civil penalty originally proposed in the November 30, 1988 Notice of Probable Violation. By letter dated April 13, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal letter, Respondent stated that it was disappointed that RSPA had not interviewed Ms. Rodica Matison in its New Jersey office because Ms. Matison was the person who telephonically reported the incident. Respondent alleged that Ms. Matison "was told by the authorities that her telephonic report was sufficient." Respondent requested that RSPA interview Ms. Matison and asserted that she would tell the truth, which is that Respondent was misinformed by the authorities and therefore the burden should not fall on Respondent alone. Respondent also stated that it now had knowledge of the law, that it would try to prevent future accidents, and report in writing any that occur.

On May 4, 1989, at Respondent's express request, an RSPA inspector telephoned Ms. Matison who stated that she was in charge of the New Jersey operation and had handled the emergency telephone calls concerning the hazardous materials incident that were made to the new Jersey Turnpike Authority (NJTA) and the New Jersey Environmental Protection Agency (NJEPA). The RSPA inspector contacted NJTA and NJEPA and was told that both these agencies generally inform callers to contact the National Response Center (NRC), Chemtrec, or both. Ms. Matison stated that she was not familiar with either agency or with the Department of Transportation's incident reporting requirements, and that she was unaware of Respondent's operations manual for hazardous materials transportation. At no time did Ms. Matison indicate that she had been misled by the state agencies she contacted. Since she was unfamiliar with the NRC, the agency to which telephone incident reports are made, it appears unlikely that she telephoned the NRC following the incident, and even less likely that she was told that the telephone report was sufficient. If Respondent relied on the two New Jersey agencies, and there is no evidence in the record to suggest that it did, its reliance was misplaced. Respondent is a transporter of hazardous materials and as such has a legal obligation to be aware of its responsibilities under the Hazardous Materials Regulations. The Chief Counsel considered this argument and justifiably discounted it.

Findings

Therefore, I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $1,500 is appropriate in light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of March 21, 1989, assessing a $1,500 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service.

Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, Room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, Room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: August 21, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Enf. Case No. 88–108–SD]

Denial of Relief

In the Matter of: PMC Specialties Group, a Division of PMC, Inc., Respondent.

Background

On February 7, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), issued an Order to PMC Specialties Group (Respondent) assessing a penalty in the amount of $2,000 for violations of 49 CFR 171.2(a), 172.201(a)(4), and 173.154. By letter dated February 28, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Respondent's February 28, 1989 letter also contained a 50 percent compromise offer, which was rejected by the Chief Counsel in a March 6, 1989 letter to Respondent.

Discussion

The substance of Respondent's appeal consists of the following sentence:

> We still maintain the emphasis of the Department of Transportation penalization was over done (sic) and had no effect on getting our attention, considering we responded immediately to the discovery by the D.O.T. inspector and the only flaw in the drum specifications to be met was the lack of embossing.

Respondent's statement that the "only" flaw in the drum specifications was the lack of embossing overlooks the fact that the absence of an embossed specification on the drums indicates that no drum manufacturer had certified that those drums had been properly tested and otherwise met the required DOT specification. Therefore, the drums, in fact, were not specification drums and could not be used to transport flammable solids.

After reviewing the record in this case, I have determined that the assessments of $1,500 for Violation No. 1 and $500 for Violation No. 2 are appropriate for the following reasons. First, the maximum penalty provided by Congress for each violation is $10,000. Second, Violation No. 1 consisted of shipments of hazardous materials in several hundred non-specification drums on several occasions, and Violation No. 2 consisted of the use of improper shipping papers on three occasions. Third, each one of these occurrences could have been charged as a separate violation. Fourth, the assessments contained in the Chief Counsel's Order are in line with those assessed for similar violations in other enforcement cases and are properly based on the assessment criteria prescribed in 49 CFR 107.331.

Findings

Based on my review of the record, I find the following:

(1) Respondent's appeal is without merit.

(2) The penalty assessments in the Chief Counsel's Order are appropriate,

and there is no basis for mitigation of the civil penalties assessed therein.

(3) The Chief Counsel properly rejected Respondent's compromise offer.

Therefore, the Order of February 7, 1989, including the $2,000 civil penalty assessment, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this Denial of Relief will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate of seven percent (7%) in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, Room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: April 4, 1988.

M. Cynthia Douglass.

Certified Mail—Return receipt requested

[Ref. No. 88–109–NVO]

Action on Appeal

In the Matter of: T–A–T Airfreight, Inc. (DBA The Tatmar Company) Respondent.

Background

On October 24, 1988, the Office of the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued to T–A–T Airfreight, Inc. (dba The TATMAR Company) (Respondent) a Notice of Probable Violation (Notice), preliminarily assessing a $40,000 civil penalty against Respondent for alleged violations of 49 CFR 171.2(a), 172.202(a)(1), 172.202(a)(2), 172.204(a)(4), and 172.504 of the Hazardous Materials Regulations (HMR). Specifically, the Notice alleged that Respondent had violated those sections of the HMR by offering hazardous materials, 20 boxes of Class A explosives, for transportation without: (1) including on the shipping papers for those materials the proper shipping name (Detonators, Class A explosives); (2) including on the shipping papers for those materials the proper hazard class (Class A explosives); (3) certifying on the shipping papers for those materials that those materials were offered for transportation in accordance with 49 CFR Subtitle B, Chapter I, Subchapter C; and (4) placarding the freight container in which those materials were being transported with "EXPLOSIVES A" placards on each end and side of the container.

On August 2, 1989, the Chief Counsel, RSPA, issued an Order to Respondent, finding that Respondent had knowingly committed acts that violated the HMR, as alleged in the Notice. In making this finding, the Chief Counsel considered the evidence that led to the issuance of the Notice, and those comments made in, and evidence provided with, Respondent's letters of December 1, 1988, April 19, 1989, and May 11, 1989, and during an "informal conference" held on February 28, 1989. In the Order, the Chief Counsel also determined that, based upon his review of the record, mitigation of the proposed civil penalty was not warranted. The "record" to which the Chief Counsel referred consisted of not only the evidence and comments listed above, upon which the Chief Counsel based his finding of violations, but additional documents, including a Federal Bureau of Investigation (FBI) laboratory analysis. The Chief Counsel used these documents to respond to arguments made by Respondent in its letters and at the informal conference.

By letter dated September 5, 1989, Respondent submitted a timely appeal of the Order. In it, Respondent stated that it had first learned of two of the additional documents, including the FBI report, after reading the Chief Counsel's Order. Respondent argued that the Order violates 49 CFR 107.317(d) because it is not based on evidence introduced at the February 28 "informal hearing." It further argued that the Order violates the Due Process Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution in that Respondent was not afforded an opportunity to examine and controvert evidence received after the "informal hearing." Respondent maintained that the "hearing" should have been reopened and that Respondent should have been given notice and opportunity to examine and refute the additional evidence. Respondent concluded that the Order must be vacated.

By letter dated September 18, 1989, I provided Respondent with copies of six documents, which were not referenced in the Notice, to enable Respondent to fully address the substantive issues in this case. By letter dated October 17, 1989, Respondent argued that its receipt of those documents did not cure the defects described in its September 5 appeal. It requested that a formal hearing be held in this case, and that Respondent be given certain original documents so that its own expert may analyze them. Respondent did not support its request for a formal hearing with argument.

Discussion

49 CFR 107.317(d) states that the Chief Counsel may issue an order assessing a civil penalty "[b]ased upon [his] review of the proceeding." That subsection implies that "the proceeding" includes the Notice, Respondent's written explanations, information, and arguments, as well as its presentation at the informal conference. Although the Chief Counsel's finding of violations was based on his review of the proceeding, his further finding concerning the amount of the civil penalty to be assessed was supported, in part, by evidence outside of the proceeding. Therefore, based upon the HMR, the Chief Counsel's Order should be vacated. I find it unnecessary to discuss Respondent's Constitutional arguments.

With the Order vacated, the issue to be addressed is the form of notice to the Respondent that the information outside of this proceeding must take. 49 CFR 107.311(c) refers to the issuance of either an amended notice of probable violation or a new one. It states that the Office of the Chief Counsel may amend a notice of probable violation at any time before an order assessing a civil penalty. It further states that if the Office of Chief Counsel alleges any new material facts or seeks new or additional remedial action or an increase in the amount of the proposed civil penalty, it issues a new notice of probably violation. Because that office did not seek remedial action or an increase in the amount of the proposed civil penalty, the question is whether the additional information constitutes allegations of new material facts. If it does, it would appear that a new notice of probable violation would be required.

The Federal Register documents concerning the Notice of Proposed Rulemaking (NPRM) and Final Rule that discuss subsection (c) demonstrate, however, that a new notice should not be required in this case. The NPRM pertained only to amended notices of probable violation and would have permitted respondents to treat amended notices as initial notices for the purposes of response options. 46 FR 47092 47095; September 24, 1981. The

Final Rule changed 49 CFR 107.311(c) to its current form (except for changes in office names following a subsequent reorganization). 48 FR 2652–3; January 20, 1983. The "Supplementary Information" section explained that the change was made based on the following recommendation of a commenter: "[A]mendments to notices should be allowed only where the new information relates directly to allegations in the original notice. In all other cases, [the agency] should have to issue a new notice based on new allegations." 48 FR 2647; January 20, 1983. Thus, the Office of the Chief Counsel would be required to issue a new notice of probable violation only if it determines that any additional information that it may seek to make a part of this proceeding does not relate directly to allegations in the original notice. Because the information does relate directly to those allegations, amending the notice of probable violation is the proper procedure for the Office of the Chief to follow.

If that is the course taken, the Respondent is not entitled to change the form of its reply that it chose under 49 CFR 107.313. It is noteworthy that that portion of the NPRM that would have permitted respondents to treat amended notices as initial notices for purposes of response options was removed from the final rule. I therefore agree with Respondent's assertion in its appeal that the "informal hearing" [49 CFR 107.317(b) refers to this response as an "informal conference"] should have been reopened and that Respondent should have been given notice and opportunity to examine and refute the additional evidence.

Findings

I find that the Chief Counsel's Order was based, in part, upon information outside of this proceeding. Accordingly, that Order is vacated, and this case remanded to the Office of the Chief Counsel to either:

1. Issue an Amended Notice of Probable Violation in accordance with this Action; or

2. Issue a new Order that is not supported by information outside of this proceeding.

If the Office of the Chief Counsel issues an Amended Notice, it must inform Respondent that it will have an opportunity to respond to the amendments by requesting that the informal conference be reconvened. I also direct the Office of the Chief Counsel to make arrangements for Respondent's expert to review any new exhibits that that office seeks to make a part of the record.

Date Issued: February 22, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 68–113–CR]

Action on Appeal

In the Matter of: Consolidated Fire Protection Services, Inc., Respondent.

Background

On December 27, 1988, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Consolidated Fire Protection Services, Inc. (Respondent) assessing a penalty in the amount of $2,000 for having knowingly committed acts in violation of 49 CFR 171.2(b), 173.34(e)(3), and 173.34(e)(5). (The Order inadvertently cited § 171.2(b) instead of § 171.2(c). The Notice of Probable Violation contained the correct reference.)

The Order assessed a civil penalty of $2,000, reduced from the $2,500 civil penalty originally proposed in the November 9, 1988 Notice of Probable Violation. By letter dated January 20, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order found two violations of the Hazardous Material Regulations. Respondent does not challenge the civil penalty for the second violation, which the Chief Counsel's Order had mitigated from $1,000 to $500. Respondent's appeal concerns only the first violation: that Respondent knowingly represented that it had performed hydrostatic retesting of DOT specification cylinders even though Respondent had not determined that its retesting equipment met the accuracy requirements of 49 CFR § 173.34(e)(3). In its appeal, Respondent argues that the $1,500 penalty for that violation was excessive because Pittsburgh Testing Laboratory, the independent inspection agency, had the responsibility to not certify Respondent's hydro-tester if the calibrated cylinder did not have a recent calibration certificate. Respondent maintains that, had it known of the requirements, it would not have continued its retesting of DOT specification cylinders until it had received a calibration certificate. Respondent further notes that following the inspection of its facility by Office of Hazardous Materials Transportation (OHMT) inspectors, it had stopped retesting the cylinders until it had received the certificate.

The fact that, subsequent to the OHMT inspection, Respondent had obtained an independent calibration of, and a certificate of calibration for, its hydro-tester was known to the Chief Counsel before the Notice issued. Regarding this effort by Respondent, the Notice stated: "this mitigating factor has been considered in determining an appropriate proposed civil penalty assessment." Moreover, during the December 16, 1988 informal telephone conference, an attorney from the Chief Counsel's Office explained to Respondent's President and Vice President that the shared responsibility of the independent inspection agency had also been considered in determining the proposed penalty. However, Respondent cannot escape its obligation to be familiar with, and abide by, the Hazardous Materials Regulations. Finally, Respondent had not been able to determine the accuracy of the calibration of its equipment for a week before the OHMT inspection because, during that time, it did not have the ¾-inch fitting necessary to connect the calibrated cylinder to the high pressure line. Despite the fact that its retest equipment had not been checked for accuracy for about one week, Respondent had continued to test DOT specification cylinders, thereby violating 49 CFR 173.34(e)(3).

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $2,000 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability reduced by some reliance on the independent inspector, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of December 27, 1988, assessing a $2,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a

penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: September 18, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 88–114–HMI]

Action on Appeal

In the Matter of: Chemcentral Corporation, Respondent.

Background

On March 3, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Chemcentral (Respondent) assessing a penalty in the amount of $1,500 for having knowingly failed to file DOT Form F 5800.1 within 15 days of discovering an incident involving the unintentional release of a hazardous material during transportation, in violation of 49 CFR 171.16. The Order assessed the $1,500 civil penalty originally proposed in the November 30, 1988 Notice of Probable Violation. Although Respondent had waived its right to respond to the Notice, by letter dated March 21, 1989, it submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The incident involving the unintentional release occurred March 3, 1988. Respondent admits that it did not mail the required DOT Form F 5800.1 until November 30, 1988, even though each of its drivers had received a handbook containing the reporting requirements. Moreover, the eventual filing on November 30, 1988, occurred more than 30 days after a Transportation Enforcement Specialist, U.S. Department of Transportation, informed Respondent's General Manager in a telephone interview that the filing was required. Respondent also took more than 30 days following that interview to bring to the attention of its supervisory personnel the necessity of making timely reports.

Respondent requests that the assessed civil penalty be reduced from $1,500 to $250, "because of the relatively insignificant nature of the real or potential harm caused by the release of the hazardous material in this instance." Respondent also reasons that it immediately made repairs to the trailer involved in the incident. Respondent's arguments are not convincing. The significance of the harm caused by the release or the repairs made to the trailer do not determine the amount of the civil penalty assessed for not reporting the release. If the reporting requirements in the regulations are violated consistently, the Department's statistics concerning the unintentional release of hazardous materials will be unreliable. In addition, the amount of the penalty assessed by the Chief Counsel, which Respondent says it has the ability to pay and will not in any way affect its ability to continue in business, is far below the maximum permitted. Pursuant to 49 CFR 107.329, when, as here, the violation is a continuing one, each day of the violation constitutes a separate offense. Thus, Respondent could have been assessed a civil penalty of up to $10,000 per day for each day Respondent was in violation of 49 CFR 171.16. Nevertheless, because Respondent did make the required filing on November 30, 1988, before receiving the Notice issued on that date, mitigation of $100 is justified.

Findings

I have determined that there is sufficient information to warrant partial mitigation of the civil penalty assessed in the Chief Counsel's Order. Respondent argues that it has a "relatively-free record of alleged violations of 49 CFR regulations." Nevertheless, I find that a civil penalty of $1,400 is appropriate in light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of March 3, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR § 107.331, except that the $1,500 civil penalty assessed therein is hereby mitigated to $1,400.

Failure to pay the $1,400 civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR Part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, Room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: August 21, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–01–SIT]

Action on Appeal

In the Matter of: FMC Corporation, Respondent.

Background

On March 22, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to FMC Corporation (Respondent) assessing a penalty in the amount of $7,000 for having knowingly committed three violations. The Order assessed the $7,000 civil penalty originally proposed in the January 18, 1989 Notice of Probable Violation.

By letter dated June 9, 1989, after obtaining an extension of time to appeal, Respondent, through counsel, submitted a timely appeal of the Order insofar as it found a violation and imposed a $3,000 civil penalty for Violation No. 3. Violation No. 3 involved the knowing offering of a hydrogen peroxide solution for transportation in commerce in a concentration (70.8%) higher than authorized for an intermodal (IM) portable tank, in violation of 49 CFR 171.2(a) and 173.266(a)(3). (Respondent previously had submitted a $4,000 check in full payment of the civil penalties imposed for Violation Nos. 1 and 2.) The Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent stated that the maximum 70% figure in the IM Tank Table and 49 CFR 173.266 originated with an exemption issued to an international tank manufacturer whose customer intended to ship standard 70% hydrogen peroxide. Respondent contended that the 70% figure was apparently chosen because that is what the exemption application requested, and that nothing in the available records indicates that RSPA "drew a line at 70% and would have considered 71% unsatisfactory, if the petition had asked for 71%." Respondent also suggested that the 70% figure was incorporated in the IM Tank Table without formal notice and comment under the Administrative Procedure Act. Respondent reiterated the arguments it made in response to the Notice, suggesting that hydrogen peroxide must be shipped in concentrations higher than 70% in order to have 70% at destination because the material slowly loses concentration over time, and that the industry practice is to describe the material by the standard commercial percentage that a company is contractually obligated to deliver (e.g., 70%), not the actual percentage shipped.

Respondent also contended that although RSPA stated that one of the purposes of adopting the portable tank rules was to facilitate international transport of hazardous materials and harmonize with the United Nations (UN) standards, the UN standards do not apply an upper limit of 70%. Furthermore, Respondent noted that a number of organic peroxides and oxidizers listed in the Hazardous Materials Table have concentrations of 52% or 72%, presumably to accommodate standard 50% or 70% material and anticipating product loss, while other materials have more even figures which correlate with uneven percentages in the UN standards. Respondent suggests that these apparent inconsistencies are not explained by any scientific rationale, but rather correlate with what was requested by a variety of petitioners over the years, some of whom accounted for decreasing concentration and some of whom merely identified the material by its commercial standard description.

Finally, Respondent contends that this situation is inappropriate for resolution through the enforcement process because all the commercial parties outside the Department understood the rule to mean one thing, while the agency understood it to mean something else. Respondent stated that it was now shipping hydrogen peroxide below 70% pending resolution of this matter, although doing so puts it at a competitive disadvantage with other companies in the industry.

The meaning of the regulatory requirement has been undisputed since its inception. In January 1981, RSPA published a final rule, after notice and comment, authorizing the use of two new specification intermodal portable tanks to transport certain hazardous materials to be identified by name in the IM Tank Table (46 FR 9880). The rule amended each of the specific packaging requirements in 49 CFR part 173 for the materials authorized. The packaging requirements in 49 CFR 173.266(a)(3) for hydrogen peroxide solution in water authorized shipment of this material, containing 70 percent or less hydrogen peroxide by weight, in specification IM 101 portable tanks, under the conditions specified in the IM Tank Table. The 70 percent figure was corrected to 60 percent by a final rule correction issued April 30, 1981 (46 FR 24184).

The January 1981 final rule stated that the IM Tank Table would be published separately, and provided procedures, in 49 CFR 173.32d, for addition, modification, and removal of entries in the IM Tank Table. The Tank Table was intended to provide flexibility by allowing addition or modification of entries through an approval process based upon a technical analysis of available data concerning the material. Absent that approval process, the Tank Table would be a static document, unable to accommodate the legitimate needs of commerce. In April 1981, the Materials Transportation Bureau (predecessor to the Office of Hazardous Materials Transportation (OHMT)) issued an interim approval, in accordance with 49 CFR 173.32d, to L'air Liquide. The interim approval, which was effective May 1, 1981, authorizes transportation in IM 101 tanks of hydrogen peroxide solution "Over 60 percent but not greater than 70 percent by weight in water" under the conditions specified in the interim approval, and requires that a copy of the interim approval accompany each shipment. The interim approval also states that hydrogen peroxide solution over 70 percent by weight in water is "*Not Authorized for transportation in IM 101 or IM 102 tanks*" (emphasis added). Respondent has been on notice since that time that hydrogen peroxide solution over 70 percent cannot be shipped in IM portable tanks, and that hydrogen peroxide solution over 60 percent but not greater than 70 percent may be shipped only under the authority, and in accordance with the terms, of the interim approval granted by OHMT. If Respondent had any doubt about the 70 percent maximum, it could have requested clarification or sought an amendment to the IM Tank Table, as provided in 49 CFR 173.32d.

The Chief Counsel considered and rejected Respondent's arguments concerning the prevailing industry practice of shipping hydrogen peroxide in concentrations greater than the 70% allowed by the regulations. I concur with the Chief Counsel's conclusion that industry practice is irrelevant as to the legality of Respondent's practice.

Respondent's contention concerning different percentages for other named materials is not directly relevant to this case because those materials are not allowed to be shipped in IM portable tanks. Respondent's contention concerning the different percentages authorized for various materials is valid to the extent that it highlights that exemptions, subsequently incorporated into the regulations, are based upon applications from industry representing what it plans to do. A company is perfectly capable of specifying what concentration it plans to ship, including an allowance for loss of concentration, and apparently many companies did so. It is not for RSPA to conjecture that a given percentage should be understood to mean approximately that percentage. The exemptions that were granted, and subsequently converted to regulation, were issued on the basis of a demonstration that a company's proposed action would result in a level of safety equivalent to the regulations. The fact that a company might have been able to make that demonstration with a higher concentration is irrelevant. The fact that the UN standards do not set a maximum percentage is likewise irrelevant. Although the portable tank rules were adopted, in part, to align with UN standards, the preamble clearly states that the rules are not identical. The Hazardous Materials Regulations, not the UN standards, regulate the packaging of hazardous materials for domestic transportation.

Findings

Accordingly, I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $3,000 is appropriate in light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of March 22, 1989, assessing a $3,000 civil penalty for Violation No. 3, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: December 4, 1989.

Travis P. Dungan,

Administrator.

cc: Robert H. Malott
Chief Executive Officer
FMC Corporation
200 E. Randolph Drive
Chicago, IL 60601.

FMC Corporation
2000 Market Street
Philadelphia, PA 19103
Attn: David D. Eckert, Branch Manager.

Certified mail—Return receipt requested

[Ref. No. 89–11–SPT]

Action on Appeal

In the Matter of: Chemcentral Corporation, Respondent.

Background

On August 14, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation (DOT), issued an Order to Chemcentral Corporation (Respondent) assessing a penalty in the amount of $2,500 for having knowingly used for transportation of hazardous materials five DOT specification 57 portable tanks that had not been retested at least once every two years, in violation of 49 CFR 173.32(e)(1)(i). The Order assessed a civil penalty which was $500 less than the $3,000 assessment originally proposed in the January 30, 1989 Notice of Probable Violation. By letter dated September 12, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Notice of Probable Violation (NOPV) originally issued in this matter proposed a penalty of $3,000 against Respondent for its knowing use for the transportation of hazardous materials five DOT specification 57 portable tanks which had not been retested as required by the Hazardous Materials Regulations. In February 20 and March 3, 1989 reply letters, Respondent requested mitigation of the penalty and stated that of the five tanks that should have been retested, two tanks subsequently had been retested and passed and the remaining three tanks had been retired from service. The Chief Counsel, RSPA, determined that Respondent's prompt corrective action warranted partial mitigation and, therefore, reduced Respondent's proposed civil penalty by $500.

In its appeal letter, Respondent requests further reduction of the penalty amount. Respondent contends that of the seven criteria listed in 49 CFR 107.331, the only two criteria addressed were Respondent's ability to pay and the effect on Respondent's ability to continue in business. Respondent argues that no harm from the violation was noted, the nature and circumstances of the violation and its extent and gravity seemed to be minor, the degree of culpability is difficult to assess, and there was no history of prior offenses.

The Chief Counsel already has mitigated the penalty by $500 in light of the corrective action taken by Respondent. The Chief Counsel considered all the civil penalty criteria in 49 CFR 107.331, including the nature and circumstances of the violation, its extent and gravity, the degree of Respondent's culpability, the absence of prior offenses by Respondent, Respondent's ability to pay, the effect of the penalty on Respondent's ability to remain in business, and such other matters as justice may require, including Respondent's remedial action. Five instances of knowing use of out-of-test portable tanks for hazardous materials transportation constitute serious offenses. Although they were charged as a single offense, Congress has provided for a possible maximum penalty of $10,000 for that offense. None of the five portable tanks had ever been retested, and there is no indication that Respondent has not presented any new information or argument to warrant further mitigation or to indicate that the Chief Counsel did not properly consider the penalty assessment factors. In light of all the foregoing, I find that the $2,500 penalty (constituting a $500 penalty for each of the out-of-test tanks) is appropriate.

Respondent also requests an informal conference and, if that proves unsatisfactory, a formal hearing to be held in Chicago, Illinois. The time for requesting either option has expired. Respondent's options, pursuant to 49 CFR 107.313, were listed in Addendum B to the Notice of Probable Violation (Notice). Within 30 days of its receipt of the Notice, Respondent could have included in its informal response a request for an informal conference. However, in its February 20 and March 3, 1989 replies to the Notice, Respondent did not request a conference. Also, within this same 30-day period, Respondent could have made a request for a formal hearing before an administrative law judge. Respondent's failure to request either an informal conference or a formal hearing within 30 days of its receipt of the Notice constituted a waiver of Respondent's right to such a conference or hearing. Therefore, I deny Respondent's request for an informal conference and its request for a formal hearing.

Findings

I have determined that there is insufficient information to warrant further mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $2,500 is appropriate in light of the nature and circumstances of the violation, its extent and gravity, Respondent's culpability, the absence of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant circumstances. Therefore, the Order of August 14, 1989, assessing a $2,500 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed in this matter within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89.

Pursuant to those same authorities, a penalty charge of 6 percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: October 12, 1989.

Travis P. Dungan,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 89–12–SP]

Action on Appeal

In the Matter of: Chemco Manufacturing Co., Inc. Respondent.

Background

On February 23, 1990, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Chemco Manufacturing Company, Inc. (Respondent) assessing a penalty in the amount of $2,000 for having knowingly offered for transportation in commerce a hazardous material, a flammable liquid with a flash point of 5 degrees Fahrenheit (#791 Strippable Booth Coating, product name: Liquid Envelope, #791–35), in 5-gallon, open-head DOT-37C pails authorized only for materials having a flash point above 20 degrees Fahrenheit, in violation of 49 CFR 171.2(a) and 173.128(a)(4). The Order assessed a civil penalty of $2,000, reduced from the $5,000 civil penalty originally proposed in the April 20, 1989, Notice of Probable Violation. By letter dated March 9, 1990, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent admitted that the civil penalty was for violations occurring prior to the date of the DOT inspection. Respondent's sole basis for appeal is that Mr. O'Neil, the inspector from the Office of Hazardous Materials Transportation (OHMT), "acknowledged to our General Manager in front of other employees that if we immediately complied with the HMR regulations, of which we had no knowledge, that we were assured no penalties for prior non-compliance would be involved [sic]." Respondent stated that it had disposed of all non-complying containers, at considerable cost, and had complied with the HMR since the date of the OHMT inspection.

It is standard procedure for OHMT inspectors to conduct an exit interview following a compliance inspection. The OHMT inspector discusses the probable violations observed during the inspection, and the range of enforcement sanctions available. The Notice of Probable Violation (Addendum A, Page 1) states that "[b]efore leaving Respondent's facility, Inspector O'Neil showed Mr. Schweizer 49 CFR 173.128(a)(4), and explained to him the probable violation concerning Respondent's shipment of its paint related material #791 packaged in DOT 37C80 5-gallon pails." Inspector O'Neil's inspection report states that the exit interview was conducted with Mrs. J.J. Pape and Mr. Schweizer. Inspector O'Neil's report also states that he discussed the probable violation, showed Mr. Schweizer the relevant section of the Hazardous Materials Regulations, and discussed "all of the enforcement possibilities." OHMT inspectors do not have the authority to waive the imposition of civil penalties, and it is standard practice for them to state during an exit interview that any enforcement decision will be made by the Chief of the Enforcement Division in consultation with the Office of Chief Counsel. Respondent never raised this allegation until it appealed the Chief Counsel's Order, and it provided no corroboration whatsoever to support its contention. I therefore find that there is on credible evidence that Inspector O'Neil made the alleged statement. Even if the inspector mistakenly or improperly had made such an unauthorized statement, the Office of Chief Counsel would not thereby have been precluded from bringing an enforcement action. Respondent has a responsibility to comply with the Hazardous Materials Regulations and is subject to appropriate sanctions for its failure to do so.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $2,000 is appropriate in light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of February 23, 1990, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331. Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual, of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service.

Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, Room 9112, Department of Transportation, 400 Seventh Street, S.W., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: April 30, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–20–CR]

Action on Appeal

In the Matter of: New York Fire and Safety Corporation, Respondent.

Background

On November 14, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to New York Fire and Safety Corporation (Respondent) assessing a penalty in the amount of $10,000 for knowingly representing, marking, certifying, and offering 15 DOT specification cylinders as successfully retested in accordance with the Hazardous Materials Regulations (HMR) when they should have been condemned because their permanent expansion exceeded ten percent of total expansion. Respondent's failure to condemn the cylinders was

determined to be in violation of 49 CFR 171.2(c) and 173.34(e)(4).

The Order assessed the maximum penalty of $10,000 allowed under the authority of 49 App. U.S.C. 1809(a)(1) and 49 CFR § 107.329, citing Respondent's failure to respond to the Notice of Probable Violation (Notice) issued August 21, 1989, and, therefore, its failure to contest the probable violation as set forth in the Notice and to present any information which would warrant mitigation of the proposed civil penalty amount. The Chief Counsel's Order is incorporated herein by reference.

Respondent submitted a timely appeal of the Order, and in the alternative, requested that the Chief Counsel vacate the Order "in the interests of justice and with a view to compromising a settlement." Respondent proposed to pay a $2,000 penalty, citing its financial difficulties and inability to pay the assessed penalty. A December 13, 1989 letter from the Acting Chief Counsel, RSPA, was sent to Respondent informing it that the proper procedure for contesting an Order of the Chief Counsel was through an appeal to the Administrator, RSPA, and that its letter was being so considered. As Respondent had not presented any documentary evidence of its financial condition prior to issuance of the Order, the letter also invited the submission of additional evidence. (Respondent had supplied certain financial statements to the staff attorney of record in the matter after its 30-day response period had run (49 CFR 107.313).) This action on appeal is based upon a *de novo* review of the administrative record in this case, as supplemented by Respondent following issuance of the Order.

Discussion

In its appeal, Respondent does not contest that it violated the HMR as stated in the Chief Counsel's Order. The sole ground for appeal is the appropriateness of imposing the maximum penalty authorized by law in light of Respondent's financial circumstances. Respondent also explains that its failure to respond to the Notice and to raise this issue in a timely manner was due to an inadvertent oversight by office personnel. (Respondent was unaware of the action pending against it until an informal conference held on October 26, 1989 with regard to a Notice of Probable Violation issued to its parent corporation, Radec Corporation.)

In order to complete the administrative record, a January 5, 1990 letter from the Office of Chief Counsel again invited the submission of any material which Respondent wished to have considered on appeal. It also presented Respondent with copies of memoranda from the Office of Hazardous Materials Transportation (OHMT) inspector and the RSPA attorney who were present at the informal conference, noting their best recollection of Respondent's statements and other evidence presented at the conference concerning the financial condition of Respondent. This was done to provide Respondent with an opportunity to respond or supplement the record as it saw fit. Respondent's first submission, dated January 22, 1990, included income statements (unverified) and a certified financial statement for its parent corporation. According to those income statements, Respondent was operating at a net loss of about $96,500 as of November 1989. Respondent's January 22, 1990 letter also noted that despite its financial difficulties, Respondent had taken corrective action to ensure its employees were properly trained in hydrostatic testing and inspection of cylinders.

In a February 26, 1990 letter, Respondent advised the Office of Chief Counsel, RSPA, that on February 23, 1990, Radec Corporation had sold all of Respondent's assets, and had realized a net loss of $60,000 on the sale. In response to the Office of Chief Counsel's request for additional information concerning the sale, Respondents supplied a copy of the Asset Purchase Agreement and related documents. Respondent noted that the terms of the sale left Respondent with a substantial amount of accounts payable for which Respondent remains liable. According to the Schedule of Assets Sold and Attachment provided, the company was sold for $280,771.67, for assets having a book value of $238,799.09. This transaction would yield a net of $41,972.58, except that Respondent still had outstanding obligations to discharge. Respondent received only $120,000 at the time of closing. Of these proceeds, $10,000 was placed in escrow for sales tax and $110,000 was used to pay off various of Respondent's obligations, leaving Respondent with another $60–65,000 of accounts payable for which it remains responsible. The balance of the sales price will be paid over five years in equal monthly installments, and $35,000 will not be paid until at least one year from the closing. According to Respondent's calculations, this sale actually resulted in a net loss to Respondent of approximately $92,000.

Respondent's March 28, 1990 letter also stated that it has agreed with the purchaser that the purchaser is in no way responsible for any liability arising out of the instant action.

Findings

I have determined that there is sufficient information to warrant partial mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $5,000 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, and all other relevant factors. The effect of a civil penalty on Respondent's ability to continue in business is, of course, not in issue, as the assets of the business have been sold.

Therefore, the Order of November 14, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CRF 107.331, except that the $10,000 civil penalty assessed therein is hereby mitigated to $5,000.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1) RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: May 21, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–25–SPT]

Action on Appeal

In the Matter of: GRO–MOR, Inc. and USA Fertilizer, Inc., Respondents.

Background

On September 6, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Gro-Mor, Inc. and USA Fertilizer, Inc. (Respondents) assessing, jointly and severally, a penalty in the amount of $8,500 for having knowingly offered for transportation and transported sulfuric acid (1) in concentration of 51 percent or less in packaging not authorized, (2) in concentration of greater than 95% to not over 100.5% in packaging not authorized, and (3) in a motor vehicle not placarded on each end and each side with CORROSIVE placards, in violation of 49 CFR 171.2(a) and (b), 173.272(a), (c), and (g), 172.504(a), 172.506(a)(1), and 177.823. The Order assessed the $8,500 civil penalty originally proposed in the February 24, 1989 Notice of Probable Violation, but authorized payment in four monthly installments. By letter dated September 29, 1989, Respondent, through counsel, submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

In their appeal, Respondents contend that the Hearing Officer (the Chief Counsel) failed to: properly consider the assessment criteria; understand the "corrosion study" submitted by Respondents; or give due credibility to the financial statements submitted by Respondents. Respondents also challenge the findings that the violations in fact occurred and the amount of the penalty. The appeal, however, does not include any arguments or additional information in support of Respondent's contentions. Accordingly, I have carefully reviewed all the information in the record and find Respondents' contentions meritless.

Respondents did not deny, and in fact acknowledged in their March 21 letter and at the informal conference, that Violation Nos. 2 and 3 occurred. Respondents even conceded in their March 21 letter, with respect to Violation No. 1, that although the material that spilled was intended to be a non-corrosive fertilizer vine-kill mix, "it is possible the plant operation could have made a mistake." In fact, the report from the Idaho Department of Health and Welfare included a laboratory analysis of the material that spilled showing it to be 50.5% sulfuric acid. The "Corrosion Study" is for a material Respondents refer to as "26–0–0–6," but there is no evidence to suggest that this material was being transported at the time of Violation No. 1, and there is ample evidence, in the form of the laboratory analysis, to conclude that it was not the material being transported.

With respect to Respondents' contention concerning the consideration given to the financial information they submitted, the information in the financial statement is sketchy, unsubstantiated, and pertained to a natural person affiliated with both corporations, rather than to the corporations themselves. Under these circumstances, the Chief Counsel was more than generous in according the financial statement even limited credibility.

Finally, although they are not required to do so, Respondents have not submitted any information concerning corrective actions taken to prevent the occurrence of such violations in the future. Transporting high concentrations of sulfuric acid in non-specification packagings is a serious violation, and there is no evidence in the record to warrant mitigation of the civil penalty assessed.

In view of the foregoing, the Chief Counsel properly considered each of the assessment criteria and decided that there was no justification for mitigating the penalty amount.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $8,500 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondents' culpability, Respondents lack of prior offenses, Respondents' ability to pay, the effect of a civil penalty on Respondents' ability to continue in business, and all other relevant factors.

Therefore, the Order of September 6, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331. The civil penalty of $8,500 shall be payable in four equal monthly installments of $2,125 each, beginning on January 22, 1990, and due on the 22nd day of each of the three succeeding months. If Respondent defaults on any payment of the authorized payment schedule, the entire amount of the remaining civil penalty shall, without notice, immediately become due and payable.

Respondent's failure to pay this accelerated amount in full will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment of the accelerated amount is not made within 90 days of default.

Each payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondents must send a photocopy of each check or money order to the Office of the Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: December 21, 1989.

Travis P. Dungan.

cc: Mr. Arthur H. Nielson, Jr., President
Gro-Mor, Inc. and USA Fertilizer, Inc.
120 North 12th Avenue
Pocatello, Idaho 83201
Certified mail—Return receipt requested

[Ref. No. 89–27–HMI]

Action on Appeal

In the Matter of: Peoples Cartage, Inc., Respondent.

Background

On April 13, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Peoples Cartage, Inc. (Respondent) assessing a penalty in the amount of $1,000 for having knowingly failed to file DOT Form F 5800.1 within 15 days of discovering an incident involving the unintentional release of a hazardous material during transportation, in violation of 49 CFR § 171.16. The Order assessed a civil penalty of $1,000, reduced from the $1,500 civil penalty originally proposed in the February 3, 1989 Notice of Probable Violation. By letter dated April 19, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent's sole basis for appeal is that the amount of the civil penalty is not warranted or reasonable given certain substantial mitigating factors. Respondent contends that the unintentional violation involved a single written reporting requirement that did not endanger persons or property; the

violation resulted from a good faith misinterpretation of the regulations, not a willful or intentional violation; Respondent has provided its personnel with training; Respondent has no history of prior offenses; Respondent should not be penalized because it is financially able to pay; and Respondent voluntarily undertook remedial action to educate its employees.

The Chief Counsel already has mitigated the $1,500 proposed penalty by $500 in light of Respondent's good faith misinterpretation and its remedial actions. Moreover, the Chief Counsel considered all the civil penalty criteria in 49 CFR 107.331, including Respondent's lack of prior offenses, its degree of culpability, the gravity of the violation, and Respondent's ability to pay and continue in business. Respondent is not being penalized because of its ability to pay. Ability to pay is considered in assessing a civil penalty only to the extent that a person is unable to pay or doing so would adversely affect the ability to continue in business. Otherwise, ability to pay is given minimal weight. Respondent has not presented any new information or argument to warrant mitigation or to indicate that the Chief Counsel did not properly consider the penalty assessment factors.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $1,000 is appropriate in light of the nature and circumstances of the violation, its extent and gravity, Respondent's culpability, Respondent's lack or prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of April 13, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR § 107.331.

Failure to pay the $1,000 civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, Room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of the Chief Counsel (DCC–1), RSPA, Room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: July 20, 1989.

Travis P. Dungan,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 89–32–CRR]

Action on Appeal

In the Matter of: Robert Gas Cylinder Co., Inc., Respondent.

Background

On July 5, 1989, the Chief Counsel, Research and Special programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Robert Gas Cylinder Co., Inc. (Respondent), assessing a penalty in the amount of $6,000 for having knowingly represented DOT–4 series specification cylinders as meeting the requirements of the Hazardous Materials Regulations (HMR) by rebuilding them when it was not authorized to do so, in violation of 49 CFR 171.2(c) and 173.34(1). The Order assessed the $6,000.00 civil penalty originally proposed in the March 27, 1989 Notice of Probable Violation (Notice). By letter dated July 24, 1989, Respondent submitted a timely appeal of the Order (the "Appeal"). The Chief Counsel's Order is incorporated herein by reference.

Discussion

In assessing the $6,000 penalty in issue, the Chief Counsel, RSPA, relied on the fact that Respondent had known, for more than four years, that the necessary RSPA approval for rebuilding of DOT cylinders had not been granted to Respondent. Specifically, an inspection performed on the Robert Cylinder Manufacture, Inc. (RCM) on February 12, 1985, revealed the same violation as that which is currently in issue; this violation was discussed with Mr. Roberto Santiago, President of RCM, who did not contest it. Mr. Santiago subsequently attended a meeting on March 24, 1988, at the Puerto Rico Public Service Commission, at which time the need to obtain RSPA approval was discussed and planned enforcement action was reviewed with him.

In the Appeal, Respondent introduced several items which contradict the evidence relied upon to assess the $6,000 penalty. First, Respondent provided a contract for the sale of the business and equipment of RCM to it on February 17, 1987. Additionally, Respondent's counsel, Mr. Fernandez Mejias, stated that, at the time of purchase of the business, Mr. Santiago warranted to Respondent that all Federal licenses and permits necessary to repair, rebuild or manufacture compressed gas cylinders had been issued to RCM, that these licenses and permits were in full force and effect, and that they could be transferred to Respondent upon consummation of the sale (see Appeal, page 2). Respondent's Counsel also stated that "After the March 24, 1988 meeting held at the Puerto Rico Public Service Commission headquarters in which RSPA officials discussed the need for facilities engaged in the rebuilding and repair of compressed gas cylinders to obtain RSPA approval, Respondent acquired constructive knowledge that such approval was needed." (see Appeal, page 3.)

Respondent's Counsel has also provided the sworn statement of Mr. Antonio Navarro, Respondent's administrative office clerk, stating that he was mistaken in this prior oral statement to RSPA inspectors that Mr. Santiago was Respondent's Vice-President; further, Respondent provided the sworn statement of Mr. Hector Barreto, its Secretary, that Mr. Santiago never occupied any office or position with Respondent.

The new evidence contradicts Mr. Navarro's prior oral statement that Mr. Santiago was Respondent's Vice-President, which was relied upon to establish the $6,000 civil penalty in the Notice and the Order. Thus, accepting this evidence as true, Respondent *did not* have knowledge of the violations in issue until sometime after Mach 24, 1988. The Order was issued on the basis of the then-uncontradicted evidence that Respondent had knowledge of the violation since 1985. Respondent's evidence shows that: (1) It did not acquire this facility until 1987, (2) it is a separate corporate entity from RCM, to which the 1985 advisory letter was issued; and (3) far from bringing knowledge of the violation to Respondent, Mr. Santiago dealt at arm's length with Respondent, merely as a predecessor-in-interest, and actually misrepresented to Respondent that it was legally free to continue the cylinder

rebuilding operation. While lack of actual knowledge is not exculpatory, the extent of actual knowledge is relevant in assessment of a penalty. The $6,000 penalty was based on the belief that Respondent knew of the requirements for four years; because Respondent had had actual knowledge of the requirements for only six months prior to the inspection in which the violation was discovered, significant mitigation of the $6,000 penalty is appropriate.

Mitigation of the penalty by $3,000 reflects my evaluation of the nature and circumstances of the violation, its extent and gravity, the degree of Respondent's culpability, and such other matters as justice may require.

Findings

I have determined that there is sufficient information to warrant partial mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $3,000 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of July 5, 1989 is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the $6,000 civil penalty assessed therein is hereby mitigated to $3,000.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: January 3, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–33–CRR]

Action on Appeal

In the Matter of: Caribe Cylinders, Inc., Respondent.

Background

On February 23, 1990, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Caribe Cylinders, Inc. (Respondent) assessing a penalty in the amount of $3,000 for having knowingly represented DOT–4 series cylinders as meeting the requirements of the Hazardous Materials Regulations (HMR), 49 CFR parts 171–180, by rebuilding them when Respondent was not authorized to rebuild DOT–4 series cylinders, in violation of 49 CFR 171.2(c) and 173.34(1).

The Order assessed a civil penalty of $3,000, reduced from the $6,000 civil penalty originally proposed in the March 27, 1989 Notice of Probable Violation. The Order also provided that the civil penalty was payable in six monthly installments of $500 each. By a March 19, 1990 letter from its President, Ruben D. Milan, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent's appeal is based on two arguments. First, Respondent asserts that it relied upon certification by the Puerto Rico Public Service Commission as authority for its operations. Second, it alleges that, in light of numerous existing debts, the proposed civil penalty would lead to bankruptcy.

With regard to Respondent's alleged reliance on a Public Service Commission certification, it is entirely possible that Respondent could have relied in good faith upon such certification, in lieu of U.S. Department of Transportation (DOT) approval, until early 1985. However, on February 14, 1985, Respondent's President, Mr. Milan, was visited by Inspector James Henderson of the Office of Hazardous Materials Transportation (OHMT) of DOT. Mr. Henderson explained to Mr. Milan the necessity to obtain OHMT approval prior to rebuilding any more DOT specification cylinders. Subsequently, OHMT sent letters to Respondent on March 26, 1985, and September 18, 1987, reiterating the OHMT approval requirement contained in the HMR. In addition, Mr. Milan attended a March 24, 1988 meeting at the Public Service Commission Headquarters at which both OHMT and Public Service Commission representatives informed him of the requirement for OHMT approval. In light of all these notifications, Respondent had no justification for reliance upon its Public Service Commission certificate when it was discovered in November 1988 to be rebuilding DOT specification cylinders without OHMT approval.

With respect to the financial assertions made in Respondent's appeal, most of them are irrelevant because they relate to the personal financial situation of Respondent's President and his family and to the financial situation of another family business. Although Respondent alleges that both it and the other company have combined debts of over $154,000, no separate information is provided for Respondent itself. The appeal also states that Respondent is closed and non-productive and that its assets are "under threat of IRS (Social Security Taxes) embargo." This financial information concerning Respondent does not justify any further reduction of the $3,000 civil penalty imposed in the Chief Counsel's Order.

Findings

I have determined that there is not sufficient information to warrant any mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $3,000 payable in six monthly installments of $500 each is appropriate in light of the serious nature and all of the circumstances concerning this violation, its extent and gravity, Respondent's culpability (aggravated by the numerous "warnings" given to Respondent about such a violation), Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of February 23, 1990, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the first $500 monthly installment of the $3,000 civil penalty assessed herein within 20 days of receipt of this decision and each subsequent $500 monthly installment during each of the five subsequent months will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations

Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. § 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: May 15, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–38–CRR]

Action on Appeal

In the Matter of: Carli Cylinder Repair Co., Respondent

Background

On October 27, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Carli Cylinder Repair Co. (Respondent) assessing a penalty in the amount of $1,500 for having knowingly represented DOT–4 series specification cylinders as meeting the requirements of the Hazardous Materials Regulations by rebuilding them when Respondent was not authorized to rebuild DOT–4 series cylinders, in violation of 49 CFR 171.2(c) and 173.34(l). The Order assessed a civil penalty of $1,500, reduced from the $3,000 civil penalty originally proposed in the March 27, 1989 Notice of Probable Violation. By letter dated February 2, 1990, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent does not contest the violation or the amount of the civil penalty. However, it indicates that Hurricane Hugo collapsed and destroyed its working facilities and that its owner is unemployed and penniless. On that basis, Respondent requests that the civil penalty be suspended or that its monthly payments be reduced.

Respondent's allegations concerning its facilities have been confirmed by the Public Service Commission of Puerto Rico. In light of that calamity and Respondent's greatly reduced ability to pay, mitigation of the civil penalty by an additional $750 and a proportional reduction of the monthly payments are appropriate.

Findings

I have determined that there is sufficient information to warrant partial mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $750 is appropriate in light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of October 27, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the $1,500 civil penalty assessed therein is hereby mitigated to $750, payable in six consecutive equal monthly installments of $125 each. The first payment shall be due on July 12, 1990, and each succeeding payment shall be due on the 12th day of each month thereafter until a total of $750 has been paid. Failure to pay the first installment or any succeeding monthly installment on time will result in the entire remaining amount of the civil penalty, without notice, becoming immediately due and payable on July 12, 1990.

Failure to pay the first $125 installment payment of the $750 civil penalty assessed herein by July 12, 1990, will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service.

Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, Room 9112, Department of Transportation, 400 Seventh Street, S.W., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, Room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: June 15, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 80–40–CR]

Action on Appeal

In the Matter of: Eagle Industries, Inc., Respondents.

Background

On July 10, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Eagle Industries, Inc. (Respondent) assessing a penalty in the amount of $2,500 for having knowingly represented and marked cylinders as meeting the requirements of the Hazardous Materials Regulations when hydrostatic testing was conducting using equipment having an expansion gauge which could not be read to an accuracy of one percent or 0.1 cubic centimeter (cc) (Violation No. 1), and when records showing the results of reinspection and retest were not kept (Violation No. 2), in violation of 49 CFR 171.2(c), 173.34(e)(3), and 173.34(e)(5). (The Chief Counsel's Order inadvertently omitted citation of 49 CFR 173.34(e)(5), although the Order clearly found a violation of that requirement.) The Order assessed the $2,500 civil penalty originally proposed in the March 22, 1989 Notice of Probable Violation, as amended on June 5, 1989. By letter dated August 1, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

With respect to Violation No. 1, Respondent contends that it offered the inspector from the Office of Hazardous Materials Transportation (OHMT) the opportunity to return the day following the inspection to meet with the shop foreman (who had been absent during the inspection), but that the OHMT inspector declined to do so. Respondent further stated that burettes must be stored carefully as they are easily broken and expensive to replace.

The OHMT inspector informed Respondent that he was investigating an accident on the day after his inspection of Respondent's operation, and could not return. Respondent is essentially reiterating the argument that it raised

before the Chief Counsel that its shop foreman is responsible for testing cylinders and uses the correct size burettes. During the inspection, however, Mr. Bill Salmon stated that the only burette used to test cylinders was the one marked in increments of 1.0 cc, and that he had never used the other burettes, which were still in the package. The OHMT inspector asked Bill Salmon specifically if there were any cylinders in the shop that had been tested with the burette in question, and Mr. Salmon identified a cylinder (Serial #HO 24528) as one so tested. In addition, the OHMT inspector photographed retest records for a cylinder (Serial No. 706691C) which Bill Salmon signed as having tested. The fact that Respondent may have had other employees who tested cylinders correctly does not alter the fact that Bill Salmon, identified by Respondent as a designated hydrostatic test operator, admitted that he did not test cylinders as required. Moreover, as noted in the Order, this violation was reviewed with Bill Salmon at the time of the inspection and he did not contest the violation. Therefore, I find there is sufficient evidence in the record to sustain a finding of violation.

With respect to Violation No. 2, Respondent appears to contend that, since it used a proof pressure test rather than a water jacket test for certain cylinders, no expansion results were necessary. Proof pressure tests are permissible only for low pressure cylinders, not for cylinders with 1800 psi service pressure and 3000 psi test pressure. In addition, during the OHMT inspection, Bill Salmon stated that Respondent tests all cylinders by the water jacket method. The Notice alleged and the Order found that Respondent's hydrostatic retest records omitted total, elastic, and permanent expansion information for several cylinders for which a proof pressure test is not allowed. Therefore, Respondent's argument concerning proof pressure testing for low pressure cylinders is irrelevant to this violation.

Finally, Respondent reiterated its argument that it is a small family-owned business and the penalty would cause it a financial hardship. Respondent contends that its total liabilities are greater than $60,000, and that a recent move cost more than $10,000. Respondent provided no financial statement supporting its contention or contradicting the information provided in the Dun & Bradstreet report which the Chief Counsel used in assessing the penalty. In addition, the Dun & Bradstreet report indicates that Respondent had cash on hand of $36,704 as of December 31, 1988. I find that the Chief Counsel correctly determined that Respondent is able to pay the civil penalty and doing so would not adversely affect its ability to continue in business.

Findings

In summary, I find Respondent's arguments on appeal to be without merit. I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $2,500 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Repondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of July 10, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accurual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date issued: November 28, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–46–HMI]

Action on Appeal

In the Matter of: Walters-Dimmick Petroleum, Inc., Respondent.

Background

On May 4, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Walters-Dimmick Petroleum, Inc. (Respondent) assessing a penalty in the amount of $1,000 for having knowingly failed to file a DOT Form F 5800.1 report within fifteen (15) days of discovering an incident involving the unintentional release of a hazardous material during transportation, in violation of 49 CFR 171.16.

The Order assessed a civil penalty of $1,000, which was $500 less than the $1,500 assessment originally proposed in the March 13, 1989 Notice of Probable Violation. By letter dated May 15, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Notice of Probable Violation (Notice) originally issued in this matter assessed a penalty of $1,500 against Respondent for failing to timely comply with the 15-day deadline for filing a written report on DOT Form F 5800.1, as mandated by 49 CFR 171.16. Respondent requested mitigation of the penalty, based on its lack of bad faith and on the fact that, upon being informed that it had committed a violation, it did file the Form F 5800.1; this filing, however, occurred subsequent to expiration of the 15-day deadline. The Chief Counsel, RSPA, reduced Respondent's civil penalty, by one-third of the proposed assessment, to $1,000.

Respondent has alleged that it was not guilty of "knowingly" failing to file the Form F 5800.1 within the requisite 15-day period. Respondent, as a carrier of hazardous materials, is expected to be aware of the hazardous materials transportation regulations. Furthermore, as explained in the Notice, under 49 CFR 107.299, a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts; there is no requirement that the person actually knew of, or intended to violate, the legal requirements. The fact that Congress has permitted the Chief Counsel to assess a penalty as high as $10,000 per violation further supports the reasonableness of the reduced penalty of $1,000 for this violation.

Findings

I have determined that there is not sufficient information to warrant further mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $1,000 is appropriate in

light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of May 4, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M-86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC-1), RSPA, room 8405, at the same street address. This decision on appeal constitutes the final administrative action in this proceeding.

Dated Issued: July 5, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89-52-HMI]

Action on Appeal

In the Matter of: Westar Corporation, Respondent.

Background

On May 31, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Westar Corporation (Respondent) assessing a penalty in the amount of $1,500 for a knowing failure to file a written Hazardous Materials Incident Report, DOT Form F. 5800.1, in violation of 49 CFR 171.16. The Order assessed the $1,500 civil penalty originally proposed in the March 13, 1989 Notice of Probable Violation. By letter dated June 20, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent, a carrier transporting a hazardous material, failed to report on DOT Form F 5800.1, within 15 days of its discovery, an unintentional release of approximately 200 pounds of sodium cyanide, which occurred on June 14, 1988, in violation of 49 CFR 171.16.

Respondent primarily bases its appeal on the double jeopardy clause of the Fifth Amendment to the United States Constitution. Respondent alleges that the State of Arizona earlier fined it for the spilling of sodium cyanide on an Interstate Highway. This argument is invalid for several reasons. First, the Double Jeopardy Clause is applicable only in criminal, not civil penalty cases. Since this case involves a civil penalty action, the principle of double jeopardy is inapplicable. Second, the Double Jeopardy Clause does not even preclude separate criminal prosecutions for the same act by two different sovereigns—the Federal Government and a State Government. Third, although the State and Federal actions against the Respondent related to the same incident, two different sets of regulatory requirements are involved. That is, there are two different violations—one for the spill and one for a failure to report the spill. In the State action, Respondent was fined for the hazardous materials release which occurred on an Interstate Highway. This Federal case involves Respondent's failure to file a written report of the incident within 15 days of its discovery as required by 49 CFR 171.16. Fourth, Mr. Robert Bartlett, a motor carrier investigator for the Arizona Department of Public Safety's Hazardous Materials Division, has stated to RSPA that no action has been taken concerning this spill by either his Department or the Arizona Department of Environmental Quality. In summary, any State assessment of a fine against Respondent related to the spill does not excuse Respondent's failure to file the required written report.

Respondent also contends that a civil penalty cannot be levied against it because on October 25, 1988, it filed a Chapter 11 petition with the U.S. Bankruptcy Court for the District of Nevada. Although 11 U.S.C. 362(a) of the Bankruptcy Code grants Respondent an automatic stay while it is under the protection of the Bankruptcy Court, it does not preclude RSPA from issuing this Final Order. Pursuant to 11 U.S.C. 362(b)(4) of the Bankruptcy Code, an automatic stay is not applicable to the commencement or continuation of an action by a governmental unit to enforce its regulatory power. This Order should not be construed as a demand and is issued to administratively conclude this case and to establish the fact of Respondent's liability for a civil penalty. Thus, this Order is not an effort to collect a debt, and, therefore, is unimpeded by Respondent's protection under the Bankruptcy Court.

Findings

I have considered the issues raised by Respondent in its appeal and find them to be without merit. Furthermore, I find that sufficient evidence has not been presented to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. Therefore, the Order of May 31, 1989, assessing a $1,500 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

If this penalty is not voluntarily paid, RSPA will seek collection through the Bankruptcy Court while the Respondent's Chapter 11 proceeding is pending. In the event that Respondent elects to pay the civil penalty, a certified check or money order (containing the Ref. No. of this case) should be made payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M-86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. In that event, Respondent also should send a photocopy of that check or money order to the Office of Chief Counsel (DCC-1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Dated Issued: August 21, 1989.

Travis P. Dungan.

Certified Mail—Return receipt requested

[Ref. No. 89-55-HMI]

Action on Appeal

In the Matter of: Slay Transportation Co., Inc., Respondent.

Background

On May 15, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Slay Transportation Co., Inc. (Respondent) assessing a civil penalty in the amount of $1,500 for having knowingly failed to file a DOT Form F 5800.1 report within fifteen (15) days of

discovering an incident involving the unintentional release of a hazardous material during transportation, in violation of 49 CFR 171.16.

The Order assessed the $1,500 civil penalty originally proposed in the March 13, 1989 Notice of Probable Violation. By letter dated May 31, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

With its appeal, Respondent submitted a Motor Carrier Accident Report (MCS 50–T), which it had filed with the Federal Highway Administration (FHWA) in October 1988, concerning the incident in question. Respondent also states that it did file the required DOT Form F 5800.1 after being advised in February 1989 of the necessity to do so and having been provided with the blank form. It has provided a copy of the completed 5800.1.

Filing of the MCS 50–T did not obviate the need to file the 5800.1 since each form provides important information to a separate government agency, which information is utilized by each agency to compile a data base used for its own regulatory purposes. However, Respondent's filing of the 5800.1 after being advised of the need to do so and prior to its receipt of the Notice of Probable Violation merits partial mitigation of $100.

Findings

I have determined that there is sufficient information to warrant partial mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $1,400 is appropriate in light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of May 15, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the $1,500 civil penalty assessed therein is hereby mitigated to $1,400.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, Room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: July 25, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–60–SP]

Action on Appeal

In the Matter of: Tennant Company, Respondent.

Background

On September 20, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), United States Department of Transportation (Department), issued an Order to Tennant Company (Respondent) assessing a penalty in the amount of $3,000 for having knowingly offered for transportation in commerce a flammable liquid, resin solution, and a corrosive liquid, n.o.s., not in compliance with the packaging requirements, in violation of 49 CFR 171.2(a), and 173.119, and 173.245(a), respectively. (Although the Order inadvertently cited 49 CFR 171.16, the Notice of Probable Violation (Notice), issued May 2, 1989, cited the correct sections of the regulations, and the facts in the Order were correct.)

The Order assessed a civil penalty of $3,000, reduced from the $3,500 civil penalty originally proposed in the Notice. By letter dated October 9, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order found two violations of the Hazardous Materials Regulations. Respondent does not challenge the civil penalty for the second violation: That Respondent knowingly offered for transportation in commerce corrosive liquid, n.o.s., in one-gallon containers that were not authorized by 49 CFR 173.245(a). Respondent's appeal concerns only the first violation: that Respondent knowingly offered for transportation in commerce a flammable liquid, resin solution, in 37A open-head steel pails that were not authorized by 49 CFR 173.119. In its appeal, Respondent argues that the $2,000 assessment for this violation is too harsh, and requests a further reduction of the penalty amount by approximately 50 percent. Respondent states that it provided for nonspecification containers of resin solution to the transporter for shipment and inquired whether the containers were acceptable. Respondent contends that the transporting company assured it that the containers met the Department's regulatory requirements, and that it in good faith left the containers with the carrier for transportation. Respondent also raises the issue that the Department's regulations are confusing. Finally, Respondent contends that it did not knowingly violate any of the Department's laws and should not be held to that level of intent.

The Chief Counsel already mitigated the penalty by $500 in light of Respondent's good faith mistake in interpreting the regulations, its reliance on advice from its carrier that it was in compliance with the regulations, and its corrective action to avoid a recurrence of these violations. Moreover, Respondent's contention that it did not knowingly violate any of the Department's regulations is not persuasive. As indicated in the Notice, under 49 CFR 107.299, a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts; there is no requirement that the person actually know of, or intend to violate, the legal requirements. As an offeror of hazardous materials, Respondent is required to be knowledgeable concerning all of the hazardous materials regulations. I therefore find the violations were "knowing." Respondent has not presented any new information or argument to warrant further mitigation or to indicate that the Chief Counsel did not properly consider the penalty assessment factors.

Findings

I have determined that there is not sufficient information to warrant further mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $3,000 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability,

Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of September 20, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331. Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: December 15, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–63–HMI]

Action on Appeal

In the Matter of: John's Oil Company, Respondent.

Background

On May 26, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to John's Oil Company (Respondent) assessing a penalty of $1,500 for having knowingly failed to file a written report on DOT Form F 5800.1 within 15 days of discovering an incident involving the unintentional release of a hazardous material during transportation, in violation of 49 CFR 171.16.

The Order assessed the $1,500 civil penalty originally proposed in the March 28, 1989 Notice of Probable Violation. By letter dated June 20, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated into this appeal by reference.

Discussion

Respondent has requested reconsideration of the penalty because it attempted to notify all local, state and Federal agencies. Respondent states that its failure to file a written hazardous materials incident report occurred while it was concentrating its efforts on consoling the family of its deceased driver, assisting in the cleanup of the gasoline spill and trying to find other means to make deliveries to its customers. Respondent also states that it has not been reimbursed for the loss of its truck and other accident-related expenses.

I recognize that the death of Respondent's driver was a sad and difficult time for Respondent and that clean-up efforts consumed much of Respondent's time. However, reporting incidents of this nature is critical to the development of a complete hazardous materials transportation data base and to the prevention of similar incidents in the future. Partial mitigation of the penalty by $100 is appropriate in recognition of the remedial action Respondent took by filing DOT Form 5800.1 on June 29, 1989.

Findings

I have determined that there is sufficient information to warrant partial mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $1,400 is appropriate in light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of may 26, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the $1,500 civil penalty assessed in that Order is mitigated to $1,400.

Failure to pay the civil penalty assessed in this matter within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: October 17, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–69–CR]

Action on Appeal

In the Matter of: Jim Hollis' Scuba World, Respondent.

Background

On August 28, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Jim Hollis Scuba World (Respondent) assessing a civil penalty in the amount of $3,250 for having knowingly (1) represented to be retesting DOT specification cylinders in accordance with the Hazardous Materials Regulations (HMR) when Respondent's equipment had a pressure gauge which could not be read to within one percent of test pressure and an expansion gauge which could not be read to within one percent of total expansion or 0.1 centimeter; (2) represented a DOT specification cylinder as meeting the requirements of the HMR when the cylinder had not been marked with the specification identification "3AL" at the time of retest; and (3) represented DOT specification cylinders as meeting the requirements of the HMR when records showing the results of reinspection and retest had not been maintained as required, in violation of 49 CFR 171.2(c), 173.23(c), 173.34(e)(3), and 173.34(e)(5). The Order assessed a civil penalty of $3250, reduced from the $4000 civil penalty originally proposed in the April 19, 1989 Notice of Probable Violation (Notice). By letter dated October 16, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent maintains that a $500 civil penalty would be more appropriate for the first violation than the "proposed" penalty of $1500. Respondent admits that it may have committed a "knowing" violation, but argues that there is no evidence that it was intentional. Respondent further admits that the calibration of the hydrotesting equipment was incorrect and acknowledges that it has a responsibility to be aware of its legal obligations as a retester of scuba tanks. Respondent argues, however, that its immediate response to correct the problem should be taken into consideration by the Department when determining the assessment amount. Respondent also points out that this is its first violation and that it relied on the past manager's instruction regarding calibration.

Respondent raised, and the Chief Counsel considered, each of these arguments following the issuance of the Notice, which had proposed a civil penalty of $2,000 for this violation. The Chief Counsel's Order pointed out that the Notice had "advised Respondent that a 'knowing' violation does not require any intention to violate the legal requirements." Furthermore, the Order specifically referred to Respondent's "lack of prior offenses" as well as Respondent's "reliance on its prior manager, and the immediate corrective action it took" as reasons for "reducing the proposed penalty amount for this violation by $500, to $1,500." Thus, the $1,500 was the amount assessed, not, as Respondent mistakenly believes, the amount proposed. In addition, the Chief Counsel may have been too generous in reducing the proposed amount in part because of Respondent's reliance on its prior manager. A Dun & Bradstreet report dated April 11, 1989, which is part of the record of this case, indicates that Respondent's Chief Executive Officer and 100% owner of its stock, Mr. James E. Hollis, started the business in 1969. Therefore, although Respondent's current business manager may not have received correct information concerning retesting requirements from the previous business manager, Respondent's CEO and owner should have know the requirements.

In its appeal, Respondent raises for the first time the argument that it "is a *small* business that tests scuba tanks making a minimum return on its investment * * *. A fine in the magnitude of $1500 to a business the size of (Respondent) would be financially devastating to his business." Respondent provides no information concerning the size of its business, the amount of its investment, or the size of its profit. Merely concluding that financial devastation will occur, without supporting documentation, is unconvincing. Moreover, the Chief Counsel's Order considered Respondent's "ability to pay" as well as "the effect of a civil penalty on Respondent's ability to continue in business" in determining the amount of the civil penalty. The Dun & Bradstreet report rates the company's worth at $200,000.

It also states that, as of March 3, 1988, projected annual sales were $600,000, and sales and profit for the 12 months ended December 31, 1987, were up compared with the same period the previous year. Finally, the report indicates that, at least until March 3, 1988, Respondent did more than test scuba tanks. Fifty percent of its business consisted of retailing scuba diving equipment, while the remainder consisted of teaching scuba diving.

Respondent contends that the second violation cited in the Chief Counsel's Order did not occur. Respondent's position is that it was not required to mark the cylinder with the specification identification "3AL" because the test had not been completed. Respondent claims that the cylinder was still in the testing zone and would not be completely tested until the final stamping and VIP stickers [1] are attached and the cylinder is moved to the service area. A form of the same argument was made by Respondent in its May 11 response to the Notice. That argument was considered and rejected by the Chief Counsel; he stated in the Order that "(t)he cylinder in question was stamped as having been retested by Respondent in October 1988, but was not marked as required at that time. Moreover, the inspection took place January 27, 1989, and the cylinder had still not been marked at that time." It is simply not a credible argument that a cylinder, stamped as having been retested in October, was still in testing merely because it had not been marked as required and may not have reached the "service area."

Regarding the third violation, Respondent admits that there were some errors on the retest data sheets, denies that they were numerous, and categorizes them merely as "technical" and "minor." Respondent again states that it "has corrected the situation and, for the most part kept good records." Respondent proposes a $100 penalty for this violation. I disagree. The evidence in the Notice demonstrates that the errors were numerous and were neither technical nor minor. Respondent was assessed a civil penalty for this violation because it represented DOT specification cylinders as meeting the requirements of the HMR when they did not. The Notice had proposed a civil penalty of $1,500 although the maximum possible assessment for this violation is $10,000. The Chief Counsel reduced the assessment to $1,250 "(i)n view of Respondent's reliance on the former manager and its corrective action[.]" Respondent has not made a convincing case for further reduction.

Findings

I have determined that there is not sufficient information to warrant any mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $3,250 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability reduced by some reliance on the instructions of the former manager, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors. Therefore, the Order of August 28, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the reference number of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

[1] Visual inspection stickers are not required by the HMR and, therefore, are irrelevant.

Dated Issued: March 5, 1990.

Travis P. Dungan.

cc: Jim Hollis' Scuba World
5107 E. Colonial Avenue
Orlando, FL 32807

Certified mail—Return receipt requested

[Ref. No. 89-75-HMI]

Action on Appeal

In the Matter of: Central Grain Corporation, Respondent.

Background

On November 7, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Central Grain Corporation (Respondent) assessing a penalty in the amount of $1,500 for having knowingly failed to file a written report, on DOT Form F 5800.1, within 15 days of discovering a December 19, 1988 incident involving the unintentional release of a hazardous material during transportation, in violation of 49 CFR 171.16. The Order assessed the $1,500 civil penalty originally proposed in the April 7, 1989 Notice of Probable Violation. By letter dated December 20, 1989, Respondent (through counsel) submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent stated that it has taken steps to ensure that there will not be any future violation by instructing its drivers about the incident reporting requirements and instituting new written procedures, which it included with its appeal. Respondent's remedial action warrants mitigation of the civil penalty in the amount of $200.

Findings

I have determined that there is sufficient information to warrant partial mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $1,300 is appropriate in light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of November 7, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the $1,500 civil penalty assessed therein is hereby mitigated to $1,300.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M-86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street SW., Washington, DC 20590-0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC-1), RSPA, Room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: March 1, 1990.

Travis P. Dungan

cc: Mr. W.R. Harrell, President
Central Grain Corporation
Route 3, Box 459
Elizabeth City, NC 27090

Certified mail—Return receipt requested

[Ref. No. 89-81-SE]

Action on Appeal

In the Matter of: Aztec International Limited, Respondent.

Background

On December 13, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Aztec International Limited (Respondent) assessing a penalty in the amount of $12,000 for having knowingly offered for transportation in commerce a new explosive device that had not been classed and approved in accordance with the Hazardous Materials Regulations (HMR), and which was not in compliance with the packaging and shipping requirements of the HMR, in violation of 49 CFR 171.2(a), 172.101(c)(13)(ii), 172.200(a), 172.202(a), 172.301(a), 172.400(a), 173.3(a), 173.51(b), and 173.86(b).

The Order assessed a civil penalty of $12,000, payable in six monthly installments of $2,000 each, reduced from the $13,500 civil penalty originally proposed in the December 13, 1989 Notice of Probable Violation (Notice). By letter dated January 19, 1990, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent does not deny that it was in violation of the HMR, as determined in the Order. Respondent maintains that the violations were not done knowingly because it relied upon information obtained from the Bureau of Alcohol, Tobacco, and Firearms (BATF). Respondent also raises the issue of its financial ability to pay the civil penalty assessed. The remainder of Respondent's arguments are a reiteration of the arguments presented below to the Office of Chief Counsel.

Respondent's argument that it did not "knowingly" violate the HMR because it contacted BATF in a good faith effort to comply with Federal regulations was considered by the Chief Counsel and found uncompelling. As stated in the Notice, a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts. There is no requirement that a person actually know of, or intend to violate, the HMR. As an offeror of hazardous materials, Respondent is responsible for having knowledge of and complying with all applicable regulations. Respondent's reliance on the representations of another Federal agency which does not have authority to enforce the Hazardous Materials Transportation Act does not excuse its violation of the HMR.

Furthermore, the administrative record in this case indicates that at least one company official had actual knowledge of the regulations. The record reflects that in 1982, Respondent's managing director, Mr. Sandy Brygider, corresponded with the Office of Hazardous Materials Transportation (OHMT) in his capacity as president of Bingham, Ltd., Norcross, Georgia. The correspondence arose out of RSPA's inquiry into a possible violation of the HMR by Bingham, Ltd., specifically, offering for transportation in commerce certain small arms ammunition without that material having been examined, classed, and approved as required by the regulations. I therefore find that the record supports the Chief Counsel's determination that the violations were committed knowingly.

Respondent's second basis for appeal is its financial condition. Respondent argues that the February 1988 Dun & Bradstreet Report reflected in the Notice was inaccurate and did not reflect the company's actual cash value. Respondent also challenges the penalty

amount because it does not know how the Dun & Bradstreet Report figures were used in arriving at the penalty amount proposed in the Notice.

Respondent's financial condition is relevant to two of the assessment criteria listed in the HMR at 49 CFR 107.331: the Respondent's ability to pay and the effect of the penalty on the Respondent's ability to continue in business. The Dun & Bradstreet Report is a tool used in evaluating the financial aspects of the assessment criteria. The nature and circumstances of the violation, the extent and gravity of the violation, the degree of culpability, prior offenses, and such other matters as justice may require were also considered. Accordingly, on the basis of all of the foregoing criteria, the Chief Counsel determined that partial mitigation of the penalty in light of Respondent's corrective action and implementation of an employee training program was warranted.

Respondent's financial condition was duly considered by the Chief Counsel. The Order provides for a payment schedule whereby Respondent could pay the penalty amount in six monthly installments of $2,000, in order to avoid cash flow problems. On appeal, Respondent has provided unverified figures which it states were prepared by its accountant for income tax purposes. These figures show a net loss for 1989 of $12,361.42. This unverified financial information does not warrant reduction of the penalty. Respondent's submission reflects a health current ratio and retained earnings. Furthermore, according to Respondent's representations at an informal conference conducted on October 20, 1989, it has annual sales of $250,000–$300,000. The record does not support further reduction of the penalty amount of the basis of Respondent's financial condition.

Findings

I have determined that there is not sufficient information to warrant further mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $12,000 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of December 13, 1989, including the payment schedule, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331. The civil penalty of $12,000 shall be payable in six monthly installments of $2,000 each, with the first payment due within 20 days of receipt of this decision. The five remaining payments shall be due on the same date of the succeeding five months until the entire amount is paid. If Respondent defaults on any payment of the authorized payment schedule, the entire amount of the remaining civil penalty shall, without notice, immediately become due and payable.

Respondent's failure to pay this accelerated amount in full will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue on the entire penalty amount if payment is not made within 90 days of default.

Each payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Dated Issued: April 30, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–83–EXR]

Action on Appeal

In the Matter of: Central Vermont Railway Inc., Respondent.

Background

On December 5, 1989, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Central Vermont Railway, Inc. (Respondent) assessing a penalty in the amount of $1,750 for having knowingly transported in commerce railway track torpedoes, Class B explosives, and railway fusees, flammable solid material, in non-DOT specification packaging, in violation of 49 CFR 171.2(b), 173.91(f), and 173.154a. The Order assessed a civil penalty of $1,750, reduced from the $2,000 civil penalty originally proposed in the June 8, 1989 Notice of Probable Violation. By letter dated January 24, 1990, Respondent (through counsel) submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent contends that the penalty assessment should be reduced to a total of $250 because one of the factors applied in originally proposing the penalty is incorrect, and that "this is a significant variation in the factors used." Respondent contends that the evidence cited in the Notice of Probable Violation included a statement that Respondent had retained earnings of $18.9 million at the end of 1988, when in fact Respondent had accumulated losses of $18.9 million at that time. Respondent attached a copy of "consolidating balance sheets for 1987 and 1988."

The balance sheet Respondent submitted shows only liabilities, not assets, making an accurate evaluation difficult. The balance sheet shows Respondent's parent corporation, Grand Trunk Railroad, as having retained earnings in excess of $38 million in 1988. It is noteworthy that Respondent did not dispute the other financial evidence in the Notice of Probable Violation, which included $10,000 in cash on hand, current assets of $8.36 million, and current liabilities of $6.3 million. The financial information cited in the Notice of Probable Violation is not used to increase the proposed penalty amount. It is only used to reduce the proposed penalty amount if the information indicates the Respondent would have difficulty paying the proposed assessment, or doing so would adversely affect its ability to continue in business. Accordingly, I find that the evidence in the record does not support Respondent's contention that the penalty should be further mitigated.

Respondent also contended that its "paper violation" did not result in injury to anyone, and that it has successfully monitored the three-month extensions to its exemption which were granted throughout 1989 and timely applied for further extensions.

The nature and gravity of the violation were already considered in proposing and assessing the civil penalty. Respondent's efforts to monitor its exemption subsequent to the violation, while laudable, do not warrant mitigation. The Chief Counsel already mitigated the penalty by $250 based on Respondent's remedial action

in establishing a computer warning system to apprise it of exemption expiration dates.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $1,750 is appropriate in light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of December 5, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331. Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Dated Issued: March 16, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–91–SB]

Action on Appeal

In the Matter of: Lumenyte International Corp. Respondent.

Background

On June 7, 1990, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Lumenyte International Corporation (Respondent) assessing a penalty in the amount of $6,750 for having knowingly offered an organic peroxide for transportation by vessel in nonspecification, unauthorized packages; without properly blocking and bracing those packages inside a freight container; in packages not marked with the proper shipping name or identification number of the hazardous material; and accompanied by shipping papers which contained additional information about the hazardous material in front of and within the proper hazardous material shipping description, listed the hazardous material description in the improper sequence, and failed to contain a shipper's certification indicating compliance with the regulations, in violation of 49 CFR 171.2(a), 173.218(a)(1), 176.76(a)(2), 176.76(a)(6), 172.301(a), 172.201(a)(4), 172.202(b) and 172.204(a). The Order assessed a civil penalty of $6,750, reduced from the $7,750 civil penalty originally proposed in the July 12, 1989 Notice of Probable Violation. By letter dated June 27, 1990, Respondent submitted a timely appeal of the Order. The Acting Chief Counsel's Order is incorporated herein by reference.

Discussion

In its letter of appeal, Respondent raises several issues. Each issue is summarized and discussed in the following paragraphs.

First, Respondent contends that the "should have known" test has not been met with respect to any of the violations because it relied upon the advice of an "expert" company in offering the organic peroxide for transportation and did not know what the regulations require. With two exceptions, discussed below, Respondent asserts that it knew of the facts constituting the violations but did not know that there was a violation. Respondent's contentions concerning the "should have known" test are without merit. As indicated in both the Notice and the Order, 49 CFR 107.299 provides that there is no requirement that a person actually knew of, or intended to violate, the regulatory requirements. Because Respondent either knew or should have known the facts constituting its six violations, the requisite "knowledge" test of the statute and the regulations has been met.

Second, Respondent contends that greater weight should be given to its reliance upon a third party with respect to its use of unauthorized packages. The evidence indicates that Respondent loaded organic peroxides in fiberboard boxes marked for transportation of frozen vegetables and containing no UN or DOT specification markings. Offering hazardous materials for transportation cannot be excused by alleged reliance upon a third party; sufficient weight already has been given to that reliance.

Third, Respondent alleges that it did provide blocking, bracing and dunnage, and points to the fact that the packages completed their voyage intact and in place as evidence of that fact. The evidence indicates otherwise. Photographs taken by Office of Hazardous Materials Transportation (OHMT) Inspector Gary P. McGinnis show that there was no blocking, bracing or dunnage around the pallet containing the organic peroxide packages when the freight container was opened for inspection. Thereafter, on November 19, 1988, when Respondent corrected the specification packaging problem, its employee, Mr. Scott Dill, and OHMT inspectors McGinnis and Douglas S. Smith corrected the blocking and bracing. Because this action was taken prior to the water voyage of the hazardous materials, their eventual safe arrival does not constitute evidence that Respondent had properly blocked and braced the hazardous materials when it offered them for transportation.

Fourth, Respondent states that the packages in question were properly marked except for the absence of a DOT number. To the contrary, the photographs taken by Inspector McGinnis show that the packages were not marked with either the proper shipping name or the identification number required by 49 CFR 172.301. Instead the boxes were preprinted with information about broccoli and were not marked with the required hazardous materials information.

Fifth, Respondent contends that there was no evidence concerning information improperly preceding the "hazardous material" information on the shipping papers. However, the shipping paper for the hazardous materials in question describes the shipment as "Chemical **, ceramic Jars, fiberboard containers, and dry ice. **CHEMICAL IS ORGANIC PEROXIDE—PRODUCED BY PPG INDUSTRIES. * * *" All of the quoted verbiage improperly preceded the required information which must appear first on the shipping paper: the proper shipping name, hazard class and identification number.

Sixth, Respondent asserts that it prepared and delivered to the "shipper" (apparently it means the carrier) a shipper's certificate to accompany the shipment and that the "shipper" apparently "failed to include it." Neither of the documents relating to this

shipment and provided to the OHMT inspectors (the invoice/shipping paper and the export declaration) contained the required certification that the shipment complied with the Hazardous Materials Regulations. Respondent has not asserted at any earlier time in this proceeding that it ever made or prepared such a certification. Furthermore, Respondent has not provided a copy of a certification. The evidence in the record, therefore, supports a finding that Respondent offered a hazardous material for transportation accompanied by a shipping paper not containing the required shipper's certification.

Seventh, Respondent contends that the civil penalty should be further mitigated because it acted in good faith, the Acting Chief Counsel's Order did not adequately reduce the penalty to reflect Respondent's actual annual sales, it was a one-time shipper of hazardous materials, and its financial condition continues to worsen. The Acting Chief Counsel's Order sufficiently reduced the civil penalty to reflect all of the issues raised by Respondent— in light of all the statutory assessment criteria—and also adequately took into account Respondent's financial condition by authorizing a reasonable payment plan. No additional mitigation is justified.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $6,750 is appropriate in light of the assessment criteria prescribed in 49 CFR 107.331: nature and circumstances of these violations, their extent and gravity, Respondent's culpability (reduced by some reliance on a third party), Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of June 7, 1990, including the authorization of a payment plan, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty of $6,750 shall be payable in six monthly installments of $1,000 each and a final installment of $750, with the first payment due within 30 days of the date of issuance of this Action on Appeal and each succeeding payment due every 30 days thereafter until the entire amount is paid. If Respondent defaults on any payment of this payment schedule, the entire amount of the remaining civil penalty shall, without further notice, become immediately due and payable as of the date that the first $1,000 installment is due.

If Respondent fails to pay this $6,750 civil penalty in accordance with the terms of this Action on Appeal, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will assess interest and administrative charges and initiate collection activities on the debt and those charges. Interest on the debt will accrue from the date of issuance of this Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR 102.13, and 49 CFR 89.23. Pursuant to those same authorities, a late-payment penalty of six percent (6%) per year will be charged on any portion of the debt that is more than 90 days past due. This penalty will accrue from the date this Action on Appeal is received.

Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: August 22, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–122–HMI]

Action on Appeal

In the Matter of: Warrenton Oil Company, Respondent.

Background

On September 14, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Warrenton Oil Company (Respondent) assessing a penalty in the amount of $900 for having knowingly failed to file a written report on DOT Form F 5800.1 within 15 days of discovering an incident involving the unintentional release of a hazardous material during transportation, in violation of 49 CFR 171.16. The Order assessed a civil penalty of $900, reduced from the $1,500 civil penalty originally proposed in the July 20, 1989 Notice of Probable Violation. By letter dated September 29, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent requested that a new attorney review its original reply and stated that the grounds for appeal are based on that original reply. Respondent contends that mitigation of the civil penalty to $900 from the original $1,500 is not appropriate, considering the nature and gravity of the violation.

It is RSPA's standard procedure to assign a different attorney to review an appeal. Respondent did not present any new information in its appeal and accordingly, I have reviewed its original response to the Notice and the notes of the informal telephone conference, in addition to the other evidence in the record. Respondent, as a carrier of hazardous materials, has a responsibility to be aware of the regulations applicable to its operations. The fact that it was not aware of the regulations and relied on the representations of Federal officials was adequately considered by the Chief Counsel. Respondent's reliance does not excuse the occurrence of the violation. Further, Respondent did not file a written report until more than a month after it was advised of the need to do so. The Chief Counsel provided sufficient mitigation of the proposed penalty amount.

Findings

Accordingly, I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $900 is appropriate in light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of September 14, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same

authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: December 21, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–138–CR]

In the Matter of: A-Advanced Fire & Safety, Inc. Respondent.

Action on Appeal

Background

On February 14, 1990, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to A-Advanced Fire & Safety, Inc. (Respondent) assessing a penalty in the amount of $3,300, payable in six equal monthly installments of $550 each, for having knowingly: (1) Represented cylinders as meeting the requirements of the Hazardous Materials Regulations (HMR) when performing cylinder retests with equipment having a pressure gauge that could not be read to an accuracy of 1 percent of test pressure; (2) failed to keep accurate records showing the results of reinspections and retests of DOT specification cylinders; (3) failed to mark each DOT specification cylinder passing retest with the retester's identification number (RIN); and (4) failed to mark a DOT–E 6498 cylinder with the specification identification "3AL" at the time of its retest, in violation of 49 CFR 171.2(c), 173.34(e)(3), 173.34(e)(5), 173.34(e)(6), and 173.23(c) of the HMR. The Order assessed a civil penalty of $3,300, reduced from the $4,250 civil penalty originally proposed in the October 4, 1989 Notice of Probable Violation (Notice). By letter dated March 8, 1990, Respondent submitted a timely appeal of the Order. The Acting Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent acknowledges that the gauge was not working properly at low test pressures, but maintains that the gauge still gave accurate test readings on the cylinders between 1,000 and 5,000 pounds of pressure. Respondent's argument ignores the fact that 49 CFR 173.34(e)(3) requires that a pressure gauge be capable of being read to within 1 percent of test pressure. Moreover, it cannot state with certainty that its improperly calibrated equipment gave accurate test readings. Pursuant to 49 CFR 173.34(e)(4), a cylinder must be condemned when the permanent expansion exceeds 10 percent of the total expansion. The use of inaccurate equipment to conduct hydrostatic testing increases the risk that a cylinder will fail after being placed back in service when it should have been condemned.

Respondent also admits the second and fourth violations. (Respondent did not address the third violation, for which no civil penalty was assessed.) Regarding the former, Respondent acknowledges that its paperwork was sloppy and that the employees who fill out the retest inspection sheets had been interrupted with other duties. With respect to the fourth violation, Respondent contends that it had ignored the DOT letter advising it of the requirement to mark the DOT–E 6498 cylinder with the specification identification "3AL" at the time of retest because the letter had not been sent by certified mail. This does not warrant a further reduction of the civil penalty.

Respondent refers to the changes in its operation to prevent these violations from occurring again. This is not new information. In the February 14 Order, the Acting Chief Counsel took these changes into consideration when she reduced the civil penalty to $3,300 from the proposed amount of $4,250. Finally, Respondent argues that the civil penalty should be reduced because the violations were not intentional, and occurred only because of Respondent's sloppiness. The fact that the violations were not intentional does not excuse them. The Notice had advised Respondent that a "knowing" violation does not require any intention to violate the legal requirements.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Acting Chief Counsel's Order. I find that a civil penalty of $3,300, payable in six equal monthly installments of $550 each, is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of February 14, 1990, including the authorization of a payment plan, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331. The civil penalty of $3,300 shall be payable in six monthly installments of $550 each, with the first payment due within 30 days of the date of issuance of this Action on Appeal, and each succeeding payment due every 30 days thereafter until the entire amount is paid. If Respondent defaults on any payment of this payment schedule, the entire amount of the remaining civil penalty shall, without further notice, become immediately due and payable as of the date that the first $550 installment is due.

If Respondent fails to pay this $3,300 in accordance with the terms of this Action on Appeal, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will assess interest and administrative charges and initiate collection activities on the debt and those charges. Interest on the debt will accrue from the date of issuance of this Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR 102.13, and 49 CFR 89.23. Pursuant to those same authorities, a late-payment penalty of six percent (6%) per year will be charged on any portion of the debt that is more than 90 days past due.

Each payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street SW., Washington, DC 20590–0001. Respondent must send a photocopy of each check or money order to the Office of Chief Counsel (DCC–1), RSPA, Room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: August 21, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–152–CR]

Action on Appeal

In the Matter of: J's Cylinder Requalification and Maintenance Co., Inc. Respondent.

Background

On March 9, 1990, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to J's Cylinder Requalification and Maintenance Co., Inc. (Respondent) assessing a civil penalty in the amount of $3,250 for having knowingly represented cylinders as meeting the requirements of the Hazardous Materials Regulations (HMR) (49 CFR parts 171–180) when the following violations were found: (1) retesting was not performed using equipment having an expansion gauge which could be read with an accuracy of one percent of total expansion or 0.1 cubic centimeters (cc); (2) the cylinders were marked with a test date when the hydrostatic retest had not yet been performed; (3) proper records showing the results of reinspection and retest were not maintained; and (4) a cylinder manufactured for use as a DOT–E 6498 exemption cylinder had not been marked with the specification "3AL" before or at the time of retesting. The Order found that Respondent had violated 49 CFR 171.2(c), 173.23(c), 173.34(e)(1)(ii), 173.34(e)(3), and 173.34(e)(5) of the HMR.

The penalties assessed in the Order reflect partial mitigation of the penalty amounts proposed in the Notice of Probable Violation (Notice) issued December 26, 1989, based upon Respondent's corrective action. No additional mitigation was deemed warranted based upon Respondent's financial circumstances or the effect of the penalty amount on Respondent's ability to continue in business. The Order of the Acting Chief Counsel is incorporated herein by reference.

Respondent submitted a timely appeal of the Order, and, on the basis of the arguments set forth in its appeal, proposed a settlement of $500.00 for its failure to conduct retesting with an expansion gauge which could be read with an accuracy of one percent of total expansion or 0.1 cubic centimeters. Respondent proposed that a compliance order be issued for the other violations.

Discussion

In its appeal, Respondent does not contest the findings of the Acting Chief Counsel with respect to Violation No. 1, as set forth in the Order. With respect to Violations Nos. 2 and 3, Respondent disputes whether the acts which form the bases of the violations were in violation of the HMR. Respondent argues that the regulations are subject to interpretation and can be read in a manner which supports a finding of no violation. With respect to Violation No. 4, Respondent argues that its actions were neither in violation of the regulations nor done knowingly or intentionally. Respondent's arguments with respect to Violations Nos. 2–4 are discussed in greater detail below.

Violation No. 2

In the Order, Respondent was assessed a penalty of $750 for marking the cylinders with a test date before hydrostatic testing had been performed. In its appeal, Respondent states that the cylinders were marked and then tested by one individual, in assembly line fashion, within a one hour period. Any cylinder which failed had its stamp or marking "removed" by that same individual. Thus, Respondent argues, there was little chance that a failed cylinder would retain its mark and be returned for service or be placed where someone other than the retest operator would be misled by the mark. Respondent argues that the regulatory directive that cylinders shall not be marked as meeting the requirements of the regulations unless retested should be construed broadly to encompass the entire requalification and maintenance procedure.

The HMR unequivocally state that a packaging or container *shall not be marked unless* it has been retested or has undergone any other required manufacturing or maintenance procedure required by the HMR. (emphasis supplied) This is to avoid any opportunity for error. Respondent has taken corrective action and discontinued its practice of marking cylinders before retesting. For this reason, the proposed penalty was mitigated by $250 in the Order. I find that further mitigation of the penalty amount by an additional $250 is appropriate on the basis of Respondent's argument that there is a negligible chance of error in a one-person retesting operation where the retest operator does not relinquish control of the cylinders being tested until all testing has been completed. Under these circumstances, I agree there is less likelihood of a safety risk.

Violation No. 3

Respondent was assessed a penalty of $750 for its failure to maintain proper records showing the results of reinspection and retest. Partial mitigation of the proposed penalty was found appropriate in the Order because of procedures Respondent has adopted to assure the proper recording of the results of visual inspection on its retest rocords. In its appeal, Respondent argues that its records did comply with the regulations because it noted the cause of any cylinder failing visual inspection on its retest report. Therefore, the absence of any notation indicated that the cylinder had passed inspection. Respondent further asserts that what constitutes proper record keeping is a subjective determination, and that under Respondent's proposed interpretation of the regulations, its "negative reporting system" was proper.

Section 173.34(e)(5) of the HMR is explicit. It states that "[r]ecords *showing the result of reinspection* and retest must be kept * * *." (emphasis supplied) No provision is made for negative implications in recording those results. I do not find that additional mitigation of the penalty amount is warranted for this violation. Furthermore, Respondent did not submit any evidence of records showing failures noted or any written procedures or directions to employees to support its position that visual inspections are actually done.

Violation No. 4

Respondent has been assessed a penalty of $500 for its failure to mark a DOT–E 6498 Exemption cylinder "3AL" before, or at the time of, its next retest, as required under 49 CFR 173.23(c). Respondent denies that its failure to so mark the cylinder was done knowingly, or that it was a violation of the regulations. In support of its argument, Respondent notes that § 173.23(c) provides that a DOT–E 6498 Exemption cylinder may be continued in "USE" if marked 3AL before or "AT THE TIME OF NEXT RETEST." (emphasis supplied by Respondent) Since the cylinder was not in use, Respondent argues there was no violation. In addition, Respondent argues that the provision referring to the time of retest could be interpreted to include the entire time the cylinder is in the uninterrupted possession of the retester for purposes of reinspection and retesting. Under Respondent's interpretation of § 173.23(c), the violation would not occur until the cylinder left the retester's premises, and perhaps not until it was actually filled and used.

Respondent's interpretation of this regulatory requirement is too broad. In 1982, Exemption DOT–E 6498 was eliminated, and its provisions became the manufacturing and testing requirements for specification 3AL

cylinders contained in 49 CFR 178.346 and 178.46–1 *et seq.* (See 46 FR 62452, published December 24, 1981, and corrections published April 1, 1982 and May 13, 1982, at 47 FR 13816 and 47 FR 20591, respectively.) Following notice and comment rulemaking, the HMR were amended to require that a DOT–E 6498 Exemption cylinder be marked 3AL to signify that it is a specification cylinder, and that, accordingly, provisions pertaining to its use and manufacture are contained in the HMR. (See 46 FR 62452, published December 24, 1981). The regulations provide that markings on the cylinder be changed before or at the time of the next retest in order to prevent the cylinder from being released from retesting before it has been marked. If a cylinder were released without receiving the necessary markings, it could be another five years before another opportunity to mark it arises. (Under 49 CFR 173.34(e), most cylinders, including DOT–3AL cylinders, must be retested at five year intervals.) Nevertheless, I find that Respondent's failure to mark the cylinder at the time of retesting did not impact upon the safe use of the cylinder. Accordingly, I find that additional mitigation of the assessed penalty in the amount of $250 is warranted.

Financial Assessment Criteria

Respondent has again placed its financial circumstances and ability to pay the assessed penalty in issue on appeal. Respondent asserts that it was unaware that the purpose of the Dun & Bradstreet inquiry into its finances was for purposes of an investigation by the U.S. Department of Transportation when its Director, Mr. Eddins, provided the information. Respondent states that had it known the purpose of the Dun & Bradstreet inquiry, it would have made certain that the appropriate, knowledgeable person provided the information to ensure that it was reliable and accurate. Respondent, and its Director, knew or should have known that the financial information reported to Dun & Bradstreet would be relied upon by third persons, and should have ensured that its response was accurate. Respondent's argument that the Dun & Bradstreet report was misleading was presented by Respondent in response to the Notice and further mitigation on this basis was not found warranted. In its appeal, Respondent has submitted additional information indicating that it is experiencing reduced demand for its services and has had to reduce its workforce in order to cut costs.

Findings

I have determined that there is sufficient information to warrant further mitigation of the civil penalty assessed in the Chief Counsel's Order, for the reasons set forth above. I find that a civil penalty of $2,750 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors. Respondent's offer of compromise is hereby rejected.

Therefore, the Order of March 9, 1990, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR § 107.331, except that the $3,250 civil penalty assessed therein is hereby mitigated to $2,750. Due to Respondent's financial circumstances, however, the civil penalty of $2,750 shall be payable in three monthly installments of $950, $900, and $900 each, with the first payment due within 20 days of receipt of this decision. The remaining two payments shall be due on the same date of the succeeding two months until the entire amount is paid. If Respondent defaults on any payment of the authorized payment schedule, the entire amount of the remaining civil penalty shall, without notice, immediately become due and payable.

Respondent's failure to pay this accelerated amount will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue on the entire penalty amount if payment is not made within 90 days of default.

Each payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW, Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: August 1, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–154–HMI]

Action on Appeal

In the Matter of: Regional Enterprises, Inc. Respondent.

Background

On January 17, 1990, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Regional Enterprises, Inc. (Respondent) assessing a civil penalty for having knowingly failed to file a DOT Form F 5800.1 report within 15 days of discovering an incident involving the unintentional release of a hazardous material during transportation, in violation of 49 CFR § 171.16. The Order assessed a civil penalty of $1,100, reduced from the $1,400 civil penalty originally proposed in the November 3, 1989 Notice of Probable Violation (Notice). The Acting Chief Counsel's Order is incorporated herein by reference. By letter dated March 8, 1990, Respondent submitted a timely appeal of the Order.

Discussion

In its appeal, Respondent contends that the Notice was inaccurate because it stated that the "incident * * * involved the unintentional release of between 10,000 and 12,000 pounds of sodium hydroxide solution *from a tank truck operated by Regional Enterprise[s], Inc. (Respondent)* * * *" (Emphasis added.) Respondent maintains that the material was released from the equipment of its customer, Champion International Corporation, not through its own equipment. Respondent further argues that because the release occurred after the unloading of the sodium hydroxide solution from its equipment to that of its customer had been completed, it was not required to file Form F 5800.1.

Respondent had argued these same points in a November 14, 1989 written response to the Notice. In the January 17, 1990 Order, the Acting Chief Counsel did not address Respondent's contention that the unintentional release of the hazardous material had occurred through the customer's equipment. As alleged in the Notice, the Order stated, without discussion, that the sodium hydroxide solution was unintentionally released from Respondent's tank truck. The Order also found "that Respondent knowingly committed acts that violated 49 CFR 171.16 of the Hazardous Materials Regulations, *as alleged in the*

Notice." (Emphasis supplied.) There is nothing in the record, however, to refute Respondent's contention that the leak occurred from its customer's equipment, not Respondent's tank truck. The Acting Chief Counsel's finding with respect to this issue, therefore, was not supported by evidence in the record.

The second issue presented in this case is whether Respondent had completed the unloading of the hazardous material from its equipment to that of its customer at the time of the unintentional release. If unloading had not been completed, Respondent, as the carrier, would be the party responsible for filing the form. Section 171.16(a) [as in effect at the time of the incident] required each carrier that transported hazardous materials to have filed Form F 5800.1 within 15 days of having discovered that, during the course of transportation (including loading, unloading, or temporary storage), there had been an unintentional release of hazardous materials from a package. Had unloading been completed, however, the release would not have occurred during the course of transportation, and Respondent would not have been required to file Form F 5800.1.

The Acting Chief Counsel's Order addressed this issue only indirectly. It stated: "During the informal conference, Respondent was informed that a written report must be filed for any hazardous materials incident that includes loading and unloading operations. Respondent now realizes that whenever a hazardous materials release occurs during unloading operations a written report should be filed." There is no evidence in the Order, however, to prove that this release of a hazardous material occurred during unloading operations. In fact, Respondent argued both in its response to the Notice and its appeal that the release occurred after unloading had been completed.

Respondent's December 11, 1989 document, labeled Appendix K, entitled, "IMPORTANT NOTICE TO ALL DRIVERS AND TERMINAL PERSONNEL:" does not prove that this incident occurred during unloading operations. It indicates that, following the informal conference, Respondent believed that its interpretation of the hazardous material incident reporting regulations must be expanded. Part of this expansion included a statement that a reportable incident can occur at any time during transportation, including loading, unloading, or temporary storage. Nevertheless, this revised interpretation is not evidence that this was a reportable incident.

The record, therefore, provides no evidence to prove that the release of the hazardous material occurred during the course of transportation. Without that evidence, the Acting Chief Counsel's Order cannot be upheld.

Findings

I have determined that there is not sufficient evidence presented to find a violation of 49 CFR 171.16. Accordingly, this case is dismissed. This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: August 10, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–162–EXR]

Action on Appeal

In the Matter of: Thermex Energy Corp., Respondent.

Background

On April 11, 1990, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Thermex Energy Corporation (Respondent) assessing a penalty in the amount of $1,400 for having knowingly offered for transportation in commerce a hazardous material, blasting agent, n.o.s., in bulk packagings, in violation of 49 CFR 171.2(a) and 173.114a(i). The Order assessed a civil penalty of $1,400, the same penalty amount originally proposed in the November 2, 1989 Notice of Probable Violation (Notice), and authorized payment in seven monthly installments of $200 each. By letter dated May 9, 1990, Respondent submitted a timely appeal of the Order. The Acting Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent's Appeal did not dispute the Order's finding of violation but protested the assessment of the $1,400 civil penalty. The Respondent stated that it did not have the financial ability to pay the penalty and that attempting to do so would adversely affect its ability to remain in business. In support of this assertion, Respondent stated that it owed back taxes, was currently a defendant in approximately 28 legal actions, and had 20 judgments against it. Respondent further stated that it was appealing a judgment of eviction obtained by its landlord and, insofar as it was financially unable to post a bond in the appeal, had been required to post a sworn pauper's affidavit. A copy of the affidavit was attached as an exhibit to Respondent's appeal.

Finally, Respondent attached a March 14, 1990 financial statement which it had prepared in an effort to compromise some of its indebtedness.

The $1,400 penalty proposed in the Notice and assessed in the Order was based upon information contained in an August 29, 1989 Dun and Bradstreet Report on Respondent. Prior to the Appeal, this was the most timely financial information covering Respondent which was available to RSPA. Review of the additional information supplied by the Respondent in the April 2, 1990 Affidavit of Inability to Pay and the March 14, 1990 Balance Sheet indicates that partial mitigation of the penalty, coupled with continued authorization of a payment plan, is appropriate. Imposition of a $1,000 penalty will take into account the serious nature of Respondent's violation, but will also give adequate consideration to Respondent's ability to pay and the effect of the penalty on Respondent's ability to remain in business.

Findings

I have determined that there is sufficient information to warrant partial mitigation of the civil penalty assessed in the Acting Chief Counsel's Order. I find that a civil penalty of $1,000 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

In addition, I have determined that the Respondent may pay this $1,000 civil penalty in five consecutive monthly installments of $200 each.

Therefore, the Order of April 11, 1990, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the $1,400 civil penalty assessed therein is mitigated to $1,000, to be paid in accordance with the following payment plan. The $1,000 civil penalty shall be payable in five monthly installments of $200 each, with the first payment due within 30 days of the date of issuance of this Action on Appeal, and each succeeding payment due every 30 days thereafter until the entire amount is paid. If Respondent defaults on any payment of this payment schedule, the entire amount of the remaining civil penalty shall, without further notice, become immediately due and payable as of the date that the first $200 installment was due.

If Respondent fails to pay the $1,000 civil penalty in accordance with the terms of this Action on Appeal, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will assess interest and administrative charges and initiate collection activities on the debt and those charges. Interest on the debt will accrue from the date of issuance of this Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR 102.13 and 49 CFR 89.23. Pursuant to those same authorities, a late payment penalty of six percent (6%) per year will be charged on any portion of the debt that is more than 90 days past due. This penalty will accrue from the date this Action on Appeal is received.

Payment must be made by certified check or money order (containing the reference number of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of the check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: March 5, 1991.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 90–21–CR]

Action on Appeal

In the Matter of: Hoopes Fire Equipment Corp., Respondent.

Background

On May 9, 1990, the Chief Counsel, Research and Special Progams Administration (RSPA), U.S. Department of Transportation, issued an Order to Hoopes Fire Equipment Corp. (Respondent) assessing a penalty in the amount of $2,750 for having knowingly: (1) represented to be retesting DOT specification cyclinders with inadequate equipment, (2) failed to maintain records showing the results of such retesting, and (3) representing inadequately marked DOT specification cyclinders as meeting the requirements of the Hazardous Materials Regulations, in violation of 49 CFR 171.2(c), 173.23(c), 173.34(e)(3) and 173.34(e)(5).

The Order assessed a civil penalty of $2,750, reduced from the $4,000 civil penalty originally proposed in the January 9, 1990 Notice of Probable Violation. By letter dated May 25, 1990, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent addressed each of the three violations. With respect to Violation 1, it enclosed a $130.65 invoice showing prompt corrective action and contended that it was unaware of the violation prior to the RSPA inspection and thus could not have "knowingly" committed the violation. As explained in the original Notice in this case, 49 CFR 107.299 provides that a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts and that there is no requirement that the person actually knew or intended to violate the legal requirements. The Chief Counsel's $750 reduction of the proposed penalty for this violation, partically due to Respondent's corrective action, has resulted in an appropriate assessment and obviated the need for any further reduction.

With respect to Violation 2, Respondent stated that it ordinarily kept proper records and that its violation was an aberration. The fact is that Respondent did not keep accurate records and that it was necessary for the Chief Counsel to point out in her Order that Respondent's corrective actions in this regard required additional changes to avoid a recurrence of this type of violation. The Chief Counsel's $250 mitigation of the proposed penalty for this violation is sufficient.

Concerning Violation 3, Respondent contended that the penalty assessment is excessive because it took immediate corrective action and no one was harmed. Again, the Chief Counsel's $250 mitigation of the proposed penalty for this violation resulted in an equitable assessment.

Finally, Respondent stated that its $9,324 cash balance on December 31, 1989, was misleading because much of that money was a reserve for payment of a mortgage and various taxes. In light of Respondent's allegations relating to its ability to pay a civil penalty and the effect of a civil penalty on Respondent's ability to remain in business, I am extending the time for Respondent to pay the civil penalty in this case from three to five months.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $2,750 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

However, I find that it is appropriate to modify the terms of the payment schedule authorized for the payment of this civil penalty by allowing and requiring Respondent to pay the $2,750 civil penalty in five equal consecutive monthly payments of $550 each instead of the three larger monthly payments set forth in the Chief Counsel's Order.

Therefore, the Order of May 9, 1990, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the civil penalty payment schedule authorized therein is hereby modified to authorize and require the payment of the $2,750 civil penalty imposed herein in five equal consecutive monthly payments of $550 each, with the first payment being due and payable on July 16, 1990, and each subsequent payment being due on the 16th day of each of the succeeding four months.

Respondent's failure to pay the first installment of the civil penalty assessed herein by July 16, 1990, or to make any of the subsequent payments when required will result in the entire amount of the remaining civil penalty, without notice, becoming immediately due and payable July 16, 1990. Failure to pay the first $550 of the $2,750 civil penalty assessed herein by July 16, 1990, or to make any of the subsequent monthly payments when required will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payments must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of those checks or money orders to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: June 15, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 90-22-PDM]

Action on Appeal

In the Matter of: Delta Drum, Inc. Respondent.

Background

On July 30, 1990, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Delta Drum, Inc. (Respondent) assessing a penalty in the amount of $11,500 for having knowingly represented, marked, certified and offered DOT 34 specification containers as meeting the requirements of 49 CFR 178.19 and 178.19-1 *et seq.* without having conducted required cold drop and hydrostatic tests and without having properly marked the containers with letters and figures at least ½ inch in size. The Order found that these actions violated 49 CFR 171.2(c), 178.0-2, 178.19-7(b), 178.19-7(a)(3) and 178.19-6. The Order assessed a civil penalty of $11,500, the same amount as had been proposed in the March 13, 1990 Notice of Probable Violation (Notice), to which Respondent had not replied.

By letter dated August 17, 1990, Respondent submitted a timely appeal of the Order. The Acting Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent raises three issues: (1) Its failure to respond to the Notice was due to the abrupt departure of its on-site operating officer, (2) its failure to comply with the Hazardous Materials Regulations (49 CFR 171-180; HMR) was caused by confusion and was ameliorate by similar testing, and (3) the financial information concerning Respondent was outdated and inaccurate.

First, Respondent explains the confusion surrounding the unexpected resignation of the corporate official who normally would have responded to the Notice. Respondent now has availed itself of the additional opportunity to respond to the allegations set forth in the Notice, and full consideration is being given in this action to Respondent's allegations.

Second, Respondent asserts that it attempted to comply with the HMR and had believed that it complied with, and exceeded, the HMR testing requirements. Respondent alleges that its employees mistakenly overlooked the fact that § 178.19-7(b) requires frequent periodic testing in addition to the four-month testing requirements § 178.19-7(a). Respondent states that it exceeds the HMR test requirements by conducting 20-foot drop tests, it now has brought its testing program into full compliance with the HMR, no drum has failed the required tests, it was not advised during an earlier inspection of any testing deficiencies, and its quality assurance supervisor believed that the July 13, 1989 inspection (which resulted in the Notice in this case) would not result in any civil penalities.

Section 178.19-7(b) of the HMR clearly states that tests must be performed on three randomly selected containers out of each lot produced of up to 1,000 containers. Furthermore, at the time of an April 23, 1987 inspection, Respondent's employees had been aware of the proper testing procedures. This explains why no corrective advice was given at that time and makes the 1989 improper practices difficult to understand. In addition, Respondent's 20-foot ambient drop tests do not adequately compensate for its failure to conduct cold drop and hydrostatic tests which are designed to reveal deficiencies which would not be detected by ambient drop testing at any height.

Furthermore, the RSPA Inspector who conducted the 1989 inspection at issue here followed standard RSPA procedures and, at the exit conference, advised Mr. James Schultz, Respondent's Quality Assurance Supervisor, and Mr. and Mrs. Evans, Respondent's Vice Presidents for Administration and Marketing, of the several types of sanctions which might result from the discovery of probable violations (letter of warning, civil penalty proceeding, criminal proceeding). At the request of Mr. Schultz, who inquired what Respondent could do to "get back on track," RSPA's Inspector reviewed all of the applicable testing requirements and photocopied the relevant pages of the HMR.

However, the corrective actions Respondent took following the inspection, and before its receipt of the Notice, justify mitigation of the proposed civil penalties.

Third, Respondent states that the financial information relied upon in the Notice is outdated and no longer accurate. It has provided, on a confidential basis, detailed financial information which is relevant to its ability to pay a civil penalty and to its ability to continue in business. That information justifies additional mitigation of the proposed civil penalties and authorization of a payment plan.

In light of all the relevant evidence, I believe that an $8,000 civil penalty is appropriate for the serious violations in this case, but that Respondent should be permitted to pay that penalty in eight consecutive monthly installments of $1,000 each. This will ensure that adequate consideration is given to Respondent's ability to pay and to the effect of this penalty on Respondent's ability to continue in business.

Findings

I have determined that there is sufficient information to warrant mitigation of the civil penalty assessed in the Acting Chief Counsel's Order. I find that a civil penalty of $8,000 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors (including Respondent's corrective actions).

In addition, I have determined that the Respondent may pay this $8,000 civil penalty in eight consecutive monthly installments of $1,000 each.

Therefore, the Order of July 30, 1990, is affirmed as being substantiated on the record except that, in accordance with the assessment criteria prescribed in 49 CFR 107.331, the civil penalty assessed therein in reduced to $8,000 and is authorized to be paid in accordance with the following payment plan. The civil penalty of $8,000 shall be payable in eight monthly installments of $1,000 each, with the first payment due within 30 days of the date of issuance of this Action on Appeal and each succeeding payment due every 30 days thereafter until the entire amount is paid. If Respondent defaults on any payment of this payment schedule, the entire amount of the remaining civil penalty shall without further notice, become immediately due and payable as of the date that the first $1,000 installment is due.

If Respondent fails to pay this $8,000 civil penalty in accordance with the terms of this Action on Appeal, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will assess interest and administrative charges and initiate collection activities on the debt and those charges. Interest on the debt will accrue from the date of issuance of this Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR

102.13, and 49 CFR 89.23. Pursuant to those same authorities, a late-payment penalty of 6 percent (6%) per year will be charged on any portion of the debt that is more than 90 days past due. This penalty will accrue from the date this Action on Appeal is received.

Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary room 9112, Department of Transportation, 400 Seventh Street SW., Washginton, DC 20590–0001. Respondent must send a photocopy of each or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: April 10, 1991.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 90–25–CR]

Action on Appeal

In the Matter of: Quincy Heating Co., Respondent.

Background

On May 31, 1990, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Quincy Heating Company (Respondent) assessing a penalty in the amount of $3,000 for having knowingly represented to be retesting DOT specification cylinders without holding a current retester's identification number issued by the RSPA, in violation of 49 CFR 173.34(e)(1)(i); and having knowingly represented DOT specification cylinders as meeting the requirements of the HMR when records showing the results of reinspection and retest had not been maintained as required, in violation of 49 CFR 171.2(c) and 173.34(e)(5). The Order assessed a civil penalty of $3,000, reduced from the $3,500 civil penalty originally proposed in the January 26, 1990 Notice of Probable Violation (Notice).

By letter dated June 25, 1990, Repsondent submitted a timely appeal of the Order. The Acting Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent strongly objects to the finding that it "knowingly" violated the two cited regulations. Respondent states that in 1985 it bought a business which had been retesting DOT specification cylinders for many years without the requisite RSPA approval and without maintaining the required records. Respondent states that it was unaware of the regulatory requirements.

As indicated in the original Notice to Respondent, under 49 CFR 107.299, a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts; there is no requirement that the person actually knew of, or intended to violate, the legal requirements.

Therefore, Respondent's lack of knowledge about the regualtory requirements does not excuse its operating without a RSPA retester's identification number or its failure to maintain records of that testing.

Respondent also requests that additional consideration be given to its ability to pay the $3,000 civil penalty and to the effect of such a penalty on its ability to remain in business. It states that it is unable to pay its accountant for services rendered or to afford the cost of obtaining the RSPA approval necessary for it to resume testing of DOT specificaion cylinders.

In response to financial information submitted by Respondent, the Acting Chief Counsel's Order reduced the proposed penalty by $500 and authorized payment of the $3,000 penalty in five monthly installments of $600 each. In light of Respondent's renewed plea of financial hardship, I have indenpendently reviewed all the financial information Respondent has submitted. I particularly note that Respondent is making $500 semi-monthly payments to the Internal Revenue Service to pay off a $65,000 tax liability.

In light of all the relevant evidence, I believe that the $3,000 civil penalty is appropriate for the serious violations in this case, but that Respondent should be permitted to pay that penalty in 12 consecutive monthly installments of $250 each. This will ensure that adequate consideration is given to Respondent's ability to pay and to the effect of this penalty on Respondent's ability to continue in business.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Acting Chief Counsel's Order. I find that a civil penalty of $3,000 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability (reduced by some reliance on its predecessor), Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

In addition, I have determined that the Respondent may pay this $3,000 civil penalty in 12 consecutive monthly installments of $250 each.

Therefore, the Order of May 31, 1990, including the authorization of a payment plan, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the civil penalty assessed therein is authorized to be paid in accordance with the following payment plan. The civil penalty of $3,000 shall be payable in 12 monthly installments of $250 each, with the first payment due within 30 days of the date of issuance of this Action on Appeal and each succeeding payment due every 30 days thereafter until the entire amount is paid. If Respondent defaults on any payment of this payment schedule, the entire amount of the remaining civil penalty shall, without further notice, become immediately due and payable as of the date that the first $250 installment is due.

If Respondent fails to pay this $3,000 civil penalty in accordance with the terms of this Action on Appeal, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will asssess interest and administrative charges and initiate collection activities on the debt and those charges. Interest on the debt will accrue from the date of issuance of this Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR 102.13, and 49 CFR 89.23. Pursuant to those same authorities, a late-payment penalty of six percent (6%) per year will be charged on any portion of the debt that is more than 90 days past due. This penalty will accrue from the date this Action on Appeal is received.

Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: September 14, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 90-35-PBM]

Action on Appeal

In the Matter of: Consolidated Plastechs, Inc. (d/b/a Contech), Respondent.

Background

On July 2, 1990, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Consolidated Plastechs, Inc. (d/b/a CONTECH) (Respondent) assessing a penalty in the amount of $7,000 for having knowingly represented, marked, certified, sold, and offered polyethylene bottles marked with DOT specification 2E as meeting the requirements of the Hazardous Materials Regulation when the required samples representing those bottles had not been subjected to the required periodic cold-drop test (Violation No. 1), and when the bottles had not been marked by embossment with the name and address or symbol of the person making the mark, or with the current year of manufacture (Violation Nos. 2 and 3), in violation of 49 CFR 171.2(c), 178.24a-5(c), 178.24a-6(a), and 178.24a-6. The Order assessed the $7,000 civil penalty originally proposed in the April 11, 1990 Notice of Probable Violation. By letter dated July 25, 1990, Respondent submitted a timely appeal of the Order. The Acting Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent contends that the $7,000 civil penalty is excessive "for the three minor infractions we were cited for." With respect to Violation No. 1, Respondent contends that it performed the required monthly cold-drop tests, but failed to log the results of the tests. Respondent's contention represents the third explanation offered by Respondent to this violation. At the time of the inspection, Mr. Cumings, Respondent's General Manager, stated that Respondent had not conducted cold-drop tests since 1986. In response to the Notice of Probable Violation, Respondent stated that it had conducted cold-drop tests "randomly" since 1984. Now Respondent asserts that it conducted cold-drop test "monthly." Respondent's latest assertion is no more persuasive than its earlier statements. As the Acting Chief Counsel found, the totality of the evidence indicates Respondent did not perform the required cold-drop testing. Failure to conduct required testing of a DOT specification container is not a "minor infraction." Testing is an essential part of the representation by the manufacturer that the container meets the DOT specifications, and is the opportunity to demonstrate the integrity of the container or discover deficiencies that may require adjustments to the manufacturing process. The gravity of the violation, its extent (from 1986 to the date of the DOT inspection), and all other relevant circumstances were considered in determining the penalty assessment for this violation. I find that a $5,000 penalty for failure to conduct required cold-drop testing is appropriate in light of all the factors required to be considered.

With respect to Violation Nos. 2 and 3, Respondent reiterated its attempts in 1986 to obtain registration numbers from DOT, and noted that it had corrected both these violations immediately following the DOT inspection. As the Acting Chief Counsel observed, it was Respondent's responsibility to obtain a manufacturer's registration number and emboss both the number and the year of manufacture on the DOT 2E bottles it manufactures—steps it easily took following the DOT inspection. Respondent was assessed penalties of $1,250 and $750 respectively for these two violations, primarily because of their lesser degree of gravity. I do not find any basis in the record for mitigating the amount of the penalty for these violations.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $7,000 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of July 2, 1990, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The $7,000 civil penalty is due and payable upon receipt of this Action on Appeal. If the civil penalty is paid within 30 days of the date of issuance of this Action on Appeal, no interest will be charged. If, however, the civil penalty is not paid by that date, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will assess interest and administrative charges, and initiate collection activities on the debt and those charges. Interest on the debt will accrue from the date of issuance of this Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR 102.13, and 49 CFR 89.23. Pursuant to those same authorities, a late-payment penalty of six percent (6%) per year will be charged on any portion of the debt that is more than 90 days past due. This penalty will accrue from the date this Action on Appeal is received.

Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M-86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590-0001. Respondent must send a photocopy of that check or money order to the Office of the Chief Counsel (DCC-1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: October 9, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 90-37-SD]

Action on Appeal

In the Matter of: Acid Products Co. Inc., Respondent

Background

On May 25, 1990, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Acid Products Co. Inc. (Respondent) assessing a penalty in the amount of $2,000 for having knowingly offered for transportation and transporting in commerce a hazardous material, acetone, a flammable liquid, in unauthorized packaging, in violation of 49 CFR 171.2(a), 171.2(b), and 173.119(a)(3). The Order assessed a civil penalty of $2,000, reduced from the $2,500 civil penalty originally proposed in the March 19, 1990 Notice of Probable Violation. By letter dated June 22, 1990, Respondent submitted a timely appeal of the Order. The Acting Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent stated that it purchased the company in 1986 from previous owners and was not aware of any problems until the RSPA inspection. Respondent stated that it immediately corrected any discrepancies that were

identified. Respondent stated that it is located in an established enterprise zone, with the goal of employing local residents, and that its partners have diverted capital to replacing old equipment and improving the building rather than taking any salary. Respondent requested that the penalty assessment be waived so that it may fulfill its goals and policies.

Respondent presented identical information in response to the Notice of Probable Violation, and the Acting Chief Counsel mitigated the amount of the proposed penalty by $500. Respondent has not presented any additional information that would justify further mitigation.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Acting Chief Counsel's Order. I find that a civil penalty of $2,000 is appropriate in light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of May 25, 1990, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The $2,000 civil penalty is due and payable upon receipt of this Action on Appeal. If the civil penalty is paid within 30 days of the date of issuance of this Action on Appeal, no interest will be charged. If, however, the civil penalty is not paid by that date, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will assess interest and administrative charges, and initiate collection activities on the debt and those charges. Interest on the debt will accrue from the date of issuance of this Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR 102.13, and 49 CFR 89.23. Pursuant to those same authorities, a late-payment penalty of six percent (6%) per year will be charged on any portion of the debt that is more than 90 days past due. This penalty will accrue from the date this Action on Appeal is received.

Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, Room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: August 28, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 90–73–SP]

Action on Appeal

In the Matter of: Kimson Chemical Inc., Respondent.

Background

On November 6, 1990, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Kimson Chemical Inc. (Respondent) assessing a penalty in the amount of $2,750 for having knowingly offered for transportation in commerce an oxidizer, potassium permanganate, in unauthorized packaging and in packagings that were not marked with a UN identification number, in violation of 49 CFR 171.2(a), 172.301(a), 173.1(b), 173.3(a), 173.154(a) and 173.194(a).

The Order assessed a $2,750 civil penalty, reduced from the $3,000 penalty originally proposed in the July 12, 1990 Notice of Probable Violation (Notice). By letter dated November 5, 1990, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

In its Appeal, Respondent contends that the Order did not consider the responses it made in its July 18, 1990 letter since it was clear that any violation was without Respondent's knowledge, consent or instigation. Respondent also argues that significant mitigation is warranted taking into account the assessment criteria set forth in 49 CFR 107.331. In reaching a decision on this Appeal, I have reviewed Respondent's July 18 response to the Notice and the notes from the August 14, 1990 informal conference, in addition to the other evidence in the record.

For Respondent to have knowingly committed the violations, there is no requirement that Respondent actually knew of, or intended to violate, the legal requirements. A violation is knowing when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts. The Chief Counsel's Order noted that Respondent stated in its July 18 letter that it thought the containers of potassium permanganate satisfied the requirements of the Hazardous Materials Regulations, even though the containers did not have DOT specification markings. Additionally, Respondent said that it had instructed its agent warehouse to mark the containers with a UN identification number and believed that its instructions were being followed. Thus, the record shows that Respondent had knowledge of the facts, or was in a position to know the facts, that gave rise to the violations described. Therefore, Respondent knowingly committed the violations.

Respondent had a responsibility to be aware of the regulations applicable to its operations and that responsibility cannot be excused by reliance upon another party. Reliance, however, is relevant to Respondent's culpability. The Chief Counsel considered Respondent's reliance upon its overseas exporters in assuming that the potassium permanganate was packaged correctly, but found no basis in Respondent's argument for reducing the proposed penalty for this violation. The record shows that the Chief Counsel adequately considered Respondent's argument and I agree with the penalty amount assessed for the violation.

With respect to the labelling violation, in its informal responses, Respondent stated that it had instructed its agent warehouse that the packagings should be marked with the UN identification number. Since the UN identification number appeared on the bill of lading the warehouse prepared, Respondent believed that the packagings were labelled in accordance with its instructions. The Chief Counsel found that Respondent's reliance upon the warehouse did not warrant a reduction in the proposed penalty amount. A $250 reduction was given, however, for the corrective measures Respondent instituted to ensure that packagings would be correctly labelled in the future. I find that the record presents a basis for further mitigation of $250, due to Respondent's reliance on its agent.

In the July 18 letter and in the informal conference, Respondent stated that the proposed penalty would pose a financial hardship, due to the size of its operations, and requested a payment plan. Respondent did not follow up with any financial information to document its claim of financial difficulty. In its Appeal, Respondent maintains that the penalty will adversely affect its three-person operation, even if it will be able to continue in business. The Order did not reduce the penalty or authorize a

payment plan because Respondent did not submit any information to support its claim of financial hardship. Because Respondent has still not provided any financial information, no further mitigation is warranted on this basis. However, based on Respondent's assertion concerning the penalty's adverse effect on its three-person business, authorization of a payment plan is appropriate.

The Chief Counsel's Order assessed the penalty to reflect all of the issues raised by Respondent, in light of all the statutory assessment criteria. Thus, in addition to the factors already described, the nature and circumstances, extent and gravity of the violations and Respondent's lack of prior offenses were considered in determining an appropriate penalty amount.

Findings

I have determined that there is sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. Additionally, a payment plan of three monthly installments is authorized. I find that a civil penalty of $2,500 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of October 17, 1990, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the penalty is reduced to $2,500, and payment is authorized in installments.

The civil penalty of $2,500 shall be payable in three monthly installments of $1,000 each for the first two months and a final installment of $500, with the first payment due within 30 days of the date of issuance of this Action on Appeal and each succeeding payment due every 30 days thereafter until the entire amount is paid. If Respondent defaults on any payment of this payment schedule, the entire amount of the remaining civil penalty shall, without further notice, become immediately due and payable as of the date the first $1,000 installment is due.

If Respondent fails to pay this $2,500 civil penalty in accordance with the terms of this Action on Appeal, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will assess interest and administrative charges, and initiate collection activities on the debt and those charges. Interest on the debt will accrue from the date of issuance of this Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR 102.13, and 49 CFR 89.23. Pursuant to those same authorities, a late-payment penalty of six percent (6%) per year will be charged on any portion of the debt that is more than 90 days past due. This penalty will accrue from the date this Action on Appeal is received.

Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M-86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of the Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: March 20, 1991.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 90–74–SP]

Action on Appeal

In the Matter of: Eastern Warehouses Inc., Respondent.

Background

On October 17, 1990, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Eastern Warehouses Inc. (Respondent) assessing a penalty in the amount of $2,500 for having knowingly offered for transportation in commerce an oxidizer, potassium permanganate, in unauthorized packaging and in packagings that were not marked with a UN identification number, in violation of 49 CFR 171.2(a), 172.301(a), 173.1(b), 173.3(a), 173.154(a) and 173.194(a).

The Order assessed a $2,500 civil penalty, reduced from the $3,000 penalty originally proposed in the April 11, 1990 Notice of Probable Violation (Notice). By letter dated November 26, 1990, Respondent submitted a timely appeal of the Order. The Acting Chief Counsel's Order is incorporated herein by reference.

Discussion

In its Appeal, Respondent contends that with respect to Violation No. 1 which concerned Respondent's offering of potassium permanganate in unauthorized packaging, the Order did not properly address the ownership of the material. Due to its reliance upon the owner of the material, Kimson Chemical Corporation (Kimson), Respondent argues that it cannot be held responsible for knowingly offering the material since Respondent was not aware of any possible violation of Department of Transportation (DOT) rules.

Respondent maintains that it had no choice but to rely on Kimson since it is part of Respondent's agreement for accepting customers that all materials accepted for storage and transportation meet all applicable government regulations. Respondent states that it merely acted as Kimson's agent and prepared the bill of lading only at the instruction of Kimson, and in good faith. Short of conducting independent examination and testing of the packaging, Respondent contends that it had no way of knowing there was a violation.

Respondent did more than prepare the bill of lading. Respondent held the material in its warehouse and then offered the potassium permanganate back into transportation by arranging for its shipment to the purchaser. Respondent was in the best position to determine if violations existed since it physically handled the packages. Furthermore, Respondent signed the certification on the bill of lading stating that the potassium permanganate was properly classified, described, packaged, marked and labeled in accordance with the applicable DOT regulations. Even if this were done under Kimson's instructions, reliance upon another does not relieve Respondent of its responsibility to be aware of the regulations applicable to its operations. By preparing the shipping documentation and offering the potassium permanganate into transportation, Respondent was responsible for ensuring compliance with the requirements of the Hazardous Materials Regulations applicable to its operations.

Contrary to Respondent's assertion, in the Order the Acting Chief Counsel considered the ownership and responsibility arguments, and as noted in the Order, reduced the proposed penalty by $250 because of Respondent's reliance upon Kimson. I do not find any basis in the record for further mitigating the amount of the penalty for this violation.

With respect to Violation No. 2 concerning the lack of a UN identification number on the pails containing the potassium permanganate, Respondent contends that it affixed a safety sticker incorporating the UN

identification number to each pail before shipment. Respondent states that there is no proof to the contrary that the labels were not affixed before leaving Respondent's warehouse and that due to the delay in bringing this action, the actual pails cannot be examined. Respondent also suggests that the recipient of the pails has a motive for removing the labels since they also reveal the supplier's identity.

Proof to the contrary is found in the observation report Inspector O'Neil made and the photographs he took during his inspection at American Industrial Chemical Company, which had purchased the potassium permanganate from Kimson. The Inspector's observation report shows that he observed 36 pails of potassium permanganate, none of which were marked with a UN identification number. The photographs show, as Respondent argues they should, the clear plastic wrap Respondent puts around the pails to hold them in position. Respondent maintains that the labels are placed on the top of the pails. However, the photographs clearly show the tops of the upper row of pails and no label can be seen on any of the tops, nor anywhere else. The photographs and the observation report are sufficient evidence to conclude that the labels were not affixed to the pails at the time they left Respondent's warehouse. Furthermore, Respondent does not present any evidence to substantiate its suggestion that the labels were later removed.

The Acting Chief Counsel mitigated the proposed penalty by $250 for the delay between the inspection and the issuance of the Notice. There is no basis in the record for further mitigation.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Acting Chief Counsel's Order. I find that a civil penalty of $2,500 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of October 17, 1990, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The $2,500 civil penalty is now due and payable. If the civil penalty is paid within 30 days of the date of issuance of this Action on Appeal, no interest will be charged. If, however, the civil penalty is not paid by that date, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will assess interest and administrative charges, and initiate collection activities on the debt and those charges. Interest on the debt will accrue from the date of issuance of this Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR 102.13, and 49 CFR 89.23.

Pursuant to those same authorities, a late-payment penalty of six percent (6%) per year will be charged on any portion of the debt that is more the 90 days past due. This penalty will accure from the date this Action on Appeal is received.

Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Divisions, Office of the Secretary, room 9112, Department of Transportation 400 Seventh Street, SW, Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of the Chief Counsel (DCC–1), RSPA room 8405, at the same street address.

This decision of appeal constitutes the final administrative action in this proceeding.

Date Issued: March 20, 1991.

Travis P. Dungan.

Certified Mail—Return Receipt Requested

[Ref. No. 90–84–SB]

Action on Appeal

In the Matter of: Whitaker Oil Co., Respondent

Background

On October 29, 1990, the Acting Chief, Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Whitaker Oil Company (Respondent) assessing a penalty in the amount of $3,000 for having knowingly offered for transportation in commerce corrosive liquid, n.o.s., in non-DOT specification packaging (Violation No. 1) and without marking the proper shipping name and hazard class on the shipping paper (Violation No. 2), in violation of 49 CFR 171.2(a), 172.202(a)(1), 172.202(a)(2), and 173.245(a). The Order assessed a $3,000 civil penalty, reduced from the $4,000 civil penalty originally proposed in the June 15, 1990 Notice of Probable Violation. By letter dated November 27, 1990, Respondent submitted an appeal of the Order. RSPA received the appeal letter on December 5, 1990, more than a week after the November 26 deadline for appeal. Although the appeal was filed after the deadline, I am waiving the 20-day appeal period requirement in this case. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent contends that the $3,000 civil penalty is excessive for the two violations, and states that there was no intent to "specifically circumvent the regulations." Respondent contends that consideration of the "nature, circumstances, extent and gravity of these allegations, would dictate a much lower penalty if at all."

Respondent was advised in the Notice that a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts. There is no requirement that the person intend to violate or circumvent the regulations. The Acting Chief Counsel specifically considered the nature, circumstances, extent, and gravity of the violations when assessing the civil penalty, in addition to the other factors required to be considered. The Acting Chief Counsel substantially reduced the amount of the civil penalty after considering corrective action taken by the Respondent. I do not find any basis in the record for further mitigating the amount of the penalty for these violations.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Order. I find that a civil penalty of $3,000 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of October 29, 1990, is affirmed as being substantiated or the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The $3,000 civil penalty is now due and payable. If the civil penalty is paid within 30 days of the date of issuance of this Action on Appeal, no interest will be charged. If, however, the civil penalty is not paid by that date, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will assess interest and administrative charges, and initiate collection activities on the debt and those charges. Interest on the debt will accrue from the date of issuance of this

Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR 102.13, and 49 CFR 89.23. Pursuant to those same authorities, a late-payment penalty of six percent (6%) per year will be charged on any portion of the debt that is more than 90 days past due. This penalty will accrue from the date this Action on Appeal is received.

Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of the Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: January 28, 1991.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 90–165–SP]

Action on Appeal

In the Matter of: United Laboratories, Inc. Respondent.

Background

On February 6, 1991, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to United Laboratories, Inc. (Respondent) assessing a penalty in the amount of $4,750 for having knowingly offered for transportation in commerce a hazardous material, oxidizer, corrosive solid, n.o.s., in non-DOT specification packaging, in violation of 49 CFR 171.2(a) and 173.154. The Order reduced the civil penalty originally proposed in the November 13, 1990 Notice of Probable Violation from $5,500 to $4,750. By letter dated February 14, 1991, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Knowingly

The first issue raised by the Respondent concerns whether the violation was committed "knowingly" as required by the Hazardous Materials Regulations (HMR). Respondent stated: "The record is clear that the supplier, on a one time basis, breached that contract, and shipped United non-conforming containers. There is no proof that United had actual recognition and knowledge of the breach."

A violation is committed "knowingly" if a person has actual knowledge of the facts that gave rise to the violation or "should have known" the facts that gave rise to the violation. 49 CFR 107.299.

A party offering hazardous materials for transportation is presumed to be aware of the regulations' requirements. Therefore, the issue on appeal is whether the Respondent should have known the facts that gave rise to the violation.

The Respondent was found to have violated the HMR by offering for shipment, and actually shipping, a corrosive oxidizer in non-DOT specification polyethylene packages. Although, as noted in the Respondent's August 28, 1990 letter, these non-DOT specification packages were manufactured and filled by third parties; these packages were stored in the Respondent's facilities, handled by the Respondent's employees and distributed by the Respondent to its Sparks, Nevada facility. Hence, the Respondent's employees had the ability and the opportunity to discover that these containers were in fact non-DOT specification packaging. Thus, the general rule that notice to a corporation's employee is notice to the corporation applies, since the Respondent's employees exercised functional responsibilities over the area where the violation occurred and therefore, could be reasonably expected to perceive the violation. As a result, I find that a reasonable party acting under circumstances similar to those which confronted the Respondent and exercising reasonable caution would have known the facts which gave rise to the Respondent's violation. Thus, I conclude that for the purposes of the HMR the Respondent should have known those facts that gave rise to its violation.

The Respondent also argues that it was the unfortunate victim of a third party supplier who "slipped in nonconforming containers." However, a Respondent may not escape its HMR responsibilities by shifting those responsibilities to a third party. As the Respondent recognized so aptly in its appeal: "It is a simple case of inadvertence: all the steps for compliance were taken by United; a third party breached and *United's shipping department failed to recognize the breach.* (emphasis added). The fact that the Respondent may have received nonconforming containers from a third party supplier may support mitigating the penalty, but on its own merits, it would not justify reducing the Respondent's civil penalty to zero.

Assessment Criteria

With regard to imposing a civil penalty, the Respondent argues that the assessment criteria do not justify imposing a fine. In addition, the Respondent claims that such a penalty would impose a financial hardship and adversely affect its ability to stay in business. The gravity of offering hazardous materials for transportation in non-DOT specification packages involves the issue of package integrity.

There is no built-in assurance that non-DOT specification packaging can withstand the stress associated with the transportation process. One goal of the HMR is to reduce the risk of such failures by requiring that all hazardous materials, which are in transportation, be packaged in containers which satisfy certain DOT specifications.

Addressing the financial considerations, an August 31, 1990 Dun & Bradstreet report indicates that as of July 31, 1989, the Respondent has a current ratio of 1.62, on current assets of $5.9 million, including $82,000 in cash, and current liabilities of $3.6 million. The Respondent's retained earnings were listed as $3.9 million. These figures must be weighted against the Respondent's claims of "shrinking" sales and profits. The Respondent submitted "Exhibit A" which indicates that it is in violation of its loan covenants with the Northern Trust Bank. This exhibit and the Respondent's written comments support the claim that the Respondent is experiencing "shrinking" sales and profits. I have considered this information in determining the amount of the civil penalty.

I have determined that there is sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. The Respondent's appeal emphasized that it had recently invested in numerous capital expenditures to improve its facility. The Respondent claims it demonstrated good faith by taking immediate corrective action. Based on the evidence submitted by the Respondent, I find that a reduction in the civil penalty is appropriate.

In light of the violation's nature and circumstances, the violation's extent and gravity, Respondent's culpability, Respondent's single prior offense, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors, I am reducing the assessed civil penalty from $4,750 to $3,900. In addition, the Respondent is permitted to pay the penalty in 12 consecutive monthly installments of

$325 each. These measures are taken in light of the Respondent's financial condition.

Amount of Relief

Therefore, the Order of February 6, 1991, is modified to reduce the assessed penalty to $3,900 and to include a payment plan. The remainder of the Order is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The $3,900 civil penalty shall be payable in 12 monthly installments of $325 each, with the first payment due within 30 days of the date of issuance of this Action on Appeal and with each succeeding payment due every thirty days thereafter until the entire amount is paid.

Should the Respondent default on any payment in this schedule, the entire amount of the remaining civil penalty shall, without further notice, become immediately due and payable as of the date the first $325 was due.

If the Respondent fails to pay this $3,900 civil penalty in accordance with the terms of this Action on Appeal, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will assess interest and administrative charges and initiate collection activities on the debt and those charges.

Interest on the debt will accrue from the date of issuance of this Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR 102.13, and 49 CFR 89.23. Pursuant to those same authorities, a late-payment penalty of six percent (6%) per year will be charged on any portion of the debt that is more than 90 days past due. This penalty will accrue from receipt of this Action on Appeal.

Payments must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street , SW., Washington, DC 20590–0001. Respondent must send a photocopy of each check or money order to the Office of the Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: May 20, 1991.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 91–02–EXR]

Action on Appeal

In the Matter of: Abacana Industries, Respondent

Background

On February 27, 1991, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Abcana Industries (Respondent) assessing a penalty in the amount of $5,000 for having knowingly offered for transportation in commerce corrosive materials in non-DOT specification plastic bottles inside a high-density polyethylene box, in violation of 49 CFR 171.2(a) and 173.277(a)(6). The Order assessed a civil penalty of $5,000, reduced from the $5,500 civil penalty originally proposed in the January 11, 1991 Notice of Probable Violation (Notice). The Order also authorized a payment plan of eight monthly installments of $625 each.

By letter dated March 4, 1991, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent denied that it "knowingly" committed the violation. Respondent stated that it thought it only had to apply for the exemption once.

As indicated in the original Notice to Respondent, under 49 CFR 107.299, a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts; there is no requirement that the person actually knew of, or intended to violate, the legal requirements. As stated in the Order, the two-paragraph document making Respondent a party to the exemption contained a clear statement: "The expiration date of the exemption is September 1, 1985 for the party(s) listed below." Respondent was one of four parties on that list.

Therefore, Respondent's failure to read the exemption document does not excuse its offering hazardous materials in packaging not authorized by the regulations.

Respondent also stated that it was under the impression that it would have a telephone conference. An informal conference must be requested in writing. Respondent's January 18, 1991 response to the Notice stated that it would like to make an informal response *or* ask for a conference. Respondent's January 18 letter was considered the informal response, and Respondent did not renew its request for a conference.

Respondent also requested that additional consideration be given to its ability to pay the $5,000 civil penalty. Respondent submitted an additional financial statement with its appeal.

In response to financial information submitted by Respondent, the Chief Counsel's Order reduced the proposed penalty by $500 and authorized payment of the $5,000 penalty in eight monthly installments of $625 each. In light of Respondent's renewed plea of financial hardship and its most recent financial statement, I have independently reviewed all the financial information Respondent has submitted. I note that although Respondent has cash on hand of approximately $42,000, its ratio of current assets ($399,800) to current liabilities ($722,800) is an unfavorable 0.55.

In light of all the relevant evidence, I believe that a $3,000 civil penalty is appropriate for the violation in this case, and that Respondent should be permitted to pay that penalty in eight consecutive monthly installments of $375 each. This will ensure that adequate consideration is given to Respondent's ability to pay and to the effect of this penalty on Respondent's ability to continue in business.

Findings

I have determined that there is sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $3,000 is appropriate in light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability. Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

In addition, I have determined that the Respondent may pay this $3,000 civil penalty in eight consecutive monthly installments of $375 each.

Therefore, the Order of February 27, 1991, including the authorization of a payment plan, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the civil penalty assessed therein is reduced to $3,000, and authorized to be paid in accordance with the following payment plan. The civil penalty of $3,000 shall be payable in eight monthly installments of $375 each, with the first payment due within 30 days of the date of issuance of this Action on Appeal and each succeeding payment due every 30 days thereafter until the entire amount is paid. If

Respondent defaults on any payment of this payment schedule, the entire amount of the remaining civil penalty shall, without further notice, become immediately due and payable as of the date that the first $375 installment is due.

If Respondent fails to pay this $3,000 civil penalty in accordance with the terms of this Action on Appeal, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will assess interest and administrative charges and initiate collection activities on the debt and those charges. Interest on the debt will accrue from the date of issuance of this Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 49 CFR 102.13, and 49 CFR 89.23. Pursuant to those same authorities, a late-payment penalty of six percent (6%) per year will be charged on any portion of the debt that is more than 90 days past due. This penalty will accrue from the date this Action on Appeal is received.

Payments must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M-86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590-0001. Respondent must send a photocopy of each check or money order to the Office of the Chief Counsel (DCC-1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: May 6, 1991.

Travis P. Dungan,

Certified mail—Return receipt requested

[FR Doc. 92-609 Filed 1-17-92; 8:45 am]

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federal register

Tuesday
January 21, 1992

Part III

Department of Health and Human Services

Administration for Children and Families

Drug Abuse Prevention Program for Runaway and Homeless Youth; Availability of Financial Assistance for FY 1992 and Request for Applications; Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

[Program Announcement No. 93657.91]

Drug Abuse Prevention Program for Runaway and Homeless Youth; Availability of Financial Assistance for FY 1992 and Request for Applications

AGENCY: Administration on Children, Youth and Families (ACYF), Administration for Children and Families (ACF).

ACTION: Announcement of the availability of financial assistance and request for applications for drug abuse prevention programs for runaway and homeless youth.

SUMMARY: The Family and Youth Services Bureau of the Administration on Children, Youth and Families announces the availability of fiscal year 1992 funds for competing new discretionary grants under the Drug Abuse Prevention Program for Runaway and Homeless Youth. The purpose of this program is to improve and expand drug abuse prevention, education and information services to runaway and homeless youth and their families.

This announcement contains all of the necessary application materials to apply for Community-Based Comprehensive Service Projects. Approximately $4,500,000 is available to support grant awards under this program announcement. An estimated 45 to 50 grants will be awarded.

DATES: The closing date for receipt of grant applications is March 23, 1992.

ADDRESSES: Application receipt point: Drug Abuse Prevention Program for Runaway and Homeless Youth, Department of Health and Human Services, Administration for Children and Families, Division of Discretionary Grants, room 341–F.2, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201. Attention: Ruthelle O. Stafford.

FOR FURTHER INFORMATION CONTACT: Anita G. Wright, Administration on Children, Youth and Families, Family and Youth Services Bureau, Program Support Division, P.O. Box 1182, Washington, DC 20013; Telephone: (202) 245–0049.

SUPPLEMENTARY INFORMATION:

Part I: General Information

A. Program Purpose

Section 3511 of Public Law 100–690, the Anti-Drug Abuse Act of 1988 (the Act), established the Drug Abuse Education and Prevention Program for Runaway and Homeless Youth. The specific purposes of this Program are to:

1. Provide individual, family, and group counseling to runaway youth and their families and to homeless youth for the purpose of preventing or reducing the illicit use of drugs by such youth;

2. Develop and support peer counseling programs for runaway and homeless youth related to the illicit use of drugs;

3. Develop and support community education activities related to the illicit use of drugs by runaway and homeless youth, including outreach to individual youth;

4. Provide runaway and homeless youth in rural areas with assistance (including the development of community support groups) related to the illicit use of drugs;

5. Provide information and training regarding issues related to the illicit use of drugs by runaway and homeless youth to individuals involved in providing services to these youth;

6. Support research on illicit drug use by runaway and homeless youth, the effects on such youth of drug abuse by family members, and any correlation between such use and attempts at suicide; and

7. Improve the availability and coordination of local services related to drug abuse for runaway and homeless youth.

While funds are available for drug treatment referral as a project component, there is no provision in the statute for the direct provision of drug treatment services.

The overall purpose of the Drug Abuse Prevention Program is to help communities address the problem of drug abuse among runaway and homeless youth through the prevention, early intervention, and reduction of drug dependency. The Administration on Children, Youth and Families will award grants to support direct services and coordination activities which are designed to achieve the specific purposes identified above. Research on illicit drug use by runaway and homeless youth and related issues is currently being supported by ACYF and will not be funded under this announcement.

B. Definitions

For the purposes of this program announcement, the following definitions apply:

1. *Drug* means a beverage containing alcohol or a controlled substance as defined in section 102 of the Controlled Substances Act.

2. *Illicit* means unlawful or injurious.

3. *Community-Based* means located within the community and maintained with community and consumer participation in the planning, operation, and evaluation of its programs.

4. *Public Agency* means any State, unit of local government, combination of such States or units, or any agency, department, or instrumentality of any of the foregoing.

5. *State* means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands (Palau).

6. *Runaway Youth* means a person under 18 years of age who absents himself or herself from home or place of legal residence without the permission of parents or legal guardian. This definition is derived from the regulatory definition (45 CFR 1351.1(f)) of runaway youth for the Runaway and Homeless Youth Act (42 U.S.C. 5701 *et seq.*).

7. *Homeless Youth* means a person under 21 years of age who is in need of services and for whom it is not possible to live in a safe environment with a relative and for whom there is no other safe alternative living arrangement. This definition is derived from the statutory definition in the Transitional Living Grant Program (42 U.S.C. 5714–1 *et seq.*).

The definitions of "runaway youth" and "homeless youth" above are used to ensure that any such youth being served under the Runaway and Homeless Youth Act are included in the target population for services under this announcement.

C. Background

The Family and Youth Services Bureau (FYSB) within the Administration on Children, Youth and Families (ACYF) administers programs that target services to an adolescent population of approximately 1.3 million runaway and homeless youth who inhabit the streets of this nation annually. This population's lifestyles put them among the most high-risk groups in the nation for exposure to and use of alcohol and other illegal substances. The abuse of drugs has had an increasingly severe impact on this vulnerable group. Reports from shelters which serve runaway and homeless youth under the provisions of the Runaway and Homeless Youth Act (title III of the Juvenile Justice and Delinquency Prevention Act of 1974, Public Law 93–415, as amended) indicate a growing drug abuse problem. In 1988, 15.4 percent of the youth entering the shelters indicated a personal drug abuse

problem. In addition, 16.6 percent of the youth entering the shelters reported their reason for running away as being drug and/or alcohol abuse on the part of their parents.

A 1990 survey by The National Network of Runaway and Youth Services of 185 community-based agencies that serve runaway and homeless youth found substance abuse to be the leading health problem among the youth served. Several other studies reveal that the incidence of substance abuse by runaway and homeless youth in large urban areas is significantly greater than the rate of abuse by other adolescents. The prevalence of the problem is underscored by the fact that not only are youth-serving agencies in major urban areas reporting an increase in drug use among their client population, but providers in small towns and rural communities are also finding that more than half of their clients are reporting drug abuse as a primary problem.

While several studies provide some evidence of alcohol and drug abuse decline in the general population, recent locally based studies indicate that this is not the trend among the runaway and homeless youth population. While there are indications that the use of marijuana among this population is declining, there has been a marked increase in the use of alcohol and other dangerous and addictive drugs such as cocaine and its derivative, crack. Alcohol use among the younger adolescent population is also on the increase. The use of alcohol is of particular concern because it often leads to other serious substance abuse.

The youth entering the shelters today appear to be more disturbed and difficult to serve; a trend often associated with an increase in substance abuse. These youth often suffer from a variety of mental, physical, educational and social deficiencies which are exacerbated by involvement with illicit drugs. The street life environment places runaway and homeless youth at a significant risk of involvement in the abuse of drugs and the related consequence of contracting and transmitting communicable diseases, including the AIDS virus. The implementation of the Anti-Drug Abuse Act of 1988 (Pub. L. 100-690) provides Federal assistance to more comprehensively address the problem of drug involvement among runaway and homeless youth. Initial grant awards under section 3511 of Public Law 100-690 were made in FY 1989. During fiscal years 1989 and 1990, approximately $25.5 million was awarded to 164 organizations to address the problem.

Under the FY 1989 program announcement, approximately $14 million in discretionary grant awards were made to 104 agencies and organizations located in 36 States, including Puerto Rico and the District of Columbia. These awards were made to support projects designed to improve or expand existing services; develop networking in rural and other areas with minimal services; develop innovative program models; and provide special services for Native American youth on or near Indian reservations and Alaska Native villages.

In FY 1990, approximately $11.5 million in discretionary grants were made to an additional 80 organizations throughout the United States. In addition to the above purposes, demonstration grants were awarded in FY 1990 to focus on services to the following subgroups among the general runaway and homeless youth population: Minority youth, older homeless youth in transition to independent living, and pregnant adolescents. Networking grants were also expanded to focus on local as well as statewide coordination efforts.

Also during FY 1990, a contract was awarded to study the incidence of illicit drug use among runaway and homeless youth, the effects of drug abuse by family members on such youth and any correlations between drug use and attempts at suicide and other harmful or risk-taking behavior caused or abetted by drugs. In addition, a management information (data collection) system (MIS) is currently being developed and tested for use by grantees. Grantees funded under this program announcement will be required to fully cooperate with MIS and research contractors funded by ACYF to support the Drug Abuse Prevention Program for Runaway and Homeless Youth.

No program announcement was published during FY 1991 under section 3511 of the Anti-Drug Abuse Act of 1988. However, approximately $13.5 million was awarded non-competitively to grantees previously funded in fiscal years 1989 and 1990.

Given the magnitude of the problem of illicit drug involvement among runaway and homeless youth and the continuing need to support communities in their efforts to address the problem, ACYF will award new grants under this announcement to focus on Comprehensive Service Projects that improve and/or expand services to the target population.

The Administration on Children, Youth and Families seeks to expand the availability of services pertaining to effective drug abuse prevention, particularly early intervention, community education methods and coordinated service delivery systems for this hard to reach population. All applications should reflect an understanding that drug abuse prevention and reduction cannot be addressed in isolation, particularly in cases where family members, especially parents, are also users of illicit drugs. Where family members are present, their involvement should be strongly encouraged as an integral part of the services provided. In addition, in the development of drug abuse prevention services, ACYF encourages awareness of and sensitivity to the particular needs of runaway and homeless youth who are members of ethnic and racial minority groups, and/or are street youth from economically deprived communities. These groups are among the most hard to reach subpopulations of runaway and homeless youth and are in greatest need of services.

The improvement and expansion of direct drug abuse prevention, intervention and reduction services, including more accessible community resources and support for runaway and homeless youth, are essential activities under this program announcement. Although section 3511 of the Act provides for services as well as referrals to drug treatment programs, drug treatment itself is not the focus of this program, and will not be supported under this program announcement.

Because of a shortage of drug treatment programs in many areas of the country, applicants are encouraged to develop innovative approaches to securing appropriate treatment services for the runaway and homeless youth they serve.

D. Additional Resources

The Administration on Children, Youth and Families, through an Interagency Agreement with the Public Health Service, DHHS, is working to improve access to medical services, including drug treatment for runaway and homeless youth. The Bureau of Health Care Delivery and Assistance (BHCDA) of the Public Health Service, with funds made available under the Stewart B. McKinney Homeless Assistance Act of 1987, has awarded grants to public and private non-profit organizations across the country to provide primary health care to homeless populations. Applicants are encouraged to contact these organizations and, where possible, access and coordinate with these resources. These grantees are listed in appendix II.

This announcement is specifically targeted to runaway and homeless youth. Potential applicants interested in providing drug abuse prevention services to high-risk youth other than runaway and homeless youth are encouraged to contact the Office of Substance Abuse Prevention (OSAP). For information on OSAP grant programs and other drug abuse prevention resources, applicants should contact: National Clearinghouse for Alcohol and Drug Information, P.O. Box 2345, Rockville, Maryland 20852, 1–800–487–4890.

E. Eligible Applicants

Any State, unit of local government (or combination of units of local government), public or non-profit private agency, organization, institution, or other non-profit entity is eligible to apply; except those grantees listed in appendix III, which were originally awarded Drug Abuse Prevention Program grants in FY 1990 and which, pending satisfactory performance, are eligible for non-competitive continuation funding during FY 1992. All other previously funded Drug Abuse Prevention Program grantees and other eligible agencies may apply under this program announcement.

Federally recognized Indian Tribes are eligible to apply for grants as units of local government. Non-federally recognized Indian Tribes and urban Indian organizations are eligible to apply for grants as private, non-profit agencies. In instances where more than one organization submits a joint application to coordinate activities under this announcement, one legal entity must be designated as the prospective grantee.

Non-profit applicants who have not previously received financial support from the Administration on Children, Youth and Families must submit proof of their non-profit status with their grant application. This can be done either by making reference to the applicant's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations or by submitting a copy of its letter from IRS (IRS Code, sections 501(c)(3) and 501(c)(6)). Non-profit applicants cannot be funded without acceptable proof of this status. Although for-profit entities may participate as sub-grantees to eligible applicants, they do not qualify as applicants under this grant announcement.

Applicants must indicate in their applications a willingness to cooperate with third party contractors funded by ACYF, including participation in any management information (data collection) system operated by ACYF.

F. Available Funds and Duration of Projects

The Administration on Children, Youth and Families expects to award approximately $4,500,000 in grants. Project periods for grants awarded under this announcement will be for three years. The award of funds for the second and third budget periods will be based upon the availability of funds and satisfactory performance by the grantee. The maximum Federal share for each 12-month budget period of the grant award will be $100,000.

G. Applicant Share of Project Costs

A 25 percent non-Federal share ($1 for every $3 of Federal funding), either in cash or third party in-kind contributions, or a combination thereof, secured from non-Federal sources, is required of all projects. For example, an applicant who applies for $75,000 in Federal funding must provide $25,000 toward the project, for a total project cost of $100,000. An applicant who applies for $100,000 in Federal funding must provide $33,333 toward the project, with a total project cost of $133,333. Contributions of more than 25 percent are encouraged. Applicants which do not provide the required 25 percent non-Federal share will not be considered for funding.

Part II: Responsibilities of Community-Based Comprehensive Service Projects

Approximately 45–50 grants will be awarded to improve and/or expand existing services related to preventing or reducing the use of illicit drugs by runaway and homeless youth. To ensure that agencies with the greatest capacity for providing quality services are selected for funding under this announcement, applicants must demonstrate in the program narrative section of their applications that they are able to meet the requirements of the Act and other applicable Federal policies and procedures.

The program narrative statement should be prepared in response to the requirements enumerated below and to the review criteria, presented in part III, which will be used to evaluate the applications. To assist applicants in preparing the narrative statements of their grant submissions, the relevant requirements of the Drug Abuse Prevention Program for Runaway and Homeless Youth (sections 3511–3515 of the Anti-Drug Abuse Act of 1988) and applicable policies and procedures have been arranged according to the five review criteria.

The program narrative should be clear and concise, and should not exceed 30 double-spaced pages exclusive of necessary attachments, such as organization charts, resumes, and letters of agreement or support. Review of the narrative portion of the statement will be limited to the first 30 pages.

A. Objectives and Need for Assistance

Applicants should specifically identify one or more purposes of the Act, as described in section A of part I of this announcement, which it will carry out through the use of grant funds (section 3514(b)(1)).

Further, applicants should discuss the rate of illicit drug use by juveniles with particular attention being paid to runaway and homeless youth in the community(ies) to be served (section 3515(a)(4)) and the availability (or lack thereof) of similar services, especially for runaway and homeless youth, in the geographical area where services will be provided (section 3515(a)(5)). ACYF encourages applications that target the particular needs of runaway and homeless youth who are members of ethnic and racial minority groups, and/or are street youth from economically deprived communities in the development of drug abuse prevention services.

B. Results and Benefits Expected

Applicants should identify the results and benefits to be derived from the project, stating the numbers of runaway and homeless youth and their families to be served, and describing the types and quantities of services to be provided. The applicant should discuss how the project will increase the capacity of the applicant to provide services to address the illicit use of drugs by runaway and homeless youth (section 3515(a)(3)). Further, the applicant should describe the extent to which the project will increase the level of services, or improve the coordination of services, in the community for runaway and homeless youth (section 3515(a)(6)).

C. Approach

Applicants should discuss how the project will be carried out, including a plan of action detailing how the proposed work will be accomplished.

ACYF encourages comprehensive approaches to the problem of drug involvement by runaway and homeless youth and their families. Some applicants, however, may want to focus more narrowly on a particular problem(s) confronting their community or on a specific gap in services. Therefore, while interested applicants are encouraged to propose as comprehensive a project as possible, applications that demonstrate how the

grant will be utilized to expand or improve a particular aspect of a program serving runaway and homeless youth will be considered. Applicants proposing narrowly focused efforts should describe how other resources available in the community will be used to ensure that the array of services needed will be available. All applicants should discuss how the proposed project will be integrated with other services to runaway and homeless youth that are provided by the applicant or that are available in the community.

Activities that may be undertaken or expanded include; but are not necessarily limited to:

- Improving networking and service coordination to increase the availability of services to runaway and homeless youth;
- Expanding outreach activities, particularly street-based outreach programs;
- Providing individual, family, group, and/or peer prevention and intervention counseling related to alcohol and other drug use;
- Strengthening intake and assessment procedures for substance abuse at runaway and homeless youth shelters;
- Coordinating services with drug treatment facilities and making referrals to treatment that are geared to the runaway and homeless youth population;
- Providing aftercare and follow-up services to runaway and homeless youth with substance abuse problems that have received shelter;
- Increasing staff knowledge and skills related to working with runaway and homeless youth with substance abuse problems by improving or accessing training opportunities;
- Improving programming to address the unique cultural needs and concerns of minority runaway and homeless youth;
- Involving and educating parents, siblings and peers of runaway and homeless youth receiving drug abuse prevention services;
- Developing and implementing programs designed to reduce drug involvement among the target population by improving coping skills and reducing stress factors arising from such problems as hopelessness, family dysfunction, and peer pressure; or
- Establishing linkages with community mental health programs that will provide comprehensive substance abuse counseling to runaway and homeless youth.

The applicant should discuss the extent, if any, to which the project will incorporate new or innovative techniques (section 3515(a)(2)). Further, the applicant should discuss its plans for evaluating the project, including assessing the outcomes and accomplishments of the program and service delivery models employed (section 3514(b)(4)).

D. Staff Background and Organizational Experience

Priority will be given to agencies and organizations that have experience in providing services to runaway and homeless youth [Section 3511(b)]; therefore, applicants should include a brief description of their organizational experience in providing services to such youth. The applicant should further demonstrate that the organization is capable of the proper and efficient administration of the project (section 3514(b)(3)).

Applicants are encouraged to show evidence of collaboration with other agencies in the community in the development of a comprehensive approach to service delivery for runaway and homeless youth. Applicants should list all organizations with which they will work and describe the contributions of these organizations to the project. (When more than one agency joins to submit a single application, one entity must be identified as the applicant organization with legal responsibility for the grant, should it be awarded.) Letters of commitment should be included for each participating agency as well as a clearly defined task chart showing the responsibilities and involvement of the designated agencies.

E. Budget Appropriateness

The applicant should discuss the relative cost and effectiveness of the proposed project or activity (section 3515(a)(1)). This should include information on the appropriateness of the proposed budget relative to the nature and scope of the activities to be undertaken. The applicant should also describe the fiscal control and fund accounting procedures that will be used to ensure prudent use, proper disbursement, and accurate accounting of funds received under this program announcement (section 3514 (b)(6)).

Part III: Criteria for Review and Evaluation of Applications

An application must meet all of the eligibility requirements specific to this announcement. This includes eligibility of the applicant, duration of the project, 25 percent minimum applicant share, and responsiveness to the purposes of the announcement.

Applications will be evaluated by a panel of non-Federal experts knowledgeable about issues related to runaway and homeless youth and illicit drug use who will comment on and score the applications based on the five criteria listed below.

To ensure the maximum score for each criterion, it is imperative that the program narrative section of the application clearly address each of these five areas and include the information requested in part II.

A. Objectives and Need for Assistance: (15 Points)

- Identify the specific purpose(s) of section 3511 of the Anti-Drug Abuse Act that is being addressed by the proposal.
- Pinpoint any relevant physical, economic, social, financial, institutional, or other problems requiring a solution (including the need for additional services for addressing the illicit use of drugs by runaway and homeless youth) in the geographic area(s) that the project is proposed to serve (section 3515(a)(5)).
- Give the precise location of the project and area(s) to be served by the proposed project (maps or other graphic aids may be attached). Provide a detailed description of the emerging or current status of illicit drug use among runaway and homeless youth and their families in the proposed target area (section 3515(a)(4)).
- Demonstrate the need for the project and state the principal and subordinate objectives of the project. Supporting documentation from concerned interests other than the applicant may be used.

B. Results or Benefits Expected: (20) Points

- Identify the results and benefits to be derived from the project, especially any quantifiable increases in the applicant's capacity to provide services to address the illicit use of drugs by runaway and homeless youth (section 3515(a)(3)); and the extent to which the project will increase the level of services, or will coordinate with other services, in the community (section 3515(a)(6)).
- Describe any anticipated changes in policy and/or practice among public and private service providers that will result in improved service delivery (e.g., identify any manuals, training curricula or reports proposed as a project accomplishment).
- Describe the plans for evaluating the effectiveness of the project, including assessing the outcomes and accomplishments of the program and service delivery models employed.

C. Approach (30 Points)

• Outline a plan of action pertaining to the scope of the project and detail how the proposed work will be accomplished. Cite factors which might accelerate or decelerate the work and the reasons for taking the approach proposed.

• Provide a description of the proposed project, including the activities for accomplishing intervention, prevention, education, client involvement, treatment referral, outreach efforts, and coordination with other agencies.

• Describe any unusual features of the project, such as design or technological innovations (section 3515(a)(2)), reductions in cost or time, or extraordinary social and community involvements (e.g., how project will be maintained after termination of Federal support).

• Describe the relationship between this project and other work planned, anticipated, underway with Federal assistance, or accomplished. Projects are encouraged to replicate existing programs and strategies. Those that are not should explain why or how they plan to incorporate successful strategies into their projects.

• Identify the kinds of data to be collected and maintained, and discuss the criteria to be used to evaluate the results and success of the project. Explain the methodology that will be used to determine if the needs identified and discussed are being met and if the results and benefits identified are being achieved. Provide quantitative projections of the accomplishments to be achieved, if possible.

D. Staff Background and Experience (20 Points)

• Present a biographical sketch of the proposed program director with the following information: name, address, telephone number, background, and other qualifying experience for the project.

• List the name, training and background for other proposed key personnel.

• List each organization, cooperator, consultant, or other key individuals who will work on the project (including the lead agency) along with a short description of the nature of their effort or contribution. In the case of an application submitted by more than one agency, describe the lead agency's role and method for coordinating activities; and role and responsibility of each member agency. Letters of commmitment that show evidence of a joint planning and implementation role in the project must be included. Letters of commitment from appropriate service delivery agencies and community and political organizations that express potential involvement may also be attached.

• Provide a brief description of the applicant's organizational experience in providing services to runaway and homeless youth (section 3511(b)).

E. Budget Appropriateness: (15 Points)

Section 3515(a)(1) of the Act requires that Federal officials give consideration to the relative cost and effectiveness of the proposed project or activity in carrying out the purposes for which the requested grant is authorized to be made. Therefore, applicants should demonstrate that the project's costs (line item costs, costs for different services) are reasonable in view of the anticipated results and benefits. (Applicants should refer to the budget information presented in Standard Forms (SF) 424 and 424A and to the Instructions for the SF–424A which follows these forms and relate this information to the results or benefits expected (Criterion B). Applicants should also indicate non-Federal sources of support.

Part IV: Application Process

A. Availability of Forms

All of the forms and instructions needed for submitting an application for Federal assistance under this announcement are included in appendix I. Single sided copies of these forms should be reproduced and used to prepare the application package.

A complete application consists of:

1. Standard Form 424: Application for Federal Assistance;

2. Standard Form 424A: Budget Information;

3. Assurances—The assurances in (3)(a), (b) and (c) must be signed and returned.

(a) Standard Form 424B: Non-Construction Programs;

(b) Certification Regarding Lobbying;

(c) The Anti-Drug Abuse Act of 1988 Certification;

(d) Debarment Certification; and

(e) Drug-Free Workplace Certification.

4. Program Narrative: A narrative description of the project, organized under the headings which address the requirements identified in part II and the five evaluation criteria identified in part III.

(A) Objectives and Need for Assistance; (B) Results or Benefits Expected; (C) Approach; (D) Staff Background and Experience; and (E) Budget Appropriateness.

The program narrative must be typed, double-spaced, on 8½ x 11 inch bond paper. All pages of the narrative (including chartes, tables, and maps) must be sequentially numbered, beginning with the "Objective and Need for Assistance" section as page number one. The program narrative must not exceed 30 double-spaced pages.

5. Project Abstract: A brief (approximately 100 words) description of the project, typed on 8½ x 11 inch bond paper.

6. Appendices/Attachments: Letters of support, exhibits, and other supporting documents must not exceed 15 pages.

B. Application Submission

Each application must be signed by an official authorized to act on behalf of the applicant agency, organization, institution, or other entity and to assume responsibility for the obligations imposed by the terms and conditions of any grant awarded.

Applications must be prepared in accordance with the guidance provided in this announcement and the instructions in the attached application package.

One signed original and two copies of the application, including all attachments, are required.

Completed applications must be sent to: Drug Abuse Prevention Program for Runaway and Homeless Youth, Department of Health and Human Services, Administration for Children and Families, Division of Discretionary Grants, room 341–F.2, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201. Attention: Ruthelle O. Stafford. Hand-delivered applications will be accepted at the ACF agency during the normal working hours of 8:30 a.m. to 5 p.m., Monday through Friday, except holidays.

C. Closing Date for the Submission of Applications

The closing date for receipt of applications under this announcement is March 23, 1992.

1. Deadlines

Applications shall be considered as meeting the deadline if they are either:

a. Received on or before the deadline date at the address specified in the application submission section of this announcement; or

b. Sent on or before the deadline date and received in time for the independent review under Chapter 1–62 of the HHS Grants Administration Manual. Applicants are cautioned to request a legibly dated U.S. Postal Service

postmark or to obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.

2. Late Applications

Applications which do not meet the criteria in the above paragraphs are considered late applications. The granting agency will notify each late applicant that its application will not be considered in the current competition.

3. Extension of Deadline

The Administration on Children, Youth and Families may extend the deadline for all applicants because of acts of God such as floods, hurricanes, etc. or when there is widespread disruption of the mail. However, if the granting agency does not extend the deadline for all applicants, it may not waive or extend the deadline for any applicant.

D. Assistant to Prospective Grantees

Potential grantees can receive informational assistance in developing applications from the appropriate ACYF Regional Youth Contacts listed in appendix IV, or from the Family and Youth Services Bureau in Washington, DC (see address at the beginning of this announcement).

E. Application Consideration

Each application will be reviewed and scored against the criteria outlined in part III of this announcement. The review will be conducted in Washington, DC. Reviewers will be persons knowledgeable about issues relating to runaway and homeless youth and illicit drug use.

The results of the competitive review will be analyzed by Federal staff and will be the primary factor taken into consideration by the Associate Commissioner, Family and Youth Services Bureau, who, in consultation with ACF Regional officials, will recommend to the Commissioner of ACYF programs to be funded. The Commissioner of ACYF will make the final selections. Applications may be funded in whole or in part. Consideration may also be given to ensuring that a variety of geographic areas are served, that projects with different auspices are selected, and that a variety of project designs and models are represented. As required by section 3511(b) of the Act, priority will be given to applicants that have experience in providing services to runaway and homeless youth.

Successful applicants will be notified through the issuance of a Financial Assistance Award. The award will state the amount of Federal funds awarded, the purpose of the grant, the terms and conditions of the grant award, the effective date of the grant, the total project period, the budget period, and the amount of the non-Federal matching share.

Organizations whose applications have been disapproved will be notified in writing by the Commissioner of the Administration on Children, Youth and Families.

F. Paperwork Reduction Act of 1980

Under the Paperwork Reduction Act of 1980, Public Law 96–511, the Department is required to submit to the Office of Management and Budget (OMB) for review and approval any reporting and recordkeeping requirements and regulations, including program announcements. This program announcement does not contain information collection requirements beyond those approved by OMB.

G. Executive Order 12372—Notification Process

This program is covered under Executive Order (E.O.) 12372, "Intergovernmental Review of Federal Programs," and 45 CFR part 100, "Intergovernmental Review of Department of Health and Human Services Programs and Activities." Under the Order, States may design their own processes for reviewing and commenting on proposed Federal assistance under covered programs. All States and territories except Alaska, Idaho, Kansas, Louisiana, Minnesota, Nebraska, Pennsylvania, Virginia, American Samoa, and Palau have elected to participate in the Executive Order process and have established Single Points of Contact (SPOCs). (See attached list of the Single Points of Contact for each State and Territory included in appendix V of this announcement.) Applicants from these ten areas need take no action regarding E.O. 12372. Applications for projects to be administered by Federally-recognized Indian Tribes are also exempt from the requirements of E.O. 12372.

Other applicants should contact their SPOC as soon as possible to alert them to the perspective application and receive any necessary instructions. Applicants must submit any required material to the SPOC as early as possible so that the program office can obtain and review SPOC comments as part of the award process. It is imperative that the applicant submit all required materials, if any, to the SPOC and indicate the date of this submittal (or date of contact if no submittal is required) on the SF–424, Block 16a. The Administration on Children and Families will notify the State of any applicant who fails to indicate SPOC contact (when required) on the application form.

SPOCs have 60 days from the grant application deadline date to comment on applications for financial assistance under this program. SPOCs are encouraged to eliminate the submission of routine endorsements as official recommendations. Additionally, SPOCs are requested to differentiate clearly between mere advisory comments and those official State process recommendations which they intend to trigger the "accommodate or explain" rule.

When comments are submitted directly to ACF, they should be addressed to: Drug Abuse Prevention Program for Runaway and Homeless Youth, Department of Health and Human Services, Administration for Children and Families, Grants and Contracts Management, room 345–F.2, Hubert H. Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201.

(Catalogue of Federal Domestic Assistance Program Number 93.657, Drug Abuse Education and Prevention Program for Runaway and Homeless Youth)

Dated: January 5, 1992.

Wade F. Horn,

Commissioner, Administration on Children, Youth and Families.

BILLING CODE 4130-01-M

APPENDIX I

APPLICATION FOR FEDERAL ASSISTANCE

OMB Approval No. 0348-0043

1. TYPE OF SUBMISSION: Application ☐ Construction ☐ Non-Construction; Preapplication ☐ Construction ☐ Non-Construction	2. DATE SUBMITTED	Applicant Identifier
	3. DATE RECEIVED BY STATE	State Application Identifier
	4. DATE RECEIVED BY FEDERAL AGENCY	Federal Identifier

5. APPLICANT INFORMATION

Legal Name	Organizational Unit
Address (give city, county, state and zip code)	Name and telephone number of the person to be contacted on matters involving this application (give area code)

6. EMPLOYER IDENTIFICATION NUMBER (EIN): ☐☐ – ☐☐☐☐☐☐☐

7. TYPE OF APPLICANT: (enter appropriate letter in box) ☐

A State; B County; C Municipal; D Township; E Interstate; F Intermunicipal; G Special District; H Independent School Dist; I State Controlled Institution of Higher Learning; J Private University; K Indian Tribe; L Individual; M Profit Organization; N Other (Specify) _____

8. TYPE OF APPLICATION:

☐ New ☐ Continuation ☐ Revision

If Revision, enter appropriate letter(s) in box(es) ☐ ☐

A Increase Award; B Decrease Award; C Increase Duration; D Decrease Duration; Other (specify) _____

9. NAME OF FEDERAL AGENCY

10. CATALOG OF FEDERAL DOMESTIC ASSISTANCE NUMBER: ☐☐ – ☐☐☐

TITLE

11. DESCRIPTIVE TITLE OF APPLICANT'S PROJECT:

12. AREAS AFFECTED BY PROJECT (cities, counties, states, etc.)

13. PROPOSED PROJECT		14. CONGRESSIONAL DISTRICTS OF	
Start Date	Ending Date	a. Applicant	b. Project

15. ESTIMATED FUNDING:		
a. Federal	$	.00
b. Applicant	$	.00
c. State	$	.00
d. Local	$	.00
e. Other	$	.00
f. Program Income	$	.00
g. TOTAL	$	.00

16. IS APPLICATION SUBJECT TO REVIEW BY STATE EXECUTIVE ORDER 12372 PROCESS?

a. YES THIS PREAPPLICATION/APPLICATION WAS MADE AVAILABLE TO THE STATE EXECUTIVE ORDER 12372 PROCESS FOR REVIEW ON

DATE _____

b. NO ☐ PROGRAM IS NOT COVERED BY E.O. 12372

☐ OR PROGRAM HAS NOT BEEN SELECTED BY STATE FOR REVIEW

17. IS THE APPLICANT DELINQUENT ON ANY FEDERAL DEBT?

☐ Yes If "Yes," attach an explanation ☐ No

18. TO THE BEST OF MY KNOWLEDGE AND BELIEF, ALL DATA IN THIS APPLICATION/PREAPPLICATION ARE TRUE AND CORRECT. THE DOCUMENT HAS BEEN DULY AUTHORIZED BY THE GOVERNING BODY OF THE APPLICANT AND THE APPLICANT WILL COMPLY WITH THE ATTACHED ASSURANCES IF THE ASSISTANCE IS AWARDED

a. Typed Name of Authorized Representative	b. Title	c. Telephone number
d. Signature of Authorized Representative		e. Date Signed

Previous Editions Not Usable

Standard Form 424 REV. 4-88
Prescribed by OMB Circular A-102

Authorized for Local Reproduction

Instructions for the SF 424

This is a standard form used by applicants as a required facesheet for preapplications and applications submitted for Federal assistance. It will be used by Federal agencies to obtain applicant certification that States which have established a review and comment procedure in response to Executive Order 12372 and have selected the program to be included in their process, have been given an opportunity to review the applicant's submission.

Item and Entry

1. Self-explanatory.
2. Date application submitted to Federal agency (or State if applicable) & applicant's control number (if applicable).
3. State use only (if applicable).
4. If this application is to continue or revise an existing award, enter present Federal identifier number. If for a new project, leave blank.
5. Legal name of applicant, name of primary organizational unit which will undertake the assistance activity, complete address of the applicant, and name and telephone number of the person to contact on matters related to this application.
6. Enter Employer Identification Number (EIN) as assigned by the Internal Revenue Service.
7. Enter the appropriate letter in the space provided.
8. Check appropriate box and enter appropriate letter(s) in the space(s) provided:
   —"New" means a new assistance award.
   —"Continuation" means an extension for an additional funding/budget period for a project with a projected completion date.
   —"Revision" means any change in the Federal Government's financial obligation or contingent liability from an existing obligation.
9. Name of Federal agency from which assistance is being requested with this application.
10. Use the Catalog of Federal Domestic Assistance number and title of the program under which assistance is requested.
11. Enter a brief descriptive title of the project, if more than one program is involved, you should append an explanation on a separate sheet. If appropriate (e.g., construction or real property projects), attach a map showing project location. For preapplications, use a separate sheet to provide a summary description of this project.
12. List only the largest political entities affected (e.g., State, counties, cities).
13. Self-explanatory.
14. List the applicant's Congressional District and any District(s) affected by the program or project.
15. Amount requested or to be contributed during the first funding/budget period by each contributor. Value of in-kind contributions should be included on appropriate lines as applicable. If the action will result in a dollar change to an existing award, indicate *only* the amount of the change. For decreases, enclose the amounts in parentheses. If both basic and supplemental amounts are included, show breakdown on an attached sheet. For multiple program funding, use totals and show breakdown using same categories as item 15.
16. Applicants should contact the State Single Point of Contact (SPOC) for Federal Executive Order 12372 to determine whether the application is subject to the State intergovernmental review process.
17. This question applies to the applicant organization, not the person who signs as the authorized representative. Categories of debt include delinquent audit disallowances, loans and taxes.
18. To be signed by the authorized representative of the applicant. A copy of the governing body's authorization for you to sign this application as official representative must be on file in the applicant's office. (Certain Federal agencies may require that this authorization be submitted as part of the application.)

BILLING CODE 4130-01-M

OMB Approval No. 0348-0044

BUDGET INFORMATION — Non-Construction Programs

SECTION A – BUDGET SUMMARY

Grant Program Function or Activity (a)	Catalog of Federal Domestic Assistance Number (b)	Estimated Unobligated Funds		New or Revised Budget		
		Federal (c)	Non-Federal (d)	Federal (e)	Non-Federal (f)	Total (g)
1.		$	$	$	$	$
2.						
3.						
4.						
5. TOTALS		$	$	$	$	$

SECTION B – BUDGET CATEGORIES

6 Object Class Categories	GRANT PROGRAM, FUNCTION OR ACTIVITY				Total (5)
	(1)	(2)	(3)	(4)	
a. Personnel	$	$	$	$	$
b. Fringe Benefits					
c. Travel					
d. Equipment					
e. Supplies					
f. Contractual					
g. Construction					
h. Other					
i. Total Direct Charges (sum of 6a - 6h)					
j. Indirect Charges					
k. TOTALS (sum of 6i and 6j)	$	$	$	$	$
7. Program Income	$	$	$	$	$

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Standard Form 424A (4-88)
Prescribed by OMB Circular A-102

SECTION C - NON-FEDERAL RESOURCES				
(a) Grant Program	(b) Applicant	(c) State	(d) Other Sources	(e) TOTALS
8.	$	$	$	$
9.				
10.				
11.				
12. TOTALS (sum of lines 8 and 11)	$	$	$	$

SECTION D - FORECASTED CASH NEEDS					
	Total for 1st Year	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter
13. Federal	$	$	$	$	$
14. NonFederal					
15. TOTAL (sum of lines 13 and 14)	$	$	$	$	$

SECTION E - BUDGET ESTIMATES OF FEDERAL FUNDS NEEDED FOR BALANCE OF THE PROJECT				
(a) Grant Program	FUTURE FUNDING PERIODS (Years)			
	(b) First	(c) Second	(d) Third	(e) Fourth
16.	$	$	$	$
17.				
18.				
19.				
20. TOTALS (sum of lines 16 -19)	$	$	$	$

SECTION F - OTHER BUDGET INFORMATION (Attach additional Sheets if Necessary)	
21. Direct Charges:	22. Indirect Charges:
23. Remarks	

SF 424A (4-88) Page 2
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Instructions For The SF–424A

General Instructions

This form is designed so that application can be made for funds from one or more grant programs. In preparing the budget, adhere to any existing Federal grantor agency guidelines which prescribe how and whether budgeted amounts should be separately shown for different functions or activities within the program. For some programs, grantor agencies may require budgets to be separately shown by function or activity. For other programs, grantor agencies may require a breakdown by function or activity. Sections A, B, C, and D should include budget estimates for the whole project except when applying for assistance which requires Federal authorization in annual or other funding period increments. In the latter case, Sections A, B, C, and D should provide the budget for the first budget period (usually a year) and Section E should present the need for Federal assistance in the subsequent budget periods. All applications should contain a breakdown by the object class categories shown in Lines a–k of Section B.

Section A. Budget Summary

Lines 1–4, Columns (a) and (b)

For applications pertaining to a *single* Federal grant program (Federal Domestic Assistance Catalog number) and *not requiring* a functional or activity breakdown, enter on Line 1 under Column (a) the catalog program title and the catalog number in Column (b).

For applications pertaining to a *single* program *requiring* budget amounts by multiple functions or activities, enter the name of each activity or function on each line in Column (a), and enter the catalog number in Column (b). For applications pertaining to multiple programs where none of the programs require a breakdown by function or activity, enter the catalog program title on each line in *Column* (a) and the respective catalog number on each line in Column (b).

For applications pertaining to *multiple* programs where one or more programs *require* a breakdown by function or activity, prepare a separate sheet for each program requiring the breakdown. Additional sheets should be used when one form does not provide adequate space for all breakdown of data required. However, when more than one sheet is used, the first page should provide the summary totals by programs.

Lines 1–4, Columns (c) through (g.)

For *new applications*, leave Columns (c) and (d) blank. For each line entry in Columns (a) and (b), enter in Columns (e), (f), and (g) the appropriate amounts of funds needed to support the project for the first funding period (usually a year).

For continuing grant program applications, submit these forms before the end of each funding period as required by the grantor agency. Enter in Columns (c) and (d) the estimated amounts of funds which will remain unobligated at the end of the grant funding period only if the Federal grantor agency instructions provide for this. Otherwise, leave these columns blank. Enter in columns (e) and (f) the amounts of funds needed for the upcoming period. The amount(s) in Column (g) should be the sum of amounts in Columns (e) and (f).

For supplemental grants and changes to existing grants, do not use Columns (c) and (d). Enter in Column (e) the amount of the increase or decrease of Federal funds and enter in Column (f) the amount of the increase or decrease of non-Federal funds. In Column (g) enter the new total budgeted amount (Federal and non-Federal) which includes the total previous authorized budgeted amounts plus or minus, as appropriate, the amounts shown in Columns (e) and (f). The amount(s) in Column (g) should not equal the sum of amounts in Columns (e) and (f).

Line 5—Show the totals for all columns used.

Section B Budget Categories

In the column headings (1) through (4), enter the titles of the same programs, functions, and activities shown on Lines 1–4, Column (a), Section A. When additional sheets are prepared for Section A, provide similar column headings on each sheet. For each program, function or activity, fill in the total requirements for funds (both Federal and non-Federal) by object class categories.

Lines 6a–i—Show the totals of Lines 6a to 6h in each column.

Line 6j—Show the amount of indirect cost.

Line 6k—Enter the total of amounts on Lines 6i and 6j. For all applications for new grants and continuation grants the total amount in column (5), Line 6k, should be the same as the total amount shown in Section A, Column (g), Line 5. For supplemental grants and changes to grants, the total amount of the increase or decrease as shown in Columns (1)–(4), Line 6k should be the same as the sum of the amounts in Section A, Columns (e) and (f) on Line 5.

Line 7—Enter the estimated amount of income, if any, expected to be generated from this project. Do not add or subtract this amount from the total project amount. Show under the program narrative statement the nature and source of income. The estimated amount of program income may be considered by the federal grantor agency in determining the total amount of the grant.

Section C. Non-Federal Resources

Lines 8–11—Enter amounts of non-Federal resources that will be used on the grant. If in-kind contributions are included, provide a brief explanation on a separate sheet.

Column (a)—Enter the program titles identical to Column (a), Section A. A breakdown by function or activity is not necessary.

Column (b)—Enter the contribution to be made by the applicant.

Column (c)—Enter the amount of the State's cash and in-kind contribution if the applicant is not a State or State agency. Applicants which are a State or State agenices should leave this column blank.

Column (d)—Enter the amount of cash and in-kind contributions to be made from all other sources.

Column (e)—Enter totals of Columns (b), (c), and (d).

Line 12—Enter the total for each of Columns (b)–(e). The amount in Column (e) should be equal to the amount on Line 5, Column (f), Section A.

Section D. Forecasted Cash Needs

Line 13—Enter the amount of cash needed by quarter from the grantor agency during the first year.

Line 14—Enter the amount of cash from all other sources needed by quarter during the first year.

Line 15—Enter the totals of amounts on Lines 13 and 14.

Section E. Budget Estimates of Federal Funds Needed for Balance of the Project

Lines 16–19—Enter in Column (a) the same grant program titles shown in Column (a), Section A. A breakdown by function or activity is not necessary. For new applications and continuation grant applications, enter in the proper columns amounts of Federal funds which will be needed to complete the program or project over the succeeding funding periods (usually in years). This section need not be completed for revisions (amendments, changes, or

supplements) to funds for the current year of existing grants.

If more than four lines are needed to list the program titles, submit additional schedules as necessary.

Line 20—Enter the total for each of the Columns (b)–(e). When additional schedules are prepared for this Section, annotate accordingly and show the overall totals on this line.

Section F. Other Budget Information

Line 21—Use this space to explain amounts for individual direct object-class cost categories that may appear to be out of the ordinary or to explain the details as required by the Federal grantor agency.

Line 22—Enter the type of indirect rate (provisional, predetermined, final or fixed) that will be in effect during the funding period, the estimated amount of the base to which the rate is applied, and the total indirect expense.

Line 23—Provide any other explanations or comments deemed necessary.

OMB Approval No. 0348–0040

Assurances—Non-Construction Programs

Note: Certain of these assurances may not be applicable to your project or program. If you have questions, please contact the awarding agency. Further, certain Federal awarding agencies may require applicants to certify to additional assurances. If such is the case, you will be notified.

As the duly authorized representative of the applicant I certify that the applicant:

1. Has the legal authority to apply for Federal assistance, and the institutional, managerial and financial capability (including funds sufficient to pay the non-Federal share of project costs) to ensure proper planning, management and completion of the project described in this application.

2. Will give the awarding agency, the Comptroller General of the United States, and if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the award; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives.

3. Will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.

4. Will initiate and complete the work within the applicable time frame after receipt of approval of the awarding agency.

5. Will comply with the Intergovernmental Personnel Act of 1970 (42 U.S.C. 4728-4763) relating to prescribed standards for merit systems for programs funded under one of the nineteen statutes or regulations specified in Appendix A of OPM's Standards for a Merit System of Personnel Administration (5 CFR 900, subpart F).

6. Will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (Pub. L. 88–352) which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681–1683, and 1685–1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C. 6101–6107), which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (Pub. L. 92–255), as amended, relating to nondiscrimination on the basis of drug abuse; (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (Pub. L. 91–616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) §§ 523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. 290 dd–3 and 290 ee–3), as amended, relating to confidentiality of alcohol and drug abuse patient records; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 *et seq.*), as amended, relating to nondiscrimination in the sale, rental or financing of housing; (i) any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and (j) the requirements of any other nondiscrimination statute(s) which may apply to the application.

7. Will comply, or has already complied, with the requirements of titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. 91–646) which provide for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal or federally assisted programs. These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases.

8. Will comply with the provisions of the Hatch Act (5 U.S.C. 1501–1508 and 7324–7328) which limit the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.

9. Will comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. 276a to 276a–7), the Copeland Act (40 U.S.C. 276c and 18 U.S.C. 874), and the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333), regarding labor standards for federally assisted construction subagreements.

10. Will comply, if applicable, with flood insurance purchase requirements of section 102(a) of the Flood Disaster Protection Act of 1973 (Pub. L. 93–234) which requires recipients in a special flood hazard area to participate in the program and to purchase flood insurance if the total cost of insurable construction and acquisition is $10,000 or more.

11. Will comply with environmental standards which may be prescribed pursuant to the following: (a) institution of environmental quality control measures under the National Environmental Policy Act of 1969 (Pub. L. 91–190) and Executive Order (EO) 11514; (b) notification of violating facilities pursuant to EO 11738; (c) protection of wetlands pursuant to EO 11990; (d) evaluation of flood hazards in floodplains in accordance with EO 11988; (e) assurance of project consistency with the approved State management program developed under the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 *et seq.*); (f) conformity of Federal actions to State (Clear Air) Implementation Plans under section 176(c) of the Clear Air Act of 1955, as amended (42 U.S.C. 7401 *et seq.*); (g) protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended, (Pub. L. 93–523); and (h) protection of endangered species under the Endangered Species Act of 1973, as amended, (Pub. L. 93–205).

12. Will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. 1271 *et seq.*) related to protecting components or potential components of the national wild and scenic rivers system.

13. Will assist the awarding agency in assuring compliance with section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), EO 11593 (identification and protection of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. 469a–1 *et seq.*).

14. Will comply with Pub. L. 93–348

regarding the protection of human subjects involved in research, development, and related activities supported by this award of assistance.

15. Will comply with the Laboratory Animal Welfare Act of 1966 (Pub. L. 89–544, as amended, 7 U.S.C. 2131 *et seq.*) pertaining to the care, handling, and treatment of warm blooded animals held for research, teaching, or other activities supported by this award of assistance.

16. Will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4801 *et seq.*) which prohibits the use of lead based paint in construction or rehabilitation of residence structures.

17. Will cause to be performed the required financial and compliance audits in accordance with the Single Audit Act of 1984.

18. Will comply with all applicable requirements of all other Federal laws, executive orders, regulations and policies governing this program.

SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL	TITLE
APPLICANT ORGANIZATION	DATE SUBMITTED

Certification Regarding Lobbying

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agenMember of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan or cooperative agreement, the undersigned shall complete and submit Standard Form–LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Organization

Authorized Signature Title Date

Note: If Disclosure Forms are required, please contact: Mr. William Sexton, Deputy Director, Grants and Contracts Management Division, Room 341F, HHH Building, 200 Independence Avenue, SW., Washington, DC 20201–0001.

Assurances Required by Section 3514 of the Anti-Drug Abuse Act of 1988

The grantee certifies that, as a condition of the grant, the agency, organization, or individual will meet the following statutory requirements:

(1) Provide that such project or activity shall be administered by or under the supervision of the applicant;

(2) Provide for the proper and efficient administration of such project or activity;

(3) Provide that regular reports on such project or activity shall be submitted to the Administration for Children and Families; and

(4) Provide such fiscal control and fund accounting procedures as may be necessary to ensure prudent use, proper disbursement, and accurate accounting of funds received under this program.

Signature of Authorized Certifying Official

Title

Applicant Organization

Date Submitted

Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions

By signing and submitting this proposal, the applicant, defined as the primary participant in accordance with 45 CFR part 76, certifies to the best of its knowledge and believe that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal Department or agency;

(b) Have not within a 3-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a 3-year period preceding this application/proposal had one or more public transactions (Federal, State, or local) terminated for cause or default.

The inability of a person to provide the certification required above will not necessarily result in denial of participation in this covered transaction. If necessary, the prospective participant shall submit an explanation of why it cannot provide the certification. The certification or explanation will be considered in connection with the Department of Health and Human Services (HHS) determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

The prospective primary participant agrees that by submitting this proposal, it will include the clause entitled "Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion—Lower Tier Covered Transaction," provided below without modification in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions (To Be Supplied to Lower Tier Participants)

By signing and submitting this lower tier proposal, the prospective lower tier participant, as defined in 45 CFR part 76, certifies to the best of its knowledge and belief that it and its principals:

(a) are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any federal department or agency.

(b) where the prospective lower tier participant is unable to certify to any of the above, such prospective participant shall attach an explanation to this proposal.

The prospective lower tier participant further agrees by submitting this proposal that it will include this clause entitled "Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion—Lower Tier Covered Transactions," without modification in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

U.S. Department of Health and Human Services Certification Regarding Drug-Free Workplace Requirements Grantees Other Than Individuals

By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

This certification is required by regulations implementing the Drug-Free Workplace Act of 1988, 45 CFR Part 76, Subpart F. The regulations, published in the January 31, 1989 **Federal Register**, require certification by grantees that they will maintain a drug-free workplace. The certification set out below is a material representation of fact upon which reliance will be placed when HHS determines to award the grant. False certification or violation of the certification shall be grounds for suspension of payments, suspension or termination of grants, or governmentwide suspension or debarment.

The grantee certifies that it will provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing a drug-free awareness program to inform employees about:

(1) The dangers of drug abuse in the workplace;

(2) The grantee's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and,

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will:

(1) Abide by the terms of the statement; and

(2) Notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after such conviction;

(e) Notifying the agency within ten days after receiving notice under subparagraph (d)(2) from an employee or otherwise receiving actual notice of such conviction;

(f) Taking one of the following actions, within 30 days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted:

(1) Taking appropriate personnel action against such an employee, up to and including termination; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

Program Narrative Statement

A. *New Applications*

1. *Objectives and need for assistance.* Pinpoint any relevant physical, economic, social, financial, institutional, or other problems requiring a solution. Demonstrate the need for the assistance and state the principal and subordinate objectives of the project. Supporting documentation or other testimonies from concerned interests other than the applicant may be used. Any relevant data based on planning studies should be included or footnoted.

2. *Results or Benefits Expected.* Identify results and benefits to be derived. The anticipated contribution to policy, practice, theory and/or research should be indicated.

3. *Approach.* Outline a plan of action pertaining to the scope and detail how the proposed work will be accomplished for each project. Cite factors which might accelerate or decelerate the work and your reasons for taking this approach as opposed to others. Describe any unusual features of the project, such as design or technological innovations, reductions in cost or time, or extraordinary social and community involvements. Provide for each assistance program quantitative projections of the accomplishments to be achieved, if possible. When accomplishments cannot be quantified, list the activities in chronological order to show the schedule of accomplishments and their target dates. Identify the kinds of data to be collected and maintained, and discuss the criteria to be used to evaluate the results and success of the project. Explain the methodology that will be used to determine if the needs identified and discussed are being met and if the results and benefits identified are being achieved. List each organization, cooperator, consultant, or other key

individuals who will work on the project along with a short description of the nature of their effort or contribution.

4. *Geographic Location.* Give a precise location of the project and area to be served by the proposed project. Maps or other graphic aids may be attached.

5. If applicable, provide the following information: for research and demonstration assistance requests, present a biographical sketch of the program director with the following information: Name, address, telephone number, background, and other qualifying experience for the project. Also, list the name, training and background for other key personnel engaged in the project. Describe the relationship between this project and other work planned, anticipated, or underway under Federal assistance.

B. *Supplemental Applications*

Explain the reason for all requests for supplemental assistance and justify the need for additional funding. Discuss accomplishments to date and list in chronological order a schedule of accomplishments, progress or milestones anticipated with the new funding request. If there have been significant changes in the project objectives, location, approach or time delays, explain and justify. For other requests for changes, or amendments, explain the reason for the change(s). If the total budget has been exceeded or if the individual budget items have changed more than the prescribed limits, explain and justify the change and its effect on the project.

C. *Continuation Applications*

Continuation applications need only provide information explaining significant changes to the original Program Narrative Statement and a description of accomplishments from the prior budget period.

Appendix II—Section 340 Health Care for the Homeless Public Health Service Grantees

Region I

Charter Oak Terrace/Rice, Heights Health Center, 81 Overlook Terrace, Hartford, CT 06106, Alfreda Turner, (203) 236–1638/236–0857.

Portland Public Health Division, 389 Congress Street, Room #307, Cumberland County, Portland, ME 04101, Meredith L. Tipton, (207) 774–4581.

Hill Health Center, 428 Columbus Avenue, New Haven, CT 06519, Mr. Cornell Scott, (203) 776–9594 Ext. 293.

Southwest Community Health Center, 361 Bird Street, Bridgeport, CT 06605, Ms. Janet Stern, (203) 576–8368.

Windham Area Community Action Program, Inc., 231 Broad Street, Danielson, CT 06239, Kerrie J. Clark, (203) 774–0400.

Boston Health Care for Homeless Project, 723 Massachusetts Avenue, Boston, MA 02118, Dr. James O'Connell, (617) 534–4623.

Franklin County Dial/Self, 196 Federal Street, Greenville, MA 01301, Melanie Goodman, (413) 774–7054.

New England Consortium for Families and Youth, 14 Beacon Street, Suite 706, Boston, MA 02108, Nancy Jackson, (617) 742–8555.

Springfield Health Services for the Homeless, 1414 State Street, Springfield, MA 01109, John Cipolla, (413) 787–6755.

Worcester Area Community, Mental Health Center, Inc., POB 229, Greendale Station, Worcester, MA 01606, David Higgins, (508) 756–4354.

City of Manchester Public Health Department, 795 Elm Street, Suite 302, Manchester, NH 03101, Fred Rusczek, (603) 624–6466.

Travelers Aid Society, 177 Union Street, Providence, RI 02903, Marion F. Avarista, (401) 521–2255.

Community Health Center of Burlington, 279 North Winooski Avenue, Burlington, VT 05401, Marilyn McKenzie, (802) 862–9011.

Region II

William F. Ryan Community Health Center, 110 West 97th Street, New York, NY 10025, Julio Bellber, (212) 645–2500.

United Hospital Fund, 55 Fifth Avenue, New York, NY 10003, Bruce Vladeck, (212) 645–2500.

Bowery Residents Committee Human Services, Corp., 191 Chrystie Street, New York, NY 10002, Joyce Wolbarst, (212) 533–5700.

Westchester Health Network Neighborhood Health Association of Mt. Vernon, Inc., 280 Dobbs Ferry Road, White Plains, NY 10607, Georganne Chapin, (914) 949–3080.

Newark Homeless Health Care Project, DHHS, 15 Roseville Avenue, Newark, NJ 07107, Bobbi N. Ruffin, (201) 733–5705.

Under 21—Covenant House, 460 West 41st Street, New York, NY 10036, Joseph Borgo, (212) 330–0505.

St. Vincent's Hospital Dept. of Community Medicine, 153 West 11th Street, New York, NY 10011, Dr. Phillip Brickner, (212) 790–2706.

NY Childrens Health Project, 317 East 64th Street, New York, NY 10021, Dr. Irwin E. Redlener, (212) 535–9779.

Jersey City Family Health Center Medical and Social Svcs for the Homeless, 114 Clifton Place, Murdock Hall, Second Floor, Jersey City, NJ 07304, Carol Lightsey, (201) 915–2528.

San Juan Dept. of Health, San Juan Health Dept., Calle Cerra 900, PDA 15, Santurce, PR 00907, Pedro A. Borras, M.D., (809) 721–3207.

Henry J. Austin Health Center, Health Care for the Homeless, 321 N. Warren Street, Trenton, NJ 08618, Derek Beckford, (609) 695–7122.

Region III

Health Care for the Homeless Project, Inc., 1511 K Street, N.W., Suite 500, Washington, DC 20005, Melvin Wilson, (202) 628–5660.

Health Care for the Homeless, 232 North Liberty Street, Baltimore, MD 21201, Jackie Gaines, (301) 837–5533.

Primary Health Care Services of NW Pennsylvania, 1720 Holland Street, Erie, PA 16503, Darlene Collins, (814) 453–5744.

Philadelphia Health Mgmt. Corporation, 260 South Broad Street, 20th Floor, Philadelphia, PA 19102, Richard Cohen, Ph.D, (215) 985–2553.

Primary Care Health Services, Alma Illery Medical Center, 7227 Hamilton Avenue, Pittsburgh, PA 15208, Wilford A. Payne, (412) 244–4700.

Rural Health Corporation of Northeastern Pennsylvania, 116 South Main Street, Wilkes-Barre, PA 18701, Stanford Weiss, (717) 825–8741.

The Daily Planet, 302 West Canal Street, Richmond, VA 23220, Sheila Crowley, (804) 783–0678.

Peninsula Institute for Community Health, Health Care for Homeless, 707 Howmet Drive, Suite C, Hampton, VA 23661, Edwina S. Davis, (804) 825–0465.

Valley Health Systems, Inc., 401 Tenth Street, Suite 410, Huntington, WV 25701, Steve Shattls, M.D., (304) 525–3334.

Region IV

Atlanta Community Health Program for the Homeless, Georgia Hill Street Neighborhood Facility, 250 Georgia Avenue, S.E., Suite 202, Atlanta, GA 30312, Lorine Spencer, (404) 522–5659.

Birmingham Health Care for the Homeless Coalition, Inc., P.O. Box 11523, Birmingham, AL 35202, Karen J. McGee, (202) 252–9624.

Charleston Interfaith Crisis Ministry, 573 Meeting Street, Charleston, SC 29403, Floy Work-Deaton, (803) 723–9477.

Chattanooga Hamilton County Health Department, 921 East Third Street, Chattanooga, TN 37403, Howard Roddy, (615) 265–5708.

Pinellas County Department of Social Services, Mobile Medical Team, 647 First Avenue North, St. Petersburg, FL 33701, Evelyn Rust, (813) 892–7577.
Lincoln Community Health Center, Inc., 1301 Fayetteville Street, Durham, NC 27707, Evelyn Schmidt, M.D., (919) 688–9078.
Midlands Primary Health Care Center, Inc., P.O. Box 248, Eastover, SC 29044, John Patrick, (803) 353–8741.
Broward County Board of County Commissioners, Health Care for the Homeless, 115 South Andrews Drive, Room 428, Ft. Lauderdale, FL 33021, Henry Thompson, (305) 581–4888.
Jackson-Hinds Comprehensive Health Department, P.O. Box 3437, Jackson, MS 39207, Aaron Shirley, M.D., (602) 364–5116.
Lexington-Fayette County Health Department, 650 Newton Pike, Lexington, KY 40508, Dr. John Poundstone, (606) 252–2371.
Seven Counties Services, Inc., 101 W. Muhammad Ali Blvd., Louisville, KY 40201, Howard Bracco, Ph.D., (502) 589–8926.
Memphis Health Center, Inc., Memphis Health Care for the Homeless, 360 E. H. Crump Blvd., Memphis, TN 38126, Phillip L. Williams, (901) 775–2000.
Camillus Health Concern, 311 Northeast First Avenue, Miami, FL 33103, Marland Bluhm, (305) 577–4840.
Metropolitan Health Dept., 311 23rd Avenue North, Nashville, TN 37203, Dr. Fredia Wadley, (615) 259–5500.
Wake Health Services, Inc., P.O. Box 95104, Raleigh, NC 27625, Malvise Scott, (919) 790–2270.
Tampa Community Health Center, Inc., Sine Domus Health Center, P.O. Box 5299, Tampa, FL 33675, Norbert Heib, Jr., (813) 248–6263.

Region V

Travelers and Immigrants Aid, Health Care for the Homeless Program, 327 South La Salle, Chicago, Illinois 60657, Sid Mohn, (312) 281–4288.
Crusaders Central Clinic Association, 120 Tay Street, Rockford, IL 61102, John Frana, (815) 968–7613.
Indiana Health Centers, Inc., 21 North Pennsylvania, 4th Floor, Indianapolis, IN 46204, Lynn Clothier, (219) 234–9033.
East Side Promise, Inc. People's Health Center, 2340 East 10th Street, Indianapolis, IN 46201, Dave Robinson, (317) 633–7360.
Visiting Nurse Services of Southern Michigan, 311 East Michigan Avenue, Suite 200, Battle Creek, MI 49017, Sally Whitten, (619) 962–0303.
Ingham County Health Department, P.O. Box 30161, Lansing, MI 48909, Bruce B. Bragg, (517) 887–4311.
St. Mary's Health Services, 200 Jefferson, S.E., Grand Rapids, MI 49503, William A. Himmelsback, Jr., (616) 774–6162.
Family Health Center, Inc., 17 West Paterson Street, Kalamazoo, MI 49007, Grace M. Lockett, (616) 349–2641.
Detroit Health Care for the Homeless, 3611 Cass Avenue, Detroit, MI 48201, Cynthia Reynolds-Caine, (313) 832–2450.
Downriver Community Services, P.O. Box 306, 329 Columbia Street, Algonac, MI 48001, Alice M. Johnson, (313) 794–4982 Ext. 14.
Hamilton Family Health Center, 4001 North Saginaw Street, Flint, MI 48505, Gerald E. Matthews, Ph.D., (313) 789–9141.
Hennepin County Homeless Assistance Project, Health Services Bldg., Level 3, 525 Portland Avenue, South, Minneapolis, MN 55415, Allain Hankey, (612) 348–5553.
West Side Community Health Center, 153 Concord Street, St. Paul, MN 55107, Jane Berg, (612) 222–1816.
ECCO Family Health Center, Health Care for the Homeless Project, 1166 East Main Street, Columbus, OH 43205, Jewel Barron, (614) 253–0861.
Cordelia Martin Health Center, 905 Nebraska Avenue, Toledo, OH 43607, Paula W. Stewart, (419) 255–7883.
Cincinnati Health Network, 400 Oak Street, Suite 225, Cincinnati, OH 45219, Randall Garland, (513) 961–0600.
Federation for Community Planning, Cleveland Health Care for the Homeless, The Rockefeller Building, Suite 300, 614 Superior Building, Cleveland, OH 44113, Dr. Ralph Brody, (216) 781–2944.
Coalition for Community Health Center, 2770 North 5th Street, Milwaukee, WI 53212, Mark Rosnow, (414) 226–8883.

Region VI

New Orleans Health Department, Health Care for the Homeless Clinic, 914 Union Street, New Orleans, LA 70112, Brobson Lutz, M.D., (504) 528–3750.
Albuquerque Health Care for the Homeless, P.O. Box 25141, Albuquerque, NM 87125, Marsha McMurrary-Avila, (503) 247–3361.
Youth Shelters and Family Services, P.O. Box 8135, Santa Fe, NM 87504, Ann Begin, (505) 473–0240.
National Resource Center for Youth Services, 202 W. 8th, Tulsa, OK 74119, James M. Walker, (918) 585–2986.
Community Health Center, Inc., Healing Hands Hlth Care Svcs., Mary Mahoney, 6291/2 West Main, Oklahoma City, OK 73102, Michael K. Fire, (405) 272–0476.
Morton Comprehensive Health, Services, Inc., 603 East Pine, Tulsa, OK 74106, Leona Young, (918) 587–2171.
South Plains Health Provider Organization, 824 Martin Road, Amarillo, TX 79107, Henry Hawley, (806) 374–7341.
City of Dallas, Dept. of Health and Human Services, 1500 Marilla 7/A/N, Dallas, TX 75201, Adela N. Gonzales, (214) 670–3968.
Harris County Hospital Dist., P.O Box 66769, Houston, TX 77266, Lois Moore, (713) 529–4624.
Guadalupe Economic Services Corporation, 1416 First Street, Lubbock, TX 79401, Richard Lopez, (806) 744–4416.
San Antonio Centro Del Barrio, 301 S. Frio, Suite 180, San Antonio, TX 78201–4414, Ronald Kemp, (319) 236–1332.

Region VII

Community Health Care, Inc., 428 Western Avenue, Davenport, IA 52801, William Rodgers, (319) 322–7899.
Polk County Health Services, Broadlawns Medical Center Homeless Outreach Program, 18th and Hickman Road, Des Moines, IA 50703, Lynn Ferrell, (515) 282–2599.
People's Community Health Clinic, Inc., 403 Sycamore, Suite 2, Waterloo, IA 50703, Ronald Kemp, (319) 236–1332.
Hunter Health Clinic, Inc., 2318 East Central, Wichita, KS 67214, Bert Steeves, (316) 262–3611.
Charles Drew Health Center, P.O. Box 111609, Omaha, NE 68111, Robert Patterson, (402) 453–1433.
Swope Parkway Health Center, 4900 Swope Parkway, Kansas City, MO 64130, E. Frank Ellis, (816) 923–5800.
Grace Hill Neighborhood Health Center, 2500 Hadley Street, St. Louis, MO 63106, Richard Gram, (314) 241–2200.

Region VIII

Volunteers of America, 1865 Larimer Street, Denver, CO 80202, Linda Sinton, (303) 297–0408.
Colorado Coalition for the Homeless, Stout Street Clinic, 2100 Broadway, Denver, CO 80205, John Parvensky, (303) 293–2220.
Community Health Center of Colorado Springs, 2828 International Circle, Colorado Springs, CO 80910, Karen Marczynski, (719) 632–3700.
Blackfeet Tribe, Blackfeet Child Abuse Prevention, White Buffalo Home, P.O. Box 1210, Browning, MT 59417, Violet Butterfly, (406) 338–2243.

Health Care for the Homeless, 30 Main Street, Rapid City, SD 57701, Nancy Glassgow, (605) 394–2230.
Fargo-Moorhead Health Care for the Homeless Project, 401 Third Avenue North, Fargo, ND 58102–4839, Sherlyn Dahl, R.N., (701) 241–1360.
Salt Lake Community Health Centers, Inc., 2300 West 1700 South, Salt Lake City, Utah 84104, Susan Reed, (801) 359–7917.

Region IX

El Rio Santa Cruz Neighborhood Hlth Ctr, P.O. Box 1271, Tucson, AZ 85701, Robert Gomez, (602) 792–9890.
Maricopa County Department of Health Services, 806 West Madison, Phoenix, AZ 85006, Adolfo Echeveste, (602) 258–2122.
The Family Health Foundation of Alviso, Inc., 1621 Gold Street, Alviso, CA 95002, Rick Ugarte, (408) 262–7944.
Clinical Sierra Vista, Inc., P.O. Box 457, Lamont, CA 93241, Stephen Schilling, (805) 845–3731.
Logan Heights Family Health Center, 1809 National Avenue, San Diego, CA 92113, Fran Bulter-Cohen, (619) 234–0360.
Merced Family Health Centers, Inc., P.O. Box 858, Merced, CA 95341, Michael Sullivan, (209) 383–1848.
San Francisco Community, Clinic Consortium, 1520 Stockton Street, San Francisco, CA 94133, Kimberly Kent-Wyard, (818) 896–0531.
Nipomo Community Medical Center, Inc., P.O. Box 430, 150 Tegas Place, Nipomo, CA 93444, Ronald Castle, (805) 929–3211.
West Contra Cost Community Health Care Corporation, Martin Luther King, Jr., Family Health Center, 101 Broadway Street, Richmond, CA 94804, Wilbur Kelly, (415) 233–3994.
Waianae Coast District Comprehensive Health and Hospital Board, Inc., 86–260 Farrington Highway, Waianae, HI 96792, Michael Tweedell, (808) 696–7081.
Sacramento County Hlth Dept., 3701 Branch Center Road, Sacramento, CA 95827, Sonia Parker, (916) 366–2171.
Santa Cruz County Health Services Agency, Homeless Persons Health Project, 739 River Street, Santa Cruz, CA 95060, Elizabeth McCarty, (408) 425–3480.
Alameda County Health Care Services Agency, Alameda County Health Care for the Homeless Program, 1900 Fruitvale Avenue, Suite 3–E, Oakland, CA 94601, Barbara Cowan, MPH, (415) 532–1930.
Santa Barbara County Health Care Services, 300 San Antonio Road, Room M331, Santa Barbara, CA 93110, Lawrence Hart, M.D., (805) 681–5145.
San Mateo County Department of Health Services, Alcohol and Drug Program, 225 West 37th Avenue, San Mateo, CA 94403, Carolina Jane, (415) 573–3703.

Region X

Terry Reilly Health Services, 211 16th Avenue North, Nampa, ID 83687–4058, Erwin Teuber, (208) 467–4431.
White Bird Clinic, 341 East Twelfth Street, Eugene, OR 97401, Robert Dritz, (503) 342–8255.
Sea Mar Community Health Community, 8720 Fourteenth Avenue, South, Seattle, WA 98108, Rogelio Riojas, (206) 428–4075.
Multnomah County Health Division, 426 SW Stark, Portland, OR 97204, Billie Odegaard, (206) 627–8588.
Central Seattle Community Health Centers, 105 Fourteenth Avenue, Suite 2–C, Seattle, WA 98122, William Hobson, (206) 461–6910.
Northwest Human Services, 681 Center Street, N.E., Salem, OR 97301, Karen Hill, (503) 588–5828.

Appendix III—Fiscal Year 1990 Runwaway and Homeless Youth Drug Abuse Prevention Grantees Who Are Ineligible to Apply Under This Announcement

Region I

Child and Family Services, 99 Hanover Street, Manchester, NH 03101.
Stopover Shelters, 3380 East Main Road, Portsmouth, RI 02871.
Wayside Community Programs, 4 Thurber Street, Framingham, MA 01701.
Massachusetts Committee for Children and Youth, Coalition of Adolescent Emergency Services, 14 Beacon Street, Suite 706, Boston, MA 02108.
University of Southern Maine, Edmund S. Muskie Institute, 96 Falmouth Street, Portland, ME 04103.
Vermont Coalition of Runaway Youth, P.O. Box 627, Montpelier, VT 05601.

Region II

Together, 7 State Street, Glassboro, NJ 08028.
Somerset Youth Shelter, 49 Brahma Avenue, Bridgewater, NJ 08807.
Ocean's Harbor House, 2445 Windsor Avenue, Toms River, NJ 08754.
Crossroads, P.O. Box 321, Lumberton, NJ 08048.
Pinelands Regional High School, School Based Youth Services, Nugentown Road, P.O. Box 248, Tuckerton, NJ 08087.
Society for Seamen's Children, 26 Bay Street, Staten Island, NY 10301.
Project Equinox, 214 Lark Street, Albany, NY 12210.
Covenant House (Under 21), 460 West 41st Street, New York, NY 10036.
The Salvation Army, 749 S. Warren Street, Syracuse, NY 13202.
Urban Strategies, Inc., 1542 East New York Avenue, Brooklyn, NY 11212.
Metropolitan Association Corporation, 2 Lafayette Street, 3rd Floor, New York, NY 10007.
Tri County Youth Services, 435 Main Street, Paterson, NJ 07501.
Sendero De La Cruz Counseling Center, 114 Eleanor Roosevelt Avenue, Hato Rey, PR 00918.
YWCA Centro de Servicios a La Juventud, Box 9368 Cotto Station, Arecibo, PR 00613.

Region III

National Association of Social Workers, 7981 Eastern Avenue, Silver Spring, MD 20910.
University of Pittsburgh, Office of Child Development, 3939 O'Hara Street, Pittsburgh, PA 15260.
Mid-Atlantic Network of Youth and Family Services, 1168 Prince Andrew Court, Pittsburgh, PA 15237.
Volunteer Emergency Foster Care, 2317 Westwood Avenue, Suite 109, Richmond, VA 23230.
Department for Children, 805 E. Broad Street, 11th Flr., Richmond, VA 23219.
Alternatives, Inc., 1520 Aberdeen Road, Suite 102, Hampton, VA 23666.
Latin American Youth Center, 3045 15th Street, NW, Washington, D.C. 20009.

Region IV

Youth Crisis Center, Inc., 3015 Parental Home Road, Jacksonville, FL 32216.
Tri-County Protective Agency, P.O. Box 1937, Hinesville, GA 31313.
Emory University, Emory University, Atlanta, GA 30322.
Mountain Youth Resources, P.O. Box 2847, Cullowhee, NC 28723.
South Carolina Department of Youth Services (Crossroads), 1122 Lady Street, Columbia, SC 29202.
MS. Childrens Home and Family Service Assn. P.O. Box 1078, 1801 NW Street, Jackson, MS 39205.

Region V

Omni Youth Services, 22 East Dundee Road, Wheeling, IL 60090.
The Sanctuary, 1232 South Washington, Royal Oak, MI 48067.
Juvenile Diversion Program, 301 Francis Street, Jackson, MI 49201.
Boysville of Michigan, 8744 Clinton-Macon Road, Clinton, MI 49236.
New Life Youth Services, 6128 Madison Road, Cincinnati, OH 45227.
YWCA, 65 South Fourth Street, Columbus, OH 43215.

Upper Midwest American Indian Center, 1113 West Broadway, Minneapolis, MN 55411.
Institute for Adolescent Development, P.O. Box 175, Batavia, OH 45103.
Ohio Youth Services Network, 50 W. Broad St., Suite 705, Columbus, OH 43215.
Kenosha Youth Development Service, 5407 8th Avenue, Kenosha, WI 53140.

Region VI

Cherokee Nation of Oklahoma, P.O. Box 948, Tahlequah, Oklahoma 74465.
Youth and Family Services of Canadian County, 2404 Sunset Drive, El Reno, OK 73036.
Youth and Family Services of North Oklahoma, 2925 North Midway, Enid, OK 73701.
Youth Services of Oklahoma County, 2915 N. Lincoln, Oklahoma City, OK 73105.
New Day, 1817 Sigma Chi N.E., Albuquerque, NM 87106.
The Bridge Association, 115 West Broadway, Fort Worth, TX 76104.
San Antonio Cares, 1411 N. Main, San Antonio, TX 78212.

Region VII

Youth Homes, Inc., P.O. Box 324, Iowa City, IA 52244.
Youth in Need, 529 Jefferson, St. Charles, MO 63301.

Region VIII

Yellowstone County Tumbleweed Runaway Program, Inc., P.O. Box 35000, 217 N. 27th Street, Billings, MT 59107.
Mountains Plains Youth Services, 311 North Washington Street, Bismarck, ND 58501.
Standing Rock Sioux Tribe, P.O. Box "D", Fort Yates, ND 58538.
Threshold, 514 S. Minnesota, Sioux Falls, SD 57109.
IHRD Proyecto La Familia, 431 South 300 East #100, Salt Lake City, UT 84111.

Region IX

Center for Youth Resources, 915 N. Fifth Street, Phoenix, AZ 85004.
The Navajo Nation, P.O. Box 1599, Window Rock, AZ 86515.
San Diego Youth Community, 3878 Old Town Avenue, Suite 200B, San Diego, CA 92110.
Youth Advocates, Inc., 285 12th Avenue, San Francisco, CA 94118.
United Cambodian Community, Inc., 2110 East 1st Street, #103, Santa Ana, CA 92705.
Santa Clara Social Advocates, 509 View Street, Mountain View, CA 94041.
Angel's Flight Catholic Charities, 1400 W. 9th Street, P.O. Box 15095, Los Angeles, CA 90015.
Klein Bottle, 401 N. Milpas, Santa Barbara, CA 93103.
Orange County Youth and Family Services, 2050 W. Chapman Avenue, Orange, CA 92668.
Community Service Programs, 17200 Jamboree, Suite D, Irvine, CA 92714.
Los Angeles Free Clinic, 8405 Beverly Boulevard, Los Angeles, CA 90048.

Region X

Alaska Youth and Parent Foundation, 3745 Community Park Loop, Anchorage, AK 99508.
Fairbanks Native Association, 310 First Avenue, Fairbanks, AK 99701.
Nez Perce Tribe, P.O. Box 305, Lapwai, ID 83540.

Appendix IV: Regional Youth Contacts

Region I: Sue Rosen, Administration for Children and Families, John F. Kennedy Federal Building, Room 2011, Boston, MA 02203 (CT, MA, ME, NH, RI, VT), (617) 565–1144
Region II: Estelle Haferling, Administration for Children and Families, 26 Federal Plaza, Room 4149, New York, NY 10278, (NJ, NY, ME, PR, VI), (212) 264–2974
Region III: David Lett, Administration for Children and Families, 3535 Market Street, Post Office Box 13714, Philadelphia, PA 19101, (DC, DE, MD, PA, VA, WV), (215) 596–1224
Region IV: Viola Brown, Administration for Children and Families, 101 Marietta Towers, Suite 903, Atlanta, GA 30323 (AL, FL, GA, KY, MS, NC, SC, TN), (404) 331–2128
Region V: William Sullivan, Administration for Children and Families, 105 West Adams, 21st Floor, Chicago, IL 60603 (IL, IN, MI, MN, OH, WI), (312) 353–4241
Region VI: Ralph Rogers, Administration for Children and Families, 1200 Main Tower, 20th Floor, Dallas, TX 75202 (AR, LA, NM, OK, TX), (214) 767–4540
Region VII: Steve Nash, Administration for Children and Families, Federal Office Building, Room 384, 601 East 12th Street, Kansas City, MO 64106 (IA, KS, MO, NE), (816) 426–5401
Region VIII: Bob Rease, Administration for Children and Families, Federal Office Building, 1961 Stout Street, 9th Floor, Denver, CO 80294 (CO, MT, ND, SD, UT, WY), (303) 844–3106
Region IX: Carolyn Mangrum, Administration for Children and Families, 50 United Nations Plaza, San Francisco, CA 94102 (AZ, CA, HI, NV, American Samoa, Guam, Northern Mariana Islands, Marshall Islands, Federal States of Micronesia, Palau), (415) 556–7460
Region X: Steve Ice, Administration for Children and Families, 2201 Sixth Avenue, Mail Stop RX 32, Seattle, WA 98121 (AK, ID, OR, WA), (206) 442–0482

APPENDIX V

State Single Points of Contact

Alabama

Mrs. Moncell Thornell, State Single Point of Contact, Alabama Department of Economic & Community Affairs, 3465 Norman Bridge Road, Post Office Box 250347, Montgomery, Alabama 36125–0347, Telephone (205) 284–8905.

Arizona

Ms. Janice Dunn, Arizona State Clearinghouse, 3800 N. Central Avenue, 14th Floor, Phoenix, Arizona 85012, Telephone (602) 280–1315.

Arkansas

Mr. Joseph Gillesbie, Manager, State Clearinghouse, Office of Intergovernmental Service, Department of Finance and Administration, P.O. Box 3278, Little Rock, Arkansas 72203, Telephone (501) 371–1074.

California

Glenn Stober, Grants Coordinator, Office of Planning and Research, 1400 Tenth Street, Sacramento, California 95814, Telephone (916) 323–7480.

Colorado

State Single Point of Contact, State Clearinghouse, Division of Local Government, 1313 Sherman Street, Room 520, Denver, Colorado 80203, Telephone (303) 866–2156.

Connecticut

Under Secretary, Attn: Intergovernmental Review Coordinator, Comprehensive Planning Division, Office of Policy and Management, 80 Washington Street, Hartford, Connecticut 06106–4459, Telephone (203) 566–3410.

Delaware

Francine Booth, State Single Point of Contact, Executive Department, Thomas Collins Building, Dover, Delaware 19903, Telephone (302) 736–3326.

District of Columbia

Lovetta Davis, State Single Point of Contact, Executive Office of the Mayor, Office of Intergovernmental Relations, Room 416, District Building, 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004, Telephone (202) 727–9111.

Florida

Karen McFarland, Director, Florida State Clearinghouse, Executive Office of the Governor, Office of Planning and Budgeting, The Capitol, Tallahassee, Florida 32399–0001, Telephone (904) 488–8114.

Georgia

Charles H. Badger, Administrator, Georgia State Clearinghouse, 270 Washington Street, S.W., Atlanta Georgia 30344, Telephone (404) 656–3855.

Hawaii

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federal register

Tuesday
January 21, 1992

Part IV

The President

Proclamation 6400—Women's History Month, 1992

Federal Register

Tuesday
January 21, 1992

Federal Register
Vol. 57, No 13
Tuesday, January 21, 1992

Presidential Documents

Title 3—

The President

Proclamation 6400 of January 16, 1992

Women's History Month, 1992

By the President of the United States of America

A Proclamation

Women's History Month provides a wonderful opportunity to reflect on the myriad contributions and achievements of American women—from the millions of unsung heroines who have strengthened our Nation through their homes, families, and communities to the many celebrated women who have enjoyed more widespread recognition and fame. While this occasion helps to bring honor where it is due, we must nevertheless resist the notion that "women's history" is somehow separate from the rest of history. In fact, they are thoroughly entwined.

When our ancestors fought for this Nation's independence, when they pushed westward across the frontier, women played integral, if not then widely acclaimed, roles in the success of the great American experiment. They shared in the labors that produced thriving farms and towns across this great land, and they helped to nurture in their children the faith and the love of freedom that have long characterized the American dream.

Over the years, women have continued to share in the pioneer spirit, and this month we remember in a special way those who were early leaders in their respective fields. We gratefully recall women like Emma Hart Willard and Elizabeth Ann Seton, who helped to shape American education, as well as trailblazers like Elizabeth and Emily Blackwell, who were two of the first women in the United States to earn medical degrees. We also recount the achievements of women like Maria Mitchell, an astronomer, educator, and the first woman to be elected to the American Academy of Arts and Sciences, and Louise Bethune, who in 1886 became the first woman elected to the American Institute of Architects. These noted women were just a few of the many who have helped to open doors of opportunity for others.

More than the collected stories of pioneers and their progeny, history also traces the development of principles and ideals—and the epic struggle for human freedom and progress. Thus, this month we also remember those women who have helped to uphold this Nation's promise of liberty and justice for all. Well over a century ago, women like Harriet Tubman, Harriet Beecher Stowe, and Sojourner Truth helped to wage the triumphant struggle against slavery. These heroines have been followed by other courageous women, such as Ida Wells-Barnett and Rosa Parks, who made further contributions to the fight for equality by calling public attention to the evils of bigotry and segregation.

Many women who opposed slavery and segregation in the United States were also early supporters of the women's suffrage movement, and vice versa. For example, we recall Lucretia Mott, a well-known abolitionist who also worked with Elizabeth Cady Stanton and Susan B. Anthony to secure for women the right to vote. These women and the countless others who joined their ranks shared a strong commitment to the ideals of equal opportunity and fairness, and their efforts helped to increase the participation of women not only in politics but also in virtually every field of endeavor.

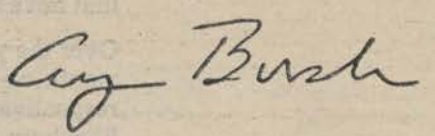
Devotion to the ideals on which the United States is founded has inspired millions of women to engage in service to our country. As demonstrated last year by U.S. military operations in the Persian Gulf, we have come a long way since the days of Sarah Edwards, who disguised herself as a young man so she could help defend the Union during the Civil War. Today women not only play highly visible and important roles in America's Armed Forces but also hold positions of leadership and responsibility in government, business, education, science, and the arts.

Most important, women continue to strengthen and enrich this country by helping their children to recognize the value of learning, as well as the importance of self-respect, personal responsibility, and respect and concern for others. Indeed, our families and communities constitute the basic fabric of America, and the women who have strengthened these institutions merit as much recognition and thanks as the great historical figures whose achievements we celebrate this month.

The Congress, by Public Law 102–70, has designated March 1992 as "Women's History Month" and has authorized and requested the President to issue a proclamation in observance of this occasion.

NOW, THEREFORE, I, GEORGE BUSH, President of the United States of America, do hereby proclaim March 1992 as Women's History Month. I invite all Americans to observe this month with appropriate programs, ceremonies, and activities.

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



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CFR CHECKLIST

This checklist, prepared by the Office of the Federal Register, is published weekly. It is arranged in the order of CFR titles, stock numbers, prices, and revision dates.

An asterisk (*) precedes each entry that has been issued since last week and which is now available for sale at the Government Printing Office.

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3 (1990 Compilation and Parts 100 and 101)	(869-013-00002-1)	14.00	[1] Jan. 1, 1991
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§§ 1.501-1.640	(869-013-00089-7)	16.00	Apr. 1, 1991
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§§ 1.851-1.907	(869-013-00091-9)	20.00	Apr. 1, 1991
§§ 1.908-1.1000	(869-013-00092-7)	22.00	Apr. 1, 1991
§§ 1.1001-1.1400	(869-013-00093-5)	18.00	[5] Apr. 1,1990
§§ 1.1401-End	(869-013-00094-3)	24.00	Apr. 1, 1991
2-29	(869-013-00095-1)	21.00	Apr. 1, 1991
30-39	(869-013-00096-0)	14.00	Apr. 1, 1991
40-49	(869-013-00097-8)	11.00	Apr. 1, 1991
50-299	(869-013-00098-6)	15.00	Apr. 1, 1991
300-499	(869-013-00099-4)	17.00	Apr. 1, 1991
500-599	(869-013-00100-1)	6.00	[5] Apr. 1, 1990

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27 Parts:			
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200-End	(869-013-00103-6)	11.00	Apr. 1, 1991
28	(869-013-00104-4)	28.00	July 1, 1991
29 Parts:			
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500-899	(869-013-00107-9)	27.00	July 1, 1991
900-1899	(869-013-00108-7)	12.00	July 1, 1991
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1910 (§§ 1910.1000 to end)	(869-013-00110-9)	14.00	July 1, 1991
1911-1925	(869-013-00111-7)	9.00	[6] July 1, 1989
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400-629	(869-013-00121-4)	26.00	July 1, 1991
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800-End	(869-013-00124-9)	18.00	July 1, 1991
33 Parts:			
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125-199	(869-013-00126-5)	18.00	July 1, 1991
200-End	(869-013-00127-3)	20.00	July 1, 1991
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36 Parts:			
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200-End	(869-013-00133-8)	26.00	July 1, 1991
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38 Parts:			
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40 Parts:			
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47 Parts:			
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*400-999	(869-013-00194-0)	27.00	Oct. 1, 1991
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[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[3] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

[4] No amendments to this volume were promulgated during the period Jan. 1, 1987 to Dec. 31, 1990. The CFR volume issued January 1, 1987, should be retained.

[5] No amendments to this volume were promulgated during the period Apr. 1, 1990 to Mar. 31, 1991. The CFR volume issued April 1, 1990, should be retained.

[6] No amendments to this volume were promulgated during the period July 1, 1989 to June 30, 1991. The CFR volume issued July 1, 1989, should be retained.

[7] No amendments to this volume were promulgated during the period July 1, 1990 to June 30, 1991. The CFR volume issued July 1, 1990, should be retained.

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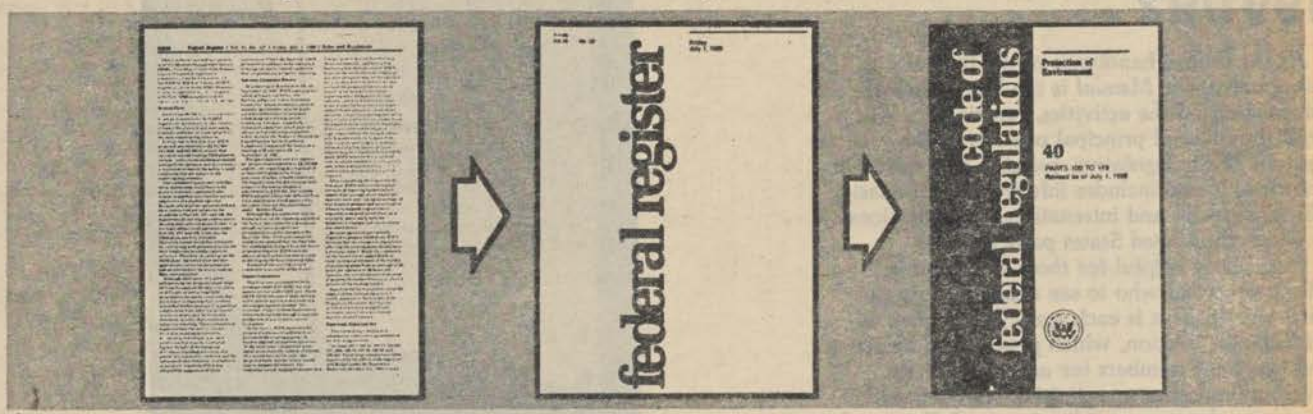

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