to ensure equal employment opportunity. If the contractor fails to comply with the requirements of the Executive Order, the implementing regulations, or these specifications, the compliance agency shall proceed in accordance with 41 CFR 60-4-8.

15. The Contractor shall designate a responsible official to (a) monitor all employment related activity to ensure that the company EEO policy is being carried out and (b) to submit reports relating to the provisions hereof as may be required by the Government and (c) to keep records. Records shall at least include for each employee: name, construction trade name, employee identification number when assigned, social security number, race, sex, status (e.g., mechanic, apprentice, trainee, helper or laborer), dates of changes in status, hours worked per week in the indicated trade, and locations at which work was performed. (Clarification of means of displaying these data requirements may be obtained from the responsible Compliance Agency.)

16. Nothing herein provided shall be construed as a limitation upon the application of State or local affirmative action or equal opportunity requirements which establish higher standards of compliance or upon the application of requirements for the hiring of local or other area residents (e.g., those under the Public Works Employment Act of 1977 and the Community Development Block Grant Program), for work performed pursuant to this contract.

(b) The notice set forth in § 60-4.2 of this part and the specification set forth in § 60-4.3 of this part replace the New Form for Federal Equal Employment Opportunity Bid Conditions for Federal and Federally Assisted Construction published at 41 FR 32482 and commonly known as the Model Federal EEO Bid Conditions, and the New Form Shall not be used after the regulations in this part become effective.

§ 60-4.4 Affirmative action requirements.

(a) To implement the affirmative action requirement of Executive Order 11246 in the construction industry, the Office of Federal Contract Compliance Programs previously has approved affirmative action programs commonly referred to as "Hometown Plans," has promulgated affirmative action plans referred to as "Imposed Plans" and has approved "Special Bid Conditions" for high impact projects constructed in areas not covered by a Hometown or an Imposed Plan. All solicitations for construction contracts made after the effective date of the regulations in this part shall include the notice specified in § 60-4.2 of this part and the specifications in § 60-4.3 of this part in lieu of the Hometown and Imposed Plans (including the Revised Philadelphia Plan (see 41 FR 1578)) and Special Bid Conditions. Until the Director has issued an order pursuant to § 60-4.6 of this part establishing goals and timetables for minorities in the appropriate geographical areas or for a project covered by Special Bid Conditions, the goals and timetables for minorities to be inserted in the Notice required by 41 CFR 60-4.2 shall be the goals and timetables contained in the Hometown Plan, Imposed Plan or Special Bid Conditions presently covering the respective geographical area or project involved. Except as provided in paragraph (b) of this § 60-4.4, and until further notice, the goals and timetables for women to be inserted in the Notice required by 41 CFR 60-4.2 shall be those goals published this same date in the FEDERAL REGISTER.

(b) Signatories to a Hometown Plan shall have 45 days from the effective date of the regulations in this part to submit goals and timetables for women to the Director for approval. If the Hometown Plan is scheduled to expire prior to or shortly after the expiration of the 45-day period, the signatories should submit for approval a new plan which contains goals and timetables for women. Failure of the signatories to submit goals for women or a new plan, as appropriate, shall result in an automatic termination of the Office of Federal Contract Compliance Program's approval of the Hometown Plan. At any time the Office of Federal Contract Compliance Programs terminates or withdraws its approval of a Hometown Plan, the Contractors signatory to the Plan shall be covered automatically by the specifications set forth in § 60-4.3 of this part and by the goals and timetables established for that geographical area or project pursuant to § 60-4.6 of this part.

§ 60-4.5 Hometown plans.

A contractor participating, either individually or through an association, in a Hometown Plan shall comply with its affirmative action obligations under Executive Order 11246 by complying with its obligations under the Hometown Plan. If a contractor is not participating in a Hometown Plan it shall comply with the specifications set forth in § 60-4.3 of this part and with the goals and timetables for the appropriate area or project as listed in the Notice required by 41 CFR 60-4.2. For the purposes of this part 60-4 a contractor is not participating in a Hometown Plan if it:

(a) Ceases to be signatory to a Hometown Plan;

(b) Is signatory to a Hometown Plan but is not party to a collective bargaining agreement;

(c) Is signatory to a Hometown Plan but is party to a collective bargaining agreement with labor organizations which are not or cease to be signatories to the same Hometown Plan;

(d) Is signatory to a Hometown Plan and is party to collective bargaining agreements with labor organizations but the two have not jointly executed a specific commitment to minority and female goals and timetables and incorporated the commitment in the Hometown Plan;

(e) Is participating in a Hometown Plan which is no longer acceptable to the Office of Federal Contract Compliance Programs;

(f) Is signatory to a Hometown Plan but is party to collective bargaining agreements with labor organizations which together have failed to make a good faith effort to comply with their obligations under the Hometown Plan.

§ 60-4.6 Goals and timetables.

The Director, from time to time, shall issue goals and timetables for minority and female utilization which shall be based on appropriate workforce, demographic or other relevant data and which shall cover specific construction projects or specific geographical areas. The goals shall be applicable to a covered contractor's or subcontractor's entire workforce which is working in the area covered by the goals and timetables. Such goals and timetables shall be published as notices in the Federal Register, and shall be inserted by the contracting officers and applicants, as applicable, in the Notice required by 41 CFR 60-4.2.

§ 60-4.7 Effect on other regulations.

The regulations in this part are in addition to the regulations contained in this chapter which apply to construction contractors and subcontractors generally. See particularly 41 CFR 60-1.7, 60-1.8, 60-1.26, 60-1.29, 60-1.30, 60-1.32, 60-1.41, 60-1.42, 60-1.43 and 41 CFR Part 60-3, Part 60-20, Part 60-30, Part 60-40 and Part 60-50.

§ 60-4.8 Show cause notice.

If an investigation or compliance review reveals that a construction contractor or subcontractor has violated the Executive Order, any contract clause, specifications or the regulations in this chapter, the compliance agency shall issue to the contractor or subcontractor a notice to show cause which shall contain the items specified in (i)-(iv) of 41 CFR 60-2.2(c)(1). If the contractor does not show good cause within 30 days, it shall take corrective action. If the contractor does neither, the compliance agency shall follow the procedure in subparagraph (2) of 41 CFR 60-2.2(c).

[FR Doc.77-23611 Filed 8-15-77;8:45 am]

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

WOMEN IN CONSTRUCTION UNDER EXECUTIVE ORDER 11246, AS AMENDED

Proposed Goals and Timetables Pursuant to Proposed Rule

Regulations (41 CFR Part 60-4) proposed by the Department of Labor in the FEDERAL REGISTER today would authorize the Director of the Office of Federal Contract Compliance Programs (OFCCP) to issue goals and timetables for minority and female participation on Federal or federally assisted construction projects. The goals would be based on workforce, demographic or other relevant data of Standard Metropolitan Statistical Areas, counties, or groups of counties, or some other geographical area in which the construction is being performed.

Under the proposed regulations, the goals and timetables would be published in the FEDERAL REGISTER in a notice of general information to the public but would not be published for public comment. However, because the OFCCP previously had not required goals for women in the construction industry under the Executive Order program, and because of the general interest in this subject, public comment is invited on this proposed notice until September 30, 1977.

A review of statistics relating to the construction industry shows a virtual exclusion of women from employment in the construction industry. Continued reliance by contractors on established hiring practices may reasonably be expected to result in continued exclusion of women. Accordingly, to implement the provisions of Executive Order 11246, as amended by Executive Order 11375, and to achieve a program of equal employment opportunity in the construction industry for women, it is proposed to develop goals and timetables for female participation in the construction industry. OFCCP has examined and considered a number of approaches for developing affirmative action goals for women. Some such methods include the female workforce, different proportions of the female workforce, and female representation in apprenticeship positions. Thought also has been given to establishing a pilot program for the purpose of developing a data base on which female goals could be developed. Each of these methods, however, suffers from certain deficiencies but basically they would establish initial goals either so high or so low that the result would be meaningless. The proposal adopted here considers both the relevant characteristics of the construction industry as they relate to developing goals and timetables for women, and the need to establish an effective implementation of the Executive Order.

Under this proposal, goals for women in construction would be established for a period of three years. The goals would be 3.1 percent, 5.0 percent, and 6.9 percent for the first, second and third years, respectively. These goals were developed using two sets of statistics. First, according to the 1970 census, the female workforce in the construction industry is 1.2 percent. Also, according to the 1970 census, women constitute 5 percent of all craft and kindred workers. This latter group of workers are in occupations which are similar to construction occupations, and possess educational levels, skills and abilities comparable to those possessed by employees working in the construction industry. It is reasonable to expect therefore that within a two-year period the construction industry, with active recruitment, could achieve a 5 percent female participation goal. This same effort would raise the goal to 6.9 percent in the third year. The statistics on which these goals are based, of course, are national in scope and are not presently available in usable form on an SMSA or county basis. It is proposed therefore that a single goal for female participation in the construction industry be adopted. Contractors are advised however, that where higher State, local or other jurisdictional goals for women are in effect, compliance with the goals and timetables proposed herein would not relieve the contractor of its obligation to comply with the higher local goal. Similarly, the proposal does not affect or limit in any way the application of requirements providing for the employment of local residents such as those contained in the Community Development Block Grant and the Public Works Employment Act grant programs.

The goals would be applied in all geographical areas and on all projects which have goals and timetables for minorities. Also, under the proposed regulation governing construction contractors under Executive Order 11246 published today in the FEDERAL REGISTER, Hometown Plans would be allowed to submit goals for women to the Director for approval. It is proposed that no goals lower than the ones proposed herein would be approved. If the Hometown Plans do not submit female affirmative action goals within the specified period and receive approval, it is proposed that the Department's approval of the plan will be automatically withdrawn and the goals proposed herein would be applicable in those Hometown areas.

These initial goals are intended to provide immediate equal employment opportunity for women in the industry until more meaningful goals based on appropriate female workforce figures can be developed and implemented. Toward this latter end and in order to develop goals and timetables for women in construction on a more permanent basis, a working committee is proposed to be established to make recommendations to the Director, OFCCP, on the total involvement of women in the construction industry. The exact structure and composition of the committee has not been determined, and comments specifically are invited on this issue. It is contemplated, however, that the committee would work closely with outreach and community groups and would operate for a period of at least five years. It also would receive input from the general public and examine the progress of women in the construction industry. In addition, at least six months before the expiration of the third year goal proposed herein, the committee would recommend meaningful female goals to the Director of the OFCCP to cover, at the minimum, an additional three-year period. The Director would, pursuant to 41 CFR 60-46, proposed in the FEDERAL REGISTER today, issue meaningful goals and timetables based on the committee's recommendations or on other appropriate data.

It is intended that the final Notice which would establish the goals would list those geographical areas and projects for which goals for minorities and women shall be applicable. These areas would include those currently covered by Imposed Plans and those projects covered by Special Bid Conditions. And as indicated in the regulations proposed in the FEDERAL REGISTER today, the goals and timetables contained in those plans and Bid Conditions would constitute the initial goals and timetables for minorities.

Accordingly, it is proposed to establish goals and timetables for women in the construction industry for use on projects and in geographical areas as designated by the Director, Office of Federal Contract Compliance Programs, as follows:

Time frame:	Goals (in percent)
1st year	3.1
2d year	5.0
3d year	6.9

These goals would apply to a covered contractor's or subcontractor's entire workforce which is working on construction projects in an area covered by the goal. Compliance with the goal will be measured against the total work hours performed during each 12-month period. The goal would apply to the contractor's entire workforce in that area notwithstanding that not all employees would be working on the Federal or federally assisted construction project.

Send comments to Weldon J. Rougeau, Director, Office of Federal Contract Compliance Programs, Room C-3324, 200 Constitution Avenue, N.W., Washington, D.C., 20210. Comments received will be available for inspection during regular working hours at the above address.

Dated: August 8, 1977.

WELDON J. ROUGEAU,
Director, OFCCP.

[FR Doc.77-23609 Filed 8-15-77;8:45 am]

federal register

TUESDAY, AUGUST 16, 1977

PART V

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

■

ON-SITE CONSULTATION AGREEMENTS

Title 29—Labor

CHAPTER XVII—OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DEPARTMENT OF LABOR

PART 1908—ON-SITE CONSULTATION AGREEMENTS

AGENCY: Occupational Safety and Health Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: The existing regulation is amended by rewording and reorganizing its present provisions, and adding new provisions. The new regulation is designed to further the Agency's objective to provide free on-site consultation to as many employers requesting this service as possible, with priority given to small business employers. The proposal was prepared to implement the policy directive of the Congress. The regulation as amended will: change the level of Federal funding from the present fifty percent to ninety percent for on-site consultation activities; expand the program to include States with approved plans under section 18 of the Occupational Safety and Health Act of 1970; set out new requirements for monitoring and evaluating State performance under the contract; further define the State's obligation to publicize the availability of the program, further define the obligations of the employer and the consultant to protect employees; and prescribe new requirements for consultant qualifications and numbers.

EFFECTIVE DATE: August 1, 1977.

FOR FURTHER INFORMATION CONTACT:

William J. Higgins, Chief, Division of Voluntary Programs, Occupational Safety and Health Administration, 200 Constitution Avenue NW., Washington, D.C. 20210 (202-634-4923).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On April 29, 1977, (42 FR 22060) notice was published in the FEDERAL REGISTER requesting public comment on proposed changes to regulations for on-site consultation contracts at 29 CFR Part 1908. After consideration of more than 50 public comments received, discussions with the States and internal review by the Federal Occupational Safety and Health Administration (hereinafter referred to as the Agency), the proposal has been amended and is published as a final regulation. The new regulation is designed to further the Agency's objective to provide free on-site consultation to as many employers requesting this service as possible, with priority given to small business employers. This program must also be consistent with public policy and the goals of the Occupational Safety and Health Act of 1970 (29 U.S.C. 667) (the Act will later be referred to as the Federal OSH Act).

The need for a greater understanding by employers of their obligations under the Federal or State OSH Acts has been widely acknowledged. The interpretation of complex standards and the ability to recognize hazards may pose difficulties for employers, but small business employers, who may lack the financial resources to utilize private consultants, are often faced with a greater difficulty in understanding their obligations under the Act.

Under the Federal OSH Act, on-site consultation services by Agency personnel cannot be provided without triggering the normal enforcement provisions of the Federal OSH Act, including citation and possible penalties for any hazards observed. Because of this restriction, Federally funded on-site consultation, prior to the promulgation of this Part, could be conducted only by States with approved plans under section 18 of the Act utilizing State personnel. These States were able to conduct on-site consultation, with fifty percent Federal funding, subject to certain restrictions and conditions similar to those under this Part. At the present time twenty-two State plans provide these services. However, because there is no comparable on-site consultation provided under the Federal program, States were not required to provide these services as part of their plan in order to meet the Federal OSH Act's requirement that they be "at least as effective."

In response to the demand for consultation in other States, regulations were promulgated on May 20, 1975, to extend fifty percent Federal funding, through contracts entered into under the authority of sections 21(c) and 7(c)(1) of the Federal OSH Act, to States without approved State plans. This fifty-percent funding level was established to place the contract States in the same position respecting funding as those States with approved plans. Twelve additional States were participating in this program at the end of fiscal year 1976. Because many States still did not provide on-site consultation, specific funds were provided for on-site consultation in the Labor-HEW Appropriation Act for fiscal year 1977, and the Appropriations Committee Report on the Act (Senate Report No. 94-997) directed the Agency to increase the level of Federal funding to a ratio which would ensure fuller State participation in the program.

The proposal was prepared to implement the policy directive of the Congress. In addition, the regulation was redrafted; provisions that had in the past been subject to misinterpretation were clarified; and, a more precise policy statement of the Agency's position was provided. In the majority of instances, the rewording and revision in many of the provisions was for the purpose of clarification and does not represent a change in intention or effect.

The following are the major issues raised by the proposal:

NEW FUNDING LEVEL

In response to the Congressional directive, the Agency proposed to increase the level of Federal funding to ninety percent, a level considered necessary to provide a stronge incentive for States to enter the program, while at the same time requiring some financial commitment on their part. It was recognized, however, that certain States would not participate in an on-site consultation program regardless of the percentage of Federal funding. These States either have legal contraints which prevent their participation, or have indicated a policy or philosophy which would prohibit it.

Several of the public comments received addressed the new funding level. Most were favorable including those from John Wenning, Administrator of the Wisconsin Division of Safety and Buildings, and Robert Palmer of the National Association of Manufacturers. On the other hand, Charles T. Greene, Director of Industrial Safety of the District of Columbia, and Allan Harvey, Deputy Director, Bureau of Safety and Regulations of the Michigan Department of Labor, along with Irving Davis, Chief, Division of Occupational Health of the Michigan Department of Public Health, objected to the new level on the grounds that it would discourage States from developing section 18 plans and encourage States with existing plans to drop their programs. In anticipation of this possible effect, the proposal expanded the eligibility for the program to include all States, including those with approved plans under section 18. Under the existing regulation, States with approved plans were not eligible to enter into on-site consultation contracts. Although some disincentive for State plans may remain, it has been minimized by the expansion of eligibility, because a State can maintain its plan under section 18 and also enter into a contract under this Part, at the increased funding level.

EFFECT UPON STATES WITH PLANS APPROVED UNDER SECTION 18

Several public comments including those from Joshua Agsalud, Director of the Hawaii Department of Labor and Industrial Relations, Steven Jablonsky, Program Manager of the Department of Industrial Relations of the California Occupational Safety and Health Administration, John Brooks, Commissioner of the North Carolina Department of Labor, and Charles Daniels, Director of the Arkansas Department of Labor, whose comments were supported by Senator John McClellan, Senator Dale Bumpers, and Congressman Ray Thornton objected to the exclusion of public employers or requested clarification of the language in the proposal. The Agency is aware of the importance of programs to protect the safety and health of employees of State and local governments. At the present time, States with approved section 18 plans must, to the extent permitted under this law, institute "effective and comprehensive" occupational safety and health programs for public employees; these programs, of course, may provide consultation services to public employees. States may also submit for approval under section 18 programs for "public-employees only"

(29 CFR 1956). Finally, States may institute public employer programs with one-hundred percent State funds.

Under the final regulation no provision is made for inclusion of consultation for public employers under these agreements. However, the agency believes that protection of public employees should be expanded to the extent possible, in all States; to this end it will explore possible strategies available to increase the Federal role in this area.

Under the final regulation, if States with approved plans wish to provide onsite consultation to private employers, with Federal funding, they must chose whether to enter into a 7(c)(1) contract under this regulation with ninety percent Federal funding, or to provide such services under their plans, with fifty percent Federal funding. They cannot do both. This restriction was placed in the proposal because of the likelihood of administrative, accounting and monitoring problems associated with dual programs, and remains unchanged in the final regulation.

Limitation of Activities Under the Contract

Several public comments, including those submitted by John J. Horn, Acting Commissioner of the Department of Labor and Industry for the State of New Jersey, Steven Jablonsky of the California Occupational Safety and Health Administration, William Wilkins, Administrator of the Wyoming Occupational Safety and Health Agency, and others, objected to the provisions in the proposal which would limit the authorized activities under the contract to onsite consultation only. The suggestion was made that this restriction, which is unchanged in the final rule, was designed to provide the maximum emphasis on on-site consultation, because under the Federal OSH Act the Agency is able, under section 21(c), to engage in its own Federal training and education activities. Since these services are provided on the Federal level, the prudent use of the limited on-site consultation contract funds dictates their expenditure for the purpose of filling a need to which the Agency is otherwise unable to adequately meet. Under the final regulation, State consultants may participate in seminars and employer conferences, but this participation would be for the purpose of program promotion rather than direct training and education of employers. Federal training and education activities will be concentrated in States without plans approved under section 18, because States with approved plans are required to maintain their own State program of training and education as a condition of plan approval.

Unscheduled Visits to Worksites

Numerous public comments, including those of John J. Horn of the New Jersey Department of Labor and Industry, James McCain, Secretary of the Kansas Department of Human Resources, John Brooks of the North Carolina Department of Labor, Philip Ross, Commissioner of the New York Department of Labor, and others, objected to the provision in § 1908.4(b) of the proposal which specifically prohibited unscheduled visits to employer worksites for the purpose of conducting an on-site consultation, if entry were granted. Many of these comments emphasized the utility of individual contact with employers, and stressed that employers could be more effectively informed of the program in this manner. In consideration of these comments, the final regulation changes the proposal and authorizes visits to employer workplaces for the purpose of explaining the availability of the program. However, because of the necessity for adequate preparation by a consultant before an effective on-site visit may be conducted, the final regulation does not authorize the conduct of on-site consultation on the basis of an unscheduled visit to a workplace.

Informing an Employer of His Obligations Under the Program

New language has been included in the final regulation under § 1908.4(a)(3), Scope of service. This new language requires a State to clearly explain in its program promotion activities and in response to inquiries, the important aspects of the program. It was considered to be essential that employers be clearly informed of the State and Federal partnership in this program and of their responsibilities in the event an on-site visit is conducted, including those safeguards for employee protection which could require employer action. Therefore, under the final regulation, these responsibilities must be explained to an employer before a request can be accepted.

Employee Participation

In the preamble to the proposal for the revision of this Part, public comments were requested on the issue of employee participation in the on-site visit. The proposed regulation was essentially a restatement of the existing regulation, which provided for employee participation only with the employer's express permission. The Agency, however, was interested in receiving comments concerning the expansion of employee participation rights to parallel the employee walkaround rights associated with enforcement inspections under section 8(e) of the Federal OSH Act. It was considered that employees could provide some assistance to a consultant during a consultation visit as they provide to an inspector during an inspection. Further, it was believed that, because employees may have been exposed to hazards the consultant might find, they had a right to be informed of their discovery.

Numerous public comments were received in response to the request. Steven Jablonsky of the California Occupational Safety and Health Administration, and Dr. N. H. Dyer, Director of the West Virginia Department of Health, commented that there were clearly instances where employees must participate in an on-site visit in order to make the visit effective. According to the comment from the California agency, contact would be essential for example, during a health consultation where individual employee exposure levels must be determined or where a firm had an active employee/employer in-plant safety committee.

Other comments expressed the opinion that such participation should be permitted only to the extent allowed by the employer and strongly objected to any mandatory walkaround on the grounds that it would greatly discourage employer requests for the program. Consideration has been given to these factors, and the final regulation specifies that employee contact by a consultant is necessary in order to properly identify hazards in the workplace, and that a consultant must explain to an employer the possibility that such contact may have to be initiated. An employer must agree to this form of contact before a visit may proceed. In addition, the regulations require the consultant to encourage employers to permit additional employee participation to the extent practicable, including participation in the walkaround but does not mandate such participation.

Employee Protection Requirements

The discussion under this heading encompasses the provisions in the regulation concerning the requirement that the employer take necessary action to eliminate hazards which present an imminent danger or serious violation. The proposal contained three provisions which affected this requirement, § 1908.4(d)(5)(v), which provided for the classification of hazards, § 1908.4(d)(6), which placed the obligation on the employer to take action if an imminent danger or serious violation was identified, and § 1908.5(b), which required the consultant to notify the appropriate OSHA enforcement authority if the employer refused to cooperate in the elimination of such hazards.

The majority of the public comments received addressed this issue. The comments ranged from strong objections to any action related to enforcement to acceptance of the concept with questions only on the procedure to be followed. Most comments, however, were opposed to the mandatory referral to enforcement authorities where an employer fails to take action to eliminate a serious violation. The terminology utilized was also questioned, with several objections to the use of the definition of a serious violation, and the requirement that the consultant must make a judgment as to how a compliance officer would cite a particular hazard.

This issue has been the subject of careful consideration. The Agency is cognizant of the need for full employer utilization of the consultation program and is aware of the argument that the requirement for referral might deter some employers from requesting on-site consultation. However, other provisions of the regulation are intended to assure the fundamental separation between the consultation program and enforcement, and would minimize this disincentive.

Thus, the regulation requires that the consultation operate independently from OSHA enforcement and that it have its own separate and distinct staff and management. Further, even in the monitoring of a State's performance, the identity of employers receiving on-site consultation is not revealed. In addition, an on-site visit in progress will delay certain types of OSHA inspections, and an employer is not required to make the consultation report available to a compliance officer during a subsequent inspection.

The only situation in which information about a consultation visit is referred to enforcement authorities is if an imminent danger or serious violation is identified and the employer fails to take the necessary action to eliminate the hazard and protect the employees. In the case of a serious violation a reasonable period for the elimination of the hazard is to be provided. Thus, an employer who in good faith seeks consultation advice to identify hazards so that they can be eliminated need have no concern about enforcement action being taken against him or her. It is only in what is likely to be the extremely rare case of an employer who, although aware of the imminent danger or serious violation, fails to act to eliminate them in the workplace that referral will occur. The Agency believes that in these limited circumstances the underlying policies of the Federal OSH Act mandate that the matter be referred for appropriate enforcement action.

Accordingly, the final regulation, although reworded, retains the provision of the present regulation and the proposal requiring referral to enforcement authorities in specified situations.

The use of the definition of a serious violation under the Federal OSH Act was determined to be necessary because, by the use of a currently available and known standard, the characterization of hazards by consultants will be more uniform throughout the program. Consequently, employers will be able to have a better understanding of their obligations, and the monitoring and subsequent evaluation of consultant performance will be facilitated. The final regulation therefore, describes both the employer's and the consultant's obligations in the event that an imminent danger or serious violation is identified, and new provisions in the regulation specify that an employer be clearly informed of these obligations before a request for an on-site consultation visit may be accepted.

A provision is also added to clarify the obligation of the OSHA enforcement authority which receives a referral for a serious violation which an employer has refused to eliminate. The new provision specifies that the OSHA authority is not automatically required to make an immediate inspection, but rather has the flexibility to take whatever action it determines is warranted, given the facts of the case.

In addition, a procedure is created by which an employer, who in good faith disagrees with the period of time established for the elimination of a hazard, may promptly discuss the time period with the program consultation manager, who may amend the time period allowed.

RELATIONSHIP TO ENFORCEMENT

Several public comments, including Nicholas Roussos, Commissioner of the Massachusetts Department of Labor and Industries, Larry Swanda of the Jensen Construction Company, Philip Ross of the New York Department of Labor, Charles Daniels of the Arkansas Department of Labor, William Foster, Commissioner of the Oklahoma Department of Labor, and others addressed a delay of an inspection occurring when a consultation visit is in progress. Most of these comments favored broadening this provision to ensure that an employer was given some period of time after a consultation visit before any enforcement activity would be initiated. The rationale advanced for this delay was that the employer should be allowed the opportunity to act upon the consultant's advice. The comments emphasized that this would result in the more efficient use of resources and point to the bad publicity that was likely to ensue if an enforcement inspection occurred shortly after the conduct of an on-site visit. After consideration of these comments, the Agency has decided to adhere to its position that no inspection should be delayed beyond the time necessary for the consultant to complete the on-site visit. The Agency must reserve the option to conduct an inspection immediately after the visit.

Accordingly, this provision, although reworded, remains essentially unchanged in the final regulation. In addition, under the final regulation certain types of inspections may not be delayed, despite the fact that a consultation visit is in progress.

Further, a new provision has been added to clarify the circumstances when an employer may receive an on-site visit subsequent to an enforcement inspection. This new provision, § 1908.5(b)(3), acknowledges the role of consultation in aiding an employer in the abatement of violations, and permits employers to request on-site consultation for the purpose of obtaining abatement advice. A restriction is placed upon this consultative activity in that an on-site consultation visit may not take place subsequent to an enforcement inspection until the employer has been notified that no citation would be issued or, where a citation is issued, until those citation items for which consultation is desired have become final orders. A citation item becomes a final order if, within the number of days specified under the applicable law, the employer does not file a notice of contest or, if a notice of contest is filed, after a final decision by the Occupational Safety and Health Review Commission or corresponding State authority.

Certain provisions of the proposal address the effect of an on-site consultation visit on a subsequent inspection. These provisions, which appeared at § 1908.5(d)(1), resulted in several comments. James McCain, of the Kansas Department of Human Resources, Governor Joseph Teasdale of the State of Missouri, L. W. Murray, Jr., Director of the Governor's Office of Illinois Manpower and Human Development, and others objected to the fact the compliance officer was not bound by the consultant's advice. It is the Agency's view, however, that because conditions in a workplace are constantly changing, the views expressed by the consultant cannot limit the effects of a subsequent inspection or preclude citations and proposed penalties being issued for violations discovered. Further, under the final regulation, a compliance officer would not ordinarily know that a consultation visit has occurred unless the employer volunteers the information or makes the written report available. Under § 1908.6(c)(4), if the report is given to the compliance officer, the advice given by the consultant would be considered and used to determine the employer's good faith. In addition, it will be the Agency's policy to permit, where warranted, a good faith penalty adjustment greater than the thirty percent currently allowed under the Field Operations Manual, thus a employer who, has taken action based on the advice of a consultant, and who was cited for a violation, may not use the advice or opinions of the consultant as a defense to the citation; but the fact that the employer did follow the consultant's advice could result in a substantial reduction of any penalty assessed.

The application of this additional good faith adjustment must, of course, be determined by the Area Director or corresponding State official on a case-by-case basis.

NUMBER OF CONSULTANTS

In the proposal, a two-year ceiling was placed on the number of consultants which could be funded in a State under an agreement pursuant to this Part, and an exception from this ceiling was allowed for States with current agreements or approved plans under section 18 of the Federal OSH Act. The proposal would have required that exempted States reduce the number of consultants down to the twenty-five percent ratio through attrition. Numerous comments received addressed this limitation on the number of consultants. The comments objected to the apparent inflexibility in the provisions and questioned whether it would be possible for a State exceeding the ratio to hire more qualified consultants or increase the number of industrial hygienists if no staff vacancies could be filled until the State was below the twenty-five percent level. In response to these comments, the final regulation, while retaining the twenty-five percent ratio as a general guideline for one year, provides that those States with current contracts may be exempted from the ratio requirement if the current number is justified based on program performance, demand for services, or other factors. The final rule creates a far greater degree of flexibility in the determination of an appropriate number of consultants in all States. The ratio itself is also recast in terms of a "positions" concept rather than in terms of individual consultants.

A new provision has been added requiring the regional administrator to determine the types of consultant expertise necessary to meet the needs of the State. This would include not only the safety/health ratio, but also any particular need present in the State, such as a need for consultants with experience in maritime. After determining the State needs, the regional administrator will negotiate a reasonable response to those needs, and could require specialized training or the assignment of consultants with particular qualifications.

QUALIFICATIONS OF CONSULTANTS

The proposal contained explicit details on minimum qualifications for consultants, including specific educational and experience requirements. The provision in the existing regulation requiring regional administrator interview and approval consultants was also retained in the proposal.

Numerous public comments were addressed to these provisions, including comments from officials from the States of California, Oklahoma, Michigan, Oregon, Kansas, Wisconsin, North Carolina, New York, West Virginia, Texas, Missouri, Illinois, Virginia, Massachusetts, Colorado, and Kentucky. One of the objections raised by the comments concerned the requirement for regional administrator interview. States strongly objected to this provision on the grounds that it would interfere with normal State hiring practices.

The comments from Philip Ross of the New York Department of Labor indicate that under the State's Merit System and Civil Service Law, certain persons have an absolute preference to any job opening for which they are qualified under State law. If the regional administrator were to reject such a person, the consultant position could not be filled until another position outside of the program was vacated. A similar concern was raised by Robert Beard, Acting Commissioner of the Virginia Department of Labor and Industry, on the grounds that the regional administrator could reject an applicant certified by the State Merit System as being qualified.

In response to this criticism, the requirement for an regional administrator interview has been removed in the final regulation. However, the requirement that the regional administrator must approve State consultants before assignment to this program is retained, and individual regional administrators may determine that an interview is essential in order to ascertain whether a consultant is, in fact, qualified to do the job. In such a case the regional administrator has the authority to conduct an interview. Other State comments objected to the minimum qualifications as too restrictive or impossible to meet given current State salary levels. On the other hand, several States, along with the Association of Federal Safety Employees and the Iron Casting Society, thought that the qualifications should be raised.

The Agency has concluded that establishment of specific minimum qualifications requirements could be counterproductive and could be a disincentive for States to participate in this program. The final regulation, therefore, provides greater flexibility in this area. This does not imply that the Agency has determined to place a lesser emphasis on consultant qualifications. The opposite is in fact the case. In order to meet the needs of the nation's employers, particularly those in small businesses, the Agency is firmly committed to a program to upgrade the qualifications of State consultants under these programs. It believes that a well-trained, highly qualified cadre of consultants is essential for an effective program. It was apparent from the State comments, however, that the existing consultation staff, as well as the ability to make changes in State hiring practices, differs widely from State to State. In addition, the demand for more qualified consultants will vary from State to State due to the differences in the types of business activities conducted and the types of hazards which may be present. A highly industrialized State would therefore require, as a general rule, a consultant with different qualifications than would an agricultural State, due to the nature of the conditions which the consultant would be likely to encounter. Therefore, it was determined that the most effective program would be a flexible one.

Accordingly, the final regulation does not contain the specific minimum qualifications listed in the proposal; instead, it includes in their place provisions which require the adoption by each State of a plan to upgrade the qualifications which it requires of consultants. These plans must contain specific goals consistent with State needs and must describe and contain the steps which shall be taken by the State to reach these goals and specific timetables for the implementation of changes. The implementation dates for these changes shall be no later than August 1, 1980. The plan must be initially submitted within 120 days of the effective date of these revisions, and thereafter revised annually to reflect the State's progress toward specific goals. The plan will become a part of a contract under this regulation and a State must satisfy the Assistant Secretary of Labor for Occupational Safety and Health (hereinafter referred to as the Assistant Secretary) that it is taking appropriate action to implement its plan in order to be eligible for continued funding.

MONITORING

Section 1908.7 of the proposal outlined new monitoring provisions for contracts under the regulations. States under contract would be required to establish an effective internal monitoring system, to prepare quarterly reports and to submit various other documents to the regional administrator. The State would be required to conduct a performance evaluation of every consultant annually, and conduct actual on-the-job evaluations. An internal self-monitoring system was determined to be the most viable alternative because except in States with approved plans under section 18, Federal OSHA could not conduct on-the-job evaluations of consultant performance without taking appropriate enforcement action against the employer for any hazards observed at the worksite. Relatively few public comments addressed the monitoring changes. James Gillice, of the American Mutual Insurance Alliance praised the new requirements, and comments from Edward Otterson, Chief of the Wisconsin Department of Health and Social Services, and others were favorable to the new program.

The final regulation is essentially unchanged from the proposal, with the exception that the regional administrator's right to conduct concurrent monitoring activities is clearly described. This Federal monitoring may take any number of forms, including the use of private contractors, or any other methods which may be desirable.

EFFECTIVE DATE

The proposal which, among other things, increased the level of Federal funding, under contracts pursuant to these regulations to ninety percent, was published in the FEDERAL REGISTER on April 29, 1977. In the interim period between the proposal and this final regulation, existing contracts with several States expired and were renewed on an interim basis. Some of these States adjusted their budgets in anticipation of prompt modification of the funding provisions. In consideration to these States and due to the delay of the promulgation of the final regulation, the Assistant Secretary finds that good cause exists for making the effective date of these revisions August 1, 1977. Those States with existing contracts as of that day, may, if a contract is renegotiated within 30 days, receive ninety percent funding for allowable costs as of the effective date. Accordingly, 29 CFR Part 1908 is hereby amended as follows:

These revisions shall be effective August 1, 1977.

AUTHORITY: Secs. 7(c)(1), 21(c), 84 Stat. 1598, 1612; (29 U.S.C. 656(c)(1), 670(c)).

§ 1908.1 Purpose and scope.

This part contains requirements for agreements between States and the Federal Occupational Safety and Health Administration (hereinafter referred to as the Agency under Sections 7(c)(1) and 21(c) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.) under which the Agency will utilize State personnel to provide on-site consultation services to employers. The service will be made available at no cost to employers to assist them in providing their employees employment and a place of employment which is safe and healthful. Consultants will identify specific hazards in the workplace and provide advice on their elimination. Although on-site consultation will be conducted independent of any OSHA enforcement activity, and the discovery of hazards will not mandate citation or penalties, the employer remains under a statutory obligation to protect his employees, and, in certain instances, will be required to take necessary protective action. States entering into agreements under this Part will receive ninety percent Federal reimbursement for allowable costs and will provide on-site consultation for employers requesting the service, subject to scheduling priorities and available resources, and will offer advice and technical assistance to each requesting employer on job-related safety and health hazards.

§ 1908.2 Definitions.

As used in this part:

"*Act*" means the Federal Occupational Safety and Health Act of 1970.

"*Assistant Secretary*" means the Assistant Secretary of Labor for Occupational Safety and Health.

"*Compliance officer*" means a Federal or State compliance safety and health officer.

"*Employer*" means a person engaged in a business, who has employees, but does not include the United States, or any State or political subdivision of a State.

"*On-site consultation*" means all activities related to the conduct of an on-site consultative visit, including a written report to the employer.

"*OSHA*" means the Federal Occupational Safety and Health Administration or the State agency responsible under a Plan approved under Section 18 of the Act for the enforcement of occupational safety and health standards in that State.

"*State*" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands.

"*RA*" means the Regional Administrator for Occupational Safety and Health of the Region in which the State concerned is located, or his designee.

§ 1908.3 Eligibility and funding.

(a) *State eligibility*. (1) Any State may enter into an agreement with the Assistant Secretary to perform on-site consultation for private-sector employers.

(2) A State having a Plan approved under Section 18 is eligible to participate in the program if that Plan does not include provisions for federally-funded on-site consultation to private-sector employers.

(b) *Reimbursement*. (1) The Assistant Secretary will reimburse 90 percent of the costs incurred under an agreement entered into pursuant to this part. Agreements negotiated within 30 days of the effective date of these revisions will be reimbursed at the level of ninety percent for allowable costs incurred as of that date. Approved training and specified out-of-State travel will be fully reimbursed.

(2) Reimbursement to States under this Part is limited to costs incurred in providing on-site consultation to private-sector employers only.

(i) In all States with Plans approved under Section 18, on-site consultation provided to State and local governments, as well as the remaining range of voluntary compliance activities referred to in 29 CFR 1902.4(c)(2)(xiii), will not be affected by the provisions of this part, with Federal reimbursement for these activities in accordance with the provisions of Section 23(g) of the Act.

(ii) In States without Plans approved under Section 18, no Federal reimbursement for on-site consultation provided to State and local governments will be allowed, although this activity may be conducted independently by a State with 100 percent State funding.

§ 1908.4 Requests and scheduling.

(a) *Encouraging requests*.—(1) *State responsibility*. The State shall be responsible for encouraging employers to request on-site consultative visits, and shall publicize the availability of its on-site consultation service and the scope of the service which will be provided. The Assistant Secretary may also engage in activities to publicize and promote the program.

(2) *Promotional methods*. To inform employers of the availablity of its on-site consultation service and to encourage requests, the State may use methods such as the following:

(i) Paid newspaper advertisements;

(ii) Newspaper, magazine, and trade publication articles;

(iii) Special direct mailings or telephone solicitations to establishments, based on Workers' Compensation data or other appropriate listings;

(iv) In-person visits to workplaces to explain the availability of the service, and participation at employer conferences and seminars;

(v) Solicitation of support from State business and labor organizations and leaders, and public officials;

(vi) Preparation and dissemination of publications, descriptive materials, etc., on on-site consultation services;

(vii) Free public service announcements on radio and television.

(3) *Scope of service*. In its publicity for the program, in response to any inquiry, and before an employer's request for a consultation visit may be accepted, the state shall clearly explain that the service is provided at no cost to an employer through federal and state funds for the purpose of providing the employer with a better understanding of the requirements of the applicable State or Federal law and regulations. The State shall explain that while utilizing this service, an employer remains under a statutory obligation to provide safe and healthful working conditions for employeees. In addition, while the identification of hazards by a consultant will not mandate the issuance of citations or penalties, the employer is required to take action necessary to eliminate a hazard which in the judgment of the consultant, represents an imminent danger to employees, or which would be classified as a serious violation. The State shall emphasize, however, that the discovery of such a hazard will not initiate any enforcement activity, and that referral will not take place unless the employer fails to cooperate in the elimination of the identified hazard.

(b) Employer requests. (1) An on-site consultative visit will be provided only at the request of the employer, and shall not result from the enforcement of any right of entry under State law. A consultant is not authorized to make an unscheduled appearance at the workplace of an employer who has not made a request to conduct an on-site consultative visit at that time.

(2) When making the request, the employer shall describe those specific working conditions, hazards or situations for which on-site consultation is desired; the smaller the employer's business, the less specific the request must be.

(3) Employers may request on-site consultation to assist in the abatement of hazards cited during an OSHA enforcement inspection. However, an on-site consultation visit may not take place after an OSHA inspection until the employer has been notified that no citation will be issued or, if a citation is issued, until those citation items for which consultation is requested have become final orders.

(c) *Scheduling priority*. Priority shall be assigned to requests from smaller businesses, based on their number of employees, with emphasis on those workplaces of a highly hazardous nature.

§ 1908.5 Conduct of a visit.

(a) *Preparation*. An on-site consultative visit shall be made only after appropriate preparation by the consultant. Prior to the visit, the consultant shall become familiar with as many factors concerning the establishment's operation as possible. The consultant shall review all applicable codes and standards. In addition, the consultant shall asssure that all necessary technical and personal protective equipment is available and functioning properly.

(b) *Structured format*. An on-site consultative visit shall follow a structured format, which will consist of an opening conference, a walk through the workplace, and a closing conference. The visit shall be followed by a written report to the employer.

(c) *Employee participation*. (1) The consultant shall retain the right to confer with individual employees during the course of the visit in order to identify and judge the nature and extent of particular hazards. The consultant shall explain the necessity for this contact to the employer during the opening conference, and an employer must agree to this contact before a visit can proceed.

(2) In addition, employees, their representatives, and members of a workplace joint safety and health committee, may participate in the on-site consultative visit, to the extent desired by the employer. In the opening conference, the consultant shall encourage the employer to allow employee participation to the fullest extent practicable.

(d) *Opening conference*. In addition to the requirements of § 1908.5(c), the consultant shall, in the opening conference, explain to the employer the relationship between on-site consultation and OSHA enforcement activity and shall explain the obligation to protect employees in the event that certain hazardous conditions are identified.

(e) *On-site activity*. (1) Activity during the on-site consultative visit will be focused primarily on those conditions, hazards or situations described by the employer when the request was made.

(2) The consultant shall advise the employer as to the employer's obligations and responsibilities under applicable Federal or State law and implementing regulations.

(3) To the extent of their capability and training, consultants shall identify and provide advice on elimination of those hazards included in the employer's request and any other safety or health hazards observed in the workplace during the course of the on-site consultative visit. The consultant shall conduct sampling and testing, with subsequent analyses, as may be necessary to confirm the existence of health hazard.

(4) Advice and technical assistance on the elimination of identified safety and health hazards may be provided to employers during and after the on-site consultative visit. Descriptive materials may be provided on approaches, means, techniques, etc., commonly ultilized for the elimination or control of such hazards. This advice should include basic information indicating the possibility of a solution and describing the general form of this solution. However, the advice and assistance shall not include engineering services or the provision of engineering design solutions. The consultants shall also advise the employers of additional sources of assistance, if known.

(5) When a hazard is identified in the workplace, the consultant shall indicate to the employer his or her best judgement as to whether this situation would be classified as a "serious" or "other-than-serious" violation of applicable Federal or State statutes, regulations or standards, based on criteria contained in the current OSHA Field Operations Manual. (The element of employer knowledge shall not be considered.)

(6) At the time that the consultant determines that an identified hazard which would be classified as a serious violation, the consultant and the employer shall develop a specific plan to eliminate the hazard, affording the employer a reasonable period of time to complete the necessary action. If, within 10 days of the development of this plan, an employer, in good faith, disagrees with the period of time established for the elimination of a hazard, the State shall provide an opportunity for an expeditious informal discussion with the State consultation manager on the time period set by the consultant.

(f) *Employer obligations*. (1) An employer must take immediate actions to eliminate employee exposure to a hazard which, in the judgment of the consultant, presents an imminent danger to employees. If the employer fails to take the necessary action, the consultant must immediately notify the affected employees and the appropriate OSHA enforcement authority and provide the relevant information.

(2) An employer must also take the necessary action in accordance with the plan developed under § 1908.5(e)(6) to eliminate employee exposure to any identified hazard which, in the judgment of the consultant, would be classified as a serious violation. In order to demonstrate that the necessary action is being taken, an employer may be required to submit periodic reports, permit a follow-up visit, or take similar action. If the employer fails to take the action necessary to eliminate a hazard which would be classified as a serious violation, the consultant shall immediately notify the appropriate OSHA enforcement authority and provide the relevant information. The OSHA enforcement authority will make a determination, based on a review of the facts, whether enforcement activity is warranted.

(g) *Written report*. A written report shall be prepared for each visit and sent to the employer. The timing and format for the report shall be approved by the Assistant Secretary. The report shall restate the employer's request and desrcibe the working conditions examined by the consultant; shall identify specific hazards; shall describe their nature, including reference to applicable standards or codes; shall identify the seriousness of the hazard; and, to the extent possible, shall include suggested means or approaches to their elimination or control. Additional sources of assistance should also be indicated, if known, including the possible need to procure specific engineering consultation, medical advice and assistance, etc. The report shall also include references to the completion dates for the situations described in §§ 1908.4(e)(5), (6).

(h) *Confidentiality*. The consultant shall preserve the confidentiality of information obtained as the result of an on-site consultative visit which contains or might reveal a trade secret of the employer.

§ 1908.6 Relationship to enforcement.

(a) *Independence*. (1) On-site consultation activity by a State shall be conducted independently of any Federal or State OSHA enforcement activity.

(2) The consultation activity shall have its own identifiable managerial staff. In States with Plans approved under Section 18, this staff will be separate from the managing compliance inspections and scheduling.

(3) The identity of employers requesting on-site consultation as well as the file of the consultant's visit shall not be forwarded or provided to OSHA for use in any compliance inspection or scheduling activities.

(4) Employers receiving on-site consultative visits shall not be identified to OSH, unless the employer fails to take the necessary action to protect employees from a hazard considered by the consultant to be an imminent danger or serious violation.

(b) *Effect upon scheduling*. (1) An on-site consultative visit already in progress will have priority over OSHA compliance inspections except as provided in 1908.5(b)(2). The consultant and the employer shall notify the compliance officer of the visit in progress and request delay of the inspection until after the visit is completed. A request for on-site consultation shall not be the basis for the delay of a compliance inspection.

(2) The consultant shall terminate an on-site consultative visit already in progress where one of the following kinds of OSHA compliance inspections is about to take place:

(i) Imminent danger investigations.

(ii) Fatality/catastrophe investigations.

(iii) Complaint investigations.

(iv) Follow-up inspections.

(v) Other critical inspections as determined by the Assistant Secretary.

(3) An on-site consultation visit shall not take place subsequent to an OSHA enforcement inspection until the employer has been notified that no citation will be issued, or if a citation is issued, on-site consultation shall only take place with regard to those citation items which have become final orders.

(c) *Effect upon enforcement*. (1) The advice of the consultant and the consultant's written report will not be binding on a compliance officer in a subsequent enforcement inspection. In a subsequent inspection, a compliance officer is not precluded from finding hazardous conditions, or violations of standards, rules or regulations, for which citations would be issued and penalties proposed.

(2) The hazard identification and abatement advice given by a State consultant, or the failure of a consultant to point out a specific hazard, or other possible errors or omissions by the consultant shall not be binding upon a compliance officer, and will not affect the regular conduct of a compliance inspection, or preclude the finding of alleged violations and the issuance of citations, or act as a defense to any enforcement action.

(3) In the event of a subsequent inspection, the employer is not required to either inform the compliance officer of the prior visit or provide a copy of the State consultant's written report to the compliance officer.

(4) If, however, the employer chooses to provide a copy of the consultant's report to a compliance officer, it may be used to determine the employer's good faith for purposes of proposing penalties.

§ 1908.7 Consultant specifications.

(a) *Number.* (1) The number of consultant positions which will be funded under an agreement pursuant to this Part for the purpose of providing on-site consultation to private sector employers will be determined by the Assistant Secretary on the basis of program performance, demand for services, resources available, and the recommendation of the RA, and may be adjusted periodically.

(2) For a period of one year from the effective date of this revision, the number of on-site consultant positions funded in a state which does not have an agreement under this Part as of the effective date of these revisions shall not exceed 25 percent of the number of full-time Federal and State compliance officer positions present within that State. The number of "compliance officer positions present" shall be the number of allocated Federal compliance officer positions for that State and, if the State has an approved Plan under Section 18, the number of compliance officer positions provided in the State's 23(g) grant. The Assistant Secretary may exempt a State from this limitation if it is determined that this exemption is warranted and consistent with available resources.

(3) States shall make efforts to utilize consultants with the safety and health expertise necessary to properly meet the demand for consultation by the various industries within a State. The RA will determine and negotiate a reasonable balance with the State on an annual basis.

(b) *Qualifications.* (1) All consultants utilized under agreements pursuant to this Part shall be employees of the State, qualified under State requirements for employment in occupational safety and health. They must demonstrate adequate education and experience to satisfy the RA, before assignment to work under an agreement, and annually thereafter, that they meet the requirements set out in § 1908.6(b)(2) and that they have the ability to perform satisfactorily pursuant to the agreement. All consultants shall be selected in accordance with the provisions of Executive Order 11246 of September 24, 1965, as amended, entitled "Equal Employment Opportunity."

(2) Minimum requirements shall include:

(i) Consultants shall demonstrate the following: the ability to identify hazards; the ability to assess employee exposure and risk; knowledge of OSHA standards; knowledge of abatement techniques and practices; knowledge of workplace safety and health program requirements; and the ability to effectively communicate, both orally and in writing.

(ii) Consultants shall meet any additional degree and/or experience requirements as may be established by the Assistant Secretary.

(3) A specific plan to upgrade the qualifications for all State consultants shall be developed by each participating State according to guidelines established by the Assistant Secretary.

(i) The plan shall include a timetable with final implementation dates for specific actions which the State shall take in order to upgrade the education and experience of State consultants, including revision of job descriptions, establishment of additional qualifications and training and increases in State salary levels.

(ii) The plan must be submitted to the RA within 120 days of the effective date of an agreement under this Part and shall be revised annually to reflect the State's progress toward specific goals.

(iii) The implementation dates in initial plans shall be no later than August 1, 1980.

(c) *Training.* As necessary, the Assistant Secretary will specify immediate and continuing training requirements for consultants. Expenses for training which is required by the Assistant Secretary or approved by the RA will be reimbursed in full.

§ 1908.8 Monitoring and evaluation.

(a) *Regional administrator responsibility.* A State's performance under the agreement will be regularly monitored and evaluated by the RA. The RA may direct changes as a result of these evaluations to foster conformance with consultation policy as established by the Assistant Secretary. All aspects of the agreement with the State will be continually monitored and evaluated as part of a systematic Federal regional plan for this activity.

(b) *State performance.* The RA or his designee will periodically meet with State project officials to assess project status and to seek resolution to any operating problems. An appropriate number of State files (without identification of the employer) on individual on-site consultative visits will be audited. Special attention will be given to determine whether the provisions of §§ 1908.5 (e) and (f) are being followed. A written report of these periodic reviews will be forwarded by the RA to the State.

(c) *Consultant performance.* (1) *State activity.* The State shall establish and maintain an organized consultant performance monitoring system under the agreement:

(i) The system shall be established within 60 days of the execution of the contract, or within 60 days from the date the Assistant Secretary publishes a program directive on the design of the performance monitoring system. Whichever occurs later. Operation of the system shall conform to all requirements established by the Assistant Secretary. The system shall be approved by the RA before it is placed in operation.

(ii) A performance evaluation of each individual State consultant performing on-site consultation for employers shall be prepared annually. All aspects of a consultant's performance shall be reviewed at that time. Recommendation for remedial action shall be made and acted upon. The annual evaluation report shall be a confidential State personnel record and may be timed to coincide with regular personnel evaluations.

(iii) Performance of individual consultants shall be measured in terms of their ability to identify hazards in the workplaces which they have visited; their ability to determine employee exposure and risk, and in particular their performance under §§ 1908.5 (e) and (f); their knowledge and application of applicable Federal or State statutes, regulations or standards; their knowledge and application of appropriate abatement techniques and approaches; and their ability to effectively communicate their findings to employers.

(iv) Accompanied visits to observe consultants during on-site consultative visits shall be conducted at least semi-annually for each consultant. The State may also conduct unaccompanied visits to workplaces which received on-site consultation, for the purpose of evaluating consultants. A written report of each visit shall be provided to the consultant. These visits shall be conducted only with the expressed permission of the employer who requested the on-site consultative visit.

(v) The State will report quarterly to the RA on system operations, including copies of accompanied visit reports (without identification of the employer) completed that quarter.

(2) *Federal activity.* State consultant performance monitoring as set out in § 1908.7(c)(1) shall not preclude Federal monitoring activity by methods determined to be appropriate by the Assistant Secretary.

(d) *State reporting.* For Federal monitoring and evaluation purposes, the State shall compile and submit such factual and statistical data in the format and at the frequency required by the Assistant Secretary. The State shall prepare and submit to the RA any narrative reports, including copies of written reports to employers (without identification of the employer) as may be required by the Assistant Secretary.

§ 1908.9 Agreements.

(a) *Who may make agreements.* The Assistant Secretary may make an agreement under this part with the Governor of a State or with any State agency designated for that purpose by the Governor.

(b) *Negotiations.* (1) Procedures for negotiations may be obtained through the RA who will negotiate for the Assistant Secretary and make final recommendations on each agreement to the Assistant Secretary.

(2) States with Plans approved under Section 18 may initiate negotiations in anticipation of the withdrawal of federally funded on-site consultation services to private-sector employers from the Plan.

(3) Renegotiation of existing agreements funded under this Part shall be intiated within 30 days of the effective date of these revisions.

(c) *Contents of agreement.* (1) Any agreement and subsequent modifications shall be in writing and signed by both parties.

(2) Each agreement shall provide that the State will conform its operations under the agreement to:

(i) The requirements contained in this Part 1908;

(ii) Al related formal directives subsequently issued by the Assistant Secretary implementing this regulation.

(3) Each agreement shall contain an explicit written commitment for each major lettered paragraph in §§ 1908.4, 1908.5, 1908.6, 1908.7, and 1908.8, with particular emphasis placed on the following elements:

(i) Consultation management structure separate from enforcement;

(ii) Consultant numerical limitation and safety and health objective;

(iii) Assignment of qualified personnel;

(iv) Submission of a plan for upgrading consultant qualifications;

(v) Advertisement of consultation services;

(vi) Early notification to employers of the scope of services provided and their obligations;

(vii) Employee participation in on-site visits;

(viii) Employee protection requirements;

(ix) Provision of written report to employers; and

(x) Monitoring and evaluation procedures;

(4) Each agreement shall also include a budget of the State's anticipated expenditures under the agreement, in the detail and format required by the Assistant Secretary.

(d) *Location of sample agreement.* A sample agreement is available for inspection at all Regional Offices of the Occupational Safety and Health Administration of the U.S. Department of Labor.

(e) *Action upon requests.* The State will be notified within a reasonable time of any decision concerning its request for an agreement. If a request is denied, the State will be informed in writing of the reasons supporting the decision. If an agreement is negotiated, the initial funding will specify the period for the agreement. Additional funds may be added at a later time provided the activity is satisfactorily carried out and appropriations are available. The State may also be required to amend the agreement for continued support.

(f) *Termination.* Either party may terminate an agreement under this part upon 30 days written notice to the other party.

§ 1908.10 Exclusions.

An agreement under this part will not restrict in any manner the authority and responsibility of the Assistant Secretary under Sections 8, 9, 10, 13, and 17 of the Act, or any corresponding State authority.

Signed at Washington, D.C., this 11th day of August, 1977.

EULA BINGHAM,
Assistant Secretary of Labor.

[FR Doc.77-23650 Filed 8-15-77;8:45 am]

federal register

TUESDAY, AUGUST 16, 1977

PART VI

FEDERAL ENERGY ADMINISTRATION

■

LOWER AND UPPER TIER CRUDE OIL PRICE CEILINGS

Resumption of Adjustments to Reflect Impact of Inflation

FEDERAL ENERGY ADMINISTRATION

[10 CFR Part 212]

LOWER AND UPPER TIER CRUDE OIL PRICE CEILINGS

Resumption of Adjustments To Reflect Impact of Inflation

AGENCY: Federal Energy Administration.

ACTION: Notice of proposed rulemaking and public hearing.

SUMMARY: The Federal Energy Administration ("FEA") proposes in this proceeding to resume in September 1977, price increases to take into account the impact of inflation, which are permitted under the Emergency Petroleum Allocation Act of 1973, as amended ("EPAA"). These price increases were discontinued because during 1976 and part of 1977 actual weighted average prices for domestic crude oil exceeded the statutory maximum weighted average first sale ("composite") price.

Currently, lower tier ceiling prices are frozen at their June 1976 levels, resulting in a projected average first sale price in August 1977 of approximately $5.17 per barrel; upper tier prices have been rolled back to a projected average first sale price in August 1977 of approximately $10.97 per barrel.

Under the proposal set forth in this Notice FEA would, beginning in September 1977, apply the inflation adjustment to the projected August lower tier price (approximately $5.17 per barrel), and would begin to restore over a 3 month period the upper tier price to a level that would represent the $11.28 per barrel price originally intended to be achieved for upper tier crude oil in February 1976 by the Energy Policy and Conservation Act ("EPCA") crude oil pricing policy, plus the $.27 per barrel increase in upper tier prices that was authorized for the months of March through June 1976. Pursuant to this proposal, lower tier prices would be approximately $5.24 per barrel by November 1977, and upper tier prices would be approximately $11.71 per barrel.

Thereafter, lower tier and upper tier prices would be allowed to rise at the rate of inflation, as was proposed in the National Energy Plan issued by the President on April 20, 1977.

DATES: Comments by Friday, August 26, 1977, 4:30 p.m.; Requests to speak by Friday, August 19, 1977, at 4:30 p.m.; Hearing date: Friday, August 26, 1977, 9:30 a.m.

ADDRESSES: Comments and requests to speak to: Executive Communications, Room 3317, Federal Energy Administration, Box OP, Washington, D.C. 20461; Hearing location: Room 2105, 2000 M Street, N.W., Washington, D.C. 20461.

FOR FURTHER INFORMATION CONTACT:

Robert C. Gillette (Hearing Procedures), 2000 M Street NW., Room 2214B, Washington, D.C. 20461, 202-254-5201.

Ed Vilade (Media Relations), 12th and Pennsylvania Avenue NW., Room 3104, Washington, D.C. 20461 (202) 566-9833.

William D. Carson (Office of Regulatory Programs), 2000 M Street NW., Room 2310, Washington, D.C. 20461, 202-254-7477.

Everard A. Marseglia, Jr. (Office of General Counsel), 12th and Pennsylvania Avenue NW., Room 5140, Washington, D.C. 20461, 202-566-9567.

SUPPLEMENTARY INFORMATION:

A. Background

Under the Emergency Petroleum Allocation Act of 1973, as amended ("EPAA," Pub. L. 93-159), Congress provided FEA with flexibility to control first sale prices of domestic crude oil as long as the national weighted average first sale price ("actual composite price") did not exceed $7.66 per barrel ("statutory composite price") for all domestic crude oil produced and sold in February 1976.

Beginning in March 1976, the EPAA authorized increases in the statutory composite price to reflect the effects of inflation and to provide production incentives. Under present authority, the statutory composite price is adjusted upward at the rate of 10 percent annually.

Under FEA price regulations adopted to implement the pricing policy that included the statutory composite price restrictions, domestic crude oil is classified either as lower tier (which accounts currently for about 50 percent of total domestic production), upper tier (which accounts currently for about 36 percent of total domestic production) and crude oil produced from stripper well properties (which accounts currently for about 14 percent of total domestic production).

Stripper well property crude oil, which is production from properties that have declined to a level of 10 barrels or less per well per day for a preceding consecutive 12-month period, is permitted by statutory authority to be sold at market price levels, so as to encourage continued production from such marginal properties for as long as possible. For purposes of determining compliance with the statutory composite price limitation, however, stripper well property crude oil is given by statutory formula an imputed value which approximates the average upper tier price. (Section 121 of the Energy Conservation and Production Act, "ECPA", Pub. L. 94-385.)

Upper tier crude oil generally includes production from properties which first began producing crude oil after 1972 (except those which qualify as stripper well properties or which produce crude oil that is otherwise exempt from first sale price controls), plus incremental production from older properties which exceeds a certain "base production control level." The upper tier price (an average of $11.64 per barrel at the end of 1976) is generally designed to stimulate increased production from older properties and to encourage further exploration and development of domestic crude oil resources. The lower tier price, which averaged about $5.17 per barrel nationally at the end of 1976, applies to all domestic production which is not exempt or which does not qualify as upper tier crude oil.

Effective July 1, 1976, FEA halted further monthly increases in crude oil price ceilings and continued them at their June 1976 levels order to compensate for actual composite prices in excess of adjusted statutory composite price levels. FEA took further corrective action to achieve compliance with statutory composite price restrictions by reducing upper tier price ceilings by 20 cents per barrel effective January 1, 1977, and by an additional 45 cents per barrel effective March 1, 1977. These actions were projected to eliminate all excess crude oil receipts by June 30, 1977 (see 42 FR 13013, March 8, 1977). (Although the ceiling prices for lower tier crude oil have been frozen since June 1976, and the ceiling prices for upper tier crude oil have been frozen—and subsequently rolled back—since June 1976, ceiling prices for lower and upper tier crude oil are determined on a field-by-field basis. As a result, the average actual prices for lower tier and upper tier crude oil vary from month to month as a function of the mix of types of crude oil selling at varying ceiling prices from field to field.)

On March 15, 1977, FEA submitted Energy Action No. 11 to the Congress, pursuant to section 8(f) of the EPAA, to continue in effect that portion of the 10 percent annual increase in the statutory composite price relating to production incentives. That action, having undergone legislative review without disapproval by either house of Congress, permits the statutory composite price to continue to increase at an annual rate of 10 percent.

In congressional hearings relating to Energy Action No. 11, FEA stated that the 10 percent annual adjustment in the statutory composite price was anticipated to be entirely or almost entirely used to reflect the impact of inflation on the ceiling prices for lower and upper tier crude oil (anticipated at between 5.5 and 6.5 percent annually) and to account for the automatic increase in the actual composite price attributable to the continuing decline in the percentage of lower tier crude oil (resulting in an increase in the actual composite price of approximately 3.0 to 3.6 percent annually). Accordingly, FEA stated that it intended in the future to adjust lower tier and upper tier prices by not more than the amount necessary to reflect the impact of inflation.

Pursuant to Section 8(d) of the EPAA, the impact of inflation is measured for purposes of adjusting the composite price by using the "adjusted GNP deflator." The Act defines the term "adjusted GNP deflator" to mean:

* * * the first revision of the quarterly percent change, seasonally adjusted at annual rates, of the most recent implicit price deflator for the gross national product which shall be computed and published for each calendar quarter by the Department of Commerce, subject to such additional modification as the President shall make to exclude therefrom any amount which he determines is attributable solely and directly to increases which occur after the date of enactment of this section in prices of imported crude oil, residual fuel oil, or any refined petroleum product resulting from concerted action of two or more petroleum exporting countries.

For purposes of this notice, the inflation adjustment for the months of September, October, and November 1977 has been computed at an annual rate of 5.5 percent. This is the most recent first revision of the GNP deflator, published by the Department of Commerce in late June 1977. Actual adjustments to crude oil price ceilings for the months of September through November 1977, pursuant to the regulations proposed in this rulemaking will be based on the first revision of the GNP deflator to be published on or about August 20, 1977. Beginning in December the first revision of the GNP deflator published on or about November 20, 1977 would be used to adjust ceiling prices for the next three months to reflect the rate of inflation, and so forth.

The purpose of this proceeding is to specify the price levels for lower tier and upper tier crude oil to which such adjustments for inflation should be applied and to implement the provision of the National Energy Plan that calls for allowing lower tier and upper tier ceiling prices to rise at the rate of inflation.

B. Proposed Amendments

As indicated above, monthly increases in both lower tier and upper tier crude oil price ceilings have been deferred and upper tier crude oil price ceilings have been reduced in order to compensate for actual composite price levels in excess of statutory composite price limits. This elimination of excess receipts is projected to be completed by June 30, 1977—final data for a particular month are not available to FEA until the end of the third month following that month—and resumption of monthly price adjustments can therefore be resumed September 1, 1977. As FEA indicated in the notice accompanying Schedule No. 7 of Monthly Price Adjustments (42 FR 38894, August 1, 1977), this more conservative pricing policy is intended to further the EPAA goal of providing a more stable and predictable basis for future pricing actions by decreasing the potential for future price freezes or rollbacks.

FEA proposes to apply such inflation adjustments prospectively to existing lower tier prices and to upper tier prices adjusted to reflect (1) the fact that actual upper tier prices when the upper tier ceiling price was first imposed in February 1976 were higher than the average of $11.28 per barrel that was intended, and (2) the fact that upper tier prices have been reduced by a total of $.65 per barrel in recent months. Because the restoration of upper tier prices will represent a price increase of some significance, it is proposed to be phased in over a 3 month period so as to avoid creating any substantial incentive unnecessarily to withhold production in anticipation of a price increase.

FEA has concluded that it would not be appropriate to seek to restore lower tier and upper tier price levels to the real dollar equivalent of their February 1976 price levels because the overall economic impact of such an action would not, in all likelihood, be counterbalanced by any measurable production response. Domestic crude oil production has been subject to frozen or reduced price levels for more than a year without any measurable effect on production. (FEA has granted price relief on a case-by-case basis in all instances in which those price levels have resulted in a demonstrable threat to continued production.)

Accordingly, FEA has concluded that restoration of crude oil ceiling prices to their February 1976 real dollar equivalent would constitute essentially a windfall to producers, in that it would constitute a form of payment for production that has already taken place under economically advantageous circumstances. In this regard, however, FEA has also concluded that equitable considerations favor the restoration of upper tier prices to a level that recognizes the initial pricing objectives of the EPAA crude oil pricing policy and the fact that the upper tier price has, in fact, been rolled back to compensate for prices in excess of the statutory composite price.

In specifying a composite price of $7.66 per barrel for all domestic crude oil in February 1976, Congress assumed that the existing ceiling price on domestic old crude oil (lower tier) would be continued and that the average price of old crude oil was $5.25 per barrel. The $5.25 per barrel estimate was derived originally by the Cost of Living Council ("CLC") as the average first sale price of controlled domestic crude oil in December 1973. FEA was not required, nor did it have any regulatory need, to monitor actual first sale prices of controlled domestic crude oil until the advent of EPCA. Inasmuch as old crude oil prices had remained frozen from December 1973, the $5.25 figure was thought to be a reasonable estimate of lower tier crude oil prices.

In specifying the $7.66 per barrel composite price, the Congress also assumed that "new," "released," and "stripper well" crude oil (which were not then subject to ceiling price limitations), would not have to be rolled back from the average first sale price of uncontrolled domestic crude oil in January 1975, which was $11.28 per barrel. The January 1975 price was based on the most recent price data available and which was free from the influence of (1) the 1975 supplemental import fees on crude oil, and (2) the effect of the October 1975 price increase by the Oil Producing and Exporting Countries which subsequently affected domestic crude oil prices.

It was also estimated that sixty percent of total domestic crude oil would constitute old crude oil. The $7.66 per barrel composite price figure was therefore calculated as follows:

$$(.6)\ (\$5.25) + (.4)\ (\$11.28) = \$7.66.$$

(*See generally* S. Rept. No. 94-516, 94th Cong., 1st Sess. 187-191 (1975).)

FEA adopted regulations to implement the composite price limitation of EPCA that were predicated on the same estimates and assumptions that had been used by the Congress. Pursuant to those regulations, which became effective February 1, 1976, comprehensive data on actual first sale prices were obtained for the first time. Those data revealed that the average first sale price for lower tier crude oil was, in fact $5.05 per barrel, rather than the estimated $5.25 per barrel; that lower tier crude oil constituted approximately 56.1 percent of domestic production rather than the estimated 60 percent; and that the upper tier ceiling price of (the September 30, 1975 posted price, less $1.32 per barrel) had resulted, in February 1976, resulted in average upper tier prices of $11.48 per barrel rather than the intended $11.28 per barrel. These factors, among others, led FEA to discontinue price increases in July 1976.

Under the amendment proposed herein, the existing lower tier ceiling price (the May 15, 1973 posted price plus $1.48 per barrel, currently resulting in an average first sale price of approximately $5.17 per barrel), would be adjusted for inflation beginning with September 1977.

Thus, the lower tier ceiling price for lower tier crude oil and the approximate average first sale price pursuant to that price in September, October and November, would be determined as follows:

Month	Ceiling price	Estimated average 1st sale price
August	May 15, 1973, highest posted field price plus $1.48.	$5.17
September	May 15, 1973, highest posted field price plus $1.51.	5.20
October	May 15, 1973, highest posted field price plus $1.53.	5.22
November	May 15, 1973, highest posted field price plus $1.56.	5.24

The upper tier ceiling price would be derived as follows. First, as noted above, the upper tier ceiling price is established by reference to September 30, 1975 highest posted field prices. When the ceiling price rule was first promulgated, FEA estimated the average of highest posted field prices on September 30, 1975 to be $12.60 per barrel; hence the price rule provided for a subtraction of $1.32 from that posted price for February 1976, with the intent of achieving an average price of $11.28. Actual upper tier pricing data have varied from month to month (which results from changes in the volumes of the various grades and qualities of upper tier crude oil produced and sold each month).

For the months of June through December 1976, when upper tier prices were frozen at the September 30, 1976 posted prices less $1.05 per barrel, actual average first sale prices ranged from $11.60 to $11.65 per barrel, averaging $11.62 per barrel. These data therefore indicate that the September 30, 1975 reference postings average approximately $12.67 per barrel (i.e., $11.62+$1.05=$12.67), rather than the $12.60 per barrel estimated by FEA when the upper tier price rule was first adopted.

Based on the foregoing actual pricing data, a February 1976 upper tier ceiling price of $11.28 per barrel would best be approximated by a ceiling price of the September 30, 1975 posted price (averaging $12.67 per barrel), less $1.39 per barrel. The adjustments to the upper tier ceiling price provided during March through June totalled $.27 per barrel. Applying this $.27 adjustment to the Congressionally intended February 1976 upper tier price of $11.28 results in a price of $11.55. The ceiling price for September that would be most likely to result in an average first sale price of $11.55 per barrel is, therefore, the September 30, 1977 posted price (approximately $12.67 per barrel), less $1.12 per barrel.

As noted above, however, the restoration of the upper tier ceiling price is proposed to be phased in over a 3-month period. Application of the 5.5 percent annual rate of inflation to the "restored" upper tier price level of $11.55 for September yields an average upper tier price of $11.71 for November 1977.

FEA does not currently have final or preliminary data with respect to actual prices in August 1977. However, assuming that the September 30, 1975 posted price averages $12.67 per barrel in August 1977, applying a $1.70 reduction in that month pursuant to Schedule No. 7 of Monthly Price Adjustments (42 FR 38894, August 1, 1977) results in a projected average upper tier price of $10.97 for August 1977 $12.67 less 1.70).

In order to provide a smooth transition from the projected August 1977 average upper tier price of $10.97, to the November 1977 target price of $11.71, FEA proposes to add to the projected August 1977 upper tier price approximately $.24 per barrel in September and approximately $.25 per barrel in October and November 1977.

Thus, the upper tier ceiling prices would be determined as follows:

Month	Ceiling price	Estimated average 1st sale price
August	Sept. 30, 1975, highest posted field price less $1.70.	$10.97
September	Sept. 30, 1975, highest posted field price less $1.46.	11.21
October	Sept. 30, 1975, highest posted field price less $1.21.	11.46
November	Sept. 30, 1975, highest posted field price less $0.96.	11.71

Beginning in December, the upper tier ceiling price would be adjusted each month at not more than the rate of inflation as determined by the most recent first revision to the GNP deflator.

The following table summarizes on a monthly basis the projected cumulative excess receipts for the months February 1976 through November 1977.

Month	Lower tier percent	Lower tier price	Upper tier price	Statutory composite price	Actual composite price1/	Cumulative excess receipts (millions)
1976						
February	56.12	$5.05	$11.48	$7.66	$7.87	$ 49
March	56.93	5.07	11.39	7.72	7.79	67
April	56.69	5.07	11.52	7.78	7.86	86
May	57.04	5.13	11.55	7.84	7.89	97
June	55.92	5.15	11.60	7.88	7.99	123
July	55.58	5.19	11.60	7.93	8.04	152
August	55.68	5.18	11.62	7.98	8.03	164
September	53.41	5.17	11.65	8.04	8.19	198
October	52.39	5.15	11.62	8.11	8.23	228
November	49.94	5.17	11.62	8.17	8.40	282
December	50.07	5.17	11.64	8.24	8.40	322
1977						
January	50.61	5.17	11.44	8.30	8.28	316
February	49.52	5.18	11.39	8.37	8.33	308
March	49.18	5.15	11.03	8.44	8.19	246
April2/	49.46	5.15	10.97	8.50	8.14	161
May3/	49.15	5.17	10.99	8.57	8.18	65
June3/	48.84	5.17	10.99	8.64	8.20	- 39
July3/	46.22	5.17	10.99	8.71	8.16	-181
August3/	44.87	5.17	10.97	8.78	8.14	-350
September3/	43.59	5.20	11.21	8.85	8.24	-509
October3/	42.36	5.22	11.46	8.92	8.33	-672
November3/	41.18	5.24	11.71	8.99	8.42	-826

1/ Beginning with the month of September 1976, includes prices for stripper well crude oil production at values imputed in accordance with section 121 of the ECPA.
2/ Preliminary.
3/ Projected. Effects of Alaska North Slope (ANS) crude oil production, which commenced June 20, 1977, are included.

C. Comment Procedures

1. *Written Comments*. Interested persons are invited to participate in this rulemaking by submitting data, views or arguments with respect to the proposals set forth in this notice. Comments should be identified on the outside envelope and on documents submitted with the designation "Resumption of Adjustments to Lower and Upper Tier Crude Oil for Inflation," Box OP. Fifteen copies should be submitted. All comments received by FEA will be available for public inspection in the FEA Reading Room, Room 2107, Federal Building, 12th and Pennsylvania Avenue NW., between the hours of 8 a.m. and 4:30 p.m., Monday through Friday.

Any information or data considered by the person furnishing it to be confidential must be so identified and submitted in writing, one copy only. The FEA reserves the right to determine the confidential status of the information or data and to treat it according to its determination.

2. *Public Hearing.*—a. *Request Procedure.* The time and place for the hearing are indicated in the "Dates" section of this preamble. If necessary to present all testimony, the hearing will be continued to 9:30 a.m. of the next business day following the date of the hearing.

Any person who has an interest in the proposed amendments issued today, or who is a representative of a group or class of persons that has an interest in today's proposed amendments, may make a written request for an opportunity to make oral presentation. The person making the request should be prepared to describe the interest concerned, if appropriate, to state why he or she is a proper representative of a group or class of persons that has such an interest, and to give a concise summary of the proposed oral presentation and a phone number where he or she may be contacted through the day before the hearing.

Each person selected to be heard will be so notified by the FEA before 4:30 p.m., Tuesday, August 23, 1977 and must submit 100 copies of his or her statement to Regulations Management, Room 2214, 2000 M Street NW., Washington, D.C., before 4:30 p.m., on Thursday, August 25, 1977.

Any interested person may submit questions to be asked of any person making a statement at the hearing, to Executive Communications, FEA, before 4:30 p.m., Tuesday, August 23, 1977. Any person who wishes to ask a question at the hearing may submit the question, in writing, to the presiding officer. The FEA or the presiding officer, if the question is submitted at the hearing, will determine whether the question is relevant, and whether the time limitations permit it to be presented for answer.

Any further procedural rules needed for the proper conduct of the hearing will be announced by the presiding officer.

A transcript of the hearing will be made and the entire record of the hearing, including the transcript, will be retained by the FEA and made available for inspection at the Freedom of Information Office, Room 2107, Federal Building, 12th and Pennsylvania Avenue NW., Washington, D.C., between the hours of 8 a.m. and 4:30 p.m., Monday through Friday. Any person may purchase a copy of the transcript from the reporter.

In the event that it becomes necessary for the FEA to cancel the hearing, FEA will make every effort to publish advance notice in the FEDERAL REGISTER of such cancellation. Moreover, FEA will notify all persons scheduled to testify at the hearing. However, it is not possible for FEA to give actual notice of cancellations or changes to persons not identified to FEA as participants. Accordingly, persons desiring to attend the hearing are advised to contact FEA on the last working day preceding the date of the hearing to confirm that it will be held as scheduled.

As required by section 7(c)(2) of the Federal Energy Administration Act of 1974, Pub. L. 93-275, a copy of this notice has been submitted to the Administrator of the Environmental Protection Agency for his comments concerning the impact of this proposal on the quality of the environment. The Administrator had no comments on this proposal.

NOTE.—This proposal has been reviewed in accordance with Executive Order 11821 and OMB Circular A-107 and has been determined not to be of a nature which requires an evaluation of its economic impact.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-163, as amended, Pub. L. 94-385; E.O. 11790, 39 FR 23185.)

In consideration of the foregoing, it is proposed to amend Part 212 of Chapter II of Title 10 of the Code of Federal Regulations as set forth below.

Issued in Washington, D.C., August 11, 1977.

ERIC J. FYGI,
Acting General Counsel
Federal Energy Administration.

1. Section 212.77 is revised in paragraph (c) to read as follows:

§ 212.77 Adjustments to ceiling prices.

* * * * *

(c) *Application of price adjustments.* (1) Price adjustment schedules issued pursuant to paragraph (b) of this section shall, beginning with prices for September 1977, adjust the lower tier and the upper tier ceiling prices by not more than the amount necessary to reflect the impact of inflation on the weighted average first sale price for each tier.

(2) Notwithstanding paragraph (c)(1) of this section, FEA may issue price adjustment schedules pursuant to paragraph (b) of this section to: (i) Discontinue or restrict price adjustments or require reductions in ceiling prices to the extent deemed necessary by the FEA to achieve compliance with the Act, or (ii) Restore, in part or in full, to the upper tier ceiling prices for months prior to September 1977.

APPENDIX.—*Schedule No. 7 of monthly price adjustments effective Sept. 1, 1977*

Month	Lower tier, May 15, 1973, posted price[1] (plus)	Upper tier, Sept. 30, 1975, posted price[2] (less)
1976:		
February	1.35	1.32
March	1.38	1.25
April	1.41	1.18
May	1.45	1.11
June	1.48	1.05
July	1.48	1.05
August	1.48	1.05
September	1.48	1.05
October	1.48	1.05
November	1.48	1.05
December	1.48	1.05
1977:		
January	1.48	1.25
February	1.48	1.25
March	1.48	1.70
April	1.48	1.70
May	1.48	1.70
June	1.48	1.70
July	1.48	1.70
August	1.48	1.70
September	1.51	1.46
October	1.53	1.21
November	1.56	.96

[1] The price referred to in 10 CFR 212.73(b)(1) or in 212.73(c)(1), 212.73(c)(3), and 212.73(c)(4).
[2] The price referred to in 10 CFR 212.74(b)(1).

This schedule of monthly price adjustments was issued by the Federal Energy Administration on September , 1977, pursuant to 10 CFR 212.77. It restates without change the lower and upper tier price ceilings applicable to crude oil produced and sold in the months of February 1976 through August 1977, as determined under 10 CFR 212.73, 212.74, and 212.77. Upper tier ceiling prices, which were reduced under Schedule No. 5 effective January 1, and further reduced effective March 1, 1977, are increased as indicated in this schedule. Also, lower tier ceiling prices, which were held at the ceiling price level for the month of June 1976, are increased as indicated in this schedule.

This schedule is effective only through November 30, 1977. Price ceilings for subsequent months will be provided by Schedule No. 8, to be issued on or about November 30, 1977. This schedule may, however, be superseded prior to November 30, 1977, by early issuance of Schedule No. 8 to reflect further ceiling price adjustments based on presently unanticipated trends in actual composite price levels.

[FR Doc.77-23606 Filed 8-12-77;10:46 am]