(c) No tolerence is established for bromide ion levels.

[FR Doc.76-12393 Filed 4-28-76;8:45 am]

Title 33—Navigation and Navigable Waters

CHAPTER I—COAST GUARD, DEPARTMENT OF TRANSPORTATION

[CGD 74-155]

PART 1—GENERAL PROVISIONS

Written Warnings by Coast Guard Boarding Officers

The Coast Guard is adding a new Subpart 1.08, Written Warnings by Coast Guard Boarding Officers, to 33 CFR Part 1, that describes the policy and the procedures of issuing written warnings for minor boating violations.

The Coast Guard is following a policy of issuing written warnings for certain violations of Coast Guard boating laws and regulations. These warnings are issued by the boarding officers who discover the violations. The issuance of a written warning, as opposed to an action for the assessment of a monetary penalty, has been determined to be an effective way for boarding officers to handle minor boating violations that involve first offenders who indicate that any discrepancies will be quickly corrected.

There is a specific list of violations for which a warning may be issued. The boarding officer is not permitted to issue a written warning for any violation which endangers the occupants of the vessel, where the operator of the vessel is required to be licensed, or where three or more violations of any type are discovered during one boarding.

Written warnings may be issued for the following violations:

1. Whistle—Sound producing devices:

a. Improper for length of boat.
b. Improper operation or not audible for required distance.

2. Personal Flotation Devices:

a. Not readily accessible or immediately available.
b. Not suitable or of appropriate size.

3. Backfire Flame Control:

a. Not properly maintained because the openings are blocked or loose but it is otherwise in good and serviceable condition.

4. Ventilation:

a. Installed, but there is a minor discrepancy that can be corrected on the spot, such as being blocked or having a loose cowl or ducting.

5. Numbers:

a. Invalid certificate of number or no certificate on board.
b. Numbers improperly displayed.

6. Documented Yachts:

a. Name and home port not displayed conspicuously.

7. Oil pollution prevention:

a. No fixed or portable means to discharge oily bilge slops to a reception facility.
b. No placard posted.
c. Evidence of draining sumps of oil lubricated machinery or the contents of oil filters, strainers, or purifiers into the bilge.

8. Fire extinguishers:

a. Not readily accessible.

Instances may arise where the operator of the boat advises the boarding officer that his violation is a first offense, where the boarding officer accordingly issues a written warning, and where subsequent record checks reveal prior violations or written warnings within one year. In these cases, the District Commander may rescind the written warning and start appropriate penalty action.

Written warnings are kept on file in District Offices for not more than one calendar year after the date of issue. Within this one year period, the operator is not considered to be a first offender if his vessel is boarded again. After this one year period has expired, the operator of a vessel that is boarded again is treated as a first offender and another written warning may be issued for any violation for which a warning is authorized.

Since written warnings issued by Coast Guard boarding officers may be referred to in determining the appropriate penalty in the case of subsequent violations within one year, there is an appeal procedure for that warning through the District Commander. The person issued a written warning may within 15 days from the date of issue appeal the warning either in person or in writing by presenting any information or material that denies, explains, or mitigates the violations in the written warning.

Since these amendments relate solely to agency policy and procedure, the notice of proposed rulemaking requirements in 5 U.S.C. 553(c) do not apply and they may be made effective in less than 30 days under 5 U.S.C. 553(d).

In consideration of the foregoing, Part I of Title 33, Code of Federal Regulations is amended by adding a new Subpart 1.08 that reads as follows:

Subpart 1.08—Written Warnings by Coast Guard Boarding Officers

Sec.

1.08-1 Applicability.
1.08-5 Procedures.

AUTHORITY: 5 U.S.C. 552; 14 U.S.C. 633; 85 Stat. 213 (46 U.S.C. 1451); 49 CFR 1.4(b), 1.46(n)(1).

Subpart 1.08—Written Warnings by Coast Guard Boarding Officers

§ 1.08-1 Applicability.

(a) The regulations in this subpart apply to certain violations of the following boating safety statutes and regulations for which Coast Guard boarding officers are authorized to issue written warnings instead of recommending civil or criminal penalty procedures under Subpart 1.07 of this part:

(1) 46 CFR 25.05 whistles or other sounding producing devices;
(2) 33 CFR 175 and 46 CFR 25.25 personal flotation devices;
(3) 46 CFR 25.35 backfire flame control;
(4) 46 CFR 25.40 ventilation;
(5) 33 CFR 173 numbering;
(6) 46 U.S.C. § 103, documented yachts;
(7) 33 CFR 155 oil pollution prevention; and
(8) 46 CFR 25.30 fire extinguishers.

(b) The Commandant authorizes designated boarding officers to issue warnings for certain minor violations of the statutes and regulations listed in paragraph (a) of this section. Written warnings are not authorized for all violations of these statutes and regulations.

§ 1.08-5 Procedures.

(a) A written warning may be issued where the boarding officer determines that—

(1) the observed violation is a first offense; and
(2) the operator states that the violation will be promptly corrected.

(b) A written warning may not be issued where—

(1) the operator is required to be licensed;
(2) the violation is a failure to have required safety equipment on board; or
(3) the boarding officer notes three or more violations during one boarding.

(c) Each District Office maintains a record of each written warning issued within that district for a period of not more than one year after date of issue.

(d) The District Commander of the district in which the warning is issued may rescind a written warning and institute civil penalty action under § 1.07-9 of this part if a record check discloses a prior written warning or violation within one year.

(e) Within 15 days after the date of issue, any person issued a written warning by a Coast Guard boarding officer may appeal the issuance of the warning to the District Commander by providing in writing or in person any information that denies, explains, or mitigates the violations noted in the warning.

(f) Each written warning states that—

(1) The warning is kept on file for one year from date of issue for reference in determining appropriate penalty action if there is a subsequent violation;
(2) If a record check reveals a prior written warning or violation within one year from the date of issue, the warning may be revoked and civil penalty action instituted;
(3) If an additional violation occurs within this one year period the warning may be used as a basis for the assessment of a higher penalty for the subsequent violation; and
(4) Within 15 days after the date of issue, the person who is issued the warning may appeal to the District Commander by providing in writing or in person any information or material that denies, explains, or mitigates the violations noted in the warning.

Effective Date: This amendment takes effect on April 29, 1976.

Dated: April 20, 1976.

O. W. SILER,
Admiral, U.S. Coast Guard,
Commandant.

[FR Doc.76-12117 Filed 4-28-76;8:45 am]

[OST Docket No. 36; Amdt. 52-1]

PART 52—BOARD FOR CORRECTION OF MILITARY RECORDS OF THE COAST GUARD

The Department of Transportation is revising the regulations governing the operation of the Board for Correction of Military Records of the Coast Guard. The United States Coast Guard is an operating administration within the Department subject to the direction of the Secretary, who is authorized by 10 U.S.C. 1552, under procedures established by him and acting through a board of civilians, to correct any military record of the Coast Guard when he considers it necessary to correct an error or remove an injustice.

This revision incorporates four important amendments to the former regulations—

(1) Section 52.05–5 has been amended, and the former section 52.05–15 (now § 52.15–5) rewritten, to provide more clearly that, in certain limited circumstances, the Board itself may deny relief without prejudice on individual applications. These circumstances are: (i) where the information or relevant evidence presented is insufficient to demonstrate probable material error or injustice; (ii) where effective relief cannot be granted by the Board; (iii) where the Board does not have jurisdiction to determine the matters presented; and (iv) where the application has not been timely filed and the interest of justice does not require its acceptance. This provision thus clarifies the fact that action by the Secretary is not required on each application submitted to the Board.

(2) Former sections 52.15–1 and 52.5–15(b), now incorporated into sections 52.20–1 through 52.20–15, have been revised and expanded to provide more suitable guidelines for the Board in determining whether a hearing is warranted and whether to grant a hearing to applicants who request reconsideration of a decision to deny a hearing. In addition, sections 52.20–1 through 52.20–15 have been revised to preclude situations in which new issues are raised at or immediately prior to the hearing. To this end, the revision provides that a hearing will be set only after the applicant or his counsel has submitted all documentary material he desires to rely on in support of the application. The revision provides further that new issues may be raised thereafter only upon a showing of good cause. If good cause is shown, the Board may postpone the hearing for such time as is necessary to allow sufficient time for review of all documentary material.

(3) Former section 52.35–2(c), in which the Commandant was required to determine personally whether military policies or regulations of the Coast Guard were involved before directing the Chief Counsel of the Coast Guard to prepare written views of the Coast Guard on a particular case before the Board, has been amended by section 52.45–5. As amended, section 52.45–5 removes the requirement of personal determination by the Commandant, thus enabling him to delegate this responsibility. This section should enable the Coast Guard to act more expeditiously on applications considered by the Board.

(4) Under former section 52.25–25(b), the record of proceedings was made available for inspection by the applicant or his counsel except where detrimental to the public interest. This provision has been clarified in light of more recently enacted laws to make the release of information to the applicant subject to Departmental regulations implementing the Privacy Act of 1974 and the Freedom of Information Act.

This revision is also intended to reflect the transfer of functions of the Coast Guard from the Department of the Treasury to the Department of Transportation, pursuant to section 6(b) of the Department of Transportation Act, 49 U.S.C. 1655(b), and to establish a greater degree of conformity between certain procedures of the Board for Correction of Military Records of the Coast Guard and those of the Army, Navy, and Air Force.

Since this revision relates only to the internal management of the Department, notice and public procedure thereon are not required, and the revision may be made effective upon publication in the FEDERAL REGISTER. However, in order to provide the public with an opportunity to submit its views on this regulation, comments from interested persons will be accepted for a period of forty-five days following the date of publication. Should any such comments justify revision of this regulation, the amended portion of the regulation will be published in the FEDERAL REGISTER.

Comments should identify the docket number (see above) and be submitted in writing to the Docket Clerk, Office of the General Counsel, TGC, Department of Transportation, Washington, D.C. 20590. Comments received on or before June 14, 1976 will be considered. All docketed comments will be available for public inspection and copying, both before and after the closing date for comments, in the Office of the Assistant General Counsel for Operations and Legal Counsel, Room 10100, Nassif Building, 400 Seventh Street, S.W., Washington, D.C., between 9 a.m. and 5:30 p.m. local time, Monday through Friday, except Federal holidays.

In consideration of the foregoing, Part 52 of Subchapter B of Chapter I of Title 33, Code of Federal Regulations, is revised to read as follows:

Subpart 52.01—Purpose and Authority

Sec.
52.01–1 Purpose.
52.01–5 Authority.

Subpart 52.05—Establishment, Function, and Jurisdiction of the Board

52.05–1 Establishment and composition.
52.05–5 Function.
52.05–10 Jurisdiction.

Subpart 52.10—Application for Correction

52.10–1 General requirements.
52.10–5 Time limit for filing application.

Subpart 52.15—Consideration of Application, Denial of Relief, and Stay of Proceedings

Sec.
52.15–1 Consideration of application.
52.15–5 Denial of relief.
52.15–10 Stay of proceedings.

Subpart 52.20—Hearings

52.20–1 Entitlement to hearing.
52.20–5 Denial of hearing.
52.20–10 Notice of hearing.
52.20–15 Postponement of hearing.
52.20–20 Nonappearance.

Subpart 52.25—Counsel, Witnesses, and Expenses

52.25–1 Counsel.
52.25–5 Witnesses.
52.25–10 Expenses.

Subpart 52.30—Procedure at Hearings

52.30–1 Convening the Board.
52.30–5 Conduct of hearing.
52.30–10 Procurement of evidence.
52.30–15 Access to official records.
52.30–20 Continuance.
52.30–25 Withdrawal.
52.30–30 Reporting.

Subpart 52.35—Judgment and Disposition

52.35–1 Deliberations and decision.
52.35–5 Minority report.
52.35–10 Record of proceedings.
52.35–15 Action by the Secretary.
52.35–20 Orders.
52.35–25 Notification.
52.35–30 Reconsideration.

Subpart 52.40—Payment of Claims

52.40–1 Authority to pay.
52.40–5 Procedures.
52.40–10 Interpretation.
52.40–15 Report of settlement.

Subpart 52.45—Miscellaneous Provisions

52.45–1 Staff assistance.
52.45–5 Request for information from the Coast Guard.

AUTHORITY: 10 U.S.C. 1552; 49 U.S.C. 1655(b).

Subpart 52.01—Purpose and Authority

§ 52.01–1 Purpose.

This part establishes the procedures for making application for the correction of military records of the Coast Guard, the consideration of applications by the Department of Transportation Board for Correction of Military Records of the Coast Guard, and for settling claims or determining monetary benefits.

§ 52.01–5 Authority.

(a) Section 131 of the Legislative Reorganization Act of 1946 (2 U.S.C. 190g) provides that no private bill or resolution, and no amendment to any bill or resolution, authorizing or directing the correction of military or naval records, shall be received or considered in either the Senate or the House of Representatives. Section 207 of the same Act, as amended, and as reenacted and codified in 10 U.S.C. 1552, provides that the Secretary of the Treasury, under procedures established by him, and acting through a board of civilians, may correct any military record of the Coast Guard when he considers it necessary to correct an error or remove an injustice. The functions, powers, and duties of the Secretary of the Treasury relating to the Coast Guard were transferred to and vested in the Secretary of Transportation (herein-

after, "the Secretary") by section 6(b) of the Department of Transportation Act (49 U.S.C. 1655(b)).

(b) Because this statutory authority is a substitute for the correction of military or naval records by legislative action, it is construed as conferring jurisdiction on the Secretary substantially equivalent to that previously exercised by the Congress.

(c) Corrections made under this authority are final and conclusive on all officers of the Government except when procured by fraud.

Subpart 52.05—Establishment, Function and Jurisdiction of the Board

§ 52.05–1 Establishment and composition.

(a) Pursuant to 10 U.S.C. 1552 and 49 U.S.C. 1655(b), the Board for Correction of Military Records of the Coast Guard (hereinafter "the Board") is established in the Office of the Secretary of Transportation.

(b) The Secretary appoints a panel of civilian officers or employees of the Department of Transportation to serve as members of the Board, and designates one such member to serve as Chairman of the Board. The Chairman designates members from this panel to serve as the Board for each case requiring consideration by a Board. A Board consists of three members, and two members present constitute a quorum of the Board.

(c) The Executive Secretary of the Board carries out the functions prescribed for him by these regulations and such other duties as may be assigned to him by the Chairman.

§ 52.05–5 Function.

The function of the Board is to consider all applications properly before it together with all pertinent military records to determine whether an error has been made in the Coast Guard records, or whether, under normal standards of military law, administration, and practice, the subject of the application has suffered a wrong as the result of an error of omission or commission in his records, or through some manifest injustice in the treatment accorded him.

§ 52.05–10 Jurisdiction.

(a) The Board has jurisdiction to review and determine all matters properly brought before it, consistent with existing law and such directives as may be issued by the Secretary.

(b) No application will be considered until the applicant has exhausted all effective administrative remedies afforded under existing law or regulations, and such legal remedies as the Board may determine are practical and appropriately available to the applicant.

Subpart 52.10—Application for Correction

§ 52.10–1 General requirements.

(a) An application for correction of a Coast Guard record must be submitted on DD Form 149 (Application for Correction of Military or Naval Record) or an exact facsimile thereof, and should be addressed to: Executive Secretary, Board for Correction of Military Records of the Coast Guard, United States Department of Transportation, Washington, D.C. 20590. Forms and explanatory matter may be obtained from the Executive Secretary of the Board.

(b) The application shall be signed by the person requesting corrective action with respect to his record, except that the application may be made by a spouse, prenat , ehir,etaoish
parent, heir, or legal representative for the purpose of bringing the matter before the Board when the record in question is that of a person who is incapable of making application himself, or whose whereabouts are unknown, or who is deceased. Where the application is not signed by the person requesting corrective action with respect to his record, it shall be accompanied by satisfactory evidence of (1) the death, incapacity, or unavailability of such person and (2) the relationship required of the person making application.

§ 52.10–5 Time limit for filing application.

An application for correction of a record must be filed within three years after discovery of the alleged error or injustice. An application filed after that time may not be accepted by the Board unless it finds that it would be in the interest of justice to do so. Reasons why its acceptance would be in the interest of justice should be set forth in the application.

Subpart 52.15—Consideration of Application, Denial of Relief, and Stay of Proceedings

§ 52.15–1 Consideration of application.

Each application and the available military records pertinent to the corrective action requested are reviewed by the Chairman to determine whether to deny relief pursuant to § 52.15–5, or to grant a hearing, or to recommend disposition on the merits without a hearing.

§ 52.15–5 Denial of relief.

(a) The Chairman, without requirement of Secretarial approval, may deny relief to an applicant—

(1) where the information or relevant evidence presented is insufficient to demonstrate probable material error or injustice;

(2) where effective relief cannot be granted by the Board;

(3) where the Board does not have jurisdiction to determine the matters presented; or

(4) where the application has not been timely filed under § 52.10–5 and the interest of justice does not require its acceptance.

Denial of relief under this section is without prejudice to further consideration in the event that new relevant evidence is submitted by the applicant or otherwise comes to the attention of the Board. Subsequent denials of relief on any application for any of the four reasons specified above are decided by the Board, without requirement of Secretarial approval.

(b) Where relief is denied under this section, written findings, conclusions, and recommendations are not required. The applicant is advised of the reasons for such denial and of any right he may have to further proceedings.

§ 52.15–10 Stay of proceedings.

The application to the Board for correction of a record does not operate as a stay of any proceedings or administrative action being taken with respect to or affecting the person involved.

Subpart 52.20—Hearings

§ 52.20–1 Entitlement to hearing.

The applicant may request that he be permitted to appear before the Board in person or by counsel or in person with counsel. The Chairman grants a hearing whenever the application and the military record in question, together with any briefs, memoranda, or other documents theretofore received, show that a hearing would be likely to produce additional information material to the case.

§ 52.20–5 Denial of hearing.

If the Chairman determines that a hearing is not warranted, the applicant or his counsel is notified in writing that a hearing has been denied and is advised of the reasons therefor. The applicant may request the Board to reconsider the denial by submitting, within 45 days after receiving notice of the denial, further documentary evidence to justify a hearing in the case. If the Board denies the request for reconsideration, the applicant or his counsel is notified in writing of the denial and the reasons therefor. The Board also sets forth the reasons for denial in its decision on the merits of the application.

§ 52.20–10 Notice of hearing.

(a) If the Chairman, or the Board upon reconsideration, determines that a hearing is warranted, the applicant or his counsel is notified in writing that a hearing has been granted, and that a time and place for the hearing will be set—

(1) upon receipt by the Board of all briefs, memoranda, or other documents the applicant or his counsel desires to submit in support of the application; or

(2) upon being advised by the applicant or his counsel that no additional documentary materials will be submitted.

(b) Written notice stating the time and place of the hearing is given to the applicant or his counsel and the Coast Guard upon the fulfillment of either of the conditions referred to in paragraph (a) of this section. The date of hearing may not be less than 30 days from the date of transmission of the written notice thereof, except that an earlier date may be set when the applicant waives his right to such 30 days' notice in writing and has actual notice of the time and place of the hearing.

§ 52.20–15 Postponement of hearing.

New issues may not be raised by legal briefs, memoranda, or other documentary evidence filed or submitted after the hearing date is set or at the hearing, ex-

cept for good cause shown. If new issues are raised after the hearing date is set, upon good cause shown, the Board may postpone the hearing for such time as is necessary to allow sufficient time for review of additional materials. If a hearing is postponed, the Board notifies the applicant or his counsel and the Coast Guard in writing of the postponement and of a place and time for a new hearing.

§ 52.20–20 Nonappearance.

An applicant who notifies the Board in writing that he does not desire to be present or to be represented by counsel at a hearing, or who fails without good cause to appear in person or by counsel at the appointed time and place for hearing, is deemed to have waived his right to a hearing. His case is then considered by the Board on the basis of all the material of record.

Subpart 52.25—Counsel, Witnesses, and Expenses

§ 52.25–1 Counsel.

As used in this part, the term "counsel" includes members in good standing of any bar; accredited representatives of veterans' organizations recognized by the Administrator of Veterans Affairs under Title 38, U.S. Code, Sec. 3402; and other persons who, in the opinion of the Board, are competent to represent the applicant for correction.

§ 52.25–5 Witnesses.

(a) In any case in which a hearing is authorized the applicant is permitted to present witnesses in his behalf.

(b) It is the responsibility of the applicant to notify his witnesses and to ensure their appearance at the time and place set for the hearing.

§ 52.25–10 Expenses.

No expenses of any nature whatsoever incurred by the applicant, his counsel, his witnesses, or any other person in his behalf may be paid by the Government.

Subpart 52.30—Procedure at Hearings

§ 52.30–1 Convening the Board.

The Board is convened at the call of the Chairman and recesses or adjourns at his order.

§ 52.30–5 Conduct of hearing.

(a) The Chairman conducts the hearing so as to insure a full and fair presentation of the evidence.

(b) The hearing is not limited by legal rules of evidence but reasonable bounds of competency, relevancy, and materiality are observed for the receipt and consideration of evidence.

(c) All testimony before the Board is given under oath or affirmation and witnesses are subject to examination by the Board.

§ 52.30–10 Procurement of evidence.

It is the responsibility of the applicant to procure such evidence, including official records, as he desires to present in support of his case.

§ 52.30–15 Access to official records.

The applicant shall have access to his official records or to any information pertaining to him which is in the custody of the Coast Guard as provided in 49 C.F.R. Part 10. The applicant shall have access to other Coast Guard records as provided in 49 C.F.R. Part 7.

§ 52.30–20 Continuance.

The Board may continue a hearing on its own motion. A request for continuance by or on behalf of the applicant may be granted by the Board if a continuance appears necessary to insure a full and fair hearing.

§ 52.30–25 Withdrawal.

The Board shall permit the applicant to withdraw his application at any time before a final determination by the Secretary. Any further consideration by the Board of the issues raised in the withdrawn application shall be given only upon a showing of good cause.

§ 52.30–30 Reporting.

The proceedings of the Board in open session are reported verbatim, and are transcribed at the discretion of the Board. The Board's deliberations are conducted in executive session and are not reported.

Subpart 52.35—Judgment and Disposition

§ 52.35–1 Deliberations and decision.

(a) Only members of the Board and its staff may be present during the deliberations of the Board.

(b) When it appears to the Board that the facts have not been fully and fairly disclosed by the records or by the testimony and other evidence before the Board, the Board may request the applicant to obtain and submit, or may itself obtain, such further evidence as it considers essential to a complete and impartial understanding of the facts and issues involved. The applicant is given an opportunity to comment on any further evidence submitted to, or obtained by, the Board.

(c) In any case in which a hearing has not been held, the Board may accept any documentary evidence relevant to the matter under consideration submitted prior to final determination of the case by the Secretary. However, in any case in which a hearing has been held, the Board may not accept documentary evidence after the hearing which, by due diligence, could have been submitted prior to the hearing.

(d) Following the receipt of all evidence, the Board prepares a written decision containing its findings, conclusions, and recommendations with respect to the relief sought by the applicant or found by the Board to be appropriate. A majority vote of the members present on any matter before the Board constitutes the action of the Board and is so recorded.

(e) The decision of the Board specifies with particularity any change, correction, or modification of records that is to be made, and any other action deemed necessary to carry out the recommendations of the Board.

(f) Where the Board deems it necessary to submit a comment or recommendation to the Secretary as to a matter arising from, but not directly related to, the issues in a case, it does so by separate communication.

§ 52.35–5 Minority report.

In case of disagreement among members of the Board, a minority report on the Board's findings, conclusions, or recommendations may be submitted.

§ 52.35–10 Record of proceedings.

When the Board has completed its deliberations a complete record of the proceedings is prepared. The record includes the application for relief; a transcript of any testimony prepared for the Board; affidavits; papers, and documents considered by the Board; briefs and written arguments filed in the case; the findings, decisions, and recommendations of the Board; any minority report; and all other papers and documents necessary to reflect a true and complete history of the proceedings.

§ 52.35–15 Action of the Secretary.

The record of proceedings is transmitted to the Secretary for approval, disapproval, or return for additional consideration. Upon final action by the Secretary the record of proceedings is returned to the Board for disposition.

§ 52.35–20 Orders.

(a) The Board issues such orders or directives as may be necessary to carry out the decision of the Secretary.

(b) The addressees of such orders or directives shall submit a written report to the Board specifying the action taken and the date thereof.

(c) Unless doing so would nullify the relief granted, copies of the Secretary's decision and the Board's order shall be placed in the service record of the individual involved.

§ 52.35–25 Notification.

(a) Upon final determination of a case, the Board notifies the applicant or his counsel of the Secretary's decision.

(b) Subject to Departmental regulations implementing the Privacy Act of 1974 and the Freedom of Information Act, the Board transmits to the applicant or his counsel a copy of the Board's findings, decision and recommendation, and the applicant and his counsel may inspect the record of proceedings.

§ 52.35–30 Reconsideration.

(a) The recommendation of the Board, as approved, constitutes a final determination of the issues presented and considered.

(b) The Board grants an application for reconsideration of a final determination only if newly discovered evidence or information, not previously considered by the Board, is presented by the applicant or otherwise comes to the attention of the Board, and if the newly discov-

ered evidence or information would, if true, result in a determination other than that originally made. The Board may refuse to consider evidence or information claimed to be newly discovered if it finds that such materials could have been presented to the Board prior to its original determination if the applicant or his counsel had exercised reasonable diligence.

(c) A denial of reconsideration must be approved by the Secretary.

Subpart 52.40—Payment of Claims

§ 52.40–1 Authority to pay.

(a) The Coast Guard is authorized to pay the claims of any person, his heir at law, or legal representative, for amounts paid as a fine, forfeiture, loss of pay (including retired or retirement pay), allowances, compensation, emolument, or other monetary benefit, as the case may be, and as the result of action heretofore or hereafter taken under 10 U.S.C. 1552.

(b) The Coast Guard is not authorized to pay any claim heretofore compensated by Congress through enactment of private law, or to pay any amount as compensation for any benefit to which the claimant might subsequently become entitled under the laws and regulations administered by the Administrator of Veterans Affairs.

§ 52.40–5 Procedures.

(a) In each case the Board transmits a certified copy of the Secretary's decision to proper Coast Guard authority for determination of monetary benefits due as a result of the action of the Board.

(b) Upon request, the claimant is required to furnish any information necessary to determine the proper parties to the claim for purposes of payment under applicable provisions of law.

(c) Appropriate records are examined in the light of the Secretary's decision of the purpose of determining all amounts which may be due. Amounts found due are subject, to the extent authorized by law or regulations, to set off in the amount of existing indebtedness to the Government arising from Coast Guard service.

(d) At the time of payment, the claimant is advised as to the nature and amount of the various benefits represented by the total settlement, and of the fact that acceptance of the settlement constitutes a complete release by the claimant of any claim against the United States on account of the correction of record ordered by the Board.

§ 52.40–10 Interpretation.

If the intent or import of the Secretary's decision is not clear with respect to payment, the decision shall be returned to the Board for clarification.

§ 52.40–15 Report of settlement.

When payment is made pursuant to the order of the Board, the Executive Secretary of the Board shall be notified in writing of the name of the person to whom payment was made and of the itemized amount of the payment.

Subpart 52.45—Miscellaneous Provisions

§ 52.45–1 Staff assistance.

The Board may request such advice, opinion, assistance, or use of the facilities of any other bureau, board, or office of the Department of Transportation as may be deemed necessary.

§ 52.45–5 Request for information from the Coast Guard.

(a) The Board shall transmit to the Commandant a copy of each application for relief submitted under Subpart 52.10 that has not been denied pursuant to § 52.15–5, together with any briefs, memoranda, and documentary evidence submitted or obtained in the case.

(b) The Board may request the Coast Guard to submit any additional pertinent facts not disclosed in an application and its supporting documents.

(c) The Commandant may forward to the Board the written views of the Coast Guard on any case before the Board.

(d) A copy of each submission made by the Coast Guard under this section is given to the applicant or his legal representative who may rebut, if he wishes, the views of the Coast Guard contained therein.

(e) Information and views furnished by the Coast Guard under this section are not binding on the Board, but shall be considered by the Board along with all other information and material submitted in the particular case.

Effective Date: This amendment is effective April 29, 1976.

Issued in Washington, D.C. on April 23, 1976.

WILLIAM T. COLEMAN, Jr.,
Secretary of Transportation.

[FR Doc.76–12532 Filed 4–28–76;8:45 am]

CHAPTER II—CORPS OF ENGINEERS, DEPARTMENT OF THE ARMY

PART 204—DANGER ZONE REGULATIONS

Canaveral Harbor, Florida

On 11 February 1976 there was published in the FEDERAL REGISTER (Vol. 41, No. 29, page 6074) a notice of proposed rulemaking to establish and govern the use and navigation of a danger zone in the Trident Basin, adjacent to Canaveral Harbor, Cape Canaveral Air Force Station, Brevard County, Florida. Interested parties were given the opportunity to submit comments or objections on or before 12 March 1976.

No comments have been received and accordingly, the proposed danger zone is hereby established without change and is set forth below effective April 28, 1976.

Dated: April 15, 1976.

Approved:

VICTOR V. VEYSEY,
Assistant Secretary of the Army, (Civil Works).

§ 204.86 TRIDENT Basin Adjacent to Canaveral Harbor at Cape Canaveral Air Force Station, Brevard County, Florida Danger Zone.

(a) *The Danger Zone.* From the west side of the access channel at latitude 28°24'37", longitude 80°35'35" to the east side of the access channel at latitude 28°24'37", longitude 80°35'26" and the entire basin.

(b) *Regulations.* (1) No unauthorized vessel shall enter the area. The area will be used for loading and unloading explosives. The entrance to the basin will be marked by suitable boundary signs.

(2) The regulations will be enforced by the Commanding Officer, Naval Ordinance Test Unit, Patrick Air Force Base, Florida, or such agencies he may designate.

[FR Doc.76–12251 Filed 4–28–76;8:45 am]

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

[FRL 524–4]

PART 104—PUBLIC HEARINGS ON EFFLUENT STANDARDS FOR TOXIC POLLUTANTS

On January 12, 1976, notice was published in the FEDERAL REGISTER (41 F.R. 1765–1769) by the Environmental Protection Agency proposing amendments to the rules of practice applicable to public hearings required to be held in connection with the establishment of effluent standards for toxic pollutants pursuant to the authority of Sections 307(a) and 501(a) of the Federal Water Pollution Control Act, as amended (the "Act") (33 U.S.C. Section 1251 et seq., Pub. L. 92–500, 86 Stat 816). Those rules of practice are set forth at 40 CFR Part 104. Interested persons were given until February 11, 1976, to submit written comments. All comments received were given full and careful consideration. In view of these comments the proposed amendments have been in certain respects revised, as set forth below. With these revisions, the new amended rules of practice are promulgated at this time.

Summary of Principal Features of These Rules. The rules in question set forth the procedure and practice applicable to public hearings required to be held under Section 307(a) of the Act in connection with the establishment of toxic pollutant effluent standards.

The purpose of the amendments made at this time is to clarify certain ambiguities in the rules as originally promulgated, and to make changes in certain areas. These include the procedures for filing objections to proposed standards, the content of those objections, the timing and status of public comments on the proposed standards filed by persons other than objecting parties, the order in which evidence is to be introduced, the provisions for administrative appeals from rulings by the presiding officer, and the provisions for a tentative and final decision by the Administrator and promulgation of final standards. The rationale for each of these modifications was set forth in the Preamble portion of the Notice of Proposed Rulemaking published on January 12, 1976, referred to above. The material therein set forth, together with the summary of principal comments, responses, and revisions hereinafter set forth, pro-

vide a statement of the basis and purpose for the amendments which are made at this time to the Agency's rules of practice applicable to public hearings on effluent standards for toxic pollutants.

Summary of Principal Comments, Responses Thereto, and Revisions. The Agency received written comments on the proposed amendments from the following 28 sources: Ford Motor Company, United States Department of Agriculture, Wisconsin Electric Power Company, St. Joe Minerals Corporation, Sun Oil Company, Union Carbide Corporation, Owens-Illinois, Inc., Standard Oil Company (SOHIO), Phillips Petroleum Company, Nalco Chemical Company, Diamond Shamrock Corporation, Exxon Company, Republic Steel Corporation, American Iron and Steel Institute, E. I. DuPont de Nemours & Company, the Synthetic Organic Chemical Manufacturers Association, FMC Corporation, Kaiser Aluminum and Chemical Corporation, National Coal Association, Aluminum Company of America, Manufacturing Chemists Association, Shell Oil Company, Kennecott Copper Corporation, The New Jersey Zinc Company, Union Oil Company of California, American Petroleum Institute, Covington and Burling on (behalf of the American Mining Congress, American Cyanamid Company, American Electric Power Service Corporation (on behalf of the A.E.P. Coal Companies), Hercules Inc., The National Association of Metal Finishers, and Reynolds Metals Company), and the U.S. Department of Commerce. The principal comments are summarized as follows, together with the Agency's response thereto, including any revisions to the amendments in light of such comments.

(1) Section 307(a)(2) of the Act requires that a public hearing commence within thirty days of the publication of proposed effluent standards. The proposed amendment would have required objections to the proposed standards to be filed with the hearing clerk within 20 days of publication in order to advise the Agency and the presiding officer as to the identity of the objecting parties and to provide an indication of the scope of the hearing. The content of the objections, as set forth in section 104.3(b) of the proposed amended rule, would have to include any modification proposed by the objecting party, the basis for any objection, and "the scientific and other basis for proposed modification, including reference to any pertinent scientific or authority in support thereof." In addition, the provision of former rule (section 104.-6) allowing late filing for good cause proposed to be deleted.

Many comments stated that the time allowed for the filing of objections, particularly coupled with the backup data requirements in support of any proposed modification, would be too short. Commenters recommended that preliminary statement of objection be required prior to the date set for commencement of the hearing, and that a further period be allowed for filing the more detailed scientific backup data in support of any proposed modification of the standard. In addition, some commenters recommended that allowance be made for late filing for good cause.

The Agency recognizes that the time prescribed for the filing of sections in the proposed amendments is indeed short. This is due to the very short 30 day time period provided for the commencement of the hearing under Section 307(a)(2) of the Act, as well as the comparatively short six month period following proposal of any toxic pollutant effluent standard within which a final standard must be promulgated. Even within these tight constraints, however, the Agency believes that its proposal with respect to the filing of objections should be relaxed to accommodate the legitimate concerns reflected in the foregoing comments. accordingly, the language of section 104.3 of the rules as promulgated at this time includes the following changes from the prior proposal. First, the time for filing an objection with the hearing clerk is extended to "within 25 days" of the publication of proposed standards, instead of the prior 20 days. Second, a provision has been added that "in exceptional circumstances and for good cause shown, the presiding officer may allow an objection to be filed after the [25 days] filing deadline * * *, which good cause must include at a minimum lack of actual notice on the part of the objector or any representative of such objector of the notice of proposed standards despite his exercise of due diligence, so long as such late filing will not cause undue delay in the proceedings or prejudice any of the parties." A strong showing of good cause must be made for such late filing, however, since publication of the proposed standards in the FEDERAL REGISTER is deemed to be adequate notice to all interested parties of the proposal.

Third, Section 104.3(b) as proposed is revised to require that the basis for the objections as well as any proposed modification and supporting data be submitted with the objection "to the greatest extent feasible". At the same time, a new subsection (c) is added which provides that in the event that an objecting party is unable to provide such information within the 25 day period for filing the objection, he may so state at the time of the filing of the objection, and thereafter may file a more complete statement furnishing such information not later than 40 days following publication of the proposed effluent standards. It should be emphasized that although the objective of these provisions is to require as precise and complete as possible a statement of any objection, modification, and the basis therefor early in the proceedings, this is not a preclusive rule of evidence, and an objecting party is not limited in his presentation of evidence at the hearing only to evidence identified or described at the time of the filing of any objection or supplemental material pursuant to Section 104.3. In light of the addition of the new subsection (c), the language of subsection (c) in the January 12 proposal (comments by non-parties) is redesignated subsection (d).

(2) The proposed amendments would have deleted the last paragraph of the existing section 104.6 providing for notification by the presiding officer to any person whose objection is not accepted for filing for failure to meet the prescribed requirements. Several commenters requested that the notification portion of this provision be retained. Accordingly, such notification is provided in subsection (b) of section 104.3 as promulgated.

(3) A new subsection (e) is added to section 104.3 providing that if no objections to a proposed standard is filed, the Administrator shall promulgate final standards on the basis of the Agency's statement of basis and purpose and any public comments received pursuant to subsection (d). This will result in promulgation of the standards as proposed, unless the comments are of such a nature as to justify a modification thereof "based upon a preponderance of the evidence" in accordance with Section 307(a)(2) of the Act.

(4) With respect to public comments filed by non-parties, several commenters suggested that comments be allowed throughout the hearing, and at the close thereof. This suggestion is not adopted on the grounds that it would not afford the parties to the proceeding sufficient opportunity to evaluate and respond to such comments, a feature which other commenters recognized as essential. One commenter suggested that parties be allowed to file comments. This suggestion is rejected since parties have ample opportunity to put forth their case at the hearing, and the public comment provision is included only to accommodate persons not in a position to participate in the hearings as parties.

(5) Several commenters observed that in the sections of the rules where evidence may be admitted without cross-examination, the proposed amendments provided that the Administrator in making any decision based thereon "may" take into account the unavailability of cross-examination in determining the weight afforded such testimony. The commenters suggested that it would be fairer to provide that the Administrator "shall" take such unavailability into account. The Agency agrees. Accordingly, the word "may" is changed to "shall" in section 104.3(d) (public comments), section 104.9(f) (admission of evidence generally), and section 104.13(f) (admission of evidence without cross-examination on administrative remand) as promulgated at this time. One commenter requested with respect to each of these sections, as well as section 104.10(c) (which allows the presiding officer under certain circumstances to limit the scope and extent of cross-examination), that a party to whom cross-examination has been denied be allowed to file a statement in lieu of cross-examination. There appears no convincing need for such an unusual provision, and accordingly, the suggestion is not adopted.

(6) Section 104.4 prescribes the requirements of the Agency's statement of basis and purpose which is to be made available at the time of proposal of effluent standards. In its proposed amendments the Agency deleted the requirement that this statement must include "any assumptions or calculations necessary" for the derivation of the standard, on the grounds that it was a vague and potentially burdensome requirement, and susceptible of an interpretation which might require the Agency to gather up and set forth any assumption or calculation whatsoever, no matter how minor. A number of commenters objected to the deletion, contending that without this language the Agency might omit to set forth any assumptions and calculations essential to derivation of the standards. The proposed deletion is retained, however, in order to avoid controversies over exactly which assumptions and calculations rise to what level of significance. Lest there be any misunderstanding, however, it is the view of the Agency that the provisions of Section 104.4 as promulgated today do not relieve the Agency from identifying in its statement of basis and purpose those critical assumptions or calculations which are essential to the derivation of the proposed standard, and such identification is clearly within the scope of subsections (b) and (d) of this Section.

(7) A number of commenters requested that at the time of proposal of standards the Agency make available for inspection and copying not only its full statement of basis and purpose, including any documents incorporated by reference in the published notice, but all of the other publications and materials referenced therein. The preamble to the January 12, 1976, Notice of Proposed Rulemaking stated that the Agency would have these cited materials available at the hearing and at any prehearing conference, to the greatest extent feasible. The Agency agrees that making such materials available at the time of publication of the proposed standards is likely to assist interested persons in assessing the basis of the Agency's proposed standards, and expedite the efforts of parties to prepare their objections and backup data. Accordingly, such materials shall be made available to the greatest extent feasible (i.e., to the extent they are in the possession of the Agency) for inspection and copying as of the date of publication of the notice of proposed effluent standards. The Notice of Proposed Rulemaking for such standards will identify the location where such material shall be available.

(8) One commenter criticized the provision in proposed section 104.7(e), which is similar to the prior provision in section 104.8(f), which authorizes the presiding officer to "require any part or all of the evidence to be submitted in writing and by a certain date" as precluding oral testimony. It is intended, however, that this provision will be implemented consistent with the Administrative Procedure Act ("A.P.A."), 5 U.S.C. section 556 (b), which expressly authorizes an agency to, "when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form." It is expected that the presiding officer will exercise his authority under this section in a manner which is best suited to the particular circumstances before him.

(9) Several commenters noted that the Administrative Law Judge, who is a hearing examiner appointed by the Agency in accordance with 5 U.S.C. section 3105, need not be limited to a person from within the Agency, as provided in the proposed amendment to section 104.6. The Agency agrees, and accordingly the section as promulgated eliminates that limitation. In addition, one commenter stated that the presiding officer should never be a person who has participated in the development or enforcement of any standard or proposed standard which is at issue in a hearing before him. This is consistent with existing Agency policy, and is therefore adopted in section 104.6 as promulgated.

(10) Section 104.8 sets forth the procedures relating to the prehearing conferences. While one commenter suggested that the powers accorded the presiding officer are too broad and could be misused, others praised the broad use of prehearing conferences to narrow and sharpen the issues and develop an orderly framework for the presentation of evidence. As noted in the Preamble portion of the January 12 proposal, the powers accorded to the presiding officer are similar to those in effect in the United States District Court, where they have proven to be highly successful as well as flexible. They are also not dissimilar from comparable provisions in other administrative rules of practice and procedure.

One specific provision, section 104.8 (a)(7), which pertains to the appointment of lead counsel for objectors with common interests so as to avoid repetitious questioning, was criticized by some on the ground that it might be interpreted as authorizing the presiding officer to require appointment of lead counsel against the wishes of a party, thereby effectively depriving him of his right to counsel of his choice. This was not the intention of the proposed amendment. To make this clear, the language of the subsection as promulgated has been revised to describe this power of the presiding officer as "encouragement of objecting parties to agree upon and designate lead counsel * * *"

(11) Section 104.9 sets forth the procedures for admission of evidence. Subsection (b) as set forth in the proposed amendments provided that at the first prehearing conference, or such other time prior to the beginning of the taking of oral testimony as the presiding officer should establish, the Agency's statement of basis and purpose "and any other materials offered by the Agency staff in support of the proposed toxic pollutant effluent standards" shall be received in evidence. One commenter somewhat ambiguously suggested that subsection (b) be deleted, or at a minimum the quoted language be deleted. In contrast, a very substantial number of commenters emphasized that the Agency's statement of basis and purpose is an essential element of the record, and should go into the record at the outset of the proceedings. The Agency is therefore retaining this amendment as proposed, with the modification that the quoted language is replaced so as to limit the additional materials to "any publications or reference materials cited" in the statement of basis and purpose. Even these "footnoted" materials may be excluded by stipulation where any parts of them are agreed to be cumulative or immaterial, to avoid cluttering the record. This does not limit the Agency's opportunities to offer additional materials in evidence at the outset of the proceeding, since this right is expressly set forth in the new language of Section 104.10(a).

(12) Section 104.10 as set forth in the amendments proposed in January embodied several revisions to the hearing procedures previously set forth in Section 104.11. Because under the prior rules it was not clear which party was to go first in presenting its case, the amendment proposed in Section 104.10(a) provided that following the admission in evidence of the materials described in Section 104.9(b), the Agency "shall have the right at the commencement of the hearing to supplement that evidence or to introduce additional relevant evidence." This provision reflects not only the right but the duty of the Agency to go forward first and present as its case in chief the evidence in support of its proposed standards. The Administrative Procedure Act, 5 U.S.C. section 556(d) provides in pertinent part that "except as otherwise provided by statute, the proponent of the rule or order has the burden of proof." Section 307(a)(2) of the Act does to some extent "otherwise provide". That statute in pertinent part provides as follows:

> as soon as possible after such hearing, but not later than six months after publication of the proposed effluent standard (or prohibition), unless the Administrator finds, on the record, that a modification of such proposed standard (or prohibition) is justified based on a preponderance of evidence adduced at such hearings, such standard (or prohibition) shall be promulgated.

Under this section, the Administrator has an initial burden of coming forward with evidence to support the proposed standard. The minimum requirements of this section are satisfied by production of the Agency's statement of basis and purpose. The Agency may supplement this in accordance with section 104.10(a). Following this, the opportunity is open to any objecting party to put on its case in support of any proposed modification. Any objecting party as the proponent of a modification has the burden of proof with respect thereto, and the evidentiary standard which such objector must meet is "a preponderance of the evidence adduced at such hearings."

The proposed amendments also contained specific language in Section 104.10 with respect to the scope of rebuttal and the order of procedure in connection therewith. The Administrative Procedure Act expressly recognizes the right of any party, including the Agency staff as pro-

ponent of the standard, "to submit rebuttal evidence." 5 U.S.C. Section 556(d). As noted in the Preamble to the amendments proposed on January 12, the interests of rulemaking are best served by a liberal approach to rebuttal, so long as the rebuttal evidence is responsive in some way to a part of the case presented by one or more of the objectors, and so long as the objectors are afforded a reasonable opportunity to reply to such rebuttal. That opportunity for the objectors to respond to any new evidence introduced on the rebuttal is expressly guaranteed by the proposed amendment in Section 104.10(a).

Nevertheless several commenters suggested variously that (1) the Agency should not be allowed to put on any evidence at all other than its statement of basis and purpose, (2) to allow the Agency to put on rebuttal evidence would allow the Agency to avoid its initial obligation to put on adequate evidence in its case in chief to support its proposed standards, and (3) that to allow rebuttal evidence which does anything other than support the standard originally proposed by the Agency, even though it may be responsive to some part of an objector's case, would in effect unfairly allow EPA to propose a new standard without adequate notice.

As to the first of these comments, the suggestion that EPA be precluded from putting on any evidence at the hearing beyond its statement of basis and purpose is clearly contrary to the provisions of the Administrative Procedure Act and without authority whatsoever in Section 307(a). The provision allowing the Agency to put on additional evidence in its case in chief at the outset is subject to two obvious limitations: first, the evidence must be relevant to the proposed standard, and second, the evidence will be identified or made available in advance to opposing parties in accordance with whatever procedures are established by the presiding officer at the prehearing conference. Such evidence might logically include, for example, further explanation where appropriate of materials or points set forth in the statement of basis and purpose, or new information which has come to light subsequent to the publication of the notice.

As to the contention that the provision for rebuttal or even the provision allowing supplemental evidence by the Agency at the outset of the hearing as part of its case in chief will permit the agency to fail to prepare an adequate statement of basis and purpose at the outset, the Agency does not interpret and will not interpret these provisions in that fashion. The Agency in proposing standards will set forth a statement of basis and purpose such that even absent any further evidence at all by any party at any hearing, the proposed standards could be promulgated in final form.

With respect to the suggestion that the scope of rebuttal evidence should be restricted only to evidence which not only is responsive to the case of an objector but which supports the precise standard proposed by the Administrator, there is no basis in the Administrative Procedure Act for such a limitation, nor in the rules of evidence for civil or administrative procedure generally. Indeed, the approach to the admissability of the evidence in a rulemaking proceeding should be liberal so as to assure an adequate and ample record on which a fair and reasonable standard can be promulgated. An offer of evidence by the Agency in response to some evidence or claim advanced by an objector is not the equivalent of a new proposal of standards. To the extent that it provides an evidentiary basis to the Administrator to promulgate a standard other than that proposed either initially by the Agency or in any specific modification proposed by an objector, no new formal public notice is required; if this were so Congress would presumably have required a formal public notice of any proposed modification sought by an objector. However, Congress did not so provide, nor is there any indication in the legislative history that such formal notification is required, nor is such a requirement inherent in the rulemaking process. The scope of rebuttal for the Agency and for objecting parties alike should be subject only to the traditional limitation that the evidence offered be in some way responsive to the case presented by the other side. Upon completion of the hearing any party is free to argue not only in support of his proposed standard or modification, but, as in any other proceeding, rulemaking or otherwise, for a compromise or "fallback" position.

Several commenters in seeking to impose narrow restrictions on the scope of rebuttal cited the decision of the Deputy Administrator on August 16, 1974, at the first hearing on proposed toxic substances, FWPCA 307(a) Docket No. 1, which affirmed an evidentiary ruling of the presiding officer excluding three affidavits offered during the course of rebuttal by the Agency very late in those hearings. The basis for that ruling, as the Deputy Administrator's decision made clear, was not the relevance of the offer but the fact that it was made without adequate prior notice to the objectors and so late in the proceeding that they were effectively deprived of an opportunity to respond. The present amendments to these rules seek to avoid a repetition of that situation. The comments in that decision that the Agency first present its case in chief, and that rebuttal should not be a substitute for the case in chief but should be responsive to some element of the case of an objector, and that adequate opportunity be allowed for the objectors to respond to such rebuttal are all addressed in these proposed amendments. For future guidance, however, it is these rules of practice and procedure, and not that decision, which will govern the scope and conduct of future hearings under Section 307(a).

(13) One commenter suggested that the rules fix specific times for both the Agency and the objectors to submit rebuttal testimony in advance. However, the Agency believes that this is best left to the judgment and discretion of the presiding officer depending upon the particular circumstances at hand.

(14) Section 104.10(d) of the proposed amendments, which is similar in substance to Section 104.11(a) of the original rules, provides in accordance with Section 307(a)(2) that the burden of proof as to any modification shall be on the party advocating such modification to show that it is justified based upon a preponderance of the evidence. Although several commenters objected to this burden, it is expressly required by the statute. One commenter expressed concern that this appeared to limit the scope of evidence which an objecting party could present only to evidence in support of his proposed modification, and might not allow the objector to put on evidence responsive to the Agency's proposal but not expressly supportive of the objector's proposed modification. The answer is that the section is not so limited and does not preclude such evidence.

(15) Several commenters suggested deletion or modification of Section 104.10(c), which allows the presiding officer to limit the evidence in the face of time constraints. The language of this subsection appeared verbatim in the original rules at Section 104.11(b), and there does not appear to be any justification for revising it at this time. The presiding officer should construe and apply it in a manner consistent with the language of the A.P.A., 5 U.S.C. § 556(d) that "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

(16) In response to a number of comments, the provision in Section 104.11 for the filing of briefs and proposed findings of fact and conclusions following the hearing is revised so as to make this a matter of right.

(17) Several recommendations were received concerning Section 104.13 of the proposed amendments pertaining to interlocutory and post-hearing review of rulings of the presiding officer. In response to these comments the following changes have been made. In subsection (b), it is provided if the presiding officer declines certification of a ruling for interlocutory review, any request for such review directed to the Administrator is subject to the same standards for review as apply when the request is made to the presiding officer. If the Administrator takes no action with respect to such request within 15 days of its filing, the application is deemed denied. Subsection (g) as proposed allowed the filing of motions at any time after the first prehearing conference. This is revised in the amendments promulgated at this time to allow the filing of motions at any time following publication of proposed standards.

(18) A number of comments were received on proposed Section 104.14, which sets forth the requirements for the tentative and final decision by the Administrator, making several modifications on the prior provisions in Sections 104.14 and 104.15. Several persons criticized deletion of the requirement that a ten-

tative decision be published in the FEDERAL REGISTER. However, there is no statutory requirement for such publication, and the tight statutory time table established in Section 307(a)(2) simply does not allow sufficient time for such publication and the receipt of meaningful comments in response thereto, nor is it clear what if any further hearing procedures should be conducted following receipt of such comments. Accordingly, that requirement is deleted in these amendments.

(19) Several commenters suggested that the presiding officer be empowered to make recommended findings of fact and conclusions, and to render a recommended decision. The Agency believes that in matters of rulemaking, as distinct from some instances involving adjudication, it is more appropriate for the Administrator rather than for the presiding officer to render the tentative and final decision, particularly in view of the fact the establishment of standards of general application involves policy decisions and hence is in some respects an institutional decision even though the basis for this decision is the record established in connection with the hearings.

(20) Several commenters felt that the opportunity to file exceptions to a tentative decision, together with a supporting brief, is an important feature of the proceeding, and should not be limited by statutory time constraints. The Agency agrees that this is an important feature, and accordingly has revised Section 104.14(b) and added a new subsection (c) to provide that ordinarily this will be allowed. The filing of a tentative decision and the allowance of exceptions thereto will be dispensed with only if, as in the language of A.P.A. 5 U.S.C. Section 557(b)(2), the Administrator determines that "due and timely execution of his functions imperatively and unavoidable so requires." Although one commenter expressly requested 30 days following the tentative decision to file such exceptions, the Agency believes that this is best left to the sound judgment of the presiding officer, or the Administrator.

(21) Several commenters suggested that the Administrator should be required in both a tentative and final decision to set forth a statement of his findings and conclusions and the basis therefore. This is normal Agency practice, and the Agency agrees that it would be helpful to incorporate such a provision in the rules. Such a provision has therefore been added in Section 104.14(d) as promulgated today.

(22) Several commenters suggested that the provision in Section 104.14(c) as proposed on January 12 concerning the taking of official notice be revised to include language allowing any opposing party a reasonable opportunity to show the contrary. *Cf.*, A.P.A. 5 U.S.C. Section 556(e) and Federal Rules of Evidence Rule 201. Also, it should follow the language of comparable provisions in other Agency regulations allowing the taking of official notice of matters based on specialized Agency knowledge, e.g. 40 C.F.R. 168.41(e). The Agency has revised the official notice provision accordingly. Because this is a matter of evidence which may be utilized by the presiding officer as well as the Administrator, the location of the provision has been moved to Section 104.9, dealing with admission of evidence, where it is promulgated as a new subsection (g).

(23) Several comments were received on the proposed amendment reflected in Section 104.15 providing that the Administrator in promulgating a final standard based upon the record is not limited solely to the express numerical standards proposed by the Agency or proposed in any modification. One commenter opposed the provision. That position is unduly restrictive, since it could happen that substantial evidence in the record taken as a whole might yield strong support for numerical standards somewhere between those proposed by the Agency and the modifications proposed by objectors. Accordingly the section is promulgated as proposed. Two commenters emphasized the need for notice prior to finalization of any decision to promulgate a standard other than that proposed. This concern is satisfied to the extent practicable in the provision for a tentative decision with opportunity for exceptions.

(24) Several commenters suggested that the possibility of a final standard different than the one proposed warrants some form of public notice, such as FEDERAL REGISTER publication, otherwise a person who was satisfied with the proposed standard and did not object, but who might not be satisfied by a modification, would miss the opportunity to object to such modification. As noted above, however, such FEDERAL REGISTER publication is not feasible within the time constraints imposed by Section 307(a) of the Act. The answer to this comment must be that if anyone believes that he may be adversely affected by the standard as proposed or modified, he should become a party to the proceedings and thereby protect his interest, even if the objection he files is an objection to any change in the proposed standards.

(25) Several commenters opposed the proposed deletion of the prohibition on *ex parte* discussions appearing in the original rules at Section 104.16. The Agency proposed to delete this section for the reason that the prohibition on such *ex parte* conversations, which is applicable to adjudication, is inapplicable to rulemaking. The Agency cited considerable case law in support of this point. Although several of the commenters cited decisions which they claim supported a contrary view, each of the cases cited involved adjudication rather than rulemaking, and are hence inapplicable. The comments submitted by Kaiser Aluminum and Chemical Corporation cite K. Davis *Administrative Law Treatise*, Section 13.00 at 453 (1970 Supp.). Davis is at that point discussing the separation of prosecutorial and decision-making functions within an administrative Agency, which is closely related to the *ex parte* question since the issue with respect to Agency personnel is whether the staff who presents the evidence should be precluded from discussing the regulation with the Administrator out of the presence of the objector's representatives. Although Professor Davis equivocates on what the policy should be, he leaves no doubt about the law: "The conclusion seems to be rather solid that no law requires the Commissioner [of FDA] to separate functions in rulemaking for which on-the-record hearings are required". Id. p. 443.

The rationale for not imposing separation of functions, and the attendant prohibition on communication between those responsible for developing and presenting the proposed rule or standard and the person ultimately charged with promulgation, lies with the nature of rulemaking. The development of a proposed rule or standard includes a number of policy decisions in which many program offices within the Agency participate. The Administrator relies on the advice and recommendations of these offices in developing and proposing the standards. At the same time, persons within these offices may well present evidence at rulemaking hearings including information on which the proposed standard was based. It would be counterproductive to reasoned rulemaking if, at the stage of final decision and promulgation, the Administrator were isolated from those within the Agency whom he normally consults on policy determinations and whose offices will be charged with implementation and enforcement of the regulations. The institutional nature of the Administrator's decision, as noted previously, is inherent in the very nature of rulemaking, and is normally absent from adjudication.

Because the law clearly does not require the prohibition on *ex parte* discussions contained in Section 104.16 as originally promulgated, and because nothing in the rulemaking process warrants its retention, it is deleted as proposed.

With the revisions above, the amendments to the Agency's rules of practice for hearings in connection with the establishment of toxic pollutant effluent standards pursuant to Section 307(a) of the Act on January 12, 1976, are adopted.

Effective Date: The amended rules of practice as hereinafter promulgated shall become effective on June 1, 1976.

Dated: April 21, 1976.

RUSSELL E. TRAIN,
Administrator.

Part 104 of Chapter I, Title 40, Code of Federal Regulations is revised to read as follows:

Sec.

104.1 Applicability.
104.2 Definitions.
104.3 Notice of Hearing; Objections; Public comment.
104.4 Statement of Basis and Purpose.
104.5 Docket and Record.
104.6 Designation of Presiding Officer.
104.7 Powers of Presiding Officer.
104.8 Prehearing Conferences.
104.9 Admission of Evidence.
104.10 Hearing Procedures.
104.11 Briefs and Findings of Fact.
104.12 Certification of Record.
104.13 Interlocutory and Post-hearing Review of Rulings of the Presiding Officer; Motions.

104.14 Tentative and Final Decision by Administrator.
104.15 Promulgation of Standards.
104.16 Filing and Time.

AUTHORITY: Sections 501 and 307(a) of the Federal Water Pollution Control Act, as amended (33 U.S.C. Section 1251 et. seq., Pub. L. 92-500, 86 Stat. 816).

§ 104.1 Applicability.

This Part shall be applicable to hearings required by statute to be held in connection with the establishment of toxic pollutant effluent standards under section 307(a) of the Act.

§ 104.2 Definitions.

As used in this part, the term:

(a) "Act" means the Federal Water Pollution Control Act, as amended, 33 U.S.C. section 1251 et seq., Pub.L. 92-500, 86 Stat. 816.

(b) "Administrator" means the Administrator of the Environmental Protection Agency, or any employee of the Agency to whom the Administrator may by order delegate his authority to carry out his functions under section 307(a) of the Act, or any person who shall by operation of law be authorized to carry out such functions.

(c) "Agency" means the Environmental Protection Agency.

(d) "Hearing Clerk" means the Hearing Clerk, U.S. Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460.

(e) "Party" means the Environmental Protection Agency as the proponent of an effluent standard or standards, and any person who files an objection pursuant to § 104.3 hereof.

(f) "Person" means an individual, corporation, partnership, association, state, municipality or other political subdivision of a state, or any interstate body.

(g) "Effluent standard" means any effluent standard or limitation, which may include a prohibition of any discharge, established or proposed to be established for any toxic pollutant under section 307(a) of the Act.

(h) "Presiding Officer" means the Chief Administrative Law Judge of the Agency or a person designated by the Chief Administrative Law Judge or by the Administrator to preside at a hearing under this part, in accordance with § 104.6 hereof.

§ 104.3 Notice of Hearing; Objection; Public Comment.

(a) *Notice of Hearing.* Whenever the Administrator publishes any proposed effluent standard, he shall simultaneously publish a notice of a public hearing to be held within thirty days following the date of publication of the proposed standard. Any person who has any objection to a proposed standard may file with the hearing clerk a concise statement of any such objection. No person may participate in the hearing on the proposed toxic pollutant effluent standards unless the hearing clerk has received within 25 days of the publication of the notice of the proposed standards a statement of objection as herein described. In exceptional circumstances and for good cause shown the presiding officer may allow an objection to be filed after the filing deadline prescribed in the preceding sentence, which good cause must include at a minimum lack of actual notice on the part of the objector or any representative of such objector of the proposed standards despite his exercise of due diligence, so long as such later filing will not cause undue delay in the proceedings or prejudice to any of the parties.

(b) *Objections.* Any objection to a proposed standard which is filed pursuant to subsection (a) hereof shall meet the following requirements:

(1) It shall be filed in triplicate with the hearing clerk within the time prescribed in paragraph (a) of this section;

(2) It shall state concisely and with particularity each portion of the proposed standard to which objection is taken; to the greatest extent feasible it shall state the basis for such objection;

(3) To the greatest extent feasible it shall (i) state specifically the objector's proposed modification to any such standard proposed by the Agency to which objection is taken, (ii) set forth the reasons why such modification is sought, and (iii) identify and describe the scientific or other basis for such proposed modification, including reference to any pertinent scientific data or authority in support thereof.

Any objection which fails to comply with the foregoing provisions shall not be accepted for filing. The presiding officer shall promptly notify any person whose objection is not accepted for any of the reasons set forth in this section, stating the reasons therefor.

(c) *Data In Support Of Objection Or Modification.* In the event that the time prescribed for filing objections pursuant to paragraphs (a) and (b) of this section is insufficient to permit an objecting party to fully set forth with such objection the basis therefor together with the information and data specified in paragraph (b)(3) of this section, he may so state at the time of the filing of such objection, and file a more complete statement of such basis, information, and data (hereinafter referred to as "supplemental data") within the time prescribed by this paragraph (c). The supplemental data herein described shall be filed not later than 40 days following publication of the proposed effluent standards.

(d) *Public Comment.* The notice required under paragraph (a) of this section shall also provide for the submission to the Agency of written comments on the proposed rulemaking by interested persons not filing objections pursuant to this section as hereinabove described, and hence not participating in the hearing as parties. The notice shall fix a time deadline for the submission of such comments which shall be not later than the date set for commencement of the hearing. Such comments shall be received in evidence at the commencement of the hearing. The Administrator in making any decision based upon the record shall take into account the unavailability of cross-examination in determining the weight to be accorded such comments.

(e) *Promulgation In Absence Of Objection.* If no objection is filed pursuant to this section, then the Administrator shall promulgate the final standards on the basis of the Agency's statement of basis and purpose and any public comments received pursuant to paragraph (d) of this section.

§ 104.4 Statement of basis and purpose.

Whenever the Administrator publishes a proposed effluent standard, the notice thereof published in the FEDERAL REGISTER shall include a statement of the basis and purpose of the standard or a summary thereof. This statement shall include:

(a) The purpose of the proposed standard;

(b) An explanation of how the proposed standard was derived;

(c) Scientific and technical data and studies supporting the proposed standard or references thereto if the materials are published or otherwise readily available; and

(d) Such other information as may be reasonably required to set forth fully the basis of the standard.

Where the notice of the proposed rulemaking summarizes the full statement of basis and purpose, or incorporates documents by reference, the documents thus summarized or incorporated by reference shall thereupon be made available by the Agency for inspection and copying by any interested person.

§ 104.5 Docket and record.

Whenever the Administrator publishes a notice of hearing under this Part, the hearing clerk shall promptly establish a docket for the hearing. The docket shall include all written objections filed by any party, any public comments received pursuant to § 104.3(d), a verbatim transcript of the hearing, the statement of basis and purpose required by § 104.4, and any supporting documents referred to therein, and other documents of exhibits that may be received in evidence or marked for identification by or at the direction of the presiding officer, or filed by any party in connection with the hearing. Copies of documents in the docket shall be available to any person upon payment to the Agency of such charges as the Agency may prescribe to cover the costs of duplication. The materials contained in the docket shall constitute the record.

§ 104.6 Designation of Presiding Officer.

The Chief Administrative Law Judge of the Agency may preside personally at any hearing under this Part, or he may designate another Administrative Law Judge as presiding officer for the hearing. In the event of the unavailability of any such Administrative Law Judge, the Administrator may designate a presiding officer. No person who has any personal pecuniary interest in the outcome of a proceeding under this Part, or who has participated in the development or enforcement of any standard or proposed standard at issue in a proceeding hereunder, shall serve as presiding officer in such proceeding.

§ 104.7 Powers of Presiding Officer.

The presiding officer shall have the duty to conduct a fair hearing within the time constraints imposed by section 307

(a) of the Act. He shall take all necessary action to avoid delay and to maintain order. He shall have all powers necessary to these ends, including but not limited to the power to:

(a) Rule upon motions and requests;

(b) Change the time and place of the hearing, and adjourn the hearing from time to time or from place to place;

(c) Examine and cross-examine witnesses;

(d) Admit or exclude evidence; and

(e) Require any part or all of the evidence to be submitted in writing and by a certain date.

§ 104.8 Prehearing Conferences.

Prehearing conferences are encouraged for the purposes of simplification of issues, identification and scheduling of evidence and witnesses, the establishment of an orderly framework for the proceedings, the expediting of the hearing, and such other purposes of a similar nature as may be appropriate.

(a) The presiding officer on his own motion may, and at the request of any party made within 20 days of the proposal of standards hereunder shall, direct all parties to appear at a specified time and place for an initial hearing session in the nature of a prehearing conference. Matters taken up at the conference may include, without limitation:

(1) Consideration and simplification of any issues of law or fact;

(2) Identification, advance submission, marking for identification, consideration of any objections to admission, and admission of documentary evidence;

(3) Possible stipulations of fact;

(4) The identification of each witness expected to be called by each party, and the nature and substance of his expected testimony;

(5) Scheduling of witnesses where practicable, and limitation of the number of witnesses where appropriate in order to avoid delay or repetition;

(6) If desirable, the segregation of the hearing into separate segments for different provisions of the proposed effluent standards and the establishment of separate service lists;

(7) Encouragement of objecting parties to agree upon and designate lead counsel for objectors with common interests so as to avoid repetitious questioning of witnesses.

(b) The presiding officer may, following a prehearing conference, issue an order setting forth the agreements reached by the parties or representatives, the schedule of witnesses, and a statement of issues for the hearing. In addition such order may direct the parties to file and serve copies of documents or materials, file and serve lists of witnesses which may include a short summary of the expected testimony of each and, in the case of an expert witness, his curriculum vitae, and may contain such other directions as may be appropriate to facilitate the proceedings.

§ 104.9 Admission of Evidence.

(a) Where the presiding officer has directed identification of witnesses and production of documentation evidence by a certain date, the presiding officer may exclude any such evidence, or refuse to allow any witness to testify, when the witness was not identified or the document was not served by the time set by the presiding officer. Any such direction with respect to a party's case in chief shall not preclude the use of such evidence or testimony on rebuttal or response, or upon a showing satisfactory to the presiding officer that good cause existed for failure to serve testimony or a document or identify a witness by the time required. The presiding officer may require direct testimony to be in writing under oath and served by a certain date, and may exclude testimony not so served.

(b) At the first prehearing conference, or at another time before the beginning of the taking of oral testimony to be set by the presiding officer, the statement of basis and purpose, together with any publications or reference materials cited therein, except where excluded by stipulation, shall be received in evidence.

(c) The presiding officer may exclude evidence which is immaterial, irrelevant, unduly repetitious or cumulative, or would involve undue delay, or which, if hearsay, is not of the sort upon which responsible persons are accustomed to rely.

(d) If relevant and material evidence is contained in a report or document containing immaterial or irrelevant matter, such immaterial or irrelevant matter may be excluded.

(e) Whenever written testimony or a document or object is excluded from evidence by the presiding officer, it shall at the request of the proponent be marked for identification. Where oral testimony is permitted by the presiding officer, but the presiding officer excludes particular oral testimony, the party offering such testimony may make a brief offer of proof.

(f) Any relevant and material documentary evidence, including but not limited to affidavits, published articles, and official documents, regardless of the availability of the affiant or author for cross-examination, may be admitted in evidence, subject to the provisions of subsections (a), (c), and (d) of this section. The availability or nonavailability of cross-examination shall be considered as affecting the weight to be accorded such evidence in any decision based upon the record.

(g) Official notice may be taken by the presiding officer or the Administrator of any matter which could be judicially noticed in the United States District Courts, and of other facts within the specialized knowledge and experience of the Agency. Opposing parties shall be given adequate opportunity to show the contrary.

§ 104.10 Hearing Procedures.

(a) Following the admission in evidence of the materials described in § 104.9(b), the Agency shall have the right at the commencement of the hearing to supplement that evidence or to introduce additional relevant evidence. Thereafter the evidence of each objector shall be presented in support of its objection and any proposed modification. The Agency staff shall then be given an opportunity to rebut or respond to the objectors' presentation, including at its option the introduction of evidence which tends to support a standard or standards other than as set forth in the Agency's own initially proposed standards. In the event that evidence which tends to support such other standard or standards is offered and received in evidence, then the objectors may thereafter rebut or respond to any such new evidence.

(b) The burden of proof as to any modification of any standard proposed by the Agency shall be upon the party who advocates such modification to show that the proposed modification is justified based upon a preponderance of the evidence.

(c) Where necessary in order to prevent undue prolongation of the hearing, or to comply with time limitations set forth in the Act, the presiding officer may limit the number of witnesses who may testify, and the scope and extent of cross-examination.

(d) A verbatim transcript of the hearing shall be maintained and shall constitute a part of the record.

(e) If a party objects to the admission or rejection of any evidence or to any other ruling of the presiding officer during the hearing, he shall state briefly the grounds of such objection. With respect to any ruling on evidence, it shall not be necessary for any party to claim an exception in order to preserve any right of subsequent review.

(f) Any party may at any time withdraw his objection to a proposed effluent standard.

§ 104.11 Briefs and Findings of Fact.

At the conclusion of the hearing, the presiding officer shall set a schedule for the submission by the parties of briefs and proposed findings of fact and conclusions. In establishing the aforesaid time schedule, the presiding officer shall consider the time constraints placed upon the parties and the Administrator by the statutory deadlines.

§ 104.12 Certification of Record.

As soon as possible after the hearing, the presiding officer shall transmit to the hearing clerk the transcript of the testimony and exhibits introduced in the hearing. The presiding officer shall attach to the original transcript his certificate stating that, to the best of his knowledge and belief, the transcript is a true transcript of the testimony given at the hearing except in such particulars as he shall specify, and that the exhibits transmitted are all the exhibits as introduced at the hearing with such exceptions as he shall specify.

§ 104.13 Interlocutory and Post-hearing Review of Rulings of the Presiding Officer; Motions.

(a) The presiding officer may certify a ruling for interlocutory review by the Administrator where a party so requests and the presiding officer concludes that (1) the ruling from which review is sought involves an important question as to which there is substantial ground for difference of opinion, and (2) either (i) a subsequent reversal of his ruling would

be likely to result in substantial delay or expense if left to the conclusion of the proceedings, or (ii) a ruling on the question by the Administrator would be of material assistance in expediting the hearing. The certificate shall be in writing and shall specify the material relevant to the ruling certified. If the Administrator determines that interlocutory review is not warranted, he may decline to consider the ruling which has been certified.

(b) Where the presiding officer declines to certify a ruling the party who had requested certification may apply to the Administrator for interlocutory review, or the Administrator may on his own motion direct that any matter be submitted to him for review, subject to the standards for review set forth in paragraph (a) of this section. An application for review shall be in writing and shall briefly state the grounds relied on. If the Administrator takes no action with respect to such application for interlocutory review within 15 days of its filing, such application shill be deemed to have been denied.

(c) Unless otherwise ordered by the presiding officer or the Administrator, the hearing shall continue pending consideration by the Administrator of any ruling or request for interlocutory review.

(d) Unless otherwise ordered by the presiding officer or the Administrator, briefs in response to any application for interlocutory review may be filed by any party within five days of the filing of the application for review.

(e) Failure to request or obtain interlocutory review does not waive the rights of any party to complain of a ruling following completion of the hearing. Within five days following the close of a hearing under this Part, any party may apply to the Administrator for post-hearing review of any procedural ruling, or any ruling made by the presiding officer concerning the admission or exclusion of evidence to which timely objection was made. Within seven days following the filing of any such application any other party may file a brief in response thereto.

(f) If the Administrator on review under paragraph (e) of this section determines that evidence was improperly excluded, he may order its admission without remand for further proceedings, or may remand with such instructions as he deems appropriate concerning cross-examination, or opportunity for any party to submit further evidence, with respect to such evidence as he directs should be admitted. In making his determination whether to remand, the Administrator shall consider whether the statutory time restraints permit a remand, and whether it would be constructive to allow cross-examination or further evidence with respect to the newly admitted evidence. If evidence is admitted without cross-examination, the Administrator shall consider the lack of opportunity for cross-examination in determining the weight to be given such evidence.

(g) Motions shall be brief, in writing, and may be filed at any time following the publication of the proposed effluent standards, unless otherwise ordered by the presiding officer or the Administrator. Unless otherwise ordered or provided in these rules, responses to motions may be filed within seven days of the actual filing of the motion with the hearing clerk.

§ 104.14 Tentative and Final Decision by The Administrator.

(a) As soon as practicable following the certification of the record and the filing by the parties of briefs and proposed findings of fact and conclusions under § 104.11, the Administrator, with such staff assistance as he deems necessary and appropriate, shall review the entire record and prepare and file a tentative decision based thereon. The tentative decision shall include findings of fact and conclusions, and shall be filed with the hearing clerk who shall at once transmit a copy thereof to each party who participated at the hearing, or his attorney or other representative.

(b) Upon filing of the tentative decision, the Administrator may allow a reasonable time for the parties to file with him any exceptions to the tenative decision, a brief in support of such exceptions containing appropriate references to the record, and any proposed changes in the tentative decision. Such materials shall, upon submission, become part of the record. As soon as practicable after the filing thereof the Administrator shall prepare and file a final decision, copies of which shall be transmitted to the parties or their representatives in the manner prescribed in paragraph (a) of this section.

(c) In the event that the Administrator determines that due and timely execution of his functions, including compliance with time limitations established by law, imperatively and unavoidably so requires, he may omit the preparation and filing of the tentative decision and related procedures set forth in paragraph (b) of this section, and shall instead prepare and file a final decision, copies of which shall be transmitted to the parties or their representatives in the manner prescribed in paragraph (a) of this section.

(d) Any decision rendered by the Administrator pursuant to this Section shall include a statement of his findings and conclusions, and the reasons and basis therefor, and shall indicate the toxic pollutant effluent standard or standards which the Administrator is promulgating or intends to promulgate based thereon.

§ 104.15 Promulgation of Standards.

Upon consideration of the record, at the time of his final decision the Administrator shall determine whether the proposed effluent standard or standards should be promulgated as proposed, or whether any modification thereof is justified based upon a proponderance of the evidence adduced at the hearing, regardless of whether or not such modification was actually proposed by any objecting party. If he determines that a modification is not justified, he shall promulgate the standard or standards as proposed. If he determines that a modification is justified, he shall promulgate a standard or standards as so modified.

§ 104.16 Filing and Time.

(a) All documents or papers required or authorized by the foregoing provisions of this Part including, but not limited to, motions, applications for review, and briefs, shall be filed in duplicate with the hearing clerk, except as otherwise expressly provided in these rules. Any document or paper so required or authorized to be filed with the hearing clerk, if it is filed during the course of the hearing, shall be also filed with the presiding officer. A copy of each document or paper filed by any party with the presiding officer, with the hearing clerk, or with the Administrator shall be served upon all other parties, except to the extent that the list of parties to be so served may be modified by order of the presiding officer, and each such document or paper shall be accompanied by a certificate of such service.

(b) A party may be represented in any proceeding under this Part by an attorney or other authorized representative. When any document or paper is required under these rules to be served upon a party such service shall be made upon such attorney or other representative.

(c) Except where these rules or an order of the presiding officer require receipt of a document by a certain date, any document or paper required or authorized to be filed by this Part shall be deemed to be filed when postmarked, or in the case of papers delivered other than by mail, when received by the hearing clerk.

(d) Sundays and legal holidays shall be included in computing the time allowed for the filing of any document or paper, provided, that when such time expires on a Sunday or legal holiday, such period shall be extended to include the next following business day.

[FR Doc.76-12386 Filed 4-28-76;8:45 am]

Title 42—Public Health

CHAPTER I—PUBLIC HEALTH SERVICE, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PART 57—GRANTS FOR CONSTRUCTION OF HEALTH RESEARCH FACILITIES (INCLUDING MENTAL RETARDATION RESEARCH FACILITIES), TEACHING FACILITIES, STUDENT LOANS, EDUCATIONAL IMPROVEMENT AND SCHOLARSHIPS

Subpart AC—Grants To Assist Medical and Dental Schools in the District of Columbia

In the FEDERAL REGISTER of May 5, 1975 (40 FR 19482), the Assistant Secretary for Health, with the approval of the Secretary of Health, Education, and Welfare, proposed to amend Part 57 of Title 42, Code of Federal Regulations, by adding thereto a new Subpart AC to implement the District of Columbia Medical and Dental Manpower Act of 1970, as amended (P.L. 91-650, 84 Stat. 1934, D.C. Code Sec. 31-921 et seq.). That Act authorizes the Secretary to award grants to the Mayor of the Dis-

trict of Columbia to assist private nonprofit medical and dental schools in the District of Columbia in their critical financial needs in meeting the operational costs required to maintain quality medical and dental educational programs and to increase the number of students in such institutions as a necessary health manpower service to the metropolitan area of the District of Columbia.

Interested persons were afforded the opportunity to participate in the rulemaking through submission of comments on or before June 4, 1975. The following is a summary of the comments received and the response to such comments:

1. Several comments concerned the role of the Mayor in applying for grants on behalf of beneficiary schools and suggested a number of changes in proposed § 57.2803 and § 57.2804(a) which would limit the Mayor's role in the process by requiring the Mayor to submit applications for assistance within a specified time after receiving a formal request from eligible beneficiary schools. While under section 304 of the Act (P.L. 91–650, sec. 304; D.C. Code sec. 31–923) the Secretary has the authority to set dates for the submission of applications by the Mayor, the Secretary does not have the authority by regulation to mandate that such applications be submitted. The proposed changes therefore have not been made.

Such comment also suggested a number of other changes which would have resulted in payments being made directly to beneficiary schools rather than to the Mayor. Under section 307 of the Act (P.L. 91–650, sec. 307; D.C. Code sec. 31–926), it is the responsibility of the Mayor after determining that the requirements of section 308 of the Act are met to make payments to the beneficiary schools. Accordingly, the suggested changes have not been accepted.

2. Section 57.2804 of the proposed regulations ("Application") generated several comments with respect to the information which a request for assistance under this subpart must contain. One comment suggested specifying that in submitting information concerning operating costs and projected income a school be permitted to use such budget categories as it would ordinarily use for accounting purposes. It was the Department's intention that in compliance with § 57.2804(c)(2) of the proposed regulations schools would follow their own accepted format in providing budgetary information. However, § 57.2804(c) (2) and (3) of the final regulations have been revised to clarify this.

The same comment also suggested that the school submit the budgetary information at the beginning of the fiscal year in which the assistance is sought so that the schools can receive payments on a quarterly basis and forstall borrowing to meet recurring operating costs. The Department recognizes the need for the timely disbursement of funds under this authority. However, in order to comply with the statutory requirements for the making of grants, including determinations concerning the amount of funds to be made available and the existence of adequate fiscal control and accounting procedures, the entire application, including the budgetary information, must be submitted and approved before funds are made available. The suggestion therefore has not been adopted. The Department will seek to meet the concern expressed by the comment, however, by the solicitation of applications as early in the fiscal year as practicable.

One comment suggested deleting as unnecessary the requirements of proposed § 57.2804(c)(4) that a school requesting assistance under this program submit a budgetary statement for that portion of the fiscal year ending 60 days before the submission of the application. The Department has reconsidered the usefulness of such information and has decided, in agreement with the comment, to delete this requirement.

Another comment sought the deletion of § 57.2804(c)(5) of the proposed regulation requiring a school to submit a statement identifying by budget category those operating costs for which assistance is requested, the amount thereof, and the manner in which the school intends to utilize funds made available from an award under this subpart, on the ground that the statute authorizes financial assistance to meet all regular operating costs of the schools. The statute, however, clearly authorizes the Secretary to make grants to the Mayor on behalf of the schools "in amounts the Secretary determines to be the minimum amounts necessary to carry out the purposes of this title" (P.L. 91–650, sec. 303; D.C. Code sec. 31–922). Such purposes are "to assist private nonprofit medical and dental schools in the District of Columbia in their critical financial needs in meeting operational costs required to maintain quality medical and dental educational programs and to increase the number of students in such institutions as a necessary health manpower service to the metropolitan area of the District of Columbia" (P.L. 91–650, sec. 302; D.C. Code sec. 31–921). Inasmuch as the statute requires the Secretary to make a determination as to the minimum amount of assistance necessary for each school under this program, the Secretary needs information from the schools concerning the operating costs for which the schools needs assistance. Therefore, the regulations will continue to require a statement identifying those operating costs for which assistance is requested and the amount thereof, although they will not require specification of the manner in which the school intends to use the funds made available under this program, since such funds are clearly to be used to meet identified operating costs. (See § 57.2804(c)(4) of the final regulations.)

Finally, § 57.2804 of the proposed regulations has been revised by adding a provision allowing a school to submit evidence of any operating costs necessary to maintain quality or to increase enrollment which are not included in its operating budget. (See § 57.2804(c)(5) of the final regulations.) The purpose of this provision is to enable a school which, due to its financial situation, has an operating budget providing for only the most critical needs of the school to request assistance for additional operating costs necessary to maintain quality educational programs or to increase enrollment. Information provided under this provision thus will be considered by the Secretary in determining the amount of assistance for the school.

3. One comment expressed the view that the purpose of the program is to meet the operating costs of the schools up to the maximum amount per student provided in the statutory formula and that, therefore, § 57.2806(a) of the proposed regulations, "Grant award," which provides for the amount of the grant to the Mayor to be based on the Secretary's estimate of the minimum aggregate sums necessary to carry out the purposes of each school's approved application, should be revised. As indicated above, however, the statute requires the Secretary to make such a determination in awarding grants under this subpart (P.L. 91–650, sec. 303; D.C. Code sec. 31–922), and therefore the requested revision has not been made.

4. Section 57.2807(b) of the proposed regulations provided that a beneficiary school could expend funds received under this program "for any purpose necessary to meet properly considered regular operating costs of the school the obligation for which is incurred in the fiscal year in which the grant is made which are required to maintain quality medical and dental educational programs and to increase the number of students in such school as a necessary health manpower service to the metropolitan area of the District of Columbia," except construction and student aid.

A comment pointed out, however, that student aid costs are an integral part of the operating costs of institutions and should be included as costs for which funds are available under the Act. Student aid costs were excluded from eligible expenditures in the proposed rulemaking on the basis of the decision that such costs should be paid from the existing programs of Federal assistance for student aid under Title VII of the Public Health Service Act. Having reconsidered this decision in light of the comment and the congressional intent that the support provided under this Act be in addition to sources of support under the Public Health Service Act, the restriction against the use of funds for student aid has been deleted.

5. With respect to § 57.2810(b) of the proposed regulations concerning the accountability of beneficiary schools for assistance payments, one comment suggested revising the provision to permit the schools to commingle assistance payments with other income available to them and to relieve the schools from having to account for such payments in separate accounting records. In accordance with the relevant provisions of Subpart B of 45 CFR Part 74, which are applicable to assistance made available under this

subpart by virtue of § 57.2811 of the proposed regulations, the Department does not require the physical segregation of such funds. It is therefore unnecessary to state in § 57.2810(b) that the schools may commingle such funds with other available funds. Regarding the accounting requirements of this provision, it is necessary for the schools to keep separate records of the assistance payments so that the Secretary can administer the program properly and determine whether such payments were expended in accordance with the statute and regulations. For this reason, the provision in question has not been revised.

6. One comment concerned § 57.2809 (b) of the proposed regulations which called attention to the requirements of Title IX of the Education Amendments of 1972 prohibiting discrimination on the basis of sex under any education program or activity receiving Federal financial assistance. Noting that under the regulations implementing Title IX which were published in the FEDERAL REGISTER on June 4, 1975 (40 FR 24127), admission to professional programs offered at private undergraduate schools is exempt from coverage (45 CFR § 86.15 (d), the commenter suggested that § 57.2809 of the proposed regulations be amended to cover private undergraduate schools insofar as such schools are recipients of funds under the District of Columbia Medical and Dental Manpower Act of 1970. Such schools, however, are not eligible for support under the statute, since only private nonprofit medical and dental schools, as defined in § 57.2802 (e) and (f) of the proposed regulations, located in the District of Columbia are eligible for assistance. As institutions of professional education (see 45 CFR § 86.2(m)), such medical and dental schools are covered by the Title IX regulations. The commenter's proposal therefore has not been adopted.

In addition to the changes described above, the proposed regulations have been revised as follows:

1. Section 57.2806(b) of the proposed regulations has been revised to state explicitly the statutory requirement that in determining the amount of funds to be made available by the Mayor to each beneficiary school, the Secretary shall take into consideration any grants made to such school pursuant to the portion of the program under section 773 of the Public Health Service Act relating to financial assistance to schools which are in serious financial straits to aid them in meeting their costs of operation.

2. In accordance with the Department's decision to make explicit in regulations for health manpower and nurse training programs the existing constitutional prohibition against Federal assistance for sectarian instruction or other religious activities, expressed for example in the Supreme Court opinion in Tilton v. Richardson, 403 U.S. 672 (1970), § 57.2807(b) of the proposed regulations has been revised to prohibit beneficiary schools from using funds made available under the District of Columbia Medical and Dental Manpower Act of 1970 for religious purposes. The Department previously has taken the approach of specifying that grant funds may not be used for religious activities in the regulations governing financial distress grants to schools of nursing under section 815 of the Public Health Service Act which were published in the FEDERAL REGISTER on December 4, 1975 (40 FR 56664).

In addition, § 57.2809 of the proposed regulations, "Nondiscrimination," has been revised to include a provision prohibiting beneficiary schools from discriminating on the basis of religion in the admission of individuals to their training programs inasmuch as the Department considers such discriminatory practices to be contrary to the educational objectives of the program of assistance for medical and dental schools in the District of Columbia. The purpose of the program is to assist such schools in their critical financial needs in order that they may continue to provide quality medical and dental educational programs and thereby maintain a necessary health manpower resource for the Nation and the District of Columbia. Any medical or dental school which denies admission to qualified applicants for reasons unrelated to their qualification for the training involved, such as religion or creed, is less effective in meeting health manpower needs in that it arbitrarily excludes an element of the population which otherwise would be available to provide necessary medical and dental services. Moreover, the capacity of such a school will not be utilized to the extent it would be were its students freely selected from among those persons best qualified to pursue its training program. It is on this basis that the Department has decided to include provisions relating to religious nondiscrimination in regulations for health manpower and nurse training programs. (See regulations for financial distress grants to schools of nursing in the FEDERAL REGISTER of December 4, 1975 (40 FR 56664).)

3. Section 57.2807(b) of the proposed regulations provided that funds made available to a beneficiary school under this program would be available through December 31 of the fiscal year following the fiscal year in which the grant is made to the Mayor to liquidate obligations incurred by the beneficiary in accordance with the regulations. The Department recognizes, however, that in some instances a school may not be able to liquidate all of its properly incurred obligations by the date specified in the regulations due to circumstances beyond its control. For this reason § 57.2807(b) of the proposed regulations has been revised to provide that the Secretary may for good cause shown allow the beneficiary an additional period of time, not to exceed six months, in which to liquidate such obligations.

4. Several minor changes of an editorial or technical nature have also been made in the final regulations.

Accordingly, a new Subpart AC is added to Part 57 of Title 42, Code of Federal Regulations, and is adopted as set forth below.

Effective date: These regulations are effective upon April 29, 1976.

Dated: March 3, 1976.

THEODORE COOPER,
Assistant Secretary for Health.

Approved: April 23, 1976.

MARJORIE LYNCH,
Acting Secretary.

Subpart AC—Grants To Assist Medical and Dental Schools in the District of Columbia

Sec.

57.2801 Applicability.
57.2802 Definitions.
57.2803 Eligibility.
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AUTHORITY: Sec. 215, 58 Stat. 690, as amended (42 U.S.C. 216); sec. 301, Pub. L. 91-650, as amended, 84 Stat. 1934 (D.C. Code sec. 31-921 et seq.).

Subpart AC—Grants To Assist Medical and Dental Schools in the District of Columbia

§ 57.2801 Applicability.

The regulations of this subpart are applicable to the award of grants to the Mayor of the District of Columbia under the District of Columbia Medical and Dental Manpower Act of 1970, as amended (Pub. L. 91-650, 84 Stat. 1934, D.C. Code sec. 31-921 et seq.), to assist private nonprofit medical and dental schools in the District of Columbia in their critical financial needs in meeting the operational costs required to maintain quality medical and dental educational programs and to increase the number of students in such institutions as a necessary health manpower service to the metropolitan area of the District of Columbia.

§ 57.2802 Definitions.

As used in this subpart:

(a) "Act" means the District of Columbia Medical and Dental Manpower Act of 1970, as amended.

(b) "Secretary" means the Secretary of Health, Education, and Welfare and any other officer or employee of the Department of Health, Education, and Welfare to whom the authority involved has been delegated.

(c) "Mayor" means the Mayor (formerly referred to as the Commissioner) of the District of Columbia.

(d) "Grantee" means the Mayor (formerly referred to as the Commissioner) of the District of Columbia.

(e) "School of medicine" means a school in the District of Columbia which provides training leading to a degree of doctor of medicine or an equivalent degree, and which is accredited by a recognized body or bodies approved for such purpose by the Commissioner of Education.

(f) "School of dentistry" means a school in the District of Columbia which

provides training leading to a degree of doctor of dentistry or an equivalent degree and which is accredited by a recognized body or bodies approved for such purpose by the Commissioner of Education.

(g) "School" means a school of medicine or school of dentistry as defined in paragraph (e) and (f) of this section.

(h) "Nonprofit" as applied to any school means one which is owned and operated by one or more corporations or associations no part of the net earnings of which inures or may lawfully inure to the benefit of any private shareholder or individual.

(i) "Full-time students" means students pursuing a full-time course of study, as determined by the school, in an accredited school of medicine or school of dentistry, leading to a degree of doctor of medicine, doctor of dentistry, or an equivalent degree.

(j) "Fiscal year" means the Federal fiscal year beginning July 1 and ending the following June 30.

(k) "Construction" means the construction of new buildings or the expansion or acquisition of existing buildings (including related costs such as architects' fees, acquisition of land, offsite improvements, and the initial equipping of such buildings).

§ 57.2803 Eligibility.

The Mayor may apply for a grant under this subpart on behalf of schools of medicine and dentistry, as defined in paragraphs (e) and (f) of § 57.2802, with operating income insufficient to meet their cost of operation required to maintain quality medical and dental educational programs and to increase the number of students in such institutions as a necessary health manpower service to the metropolitan area of the District of Columbia.

§ 57.2804 Application.

(a) An application for a grant under this subpart may be submitted to the Secretary by the Mayor at such time and in such form and manner as the Secretary may require.[1]

(b) The application shall be executed by the Mayor or by an individual authorized to act for the Mayor and to assume on his behalf the obligations imposed upon the Mayor by the terms and conditions of any award, including the regulations of this subpart.

(c) In addition to such other pertinent information as the Secretary may require, the application submitted by the Mayor shall contain or be supported by requests for assistance from each proposed beneficiary school each of which request shall be executed by an individual authorized to act for the school and to assume on its behalf the obligations imposed upon beneficiary schools by the terms and conditions of any award, including the regulations of this subpart. Such requests for assistance shall contain the following information in addition to such information as the Mayor may require in carrying out his responsibilities under this Act:

(1) A detailed description of the school's financial need to meet the operational costs (i) to maintain a quality medical or dental educational program and (ii) to increase the number of students in the school as a necessary health manpower service to the metropolitan area of the District of Columbia;

(2) The operating budget of the school, as approved by the Board of Trustees or other officials of the school responsible for approving such budget and arranged according to the budget categories currently in use by such school, for the fiscal year in which the assistance is sought;

(3) A statement, arranged according to the budget categories currently in use by the school, identifying by source (Federal and non-Federal) the projected total income of the school for the fiscal year in which the assistance is sought;

(4) A statement identifying by the budget categories currently in use by the school those operating costs for which assistance is requested and the amount thereof.

(5) A statement identifying the operational costs, if any, required to maintain a quality medical or dental educational program and to increase the number of students in the school as a necessary health manpower service to the metropolitan area of the District of Columbia, which are not included in the operating budget of the school as described in paragraph (c)(2) of this section and for which such school desires assistance.

(d) Such application may contain comments or recommendations from the Mayor on each school's request for assistance, particularly requests to meet operational costs to increase the number of students in the school as a necessary health manpower service to the metropolitan area of the District of Columbia.

§ 57.2805 Determination of number of students.

For purposes of this subpart, the number of full-time students enrolled in a school for any year shall be the number of full-time students enrolled in such school on October 15 of the fiscal year in which the grant is sought.

§ 57.2806 Grant award.

(a) Within the limits of funds available for such purpose, the Secretary may award a grant to the Mayor on the basis of the Secretary's estimate of the minimum aggregate sums necessary to carry out the purposes of each beneficiary school's application for assistance as approved by the Secretary: *Provided*, That the amount of such grant shall not exceed the sum of (1) the product of $5,000 times the number of full-time students enrolled in schools of medicine and (2) the product of $3,000 times the number of students in schools of dentistry.

(b) A grant awarded to the Mayor under this subpart shall be in writing, shall set forth the aggregate amount of funds granted, and the amount determined by the Secretary to be made available by the Mayor to each beneficiary school, such determination to be made by the Secretary on the basis of his estimate of the minimum amount necessary to carry out the purposes of the beneficiary's application as approved by the Secretary, and taking into consideration (1) any grants made to such beneficiary pursuant to the portion of the program under section 773 of the Public Health Service Act relating to financial assistance to schools which are in serious financial straits to aid them in meeting their costs of operation, and (2) any comments or recommendations made by the Mayor: *Provided*, That the amount of assistance to be made available to any beneficiary school under this subpart shall not exceed (1) in the case of a school of medicine, the product of $5,000 times the number of full-time students enrolled therein; or (2) in the case of a school of dentistry, the product of $3,000 times the number of full-time students enrolled therein.

(c) In addition to such other terms and conditions as the Secretary determines to be reasonable and necessary to carry out the purposes of the grant, a grant made under this subpart shall be subject to the following requirements: (1) That the Mayor agree to provide access to such records as the Secretary may from time to time require in carrying out his functions under this subpart, and (2) that the beneficiary schools agree to provide for such fiscal control, accounting procedures, reports and access to records as the Secretary may from time to time require in carrying out his functions under this subpart.

§ 57.2807 Expenditure of grant funds.

(a) *Grantee.* Grant funds awarded to the Mayor under this subpart may be expended by the Mayor solely for making assistance payments to beneficiary schools in accordance with the determination of the Secretary pursuant to this subpart. The grant award will set forth the period for which such funds will be available for such payment by the grantee.

(b) *Beneficiary schools.* Assistance made available to a beneficiary school from grant funds awarded under this subpart may be expended by such school in accordance with the applicable provisions of the Act, the regulations of this subpart and the applicable terms and conditions of any grant award, for any purpose necessary to meet properly considered regular operating costs of the school the obligation for which is incurred in the fiscal year in which the grant is made which are required to maintain quality medical and dental educational programs and to increase the number of students in such school as a necessary health manpower service to the metropolitan area of the District of Columbia: *Provided*, That such funds shall not be expended for construction;

[1] Applications and instructions may be obtained from the Office of Program Operations, Bureau of Health Manpower, Health Resources Administration, 9000 Rockville Pike, Building 31, Room 4C-02, Bethesda, Maryland 20014.

and, *Provided, further,* That such funds shall not be expended for sectarian instruction or for any religious purpose. Such funds will be available through December 31 of the fiscal year following the fiscal year in which the grant is made to the Mayor to liquidate obligations incurred by the beneficiary in accordance with the preceding sentence. The Secretary may for good cause shown provide the beneficiary an additional period of time, not to exceed 6 months, in which to liquidate such obligations.

§ 57.2808 Grant payments.

The Secretary shall from time to time make payments to the grantee of all or such portion of any grant award as is necessary for the grantee to make payments to beneficiary schools in accordance with section 309 of the Act (D.C. Code sec. 31–928).

§ 57.2809 Nondiscrimination.

(a) Attention is called to the requirements of Title VI of the Civil Rights Act of 1964 (78 Stat. 252, 42 U.S.C. 2000d et seq.) and in particular to section 601 of such Act which provides that no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. A regulation implementing such Title VI, which is applicable to grants made under this subpart, has been issued by the Secretary with the approval of the President (45 CFR Part 80).

(b) Attention is called to the requirements of Title IX of the Education Amendments of 1972 and in particular to section 901 of such Act which provides that no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. A regulation implementing such Title IX, which is applicable to grants made under this subpart, has been issued by the Secretary with the approval of the President (45 CFR Part 86).

(c) Attention is called to the requirements of section 504 of the Rehabilitation Act of 1973, as amended, which provides that no otherwise qualified handicapped individual in the United States shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

(d) No beneficiary school shall discriminate on the basis of religion in the admission of individuals to its training programs.

(e) Grant funds used for alteration or renovation shall be subject to the condition that the beneficiary school shall comply with the requirements of Executive Order 11246, 30 FR 12319 (Sept. 24, 1965), as amended, and with the applicable rules, regulations, and procedures prescribed pursuant thereto.

§ 57.2810 Accountability.

(a) *Grantee.*—(1) *Accounting for grant award payments.* All payments made to the grantee by the Secretary shall be recorded by the grantee in accounting records separate from the records of all other funds, including funds derived from other grant awards. The grantee shall account for the sum total of all amounts paid by presenting or otherwise making available evidence satisfactory to the Secretary of expenditures meeting the requirements of this subpart.

(2) *Grant closeout*—(i) *Date of final accounting.* The grantee shall render, with respect to each grant, a full account, as provided herein, as of the date of the termination of grant support. The Secretary may require other special and periodic accounting.

(ii) *Final settlement.* There shall be payable to the Federal government as final settlement with respect to each grant the total sum of:

(A) Any amount not accounted for pursuant to subparagraph (1) of this paragraph; and

(B) Any other amounts due pursuant to applicable provisions of 45 CFR Part 74.

Such total sum shall constitute a debt owed by the grantee to the Federal government and shall be recovered from the grantee or its successors or assigns by set off or other action as provided by law.

(b) *Beneficiary schools.*—(1) *Accounting for assistance payments.* All payments made to beneficiary schools by the Mayor shall be recorded by the beneficiary school in accounting records separate from the records of all other funds. With respect to each approved application for assistance, the beneficiary shall account for the total of all amounts paid by presenting or otherwise making available evidence satisfactory to the Secretary of expenditures meeting the requirements of this subpart.

(2) *Assistance closeout*—(i) *Date of final accounting.* A beneficiary shall render, with respect to each approved application for assistance, a full account, as provided herein, as of the date of termination of such support. The Secretary may require other special and periodic accounting. (ii) *Final settlement.* There shall be payable to the Federal Government as final settlement with respect to any approved application the total sum of:

(A) Any amount not accounted for pursuant to subparagraph (1) of this paragraph; and

(B) Any other amounts due pursuant to Subparts F and M of 45 CFR Part 74.

Such total sum shall constitute a debt owed by the beneficiary school to the Federal government and shall be recovered from the beneficiary school or its successors or assigns by setoff or other action as provided by law.

§ 57.2811 Applicability of 45 CFR Part 74.

(a) *Grantee.* The provisions of 45 CFR Part 74, establishing uniform administrative requirements and cost principles, shall apply to all grants awarded pursuant to this subpart.

(b) *Beneficiary schools.* The relevant provisions of the following subparts of 45 CFR Part 74, establishing uniform administrative requirements and cost principles, shall apply to assistance made available from grants awarded pursuant to this subpart.

SUBPART

A General
B Cash depositories
C Bonding and Insurance
D Retention and Custodial Requirements for Records
F Grant-related Income
L Budget Revision Procedures
M Grant Closeout, Suspension and Termination

§ 57.2812 Additional conditions.

The Secretary may, with respect to any grant award, impose additional conditions prior to or at the time of any award when, in his judgment, such conditions are necessary to assure or protect advancement of the approved activity, the interest of the public health, or the conservation of grant funds.

[FR Doc.76–12475 Filed 4–28–76;8:45 am]

Title 43—Public Lands: Interior

CHAPTER II—BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR

PART 2650—ALASKA NATIVE SELECTIONS

Correction

In FR Doc. 76–9868 appearing at page 14734 in the issue for Wednesday, April 7, 1976, the following corrections should be made:

A. On page 14737:

1. In the first column, the signature should read: "Thomas S. Kleppe, Secretary of the Interior."

2. In the first column, the twenty-fourth line of § 2650.7(d), the word "situation" should read "situated".

3. In the first column, the thirty-second line of § 2650.7(d), the word "stat" should read "state".

4. In the third column, the tenth line of § 2653.3(a), the word "Refugee" should read "Refuge".

B. On page 14739, in the first column, the tenth line of § 2653.5(k) which reads "served on the applicant and all parties of" should read: "§ 2653.5(b) are raised by the reports of".

Title 46—Shipping

CHAPTER I—COAST GUARD, DEPARTMENT OF TRANSPORTATION

[CGD 75–032]

"B" Class Bulkheads

A notice of proposed rulemaking that proposed the deletion of the words "and smoke" from the definitions of "B" class bulkheads in the rules for the construction of tank vessels, cargo and miscellaneous vessels, and oceanographic vessels was published in the FEDERAL REGISTER on December 22, 1975 (40 FR 59219). Interested persons were invited to submit written comments before Feb-

ruary 5, 1976. One comment was received. The comment was favorable and recommended adoption of the proposal.

In consideration of the foregoing, Parts 32, 92, and 190 of Title 46, Code of Federal Regulations are amended as follows:

PART 32—SPECIAL EQUIPMENT, MACHINERY, AND HULL REQUIREMENTS

1. In § 32.57–5(c), delete the words "and smoke" from the second sentence.

PART 92—CONSTRUCTION AND ARRANGEMENT

2. In § 92.07–5(c), delete the words "and smoke" from the second sentence.

PART 190—CONSTRUCTION AND ARRANGEMENT

3. In § 190.07–5(c), delete the words "and smoke" from the second sentence.

(46 U.S.C. 375, 391a, and 416; 49 U.S.C. 1655(b); and 49 CFR 1.4(b) and 1.46)

Effective date: May 31, 1976.

Dated: April 15, 1976.

O. W. SILER,
Admiral,
U.S. Coast Guard Commandant.

[FR Doc.76–12115 Filed 4–28–76;8:45 am]

[CGD 75–105]

PART 105—COMMERCIAL FISHING VESSELS DISPENSING PETROLEUM PRODUCTS

Vessels of Not More Than 5000 Gross Tons, Used in Processing and Assembling of Fishery Products Having on Board Inflammable or Combustible Cargoes in Bulk

On December 22, 1975, the Coast Guard published a notice of proposed rulemaking in the FEDERAL REGISTER (40 FR 59219) proposing amendments to the regulations for commercial fishing vessels dispensing petroleum products in 46 CFR Part 105. The amendments concern the inclusion under these regulations of vessels of not more than 5000 gross tons, used in the processing and assembling of fishery products in the fisheries of the States of Oregon, Washington, and Alaska, if they have on board inflammable or combustible cargo in bulk. Interested persons were given the opportunity to submit, not later than February 4, 1976, data, views, and recommendations regarding these proposed rules.

No comments have been received and the proposed rules are adopted without change and are set forth below.

Effective date. These amendments become effective on May 31, 1976.

Dated: April 15, 1976.

O. W. SILER,
Admiral,
U.S. Coast Guard Commandant.

1. Section 105.01–1 is revised to read as follows:

§ 105.01–1 Purpose.

The purpose of the regulations in this part is to provide adequate safety in the transporting and handling of inflammable or combustible cargo in bulk on board certain commercial fishing vessels and tenders, as authorized by 46 U.S.C. 391a (Tanker Act; R.S. 4417a), as amended by section 4 of Pub. L. 90–397 (approved July 11, 1968, 82 Stat. 341) and section 6(3) of Pub. L. 93–430 (approved October 1, 1974, 88 Stat. 1183). The regulations in this part set forth minimum requirements for two categories of commercial fishing vessels and tenders which have on board inflammable or combustible cargo in bulk.

2. Section 105.01–5 is revised to read as follows:

§ 105.01–5 Intent of Pub. L. 90–397 (approved July 11, 1968, 82 Stat. 341) and Pub. L. 93–430 (approved October 1, 1974, 88 Stat. 1180).

(a) Pub. L. 90–397 allowed cannery tenders, fishing tenders, and fishing vessels of not more than 500 gross tons used in the salmon or crab fisheries of the States of Oregon, Washington, and Alaska when engaged exclusively in the fishing industry, to have on board inflammable or combustible cargo in bulk to the extent and upon conditions as might be required by regulations promulgated by the Secretary of the department in which the Coast Guard is operating.

(b) Pub. L. 93–430 allowed vessels of not more than 5000 gross tons used in the processing and assembling of fishery products in the fisheries of the States of Oregon, Washington, and Alaska to have on board inflammable or combustible cargo in bulk to the extent and upon conditions as might be required by regulations promulgated by the Secretary of the department in which the Coast Guard is operating.

3. Section 105.01–10 is amended by revising paragraph (a) to read as follows:

§ 105.01–10 Effective date of regulations.

(a) Amendments, revisions, or additions to the regulations in this part will become effective 90 days after the date of publication in the FEDERAL REGISTER, unless the Commandant directs otherwise.

* * * * *

§ 105.05–1 [Amended]

4. Section 105.05–1 is amended by:

a. In paragraph (a), inserting the words "and all vessels of not more than 5000 gross tons used in the processing and assembling of fishery products in the fisheries of the States of Oregon, Washington, and Alaska, the construction of which is contracted for on or after May 31, 1976" between the numerals "1969" and the word "which."

b. In paragraph (b), inserting the words "and all vessels of not more than 5000 gross tons used in the processing and assembling of fishery products in the fisheries of the States of Oregon, Washington, and Alaska, the construction of which is contracted for prior to May 31, 1976" between the numerals "1969" and the word "which."

5. Section 105.05–3 is amended by revising it to read as follows:

§ 105.05–3 New vessels and existing vessels for the purpose of application of regulations in this part.

(a) *New vessels.* In the application of the regulations in this part, the term "new vessels" means any commercial fishing vessel of not more than 500 gross tons used in the salmon or crab fisheries of Oregon, Washington, or Alaska, the construction of which is contracted for on or after December 1, 1969, and vessels of not more than 5000 gross tons used in the processing and assembling of fishery products in the fisheries of the States of Oregon, Washington, and Alaska, the construction of which is contracted for on or after May 31, 1976.

(b) *Existing vessels.* In the application of the regulations in this part, the term "existing vessels" means any commercial fishing vessel of not more than 500 gross tons used in the salmon or crab fisheries of Oregon, Washington, or Alaska, the construction of which is contracted for prior to December 1, 1969, and vessels of not more than 5000 gross tons used in the processing and assembling of fishery products in the fisheries of the States of Oregon, Washington, and Alaska, the construction of which is contracted for prior to May 31, 1976.

6. Section 105.05–5 is revised to read as follows:

§ 105.05–5 Types of vessels.

(a) The only types of commercial fishing vessels to which the provisions of this part apply are self-propelled manned vessels with one of the following:

(1) Permanently installed dispensing tanks or containers on open decks.

(2) Permanently installed dispensing tanks or containers located below deck or in closed compartments.

(3) Temporary dispensing tanks or containers installed on open decks.

7. Section 105.10–25 is amended by revising it to read as follows:

§ 105.10–25 Commercial fishing vessel.

(a) The term "commercial fishing vessel" includes fishing vessels, cannery tenders, fishing tender vessels, and vessels processing or assembling fishery products.

8. Section 105.90–1 is amended by: revising the section heading and revising the introductory portion of paragraph (b) to read as follows:

§ 105.90–1 Existing commercial fishing vessels dispensing petroleum products.

* * * * *

(b) Existing vessels must meet the following requirements:

(1) * * *

* * * * *

(88 Stat. 1183 (46 U.S.C. 391a); 49 CFR 1.46(o)(4))

[FR Doc.76–12116 Filed 4–28–76;8:45 am]