

NADA No.:	Drug name and form
30-314	Selenium, vitamin E for injection.
30-315	Selenium, vitamin E injection.
30-316	Do.
31-555	Trypsin-Peru balsam-castor oil (topical) liquid.
31-971	Copper glycinate, polyvinylpyrrolidone injection.
40-322	Neomycin palmitate-hydrocortisone acetate-trypsin - chymotrypsin ointment.
46-288	Pyriminyl maleate injection.
46-588	Pentobarbital sodium injection.
48-854	Glyceryl guaiacolate injection.

Amendment of the regulations to reflect this change does not require a re-evaluation of the NADA's nor does it constitute a reaffirmation of the drug's safety and effectiveness.

Therefore, under the Federal Food, Drug, and Cosmetic Act (sec. 512(i), 82 Stat. 347 (21 U.S.C. 360b(i))) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.1), § 510.600 is amended in paragraph (c) (1) and (2) by revising the entry for Burns-Biotec to reflect the new address, as follows:

§ 510.600 Names, addresses, and code numbers of sponsors of approved applications.

(c) ***	
(1) ***	
Drug Listing No.	Firm name and address
000845	Burns-Biotec Laboratories Division Chromalloy Pharmaceuticals, Inc., 8530 K St., P.O. Box 3113, Omaha, Nebr. 68103.
(2) ***	
Drug Listing No.	Firm name and address
000845	Burns-Biotec Laboratories Division, Chromalloy Pharmaceuticals, Inc., 8530 K St., P.O. Box 3113, Omaha, Nebr.

Effective date: December 16, 1977.
(Sec. 512(i), 82 Stat. 347 (21 U.S.C. 360b(i))).

Dated: December 7, 1977.

FRED J. KINGMA,
Acting Director, Bureau
of Veterinary Medicine.

[FR Doc. 77-35706 Filed 12-15-77; 8:45 am]

[4110-03]

PART 524—OPHTHALMIC AND TOPICAL DOSAGE FORM NEW ANIMAL DRUGS NOT SUBJECT TO CERTIFICATION

Neomycin Sulfate-Sulfacetamide Sodium-Hydrocortisone Acetate Ophthalmic Ointment

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The animal drug regulations are amended to reflect approval of a new animal drug application (NADA) filed by Byk-Gulden, Inc., providing for use of a combination drug for treating certain eye conditions in cats and dogs.

EFFECTIVE DATE: December 16, 1977.

FOR FURTHER INFORMATION CONTACT:

Henry C. Hewitt, Bureau of Veterinary Medicine (HFV-112), Food and Drug Administration, Department of Health, Education, and Welfare, 5600 Fishers Lane, Rockville, Md. 20857, 301-443-3430.

SUPPLEMENTARY INFORMATION: Byk-Gulden, Inc., Catiague Rock Rd., P.O. Box 730, Hicksville, N.Y. 11802, filed an NADA (47-090V) providing for use of neomycin sulfate-sulfacetamide sodium-hydrocortisone acetate ophthalmic ointment in local treatment of inflammation and infections of the eye in dogs and cats. This application reflects the NAS/NRC evaluation of a similar product.

This application concerns a product that is similar to one that was evaluated by the National Academy of Sciences/National Research Council (NAS/NRC), Drug Efficacy Study Group and published in the FEDERAL REGISTER of August 25, 1970 (35 FR 13543). The evaluated product (DESI 10471V) contained neomycin sulfate, sulfacetamide sodium, and prednisolone acetate. The NAS/NRC evaluated the product as probably effective as an eye and ear ointment. The Food and Drug Administration concurred with the evaluation.

Holders of NADA's were provided 6 months to submit revised labeling that reflected the NAS/NRC evaluation or adequate documentation in support of the labeling used.

Sponsors of the evaluated product submitted revised labeling which was approved and upgraded the product to effective status.

The evaluated product contains prednisolone whereas the product which is the subject of this application contains hydrocortisone. However, the products are considered to be pharmacologically comparable. This consideration, in addition to adequate manufacturing specifications, is deemed sufficient to substantiate a 21 CFR 514.111(a) (5) (vi) waiver.

The current regulation for neomycin sulfate ophthalmic and topical dosage forms is amended to reflect that this application's approval is based upon a NAS/NRC reviewed product, to specify those conditions of use which were NAS/NRC approved, and serve notice that submission of similar applications reflecting the same conditions of use need not include efficacy data required by § 514.111, but may require submission of bioequivalency and safety data.

In accordance with the freedom of information regulations and § 514.11(e)

(2) (ii) of the animal drug regulations, a summary of safety and effectiveness data and information submitted to support approval of this application is released publicly. The summary is available for public examination at the office of the Hearing Clerk (HFC-20), Rm. 4-65, 5600 Fishers Lane, Rockville, Md. 20857, Monday through Friday from 9 a.m. to 4 p.m., except on Federal legal holidays.

Therefore, under the Federal Food, Drug, and Cosmetic Act (sec. 512(i), 82 Stat. 347 (21 U.S.C. 360b(i))) and under authority delegated to the Commissioner (21 CFR 5.1), Part 524 is amended by adding new § 524.1484h to read as follows:

§ 524.1484h Neomycin sulfate-sulfacetamide sodium-hydrocortisone acetate ophthalmic ointment.

(a) *Specifications.* Each gram of ointment contains 0.5 percent neomycin sulfate (equivalent to 3.5 milligrams per gram of neomycin base), 10 percent sulfacetamide sodium, and 0.5 percent hydrocortisone acetate.

(b) *Sponsor.* See No. 025463 in § 510.600(c) of this chapter.

(c) *Conditions of use.*—(1) *Amount.* Apply four times a day beneath the lower eyelid into the conjunctival sac.¹

(2) *Indications for use.* For use in superficial ocular inflammations or infections limited to the conjunctival or the anterior segment of the eye of cats and dogs, such as those associated with allergic reactions or gross irritants or due to organisms sensitive to neomycin or sulfacetamide sodium.¹

(3) *Limitations.* All topical ophthalmic preparations containing corticosteroids with or without an antimicrobial agent, are contraindicated in the initial treatment of corneal ulcers. They should not be used until the infection is under control and corneal regeneration is well underway.¹ When infection is suspected as being the cause of the disease process, particularly in purulent or catarrhal conjunctivitis, attempts should be made to determine which effective antibiotics should be used by sensitivity tests before applying ophthalmic preparations containing a corticosteroid. Federal law restricts this drug to use by or on the order of a licensed veterinarian.¹

Effective date: This regulation is effective December 16, 1977.

(Sec. 512(i), 82 Stat. 347 (21 U.S.C. 360b(i))).

Dated: December 7, 1977.

FRED J. KINGMA,
Acting Director, Bureau
of Veterinary Medicine.

[FR Doc. 77-35705 Filed 12-15-77; 8:45 am]

¹ These conditions are NAS/NRC reviewed and deemed effective. Applications for these uses need not include effectiveness data as specified by § 514.111 of this chapter, but may require bioequivalency and safety information.

[1505-01]

SUBCHAPTER F—BIOLOGICS

[Docket No. 75-0313]

PART 660—ADDITIONAL STANDARDS FOR DIAGNOSTIC SUBSTANCES FOR LABORATORY TESTS

Blood Grouping Serum

Correction

In FR Doc. 77-29206 appearing at page 54534 in the issue for Friday, October 7, 1977 make the following changes:

1. In the second line of § 660.25(a) (5) (iii), third column, page 54543, delete the subscript "g" from "Anti-N_g".

2. In the second line of the entry for "Anti-C" in the table in § 660.26(b) (1), first column, page 54544, the small "i" following "rh" should be a subscript.

3. In the second line of § 660.26(c) (1), first column, page 54544, the numeral "1" following the letter "P" should be a subscript.

4. In the fourth line of § 660.29(a) (1) (ii), third column, page 54545, "filed" should read "filled".

[4110-08]

Title 42—Public Health

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

PART 66—NATIONAL RESEARCH SERVICE AWARDS

Technical Amendments

AGENCY: Public Health Service, HEW.

ACTION: Final rule.

SUMMARY: This notice amends the regulations for the program of National Research Service Awards. These amendments are made to comply with statutory changes mandated by the Health Research and Health Services Amendments of 1976 (Pub. L. 94-278) enacted April 22, 1976. They expand the scope of the regulations to include programs administered by the Division of Nursing of the Health Research Administration, remove certain limitations on institutional eligibility for awards and both clarify and refine service payback requirements.

DATES: Effective date December 16, 1977.

FOR FURTHER INFORMATION CONTACT:

Dr. William Batchelor, Research Manpower Officer, National Institutes of Health, Bethesda, Md. 20014, 301-496-1963.

SUPPLEMENTARY INFORMATION: On May 2, 1975, final regulations were published in the FEDERAL REGISTER (40 FR 19314) implementing Section 472 of the Public Health Service Act (42 U.S.C. 2891-1) regarding National Research Service Awards. These regulations are codified in 42 CFR Part 66.

The Health Research and Health Services Amendments of 1976 (Pub. L. 94-278), which were enacted on April 22, 1976, amended Section 472 by: (1) Extending its scope to include programs

administered by the Division of Nursing of the Health Resources Administration, (2) removing the "non-Federal" limitation on institutional eligibility, (3) clarifying that service payback through "health research or teaching" may include any combination thereof which is in accordance with usual patterns of academic employment, (4) removing the requirement that any amount the United States is entitled to recover includes, in addition to the principal, the interest that would have accrued had the individual's award been an interest-bearing loan at the time it was made, and (5) replacing that interest requirement by one computed utilizing for start date of accrual the date the obligation falls due, and for interest rate one that takes into consideration the rate then prevailing.

The amendments to Part 66 set forth below are intended solely to reflect these statutory changes in the regulations. Hence, no purpose would be served by publishing the changes as a notice of proposed rulemaking, and the Department finds that good cause exists for dispensing with this step. For the same reason, the Secretary has authorized the issuance of these amendments without the prior publication of a Notice of Intent which would otherwise be required under the Department's new regulations policy issued on July 25, 1976.

NOTE.—The Department of Health, Education, and Welfare has determined that this document does not contain a major proposal requiring preparation of an Inflation Impact Statement under Executive Order 11821 and OMB Circular A-107.

Dated: July 22, 1977.

JAMES F. DICKSON,
Acting Assistant
Secretary for Health.

Approved: December 2, 1977.

JOSEPH A. CALIFANO, JR.,
Secretary.

Accordingly, Part 66 of 42 CFR is amended by:

1. Revising § 66.101 to read as follows: The regulations in this subpart are applicable to National Research Service Awards made by the Secretary, under section 472(a) (1) (A) of the Public Health Service Act, as amended (42 U.S.C. 2891-1(a) (1) (A)), to individuals for: (a) Biomedical and behavioral research at the National Institutes of Health and the Alcohol, Drug Abuse, and Mental Health Administration, and under programs administered by the Division of Nursing of the Health Resources Administration, in matters relating to the cause, diagnosis, prevention, and treatment of diseases or other health problems, (b) training at NIH and ADAMHA of individuals to undertake such research, (c) biomedical and behavioral research at public and nonprofit private institutions, and (d) predoctoral and postdoctoral training at such institutions of individuals to undertake such research.

2. Revising § 66.102 by relettering paragraphs (e) through (k) as (f) through

(l), and inserting the following paragraph (e):

(e) "DN" means the Division of Nursing of the Health Resources Administration.

3. Revising § 66.103(b) to read as follows: (b) Propose to engage in full-time biomedical or behavioral research at NIH or ADAMHA or under programs administered by DN, or training to undertake such research at NIH or ADAMHA or at a public or nonprofit private institution.

4. Deleting the reference in § 66.104 to "NIH or ADAMHA" and substituting therefor "NIH, ADAMHA, or DN."

5. Deleting from § 66.105(b) the words "at a non-Federal institution" and substituting therefor "at an institution other than at NIH or ADAMHA."

6. Deleting the references in §§ 66.106 (a) (1) and 66.206(a) (1) to "NIH and ADAMHA" and substituting therefor "NIH, ADAMHA, or DN."

7. Revising § 66.110(a) (1) to read as follows: (1) Engage for a period equal to the period of support in health research or teaching or, when in academic employment, any combination thereof which is in accordance with the usual patterns of such employment, or

8. Deleting from § 66.110(c) the words "and the interest on such amount which would be payable if at the time it was paid it was a loan bearing interest at a rate fixed by the Secretary of the Treasury after taking into consideration private consumer rates of interest prevailing at the time the Award was made"; and adding a semicolon after the phrase "to such individual."

9. Revising § 66.110(d) to read as follows: Except as provided in § 66.111, any amount which the United States is entitled to recover under paragraph (c) shall, within the three-year period beginning on the date the United States becomes entitled to recover such amount, be paid to the United States. Until any amount due the United States under paragraph (c) of this section on account of any Award is paid, there shall accrue to the United States interest on such amount at a rate fixed by the Secretary of the Treasury after taking into consideration private consumer rates of interest prevailing on the date the United States becomes entitled to such amount.

10. Deleting the references to "non-Federal" in §§ 66.113 and 66.203(a).

11. Revising § 66.201 to read as follows: The regulations in this subpart are applicable to grants under section 472(a) (1) (B) of the Public Health Service Act, as amended (42 U.S.C. 2891-1(a) (1) (B)), to public institutions and to nonprofit private institutions to enable such institutions to make to individuals selected by them National Research Service Awards for research and predoctoral and postdoctoral training to undertake such research in matters relating to the cause, diagnosis, prevention, and treatment of diseases or other health problems.

Subpart A—Direct Awards

- Sec.
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 66.102 Definitions.
 66.103 Eligibility.
 66.104 Application.
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- 66.201 Applicability.
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 66.212 Progress and fiscal records and reports.
 66.213 Grantee accountability.
 66.214 Publications and copyright.
 66.215 Additional conditions.

AUTHORITY: Sec. 215, 58 Stat. 690, as amended (42 U.S.C. 216); sec. 472, 88 Stat. 342 (42 U.S.C. 2891-1).

Subpart A—Direct Awards

§ 66.101 Applicability.

The regulations in this subpart are applicable to National Research Service Awards made by the Secretary, under section 472(a)(1)(A) of the Public Health Service Act, as amended (42 U.S.C. 2891-1(a)(1)(A)), to individuals for: (a) Biomedical and behavioral research at the National Institutes of Health and Alcohol, Drug Abuse, and Mental Health Administration, and under programs administered by the Division of Nursing of the Health Resources Administration, in matters relating to the cause, diagnosis, prevention, and treatment of diseases or other health problems, (b) training at NIH and ADAMHA of individuals to undertake such research, (c) biomedical and behavioral research at public and nonprofit private institutions, and (d) predoctoral and postdoctoral training at such institutions of individuals to undertake such research.

§ 66.102 Definitions.

As used in this subpart:

- (a) "Act" means the Public Health Service Act, 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) "NIH" means the National Institutes of Health.

(d) "ADAMHA" means the Alcohol, Drug Abuse, and Mental Health Administration.

(e) "DN" means the Division of Nursing of the Health Resources Administration.

(f) "Nonprofit" as applied to any institution means an institution which is a corporation or association no part of the net earnings of which inures or may lawfully inure to the benefit of any private shareholder or individual.

(g) "Award" means a National Research Service Award under section 472 of the Act (42 U.S.C. 2891-1).

(h) "Residency" means post-graduate training, for doctors of medicine, osteopathy, dentistry, optometry, and podiatry, nurses, and other individuals providing health care directly to patients, where the majority of their time is spent in non-research clinical training.

(i) "National Health Service Corps" means the Corps referred to in section 329 of the Act (42 U.S.C. 254b).

(j) "Noncitizen national of the United States" means a person who, though not a citizen of the United States, owes permanent allegiance to the United States (8 U.S.C. 1101(a)(22)).

(k) "Predoctoral training" means training at the post-baccalaureate level in a program leading to the award of a doctor of philosophy or science, or equivalent degree.

(l) "Postdoctoral training" means training of individuals holding a doctor of philosophy, science, medicine, dentistry, osteopathy, optometry, podiatry, veterinary medicine, engineering, nursing sciences, public health, or equivalent degree.

§ 66.103 Eligibility.

To be eligible for a National Research Service Award under this subpart an individual must:

- (a) Be a citizen or noncitizen national of the United States or have been lawfully admitted to the United States for permanent residence at the time of application; and
 (b) Propose to engage in full-time biomedical or behavioral research at NIH or ADAMHA or at a public or nonprofit private institution or under a program administered by DN, or training to undertake such research at NIH or ADAMHA or at a public or nonprofit private institution.

§ 66.104 Application.

(a) Application for an Award under this subpart shall be made on a form approved for that purpose by the Secretary. The completed form, executed by the individual applicant, shall be submitted to NIH, ADAMHA, or DN on or before such dates as the Secretary may prescribe.

(b) In addition to any other pertinent information that the Secretary may require, each application shall set forth in detail:

- (1) The applicant's educational background and other qualifications and ex-

perience, including previous academic and professional degrees;

(2) The subject area of the proposed research or training;

(3) The proposed period of Award;

(4) If the proposed period of Award is in excess of three years, the justifications for such request; and

(5) The availability at the institution where the research or training would be conducted of resources and facilities necessary to carry out such research or training.

§ 66.105 Requirements.

No Award shall be made to an individual under this subpart unless:

(a) The individual has submitted to the Secretary a written assurance (in such form as the Secretary may prescribe) that he or she will satisfy the requirements of §§ 66.110(a) and 66.110(b);

(b) If the proposed research or training would take place at an institution other than at NIH or ADAMHA, such institution has submitted a written assurance (in such form as the Secretary may prescribe), executed by a representative of the institution authorized to act for the institution and to assume on behalf of the institution the obligations imposed by the terms and conditions of the Award including the regulations of this subpart, indicating that the applicant has been accepted to the institution for the purpose of engaging in the research or training for which an Award is being sought, that the Award is not to be used to support a residency, and that, in the event an Award is made, the institution will make available to the applicant any resources and facilities described in the application as necessary to carry out such research or training;

(c) Effective July 1, 1975, the proposed research or training is in a subject area for which there is a need for personnel, as determined under section 473 of the Act (42 U.S.C. 2891-2); and

(d) The individual has submitted a written assurance (in such form as the Secretary may prescribe) that the Award is not to be used to support a residency.

(a) Within the limits of funds available, the Secretary shall make Awards to those applicants:

(1) Whose applications have been reviewed and recommended for approval by appropriate advisory councils within NIH, ADAMHA, or DN;

(2) Who have satisfied the requirements of § 66.105; and

(3) Whose proposed research or training would, in the judgment of the Secretary, best promote the purposes of section 472(a)(1)(A) of the Act, taking into consideration among other pertinent factors:

(i) The scientific, technical, or educational merit of the particular proposal;

(ii) The availability of resources and facilities to carry it out;

(iii) The qualifications and experience of the applicant; and

(iv) The degree of the need for personnel in the subject area of the proposed research or training.

(b) All Awards shall be in writing and shall specify the period of the Award (which may not exceed three years in the aggregate for any individual unless the Secretary for good cause shown waives the application of this limitation to such individual), the total recommended stipends and allowances provided for the entire period of the Award, the amount awarded for the initial year of said period (see § 66.107), and (if the Award is made for research or training at a non-Federal institution) the amount of the payments to the institution for the cost of services provided the awardee by such institution during the initial year of said period (see § 66.108).

(c) Neither the approval of any application nor any Award shall commit or obligate the United States in any way to make any additional, supplemental, continuation, or other Award with respect to any approved application or portion thereof.

(d) In determining what constitutes "good cause" for purposes of paragraph (b) of this section, the Secretary shall take into account such factors as whether the applicant proposes to complete both predoctoral and postdoctoral training programs under the Award or whether the applicant proposes to pursue a combined program leading to the degrees of doctor of medicine and doctor of philosophy.

§ 66.107 Payments to awardees.

(a) Individuals receiving Awards shall be entitled to such stipends and allowances as the Secretary may designate, taking into account such factors as the needs of the program, the cost of living, and the availability of funds.

(b) Payments of stipends and allowances shall, at the discretion of the Secretary, be made to the awardee or the sponsoring institution for payment to the awardee.

§ 66.108 Payments to institutions.

(a) Where an Award is made to an individual under this subpart for research or training at a non-Federal public or nonprofit private institution, the institution shall be entitled to an allowance to help defray the cost of support services (including the cost of faculty salaries, supplies, equipment, general research support, and related items) provided such individual by the institution. The amount of any such payments to any institution shall be determined by the Secretary based upon the reasonable costs to the institution of establishing and maintaining the quality of its biomedical and behavioral research and training programs.

(b) Payments to the institution under this section may be made either in advance or by way of reimbursement, as prescribed by the Secretary.

§ 66.109 Termination.

(a) The Secretary may terminate an Award prior to its normal expiration date:

(1) At the written request of the awardee; or

(2) If the Secretary finds that the awardee has materially failed to comply with the terms and conditions of the Award or to carry out the purpose for which it was made.

(b) In the event an Award is terminated the Secretary shall notify the awardee in writing of this determination, the reasons therefor, the effective date, and any procedural rights available.

§ 66.110 Service, payback, and recovery requirements.

(a) Each individual who receives an Award shall upon completion thereof:

(1) Engage for a period equal to the period of support in health research or teaching or, when in academic employment, any combination thereof which is in accordance with the usual patterns of such employment; or

(2) If the Secretary determines that there are no suitable research or teaching positions available to such individual, and if such individual is a physician, dentist, nurse, or other individual trained to provide health care directly to individual patients, and if the Secretary so authorizes such individual, in lieu of engaging in research or training:

(i) Serve as a member of the National Health Service Corps for a period equal to the period of support;

(ii) Serve in his specialty in private practice in a geographic area designated by the Secretary as requiring that specialty for 20 months for each twelve months of support; or

(iii) Provide services in his specialty for a health maintenance organization to which payments may be made under section 1876 of Title XVIII of the Social Security Act and which serves an underserved population (as defined in section 1302(7) of the Act) for 20 months for each 12 months of support; or

(3) If the Secretary determines that there are no suitable research or teaching positions available to an individual, and if such individual is not trained to provide health care directly to individual patients, and if the Secretary so authorizes such individual, in lieu of engaging in research or teaching, engage in a health activity appropriate to his education and training for 20 months for each 12 months of support.

(b) Except as provided in section 111 of this subpart, an individual to whom the requirement for service in paragraph (a) of this section is applicable must begin to undertake such service on a continuous basis within two years after the termination of his or her Award.

(c) If an individual fails to undertake or perform such service in accordance with the requirements of paragraph (b) of this section, the United States shall be

entitled to recover from such individual an amount determined in accordance with the formula:

$$A = O \left(\frac{t - (1/2)s}{t} \right)$$

in which "A" is the amount the United States is entitled to recover; "O" is the sum of the total amount of stipends paid under one or more Awards to such individual; "t" is total number of months in such individual's service obligation; and "s" is the number of months of such obligation served by him in accordance with paragraph (a) of this section.

(d) Except as provided in § 66.111, any amount which the United States is entitled to recover under paragraph (c) shall, within the three-year period beginning on the date the United States becomes entitled to recover such amount, be paid to the United States. Until any amount due the United States under paragraph (c) of this section on account of any Award is paid, there shall accrue to the United States interest on such amount at a rate fixed by the Secretary of the Treasury after taking into consideration private consumer rates of interest prevailing on the date the United States becomes entitled to such amount.

§ 66.111 Suspension, waiver, and cancellation.

(a) The Secretary may extend the period for undertaking service prescribed in § 66.110(b) permit breaks in service under § 66.110(b), or extend the period for repayment under § 66.110(d) if the Secretary determines that:

(1) Such an extension or break in service is necessary so the individual may complete his or her research training;

(2) Completion during said period would be impossible because the individual is temporarily disabled; or

(3) Completion during said period would involve an extreme hardship to such individual and failure to extend such period would be against equity and good conscience.

(b) The Secretary may waive, in whole or in part, the obligation of such individual to repay pursuant to § 66.110(c) if the Secretary determines that:

(1) Fulfillment would be impossible because the individual is permanently and totally disabled; or

(2) Fulfillment would involve an extreme hardship to such individual and enforcement of such obligation would be against equity and good conscience.

(c) In making determinations under §§ 66.111 (a) (3) and (b) (2), the Secretary will take into consideration such factors as:

(1) The individual's present financial resources and obligations;

(2) The individual's estimated future financial resources and obligations;

(3) The reasons for the individual's failure to complete such requirements within the prescribed period, such as problems of a personal nature;

(4) The extent to which the individual has been engaged in activities encompassed by § 66.110(a);

(5) Whether the individual has received sufficient training to be qualified to perform any such activities; and

(6) The unavailability of employment opportunities appropriate to the individual's education and training.

(d) Any obligation of any individual under this subpart will be cancelled upon the death of such individual.

§ 66.112 Nondiscrimination.

Attention is called to the fact that funds paid to an institution under § 66.108 are considered Federal financial assistance to such institution. The institution is thus subject to:

(a) The prohibition against discrimination on the basis of race, color, or national origin imposed by Title VI of the Civil Rights Act of 1964 (78 Stat. 252, 42 U.S.C. 2000d et seq.) and the implementing regulation of the Department of Health, Education, and Welfare (45 CFR Part 80);

(b) The prohibition against discrimination on the basis of sex imposed by Title IX of the Education Amendments of 1972 and in particular section 901 of such Act (20 U.S.C. 1681); and

(c) The prohibition against discrimination against the handicapped imposed by section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794).

§ 66.113 Human subjects; animal welfare.

Where the application is for research or training at a public or non-profit private institution, no Award may be made under this subpart unless said institution has complied with:

(a) 45 CFR Part 46 and any other applicable requirements pertaining to the protection of human subjects.

(b) Chapter 1-43 of the Department of Health, Education, and Welfare Grants Administration Manual¹ and any other applicable requirements concerning animal welfare.

§ 66.114 Publications.

Publication, distribution, and disposition of all manuscripts and other materials resulting from an Award shall be subject to the conditions that all such materials shall bear appropriate acknowledgement of Department of Health, Education, and Welfare support and that the awardee shall furnish such copies of these manuscripts or other materials as the Secretary may reasonably request.

§ 66.115 Copyright.

Where the work accomplished under an Award results in a book or other copyrightable material, the author is free to copyright the work, but the United States reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, or otherwise use, and to authorize others to use, all copyrightable or copyrighted material resulting from the Award.

§ 66.116 Inventions and discoveries.

(a) Any Award is subject to the regulations of the Department of Health, Education, and Welfare set forth in 45 CFR Parts 6 and 8, as amended. Such regulations shall apply to any activity for which Award funds are in fact used, whether within the scope of the Award as approved or otherwise. Each such invention or discovery shall be promptly and fully reported to the Assistant Secretary for Health, Department of Health, Education, and Welfare.

(b) Determination as to ownership and disposition of rights to such invention or discovery, including whether a patent application shall be filed, and, if so, the manner of obtaining, administering, and disposing of rights under any patent application or patent which may issue shall be made either:

(1) By the Assistant Secretary for Health, whose decision shall be final, or

(2) Where an Award is made to an individual for research or training at a non-Federal public or nonprofit private institution having a separate formal institutional patent agreement with the Department of Health, Education, and Welfare, by the institution in accordance with that agreement.

§ 66.117 Additional conditions.

The Secretary may with respect to any Award or class of Awards impose additional conditions prior to or at the time of any Award when in his judgment such conditions are necessary to assure the carrying out of the purposes of the Award, the interests of the public health, or the conservation of funds awarded.

Subpart B—Institutional Grants

§ 66.201 Applicability.

The regulations in this subpart are applicable to grants under section 472 (a)(1)(B) of the Public Health Service Act, as amended (42 U.S.C. 289l-1(a)(1)(B)), to public institutions and to nonprofit private institutions to enable such institutions to make to individuals selected by them National Research Service Awards for research and predoctoral and postdoctoral training to undertake such research in matters relating to the cause, diagnosis, prevention, and treatment of diseases or other health problems.

§ 66.202 Definitions.

The definitions in § 66.102 of Subpart A of this part shall apply as well to this subpart.

§ 66.203 Eligibility.

To be eligible for a grant under this subpart, an applicant must be:

(a) A public or nonprofit private institution; and

(b) Located in a State, the District of Columbia, Puerto Rico, the Virgin Islands, the Canal Zone, Guam, American Samoa, or the Trust Territory of the Pacific Islands.

§ 66.204 Application.

(a) Each institution desiring a grant under this subpart shall submit an application on a form approved for that purpose by the Secretary, on or before such dates as the Secretary may prescribe. Such application shall be executed by an individual authorized to act for the applicant and to assume on behalf of the applicant the obligations imposed by the terms and conditions of the grant, including the regulations of this subpart.

(b) In addition to any other pertinent information that the Secretary may require, each application shall set forth in detail:

(1) The subject area or areas in which the proposed research or training will be conducted;

(2) The resources and facilities available to the applicant for use by recipients of Awards in carrying out such research or training;

(3) The names, qualifications, and experience of the program director and principal staff members who will be responsible for the proposed program;

(4) The criteria to be employed in selecting individuals to be recipients of Awards;

(5) The estimated number of recipients of Awards under the grant;

(6) The proposed period of support and a detailed budget and justification for the amount of grant funds requested; and

(7) Proposed methods for monitoring and evaluating the performance of individual recipients of Awards, as well as the overall program.

§ 66.205 Requirements.

(a) No Award shall be made to an individual under a grant pursuant to this subpart unless:

(1) The individual has submitted to the Secretary a written assurance (in such form as the Secretary may prescribe) that he or she will satisfy the requirements of § 66.110 (a) and (b) of Subpart A of this part;

(2) Effective July 1, 1975, such Award is for research or training in a subject area for which there is a need for personnel, as determined under section 473 of the Act (42 U.S.C. 289l-2);

(3) The individual is a citizen or non-citizen national of the United States or has been lawfully admitted to the United States for permanent residence at the time of application;

(4) The Award includes a provision for termination in the event the recipient is found by the institution to have materially failed to comply with the terms and conditions of the Award or to

¹ The Department of Health, Education, and Welfare Grants Administration Manual is available for public inspection and copying at the Department's and Regional Offices' information centers listed in 45 CFR 5.31 and may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

carry out the purpose for which it was made; and

(5) The Award is not to be used to support a residency.

(b) No Award shall be made to an individual under such grant which exceeds three years in the aggregate unless the Secretary for good cause shown as provided in § 66.106(d) of Subpart A of this part, waives the application of this limitation to such individual.

(c) The provisions of §§ 66.110 and 66.111 of Subpart A of this part constitute terms and conditions of any Award made under a grant pursuant to this subpart.

§ 66.206 Grant awards.

(a) Within the limits of funds available, the Secretary shall award grants to those applicants:

(1) Whose applications have been reviewed and recommended for approval by appropriate advisory councils within NIH, ADAMHA, or DN;

(2) Who have satisfied the requirements of § 66.205 of this subpart; and

(3) Whose proposed programs would, in the judgment of the Secretary, best promote the purposes of section 472(a) (1)(B) of the Act, taking into consideration among other pertinent factors:

(i) The scientific, technical, or educational merit of the proposed program;

(ii) The adequacy of the resources and facilities available to the applicant;

(iii) The qualifications and experience of the program director and principal staff members;

(iv) The degree of the need for personnel in the subject area or areas of the proposed research or training;

(v) The administrative and managerial capability of the applicant;

(vi) The reasonableness of the proposed budget in relation to the proposed program; and

(vii) The adequacy of the methods for monitoring and evaluating the performance of individual recipients and the overall program.

(b) All grant awards shall be in writing and shall specify the period of support, the total recommended amount of funds for the entire period of support, the approved budget for the initial budget period, and the amount awarded for the initial budget period.

(c) Neither the approval of any application nor any grant award shall commit or obligate the United States in any way to make any additional, supplemental, continuation, or other grant award with respect to any approved application or portion thereof.

(d) The amount of any grant award shall be determined by the Secretary on the basis of his estimate of the sum necessary during the budget period: (1) To provide stipends and allowances to individual recipients of Awards and payments to the institution, as determined in accordance with §§ 66.107(a) and 66.108(a) of Subpart A of this part, and (2) otherwise to carry out the grant award.

§ 66.207 Payment.

The Secretary shall from time to time make payments to a grantee of all or a portion of any grant award, either in advance or by way of reimbursement, for expenses incurred or to be incurred in accordance with its approved application.

§ 66.208 Expenditure of grant funds.

(a) Any funds granted pursuant to this subpart shall be expended solely for the purposes for which the funds were granted in accordance with the approved application and budget, the regulations of this subpart, the terms and conditions of the award, and the applicable cost principles prescribed by Subpart Q of 45 CFR Part 74.

(b) Any unobligated grant funds remaining in the grant account at the close of a budget period may, with prior approval by the Secretary, be carried forward and remain available for obligation during the remainder of the period of support, subject to such limitations as the Secretary may prescribe. The amount of any subsequent award will take into consideration unobligated grant funds remaining in the grant account. At the end of the period of support any unobligated grant funds remaining in the grant account must be refunded to the United States.

§ 66.209 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.) 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 subject 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 of Health, Education, and Welfare with the approval of the President (45 CFR Part 80).

(b) Attention is also called to the requirements of Title IX of the Education Amendments of 1972 and in particular to section 901 of such Act (20 U.S.C. 1681) 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.

(c) Grant funds used for alterations and renovations shall be subject to the condition that the grantee shall comply with the requirements of Executive Order 11246, 30 FR 12319 (September 24, 1965), as amended, and with the applicable rules, regulations, and procedures prescribed pursuant thereto.

(d) Attention is called to the requirements of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), 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.

§ 66.210 Human subjects; animal welfare.

No grant award may be made under this subpart unless the applicant has complied with:

(a) 45 CFR Part 46 and any other applicable requirements pertaining to the protection of human subjects.

(b) Chapter 1-43 of the Department of Health, Education, and Welfare Grants Administration Manual¹ and any other applicable requirements concerning animal welfare.

§ 66.211 Applicability of 45 CFR Part 74.

The provisions of 45 CFR Part 74, establishing uniform administrative requirements and cost principles, shall apply to all grants under this subpart to State and local governments as those terms are defined in Subpart A of that Part 74. The relevant provisions of the following subparts of Part 74 shall also apply to grants to all other grantee organizations under this subpart:

45 CFR PART 74

Subpart

- A. General.
- B. Cash Depositories.
- C. Bonding and Insurance.
- D. Retention and Custodial Requirements for Records.
- F. Grant-Related Income.
- G. Matching and Cost Sharing.
- K. Grant Payment Requirements.
- L. Budget Revision Procedures.
- M. Grant Closeout Suspension, and Termination.
- O. Property.
- Q. Cost Principles.

§ 66.212 Progress and fiscal records and reports.

Each grant award shall require that the grantee maintain such progress and fiscal records and file with the Secretary, such progress and fiscal reports relating to the conduct and results of the approved grant and the use of grant funds as the Secretary may find necessary to carry out the purposes of this subpart.

§ 66.213 Grantee accountability.

(a) All payments made by the Secretary shall be recorded by the grantee in accounting records separate from the records of all other grant funds, including funds derived from other grant awards. With respect to each approved

¹The Department of Health, Education, and Welfare Grants Administration Manual is available for public inspection and copying at the Department's and Regional Offices' information centers listed in 45 CFR § 5.31 and may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

program the grantee shall account for the sum total of all amounts paid by presenting or otherwise making available to the Secretary, satisfactory evidence of expenditures for direct and indirect costs meeting the requirements of this subpart.

(b) Accounting for royalties. Royalties received by grantees from copyrights on publications or other works developed under the grant, or from patents or inventions conceived or first actually reduced to practice in the course of or under such grant, shall be accounted for as follows:

(1) State and local governments. Where the grantee is a State or local government as those terms are defined in subpart A of 45 CFR Part 74, royalties shall be accounted for as provided in 45 CFR 74.44.

(2) Grantees other than State and local governments. Where the grantee is not a State or local government as those terms are defined in subpart A of 45 CFR Part 74, royalties shall be accounted for as follows:

(i) Patent royalties, whether received during or after the grant period, shall be governed by agreements between the Assistant Secretary for Health, Department of Health, Education, and Welfare, and the grantee, pursuant to the Department's patent regulations (45 CFR Parts 6 and 8).

(ii) Copyright royalties, whether received during or after the grant period, shall first be used to reduce the Federal share of the grant to cover the costs of publishing or producing the materials, and any royalties in excess of the costs of publishing or producing the materials shall be distributed in accordance with Chapter 1-420 of the Department of Health, Education, and Welfare Grants Administration Manual.

§ 66.214 Publications and copyright.

(a) State and local governments. Where the grantee is a State or local government as those terms are defined in subpart A of 45 CFR Part 74, the Department of Health, Education, and Welfare copyright requirement set forth in 45 CFR 74.140 shall apply with respect to any book or other copyrightable materials developed or resulting from an activity supported by a grant under this subpart.

(b) Grantees other than State and local governments. Where the grantee is not a State or local government as those terms are defined in subpart A of 45 CFR Part 74, except as may otherwise be provided under the terms and conditions of the grant award, the grantee may copyright without prior approval any publications, films, or similar materials developed or resulting from an activity supported by a grant under this subpart, subject to a royalty-free non-exclusive, and irrevocable license or right in the United States to reproduce, translate, publish, use, disseminate and dispose of such materials, and to authorize others to do so.

§ 66.215 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 program, the interests of the public health, or the conservation of grant funds.

[FR Doc. 77-35569 Filed 12-15-77; 8:45 am]

[4310-02]

Title 25—Indians

CHAPTER I—BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

PART 177—PLANS FOR PROSPECTING AND MINING ON INDIAN MINERAL LANDS: RECLAMATION OF NONMINERAL RESOURCES

Indian Coal Mining Regulations

AGENCY: Bureau of Indian Affairs, Department of the Interior.

ACTION: Final rules.

SUMMARY: These regulations implement section 710(c) of the Surface Mining Control and Reclamation Act of 1977 (Pub. L. 95-87). That section requires the Secretary of the Interior to incorporate certain of the Act's performance and reclamation standards in all existing and new coal mining leases on Indian lands.

EFFECTIVE DATE: December 16, 1977.

ADDRESSES: Director, Office of Surface Mining Reclamation and Enforcement, Department of the Interior, Washington, D.C. 20240, 202-343-4237; and Director, Office of Trust Responsibilities, Bureau of Indian Affairs, Department of the Interior, Washington, D.C. 20240, 202-343-5831.

FOR FURTHER INFORMATION CONTACT:

Richard Wilson, 202-343-3722; Tim Vallmann, 202-343-6967.

SUPPLEMENTARY INFORMATION: The Surface Mining Control and Reclamation Act of 1977 (the Act), Pub. L. 95-87, requires the Secretary of the Interior to publish environmental protection regulations that are applicable to all coal mining operations.

Final regulations governing coal mining on non-Indian lands were published in the FEDERAL REGISTER on December 13, 1977 (42 FR 62639). These final rules are designed to implement the Act insofar as it requires the Secretary of the Interior to incorporate certain of the Act's performance and reclamation standards in all existing and new coal mining leases on Indian lands. Section 710(c) of the Act provides that those requirements will take effect on December 16, 1977. Proposed regulations on this subject were published in the FEDERAL REGISTER on September 15, 1977 (42 FR 46352).

The performance and reclamation standards set out below are nearly identical to the standards found in 30 CFR

Part 715, which were published in the FEDERAL REGISTER on December 13, 1977 (42 FR 62639). While the standards applicable to Indian lands are little different from those applicable to non-Indian lands, they do recognize specific procedures and considerations which apply only to Indian lands. These regulations do not include any of the provisions governing use of explosives found in 30 CFR 715.19. However, the standards for steep-slope mining found in 30 CFR 716.2 are included in this part.

Sections 177.112 through 177.114 set up enforcement procedures similar to those found in 30 CFR Parts 721-723. However, the enforcement procedures published here differ from those in 30 CFR in their provision for tribal involvement in the process and their preservation of tribal remedies in the enforcement scheme.

DRAFTING INFORMATION

These rules were drafted by members of the Office of Surface Mining Task Force and the Office of the Solicitor in cooperation with the Bureau of Indian Affairs. The principal authors are listed in the FEDERAL REGISTER of December 13, 1977 (42 FR 62675). The following individuals were also specifically responsible for the regulations governing Indian lands: Richard Wilson of the Office of Trust Responsibilities, Bureau of Indian Affairs, (202 343-3722, and Tim Vollman, Division of Indian Affairs, Office of the Solicitor, (202) 343-6967. Additional background on the drafting process and public comments received after proposed rulemaking may also be found in the FEDERAL REGISTER of December 13, 1977.

In addition to the changes made to the proposed rules which are discussed in the December 13, 1977, FEDERAL REGISTER, one other change was made in the regulations governing surface coal mining on Indian lands. One commentator noted that there was nothing in the proposed rules to implement section 710(e) of the Act which requires the Secretary to enforce terms and conditions in addition to those required by the Act, as may be requested by the Indian Tribe. A new paragraph, § 177.113(i), has been added to implement that authority.

The Solicitor of the Department of the Interior has been delegated the authority to promulgate these regulations by order of the Secretary of the Interior.

NOTE.—The Department of the Interior has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11821 and OMB circular A-107.

Dated: December 13, 1977.

LEO M. KRULITZ,
Solicitor of the Interior.

25 CFR Part 177 is amended by designating existing regulations under that part as "Subpart A—General Pro-

visions," and by adding new Subpart B, reading as follows:

Subpart B—Coal Operations

- Sec.
- 177.100 Applicability.
 - 177.101 Definitions.
 - 177.102 General obligations.
 - 177.103 Signs and markers.
 - 177.104 Postmining use of land.
 - 177.105 Backfilling and grading.
 - 177.106 Disposal of spoil and waste materials in areas other than the mine workings or excavations.
 - 177.107 Topsoil handling.
 - 177.108 Protection of the hydrologic system.
 - 177.109 Dams constructed of refuse materials.
 - 177.110 Revegetation.
 - 177.111 Steep-slope mining.
 - 177.112 Inspections.
 - 177.113 Enforcement procedures.
 - 177.114 Civil penalties.

AUTHORITY: Secs. 201, 501, Pub. L. 95-87, 91 Stat. 445 (30 U.S.C. 1201) (25 U.S.C. 396d).

Subpart B—Coal Operations

§ 177.100 Applicability.

(a) The performance standards in this subpart shall apply to all coal mining operations on Indian lands on or after December 16, 1977.

(b) The requirements of this subpart shall be incorporated in all existing and new contracts entered into for coal mining on Indian lands.

§ 177.101 Definitions.

As used throughout the regulations in this subpart, except where otherwise indicated:

Acid drainage means water with a pH of less than 6.0 discharged from active or abandoned mines and from areas affected by coal mining operations.

Acid-forming materials means earth materials that contain sulfide mineral or other materials which, if exposed to air, water, or weathering processes, will cause acids that may create acid drainage.

Act means the Surface Mining Control and Reclamation Act of 1977, (Pub. L. 95-87).

Alluvial valley floors means unconsolidated stream-laid deposits holding streams where water availability is sufficient for subirrigation or flood irrigation agricultural activities but does not include upland areas which are generally overlain by a thin veneer of colluvial deposits composed chiefly of debris from sheet erosion, deposits by unconcentrated runoff or slope wash, together with talus, other mass movement accumulation and windblown deposits.

Approximate original contour means that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated; water impoundments may be permitted where the regulatory authority determines that they are in compliance with § 177.108.

Aquifer means a zone, stratum, or group of strata that can store and transmit water in sufficient quantities for a specific use.

Auger mining means a method of mining coal at a cliff or highwall by drilling holes laterally into an exposed coal seam from the highwall and transporting the coal along an auger bit to the surface.

Coal means combustible carbonaceous rock, classified as anthracite, bituminous, subbituminous, or lignite by A.S.T.M. designation 0-388-666.

Combustible material means organic material that is capable of burning either by fire or through a chemical process (oxidation) accompanied by the evolution of heat and a significant temperature rise.

Compaction means the reduction of pore spaces among the particles of soil or rock, generally done by running heavy equipment over the earth materials.

Director means the Director, Office of Surface Mining Reclamation and Enforcement, or his representative.

Disturbed area means those lands that have been affected by surface coal mining and reclamation operations.

Diversion means a channel, embankment, or other manmade structure constructed for the purpose of diverting water from one area to another.

Downslope means the land surface between a valley floor and the projected outcrop of the lowest coalbed being mined along each highwall.

Embankment means an artificial deposit of material that is raised above the natural surface of the land and used to contain, divert, or store water, support roads or railways, or other similar purposes.

Essential hydrologic functions means, with respect to alluvial valley floors, the role of the valley floor in collecting, storing, and regulating the natural flow of surface water and ground water, and in providing a place for irrigated and sub-irrigated farming, by reason of its position in the landscape and the characteristics of its underlying material.

Flood irrigation means irrigation through natural overflow or the temporary diversion of high flows in which the entire surface of the soil is covered by a sheet of water.

Ground water means subsurface water that fills available openings in rock or soil materials such that they may be considered water-saturated.

Highwall means the face of exposed overburden and coal in an open cut of a surface or underground coal mine.

Hydrologic balance means the relationship between the quality and quantity of inflow to, outflow from, and storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir. It encompasses the quantity and quality relationships between precipitation, runoff, evaporation, and the change in ground and surface water storage.

Hydrologic regime means the entire state of water movement in a given area. It is a function of the climate, and includes the phenomena by which water first occurs as atmospheric water vapor

passes into a liquid or solid form and falls as precipitation, moves thence along or into the ground surface, and returns to the atmosphere as vapor by means of evaporation and transpiration.

Imminent danger to the health and safety of the public means the existence of any condition, or practice, or any violation of a permit or other requirement of the Act in a surface coal mining and reclamation operation, which condition, practice, or violation could reasonably be expected to cause substantial physical harm to persons outside the permit area before such condition, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same condition or practice giving rise to the peril, would not expose himself or herself to the danger during the time necessary for abatement.

Impoundment means a closed basin formed naturally or artificially built, which is dammed or excavated for the retention of water, sediment, or waste.

Indian lands means all lands, including mineral interest, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe.

Indian Tribe means any Indian Tribe, band, group or community having a governing body recognized by the Secretary.

Intermittent or perennial stream means a stream or part of a stream that flows continuously during all (perennial) or for at least one month (intermittent) of the calendar year as a result of groundwater discharge or surface runoff. The term does not include an ephemeral stream which is one that flows for less than one month of a calendar year and only in direct response to precipitation in the immediate watershed and whose channel bottom is always above the local water table.

Leachate means a liquid that has percolated through soil, rock, or waste and has extracted dissolved or suspended materials.

Noxious plants means species that have been included on official State lists of noxious plants for the State in which the operation occurs.

Office means the Office of Surface Mining Reclamation and Enforcement established under Title II of the Act.

Operator means any person, partnership or corporation engaged in coal mining who removes or intends to remove more than 250 tons of coal from the earth by mining within 12 consecutive calendar months in any one location.

Outslope means the exposed area sloping away from a bench or terrace being constructed as a part of a surface coal mining and reclamation operation.

Overburden means material of any nature, consolidated or unconsolidated, that overlies a coal deposit, excluding topsoil.

Permit means an approval by the Secretary of the Interior to conduct sur-

face coal mining and reclamation operations on Indian lands.

Permittee means a person holding a permit to conduct surface coal mining and reclamation operations on Indian lands.

Person means an individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization.

Productivity means the vegetative yield produced by a unit area for a unit of time.

Recharge capacity means the ability of the soils and underlying materials to allow precipitation and runoff to infiltrate and reach the zone of saturation.

Recurrence interval means the precipitation event expected to occur, on the average, once in a specified interval. For example, the 10-year 24-hour precipitation event would be that 24-hour precipitation event expected to be exceeded on the average once in 10 years. Magnitude of such events are as defined by the National Weather Service Technical Paper No. 40, "Rainfall Frequency Atlas of the U.S.," May 1961, and subsequent amendments or equivalent regional or rainfall probability information developed therefrom.

Regulatory Authority means the Secretary.

Roads means access and haul roads constructed, used, reconstructed, improved, or maintained for use in surface coal mining and reclamation operations, including use by coal-hauling vehicles leading to transfer, processing, or storage areas. The term includes any such road used and not graded to approximate original contour within 45 days of construction other than temporary roads used for topsoil removal and coal haulage roads within the pit area. Roads maintained with public funds such as all Federal, State, tribal, and county roads are excluded.

Runoff means precipitation that flows overland before entering a defined stream channel and becoming streamflow.

Safety factor means the ratio of the available shear strength to the developed shear stress on a potential surface of sliding determined by accepted engineering practice.

Secretary means the Secretary of the Interior or his representative.

Sediment means undissolved organic and inorganic material transported or deposited by water.

Sedimentation pond means any natural or artificial structure or depression used to remove sediment from water and store sediment or other debris.

Significant imminent environmental harm to land, air or waste resources is determined as follows:

(i) An environmental harm is any adverse impact on land, air, or water resources, including plant and animal life.

(ii) An environmental harm is imminent if a condition, practice or violation exists which (a) is causing such harm or (b) may reasonably be expected to cause such harm at any time before the end of the reasonable abatement time that

would be set under § 177.123(b) of these regulations.

(iii) An environmental harm is significant if that harm is appreciable and not immediately reparable.

Slope means average inclination of a surface, measured from the horizontal. Normally expressed as a unit of vertical distance to a given number of units of horizontal distance (eg., 1v to 5h=20 percent=11.3 degrees).

Soil horizons means contrasting layers of soil lying one below the other, parallel or nearly parallel to the land surface. It is the part of the soil in which basis of field characteristics and laboratory data. The three major soil horizons are—

(1) **A horizon.** The uppermost layer in the soil profile often called the surface soil. It is the part of the soil in which organic matter is most abundant, and where leaching of soluble or suspended particles is the greatest.

(2) **B horizon.** The layer immediately beneath the A horizon and often called the subsoil. This middle layer commonly contains more clay, iron, or aluminum than the A or C horizons.

(3) **C horizon.** The deepest layer of the soil profile. It consists of loose material or weathered rock that is relatively unaffected by biologic activity.

Spoil means overburden that has been removed during surface mining.

Stabilize means any method used to control movement of soil, spoil piles, or areas of disturbed earth and includes increasing bearing capacity, increasing shear strength, draining, compacting, or revegetating.

Subirrigation means irrigation of plants with water delivered to the roots from underneath.

Surface Coal Mining Operations means: (a) activities conducted on the surface of lands in connection with a surface coal mine and surface impacts incident to an underground coal mine. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for commerce at or near the mine site; *Provided, however,* That such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16% percentum of the tonnage of minerals removed for purposes of commercial use or sale, or coal exploration; and (b) the areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land, the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage and excavation, workings, impound-

ments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or material on the surface, resulting from or incident to such activities.

Surface coal mining and reclamation operations means surface coal mining operations and all activities necessary and incidental to the reclamation of such operations. This term includes the term "surface coal mining operations."

Surface water means water, either flowing or standing, on the surface of the earth.

Suspended solids means organic or inorganic materials carried or held in suspension in water that will remain on a 0.45 micron filter.

Ton means 2,000 pounds avoirdupois (.90718 metric ton).

Toxic-forming materials means earth materials or wastes which, if acted upon by air, water, weathering, or microbiological processes, are likely to produce chemical or physical conditions in soils or water that are detrimental to biota or uses of water.

Toxic-mine drainage means water that is discharged from active or abandoned mines and from other areas affected by coal mining operations and which contains a substance which through chemical action or physical effects is likely to kill, injure, or impair biota commonly present in the area that might be exposed to it.

Valley fill and head-of-hollow fill means a structure consisting of any materials other than waste placed so as to encroach upon or obstruct to any degree any natural stream channel other than those minor channels located on highland areas where overland flow in natural rills and gullies is the predominant form of runoff. Such fills are normally constructed in the uppermost portion of a V-shaped valley in order to reduce the upstream drainage area (head-of-hollow fills). Fills located farther downstream (valley fills) must have larger diversion structures to minimize infiltration. Both fills are characterized by rock underdrains and are constructed in compacted lifts from the toe to the upper surface in a manner to promote stability.

Waste means earth materials, which are combustible, physically unstable, or acid-forming or toxic-forming, wasted or otherwise separated from product coal and are slurried or otherwise transported from coal processing facilities or preparation plants after physical or chemical processing, cleaning, or concentrating of coal.

Water table means upper surface of a zone of saturation, where the body of ground water is not confined by an overlying impermeable zone.

§ 177.102. General obligations.

(a) **Authorizations to operate.** A copy of all current permits, licenses, approved

plans or other authorizations to operate the mine shall be available for inspection at or near the mine site.

(b) *Mine Maps.* Any person conducting surface coal mining and reclamation operations on and after Dec. 16, 1977, shall submit two copies of an accurate map of the mine and permit area at a scale of 1:6000 or larger. The maps shall show as of Dec. 16, 1977, the lands from which coal has not yet been removed, and the lands and structures which have been used or disturbed to facilitate mining. One copy of the mine map shall be submitted to the appropriate agency of the local governing Indian Tribe, and one copy shall be submitted to the Regional Director, OSM, before March 16, 1978.

§ 177.103 Signs and markers.

(a) *Specifications.* All signs required to be posted shall be of a standard design that can be seen and read easily and shall be made of durable material. The signs and other markers shall be maintained during all operations to which they pertain and shall conform to local ordinances and codes.

(b) *Mine and permit identification signs.* Signs identifying the mine area shall be displayed at all points of access to the permit area from public roads and highways. Signs shall show the name, business address, and telephone number of the permittee and identification numbers of current mining and reclamation permits or other authorizations to operate. Such signs shall not be removed until after release of all bonds.

(c) *Perimeter markers.* The perimeter of the permit area shall be clearly marked by durable and easily recognized markers, or by other means approved by the regulatory authority.

(d) *Buffer zone markers.* Buffer zones as defined in § 177.108 shall be marked in a manner consistent with the perimeter markers along the interior boundary of the buffer zone.

(e) *Blasting signs.* If blasting is necessary to conduct surface coal mining operations, signs reading "Blasting Area" shall be displayed conspicuously at the edge of blasting areas along access and haul roads within the mine property. Signs reading "Blasting Area" and explaining the blasting warning and all-clear signals shall be posted at all entrances to the permit area.

(f) *Topsoil markers.* Where topsoil or other vegetation-supporting material is segregated and stockpiled according to § 177.107(c), the stockpiled material shall be marked. Markers shall remain in place until the material is removed.

§ 177.104 Postmining use of land.

(a) *General.* All disturbed areas shall be restored in a timely manner (1) to conditions that are capable of supporting the uses which they were capable of supporting before any mining, or (2) to higher or better uses achievable under criteria and procedures of paragraph (d) of this section.

(b) *Determining premining use of land.* The premining uses of land to which the postmining land use is com-

pared shall be those uses which the land previously supported if the land had not been previously mined and had been properly managed.

(1) The postmining land use for land that has been previously mined and not reclaimed shall be judged on the basis of the highest and best use that can be achieved and is compatible with surrounding areas.

(2) The postmining land use for land that has received improper management shall be judged on the basis of the premining use of surrounding lands that have received proper management.

(3) If the premining use of the land was changed within 5 years of the beginning of mining, the comparison of postmining use to premining use shall include a comparison with the historic use of the land as well as its use immediately preceding mining.

(c) *Land-use categories.* Land use is categorized in the following groups. Change from one to another land use category in premining to postmining constitutes an alternate land use and the permittee shall meet the requirements of paragraph (d) of this section and all other applicable environmental protection performance standards of this part.

(1) *Heavy industry.* Manufacturing facilities, powerplants, airports or similar facilities.

(2) *Light industry and commercial services.* Office buildings, stores, parking facilities, apartment houses, motels, hotels, or similar facilities.

(3) *Public services.* Schools, hospitals, churches, libraries, water-treatment facilities, solid-waste disposal facilities, public parks and recreation facilities, major transmission lines, major pipelines, highways, underground and surface utilities, and other servicing structures and appurtenances.

(4) *Residential.* Single- and multiple-family housing (other than apartment houses) with necessary support facilities. Support facilities may include commercial services incorporated in and comprising less than 5 percent of the total land area of housing capacity, associated open space, and minor vehicle parking and recreation facilities supporting the housing.

(5) *Cropland.* Land used primarily for the production of cultivated and close-growing crops for harvest alone or in association with sod crops. Land used for facilities in support of farming operations are included.

(6) *Rangeland.* Includes rangelands and forest lands which support a cover of herbaceous or scrubby vegetation suitable for grazing or browsing use.

(7) *Hayland or pasture.* Land used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or cut and cured for livestock feed.

(8) *Forest land.* Land with at least a 25 percent tree canopy or land at least 10 percent stocked by forest trees of any size, including land formerly having had such tree cover and that will be naturally or artificially reforested.

(9) *Impoundments of water.* Land used for storing water for beneficial uses such as stock ponds, irrigation, fire protection, recreation, or water supply.

(10) *Fish and wildlife habitat and recreation lands.* Wetlands, fish and wildlife habitat, and areas managed primarily for fish and wildlife or recreation.

(11) *Combined uses.* Any appropriate combination of land uses where one land use is designated as the primary land use and one or more other land uses are designated as secondary land uses.

(d) *Criteria for approving alternative postmining use of land.* An alternative postmining land use shall be approved by the regulatory authority, after consultation with the landowner or the land-management agency on Federal lands, if the following criteria are met.

(1) The proposed land use is compatible with adjacent land use and, where applicable, with existing Tribal and Federal land use policies and plans.

A written statement of the views of the authorities with statutory responsibilities for land use policies and plans shall accompany the request for approval. The permittee shall obtain any required approval of Tribal or Federal land management agencies, including any necessary zoning or other changes necessarily required for the final land use.

(2) Specific plans have been prepared which show the feasibility of the proposed land use as related to needs, projected land use trends, and markets and that include a schedule showing how the proposed use will be developed and achieved within a reasonable time after mining and be sustained. The regulatory authority may require appropriate demonstrations to show that the planned procedures are feasible, reasonable, and integrated with mining and reclamation, and that the plans will result in successful reclamation.

(3) Provision of any necessary public facilities is assured as evidenced by letters of commitment from parties other than the permittee, as appropriate, to provide them in a manner compatible with the permittee's plans.

(4) Specific and feasible plans for financing attainment and maintenance of the postmining land use including letters of commitment from parties other than the permittee as appropriate, if the postmining land use is to be developed by such parties.

(5) The plans are designed under the general supervision of a registered professional engineer, or other appropriate professional, who will ensure that the plans conform to applicable accepted standards for adequate land stability, drainage, and vegetative cover, and aesthetic design appropriate for the postmining use of the site.

(6) The proposed use or uses will neither present actual or probable hazard to public health or safety nor will they pose any actual or probable threat of water flow diminution or pollution.

(7) The use or uses will not involve unreasonable delays in reclamation.

(8) Necessary approval of measures to prevent or mitigate adverse effects on fish and wildlife has been obtained from the regulatory authority and appropriate Tribal and Federal fish and wildlife management agencies.

(9) Proposals to change premining land uses of range, fish and wildlife habitat, forest land, hayland, or pasture to a postmining cropland use, where the cropland would require continuous maintenance such as seeding, plowing, cultivation, fertilization, or other similar practices to be practicable or to comply with applicable Federal and Tribal laws, shall be reviewed by the regulatory authority to assure that:

(i) There is a firm written commitment by the permittee or by the landowner or land manager to provide sufficient crop management after release of applicable performance bonds to assure that the proposed postmining cropland use remains practical and reasonable;

(ii) There is sufficient water available and committee to maintain crop production; and

(iii) Topsoil quality and depth are shown to be sufficient to support the proposed use.

(10) The regulatory authority has provided by public notice not less than 45 days nor more than 60 days for interested citizens and Tribal and Federal agencies to review and comment on the proposed land use.

§ 177.105 Backfilling and grading.

In order to achieve the approximate original contour, the permittee shall, except as provided in this section, transport, backfill, compact (where advisable to ensure stability or to prevent leaching of toxic materials), and grade all spoil material to eliminate all highwalls, spoil piles, and depressions. Cut-and-fill terraces may be used only in those situations expressly identified in this section. The postmining graded slopes must approximate the premining natural slopes in the area as defined in paragraph (a) of this section.

(a) *Slope measurements.* (1) To determine the natural slopes of the area before mining, sufficient slopes to adequately represent the land surface configuration, and as approved by the regulatory authority in accordance with site conditions, must be accurately measured and recorded. Each measurement shall consist of an angle of inclination along the prevailing slope extending 100 linear feet above and below or beyond the coal outcrop or the area to be disturbed; or, where this is impractical, at locations specified by the regulatory authority. Where the area has been previously mined, the measurements shall extend at least 100 feet beyond the limits of mining disturbances as determined by the regulatory authority to be representative of the premining configuration of the land. Slope measurements shall take into account natural variations in slope so as to provide accurate representation of the range of natural slopes and shall reflect geomorphic differences of the

area to be disturbed. Slope measurements may be made from topographic maps showing contour lines, having sufficient detail and accuracy consistent with the submitted mining and reclamation plan.

(2) After the disturbed area has been graded, the final graded slopes shall be measured at the beginning and end of lines established on the prevailing slope at locations representative of premining slope conditions and approved by the regulatory authority. These measurements must not be made so as to allow unacceptably steep slopes to be constructed.

(b) *Final graded slopes.* (1) The final graded slopes shall not exceed either the approximate premining slopes as determined according to paragraph (a) (1) of this section and approved by the regulatory authority or any lesser slope specified by the regulatory authority based on consideration of soil, climate, or other characteristics of the surrounding area. Postmining final graded slopes need not be uniform. The requirements of this paragraph may be modified by the regulatory authority where the mining is re-affecting previously mined lands that have not been restored to the standards of this section and sufficient spoil is not available to return to the slope determined according to paragraph (a) (1) of this section. Where such modifications are approved, the permittee shall, as a minimum, be required to:

(i) Retain all overburden and spoil on the solid portion of existing or new benches; and

(ii) Backfill and grade to the most moderate slope possible to eliminate the highwall which does not exceed the angle of repose or such lesser slopes as is necessary to assure stability.

(2) On approval by the regulatory authority and in order to conserve soil moisture, ensure stability, and control erosion on final graded slopes, cut-and-fill terraces may be allowed if the terraces are compatible with the postmining land use approved under § 177.104, and are appropriate substitutes for construction of lower grades on the reclaimed lands. The terraces shall meet the following requirements:

(i) The width of the individual terrace bench shall not exceed 20 feet unless specifically approved by the regulatory authority as necessary for stability, erosion control, or roads included in the approved postmining land use plan.

(ii) The vertical distance between terraces shall be as specified by the regulatory authority to prevent excessive erosion and to provide long-term stability.

(iii) The slope of the terrace outslope shall not exceed 1v:2h (50 percent). Out-slopes which exceed 1v:2h (50 percent) may be approved if they have a minimum static safety factor of more than 1.5 and provide adequate control over erosion and closely resemble the surface configuration of the land prior to mining. In no case may highwalls be left as part of terraces.

(iv) Culverts and underground rock drains shall be used on the terrace only

when approved by the regulatory authority.

(3) All operations on steep slopes of 20 degrees or more or on such lesser slopes as the regulatory authority defines as a *steep slope* shall meet the provisions of § 177.111 of this part.

(c) *Mountaintop removal.* The requirements of this paragraph shall apply to surface mining operations which remove entire coal seams in the upper part of a mountain, ridge, or hill by removing all of the overburden, and where the requirements for achieving the approximate original contour of this section cannot be met. Final graded top plateau slopes on the mined area shall be less than 1v:5h so as to create a level plateau or gently rolling configuration and the out-slopes of the plateau shall not exceed 1v:2h, except where engineering data substantiates and the regulatory authority finds that a minimum static safety factor of 1.5 (or higher factors specified by the regulatory authority) will be attained. Although the area need not be restored to approximate original contour, all highwalls, spoil piles, and depressions except as provided in paragraphs (d) and (e) of this section shall be eliminated.

(d) *Small depressions.* The requirement of this section to achieve approximate original contour does not prohibit construction of small depressions if they are approved by the regulatory authority to minimize erosion, conserve soil moisture or promote revegetation. These depressions shall be compatible with the approved postmining land use and shall not be inappropriate substitutes for construction of lower grades on the reclaimed lands. Depressions approved under this section shall have a holding capacity of less than 1 cubic yard of water or, if it is necessary that they be larger, shall not restrict normal access throughout the area or constitute a hazard. Large, permanent impoundments shall be governed by paragraph (e) of this section and by § 177.108.

(e) *Permanent impoundments.* Permanent impoundments may be retained in mined and reclaimed areas provided all highwalls are eliminated by grading to appropriate contour and the provisions for postmining land use (§ 177.104) and protection of the hydrologic balance (§ 177.108) are met. No impoundments shall be constructed on top of areas in which excess materials are deposited pursuant to § 177.106 of this part. Impoundments shall not be used to meet the requirements of paragraph (j) of this section.

(f) *Definition of thin and thick re-stored overburden.* The thin overburden provisions of paragraph (g) of this section may apply only where the final thickness is less than 0.8 of the initial thickness. The thick overburden provisions of paragraph (h) of this section may apply only where the final thickness is greater than 1.2 of the initial thickness. Initial thickness is the sum of the overburden thickness and coal thickness. Final thickness is the product

of the overburden thickness times the bulking factor to be determined for each mine area. The provisions of paragraphs (g) and (h) apply only when operations cannot be carried out to comply with the requirements of paragraph (a) of this section to achieve the approximate original contour.

(g) *Thin overburden.* In surface coal mining operations carried out continuously in the same limited pit area for more than 1 year from the day coal-removal operations begin and where the volume of all available spoil and suitable waste materials is demonstrated to be insufficient to achieve approximate original contour, surface coal mining operations shall be conducted to meet, at a minimum, the following standards:

(1) Transport, backfill, and grade, using all available spoil and suitable waste materials from the entire mine area, to attain the lowest practicable stable grade, which may not exceed the angle of repose, and to provide adequate drainage and long-term stability of the regraded areas.

(2) Eliminate highwalls by grading or backfilling to stable slopes not exceeding 1v:2h (50 percent), or such lesser slopes as the regulatory authority may specify to reduce erosion, maintain the hydrologic balance, or allow the approved postmining land use.

(3) Transport, backfill, grade, and revegetate to achieve an ecologically sound land use compatible with the prevailing land use in unmined areas surrounding the permit area.

(4) Transport, backfill, and grade to ensure the impoundments are constructed only where it has been demonstrated to the regulatory authority's satisfaction that all requirements of § 177.108 have been met and that the impoundments have been approved by the regulatory authority as meeting the requirements of this part and all other applicable Federal and Tribal regulations.

(h) *Thick overburden.* In surface coal mining operations where the volume of spoil is demonstrated to be more than sufficient to achieve the approximate original contour surface coal mining operations shall be conducted to meet at a minimum the following standards:

(1) Transport, backfill, and grade all spoil and wastes not required to achieve approximate original contour in the surface mining area to the lowest practicable grade.

(2) Deposit, backfill, and grade excess spoil and wastes only within the permit area and dispose of such materials in conformance with this part.

(3) Transport, backfill, and grade excess spoil and wastes to maintain the hydrologic balance in accordance with this part and to provide long-term stability.

(4) Transport, backfill, grade and revegetate wastes and excess spoil to achieve an ecologically sound land use compatible with the prevailing land uses in unmined areas surrounding the permit area.

(5) Eliminate all highwalls and depressions except as stated in paragraph (e) of this section by backfilling with spoil and suitable waste materials.

(i) *Regrading or stabilizing rills and gullies.* When rills or gullies deeper than 9 inches form in areas that have been regraded and the topsoil replaced but vegetation has not yet been established, the permittee shall fill, grade, or otherwise stabilize the rills and gullies and reseed or replant the areas according to § 177.110. The regulatory authority shall specify that rills or gullies of lesser size be stabilized if the rills or gullies will be disruptive to the approved postmining land use or may result in additional erosion and sedimentation.

(j) *Covering coal and acid-forming, toxic-forming, combustible, and other waste materials; stabilizing backfilled materials; and using waste material for fill.* (1) *Cover.* All exposed coal seams remaining after mining and any acid-forming, toxic-forming, combustible materials, or any other waste materials identified by the regulatory authority that are exposed, used, or produced during mining shall be covered with a minimum of 4 feet of nontoxic and noncombustible material; or, if necessary, treated to neutralize toxicity in order to prevent water pollution and sustained combustion, and to minimize adverse effects on plant growth and land uses. Where necessary to protect against upward migration of salts, exposure by erosion, to provide an adequate depth for plant growth, or to otherwise meet local conditions, the regulatory authority shall specify thicker amounts of cover using nontoxic material. Acid-forming or toxic-forming material shall not be buried or stored in proximity to a drainage course so as to cause or pose a threat of water pollution or otherwise violate the provisions of § 177.108 of this part.

(2) *Stabilization.* Backfilled materials shall be selectively placed and compacted wherever necessary to prevent leaching of toxic-forming materials into surface or subsurface waters in accordance with § 177.108 and wherever necessary to ensure the stability of the backfilled materials. The method of compacting material and the design specifications shall be approved by the regulatory authority before the toxic materials are covered.

(3) *Use of waste materials as fill.* Before waste materials from a coal preparation or conversion facility or from other activities conducted outside the permit area such as municipal wastes are used for fill material, it must be demonstrated to the regulatory authority by hydrogeological means and chemical and physical analyses that use of these materials will not adversely affect water quality, water flow, and vegetation; will not present hazards to public health and safety; and will not cause instability in the backfilled area.

(k) *Grading along the contour.* All final grading, preparation of overburden before replacement of topsoil, and placement of topsoil, in accordance with § 177.107, shall be done along the con-

tour to minimize subsequent erosion and instability. If such grading, preparation or placement along the contour would be hazardous to equipment operators then grading, preparation or placement in a direction other than generally parallel to the contour may be used. In all cases, grading, preparation or placement shall be conducted in a manner which minimizes erosion and provides a surface for replacement of topsoil which will minimize slippage.

§ 177.106 Disposal of spoil and waste materials in areas other than the mine workings or excavations.

(a) *Disposal of spoil in other than valley or head-of-hollow fills.* Spoil not required to achieve the approximate original contour shall be transported to and placed in a controlled (engineered) manner in disposal areas other than the mine workings or excavations only if all the following conditions, in addition to the other requirements of this part, are met:

(1) The disposal areas shall be within the permit area, and they must be approved by the regulatory authority as suitable for construction of fills in accordance with the requirements of this paragraph;

(2) The disposal areas shall be located on the most moderate sloping and naturally stable areas available as approved by the regulatory authority. Where possible, fill materials suitable for disposal shall be placed upon or above a natural terrace, bench, or berm if such placement provides additional stability and prevents mass movement;

(3) The fill shall be designed using recognized professional standards, certified by a registered professional engineer, and approved by the regulatory authority;

(4) Where the slope in the disposal area exceeds 1v:2.8h (36 percent), or such lesser slope designated by the regulatory authority based on local conditions, measures such as keyway cuts (excavations to stable bedrock) or rock toe buttresses shall be constructed to stabilize the fill.

(5) The disposal area does not contain springs, natural water courses or wet weather seeps unless lateral drains are constructed from the wet areas to the underdrains in such a manner that infiltration of the water into the spoil pile will be prevented.

(6) All organic material shall be removed from the disposal area and the topsoil must be removed and segregated pursuant to § 177.107 before the material is placed in the disposal area. However, if approved by the regulatory authority, organic material may be used as mulch or may be included in the topsoil.

(7) The spoil shall be transported and placed in a controlled manner, concurrently compacted as necessary to ensure mass stability and prevent mass movement, covered, and graded to allow surface and subsurface drainage to be compatible with the natural surround-

ings, and to ensure long-term stability. The final configuration of the fill must be suitable for postmining land uses approved in accordance with § 177.104. Terraces shall not be constructed unless approved by the regulatory authority.

(8) If any portion of the fill interrupts, obstructs, or encroaches upon any natural drainage channel, the entire fill is classified as a valley or head-of-hollow fill and must be designed and constructed in accordance with the requirements of paragraph (b) of this section.

(9) The fill shall be inspected for stability by a registered engineer or qualified professional specialist during critical construction periods to assure removal of all organic material and topsoil, placement of under-drainage systems, and proper construction of terraces according to the approved plan. The registered engineer or other qualified professional specialist shall provide a certified report after each inspection that the fill has been constructed as specified in the design approved by the regulatory authority.

(b) *Disposal of spoil in valley or head-of-hollow fills.* Waste material must not be disposed of in valley or head-of-hollow fills. Spoil to be disposed of in natural valleys must be placed in accordance with the following requirements:

(1) The disposal areas shall be within the permit area, and they must be approved by the regulatory authority as suitable for construction of fills in accordance with the requirements of paragraph (b) of this section.

(2) The disposal site shall be near the ridge top of a valley selected to increase the stability of the fill and to reduce the drainage area above the fill. Where possible, spoil shall be placed above a natural terrace, bench, or berm, if such placement provides additional stability and prevents mass movement.

(3) The fill shall be designed using recognized professional standards, certified by a registered professional engineer and approved by the regulatory authority.

(4) All organic material shall be removed from the disposal area and the topsoil must be removed and segregated pursuant to § 177.107 of this part before the material is placed in the disposal area. However, if approved by the regulatory authority, organic material may be used as mulch or may be included in the topsoil.

(5) Where the slope in the disposal area exceeds 1v:2.8h (36 percent), or such lesser slope designated by the regulatory authority based on local conditions, measures such as keyway cuts (excavations to stable bedrock) or rock toe buttresses shall be constructed to stabilize the fill.

(6) A system of under drains constructed of durable rock shall be installed along the natural drainage system shall extend from the toe to the head of the fill and contain lateral drains to each area of potential drainage or seepage. In constructing the underdrains, no more than

of 10 percent of the rock may be less than 12 inches in size and no single rock may be larger than 25 percent of the width of the drain. No rock shall be used in underdrains if it tends to easily disintegrate and thereby clog the drain or if it is acid-forming or toxic-forming. The minimum size of the main underdrain shall be:

Total amount of fill material	Predominant type of fill material	Minimum size of drain in feet	
		Width	Height
Less than 1,000,000 yd ³	Sandstone	10	4
Do.	Shale	16	8
More than 1,000,000 yd ³	Sandstone	16	8
Do.	Shale	16	8

(7) Spoil shall be transported and placed in a controlled manner and concurrently compacted as specified by the regulatory authority in lifts that are less than 4 feet thick in order to achieve the densities designed to ensure mass stability, to prevent mass movement, to avoid contamination of the rock underdrain and to prevent formation of voids. The final configuration of the fill must be suitable for postmining land uses approved in accordance with § 177.104.

(8) Terraces shall be constructed to stabilize the face of the fill. The out-slope of each terrace shall not exceed 50 feet in length and the width of the terrace shall not be less than 20 feet.

(9) The tops of the fill and each terrace shall be graded no steeper than 1v:20h (5 percent) and shall be constructed to drain surface water to the sides of the fill where stabilized surface channels shall be established off the fill to carry drainage away from the fill. Drainage shall not be directed over the out-slope of the fill unless approved by the regulatory authority.

(10) All surface drainage from the undisturbed area above the fill shall be diverted away from the fill by approved structures leading into water courses.

(11) The out-slope of the fill shall not exceed 1v:2h (50 percent). The regulatory authority may require a flatter slope.

(12) The fill shall be inspected for stability by a registered engineer or qualified professional specialist during critical construction periods and at least quarterly throughout construction to assure removal of all organic material and topsoil, placement of under drainage systems, and proper construction of terraces according to the approved plan. The registered engineer or other qualified professional specialist shall provide a certified report, after each inspection that the fill has been constructed as specified in the design approved by the regulatory authority.

§ 277.107 Topsoil handling.

To prevent topsoil from being contaminated by spoil or waste materials, the permittee shall remove the topsoil as a separate operation from areas to be disturbed. Topsoil shall be immediately

redistributed according to the requirements of paragraph (b) of this section on areas graded to the approved postmining configuration. The topsoil shall be segregated, stockpiled, and protected from wind and water erosion and from contaminants which lessen its capability to support vegetation if sufficient graded areas are not immediately available for redistribution.

(a) *Topsoil removal.*—All topsoil to be salvaged shall be removed before any drilling for blasting, mining, or other surface disturbance.

(1) All topsoil shall be removed unless use of alternative materials is approved by the regulatory authority in accordance with paragraph (a) (4) of this section. Where the removal of topsoil results in erosion that may cause air or water pollution, the regulatory authority shall limit the size of the area from which topsoil may be removed at any one time and specify methods of treatment to control erosion of exposed overburden.

(2) All of the A horizon of the topsoil as identified by soil surveys shall be removed according to paragraph (a) of this section and then replaced on disturbed areas as the surface soil layers. Where the A horizon is less than 6 inches, a 6-inch layer that includes the A horizon and the unconsolidated material immediately below the A horizon (or all unconsolidated material if the total available is less than 6 inches) shall be removed and the mixture segregated and replaced as the surface soil layer.

(3) Where necessary to obtain soil productivity consistent with postmining land use, the regulatory authority may require that the B horizon or portions of the C horizon or other underlying layers demonstrated to have comparable quality for root development be segregated and replaced as subsoil.

(4) Selected overburden materials may be used instead of, or as a supplement to, topsoil where the resulting soil medium is equal to or more suitable for vegetation, and if all the following requirements are met:

(i) The permittee demonstrates that the selected overburden materials or an overburden-topsoil mixture is more suitable for restoring land capability and productivity by the results of chemical and physical analyses. These analyses shall include determinations of pH, percent organic material, nitrogen, phosphorus, potassium, texture class, and water-holding capacity, and such other analyses as required by the regulatory authority. The regulatory authority also may require that results of field-site trials or greenhouse tests be used to demonstrate the feasibility of using such overburden materials.

(ii) The chemical and physical analyses and the results of field-site trials and greenhouse tests are accompanied by a certification from a qualified soil scientist or agronomist.

(iii) The alternative material is removed, segregated, and replaced in conformance with this section.

(b) *Topsoil redistribution.*—(1) After final grading and before the topsoil is replaced, regraded land shall be scarified or otherwise treated to eliminate slippage surfaces and to promote root penetration.

(2) Topsoil shall be redistributed in a manner that—

(i) Achieves an approximate uniform thickness consistent with the postmining land uses;

(ii) Prevents excess compaction of the spoil and topsoil; and

(iii) Protects the topsoil from wind and water erosion before it is seeded and planted.

(c) *Topsoil storage.*—If the permit allows storage of topsoil, the stockpiled topsoil shall be placed on a stable area within the permit area where it will not be disturbed or be exposed to excessive water, wind erosion, or contaminants which lessen its capability to support vegetation before it can be redistributed on terrain graded to final contour. Stockpiles shall be selectively placed and protected from wind and water erosion, unnecessary compaction, and contamination by undesirable materials either by a vegetative cover as defined in § 177.110(g) or by other methods demonstrated to provide equal protection such as snow fences, chemical binders, and mulching. Unless approved by the regulatory authority, stockpiled topsoil shall not be moved until required for redistribution on a disturbed area.

(d) *Nutrients and soil amendments.*—Nutrients and soil amendments in the amounts and analyses as determined by soil tests shall be applied to the surface soil layer so that it will support the postmining requirements of § 177.104 and the revegetation requirements of § 177.110.

§ 177.108 Protection of the hydrologic system.

The permittee shall plan and conduct coal mining and reclamation operations to minimize disturbance to the prevailing hydrologic balance in order to prevent long-term adverse changes in the hydrologic balance that could result from surface coal mining and reclamation operations, both on- and off-site. Changes in water quality and quantity, in the depth to ground water, and in the location of surface water drainage channels shall be minimized such that the postmining land use of the disturbed land is not adversely affected and applicable Federal and Tribal statutes and regulations are not violated. The permittee shall conduct operations so as to minimize water pollution and shall, where necessary, use treatment methods to control water pollution. The permittee shall emphasize surface coal mining and reclamation practices that will prevent or minimize water pollution and changes in flows in preference to the use of water treatment facilities. Practices to control and minimize pollution include, but are not limited to, stabilizing disturbed areas through grading, diverting runoff, achieving quick growing

stands of temporary vegetation, lining drainage channels with rock or vegetation, mulching, sealing acid-forming and toxic-forming materials, and selectively placing waste materials in backfill areas. If pollution can be controlled only by treatment, the permittee shall operate and maintain the necessary water-treatment facilities for as long as treatment is required.

(a) *Water quality standards and effluent limitations.* All surface drainage from the disturbed area, including disturbed areas that have been graded, seeded, or planted shall be passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area. Sedimentation ponds shall be retained until drainage from the disturbed area have met the water quality requirements of this section and the revegetation requirements of § 177.110 have been met. The regulatory authority may grant exemptions from this requirement only when the disturbed drainage area within the total disturbed area is small and if the permittee shows that sedimentation ponds are not necessary to meet the effluent limitations of this paragraph and to maintain water quality in downstream receiving waters. For purpose of this section only, disturbed area shall not include those areas in which only diversion ditches, sedimentation ponds, or roads are installed in accordance with this section and the upstream area is not otherwise disturbed by the permittee. Sedimentation ponds required by this paragraph shall be constructed in accordance with paragraph (e) of this section in appropriate locations prior to any mining in the affected drainage area in order to control sedimentation or otherwise treat water in accordance with this paragraph. Discharges from areas disturbed by surface coal mining and reclamation operations must meet all applicable Federal and Tribal laws and regulations and, at a minimum, the following numerical effluent limitations:

Effluent limitations, in milligrams per liter, (mg/l) except for pH

Effluent characteristics	Maximum allowable ¹	Average of daily values for 30 consecutive discharge days ¹
Iron, total	7.0	3.5
Manganese, total	4.0	2.0
Total suspended solids ²	70.0	35.0
pH ³	Within the range 6.0 to 9.0	

¹ Based on representative sampling.

² In Arizona, Colorado, Montana, New Mexico, North Dakota, South Dakota, Utah, and Wyoming, total suspended solids limitations will be determined on a case-by-case basis, but they must not be greater than 45 mg/l (maximum allowable) and 30 mg/l (average of daily value for 30 consecutive discharge days) based on a representative sampling.

³ Where the application of neutralization and sedimentation treatment technology results in inability to comply with the manganese limitations set forth, the regulatory authority may allow the pH level in the discharge to exceed to a small extent the upper limit of 9.0 in order that the manganese limitations will be achieved.

(1) Any overflow or other discharge of surface water from the disturbed area within the permit area demonstrated by the permittee to result from a precipitation event larger than a 10-year, 24-hour frequency event will not be subject to the effluent limitations of paragraph (a) of this section.

(2) The permittee shall install, operate, and maintain adequate facilities to treat any water discharged from the disturbed area that violates applicable Federal or Tribal laws or regulations or the limitations of paragraph (a) of this section. If the pH of waters to be discharged from the disturbed area is normally less than 6.0, an automatic lime feeder or other neutralization process approved by the regulatory authority shall be installed, operated, and maintained. If the regulatory authority finds (1) that small and infrequent treatment requirements to meet applicable standards do not necessitate use of an automatic neutralization process, and (2) that the mine normally produces less than 500 tons of coal per day, then the regulatory authority may approve the use of a manual system if the permittee ensures consistent and timely treatment.

(b) *Surface-water monitoring.* (1) The permittee shall submit for approval by the regulatory authority a surface-water monitoring program which meets the following requirements:

(i) Provides adequate monitoring of all discharge from the disturbed area.

(ii) Provides adequate data to describe the likely daily and seasonal variation in discharges from the disturbed area in terms of water flow, pH, total iron, total manganese, and total suspended solids and, if requested by the regulatory authority, any other parameter characteristic of the discharge.

(iii) Provides monitoring at appropriate frequencies to measure normal and abnormal variations in concentrations.

(iv) Provides an analytical quality control system including standard methods of analysis such as those specified in 40 CFR 136.

(v) Provides a regular report of all measurements to the regulatory authority within 60 days of sample collection unless violations of permit conditions occur in which case the regulatory authority shall be notified immediately after receipt of analytical results by the permittee. If the discharge is subject to regulation by a Federal permit issued in compliance with the Federal Water Pollution Control Act Amendment of 1972 (33 U.S.C. §§ 1251-1378), a copy of the completed reporting form supplied to meet the permit requirements may be submitted to the regulatory authority to satisfy the reporting requirements, if the data meet the sampling frequency and other requirements of this paragraph.

(2) After disturbed areas have been regraded and stabilized in accordance with this part, the permittee shall monitor surface water flow and quality. Data from this monitoring shall be used to

demonstrate that the quality and quantity of runoff without treatment will be consistent with the requirement of this section to minimize disturbance to the prevailing hydrologic balance and with the requirements of this part to attain the approved postmining land use. These data shall provide a basis for approval by the regulatory authority for removal of water quality or flow control systems and for determining when the requirements of this section are met. The regulatory authority shall determine the nature of data, frequency of collection, and reporting requirements.

(3) Equipment, structures, and other measures necessary to accurately measure and sample the quality and quantity of surface water discharges from the disturbed area of the permit area shall be properly installed, maintained, and operated and shall be removed when no longer required.

(c) *Diversion and conveyance of overland flow away from disturbed areas.* In order to minimize erosion and to prevent or remove water from contacting toxic-producing deposits, overland flow from undisturbed areas may, if required or approved by the regulatory authority, be diverted away from disturbed areas by means of temporary or permanent diversion structures. The following requirements shall be met:

(1) Temporary diversion structures are those used during mining and reclamation. When no longer needed, these structures shall be removed and the area reclaimed. Temporary diversion structures shall be constructed to safely pass the peak runoff from a precipitation event with a 10-year recurrence interval, or a larger event as specified by the regulatory authority.

(2) Permanent diversion structures are those remaining after mining and reclamation and approved for retention by the regulatory authority and other appropriate Tribal and Federal agencies. To protect fills and property and to avoid danger to public health and safety, permanent diversion structures shall be constructed to safely pass the peak runoff from a precipitation event with a 100-year recurrence interval, or a larger event as specified by the regulatory authority. Permanent diversion structures shall be constructed with gently sloping banks that are stabilized by vegetation. Asphalt, concrete, or other similar linings shall not be used unless specifically required to prevent seepage or to provide stability and are approved by the regulatory authority.

(3) Diversions shall be designed, constructed, and maintained in a manner to prevent additional contributions of suspended solids to streamflow or to runoff outside the permit area to the extent possible, using the best technology currently available. In no event shall such contributions be in excess of requirements set by applicable Tribal or Federal law. Appropriate sediment control measures for these diversions shall include, but not be limited to, maintenances of

appropriate gradients, channel lining, revegetation, roughness structures, and detention basins.

(d) *Stream channel diversions.* (1) Flow from perennial and intermittent streams within the permit area may be diverted only when the diversions are approved by the regulatory authority and they are in compliance with Tribal and Federal statutes and regulations. When streamflow is allowed to be diverted, the new stream channel shall be designed and constructed to meet the following requirements:

(i) The average stream gradient shall be maintained and the channel designed, constructed, and maintained to remain stable and to prevent additional contributions of suspended solids to streamflow, or to runoff outside the permit area to the extent possible, using the best technology currently available. In no event shall such contributions be in excess of requirements set by applicable Tribal or Federal law. Erosion control structures such as channel lining structures, retention basins, and artificial channel roughness structures shall be used only when approved by the regulatory authority for temporary diversions where necessary or for permanent diversions where they are stable and will require only infrequent maintenance.

(ii) Channel, bank, and flood-plain configurations shall be adequate to safely pass the peak runoff of a precipitation event with a 10-year recurrence interval for temporary diversions and a 100-year recurrence interval for permanent diversions, or larger events as specified by the regulatory authority.

(iii) Fish and wildlife habitat and water and vegetation of significant value for wildlife shall be protected in consultation with appropriate Tribal and Federal fish and wildlife management agencies.

(2) All temporary diversion structures shall be removed and the affected land regraded and revegetated consistent with the requirements of § 177.105 and § 177.110. At the time such diversions are removed, the permittee shall ensure that downstream water treatment facilities previously protected by the diversion are modified or removed to prevent overtopping or failure of the facilities.

(3) *Buffer zone.* No land within 100 feet of an intermittent or perennial stream shall be disturbed by surface coal mining and reclamation operations unless the regulatory authority specifically authorizes surface coal mining and reclamation operations through such a stream. The area not to be disturbed shall be designated a buffer zone and marked as specified in § 177.103.

(e) *Sediment control measures.* Appropriate sediment control measures shall be designed, constructed, and maintained to prevent additional contributions of sediment to streamflow or to runoff outside the permit area to the extent possible, using the best technology currently available. Sediment control measures may include, but are not limited to, sedimentation ponds, diversion

structures, sediment traps, straw dikes, riprap, check dams, vegetative filters, dugout ponds, and chemical treatment. Sedimentation ponds may be used individually or in a series and shall (either individually or in series) meet the following criteria:

(1) Sedimentation ponds must provide at least a 24-hour detention time and a surface area of at least 1 square foot for each 50 gallons per day of inflow for runoff entering the pond(s) that results from a 10-year, 24-hour precipitation event. Runoff diverted, in accordance with paragraphs (c) and (d) of this section, away from disturbed drainage areas need not be considered in sedimentation pond design. Required sedimentation pond surface area and detention time may be accordingly reduced by the appropriate use of chemical treatment measures such as flocculation and coagulation if approved by the regulatory authority.

(2) An additional sediment storage volume must be provided equal to 0.2 acre-feet for each acre of disturbed area within the upstream drainage area. Upon approval of the regulatory authority, the sediment storage volume may be reduced in an amount, as demonstrated by the permittee equal to the sediment removed by other appropriate sediment control measures.

(3) Ponds may be of the permanent pool or self-dewatering type. Dewatering-type ponds shall use siphon or other dewatering methods approved by the regulatory authority to prevent discharges of pollutants within the design flow.

(4) Spillway systems shall be properly located to maximize the distances from the point of inflow into the pond to maximize detention times. Spillway systems shall be provided to safely discharge the peak runoff from a precipitation event with a 25-year recurrence interval, or larger event as specified by the regulatory authority.

(5) Sediment shall be removed from sedimentation ponds when the volume of sediment accumulates to 80 percent of the sediment storage volume required. Sediment removal shall be done in a manner that minimizes adverse effects on surface waters due to its chemical and physical characteristics, on infiltration, on vegetation, and on surface and ground water quality. Sediment that has been removed from sedimentation ponds and that meets the requirements for topsoil may be redistributed over graded areas in accordance with § 177.107.

(6) If a sedimentation pond has an embankment that is more than 20 feet in height, as measured from the upstream toe of the embankment to the crest of the emergency spillway, or has a storage volume of 20 acre-feet or more, the following additional requirements shall be met:

(i) An appropriate combination of principal and emergency spillways shall be provided to safely discharge the runoff resulting from a 100-year, 6-hour precipitation event, or larger event as

specified by the regulatory authority.

(ii) Ponds shall be designed and constructed with an acceptable static safety factor of at least 1.5 of maximum design flood elevation of the pool to ensure embankment slope stability.

(iii) The minimum top width of the embankment shall not be less than the quotient of $H+35/5$ where H is the height of the embankment as measured from the upstream toe of the top of the embankment.

(iv) Ponds shall have appropriate barriers to control seepage along conduits that extend through the embankment.

(7) All ponds shall be designed and inspected under the supervision of, and certified after construction by a registered professional engineer.

(8) All ponds, including those not meeting the size or other criteria of 30 CFR § 77.216(a), shall be examined for structural weakness, erosion, and other hazardous conditions in accordance with the inspection requirements contained in 30 CFR § 77.216-3.

(9) All ponds shall be removed and the affected land regarded and revegetated consistent with the requirements of § 177.105 and § 177.110, unless the regulatory authority approves retention of the ponds pursuant to paragraph (k) of this section.

(f) *Discharge structures.* Discharges from sedimentation ponds and diversions shall be controlled, where necessary, using energy dissipators, surge ponds, and other devices to reduce erosion and prevent deepening or enlargement of stream channels and to minimize disturbances to the hydrologic balance.

(g) *Acid and toxic materials.* Drainage from acid-forming and toxic-forming mine waste materials and soils into ground and surface water shall be avoided by:

(1) Identifying, burying, and treating where necessary, spoil or other materials that, in the judgment of the regulatory authority, will be toxic to vegetation or that will adversely affect water quality if not treated or buried. Such material shall be disposed of in accordance with the provision of § 177.105(j);

(2) Preventing or removing water from contact with toxic-producing deposits;

(3) Burying or otherwise treating all toxic or harmful materials within 30 days, if such materials are subject to wind and water erosion, or within a lesser period designated by the regulatory authority. If storage of such materials is approved, the materials shall be placed on impermeable material and protected from erosion and contact with surface water. Coal waste ponds and other coal waste materials shall be maintained according to § 177.108(g)(4), and § 177.109 shall apply;

(4) Burying or otherwise treating waste materials from coal preparation plants no later than 90 days after the cessation of the filling of the disposal area. Burial or treatment shall be in accordance with § 177.105(j);

(5) Casing, sealing or otherwise man-aging boreholes, shafts, wells, and auger

holes or other more or less horizontal holes to prevent pollution of surface or ground water and to prevent mixing of ground waters of significantly different quality. All boreholes that are within the permit area but are outside the surface coal mining area or which extend beneath the coal to be mined and into water bearing strata shall be plugged permanently in a manner approved by the regulatory authority, unless the boreholes have been approved for use in monitoring.

(6) Taking such other actions as required by the regulatory authority.

(h) *Ground water.*—(1) *Recharge capacity of reclaimed lands.* The disturbed area shall be reclaimed to restore approximate premining recharge capacity through restoration of the capability of the reclaimed areas as a whole to transmit water to the ground water system. The recharge capacity should be restored to support the approved postmining land use and to minimize disturbances to the prevailing hydrologic balance at the mined area and in associated offsite areas. The permittee shall be responsible for monitoring according to paragraph (h)(3) of this section to ensure operations conform to this requirement.

(2) *Ground water systems.* Backfilled materials shall be placed to minimize adverse effects on ground water flow and quality, to minimize offsite effects, and to support the approved postmining land use. The permittee shall be responsible for performing monitoring according to paragraph (h)(3) of this section to ensure operations conform to this requirement.

(3) *Monitoring.* Ground water levels, infiltration rates, subsurface flow and storage characteristics, and the quality of ground water shall be monitored in a manner approved by the regulatory authority to determine the effects of surface coal mining and reclamation operations on the recharge capacity of reclaimed lands and on the quantity and quality of water in ground water systems at the mine area and in associated offsite areas. When operations are conducted in such a manner that may affect the ground water system, ground water levels and ground water quality shall be periodically monitored using wells that can adequately reflect changes in ground water quantity and quality resulting from such operations. Sufficient water wells must be used by the permittee. The regulatory authority may require drilling and development of additional wells if needed to adequately monitor the ground-water system. As specified and approved by the regulatory authority, additional hydrologic tests, such as infiltration tests and aquifer tests must be undertaken by the permittee to demonstrate compliance with paragraphs (h)(1) and (2) of this section.

(i) *Water rights and replacement.* The permittee shall replace the water supply of an owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use from an

underground or surface source where such supply has been affected by contamination, diminution or interruption proximately resulting from surface coal mine operation by the permittee.

(j) *Alluvial valley floors west of the 100th meridian west longitude.* (1) Surface coal mining operations conducted in or adjacent to alluvial valley floors shall be planned and conducted so as to preserve the essential hydrologic functions of these alluvial valley floors throughout the mining and reclamation process. These functions shall be preserved by maintaining or reestablishing those hydrologic and biologic characteristics of the alluvial valley floor that are necessary to support the functions. The permittee shall provide information to the regulatory authority as required in paragraph (j)(3) of this section to allow identification of essential hydrologic functions and demonstrate that the functions will be preserved. The characteristics of an alluvial valley floor to be considered include, but are not limited to:

(i) The longitudinal profile (gradient), cross-sectional shape, and other channel characteristics of streams that have formed within the alluvial valley floor and that provide for maintenance of the prevailing conditions of surface flow;

(ii) Aquifers (including capillary zones and perched water zones) and confining beds within the mined area which provide for storage, transmission, and regulation of natural ground water and surface water that supply the alluvial valley floors;

(iii) Quantity and quality of surface and ground water that supply alluvial valley floors;

(iv) Depth to and seasonal fluctuations of ground water beneath alluvial valley floors;

(v) Configuration and stability of the land surface in the flood plain and adjacent low terraces in alluvial valley floors as they allow or facilitate irrigation with flood waters or subirrigation and maintain erosional equilibrium; and

(vi) Moisture-holding capacity of soils (or plant growth medium) within the alluvial valley floors, and physical and chemical characteristics of the subsoil which provide for sustained vegetation growth or cover through dry months.

(2) Surface coal mining operations located west of the 100th meridian west longitude shall not interrupt, discontinue, or preclude farming on alluvial valley floors and shall not materially damage the quantity or quality of surface or ground water that supplies these valley floors unless the premining land use has been undeveloped rangeland which is not significant to farming on the alluvial valley floors or unless the area of affected alluvial valley floor is small and provides negligible support for the production from one or more farms. This subparagraph (2) does not apply to those surface coal mining operations that:

(i) Were in production in the year preceding August 3, 1977, were located

in or adjacent to an alluvial valley floor, and produced coal in commercial quantities during the year preceding August 3, 1977; or

(ii) Had specific permit approval by the Bureau of Indian Affairs before August 3, 1977, to conduct surface coal mining operations for an area within an alluvial valley floor.

(3) (i) Before surface mining and reclamation operations authorized under paragraph (j) (2) of this section may be issued a new, revised or amended permit, the permittee shall submit, for regulatory authority approval, detailed surveys and baseline data to establish standards against which the requirements of paragraph (j) (1) of this section may be measured and from which the degree of material damage to the quantity and quality of surface and ground water that supply the alluvial valley floors may be assessed. The surveys and data shall include:

(A) A map, at a scale determined by the regulatory authority, showing the location and configuration of the alluvial valley floor;

(B) Baseline data covering a full water year for each of the hydrologic functions identified in paragraph (j) (1) of this section;

(C) Plans showing how the operation will avoid, during mining and reclamation, interruption, discontinuance, or preclusion of farming on the alluvial valley floors and will not materially damage the quantity or quality of water in surface and ground water systems that supply such valley floors;

(D) Historic land use data for the proposed permit area and for farms to be affected; and

(E) Such other data as the regulatory authority may require.

(ii) Surface mining operations which qualify for the exceptions in paragraph (j) (2) of this section are not required to submit the plans prescribed in paragraph (j) (3) (i) (C) of this section.

(k) *Permanent impoundments.* The permittee may construct, if authorized by the regulatory agency pursuant to this paragraph and § 177.104 permanent water impoundments on mining sites as a part of reclamation activities only when they are adequately demonstrated to be in compliance with § 177.104 and § 177.105 in addition to the following requirements:

(1) The size of the impoundment is adequate for its intended purposes.

(2) The impoundment dam construction is designed to achieve necessary stability with an adequate margin of safety compatible with that of structures constructed under Pub. L. 83-566 (16 U.S.C. 1006).

(3) The quality of the impounded water will be suitable on a permanent basis for its intended use and discharges from the impoundment will not degrade the quality of receiving waters below the water quality standards established pursuant to applicable Federal and Tribal law.

(4) The level of water will be reasonably stable.

(5) Final grading will comply with the provisions of § 177.105 and will provide adequate safety and access for proposed water users.

(6) Water impoundments will not result in the diminution of the quality or quantity of water used by adjacent or surrounding landowners for agricultural, industrial, recreational, or domestic uses.

(1) *Hydrologic impact of roads.*—(i) *General.* Access and haul roads and associated bridges, culverts, ditches, and road rights-of-way shall be constructed, maintained, and reclaimed to prevent additional contributions of suspended solids to streamflow, or to runoff outside the permit area to the extent possible, using the best technology currently available. In no event shall the contributions be in excess of requirements set by applicable Tribal or Federal law. All access and haul roads shall be removed and the land affected regraded and revegetated consistent with the requirements of § 177.105 and § 177.110 unless retention of a road is approved as part of a postmining land use under § 177.104 as being necessary to support the postmining land use or necessary to adequately control erosion and the necessary maintenance is assured.

(2) *Construction.* (i) All roads, insofar as possible, shall be located on ridges or on the available flatter and more stable slopes to minimize erosion. Stream fords are prohibited unless they are specifically approved by the regulatory authority as temporary routes across dry streams that will not adversely affect sedimentation and that will not be used for coal haulage. Other stream crossing shall be made using bridges, culverts or other structure designed and constructed to meet the requirements of this paragraph. Roads shall not be located in active stream channels nor shall they be constructed or maintained in a manner that increases erosion or causes significant sedimentation or flooding. However, nothing in this paragraph will be construed to prohibit relocation of stream channels in accordance with paragraph (d) of this section.

(ii) In order to minimize erosion and subsequent disturbances of the hydrologic balance, roads shall be constructed in compliance with the following grade restrictions or other grades determined by the regulatory authority to be necessary to control erosion:

(A) The overall sustained grade shall not exceed 1v:10h (10 percent).

(B) The maximum grade greater than 10 percent shall not exceed 1v:6.5h (15 percent) for more than 300 feet.

(C) There shall not be more than 300 feet of grade exceeding 10 percent within each 1,000 feet.

(iii) All access and haul roads shall be adequately drained using structures such as, but not limited to, ditches, water barriers, cross drains, and ditch relief drains. For access and haul roads that are to be maintained for more than 1 year, water-control structures shall be designed with a discharge capacity capable of passing the peak runoff from a 10-year, 24-hour precipitation event.

Drainage pipe and culverts shall be constructed to avoid plugging or collapse and erosion at inlets and outlets. Drainage ditches shall be provided at the toe of all cut slopes formed by construction of roads. Trash racks and debris basins shall be installed in the drainage ditches wherever debris from the drainage area could impair the functions of drainage and sediment control structures. Ditch relief and cross drains shall be spaced according to grade. Effluent limitations of paragraph (a) of this section shall not apply to drainage from access and haul roads located outside the disturbed area as defined in this section unless otherwise specified by the regulatory authority.

(iv) Access and haul roads shall be surfaced with durable material. Toxic or acid-forming substances shall not be used. Vegetation may be cleared only for the essential width necessary for road and associated ditch construction and to serve traffic needs.

(3) *Maintenance.*—(i) Access and haul roads shall be routinely maintained by means such as, but not limited to, wetting, scraping or surfacing.

(ii) Ditches, culverts, drains, trash racks, debris basins and other structures serving to drain access and haul roads shall not be restricted or blocked in any manner that impedes drainage or adversely affects the intended purpose of the structure.

(m) *Hydrologic impacts of other transport facilities.* Railroad loops, spurs, sidings and other transport facilities shall be constructed, maintained and reclaimed to control diminution or degradation of water quality and quantity and to prevent additional contributions of suspended solids to streamflow, or runoff outside the permit area to the extent possible, using the best technology currently available.

In no event shall contributions be in excess of requirements set by applicable Tribal or Federal law.

(n) *Discharge of waters into underground mines.* Surface and ground waters shall not be discharged or diverted into underground mine workings.

§ 177.109 Dams constructed of or impounding waste material.

(a) *General.* No waste material shall be used in or impounded by existing or new dams without the approval of the regulatory authority. The permittee shall design, locate, construct, operate, maintain, modify, and abandon or remove all dams (used either temporarily or permanently) constructed of waste materials, in accordance with the requirements of this section.

(b) *Construction of dams.* (1) Waste shall not be used in the construction of dams unless demonstrated through appropriate engineering analysis, to have no adverse effect on stability.

(2) Plans for dams subject to this section and also including those dams that do not meet the size or other criteria of 30 CFR § 77.216(a), shall be approved by the regulatory authority before con-

struction and shall contain the minimum plan requirements established by the Mining Enforcement and Safety Administration pursuant to 30 CFR § 77.216-2.

(3) Construction requirements are as follows: (i) Design shall be based on the flood from the probable maximum precipitation event unless the permittee shows that the failure of the impounding structure would not cause loss of life or severely damage property or the environment, in which case, depending on site conditions, a design based on a precipitation event of no less than 100-year frequency may be approved by the regulatory authority.

(ii) The design freeboard distance between the lowest point on the embankment crest and the maximum water elevation shall be at least 3 feet to avoid overtopping by wind and wave action.

(iii) Dams shall have minimum safety factors as follows:

Case	Loading condition	Minimum safety factor
I	End of construction	1.3
II	Partial pool with steady seepage saturation	1.5
III	Steady seepage from spillway or decant crest	1.5
IV	Earthquake (cases II and III with seismic loading.)	1.0

(iv) The dam, foundation, and abutments shall be stable under all conditions of construction and operation of the impoundment. Sufficient foundation investigations and laboratory testing shall be performed to determine the factors of safety of the dam for all loading conditions in paragraph (b) (3) (iii) of this section and for all increments of construction.

(v) Seepage through the dam, foundation, and abutments shall be controlled to prevent excessive uplift pressures, internal erosion, sloughing, removal of material by solution, or erosion of material by loss into cracks, joints, and cavities. This may require the use of impervious blankets, previous drainage zones or blankets, toe drains, relief wells, or dental concreting of jointed rock surface in contact with embankment materials.

(vi) Allowances shall be made for settlement of the dams and the foundation so that the freeboard will be maintained.

(vii) Impoundments created by dams of waste materials shall be subject to a minimum drawdown criteria that allows the facility to be evacuated by spillways or decants of 90 percent of the volume of water stored during the design precipitation event within 10 days.

(viii) During construction of dams subject to this section, the structures shall be periodically inspected by a registered professional engineer to ensure construction according to the approved design. On completion of construction, the structure shall be certified by a registered professional engineer experienced in the field of dam construction as having been constructed in accordance with ac-

cepted professional practice and the approved design.

(ix) A permanent identification marker, at least 6 feet high that shows the dam number assigned pursuant to 30 CFR § 77.216-1 and the name of the person operating or controlling the dam, shall be located on or immediately adjacent to each dam within 30 days of certification of design pursuant to this section.

(4) All dams, including those not meeting the size or other criteria of 30 CFR § 77.216(a), shall be routinely inspected by a registered professional engineer, or someone under the supervision of a registered professional engineer, in accordance with Mining Enforcement and Safety Administration regulations pursuant to 30 CFR § 77.216-3.

(5) All dams shall be routinely maintained. Vegetative growth shall be cut where necessary to facilitate inspection and repairs. Ditches and spillways shall be cleaned. Any combustible materials present on the surface, other than that used for surface stability such as mulch or dry vegetation, shall be removed and any other appropriate maintenance procedures followed.

(6) All dams subject to this section shall be certified annually as having been constructed and modified in accordance with current prudent engineering practices to minimize the possibility of failures. Any changes in the geometry of the impounding structure shall be highlighted and included in the annual certification report. These certifications shall include a report on existing and required monitoring procedures and instrumentation, the average and maximum depths and elevations of any impounded waters over the past year, existing storage capacity of impounding structures, any fires occurring in the material over the past year and any other aspects of the structures affecting their stability.

(7) Any enlargements, reductions in size, reconstruction or other modification of the dams shall be approved by the regulatory authority before construction begins.

(8) All dams shall be removed and the disturbed areas regraded, revegetated, and stabilized before the release of bond unless the regulatory authority approve retention of such dams as being compatible with an approved postmining land use (§ 177.104).

§ 177.110 Revegetation.

(a) General. (1) The permittee shall establish on all land that has been disturbed, a diverse, effective, and permanent vegetative cover of species native to the area of disturbed land or species that will support the planned postmining uses of the land approved according to § 177.104.

(2) Revegetation shall be carried out in a manner that encourages a prompt vegetative cover and recovery of productivity levels compatible with approved land uses. The vegetative cover shall be capable of stabilizing the soil surface

with respect to erosion. All disturbed lands, except water areas and surface areas of roads that are approved as a part of the postmining land use, shall be seeded or planted to achieve a vegetative cover of the same seasonal variety native to the area of disturbed land. If both the pre- and postmining land use is intensive agriculture, planting the crops normally grown will meet the requirement. Vegetative cover will be considered of the same seasonal variety when it consists of a mixture of species of equal or superior utility for the intended land use when compared with the utility of naturally occurring vegetation during each season of the year.

(b) Use of introduced species. Introduced species may be substituted for native species only if appropriate field trials have demonstrated that the introduced species are of equal or superior utility for the approved postmining land use, or are necessary to achieve a quick, temporary, and stabilizing cover. Such species substitution shall be approved by the regulatory authority. Introduced species shall meet applicable Tribal and Federal seed or introduced species statutes, and shall not include poisonous or potentially toxic species.

(c) Timing of revegetation. Seeding and planting of disturbed areas shall be conducted during the first normal period for favorable planting conditions after final preparation. The normal period for favorable planting shall be that planting time generally accepted locally for the type of plant materials selected to meet specific site conditions and climate. Any disturbed areas, except water areas and surface areas of roads that are approved under § 177.104 as part of the postmining land use, which have been graded shall be seeded with a temporary cover of small grains, grasses, or legumes to control erosion until an adequate permanent cover is established. When rills or gullies, that would preclude the successful establishment of vegetation or the achievement of the postmining land use, form in regraded topsoil and overburden materials as specified in § 177.105, additional regrading or other stabilization practices will be required before seeding and planting.

(d) Mulching. Mulch shall be used on all regraded and topsoiled areas to control erosion, to promote germination of seeds, and to increase the moisture retention of the soil. Mulch shall be anchored to the soil surface where appropriate, to ensure effective protection of the soil and vegetation. Mulch means vegetation residues or other suitable materials that aid in soil stabilization and soil moisture conservation, thus providing micro-climatic conditions suitable for germination and growth, and do not interfere with the postmining use of the land. Annual grains such as oats, rye and wheat may be used instead of mulch when it is shown to the satisfaction of the regulatory authority that the substituted grains will provide adequate stability and that they will later be re-

placed by species approved for the postmining use.

(e) *Methods of revegetation.* (1) The permittee shall use technical publications or the results of laboratory and field tests approved by the regulatory authority to determine the varieties, species, seeding rates, and soil amendment practices essential for establishment and self-regeneration of vegetation. The regulatory authority shall approve species selection and planting plans.

(2) Where hayland, pasture, or range is to be the postmining land use, the species of grasses, legumes, browse, trees, or forbes for seeding or planting and their pattern of distribution shall be selected by the permittee to provide a diverse, effective, and permanent vegetative cover with the seasonal variety, succession, distribution, and regenerative capabilities native to the area. Livestock grazing will not be allowed on reclaimed land until the seedlings are established and can sustain managed grazing. The regulatory authority, in consultation with the permittee and the landowner or in concurrence with the governmental land-managing agency having jurisdiction over the surface, shall determine when the revegetated area is ready for livestock grazing.

(3) Where forest is to be the postmining land use, the permittee shall plant trees adapted for local site conditions and climate. Trees shall be planted in combination with an herbaceous cover of grains, grasses, legumes, forbs, or woody plants to provide a diverse, effective, and permanent vegetation cover with the seasonal variety, succession, and regeneration capabilities native to the area.

(4) Where wildlife habitat is to be included in the postmining land use, the permittee shall consult with appropriate Tribal and Federal wildlife and land management agencies and shall select those species that will fulfill the needs of wildlife, including food, water, cover, and space. Plant groupings and water resources shall be spaced and distributed to fulfill the requirements of wildlife.

(f) *Standards for measuring success of revegetation.* (1) Success of revegetation shall be measured on the basis of reference areas approved by the regulatory authority. Reference areas mean land units of varying size and shape identified and maintained under appropriate management for the purpose of measuring ground cover, productivity and species diversity that are produced naturally. The reference areas must be representative of geology, soils, slope, aspect, and vegetation in the permit area. Management of the reference area shall be comparable to that which will be required for the approved postmining land use of the area to be mined. The regulatory authority shall approve the estimating techniques that will be used to determine the degree of success in the revegetated area.

(2) The ground cover of living plants on the revegetated area shall be equal

to the ground cover of living plants of the approved reference area for a minimum of two growing seasons. The ground cover shall not be considered equal if it is less than 90 percent of the ground cover of the reference area for any significant portion of the mined area. Exceptions may be authorized by the regulatory authority for:

(i) Previously mined areas that were not reclaimed to the standards required by this part prior to the effective date of these regulations. The ground cover of living plants for such areas shall not be less than required to control erosion, and in no case less than that existing before redisturbance;

(ii) Areas to be developed immediately for industrial or residential use. The ground cover of living plants shall not be less than required to control erosion. As used in this paragraph, immediately means less than 2 years after regrading has been completed for the area to be used; and

(iii) Areas to be used for agricultural cropland purposes. Success in revegetation of crop land shall be determined on the basis of crop production from the mined area compared to the reference area. Crop production from the mined area shall be equal to that of the approved reference area for a minimum of two growing seasons. Production shall not be considered equal if it is less than 90 percent of the production of the reference area for any significant portion of the mined area.

(3) Species diversity, distribution, seasonal variety, and vigor shall be evaluated on the basis of the results which could reasonably be expected using the methods of revegetation approved under paragraph (e) of this section.

(g) *Seeding of stockpiled topsoil.* Topsoil stockpiled in compliance with § 177.107 must be seeded or planted with an effective cover of nonnoxious, quick growing annual and perennial plants during the first normal period for favorable planting conditions or protected by other approved measures as specified in § 177.107.

§ 177.111 Steep-slope mining.

(a) The permittee conducting surface coal mining and reclamation operations on natural slopes that exceed 20 degrees, or on lesser slopes that require measures to protect the area from disturbance, as determined by the regulatory authority after consideration of soils, climate, the method of operation, geology, and other regional characteristics, shall meet the following performance standards. The standards of this section do not apply where mining is done on a flat or gently rolling terrain with an occasional steep slope through which the mining proceeds and leaves a plain or predominantly flat area; or where the mining removes entire coal seams running through the upper fraction of a mountain, ridge, or hill by removing all of the overburden and creating a level plateau or gently rolling contour.

(1) Spoil, waste materials or debris, including that from clearing and grubbing, and abandoned or disabled equipment, shall not be placed or allowed to remain on the downslope.

(2) The highwall shall be completely covered with spoil and the disturbed area graded to comply with the provisions of § 177.105 of this part. Land above the highwall shall not be disturbed unless the regulatory authority finds that the disturbance will facilitate compliance with the requirements of this section.

(3) Material in excess of that required to meet the provisions of § 177.105 of this part shall be disposed of in accordance with the requirements of § 177.106 of this part.

(4) Woody materials may be buried in the backfilled area only when burial does not cause, or add to, instability of the backfill. Woody materials may be chipped and distributed through the backfill when approved by the regulatory authority.

§ 177.112 Inspections.

(a) *Extent.* The authorized representatives of the Secretary shall conduct inspections of surface coal mining operations subject to regulations under the Act—

(1) On the basis of information provided by a Tribe or any person which gives rise to a reasonable belief that the provisions of the Act, regulations or permit condition required by the Act are being violated, or that a condition or practice exists which creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources; and

(2) On a random basis of at least one complete inspection each 6 months. A complete inspection is an onsite review of the operator's compliance with all applicable standards in these regulations within the entire area disturbed or affected by mining.

(b) *Right of Entry.* (1) Authorized representatives of the Secretary, without advance notice and upon presentation of appropriate credentials and without a search warrant, shall have the right of entry to, upon, or through any surface coal mining and reclamation operations or any premises in which any records required to be maintained are located.

(2) The authorized representatives may at reasonable times, and without delay, have access to and copy any records, and inspect any monitoring equipment or method of operation required under this act, the regulations or the permit.

(c) *Inspection based on citizen requests.* (1) *Citizen reports.* (i) Any person who believes that there is a violation of the Act, regulations or permit conditions required by the Act or that any imminent danger or harm exists may report this information to the Office of Surface Mining Reclamation and Enforcement. Written reports must be signed and in-

clude a phone number where the reporting party can be contacted. Oral reports will be accepted but must be followed by a written and signed statement including the information reported. The complaint or other information shall be considered as having a reasonable basis if it alleges facts which, if proven to be true, would be sufficient to show a violation of the Act, regulations or permit. Unless the Office has reason to believe that the information is incorrect, or determines that even if true it would not constitute a violation, the Office shall conduct an inspection within 15 days of receipt of the complaint. If the complaint alleges an imminent danger or harm, the inspection shall be conducted promptly.

(ii) The identity of any person supplying information to the Office relating to possible violations or imminent dangers or harms shall remain confidential with the Office, if requested by the person supplying the information, unless disclosure is required under the Freedom of Information Act (5 U.S.C. § 552) or by other Federal law.

(2) *Right to Accompany the Authorized Representative of the Secretary.*

(i) If a Federal inspection is conducted as a result of information provided to the Office, the person who provided the information shall be notified when the inspection is to occur and the person will be allowed to accompany the authorized representative of the Secretary during the inspection.

(ii) Any person accompanying an authorized representative of the Secretary has a right of entry to, upon and through the mining and reclamation operations about which he supplied information, only if he is in the presence of and is under the control, direction and supervision of the authorized representative while on the mine property.

(3) *Notification of Results of Investigation.* Within 10 days of the inspection or, if no inspection, within 15 days of the complaint, the Office shall notify the person in writing of the following—

(i) The results of the investigation, including a description of any inspection which occurred and any enforcement action taken; copies of Federal inspection reports, notices of violation, and cessation orders may be forwarded to the person in satisfaction of this requirement.

(ii) If no inspection was conducted, an explanation of the reason for not inspecting.

(iii) A statement as to the person's right to informal review of the actions or inactions of the Office.

(iv) The permittee shall receive copies of all such reports which have not already been given to the permittee, except that the name of the complainant shall be removed.

(4) *Review of Action of Local Offices.* A person who does not agree with the action taken by the Office on their report may request the Regional Director to review the complaint and actions taken. The Regional Director shall advise the person in writing, within 30 days, of the

results of the review. Informal review under this subsection shall not affect any rights to formal review or a citizen's suit.

(d) *Failure to Give Notice and Lack of Reasonable Belief.* No notice of violation or cessation order may be vacated by reason of failure to give notice required by the Act, or these regulations prior to the inspection; or by reason of a subsequent determination that prior to the inspection the Office did not have information sufficient to create a reasonable belief that a violation had occurred.

(e) *Tribal involvement.* (1) Whenever an authorized representative of the Secretary decides to conduct an inspection of any coal mining operation or any premises in which any records to be maintained are located, the appropriate representative of the local governing Indian Tribe shall be notified and invited to accompany the Secretary's representative on such an inspection.

(2) An Indian Tribe, or its authorized representatives, shall be entitled to all the protections of paragraph (c) of this section.

§ 177.113 Enforcement procedures.

(a) *Imminent Dangers and Harms.*

(1) If an authorized representative of the Secretary finds conditions or practices, or violations of applicable performance standards, which create an imminent danger to the health or safety of the public, the authorized representative shall immediately order a cessation of surface coal mining and reclamation operations or that portion of the operation relevant to the condition, practice, or violation.

(2) If an authorized representative of the Secretary finds conditions or practices, or violations of applicable performance standards, which are causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the authorized representative shall immediately order a cessation of surface coal mining and reclamation operations or that portion of the operation relevant to the condition, practice, or violation.

(3) An authorized representative of the Secretary shall impose affirmative obligations on an operator which the authorized representative deems necessary to abate the condition, practice, or violation if—

(i) A cessation order is issued under paragraph (a) (1) or (2) of this section; and

(ii) The cessation of mining or reclamation activities will not completely abate the imminent danger or harm or eliminate the practices or conditions that contributed to the imminent danger or harm.

(4) When imposing affirmative obligations under this section, the authorized representative of the Secretary shall require abatement of the imminent danger or harm in the most expeditious manner physically possible. The affirmative obligation shall include a time by which abatement shall be accomplished

and may include, among other things, the use of existing or additional personnel and equipment.

(5) Reclamation operations not directly the subject of the order or affirmative obligation shall continue during any cessation order.

(6) An authorized representative of the Secretary shall terminate a cessation order issued under paragraph (a) (1) or (2) of this section by written notice when the authorized representative determines that the conditions or practices or violations that contributed to the imminent danger to life or the environment have been eliminated.

(b) *Non-Imminent Danger or Harm.*

(1) If an authorized representative of the Secretary finds a violation which is not covered by paragraph (a), the authorized representative shall issue a notice of violation fixing a reasonable time for abatement.

(2) An authorized representative of the Secretary may extend the time to abate a violation by written notice if the failure to abate within the time set was not caused by the permittee's lack of diligence.

(3) An authorized representative of the Secretary may establish interim steps in an abatement period. If the permittee fails to meet any interim step within the time set, the authorized representative may extend the time set for meeting the interim step, in accordance with this section, or may issue a cessation order pursuant to paragraph (c).

(4) The total time for abatement as originally fixed and subsequently extended shall not exceed 90 days.

(c) *Failure to Abate.* An authorized representative of the Secretary shall order cessation of surface coal mining and reclamation operations, or the portion relevant to the violation, when a notice of violation has been issued under paragraph (b) and the permittee fails to abate the violation within the time originally fixed or subsequently extended. In a cessation order issued under this subsection, the authorized representative shall impose affirmative obligations to abate the violation in the manner provided in § 722.11 of this part. Reclamation operations not directly the subject of the order or affirmative obligation shall continue during any cessation order. A cessation order issued under this subsection shall be terminated as provided in paragraph (a).

(d) *Service of Notice.* Notices and orders issued under this part shall be given to the permittee or his designated agent. If no designated agent is found at the mine site, service will be made upon the person who, based on reasonable inquiry by the authorized representative of the Secretary, appears to be in charge of the mining or reclamation operation. The person receiving service shall be responsible for any immediate compliance actions required by the notice or order. Service is complete on delivery at the mine. However, a copy of each notice or order shall be mailed to the permittee within 48 hours.

(e) *Review at Minesite of Cessation Orders.* (1) Within 30 days after the permittee has received any cessation order issued under this part, a representative of the Office may conduct an informal hearing at the minesite or within such reasonable proximity to the mine that it may be visited during the conduct of the hearing. No hearing will be required where the condition, practice, or violation in question has been abated or the permittee waives the hearing. If no hearing is held because of a waiver, the cessation order shall not expire.

(2) Any request made to the Office for a substantial modification or vacation of a cessation order shall be deemed a request for an informal hearing under this paragraph.

(3) Notice of the time, place and subject matter of the hearing shall be given to the permittee, any citizen who filed a report which led to the cessation order to be reviewed, and appropriate officials of the local governing Indian Tribe. Notice of the hearing also shall be posted at the appropriate district or field office and at the mine site and, to the extent possible, in a newspaper in the area of the mine.

(4) The requirements of section 554 of Title 5 of the United States Code shall not govern the conduct of the hearings required by this paragraph. The representative of the Office may accept oral or written arguments and any other relevant information from any person attending.

(5) Within 15 days of the close of the informal hearing, the Office shall affirm, modify, or vacate the order. The decision shall be in writing and shall be sent to the permittee, any citizen who filed a report which led to the cessation order reviewed, and the appropriate agency of the local governing Indian Tribe.

(6) Informal review under this subsection shall not affect the rights of any person to request formal review under section 525(a)(1) of the Act. A request for informal review under this section of the Act shall not affect the 30-day time period for filing a request for formal review.

(f) *Pattern of Violations.* (1) The regulations of this paragraph set forth the procedures governing the suspension or revocation of permits and rights to mine under this Act based on a pattern of violations arising during Federal inspections during the initial regulatory program.

(2) *Definitions.* As used in this paragraph—

(i) "Violations of the same or related requirements of the Act, regulations or permit conditions" means noncompliance with any single section of this part.

(ii) "Violations of different requirements of the Act, regulations, or permit conditions" means noncompliance with different sections of this part.

(iii) "Unwarranted failure to comply" means the failure of a permittee to prevent the occurrence of any violation of his permit or any requirement of the Act or these regulations due to indifference, lack of diligence, lack of reasonable care; or the failure to abate any violation of

such permit, the Act or regulations due to indifference, lack of diligence, or lack of reasonable care.

(iv) "Willful violation" means an intentional action or omission which violates the Act, regulations or permit conditions required under the Act.

(v) "Inspection" as used in this paragraph means any visit to the mine.

(3) *Order to show cause.* (i) If the Director determines that a pattern of violations of any requirements of the Act, the regulations, or a permit condition imposed under the Act or regulations exists, or has existed, and that such violations are caused by the unwarranted failure of the permittee or were willful violations, the Director shall issue an order to the permittee to show cause why the permit should not be suspended or revoked.

(ii) The Director may determine that a pattern of violations exists or has existed, after considering the circumstances, including—

(A) The number of willful violations or violations caused by unwarranted failure to comply with the same or related requirements of the Act, regulations, or permit conditions during two or more Federal inspections;

(B) The number of willful violations or violations caused by unwarranted failure to comply with different requirements of the Act, regulations, or permit conditions; and

(C) The extent to which the violations were isolated departures from lawful conduct.

(iii) Violations of the same or related requirements of the Act, regulations, or permit conditions required by the Act during three or more Federal inspections within any 12-month period which were either caused by the unwarranted failure of the permittee to comply with the Act, the regulations or permit conditions required by the Act, or were willful violations, shall constitute a pattern of violations. A show cause order shall issue unless the Director finds that it would not further enforcement of the performance standards of the Act.

(4) *Suspension or revocation of permit.* (1) The order to show cause shall be issued and a public hearing, if requested, shall be conducted under the procedures of 43 CFR Part 4.

(ii) If the Secretary finds that a pattern of violations exists or has existed, the permit and right to mine under this Act shall be either suspended or revoked and the permittee directed to complete necessary corrective measures and reclamation operations.

(g) *Inability to Comply.* (1) Neither a notice of violation nor a cessation order issued under this part may be vacated because of inability to comply.

(2) A permittee may not be deemed to have shown good cause for not suspending or revoking a permit by showing inability to comply.

(3) Unless caused by lack of diligence, inability to comply may be considered in mitigation of the amount of a civil penalty under § 177.114 and of the duration

of the suspension of the permit under paragraph (f) of this section.

(h) *Other remedies preserved.* No provision in this section shall be interpreted as replacing or superseding any other remedies of the Indian mineral owner as set forth in the contract or otherwise available at law.

(i) With respect to coal leases issued on Indian lands after August 3, 1977, the Secretary shall enforce terms and conditions in addition to those required by this subpart, as may be requested by the Indian Tribe in such leases.

§ 177.114 Civil penalties.

(a) *Scope.* This section covers the assessment of civil penalties for violations of a permit condition, or any provision of the regulations in this subpart. This section governs when a civil penalty is assessed and how the amount is determined and sets forth applicable procedures. This section applies to cessation orders and notices of violation issued to permittees or operators under § 177.113 during a Federal inspection.

(b) *When assessment made.* (1) The Office will review each notice of violation and cessation order in accordance with the assessment procedures described in this section to determine whether a civil penalty will be assessed, the amount of the penalty and whether each day of a continuing violation will be deemed a separate violation for purposes of the total penalty assessed.

(2) The Office shall assess a civil penalty for each violation contained in a cessation order.

(3) In determining whether to assess a civil penalty for a violation not covered by paragraph (b)(2) above, the Office shall consider—

(i) The permittee's history of previous violations at the particular coal mining operation;

(ii) The seriousness of the violation;

(iii) Whether the permittee is negligent; and

(iv) The demonstrated good faith of the permittee in attempting to achieve rapid compliance after notification of the violation. The Office shall make this determination by use of a point system described in paragraph (c) of this section.

(c) *Whether to assess after a notice of violation.* (1) *General.* The Office shall determine whether to assess a penalty following the issuance of a notice of violation by a point system that takes into account the four criteria in paragraph (b)(3) of this section. Points are assigned based on each of the four criteria. If the total is more than 30 points, a penalty shall be assessed.

(2) *History of previous violations.* The Office shall assign one point for each past violation, and five points for each past cessation order issued as a result of a violation at the particular coal mining operation, up to a maximum of 30 points. Each violation which underlies a cessation order shall be counted separately from the cessation order itself. For purposes of history of previous vio-

lations, all violations and cessation orders issued within one year preceding the violation under consideration shall be counted unless—

(i) The violation or cessation order is the subject of pending administrative or judicial review or;

(ii) The violation or cessation order has been vacated because of a determination that the violation did not occur. In the event that administrative or judicial review is sought, the period of time during which the contested notice or order was under review shall not be counted in computing the 1-year period preceding the notice or order. The Office shall count each violation without regard to whether it led to a civil penalty assessment.

(3) **Seriousness.** The Office shall assign up to 30 points based on the seriousness of the violation according to the following schedules:

(i) **Probability of occurrence.** The probability of the occurrence of the event which a violated standard is designed to prevent may account for a maximum of 15 penalty points. (An example of the concept of the phrase "the event which a violated standard is designed to prevent" is as follows: Mishandling of topsoil is a violation of the topsoil standard in § 177.107 of this part; however, delay or failure in the revegetation and resulting environmental harm are the events which the topsoil standard in § 177.107 of this part is designed to prevent.) The Office shall use the following definitions and schedules—

Probability of occurrence:	Points
None or insignificant.....	0-5
Unlikely	5-10
Likely	10-15
Occurred	15

(ii) **Extent of potential or actual damage.** The extent of the potential or actual damage in terms of area and impact on the public or environment may account for a maximum of 15 penalty points based on the following—

(A) If the damage or impact which the violated standard is designed to prevent would remain within the permit area (or in the case of a deep mine, the area of surface structures), the Office shall assign zero to seven points depending on the duration and extent of the damage or impact.

(B) If the damage or impact against which the violated standard is designed to prevent would extend outside the permit area (or in the case of a deep mine, the area of surface structures), the Office shall assign eight to fifteen points depending on the duration and extent of the damage or impact.

(iii) In the case of a violation of a requirement of the Act, the regulations, or a permit to keep records, give notice, or conduct any measuring or monitoring, the Office may, as an alternative to the use of paragraphs (c) (3) (i) and (3) (ii) above assign up to 15 points for seriousness based upon the extent to which enforcement is obstructed by the violation.

(4) **Negligence.** (i) The Office shall assign up to 25 points based on the degree of

fault of the permittee, either through act or omission, in causing or failing to correct the condition or practice which is a violation. A violation which occurs through no negligence shall not be assigned penalty points for negligence. A violation which is caused by negligence shall be assigned 12 points or less depending on the degree of negligence. A violation which occurs through a greater degree of fault than negligence shall be assigned 13 through 25 penalty points depending on the degree of fault.

(ii) In determining the degree of negligence involved in a violation and the number of penalty points to be assigned, the following definitions apply—

(A) **No negligence** means an inadvertent violation of the Act, regulations or permit conditions which was unavoidable by the exercise of reasonable care.

(B) **Negligence** means the failure of a permittee to prevent the occurrence of any violation of his permit or any requirement of the Act or the regulations due to indifference, lack of diligence, or lack of reasonable care, or the failure to correct any violation of such permit or the Act or the regulations due to indifference, lack of diligence or lack of reasonable care.

(C) Examples of greater degree of fault than negligence are reckless, knowing or intentional conduct.

(iii) In calculating points to be assigned for negligence, the actions of all persons working on the mine site shall be attributed to the permittee or operator.

(5) **Good faith in attempting to achieve compliance.** (i) The Office shall subtract or add points based on the degree of good faith of the permittee in attempting to achieve rapid compliance after notification of the violation. The points shall be assigned according to the following schedule—

Degree of good faith:	Points
Rapid	-10
Normal	0
Lack of good faith.....	10

(ii) In determining the permittee's degree of good faith in attempting to achieve rapid compliance, the following definitions apply—

(A) **Rapid compliance** means that the permittee took extraordinary measures to abate the violation in the shortest possible time and that abatement was achieved before the time set for abatement.

(B) **Normal compliance** means the permittee abated the violation within the time given for abatement.

(C) **Lack of good faith** means the permittee did not show diligence in attempting to abate the violation and the violation was not timely abated.

(iii) If the consideration of this criteria is impractical because of the length of the abatement period, the assessment may be made without considering this criteria. Any such assessment may be reconsidered upon the permittee's request after abatement is completed.

(d) **Determination of amount of penalty.** The Office shall determine the

amount of any civil penalty by converting the total number of points assigned under paragraph (c) of this section to a dollar amount according to the following schedule:

1—\$20	36—1,600
2—40	37—1,700
3—60	38—1,800
4—80	39—1,900
5—100	40—2,000
6—120	41—2,100
7—140	42—2,200
8—160	43—2,300
9—180	44—2,400
10—200	45—2,500
11—220	46—2,600
12—240	47—2,700
13—260	48—2,800
14—280	49—2,900
15—300	50—3,000
16—320	51—3,100
17—340	52—3,200
18—360	53—3,300
19—380	54—3,400
20—400	55—3,500
21—420	56—3,600
22—440	57—3,700
23—460	58—3,800
24—480	59—3,900
25—500	60—4,000
26—600	61—4,100
27—700	62—4,200
28—800	63—4,300
29—900	64—4,400
30—1,000	65—4,500
31—1,100	66—4,600
32—1,200	67—4,700
33—1,300	68—4,800
34—1,400	69—4,900
35—1,500	70 and above 5,000

(e) **Assessment of separate violations for each day.** (1) If a cessation order is issued for failure to abate a violation within the time set in a prior notice of violation the Office shall assess separately each day the violation underlying the cessation order remains unabated following expiration of the abatement period in the notice of violation. The daily penalty shall be the amount assessed for the violation or \$750.00, whichever is greater. The daily assessment of a penalty shall not be made for any period that the obligation to abate is suspended.

(2) The Office may assess separately each day of any continuing violation. In making this determination, the Office may consider the factors listed in paragraph (b) of this section and any economic benefit to the permittee which resulted from a failure to comply.

(3) The Office shall separately assess a minimum of 2 days for any continuing violation which is assigned more than 70 points under paragraph (c) of this section.

(f) **Waiver of use of formula to determine civil penalty.** The Director, upon his own initiative or upon written request received within the time set in paragraph (g) of this section, may elect to waive in whole or in part the use of the formula contained in this part in determining the civil penalty for violation of the Act, if he determines that a waiver will further abatement of violations of the Act. A grant or denial of a waiver may be reversed by the Office of Hearings and Appeals, if such grant or denial is determined to be an abuse of discretion.

(g) *Procedures for assessment of civil penalties.* (1) Within 10 days of service of a notice or order, the permittee may submit information in writing pertaining to the violation involved to the Assessment Office and to the inspector who issued the notice or order. The Office shall consider any information so submitted in determining the facts surrounding the violation and the amount of the penalty.

(2) The Office shall serve the permittee by certified mail, return receipt requested with 30 days of the issuance of the notice or order, with a copy of the proposed assessment and of the worksheets showing the computation.

(h) *Procedure for conference.* (1) If a written request from the permittee is received within 15 days from receipt of a proposed assessment, the Office shall arrange for a conference to review the assessment. The permittee may submit additional material for consideration during the conference. The Office may contact the permittee to discuss the assessment prior to the conference if necessary to expedite the review.

(2) The Office shall consider all relevant information on the violation in question presented by the permittee and may recalculate either up or down or vacate the proposed penalty. No information as to which the permittee claims confidentiality shall be considered as a basis for reduction of a proposed assessment. When new facts warrant the imposition of a higher penalty, it shall be proposed in the manner provided in paragraph (f) of this section. Every change in a proposed assessment shall be fully documented in the file including a written explanation of the reason the penalty has changed.

(3) Notice of the time and place of the conference shall be posted at the Office of Surface Mining Reclamation and Enforcement field office with jurisdiction over the mine at least 5 days prior to the conference. Any person shall have a right to attend the conference and participate.

(4) If the issues are resolved, the agreement shall be in writing and signed by the party assessed and the representative of the Office. If payment is not received within 30 days, the office may:

(i) Enter the agreed upon amount as a final order of the Secretary; or

(ii) Rescind the agreement and reinstate the original proposed assessment.

(5) A reduction of a proposed civil penalty assessment of more than 25 percent and more than \$500 agreed to during a conference shall be approved by the Director or his designee before it is final and binding on the Secretary.

(i) *Request for hearing.* (1) Within 30 days from receipt of the proposed assessment, the permittee may request a hearing before the Office of Hearings and Appeals by filing a petition and tendering full payment of the proposed assessment to be held in escrow.

(2) The timely filing of a request for a conference under paragraph (h) of this section suspends the running of the 30-day period for requesting a hearing.

The suspension shall continue until the completion of the conference, which shall be held within 60 days from the date of the request for the conference. The permittee shall have 15 days after completion of the conference or after any disapproval by the Director or his designee under subparagraph (5) of paragraph (h), whichever occurs later, to request a public hearing.

(3) The Office of Hearings and Appeals conducts the hearings and issues orders or otherwise terminates the petition pursuant to its procedures in 43 CFR Part 4. The Office of Hearings and Appeals may determine whether a violation occurred. When determining the amount of the penalty, the Office of Hearings and Appeals shall use the point system and conversion table contained in this Part, except in cases in which the Office has waived the use of the point system and conversion table pursuant to paragraph (f) of this section.

(j) *Availability of records.* All records and files created or used in the assessment process under this Part shall be available for public inspection.

(k) *Notice to Tribe.* Appropriate officials of the local governing Indian Tribe shall be notified of any hearings or conferences conducted pursuant to this section, and shall be invited to attend.

[FR Doc. 77-36058 Filed 12-13-77; 5:08 pm]

[4830-01]

Title 26—Internal Revenue

CHAPTER I—INTERNAL REVENUE SERVICE, DEPARTMENT OF THE TREASURY SUBCHAPTER A—INCOME TAX

[T.D. 7522]

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Disaster Losses

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document provides amendments to the regulations relating to disaster losses. The amendments clarify the position of the Internal Revenue Service with respect to the types of losses eligible for retroactive deduction. These amendments make clear that a loss arising from a disaster and incurred in a trade or business or in a profit-seeking transaction may qualify as a disaster loss even if that loss is not technically a "casualty" loss.

EFFECTIVE DATE: Effective with respect to disasters occurring after December 31, 1961.

FOR FURTHER INFORMATION CONTACT:

Paul A. Francis of the Legislation and Regulations Division, Office of the Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, D.C. 20224, (Attention: CC:LR:T) 202-566-6640.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In 1962, Pub. L. 87-426 (76 Stat. 51) added section 165(h) to the Internal Revenue Code of 1954. Section 165(h) provides that a taxpayer may elect to deduct certain disaster losses for the taxable year preceding the year in which the disaster occurs. A disaster loss is a loss arising from a disaster by reason of which the President determines that Federal assistance is warranted for the area in which the loss occurs. The President now makes this determination under the Disaster Relief Act of 1974.

On May 19, 1964, the FEDERAL REGISTER published Treasury Decision 6735 which added § 1.165-11 to the Income Tax Regulations (26 CFR Part 1) to provide guidance as to the application of section 165(h) of the Internal Revenue Code of 1954 (29 FR 6493). Section 1.165-11, as adopted by Treasury Decision 6735, provided that section 165(h) applied to losses arising from fire, storm, shipwreck, or other casualty.

CLARIFYING CHANGE

Upon consideration of the scope of disaster relief legislation, the Internal Revenue Service has concluded that the election under section 165(h) is properly available whenever a taxpayer incurs a deductible disaster loss whether or not that loss is technically a "casualty" loss. It appears that the term "casualty" as used in section 165(h) is merely a synonym for "disaster". It would, therefore, be inappropriate to restrict the application of this provision to the circumstances in which an individual may claim a "casualty" loss with respect to personal use property under section 165(c)(3).

Accordingly, this Treasury decision amends § 1.165-11 to make clear that a taxpayer may elect to deduct any disaster loss for the taxable year immediately preceding the year in which the disaster occurs if the loss is deductible under other provisions of section 165. Losses to property used in a trade or business or in a profit-seeking transaction are deductible under section 165 whether or not the loss arises from a casualty. However, individuals may deduct losses to personal use property only if the loss arises from a casualty within the meaning of section 165(c)(3).

REGULATIONS ADOPTED WITHOUT PRIOR NOTICE AND PUBLIC PROCEDURE

Because of the need to provide immediate guidance to taxpayers and because this Treasury decision is not considered to be detrimental to any taxpayer, it is hereby found impracticable and unnecessary to issue this Treasury decision with notice and public procedure thereon under 5 U.S.C. 553(b) or subject to the effective date limitation of 5 U.S.C. 553(d).

DRAFTING INFORMATION

The principal author of this regulation was Paul A. Francis of the Legisla-

tion and Regulations Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations, both on matters of substance and style.

Adoption of amendments to the regulations. Accordingly, 26 CFR Part 1 is amended as follows:

§ 1.165 [Deleted]

Paragraph 1. Section 1.165 is deleted.

Par. 2. Paragraph (e) of § 1.165-1 is amended to read as follows:

§ 1.165-1 Losses.

(e) *Limitation on losses of individuals.* In the case of an individual, the deduction for losses granted by section 165(a) shall, subject to the provisions of section 165(c) and paragraph (a) of this section, be limited to:

(1) Losses incurred in a trade or business;

(2) Losses incurred in any transaction entered into for profit, though not connected with a trade or business; and

(3) Losses of property not connected with a trade or business and not incurred in any transaction entered into for profit, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft, and if the loss involved has not been allowed for estate tax purposes in the estate tax return. For additional provisions pertaining to the allowance of casualty and theft losses, see §§ 1.165-7 1.165-8, respectively.

For special rules relating to an election by a taxpayer to deduct disaster losses in the taxable year immediately preceding the taxable year in which the disaster occurred, see section 165(h) and § 1.165-11.

§ 1.165-7 [Amended]

Par. 3. Paragraph (a) (1) of § 1.165-7 is amended by deleting "casualty" and inserting in lieu thereof "disaster" in the second sentence.

Par. 4. Section 1.165-11 is amended by revising paragraphs (b) (2) and (3), (c), and (d) to read as follows:

§ 1.165-11 Election in respect of losses attributable to a disaster.

(b) *Loss subject to election.* . . .

(2) Occurring in an area subsequently determined by the President of the United States to warrant assistance by the Federal Government under the Disaster Relief Act of 1974; and

(3) Constituting a loss otherwise allowable as a deduction for the year in which the loss occurred under section 165(a) and the provisions of §§ 1.165-1 through 1.165-10 which are applicable to such losses.

(c) *Amount of loss to which election applies.* The amount of the loss to which section 165(h) and this section apply shall be the amount of the loss sustained during the period specified in paragraph (b) (1) of this section computed in ac-

cordance with the provisions of section 165 and those provisions of §§ 1.165-1 through 1.165-10 which are applicable to such losses. However, for purposes of making such computation, the period specified in paragraph (b) (1) of this section shall be deemed to be a taxable year.

(d) *Scope and effect of election.* An election made pursuant to section 165(h) and this section in respect of a loss arising from a particular disaster shall apply to the entire loss sustained by the taxpayer from such disaster during the period specified in paragraph (b) (1) of this section in the area specified in paragraph (b) (2) of this section. If such an election is made, the disaster to which the election relates will be deemed to have occurred in the taxable year immediately preceding the taxable year in which the disaster actually occurred, and the loss to which the election applies will be deemed to have been sustained in such preceding taxable year.

This Treasury decision is issued under the authority contained in section 7805 of the Internal Revenue Code of 1954 (68A Stat. 917; 26 U.S.C. 7805).

JEROME KURTZ,
Commissioner of Internal Revenue.

Approved: December 9, 1977.

DONALD C. LUBICK,
Acting Assistant Secretary of
the Treasury.

[FR Doc. 77-36059 Filed 12-13-77; 5:32 pm]

[4830-01]

[T.D. 7524]

PART 301—PROCEDURE AND ADMINISTRATION

Public Inspection of Written Determinations

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the public inspection of written determinations, which are rulings, determination letters, and technical advice memoranda. Provisions for public inspection of written determinations were added by the Tax Reform Act of 1976. These regulations provide the public with the guidance needed to take advantage of the new provisions. The regulations affect taxpayers who request a written determination and persons who want to inspect a written determination.

DATES: The regulations are effective with respect to written determinations issued in response to requests submitted after October 31, 1976.

FOR FURTHER INFORMATION CONTACT:

James Edward Maule of the Legislation and Regulations Division, Office of the Chief Counsel, Internal Revenue

Service, 1111 Constitution Avenue NW., Washington, D.C. 20224, Attention: CC:LR:T, 202-566-3350, not a toll-free call.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On June 17, 1977, the FEDERAL REGISTER published proposed amendments to the Regulations on Procedure and Administration (26 CFR Part 301) under section 6110 of the Internal Revenue Code of 1954 (42 FR 30868). The amendments were proposed to conform the regulations to section 1201(a) of the Tax Reform Act of 1976 (90 Stat. 1660). A detailed description of the regulations appears in the preamble to the notice of proposed rulemaking published on June 17, 1977, and is therefore not repeated here. No public hearing was requested. After consideration of all comments regarding the proposed amendments, those amendments are adopted with one change by this Treasury decision.

ONE CHANGE MADE

One change is made by this Treasury decision to the proposed amendments to the regulations under section 6110. The Treasury decision adopts a suggestion made in a comment with respect to the notice of proposed rulemaking. The suggestion is that a person requesting additional disclosure be permitted to bring a judicial action for additional disclosure under section 6110(f) (4) if the Internal Revenue Service does not conclude the person's administrative remedies by approving or denying the request within 180 days after it is made. Otherwise, if the Internal Revenue Service did not respond to the request for additional disclosure, the person making the request would not be able to bring a judicial action because the administrative remedies would not be exhausted.

OTHER COMMENTS

The other comments received with respect to the notice of proposed rulemaking were minor. Some of the comments addressed the merits of section 6110. Other comments suggested that certain issues, which are in fact resolved by the regulations, should be resolved by the regulations. Additional comments requested the Internal Revenue Service to adopt procedures not required by the statute or suggested by the legislative history, which if adopted would impose needless and insurmountable burdens on the daily operations of the Internal Revenue Service. The last group of comments contained suggestions which are contrary to existing law. For example, two comments both suggested that a person's name, address, or identifying number be disclosed if the person did not object. However, section 6110(c) (1) requires that names and addresses not be disclosed, and section 6103(b) (2)(B) includes them within the definition of "return information". Therefore, the suggestion is not adopted.

DRAFTING INFORMATION

The principal author of these regulations was James Edward Maule of the Legislation and Regulations Division, Office of the Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing these regulations, both on matters of substance and style.

Adoption of amendments to the regulations. The proposed amendments of the regulations are adopted, subject to the change set forth below:

Paragraph (d) (3) (i) of § 301.6110-5, as set forth in paragraph 2 of the notice of proposed rulemaking, is amended by adding a sentence at the end which reads as follows:

§ 301.6110-5 Notice and time requirements; actions to restrain disclosure; actions to obtain additional disclosure.

(d) Actions to obtain additional disclosure.

(3) Limitations on right to bring judicial action—(1) Exhaustion of administrative remedies. * * * However, if the Internal Revenue Service does not approve or deny the request for additional disclosure within 180 days after the request is submitted, the person making the request may file a petition pursuant to section 6110(f) (4).

This Treasury decision is issued under the authority contained in section 7805 of the Internal Revenue Code of 1954 (68A Stat. 917; 26 U.S.C. 7805).

JEROME KURTZ,

Commissioner of Internal Revenue.

Approved: November 25, 1977.

LAURENCE N. WOODWORTH,

Assistant Secretary of the Treasury.

The amendments to 26 CFR Part 301 are as follows:

§ 301.6111 [Redesignated from § 301.6110]

Paragraph 1. Section 301.6110 is redesignated as § 301.6111.

Paragraph 2. There are added immediately after § 301.6109-1 the following new sections:

§ 301.6110-1 Public inspection of written determinations and background file documents.

(a) General rule. Except as provided in § 301.6110-3, relating to deletion of certain information, § 301.6110-5(b), relating to actions to restrain disclosure, paragraph (b) (2) of this section, relating to technical advice memoranda involving civil fraud and criminal investigations, and jeopardy and termination assessments, and paragraph (b) (3) of this section, relating to general written determinations relating to accounting or funding periods and methods, the text of any written determination (as defined in § 301.6110-2(a)) issued pursuant to a request postmarked or hand delivered after October 31, 1976, shall be open to public inspection in the places provided in paragraph (c) (1) of this section. The

text of any written determination issued pursuant to a request postmarked or hand delivered before November 1, 1976, shall be open to public inspection pursuant to section 6110(h) and § 301.6110-6, when funds are appropriated by Congress for such purpose. The procedures and rules set forth in §§ 301.6110-1 through 301.6110-5 and 301.6110-7 do not apply to written determinations issued pursuant to requests postmarked or hand delivered before November 1, 1976, unless § 301.6110-6 states otherwise. There shall also be open to public inspection in each place of public inspection an index to the written determinations open or subject to inspection at such place. Each such index shall be arranged by section of the Internal Revenue Code, related statute, or tax treaty and by subject matter description within such section in such manner as the Commissioner may from time to time provide. The Commissioner shall not be required to make any written determination or background file document open to public inspection pursuant to section 6110 or refrain from disclosure of any such documents or any information therein, except as provided by section 6110 or with respect to a discovery order made in connection with a judicial proceeding. The provisions of section 6110 shall not apply to matters for which the determination of whether public inspection should occur is made pursuant to section 6104. Matters within the ambit of section 6104 include: any application filed with the Internal Revenue Service with respect to the qualification or exempt status of an organization, plan, or account described in section 6104(a) (1), whether the plan or account has more than 25 or less than 26 participants; any document issued by the Internal Revenue Service in which the qualification or exempt status of an organization, plan, or account described in section 6104(a) (1) is granted, denied or revoked or the portion of any document in which technical advice with respect thereto is given to a district director; any application filed, and any document issued by the Internal Revenue Service, with respect to the qualification or status of master, prototype, and pattern employee plans; the portion of any document issued by the Internal Revenue Service in which is discussed the effect on the qualification or exempt status of an organization, plan, or account described in section 6104(a) (1) of proposed transactions by such organization, plan, or account; and any document issued by the Internal Revenue Service in which is discussed the qualification or status of an organization described in section 509(a) or 4942(j) (3), but not including any document issued to nonexempt charitable trusts described in section 4947(a) (1).

(b) Items that may be inspected only under certain circumstances—(1) Background file documents. A background file document (as such term is defined in § 301.6110-2(g)) relating to a particular written determination issued pur-

suant to a request postmarked or hand delivered after October 31, 1976, shall not be subject to inspection until such written determination is open to public inspection or available for inspection pursuant to paragraph (b) (2) or (3) of this section, and then only if a written request pursuant to paragraph (c) (4) of this section is made for inspection of such background file document. Background file documents relating to written determinations issued pursuant to requests postmarked or hand delivered before November 1, 1976, shall be subject to inspection pursuant to section 6110 (h) and § 301.6110-6, when funds are appropriated by Congress for such purpose. The version of the background file document which is available for inspection shall be the version originally made available for inspection, as modified by any additional disclosure pursuant to section 6110(d) (3) and (f) (4).

(2) Technical advice memoranda involving civil fraud and criminal investigations, jeopardy and termination assessments. Any technical advice memorandum (as such term is defined in § 301.6110-2(f) involving any matter that is the subject of a civil fraud or criminal investigation, a jeopardy assessment (as such term is defined in section 6861), or a termination assessment (as such term is defined in section 6851) shall not be subject to inspection until all actions relating to such investigation or assessment are completed and then only if a written request pursuant to paragraph (c) (4) of this section is made for inspection of such technical advice memorandum. A "civil fraud investigation" is any administrative step or judicial proceeding in which an issue for determination is whether the Commissioner should impose additional tax pursuant to section 6653(b). A "criminal investigation" is any administrative step or judicial proceeding in which an issue for determination is whether a taxpayer should be charged with or is guilty of criminal conduct. An action relating to a civil fraud or criminal investigation includes any such administrative step or judicial proceeding, the review of subsequent related activities and related returns of the taxpayer or related taxpayers, and any other administrative step or judicial procedure or proceeding or appellate process that is initiated as a consequence of the facts and circumstances disclosed by such investigation. An action relating to a jeopardy or termination assessment includes any administrative step or judicial proceeding that is initiated to determine whether to make such assessment, that is brought pursuant to section 7429 to determine the appropriateness or reasonableness of such assessment, or that is brought to resolve the legal consequences of the tax status or liability issue underlying the making of such assessment. Any action relating to a civil fraud or criminal investigation, a jeopardy assessment, or a termination assessment is not completed until all available administrative steps and judicial proceedings and remedies, including appeals, have been completed.

(3) *Written determinations with respect to adoption of or change in certain accounting or funding periods and methods.* Any general written determination (as defined in § 301.6110-2(c) that relates solely to approval of any adoption of or change in—

(i) The funding method or plan year of a plan under section 412.

(ii) A taxpayer's annual accounting period under section 442.

(iii) A taxpayer's method of accounting under section 446(e), or

(iv) A partnership's or partner's taxable year under section 706

shall not be subject to inspection until such written determination would, but for this paragraph (b)(3), be open to public inspection pursuant to § 301.6110-5(c) and then only if a written request pursuant to paragraph (c)(4) of this section is made for inspection of such written determination.

(c) *Procedure for public inspection.*

(1) *Place of public inspection.* The text of any ruling (as such term is defined in § 301.6110-2(d)) or technical advice memorandum that is open to public inspection pursuant to section 6110 shall be located in the National Office Reading Room. The text of any determination letter (as such term is defined in § 301.6110-2(e)) that is open to public inspection pursuant to section 6110 shall be located in the Reading Room of the Regional Office in which is located the district office that issued such determination letter. Inspection of any written determination subject to inspection only upon written request shall be requested from the National Office Reading Room. Inspection of any background file document shall be requested only from the reading room in which the related written determination is either open to public inspection or subject to inspection upon written request. The locations and mailing addresses of the reading rooms are set forth in § 601.702(b)(3)(ii) of this chapter.

(2) *Time and manner of public inspection.* The inspection authorized by section 6110 will be allowed only in the place provided for such inspection in the presence of an Internal Revenue officer or employee and only during the regular hours of business of the Internal Revenue Service office in which the reading room is located. The public will not be allowed to remove any record from a reading room. A person who wishes to inspect reading room material without visiting a reading room may submit a written request pursuant to paragraph (c)(4) of this section for copies of any such material to the Internal Revenue Service reading room in which is located such material.

(3) *Copies.* Notes may be taken of any material open to public inspection under section 6110, and copies may be made manually. Copies of any material open to public inspection or subject to inspection upon written request will be furnished by the Internal Revenue Service to any person making requests therefor pursuant to paragraph (c)(4) of this

section. If made at the time of inspection, the request for copies need not be in writing, unless the material is not immediately available for copying. The Commissioner may prescribe fees pursuant to section 6110(j) for furnishing copies of material open or subject to inspection.

(4) *Requests.* Any request for copies of written determinations, for inspection of general written determinations relating to accounting or funding periods and methods or technical advice memoranda involving civil fraud and criminal investigations, and jeopardy and termination assessments, for inspection or copies of background file documents, and for copies of the index shall be submitted to the reading room in which is located the requested material. If made in person, the request may be submitted to the internal revenue employee supervising the reading room. The request shall contain:

(i) Authorization for the Internal Revenue Service to charge the person making such request for making copies, searching for material, and making deletions therefrom;

(ii) The maximum amount of charges which the Internal Revenue Service may incur without further authorization from the person making such request;

(iii) With respect to requests for inspection and copies of background file documents, the file number of the written determination to which such background file document relates and a specific identification of the nature or type of the background file document requested;

(iv) With respect to requests for inspections of general written determinations relating to accounting or funding periods and methods, the day, week, or month of issuance of such written determination, and the applicable category as selected from a special summary listing of categories prepared by the Internal Revenue Service;

(v) With respect to requests for copies of written determinations, the file number of the written determination to be copied, which can be ascertained in the reading room or from the index;

(vi) With respect to requests for copies of portions of the index, the section of the Internal Revenue Code, related statute or tax treaty in which the person making such request is interested;

(vii) With respect to material which is to be mailed, the name, address, and telephone number of the person making such request and the address to which copies of the requested material should be sent; and

(viii) Such other information as the Internal Revenue Service may from time to time require in its operation of reading rooms.

§ 301.6110-2 Meaning of terms.

(a) *Written determination.* A "written determination" is a ruling, a determination letter, or a technical advice memorandum, as such terms are defined in paragraphs (d), (e), and (f) of this section, respectively. Notwithstanding

paragraphs (d) through (f) of this section, a written determination does not include, for example, opinion letters (as defined in § 601.201(a)(4) of this chapter), information letters (as defined in § 601.201(a)(5) of this chapter), technical information responses, technical assistance memoranda, notices of deficiency, reports on claims for refund, Internal Revenue Service decisions to accept taxpayers' offers in compromise, earnings and profits determinations, or documents issued by the Internal Revenue Service in the course of tax administration that are not disclosed to the persons to whose tax returns or tax liability the documents relate.

(b) *Reference written determination.* A "reference written determination" is any written determination that the Commissioner determines to have significant reference value. Any written determination that the Commissioner determines to be the basis for a published revenue ruling is a reference written determination until such revenue ruling is obsolete, revoked, superseded or otherwise held to have no effect.

(c) *General written determination.* A "general written determination" is any written determination that is not a reference written determination.

(d) *Ruling.* A "ruling" is a written statement issued by the National Office to a taxpayer or to the taxpayer's authorized representative (as such term is defined in § 601.201(e)(7) of this chapter) on behalf of the taxpayer, that interprets and applies tax laws to a specific set of facts. A ruling generally recites the relevant facts, sets forth the applicable provisions of law, and shows the application of the law to the facts.

(e) *Determination letter.* A "determination letter" is a written statement issued by a district director in response to a written inquiry by an individual or an organization that applies principles and precedents previously announced by the National Office to the particular facts involved.

(f) *Technical advice memorandum.* A "technical advice memorandum" is a written statement issued by the National Office to, and adopted by, a district director in connection with the examination of a taxpayer's return or consideration of a taxpayer's claim for refund or credit. A technical advice memorandum generally recites the relevant facts, sets forth the applicable law, and states a legal conclusion.

(g) *Background file document.*—(1) *General rule.* A "background file document" is—(i) The request for a written determination.

(ii) Any written material submitted in support of such request by the person by whom or on whose behalf the request for a written determination was made.

(iii) Any written communication, or memorandum of a meeting, telephone communication, or other contact, between employees of the Internal Revenue Service or Office of its Chief Counsel and persons outside the Internal Revenue Service in connection with such re-

quest or written determination which is received prior to the issuance (as such term is defined in paragraph (h) of this section) of the written determination, but not including communications described in paragraph (g) (2) of this section, and

(iv) Any subsequent communication between the National Office and a district director concerning the factual circumstances underlying the request for a technical advice memorandum, or concerning a request by the district director for reconsideration by the National Office of a proposed technical advice memorandum.

(2) *Limitations.* Notwithstanding paragraph (g) (1) of this section, a "background file document" shall not include any—

(i) Communication between the Department of Justice and the Internal Revenue Service or the Office of its Chief Counsel relating to any pending civil or criminal case or investigation,

(ii) Communication between Internal Revenue Service employees and employees of the Office of its Chief Counsel,

(iii) Internal memorandum or attorney work product prepared by the Internal Revenue Service or Office of its Chief Counsel which relates to the development of the conclusion of the Internal Revenue Service in a written determination, including, with respect to a technical advice memorandum, the Transmittal Memorandum, as defined in § 601.105(b) (5) (vi) (c) of this chapter,

(iv) Correspondence or any portion of correspondence between the Internal Revenue Service and any person relating solely to the making of or extent of deletions pursuant to section 6110(c), or a request pursuant to section 6110(g) (3) and (4) for postponement of the time at which a written determination is made open or subject to inspection,

(v) Material relating to (A) a request for a ruling or determination letter that is withdrawn prior to issuance thereof or that the Internal Revenue Service declines to answer, (B) a request for technical advice that the National Office declines to answer, or (C) the appeal of a taxpayer from the decision of a district director not to seek technical advice, or

(vi) Response to a request for technical advice which the district director declines to adopt, and the district director's request for reconsideration thereof.

(h) *Issuance.* "Issuance" of a written determination occurs, with respect to rulings and determination letters, upon the mailing of the ruling or determination letter to the person to whom it pertains. Issuance of a technical advice memorandum occurs upon the adoption of the technical advice memorandum by the district director.

(i) *Person to whom written determination pertains.* A "person to whom a written determination pertains" in the person by whom a ruling or determination letter is requested, but if requested by an authorized representative, the person on whose behalf the request is made. With respect to a technical advice memorandum,

a "person to whom a written determination pertains" is the taxpayer whose return is being examined or whose claim for refund or credit is being considered.

(j) *Person to whom a background file document relates.* A "person to whom a background file document relates" is the person to whom the related written determination pertains, as such term is defined in paragraph (i) of this section.

(k) *Person who has a direct interest in maintaining confidentiality.* A "person who has a direct interest in maintaining the confidentiality of a written determination" is any person whose name and address is listed in the request for such written determination, as required by § 601.201(e) (2) of this chapter. A "person who has a direct interest in maintaining the confidentiality of a background file document" is any person whose name and address is in such background file document, or who has a direct interest in maintaining the confidentiality of the written determination to which such background file document relates.

(l) *Successor in interest.* A "successor in interest" to any person to whom a written determination pertains or background file document relates is any person who acquires the rights and assumes the liabilities of such person with respect to the transaction which was the subject matter of the written determination, provided that the successor in interest notifies the Commissioner with respect to the succession in interest.

§ 301.6110-3 Deletion of certain information in written determinations open to public inspection.

(a) *Information subject to deletion.* There shall be deleted from the text of any written determination open to public inspection or subject to inspection upon written request and background file document subject to inspection upon written request pursuant to section 6110 the following types of information:

(1) *Identifying details.* (i) The names, addresses, and identifying numbers (including telephone, license, social security, employer identification, credit card, and selective service numbers) of any person, other than the identifying details of a person who makes a third-party communication described in § 301.6110-4(a), and

(ii) Any other information that would permit a person generally knowledgeable with respect to the appropriate community to identify any person. The determination of whether information would permit identification of a particular person will be made in view of information available to the public at the time the written determination or background file document is made open or subject to inspection and in view of information that will subsequently become available, provided the Internal Revenue Service is made aware of such information and the potential that such information may identify any person. The "appropriate community" is that group of persons who would be able to associate a particular

person with a category of transactions one of which is described in the written determination or background file document. The appropriate community may vary according to the nature of the transaction which is the subject of the written determination. For example, if a steel company proposes to enter a transaction involving the purchase and installation of blast furnaces, the "appropriate community" may include all steel producers and blast furnace manufacturers, but if the installation process is a unique process of which everyone in national industry is aware, the "appropriate community" might also include the national industrial community. On the other hand, if the steel company proposes to enter a transaction involving the purchase of land on which to construct a building to house the blast furnaces, the "appropriate community" may also include those residing or doing business within the geographical locale of the land to be purchased.

(2) *Information concerning national defense and foreign policy.* Information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and which is in fact properly classified pursuant to such order.

(3) *Information exempted by other statutes and agency rules.* Information specifically exempted from disclosure by any statute other than the Internal Revenue Code of 1954 and 5 U.S.C. 552 which is applicable to the Internal Revenue Service, and any information obtained by the Internal Revenue Service solely and directly from another Federal agency subject to a nondisclosure rule of such agency. Deletion of information shall not be made solely because the same information was submitted to another Federal agency subject to a nondisclosure rule applicable only to such agency.

(4) *Trade secrets and privileged or confidential commercial or financial information—(i) Deletions to be made.* Any—

(A) Trade secrets, and

(B) Commercial or financial information obtained from any person which, despite the fact that identifying details are deleted pursuant to paragraph (a) (1) of this section, nonetheless remains privileged or confidential.

(ii) *Trade secret.* For purposes of paragraph (a) (4) (i) (A) of this section, a trade secret may consist of any formula, pattern, device or compilation of information that is used in one's business, and that gives one an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. The subject of a trade secret must be secret, that is, it must not be of public knowledge or of a general knowledge in the trade or business. Novelty, in the patent law sense, is not required for a trade secret.

(iii) *Privileged or confidential.* For purposes of paragraph (a) (4) (1) (B) of this section, information is privileged or confidential if from examination of the request and supporting documents relating to a written determination, and in consideration of the fact that identifying details are deleted pursuant to paragraph (a) (1) of this section, it is determined that disclosure of such information would cause substantial harm to the competitive position of any person. For example, while determining whether disclosure of certain information would cause substantial harm to X's competitive position, the Internal Revenue Service becomes aware that this information has previously been disclosed to the public. In this situation, the Internal Revenue Service will not agree with X's argument that disclosure of the information would cause substantial harm to X's competitive position. An example of information previously disclosed to the public is financial information contained in the published annual reports of widely held public corporations.

(5) *Information within the ambit of personal privacy.* Information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, despite the fact that identifying details are deleted pursuant to paragraph (a) (1) of this section. Personal privacy information encompasses embarrassing or sensitive information that a reasonable person would not reveal to the public under ordinary circumstances. Matters of personal privacy include, but are not limited to, details not yet public of a pending divorce, medical treatment for physical or mental disease or injury, adoption of a child, the amount of a gift, and political preferences. A clearly unwarranted invasion of personal privacy exists if from analysis of information submitted in support of the request for a written determination it is determined that the public interest purpose for requiring disclosure is outweighed by the potential harm attributable to such invasion of personal privacy.

(6) *Information concerning agency regulation of financial institutions.* Information contained in or related to reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions concerning examination, operation or condition of a financial institution, disclosure of which would damage the standing of such financial institution.

(7) *Information concerning wells.* Geological or geophysical information and data, including maps, concerning wells.

(b) *Manner of deletions.* Whenever information, which is not to be disclosed pursuant to section 6110(c), is deleted from the text of a written determination or background file document, substitutions therefore shall be made to the extent feasible if necessary for an understanding of the legal analysis developed in such written determination or to make the disclosed text of a background file document comprehensible. Wherever

any material is deleted, an indication of such deletion, and of any substitution therefor, shall be made in such manner as the Commissioner deems appropriate.

(c) *Limitations on the making of deletions.* Any portion of a written determination or background file document that has been deleted will be restored to the text thereof—

(1) If pursuant to section 6110(d) (3) or (f) (4) (A) a court orders disclosure of such portion, or

(2) If pursuant to § 301.6110-5(d) (1) an agreement is reached to disclose information.

§ 301.6110-4 Communications from third parties.

(a) *General rule.* Except as provided in paragraph (b) of this section a record will be made of any communication, whether written, by telephone, at a meeting, or otherwise, received by the Internal Revenue Service or Office of its Chief Counsel prior to the issuance of a written determination from any person other than a person to whom the written determination pertains or the authorized representative of such person. This rule applies to any communication concerning such written determination, any communication concerning the request for such written determination, or any communication concerning other matters involving such written determination. A notation that such communication has been made shall be placed on such written determination when it is made open to public inspection or available for inspection upon written request pursuant to § 301.6110-5. The notation to be placed on a written determination shall consist of the date on which the communication was received and the category of the person making such communication, for example, Congressional, Department of Commerce, Treasury, trade association, White House, educational institution. Any person may request the Internal Revenue Service to disclose the name of any person about whom a notation has been made pursuant to this paragraph.

(b) *Limitations.* The provisions of paragraph (a) of this section shall not apply to communications received by the Internal Revenue Service from employees of the Internal Revenue Service or Office of its Chief Counsel, from the Chief of Staff of the Joint Committee on Internal Revenue Taxation, from the Department of Justice with respect to any pending civil or criminal case or investigation, or from another government agency in response to a request made by the Internal Revenue Service to such agency for assistance involving the expertise of such agency.

(c) *Action to obtain disclosure of identity of person to whom written determination pertains.*—(1) *Creation of remedy.* With respect to any written determination on which a notation has been placed pursuant to paragraph (a) of this section, any person may file a petition in the United States Tax Court or file a complaint in the United States

District Court for the District of Columbia for an order requiring that the identity of any person to whom such written determination pertains be disclosed, but such petition or complaint must be filed within 36 months of the date such written determination is made open or subject to inspection.

(2) *Necessary disclosure.* Whenever an action is brought pursuant to section 6110(d) (3), the court may order that the identity of any person to whom the written determination pertains be disclosed. Such disclosure may be ordered if the court determines that there is evidence in the record from which it could reasonably be concluded that an impropriety occurred or undue influence was exercised with respect to such written determination by or on behalf of the person to whom the written determination pertains. The court may, pursuant to section 6110(d) (3), also order the disclosure of any material deleted pursuant to section 6110(c) if such disclosure is in the public interest. The written determination or background file document with respect to which the disclosure was sought shall be revised to disclose the information which the court orders to be disclosed.

(3) *Required notice.* If a proceeding is commenced pursuant to section 6110(d) (3) and paragraph (c) (1) of this section with respect to any written determination, the Secretary shall send notice of the commencement of such proceeding to any person whose identity is subject to being disclosed and to the person about whom a third-party communication notation has been made pursuant to section 6110(d) (1). Such notice shall be sent, by registered or certified mail, to the last known address of the persons described in this paragraph (c) (3) within 15 days after notice of the petition or complaint filed pursuant to section 6110(d) (3) is served on the Secretary.

(4) *Intervention.* Any person who is entitled to receive notice pursuant to paragraph (c) (3) of this section shall have the right to intervene in any action brought pursuant to section 6110(d) (3). If appropriate such person shall be permitted to intervene anonymously.

§ 301.6110-5 Notice and time requirements; actions to restrain disclosure; actions to obtain additional disclosure.

(a) *Notice.*—(1) *General rule.* Before a written determination is made open to public inspection or subject to inspection upon written request, or before a background file document is subject to inspection upon written request, the person to whom the written determination pertains or background file document relates shall be notified by the Commissioner of intention to disclose such written determination or background file document. The notice with respect to a written determination, other than a written determination described in § 301.6110-1(b) (2) or (3) shall be mailed when such written determination is issued. The notice with respect to any written determina-

tion relating to accounting or funding periods and methods, any technical advice memoranda involving civil fraud and criminal investigations, and jeopardy and termination assessments, and any background file document shall be mailed within a reasonable time after the receipt of the first written request for inspection thereof.

(2) *Contents of notice.* The notice required by paragraph (a)(1) of this section shall—

(i) Include a copy of the text of the written determination or background file document, which the Commissioner proposes to make open to public inspection or subject to inspection pursuant to a written request, on which is indicated (A) the material that the Commissioner proposes to delete pursuant to section 6110(f)(3), (B) any substitutions proposed to be made therefor, and (C) any third-party communication notations required to be placed pursuant to § 301.6110-4(a) on the face of the written determination.

(ii) State that the written determination or background file document is to be open to public inspection or subject to inspection pursuant to a written request pursuant to section 6110.

(iii) State that the recipient of the notice has the right to seek administrative remedies pursuant to paragraph (b)(1) of this section and to commence judicial proceedings pursuant to section 6110(f)(3) within indicated time periods, and

(iv) Prominently indicate the date on which the notice is mailed.

(b) *Actions to restrain disclosure.*—(1) *Administrative remedies.* Any person to whom a written determination pertains or background file document relates, and any successor in interest, executor or authorized representative of such person may pursue the administrative remedies described in § 601.105(b)(5)(iii) (i) and (vi)(f) and § 601.201(e)(11) and (16) of this chapter. Any person who has a direct interest in maintaining the confidentiality of any written determination or background file document or portion thereof may pursue the administrative remedies described in § 601.105(b)(5)(vi)(f) and § 601.201(e)(16) of this chapter. No person about whom a third-party communication notation has been made pursuant to § 301.6110-4(a) may pursue any administrative remedy for the purpose of restraining disclosure of the identity of such person where such identity appears with respect to the making of such third-party communication.

(2) *Judicial remedy.* Except as provided in paragraph (b)(3) of this section, any person permitted to resort to administrative remedies pursuant to paragraph (b)(1) of this section may, if such person proposes any deletion not made pursuant to § 301.6110-3 by the Commissioner, file a petition in the United States Tax Court pursuant to section 6110(f)(3) for a determination with respect to such proposed deletion. If appropriate, such petition may be filed anonymously. Any petition filed pursuant to section 6110(f)(3) must be filed

within 60 days after the date on which the Commissioner mails the notice of intention to disclose required by section 6110(f)(1).

(3) *Limitations on right to bring judicial actions.* No petition shall be filed pursuant to section 6110(f)(3) unless the administrative remedies provided by paragraph (b)(1) of this section have been exhausted. However, if the petitioner has responded within the prescribed time period to the notice pursuant to section 6110(f)(1) of intention to disclose, but has not received the final administrative conclusion of the Internal Revenue Service within 50 days after the date on which the Commissioner mails the notice of intention to disclose required by section 6110(f)(1), the petitioner may file a petition pursuant to section 6110(f)(3). No judicial action with respect to any written determination or background file document shall be commenced pursuant to section 6110(f)(3) by any person who has received a notice with respect to such written determination or background file document pursuant to paragraph (b)(4) of this section.

(4) *Required notice.* If a proceeding is commenced pursuant to section 6110(f)(3) with respect to any written determination or background file document, the Secretary shall send notice of the commencement of such proceeding to any person to whom such written determination pertains or to whom such background file document relates. No notice is required to be sent to persons who have filed the petition that commenced the proceeding pursuant to section 6110(f)(3) with respect to such written determination or background file document. The notice shall be sent, by registered or certified mail, to the last known address of the persons described in this paragraph (b)(4) within 15 days after notice of the petition filed pursuant to section 6110(f)(3) is served on the Secretary.

(5) *Intervention.* Any person who is entitled to receive notice pursuant to paragraph (b)(4) of this section shall have the right to intervene in any action brought pursuant to this section. If appropriate, such person shall be permitted to intervene anonymously.

(c) *Time at which open to public inspection.*—(1) *General rule.* Except as otherwise provided in paragraph (c)(2) of this section, the text of any written determination or background file document open to public inspection or available for inspection upon written request pursuant to section 6110 shall be made open to or available for inspection no earlier than 75 days and no later than 90 days after the date on which the Commissioner mails the notice required by paragraph (a)(1) of this section. However, if an action is brought pursuant to section 6110(f)(3) to restrain disclosure of any portion of such written determination or background file document the disputed portion of such written determination or background file document shall be made open to or available for

inspection pursuant to paragraph (c)(2)(i) of this section.

(2) *Limitations.*—(i) *Court order.* The portion of the text of any written determination or background file document that was subject to an action pursuant to section 6110(f)(3) to restrain disclosure in which the court determined that such disclosure should not be restrained shall be made open to or available for inspection within 30 days of the date that the court order becomes final. However, in no event shall such portion of the text of such written determination or background file document be made open to or available for inspection earlier than 75 days after the date on which the Commissioner mails the notice of intention to disclose required by section 6110(f)(1) and paragraph (a)(1) of this section. Such 30-day period may be extended for such time as the court finds necessary to allow the Commissioner to comply with its decision. Any portion of a written determination or background file document which a court orders open to public inspection or subject to inspection upon written request pursuant to section 6110(f)(4) or disclosed pursuant to section 6110(d)(3) shall be made open or subject to inspection or disclosed within such time as the court provides.

(ii) *Postponement based on incomplete status of underlying transaction.*—(A) *Initial period not to exceed 90 days.* The time period set forth in paragraph (c)(1) of this section within which a written determination shall be made open to public inspection or available for inspection upon written request shall be extended, upon the written request of the person to whom such written determination pertains or the authorized representative of such person, until 15 days after the date on which the transaction set forth in the written determination is scheduled to be completed, but such day shall be no later than 180 days after the date on which the Commissioner mails the notice of intention to disclose.

(B) *Additional period.* The time period determined pursuant to paragraph (c)(2)(ii)(A) of this section shall be further extended upon an additional written request, if the Commissioner determines from the information contained in such request that good cause exists to warrant such extension. This further extension shall be until 15 days after the date on which the transaction set forth in the written determination is expected to be completed, but such day shall be no later than 360 days after the date on which the Commissioner mails the notice of intention to disclose. The good cause required by this (B) exists if the person requesting the delay in inspection demonstrates to the satisfaction of the Commissioner that it is likely that the lack of such extension will cause interference with consummation of the pending transaction.

(C) *Written request for extension.* The written request for extension of the time when a written determination is to be made open to public inspection or avail-

able for inspection upon written request shall set forth the date on which it is expected that the underlying transaction will be completed, and, with respect to the additional extension described in paragraph (c) (2) (ii) (B) of this section, set forth the reason for requesting such extension. A request for extension of time may not be submitted until the notice of intention to disclose is mailed and must be received by the Internal Revenue Service office which issued such written determination no later than—

(1) In the case of the initial extension, 60 days after the date on which the Commissioner mails the notice of intention to disclose, or

(2) In the case of the additional extension, 15 days before the day on which, for purposes of paragraph (c) (2) (ii) (A) of this section, the transaction set forth in the written determination was expected to have been completed.

(D) *Notice and determination of actual completion.* If an extension of time for inspection has been granted, and the transaction is completed prior to the day on which it was expected to have been completed, the Internal Revenue Service office which issued such written determination shall be so notified by the person who requested such extension. In such event, the written determination shall be made open to public inspection or available for inspection upon written request on the earlier of (1) 30 days after the day on which the Commissioner is notified that the transaction is completed, or (2) the day on which the written determination was scheduled to be made open to public inspection or available for inspection upon written request pursuant to paragraph (c) (2) (ii) of this section. Similarly, if the Commissioner determines that the transaction was completed prior to the day on which it was expected to have been completed, even if the person requesting such extension has not so notified the Internal Revenue Service, the written determination shall be made open to public inspection or available for inspection upon written request on the earlier of (1) the day which is 30 days after the Commissioner ascertains that the transaction is completed sooner than has been expected, or (2) the day on which the written determination was scheduled to be made open to public inspection or available for inspection upon written request pursuant to paragraph (c) (2) (ii) of this section.

(d) *Actions to obtain additional disclosure—(1) Administrative remedies.* Under section 6110(f) (4) any person may seek to obtain additional disclosure of information contained in any written determination or background file document that has been made open or subject to inspection. A request for such additional disclosure shall be submitted to the Internal Revenue Service office which issued such written determination, or to which the request for inspection of such background file document has been submitted pursuant to § 301.6110-1(c) (4), and must contain the file number of the written determination or a description of the background file document (including the file number of the related written determination), the deleted information which in the opinion of such person should be open or subject to inspection, and the basis for such opinion. If the Internal Revenue Service determines that the request constitutes a request for disclosure of the name, address, or the identifying numbers described in § 301.6110-3(a) (1) (i) of any person, it shall within a reasonable time notify the person requesting such disclosure that disclosure will not be made. If the Internal Revenue Service determines that the request or any portion thereof constitutes a request for disclosure of information other than the name, address, or the identifying numbers described in § 301.6110-3(a) (1) (i) of any person, it shall send a notice that such additional disclosure has been requested to any person to whom the written determination pertains or background file document relates, and to all persons who are identified by name and address in the written determination or background file document. Notice that such persons have been contacted shall be sent to the person requesting the additional disclosure. The notice that additional disclosure has been requested shall state that the Internal Revenue Service has determined that additional disclosure of information other than the name, address, or the identifying numbers described in § 301.6110-3(a) (1) (i) of any person has been requested, inform the recipient of the notice that the person seeking the additional disclosure has the right under section 6110(f) (4) to bring a judicial action to attempt to compel such disclosure, and request the recipient of the notice to reply within 20 days by submitting a statement of whether or not the recipient of the notice agrees to the requested disclosure or portion thereof. If all persons to whom a notice is sent pursuant to this (1) agree to disclose the requested information or any portion thereof, the person seeking such disclosure will be so informed; the written determination or background file document shall be accordingly revised to disclose the information with respect to which an agreement to disclose has been reached. If any of the persons to whom a notice is sent pursuant to this (1) do not agree to the additional disclosure or do not respond to such notice, the Internal Revenue Service shall within a reasonable time so notify the person requesting such disclosure, and deny the request for additional disclosure.

(2) *Judicial remedy.* Except as provided in paragraph (d) (3) of this section, any person who seeks to obtain additional disclosure of information contained in any written determination or background file document may file a petition pursuant to section 6110(f) (4) in the United States Tax Court or a complaint in the United States District Court for the District of Columbia for an order

requiring that such information be made open or subject to inspection. Nothing in this paragraph shall prevent the Commissioner from disposing of written determinations and related background file documents pursuant to § 301.6110-7(a).

(3) *Limitations on right to bring judicial action—(i) Exhaustion of administrative remedies.* No petition or complaint shall be filed pursuant to section 6110(f) (4) unless the administrative remedies provided by paragraph (d) (1) of this section have been exhausted. However, if the Internal Revenue Service does not approve or deny the request for additional disclosure within 180 days after the request is submitted, the person making the request may file a petition pursuant to section 6110(f) (4).

(ii) *Actions to obtain identity.* No petition or complaint shall be filed pursuant to section 6110(f) (4) to obtain disclosure of the identity of any person to whom a written determination on which a third-party communication notation has been placed pursuant to § 301.6110-4(a) pertains. Such actions shall be brought pursuant to section 6110(d) (3).

(4) *Required notice.* If a proceeding is commenced pursuant to section 6110(f) (4) with respect to any written determination or background file document, the Secretary shall send notice of the commencement of such proceeding to any person to whom the written determination pertains or background file document relates, and to all persons who are identified by name and address in the written determination or background file document. The notice shall be sent, by registered or certified mail, to the last known address of the persons described in this paragraph (d) (4) within 15 days after notice of the petition or complaint filed pursuant to section 6110(f) (4) is served on the Secretary.

(5) *Intervention.* Any person who is entitled to receive notice pursuant to paragraph (d) (4) of this section shall have the right to intervene in any action brought pursuant to this section. If appropriate, such person shall be permitted to intervene anonymously.

§ 301.6110-6 Written determinations issued in response to requests received before November 1, 1976. [Reserved]

§ 301.6110-7 Miscellaneous provisions.

(a) *Disposition of written determinations and background file documents—*

(1) *Reference written determinations.* The Internal Revenue Service shall not dispose of any reference written determinations or related background file documents. The Commissioner may reclassify reference written determinations as general written determinations if the classification as reference was erroneous or if the Commissioner determines that such written determination no longer has any significant reference value. Notwithstanding the preceding sentence, the Commissioner shall not classify as a general written determination any written determination which is determined to be the basis for a published revenue ruling unless such rev-

enue ruling is obsoleted, revoked, superseded or otherwise held to have no effect.

(2) *General written determinations.* The Internal Revenue Service may dispose of general written determinations and any background file document relating to such written determination pursuant to its established records disposition procedures. Disposition of a written determination shall not occur earlier than 3 years after the date on which such written determination is made open to public inspection or available for inspection upon written request. Disposition of a background file document shall not occur earlier than 3 years after the date on which the related written determination is made open to public inspection or available for inspection upon written request.

(b) *Precedential status of written determinations open to public inspection.* A written determination may not be used or cited as precedent, but the rule set forth in this paragraph shall not apply to change the precedential status, if any, of written determinations issued with respect to taxes imposed by subtitle D of the Internal Revenue Code of 1954.

(c) *Civil remedies—(1) Liability for failure to make deletions or to conform to time limitations—(i) Creation of remedy.* An exclusive remedy against the Commissioner shall exist in the Court of Claims for—

(A) The person to whom the written determination pertains whenever the Commissioner fails to act in accordance with the time requirements of section 6110(g), and

(B) The person to whom the written determination pertains and any person identified in such written determination whenever the Commissioner fails to make deletions required by section 6110(c) if as a consequence of such failure there is disclosed the identity of such person or other information with respect to such person that is required to be deleted pursuant to section 6110(c).

(ii) *Limitations.* The remedy provided in paragraph (c)(1)(i) of this section for failure to make deletions shall be available only if—

(A) The failure of the Commissioner to make the deletions required by section 6110(c) is intentional or willful,

(B) The Commissioner fails to make any deletion required by section 6110(c) which the Commissioner has agreed to make, or

(C) The Commissioner fails to make any deletion which a court has ordered to be made pursuant to section 6110(f)(3).

(iii) *Damages.* In any suit brought pursuant to paragraph (c)(1)(i) of this section in which the court determines that an employee of the Internal Revenue Service intentionally or willfully failed to make a deletion required by section 6110(c), or intentionally or willfully failed to act in accordance with the time requirements of section 6110(g), the United States shall be liable, to the person described in paragraph (c)(1)

(i) of this section who brought the action, in an amount equal to the sum of—

(A) Actual damages sustained by such person but in no case shall such person be entitled to receive less than the sum of \$1,000,

(B) The costs of the action, and

(C) Reasonable attorney's fees as determined by the court.

(2) *Liability for making additional disclosure of information.* The Commissioner shall not be liable for making any additional disclosure ordered pursuant to an action described in § 301.6110-5(d) (2) if the notice required by § 301.6110-5(d)(4) is sent.

(3) *Obligation to defend action for additional disclosure.* The Commissioner shall not be required to defend any action brought to obtain additional disclosure pursuant to section 6110(f)(4) if the notice required by § 301.6110-5(d)(4) is sent.

(4) *Obligation to make deletions.* The Commissioner shall be obligated to make only those deletions required by section 6110(c) which he has agreed to make, those which a court has ordered to be made pursuant to § 301.6110-5(b)(2) and those the omission of which would be intentional or willful.

(d) *Fees—(1) General rule—(i) Copies.* The Commissioner may prescribe fees pursuant to § 607.702(f)(4) of this chapter for the costs of furnishing copies of material open to public inspection or subject to inspection upon written request pursuant to section 6110.

(ii) *Preparation of information available upon request.* The Commissioner may prescribe fees pursuant to § 601.702(f) of this chapter for the costs of searching for and making deletions from any written determinations and background file documents that are subject to inspection only upon written request pursuant to § 301.6110-1(b).

(2) *Reduction or waiver of fees—(i) Public interest.* The Commissioner shall reduce or waive the fees described in paragraph (d)(1) of this section if the Commissioner determines that furnishing copies of, searching for, or making deletions from any written determination or background file document primarily benefits the general public, as described in § 601.702(f)(2)(ii)(B) of this chapter.

(ii) *Previous requests.* The Commissioner may waive the fees described in paragraph (d)(1) of this section for searching for any written determination or background file document if the search for such written determination or background file document was made pursuant to a previous request for inspection thereof. The Commissioner shall waive the fees described in paragraph (d)(1) of this section for making deletions from any written determination or background file document if the making of such deletions from such written determination or background file document was made pursuant to a previous request for inspection thereof. Nothing in this (d)(2)(ii) shall prevent the Commis-

sioner from prescribing fees for making additional deletions from such written determination or background file document pursuant to § 301.6110-5(b).

[FR Doc. 77-36064 Filed 12-15-77; 8:45 am]

[4830-01]

SUBCHAPTER F—PROCEDURE AND ADMINISTRATION

[T.D. 7520]

PART 404—TEMPORARY REGULATIONS ON PROCEDURE AND ADMINISTRATION UNDER THE TAX REFORM ACT OF 1976

Disclosure of Returns and Return Information to Designee of Taxpayer

AGENCY: Internal Revenue Service, Treasury.

ACTION: Temporary regulations.

SUMMARY: This document provides temporary regulations relating to disclosures of tax returns and tax return information to certain persons. These persons are either designated in a written request for or consent to a disclosure or are requested by the taxpayer to obtain information or provide assistance concerning the taxpayer's return or other matter before the Internal Revenue Service. Changes to the applicable law were made by the Tax Reform Act of 1976. The regulations provide taxpayers and Internal Revenue Service personnel with guidance needed to comply with the act.

DATE: The regulations are effective as of January 1, 1977.

FOR FURTHER INFORMATION CONTACT:

KARL P. Fryzel of the Legislation and Regulations Division, Office of the Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, D.C. 20224, Attention: CC:LR:T, 202-566-3294.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On Tuesday, April 12, 1977, the FEDERAL REGISTER published temporary regulations on procedure and administration (26 CFR Part 404) under section 6103 (c) of the Internal Revenue Code of 1954 (42 FR 19144). These temporary regulations were issued to provide taxpayers and Internal Revenue Service personnel with guidance needed to comply with section 1202(a) of the Tax Reform Act of 1976.

WRITTEN REQUEST OR CONSENT

Section 1202(a) of the Tax Reform Act of 1976 amended section 6103 to permit disclosures of tax return and tax return information to a person designated by the taxpayer in a written request or consent. Paragraph (a) of § 404.6103 (c)-1 prescribes rules governing the necessary form and content of these written requests or consents. Some stylistic changes have been made to this paragraph.