PART 65—DELAYED COMPLIANCE ORDERS

1. By adding the following entry to the table in § 65.350:

§ 65.350 Federal delayed compliance orders issued under Section 113(d)(1), (3) and (4) of the Act.

The delayed compliance orders referenced below have been issued by the Administrator in accordance with Section 113(d) of the Act and with this part. With regard to each order, the Administrator has made all the determinations and findings which are necessary for issuance of the Order under Section 113(d) of the Act.

Source	Location	Order No.	Date of FR proposal
Mennington Mills, Inc.	Salem, New Jersey.	70117	5/8/79 (44 FR 26936)

SIP regulation involved	Final compliance date
N.J.A.C. 7:27-6.2	6/30/79

[FR Doc. 79-22236 Filed 7-17-79; 8:45 am]

BILLING CODE 6560-01-M

40 CFR Part 81

[FRL 1268-6]

Air Quality Control Regions, Criteria, and Control Techniques; Attainment Status Designations: Alabama and Kentucky

AGENCY: U.S. Environmental Protection Agency, Region IV.

ACTION: Final rule.

SUMMARY: On April 2, 1979 (44 FR 19213), the Agency proposed to change the nonattainment designation of Greenup County, Kentucky, (for sulfur dioxide), and northern Mobile County, Alabama (for particulate matter) to attainment. No comments were received in reponse to the proposed notice. These changes are made final as proposed. Greenup County, Kentucky is redesignated attainment for sulfur dioxide because a large source of that pollutant has come into compliance with emission limiting regulations. A portion of northern Mobile County is redesignated attainment for particulate matter on the basis of measured air quality data showing attainment of the national ambient air quality standards for that pollutant.

EFFECTIVE DATE: These actions are effective today, July 18, 1979.

FOR FURTHER INFORMATION CONTACT: Walter Bishop, Air Programs Branch, EPA Region IV, 345 Courtland Street, N.E. Atlanta, Georgia, 30308, telephone 404/881-3286 (FTS 257-3286).

SUPPLEMENTARY INFORMATION: On March 3, 1978 (43 FR 8962 at 8997), Greenup County, Kentucky was designated nonattainment for sulfur dioxide. The basis for this designation was air quality modeling results for the vicinity of a non-complying source, DuPont's sulfuric acid plant. Since that time, the source has come into compliance.

Recent modeling of the plant at the allowable emission rate shows the national ambient air quality standards for SO_2 are being attained. Consequently, the Kentucky Department for Natural Resources and Environmental Protection requested on December 27, 1978, that the designation be changed to attainment. Based on EPA's finding that Kentucky's submittal is valid, this change is hereby made.

On January 19, 1979, the director of the Alabama Division of Air Pollution Control submitted air quality data showing that the national ambient air quality standards for particulate matter were not violated at the Salco and Axis sites (northern Mobile County) during the period May 1976 through October 1978, and requested that the status of the area be redesignated attainment.

(This area had been designated nonattainment on March 3, 1978 (43 FR 8962 at 8965).) EPA has verified that the data in question meets all applicable Agency criteria established to assure the validity and representativeness of quality data. Accordingly, the area is redesignated as the State requests.

The Morgan County (Alabama) nonattainment area was incorrectly identified in the April 2, 1978, proposal notice; it is in Decatur, not Huntsville. The correct identification is listed below.

On May 3, 1979, the U.S. Court of Appeals for the Fifth Circuit set aside the TSP nonattainment designation for Jefferson and Etowah Counties, Alabama, on petition by United States Steel Corporation (78-1922) and Republic Steel Corporation (78-1927). The TSP attainment status designations for these areas are being proposed for public comment in another issue of the **Federal Register.** A note is today inserted in the Alabama TSP table to identify the voided designations.

(Sections 107, 171, 301 of the Clean Air Act (42 U.S.C. 7407, 7501, 7601)).

Dated: July 11, 1979.

Douglas M. Costle,

Administrator.

Part 81 of Chapter I, Title 40, Code of Federal Regulations, is amended as follows:

Subpart C—Section 107 Attainment Status Designations

* * * * *

1. In § 81.301, the attainment status designation table for TSP is revised to read as follows:

§ 81.301 Alabama.

Alabama—TSP

Designated area	Does not meet primary standards	Does not meet secondary standards	Cannot be classified	Better than national standards
That portion of Etowah County within the western section of Gadsden	*X	*X		
That portion of Jackson County surrounding TVA's Widows Creek plant	X	X		
Those portions of Jefferson County within central Birmingham and the area surrounding the Universal Atlas Cement plant	*X	*X		
That portion of Lauderdale County containing Florence			X	
That portion of Mobile County within a section of downtown Mobile	X	X		
A portion of Morgan County including portions of the city of Decatur		X		
Rest of State				X

* These designations were held invalid by the U.S. Court of Appeals for the Fifth Circuit on May 3, 1979.

* * * * * * *

2. In § 81.318, the attainment status designation table for SO_2 is revised to read as follows:

§ 81.318 Kentucky.

Kentucky—SO_2

Designated area	Does not meet primary standards	Does not meet secondary standards	Cannot be classified	Better than national standards
Boyd County	X			
That portion of Daviess County in Owensboro	X	X		
That portion of Henderson County in Henderson	X			
Jefferson County	X	X		
McCracken County	X			
Muhlenberg County	X	X		
Webster County	X	X		
Rest of State				X

[FR Doc. 79-22235 Filed 7-17-79; 8:45 am]

BILLING CODE 6560-01-M

40 CFR Part 172

[FRL 1217-1; OPP-30031]

Experimental Use Permits for Pesticides

AGENCY: Environmental Protection Agency, Office of Pesticide Programs.

ACTION: Final rule.

SUMMARY: This rule sets forth regulations under which States may submit plans to the Environmental Protection Agency requesting authority to issue experimental use permits for pesticides. This rule also specifies the requirements which States must impose on persons seeking such permits. States receiving authority from EPA under this rule may issue experimental use permits to any person who needs to gather the data required to register a pesticide product to meet a special local need, or to any public or private agricultural research agency or educational institution within the State for the purpose of experimentation.

EFFECTIVE DATE: August 17, 1979.

FOR FURTHER INFORMATION CONTACT: P. H. Gray, Jr., Operations Division (TS-770-M), Office of Pesticide Programs, Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460 (202) 472-9400.

SUPPLEMENTARY INFORMATION: On September 3, 1975, a notice was published in the **Federal Register** (40 FR 40545) proposing regulations to govern the issuance of experimental use permits by States. This final rule is based upon those proposed regulations and applies to the issuance of experimental use permits by States which have been authorized by EPA under section 5(f) of FIFRA to issue such permits.

Written comments on the proposed regulations were invited and were received from twelve interested parties. In addition, the proposal was distributed for review to all State pesticide control lead agencies and to the former State-Federal FIFRA Implementation Advisory Committee (SFFIAC). The proposal was amended in response to some of the comments. An amended proposal was submitted to interested persons, including the original commenters, and 19 additional comments were received. As a result, certain changes have been made in this final rule. All of the written comments received are on file with EPA and may be seen between 8:30 a.m. and 4:00 p.m. in the office of the Federal Register Section, Room 401, East Tower, Program Support Division, Office of Pesticide Programs, Environmental Protection Agency, 401 M Street, SW., Washington, D.C., 20460, (202) 755-8454.

As a result of the extensive public participation in the development of this regulation as described above, the Agency finds that additional notice and public comment thereon are unnecessary and would be contrary to the public interest. Thus, pursuant to the Administrative Procedures Act (5 U.S.C. 553(b)(3)(B)) there is no need to repropose this regulation.

The significant changes made in the regulation since it was proposed are discussed below, along with EPA's response to the more significant comments.

Dual Permit Systems

A new § 172.22(b) has been added to make it clear that this regulation does not affect any mechanism under State law by which a State requires that a person receiving an experimental use permit issued by EPA under FIFRA, section 5, must also obtain a State permit for the same use.

Purposes for Which Experimental Use Permits Are Issued

The proposed regulations limited the State issuance of experimental use permits to those persons gathering data needed to support a registration to meet special local needs under section 24(c) of FIFRA. Several commenters, including SFFIAC, said that authorized States should also be allowed to issue permits for certain additional purposes, including academic research done within the State, work on integrated pest management, and other experimentation concerning unexpected or unusual local problems which might not initially be intended to result in a section 24(c) registration.

At the time the regulations were proposed, FIFRA section 5(a) strictly limited the purpose of issuance of federal and, by implication, State experimental use permits to "accumulat(ion of) information necessary to register a pesticide * * *" Since that time, however, Congress has authorized the issuance of Federal experimental use permits to agricultural research agencies and educational institutions for general research purposes (FIFRA section 5 (g)). Accordingly, the Agency has also modified this final rule to authorize States to issue experimental use permits to educational institutions or agricultural research agencies for purposes of experimentation, as well as for the accumulation of information necessary to support a registration under section 24(c) of FIFRA.

Accordingly, EPA has broadened the scope of this regulation and has changed §§ 172.20, 172.23 and 172.24 to provide for State issuance of experimental use permits for such additional purposes.

One person commenting on the revised draft rule protested the limitation in the final sentence of the definition of "Public or Private Agricultural Research Agency or Educational Distribution" (§ 172.21(a)(1)), excluding researchers working on behalf of pesticide distributors. The commenter cited this as an unnecessary restriction. EPA believes, however, that the definition as stated is in accordance with the intent of Congress. Research agencies or educational institutions not coming within the framework of the definition may obtain a State permit under § 172.24(b)(1), or may apply for a Federal permit.

Establishment Registration Requirement

Subsection 172.22(d) of these regulations requires that pesticide

products be produced under State experimental use permits only in federally registered establishments (except when produced solely for application by the permittee). One commenter pointed out that some permittees who will be producing State experimental use pesticides are not familiar either with EPA's definition of pesticide production or with establishment registration requirements under section 7 of FIFRA. The commenter was concerned that such permittees might inadvertently violate these requirements, even though they are set forth in the regulations implementing section 7. Thus, EPA recommends that States authorized to issue experimental use permits advise each permittee of EPA's establishment registration requirements in advance of production under the permit, and provide the permittee with a copy of EPA's establishment registration regulations (40 CFR Part 167).

The same commenter raised a second related concern about universities which might be simultaneously involved in more than one experimental use program and where different departments of the same university might be producing pesticide products, and thus become subject to EPA's establishment registration requirements. In such cases, the Agency has decided that a single registration for the university will be sufficient as long as production for each experimental use product is properly noted on the annual Pesticides Report form.

State Inspection Authority

One commenter suggested that § 172.24(c)(3), concerning State inspection of premises involved in permit programs, was too vague. This proposed paragraph has been modified and included as a requirement for State plan approval at § 172.23(c)(1)(i)(E) of this final rule. It has been amended to clarify that the State's authority to enter premises need extend only to permittees' and cooperators' premises, and to specify purposes for which entry may be sought by the State.

On the same topic, another commenter suggested that FIFRA might not authorize such a right of entry requirement. EPA has concluded that such authority should be required as a condition for approval of a section 5(f) plan. Authority for the designated State agency to enter premises, as described in § 172.23(c)(1)(i)(E), is a necessary and reasonable means of adequately enforcing State law and the State plan. EPA has a statutory duty to ensure that section 5(f) plans can be implemented by a State effectively and consistently with the purposes of FIFRA. Therefore, the Agency has resolved to promulgate § 172.23(c)(1)(i)(E).

Another commenter suggested that EPA should require States to obtain consent to State entry, for inspection purposes, from each applicant for a State permit, as a condition to issuance of such a permit. As stated above, EPA believes that States must have sufficient authority under State law to enter permittees' and cooperators' premises for specified purposes, in order to be authorized to issue permits under this rule. For States with such legal authority, prior written consent from permit applicants would be superfluous. Therefore, EPA does not consider it necessary to amend the rules as the commenter suggested. However, EPA encourages permit applicants to indicate in their applications their consent to entry by State officials for legitimate inspection purposes.

Several additional comments were received concerning the requirements for State right-of-entry authority in connection with State plans for the issuance of EUPs. One commenter suggested dropping the phrase "or by other legal means", and limiting State inspection authority to entry by consent or warrant. Since this language merely leaves open to the States the option to choose various approaches to right-of-entry authority, EPA did not adopt the commenter's suggestion. EPA's decision to retain this language is also based on the fact that the courts have recognized that under certain circumstances entry without a warrant or without consent is justified and not unconstitutional. EPA believes that States who wish to take such an approach, consistent with State law, should have that option.

Limitations on Issuance of State Experimental Use Permits

Section 172.24 has been modified to list limitations applicable to all State permits. Under § 172.24(c)(2), permits may not be issued for pesticide products containing active or inert ingredients which are currently subject to an EPA cancellation or suspension of registration order, or which are subject to a notice of intent to cancel or suspend, or which are not found in any EPA registered product. However, States may issue permits for products containing ingredients subject to the EPA administrative review process known as Rebuttable Presumption Against Registration, provided that no notice of intent to cancel or suspend the registrations of such ingredients has been issued.

In response to several comments, a clause has been inserted in § 172.24(c)(2) authorizing a State to issue a permit for a product containing a cancelled or suspended ingredient intended for a use or in a formulation *not* specifically considered during cancellation or suspension proceedings for such an ingredient: *Provided,* That the State consults with EPA prior to issuing such a permit.

However, the Agency has decided to refuse the request of one commenter to delete the prohibition in § 172.24(c)(2)(i) on issuance of a permit for a product containing an *inert* ingredient not contained in any federally registered product, because EPA believes it to be in accordance with public policy that it review any ingredient, whether active or inert, for safety to public health and the environment, prior to the appearance of such an ingredient in a non-federally registered product. Thus, the Agency's response to several commenters who requested authority for States to issue permits for new active ingredients is that the proper type of permit to request in such cases is a Federal permit under section 5(a–e) of the amended FIFRA.

One commenter also protested the prohibition on States issuing permits for research on pesticide uses denied registration under section 3(c)(6) of the amended FIFRA. EPA believes that a greater degree of Federal control is needed in such cases, in order to protect man and the environment, and thus prospective permittees under these circumstances should be required to apply for a Federal permit.

Section 172.24(c)(3) requires that permits be issued by the States for use only of the amount of pesticide necessary to gather data or complete the experiment. As one commenter stressed, the determination of the necessary amount is a decision to be made by the State, based on its knowledge of the particular conditions of use.

Publication Requirements

A commenter noted that users of pesticides under State experimental use permits should be listed in the **Federal Register.** EPA does not believe this procedure is necessary, but feels that it would, rather, add to the administrative burden of implementing section 5(f) without creating sufficient incremental benefit to human health and the environment. EPA will, however, continue to publish notification of State actions under section 5(f), as it has been doing in the case of Federal experimental use permits under section 5(a).

Another commenter suggested that in order to eliminate unnecessary Federal Register notices, amendments to experimental use permits be dropped from the proposed list of items to be published. The Agency accepts this suggestion as a means of eliminating an unnecessary procedure which does not increase protection of public health or the environment. Accordingly, the regulations now require publication of Federal Register notices in seven instances: (1) State issuance of experimental use permits; (2) EPA receipt of State plans requesting authorization to issue experimental use permits; (3) approval of State plans; (4) notice of intention to reject State plans; (5) rejection of State plans; (6) notice of intention to revoke State authorization to issue experimental use permits; and (7) revocation of State authorization to issue experimental use permits.

On a similar matter, a third commenter suggested the deletion of the requirement for publication in the Federal Register of notices of State issuance of permits and amendments of permits. The commenter felt that such notices would be unnecessary, given that permits would be issued only in relation to "special local needs" in the States. The commenter also felt that publication of such notices might be "anti-competitive."

In response, EPA would again point out that under this final rule publication of notices of amendments to State permits is not required. However, with regard to notices of issuance of State permits, it should be observed that States with approved section 5(f) plans are no longer limited to "special local needs" as grounds for issuing such permits. In addition, even where research related to "special local needs" is the sole reason for issuing a permit, the program implemented under the permit may have interstate or nationwide impacts justifying publication of a notice in the Federal Register, despite the remote possibility that such a notice would harm business interests. Thus, this publication requirement is both reasonable and consistent with EPA's general policy of public disclosure of significant actions taken under Federal law.

A fourth commenter urged that notices of application for, or requests for amendments to, State experimental use permits be provided to EPA within 10 days of receipt and published in the Federal Register. The Agency does not agree with the need for such publication, if the State programs are to operate in a timely and efficient fashion. EPA's authority to revoke permits, and, if necessary, to terminate a State program not in the public interest, provides sufficient safeguard for public health and the environment without the additional procedure of publication in the Federal Register.

Quantity of Pesticide To Be Used

One commenter suggested that State agencies should impose limitations in the permit on quantity, as well as on other parameters of pesticide use. The commenter also urged that these regulations establish upper limits on the quantity of pesticide which may be used, and the size of the area which may be treated. EPA agrees with the first request, noting that quantity was inadvertently omitted from the proposed parameters of pesticide use. Accordingly, § 172.25(e) now contains such a requirement. However, the Agency believes that establishing by regulation an upper limit on quantity, which is only one of several important parameters, could promote applications for permits to use quantities of pesticide in excess of that necessary to achieve the object of the permit. Also, such upper limits might prove to be too low in some cases, particularly those involving forestry use. Therefore, the quantity used and acreage treated should be consistent with the objectives of the program. Should abuse by the permittee occur, EPA and the State, of course, retain the authority to revoke the permit.

Possible Circumvention of Federal Experimental Use Permit Requirements

One commenter suggested that some experimenters might attempt to circumvent Federal experimental use permit requirements (40 CFR 172.1–172.11) in cases where a Federal permit should be obtained, by acquiring instead permits from several adjacent States certified under this rule. EPA recognizes the potential for misuse of the opportunities presented to experimenters by this rule. It would, however, be unfair to experimenters with legitimate needs for multiple State permits to prohibit more than one State from issuing a permit for a particular program. Therefore, the Agency intends to prevent abuse of this rule by carefully reviewing, under § 172.26, permits issued by several States for a single program. If EPA discovers that State permits have been issued in a situation where a Federal permit is more appropriate, the Agency may revoke some or all of the State experimental use permits under the authority granted by § 172.26(c)(1)(iv).

Permit Revocation

A commenter urged that the regulations provide that a State permit be considered revoked during any hearing requested by the permittee to contest revocation. EPA had intended that such a procedure would be followed in all revocation actions, and has modified § 172.26(c)(6) to state this explicitly.

Two commenters stated that EPA's authority to revoke State experimental use permits should be exercised through the designated State agency rather than by direct contact between EPA and the permittee. EPA intends to cooperate fully with States in cases involving revocation of permits. However, the Agency believes that it must retain authority to revoke a State permit directly, particularly in a case involving imminent hazard to man and the environment. This position is consistent with EPA procedures under sections 5(a)–(e) of the Act.

One commenter recommended that this rule be amended to require EPA to give a permit holder prior notice of the Agency's intent to revoke an experimental use permit. EPA agrees that a permit holder should be informed of any action being taken against him. However, this purpose will be accomplished without amendment of this rule, in the same fashion as is done for holders of Federal permits. The Agency intends for the State to notify permit holders of, and to discuss the reasons for, contemplated revocation actions prior to revoking any permits under section 5(f), unless continued use under the permits would cause unreasonable adverse effects on man or the environment. In the latter case, EPA will revoke the permit immediately under the authority granted in § 172.26 of this rule. In either case, however, § 172.26(c)(6)–(8) guarantees the permit holder the right to a conference with the Administrator to challenge any revocation order issued by the Administrator. In addition, § 172.26(c)(9) confirms the permittee's right to judicial review of any final decision by the Administrator to revoke a permit.

Another commenter noted that a permit could be revoked if "its terms and conditions are inadequate to avoid unreasonable adverse effects on the environment." The commenter suggested that the regulation specify a period of time within which EPA would determine, prior to initiation of the experimental program, if the test program approved by the State met the requirements of § 172.25(c)(1)(ii) (in the final rule, § 172.26(c)(1)(ii)). EPA

believes that such a procedure would be both time consuming, delaying implementation of the test program, and duplicative of State review efforts. EPA's basic permit revocation authority provides a sufficient additional safeguard for public health and the environment.

Another commenter suggested that EPA should retain the option of requiring that the treated commodity be destroyed under § 172.26(c)(1)(iii) instead of revoking the permit. The Agency believes it must retain authority to revoke a permit under such circumstances. Although EPA does not have the authority to order destruction of a commodity, the permittee may avoid having his permit revoked by destroying the commodity himself. The same commenter protested as excessive the requirement in § 172.26(c)(5) that EPA notify the Food and Drug Administration of a permit revocation if the permit involved the use of a pesticide on food or feed. The Agency accepts this comment, and has deleted this provision from the final regulation. However, EPA retains the authority to notify FDA of any permit revocation if the Agency believes such action desirable.

Finally, one commenter suggested that in those situations where a State's authority to issue permits is revoked by EPA, the regulation should require that a statement be included which would list the status of State permits in effect at the time of revocation. Instead of taking such action, the Agency has decided to add a sentence to the revocation of State authority provision (now § 172.23(d)(2)) stating that permits issued prior to the revocation shall remain valid, unless revoked by EPA, until they expire or until three years from the date of revocation of State authority, whichever comes first. This provision should clarify the status of permits, in the event of revocation of State authority, to the advantage of all permittees.

Reports

Two commenters suggested that the requirement for State agency reports to EPA should be more limited than in the proposed rule. On the other hand, one EPA Regional commenter suggested the inclusion of several categories of information as part of regular reporting to EPA. EPA does not propose to burden the States with excessive reporting requirements. However, the Agency believes it must retain a certain flexibility in this area. Therefore, the final language in § 172.26(b) combines one regular, but minimal, reporting requirement with a requirement for special reports when requested by EPA or when adverse effects to man and the environment occur as a result of pesticide usage.

Definition of "Special Local Needs"

Another commenter suggested that a definition be added to this rule to clarify what experimental uses are authorized by a permit to conduct research leading to registration for "special local needs" (as used in §§ 172.24(b)(1) and 172.24(c)). EPA recognizes that a definition of this expression might be useful to persons conducting such research. However, no such definition can be included in this rule at this time. Recent amendments to section 24(c) have substantially expanded State authority to register pesticides for "special local needs." These amendments require a change in EPA's interpretation of that term. The Agency expects within the next few months to publish new proposed section 24(c) regulations which will probably include a definition of "special local needs" applicable to research. Until then, States should exercise their discretion in determining whether or not an EUP is necessary to develop data for a State "special local needs" registration.

Tolerances

There was no specific discussion in the 1975 proposed regulations of the requirement for tolerances for pesticides to be used on or in food or feed. However, this requirement was implied. A new § 172.24(d) has been added which specifically addresses the possible alternatives insofar as tolerances are concerned. There is no change in the intent or effect of the rule.

One comment was received relating to the requirement in the initial draft of § 172.24(d) for a tolerance, or exemption from the requirement of a tolerance, whenever an experimental use pesticide is to be used in or on food or feed. The commenter wished to have included an alternative provision authorizing the submission of evidence to show that the proposed experimental program would not reasonably be expected to result in residues of the pesticide in or on food or feed, and that therefore no tolerance was necessary in such cases. The so-called "no residue" concept as it applies to food or feed was phased out more than 10 years ago. EPA's position is that any pesticide used in or on food or feed will reasonably be expected to result in residues of such pesticide. Therefore, some sort of legal residue clearance under the Federal Food, Drug and Cosmetic Act is required. Where such residues are below the level of detection of the applicable analytical method, a tolerance is established at the level of sensitivity of the method. Therefore, the requested change would be inappropriate.

Disposal

The proposed regulations inadvertently omitted mention of disposal of pesticides and pesticide containers under, and following termination of, a State permit. A new § 172.25(g) has been added to address this need. Again, this addition does not alter the intent or effect of the rule, but merely provides a reference to existing federal disposal requirements, including the requirements of the Resource Conservation and Recovery Act (Pub. L. 94–580; 90 Stat. 2795; 42 U.S.C. 6901 *et seq.*) (RCRA) and the recommended disposal procedures in 40 CFR Part 165.

General

Concern has been expressed by several State regulatory officials that the newly added § 172.24(b) would require educational institutions and agricultural research agencies to obtain a State experimental use permit prior to all experiments involving pesticides. In response, EPA would point out that § 172.22(a) provides that State permits are not required in those situations (e.g., small plot pesticide research) described in § 172.3 of the regulations pertaining to Federal experimental use permits. These exemptions apply to educational institutions and to agricultural research agencies, as well as to all other persons subject to this rule. EPA believes that these exemptions afford legitimate experimenters adequate opportunity to perform pure research free from unnecessary procedural requirements.

Miscellaneous

Certain minor changes in this regulation have been made since it was proposed for purposes of greater clarity or to achieve consistency with recent amendments to FIFRA. These changes are not of such significance to require being specifically addressed in the preamble.

Regulatory Analysis

EPA has determined that this rule does not require a Regulatory Analysis under Executive Order 12044. However, in accordance with FIFRA section 25(a)(2)(B), the Agency carried out an Agricultural Regulatory Impact Analysis, which determined that there would not be any significant national effects on production and prices of agricultural commodities or retail food

prices as a result of promulgation of this rule.

Statutory Review

The U.S. Department of Agriculture has reviewed the final regulation in accordance with section 25(a) of FIFRA and concurs without comment with its publication in the Federal Register.

The regulation was also submitted for scientific review and comment to the FIFRA Scientific Advisory Panel (SAP) in accordance with section 25(d) of FIFRA. However, the SAP, in a memorandum dated January 29, 1979, to the EPA Deputy Assistant Administrator for Pesticide Programs, waived such review and comment on the grounds that "the regulation was procedural in nature and did not involve scientific matters which would directly impact on health and the environment."

Regulatory Review

Section 2(d)(8) of Executive Order 12044 requires that a plan for evaluating the regulation after its issuance be developed. EPA's plan for evaluating this rule calls for an analysis of data submitted by States in their reports required under § 172.26(b) of this rule. This evaluation will be performed within five years from the date of promulgation of this rule, and a determination will then be made, based upon such evaluation, as to whether modification of the rule is necessary.

Dated: July 6, 1979.

Barbara Blum,

Acting Administrator.

PART 172—EXPERIMENTAL USE PERMITS

40 CFR Part 172 is amended by establishing a new Subpart B, to read as follows:

Subpart B—State Issuance of Experimental Use Permits

Sec.

172.20 Scope.
172.21 Definitions.
172.22 General.
172.23 State plans.
172.24 State issuance of permits.
172.25 Administration of State program.
172.26 EPA review of permits.

Authority: Secs. 5(f), 25(a), Federal Insecticide, Fungicide, and Rodenticide Act as amended in 1972, 1975, and 1978 (92 Stat. 819; 7 U.S.C. 136).

Subpart B—State Issuance of Experimental Use Permits

§ 172.20 Scope.

This subpart sets forth regulations governing State issuance of experimental use permits pursuant to section 5(f) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA). It also sets forth regulations governing authorization by the Administrator of State experimental use permit programs.

§ 172.21 Definitions.

(a) Terms used in this subpart shall, with the exception of those terms defined below, have the meaning set forth in FIFRA and in § 172.1.

(1) "Public or Private Agricultural Research Agency or Educational Institution"—means any organization engaged in research pertaining to the agricultural use of pesticides, or any educational institution engaged in pesticides research. Any research agency or educational institution whose principal function is to promote, or whose principal source of income is directly derived from, the sale or distribution of pesticides (or their active ingredients) does not come within the meaning of this term.

(2) "Designated State Agency"—means the State agency designated by State law or other authority to be responsible for registering pesticides to meet special local needs.

§ 172.22 General.

(a) Experimental use permits are not required under this rule in those situations described in § 172.3 of Subpart A pertaining to Federal experimental use permits.

(b) Subpart B is not applicable to experimental use permits issued by a State, as required by State law, to a permittee who already holds a valid Federal experimental use permit issued under Subpart A for the same purpose, or who is not required to obtain a permit under this rule.

(c) Pesticide products used under experimental use permits may not be sold or distributed other than through participants, and, if sold or distributed through participants, may be used only at an application site of a cooperator and in accordance with the terms and conditions of the experimental use permit.

(d) Establishments in which pesticide products under State experimental use permits are produced shall be registered as required by 40 CFR 167.2(a) and producers of such products shall maintain books and records as required by 40 CFR 169.2.

(e) Pesticide products and their containers used under this rule must also be packaged, stored, transported, used, and disposed of in accordance with all applicable Federal laws and regulations, including the Resource Conservation and Recovery Act of 1976 as amended (Pub. L. 94–580; 90 Stat. 2795; 42 U.S.C. 6901 *et seq.*) (RCRA), and rules thereunder.

§ 172.23 State plans.

(a) *Submission.* (a) A State may, by submitting a State plan, request the Administrator to authorize the designated State agency to issue experimental use permits under section 5(f) of FIFRA.

(2) A State shall request authorization to issue experimental use permits by having the Governor or Chief Executive Officer or his designated agent submit a State plan in writing to the Administrator.

(b) *Contents.* A State plan shall include—

(1) A designation of the State agency responsible for the administration of the State experimental use permit program.

(2) An opinion of the State attorney general or the legal counsel of the designated State agency that the State has the requisite legal authorities as set forth in paragraph (c)(1)(i) of this section, accompanied by copies of the applicable State laws and regulations.

(3) A description of procedures that the designated State agency will follow:

(i) To review experimental use permit applications, to ensure that experimental use permits will be issued in accordance with the terms and conditions of the authorization, FIFRA, and this subpart; and

(ii) To supervise use pursuant to the permits, and to ensure that permits are used in accordance with their terms and conditions, FIFRA, and this subpart.

(c) *Criteria for EPA acceptance of State plan.* (1) The Administrator shall grant authorization to issue experimental use permits if the State plan establishes that the designated State agency—

(i) Has adequate legal authority under State law to implement the plan, including authority:

(A) To issue experimental use permits, subject to limitations necessary for the protection of public health and the environment;

(B) To supervise the use of a pesticide pursuant to an experimental use permit, as provided in § 172.25(c);

(C) To deny an experimental use permit if it determines that a permit is not justified, or that the issuance of the permit would cause unreasonable adverse effects on the environment;

(D) To amend or revoke an experimental use permit, if the designated State agency finds that:

(*1*) The terms and conditions of the permit are being violated, or are

inadequate to avoid unreasonable adverse effects on the environment;

(2) Any required tolerance under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.) has been revoked by EPA, or any exemption from the requirement for tolerance has been withdrawn by EPA; or

(3) A failure by the permittee or any cooperator to meet any other provision of FIFRA or this subpart has occurred;

(E) To enter, by consent or by warrant or by other legal means, in connection with an experimental use permit, a permittee's or cooperator's premises at reasonable times in order to sample or inspect any pesticides used or property treated, to inspect any equipment or records kept, or to observe any activities conducted, as necessary to enforce compliance with State law, the terms of the permit, and this subpart;

(F) To comply in all other respects with the requirements of this subpart, including labeling requirements; and

(ii) Utilizes procedures for the review of each permit which are adequate to ensure that the State program will be administered in accordance with the purposes of FIFRA and this subpart.

(2) After receiving a State plan, EPA shall publish a **Federal Register** notice announcing the fact and inviting interested parties to comment thereon.

(d) *Approval, rejection, and revocation.* (1) EPA shall approve or reject the State plan within 90 days after receipt of all information necessary for final review of the plan, including copies of effective statutes and regulations which satisfy the requirements of this subpart.

(2) The Administrator may at any time revoke the authorization of a State to issue experimental use permits if he determines that the designated State agency has not complied with the requirements of this subpart or with the terms and conditions of such authorization. State experimental use permits issued prior to the revocation of authority shall remain valid until they expire or until three years from the date of revocation of the State's authority, whichever comes first, unless sooner revoked by EPA under § 172.26(c) of this subpart.

(3) Notices of approval, rejection, and revocation shall be published in the **Federal Register**, as well as the basis for such approval, rejection, or revocation.

(4) Prior to rejecting or revoking authorization, the Administrator shall notify the State in writing of his intention to take such action, along with the basis for such action, and shall afford the State the opportunity for a hearing, and time to take corrective action.

§ 172.24 State issuance of permits.

(a) *General.* Upon approval of a State plan by the Administrator under § 172.23, the designated State agency is authorized to issue, amend, renew, deny or revoke experimental use permits subject to the terms of the authorization and these regulations.

(b) *Authority.* A designated State agency may issue an experimental use permit—

(1) To any person for the purpose of gathering the data necessary to support the State registration of a pesticide to meet special local needs under section 24(c), FIFRA.

(2) To any agricultural research agency or educational institution conducting work within the State for the purpose of experimentation:

(i) Which is done within the State; and

(ii) Which is not directly intended to result in the registration of a specific pesticide product.

(3) For use of a restricted use pesticide only if the pesticide is to be used by, or under the direct supervision of, an applicator certified in accordance with section 4 of FIFRA.

(c) *Limitations.* (1) In the case of applicants who need to gather data required to register a pesticide product to meet a special local need under section 24(c) of FIFRA, a State may only issue experimental use permits for the types of pesticide products and uses which it has authority to register under section 24(c).

(2) A State may not issue an experimental use permit under § 172.24(b)(1) or § 172.24(b)(2) for any of the following:

(i) A product containing an active or inert ingredient not contained in any EPA-registered product;

(ii) A product containing an active or inert ingredient which is currently subject to an EPA cancellation or suspension of registration order, or which is currently subject to an EPA notice of intent to suspend or cancel registration because of human health, environmental or efficacy considerations; except that the State may issue a permit for such a product for a purpose or in a formulation—

(A) Which was not specifically considered in, or which is not subject to, such suspension or cancellation proceedings, after consultation with appropriate EPA officials; or

(B) Which was specifically considered during such proceedings but not suspended, cancelled, or subjected to a notice of intent to suspend or cancel;

(iii) A use of a product which has been the subject of a notice of denial of registration published in the **Federal Register** pursuant to section 3(c)(6) of FIFRA and 40 CFR 162.11(a) and (b); or

(iv) A use of a product which may involve use in or on food or feed other than as authorized under § 172.24(d), *Requirement of tolerance.*

(3) A State may not issue an experimental use permit for use of a pesticide product in an area or in an amount in excess of that necessary to accomplish the purposes for which the permit was issued under paragraph (b) of this section.

(d) *Requirement of tolerance.* If the experimental use pesticide is to be used in or on food or feed, the applicant must—

(1) Submit evidence that:

(i) A tolerance or exemption from the requirement of a tolerance has been established for residues of the pesticide in or on such food or feed under section 408 of the Federal Food, Drug and Cosmetic Act, or a regulation established under section 409 of the Act; and

(ii) The proposed program would not reasonably be expected to result in residues of the pesticide in or on such food or feed in excess of that authorized under section 408 of the Federal Food, Drug and Cosmetic Act, or a regulation established under section 409 of the Act; and

(iii) All inert ingredients in the pesticide are exempted from the requirement of a tolerance under the appropriate section of 40 CFR Part 180, Subpart D; or

(2) Certify that the food or feed derived from the experimental program will be destroyed or fed only to experimental animals for testing purposes, or otherwise disposed of in a manner which will not endanger man or the environment. The method of destruction or disposal shall be described in the application for the permit.

§ 172.25 Administration of State programs.

(a) *General.* State experimental use permit programs shall be consistent with the Federal experimental use permit program, as set forth in Subpart A of 40 CFR Part 172.

(b) *Procedures leading to issuance.* An application for an experimental use permit shall be made in writing, and shall contain sufficient information, including a confidential statement of formula for any new product, to enable the State to determine whether use pursuant to the permit would be in accordance with the purposes of FIFRA and this subpart.

(c) *Labeling.* (1) New products shall bear labeling satisfying the requirements of § 172.6(a), except that the prominent statement "For Distribution and Experimental Use Only Within (State)" shall be used in place of "For Experimental Use Only". The designated State agency may approve, as directions for use on labeling, the experimental program, provided such program is to be distributed with the product.

(2) The designated State agency may permit an EPA or State registered pesticide to be used under an experimental use permit with supplemental labeling as approved by the State agency. In exercising this discretion, the designated State agency shall ensure that the supplemental labeling and the registered label together satisfy the requirements of § 172.6(a).

(d) *Duration.* State experimental use permits shall be issued for a specified period of time, not to exceed three years, depending upon the nature of the pest problem and the requirements of the testing program submitted. The designated State agency may renew, extend or amend the stated duration of a permit, if circumstances warrant.

(e) *Limitations.* The designated State agency shall impose such limitations in the permit as are necessary to protect health and the environment, including limitations on quantity, sites, area, disposal, and other aspects of pesticide use.

(f) *Program surveillance and reporting of data.* (1) The permittee shall supervise the test program and evaluate the results of testing at each site of application. The designated State agency shall require the permittee to report to it immediately any adverse effects resulting from use of, or exposure to, the pesticide.

(2) During the course of the program, the designated State agency shall require the permittee to submit such reports (both special and periodic) as are necessary to supervise effectively the progress of the program to prevent unreasonable adverse effects on man or the environment. The designated State agency shall also require the permittee to submit a final report at the conclusion of the program. Where applicable, such reports shall also be made available to the U.S. Department of Agriculture, Food Service and Quality Service (FSQS), as required by § 172.8(c).

(g) *Disposal.* All pesticides and pesticide containers, whether disposed of during the course of a State permit or remaining at the termination of a permit, must either be:

(1) Disposed of in accordance with 40 CFR Part 165 and a disposal plan approved as part of the experimental program; or,

(2) Returned to the permittee for storage or disposal in accordance with 40 CFR Part 165 and the requirements of RCRA and rules thereunder; or,

(3) If the product is currently registered, used in accordance with the registered label.

§ 172.26 EPA review of permits.

(a) *Notification of State action.* (1) Within 10 days after the issuance of an experimental use permit, the designated State agency shall notifiy EPA of the action by forwarding to the appropriate EPA Regional Office a copy of the permit, a description of the experimental program to be conducted under the terms of the permit, a copy of the approved labeling, and a copy of the confidential statement of formula for any new product.

(2) Within 10 days after amendment or revocation of an experimental use permit by a State, the designated State agency shall notify the appropriate EPA Regional Office in writing of the amendment or revocation. The notice shall include a brief explanation of the reason for the amendment or revocation. If amendments to permits include changes in the approved labeling, the designated State agency shall also forward a copy of the amended labeling.

(3) EPA shall give notice in the **Federal Register** of State issuance of experimental use permits.

(b) *Reports.* The designated State agency shall submit the following reports to EPA:

(1) An annual report covering the number of permits issued, the names and addresses of permittees, the names of the products covered by permits, and the State permit numbers issued;

(2) Reports, as requested by EPA, containing any information that EPA may determine necessary to ensure that a State has acted in compliance with provisions of FIFRA and this subpart; and

(3) Reports of any serious adverse effect(s), as soon thereafter as possible, from use of, or exposure to, a pesticide used pursuant to an experimental use permit.

(c) *Revocation by EPA.* (1) The Administrator may revoke an experimental use permit issued under this Subpart if he finds:

(i) That its terms and conditions are being violated;

(ii) That its terms and conditions are inadequate to avoid unreasonable adverse effects on the environment;

(iii) That new evidence demonstrates that any tolerance or food additive regulation upon which the permit is based will be inadequate to protect the public health, or that any exemption from the requirement for a tolerance or food additive regulation is no longer appropriate; or

(iv) That a failure by the permittee to meet any other provisions of FIFRA or this subpart has occurred.

(2) The Administrator shall, prior to revoking a State experimental use permit, consult with the State agency which issued the permit, except in cases where continued use of the pesticide under the permit would create an imminent hazard to man or the environment.

(3) The Administrator shall notify the designated State agency, in writing, of the revocation, and the State agency shall notify the permittee, also in writing, of the revocation.

(4) The permittee shall notify all participants of the revocation within 10 days after he receives notice of revocation.

(5) The revocation of a permit shall not preclude the Administrator from initiating civil or criminal sanctions for violations of the permit conditions or other violations, as authorized by law.

(6) If a permittee wishes to contest the revocation of a State experimental use permit, he shall, within 30 days after receipt of notice of such revocation, file with the Administrator a written request for an opportunity to confer with the Administrator or his designee. The revocation of the permit shall remain effective pending the outcome of any conference requested under this paragraph.

(7) If a permittee requests a conference under paragraph (c)(6) of this section, the Administrator shall provide the permittee:

(i) With information as to the time, place and nature of the conference, and of the matters of fact and law asserted by the Agency as grounds for the revocation action;

(ii) An opportunity to offer a written statement of facts, explanations, and arguments relevant to the revocation action;

(iii) All other procedural opportunities to which the permittee may be entitled by law.

(8) The Administrator shall notify the affected permittee and State Agency, in writing, of his final decision on the revocation matter as expeditiously as possible and shall attempt to do so within 30 days after the conclusion of a conference conducted under paragraph (c)(7). The Administrator shall also

provide the permittee and the State agency with a written statement of the reasons for his decision, which shall take into account the evidence presented pursuant to paragraph (c)(7)(ii) of this section.

(9) A decision to revoke a permit under paragraph (c)(8) of this section is a final Agency action subject to judicial review as provided by law.

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DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 4

[Circular No. 2448]

Department Hearings and Appeals Procedures; Grazing Procedures

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rulemaking.

SUMMARY: This rulemaking amends the Department's hearings and appeals procedures pertaining to grazing proceedings. The amendment makes the appeal regulations consistent with the revised grazing administration regulations in 43 CFR Part 4100, that were published in the Federal Register as final rulemaking on July 5, 1978.

DATE: Effective August 17, 1979.

ADDRESS: Director (210), Bureau of Land Management, 1800 C Street, NW., Washington, DC 20240

FOR FURTHER INFORMATION CONTACT: Maxwell T. Lieurance, 202 343-6011.

SUPPLEMENTARY INFORMATION: The principal author of this final rulemaking is David Little of the Division of Range, Bureau of Land Management assisted by the Division of Legislation and Regulatory Management, Bureau of Land Management and the Office of the Solicitor, Department of the Interior.

Proposed rulemaking was published in the Federal Register on November 19, 1976, following publication on July 26, 1976, of proposed rulemaking on grazing administration and trespass. The proposed rulemaking on grazing administration and trespass required that changes be made in the Department's hearings and appeals procedures. Proposed rulemaking for grazing administration and trespass was again published on July 8, 1977, to include changes required by the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.)

Under the existing regulations, applicants for grazing use and licensees and permittees on public lands administered under section 3 of the Taylor Grazing Act can appeal decisions that adversely affect them to an administrative law judge for a hearing. Decisions of an administrative law judge can be appealed to the Interior Board of Land Appeals. Applicants for grazing use and lessees of public lands administered under section 15 of the Taylor Grazing Act can appeal decisions adversely affecting their interest to the Interior Board of Land Appeals only. They cannot appeal to an administrative law judge, although the Interior Board of Land Appeals does have the discretion to assign or refer such cases to an administrative law judge for a hearing. Comments were invited for 30 days ending December 20, 1976. Two letters of comment were received. These letters have been reviewed and analyzed. The following summarizes the comments and suggestions received and the action taken on them.

It was suggested that the regulations provide that appeals be submitted directly to the Hearings Division, Office of Hearings and Appeals, Salt Lake City, Utah, by the authorized officer instead of forwarding the appeals to the State Directors for submission to the Hearing Division. This suggestion was not adopted. The appeals filed in the District Offices of the Bureau of Land Management are forwarded to the State Directors because it is at this level that the appeals are referred to the Field Solicitors. The Field Solicitors and the State Office resource specialists assist the Districts within the State in preparing for hearings on appeals.

As suggested, an administrative law judge will continue to set the dates and times for hearings. However, arranging for the place of the hearings and notifying the appellants of the hearings will continue to be the responsibility of the District Managers and not the administrative law judge, as suggested. The District Managers are in a better position to make the local arrangements and issue the notification of hearings.

Section 4.474 was changed to provide that the State Directors, and not the adversely affected parties, must present their case first following the opening statement of a hearing in the case of a show cause. In the case of appeals of decisions of the authorized officer, the appellants generally present their case first following the opening statement of a hearing.

One comment reflected concern about appealing decisions to an administrative law judge instead of going directly to Federal Court. Section 9 of the Taylor Grazing Act provides that, "the Secretary of the Interior shall provide appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge * * *". These regulations provide for the local hearings. They also provide for exhaustion of administrative remedies before a case can be taken to Federal Court.

Note.—The Department of the Interior has determined that this document is not a significant rule and does not require the preparation of a regulatory analysis under Executive Order 12044 and 43 CFR Part 14.

Editorial changes and corrections have been made as necessary and suggested changes have been made to eliminate redundancies.

Under the authority of the Taylor Grazing Act of 1934, as amended (43 U.S.C. 315, 315a-315r), and the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.), Part 4, Subtitle A, Title 43 of the Code of Federal Regulations is amended as set forth below.

Guy R. Martin,

Assistant Secretary of the Interior.

July 13, 1979.

1. Section 4.410 is amended by changing the reference from "Part 4110" to "Part 4100."

2. Sections 4.470 through 4.478 are amended to read as follows:

Grazing Procedures (Inside and Outside Grazing Districts)

§ 4.470 Appeal to administrative law judge; motion to dismiss.

(a) Any applicant, permittee, lessee, or any other person whose interest is adversely affected by a final decision of the authorized officer may appeal to an administrative law judge by filing his appeal in the office of the authorized officer within 30 days after receipt of the decision. The appeal shall state the reasons, clearly and concisely, why the appellant thinks the final decision of the authorized officer is in error. All grounds of error not stated shall be considered as waived, and no such waived ground of error may be presented at the hearing unless ordered or permitted by the administrative law judge.

(b) Any applicant, permittee, lessee, or any other person who, after proper notification, fails to appeal a final decision of the authorized officer within the period prescribed in the decision, shall be barred thereafter from challenging the matters adjudicated in that final decision.

(c) When separate appeals are filed and the issue or issues involved are common to two or more appeals, they may be consolidated for purposes of hearing and decision.

(d) The authorized officer shall promptly forward the appeal to the State Director. Within 30 days after his receipt of the appeal the State Director may file on behalf of the authorized officer a written motion, serving a copy thereof upon the appellant, requesting that the appeal be dismissed for the reason that it is frivolous, the appeal was filed late, the errors are not clearly and concisely stated, the issues are immaterial, the issue or issues were included in a prior final decision from which no timely appeal was made, or all issues involved therein have been previously adjudicated in an appeal involving the same preference, the same parties or their predecessors in interest. The appellant may file a written answer within 20 days after service of the motion upon him with the State Director. The appeal, motion, the proofs of service (see § 4.401(c)), and the answers will be transmitted to the Hearings Division, Office of Hearings and Appeals, Salt Lake City, Utah. An administrative law judge, shall rule on the motion, and, if the motion is sustained, dismiss the appeal by written order.

§ 4.471 Time and place of hearing; notice; intervenors.

At least 30 days before the date set by the administrative law judge the authorized officer will notify the appellant of the time and place of the hearing within or near the district. Any other person who in the opinion of the authorized officer may be directly affected by the decision on appeal will also be notified of the hearing; such person may himself appear at the hearing, or by attorney, and upon a proper showing of interest, may be recognized by the administrative law judge as an intervenor in the appeal.

§ 4.472 Authority of administrative law judge.

(a) The administrative law judge is vested with the duty and general authority to conduct the hearing in an orderly, impartial, and judicial manner, including authority to subpoena witnesses, recognize intervenors, administer oaths and affirmations, call and question witnesses, regulate the course and order of the hearing, rule upon offers of proof and the relevancy of evidence, and to make findings of fact, conclusions of law, and a decision. The administrative law judge shall have authority to take or to cause depositions to be taken. Subpoenas, depositions, the attendance of witnesses, and witness and deposition fees shall be governed by § 4.26 of the general rules in Subpart B of this part, to the extent such regulations are applicable.

(b) The administrative law judge also may grant or order continuances, and set the times and places of further hearings. Continuances shall be granted in accordance with § 4.452–3 add "."

§ 4.473 Service.

Service of notice or other documents required under this subpart shall be governed by §§ 4.413 and 4.422. Proof of such service shall be filed in the same office where the notice or document was filed within 15 days after such service, unless filed with the notice or document.

§ 4.474 Conduct of hearing; reporter's fees; transcript.

(a) The appellant, the State Director or his representative, and recognized intervenors will stipulate so far as possible all material facts and the issue or issues involved. The administrative law judge will state any other issues on which he may wish to have evidence presented. Issues which appear to the administrative law judge to be unnecessary to a proper disposition of the case will be excluded; but the party asserting such issue may state briefly for the record the substance of the proof which otherwise would have been offered in support of the issue. Issues not covered by the appellant's specifications of error may not be admitted except with the consent of the State Director or his representative, unless the administrative law judge rules that such issue is essential to the controversy and should be admitted. The parties will then be given an opportunity to submit offers of settlement and proposals of adjustment for the consideration of the administrative law judge and of the other parties.

(b) Unless the administrative law judge orders otherwise, the State Director or his representative will then make the opening statement, setting forth the facts leading to the appeal. Upon the conclusion of the opening statement, the appellant shall present his case, consistent with his specifications of error. (In the case of a show cause, the State Director shall set forth the facts leading to the issuance of the show cause notice and shall present his case following the opening statement.) Following the appellant's presentation, or upon his failure to make such presentation, the administrative law judge, upon his own motion or upon motion of any of the parties, may order summary dismissal of the appeal with prejudice because of the inadequacy or insufficiency of the appellant's case, to be followed by a written order setting forth the reasons for the dismissal and taking such other action under this subpart as may be proper and warranted. An appeal may be had from such order as well as from any other final determination made by the administrative law judge.

(c) In the absence or upon denial of such motion the State Director or his representative and recognized intervenors may present evidence if such a presentation appears to the administrative law judge to be necessary for a proper disposition of the matters in controversy, adhering as closely as possible to the issues raised by the appellant. All oral testimony shall be under oath or affirmation, and witnesses shall be subject to cross-examination by any party to the proceeding. The administrative law judge may question any witness whenever it appears necessary. Documentary evidence will be received by the administrative law judge and made a part of the record, if pertinent to any issue, or may be entered by stipulation. No exception need be stated or noted and every ruling of the administrative law judge will be subject to review on appeal. The party affected by an adverse ruling sustaining an objection to the admission of evidence, may insert in the record, as a tender of proof, a brief written statement of the substance of the excluded evidence; and the opposing party may then make an offer of proof in rebuttal. The administrative law judge shall summarily stop examination and exclude testimony on any issue which he determines has been adjudicated previously in an appeal involving the same preference and the same parties or their predecessors in interest, or which is obviously irrelevant and immaterial to the issues in the case. At the conclusion of the testimony the parties at the hearing shall be given a reasonable opportunity, considering the number and complexity of the issues and the amount of testimony, to submit to the administrative law judge proposed findings of fact and conclusions of law, and reasons in support thereof, or to stipulate to a waiver of such findings and conclusions.

(d) The reporter's fees shall be borne by the Government. Each party shall pay for any copies of the transcript obtained by him. Unless the parties stipulate to a summary of the evidence, the Government will file the original

copy of the transcript with the case record.

§ 4.475 Findings of fact and decision by administrative law judge: notice; submission to Board of Land Appeals for decision.

(a) As promptly as possible after the time allowed for presenting proposed findings and conclusions, the administrative law judge shall make findings of fact and conclusions of law unless waiver has been stipulated, and shall render a decision upon all material issues of fact and law presented on the record. In doing so he may adopt the findings of fact and conclusions of law proposed by one or more of the parties if they are correct. The reasons for the findings, conclusions, and decisions made shall be stated, and along with the findings, conclusions, and decision, shall become a part of the record in any further appeal. A copy of the decision shall be sent by certified mail to the appellant and all intervenors, or their attorneys of record.

(b) The Board of Land Appeals may require, in any designated case, that the administrative law judge make only a recommended decision and that such decision and the record be submitted to the Board for consideration. The recommended decision shall meet all the requirements for a decision set forth in paragraph (a) of this section. The Board shall then make the decision in the case. This decision shall include such additional findings and conclusions as do not appear in the recommended decision and the record shall include such rulings on proposed findings and conclusions submitted by the parties as have not been made by the administrative law judge.

§ 4.476 Appeals to the Board of Land Appeals.

Any party affected by the administrative law judge's decision, including the State Director, has the right to appeal to the Board of Land Appeals, in accordance with the procedures and rules set forth in this Part 4.

§ 4.477 Effect of decision suspended during appeal.

(a) An appeal shall suspend the effect of the decision from which it is taken pending final action on the appeal unless the decision appealed from is made immediately effective.

(b) Consistent with the provisions of § 4160.3 of this title, (1) the authorized officer may provide initially in his decision that it shall be in full force and effect pending decision on an appeal therefrom; (2) the administrative law judge may provide in the decision on an appeal before such officer that it shall be in full force and effect pending decision on any further appeal; (3) the Board may provide by interim order that any decision from which an appeal is taken shall be in full force and effect pending final decision on the appeal. Any action taken by the authorized officer pursuant to a decision shall be subject to modification or revocation by the administrative law judge or the Board upon an appeal from the decision. In order to insure the exhaustion of administrative remedies before resort to court action, a decision which at the time of its rendition is subject to appeal to a superior authority in the Department shall not be considered final so as to be agency action subject to judicial review under 5 U.S.C. section 704, unless it has been made effective pending a decision on appeal in the manner provided in this paragraph.

§ 4.478 Conditions of decision action.

(a) *Record as basis of decision; definition of record.* No decision shall be rendered except on consideration of the whole record or such portions thereof as may be cited by any party or by the State Director and as supported by and in accordance with the reliable, probative, and substantial evidence. The transcript of testimony and exhibits, together with all papers and requests filed in the proceedings, shall constitute the exclusive record for decision.

(b) *Effect of substantial compliance.* No adjudication of grazing preference will be set aside on appeal, if it appears that it is reasonable and that it represents a substantial compliance with the provisions of Part 4100 of this title.

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Bureau of Land Management

43 CFR Parts 2540, 2740, and 9180

[Circular No. 2447]

Omitted Lands and Unsurveyed Islands

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rulemaking.

SUMMARY: This final rulemaking provides procedures for the conveyance of unsurveyed islands and lands omitted from original surveys. Section 211 of the Federal Land Policy and Management Act of 1976 authorizes the Secretary of the Interior to convey unsurveyed islands and omitted lands to State and local governments and to occupants under certain conditions.

DATE: Effective on August 17, 1979.

ADDRESS: Any comments or inquiries should be sent to: Director (320), Bureau of Land Management, 1800 C Street, N.W., Washington, D.C. 20240.

FOR FURTHER INFORMATION CONTACT: Stephen Spector, 202-343-8731.

SUPPLEMENTARY INFORMATION: The proposed rulemaking on this subject was published in the **Federal Register** on November 2, 1978 (43 FR 51043), and provided for a 60 day comment period. Nine written comments were received during the 60 day comment period, all from State governments or agencies. All of the comments supported the rulemaking but a number of questions were raised about the way the rulemaking will be carried out. One comment raised a question about whether the conveyances covered by the rulemaking would be subject to the provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The disposal of an unsurveyed island or omitted lands will be the subject of an environmental analysis prior to conveyance. If the analysis indicates a need for an environmental statement, such a statement will be completed.

Several of the comments raised the issue of possible State claims to an unsurveyed island and how those claims would be handled if an application for conveyance of that island were received from a local government. This rulemaking does not create new procedures which will require a State to qualify to receive unsurveyed islands or omitted lands which it already claims. The provisions of the Submerged Lands Act (43 U.S.C. 1301 et seq.) as it applies to islands within navigable waters and the Swamp and Overflowed Lands Act (43 U.S.C. 983) are still applicable. This rulemaking does not change the rights created by those Acts.

The rulemaking requires the Secretary of the Interior to make a determination that an unsurveyed island covered by an application is public lands. The procedure that will be followed in making that determination is that the assumption will be made that a State making an application for title to an unsurveyed island under this rulemaking is waiving any claim that it might have to that island under other laws or regulations. This assumption will allow the Department of the Interior to make a very abbreviated title determination and declare the island to be public lands. However, if a local government applies for title to an unsurveyed island under this rulemaking, it should first attempt to obtain a waiver of any claim from the

State where the island is located. If the waiver is obtained, an abbreviated title determination declaring the island to be public lands can be made. If, however, the State objects to the application and raises the question of a prior claim to the island, the Department of the Interior will have no choice but to make a complete title survey in order to determine if the island is in fact public lands or not. This title survey will be long and tedious, but is required if the Department is to give an adequate title opinion. This procedure will carry out the intent of Congress in its enactment of section 211 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1721) of providing a quick method of conveying unsurveyed islands to States and local governments, but at the same time will protect any claims that the States might have to those unsurveyed islands. Finally, the rulemaking provides for a survey if the applicant bears the cost and this would provide as clear a title opinion as can be given.

Further, if the Department of the Interior makes a determination that an unsurveyed island is public lands, a State with a claim to that unsurveyed island could take steps to challenge that decision.

In those instances where the Department of the Interior determines that an unsurveyed island is not public lands, title could be clarified under a disclaimer provided for in section 315 of the Federal Land Policy and Management Act.

One comment pointed out that some State laws exempt the State from having to comply with requirements of local governmental authorities for planning. It is not intended to impose conditions beyond those imposed by existing law but every effort will be made to comply with applicable law and to keep all interested parties informed so that those affected by a disposal of public lands can work together for the public interest.

No changes, other than editorial changes, have been made in the proposed rulemaking for its publication as final rulemaking.

The principal author of this final rulemaking is Stephen H. Spector, Division of Lands and Realty, assisted by the staff of the Division of Legislation and Regulatory Management, Bureau of Land Management.

Note.—The Department of the Interior has determined that this document is not a significant regulatory action requiring the preparation of a regulatory analysis under Executive Order 12044 and 43 CFR Part 14.

Under the authority of section 211 and 310 of the Federal Land Policy and Management Act of 1976, (43 U.S.C. 1721 and 1740), Parts 2540, 2740 and 9180, Subchapters B and I, Chapter II, Title 43 of the Code of Federal Regulations are amended as set forth below.

Guy R. Martin,

Assistant Secretary of the Interior.

July 11, 1979.

1. Part 2540 is amended by changing its title as follows:

PART 2540—COLOR-OF-TITLE AND OMITTED LANDS

2. Part 2540, Subpart 2540, § 2540.0–3 is amended by adding an additional source of authority (paragraph (g)) to read as follows:

§ 2540.0–3 Authority.

* * * * *

(g) The Federal Land Policy and Management Act of 1976.

(1) Section 211 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1721), authorizes the Secretary of the Interior in his discretion to sell at not less than fair market value to the occupant thereof any omitted lands which, after survey, are found to have been occupied and developed for a 5-year period prior to January 1, 1975.

(2) The Act provides that all such conveyances under the Act must be in the public interest and will serve objectives which outweigh all public objectives and values served by retaining such lands in Federal ownership.

(3) Section 208 of the Act (43 U.S.C. 1718) further provides that the Secretary of the Interior shall issue patents subject to such terms, convenants, conditions, and reservations as deemed necessary to insure proper land use and protection of the public interest.

(4) Section 209 of the Act (43 U.S.C. 1719) provides that all patents issued under the Act shall reserve to the United States all minerals in the lands, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe, except as provided by section 209(b) of the Act.

3. Part 2540, Subpart 2541, is amended by changing the title as follows:

Subpart 2541—Color-of-Title Act

4. Part 2540 is further amended by adding Subpart 2547 to read as follows:

Subpart 2547—Omitted Lands—General

Sec.

2547.1 Qualifications of applicants.
2547.2 Procedures; applications.
2547.3 Price of land; payment.
2547.4 Publication and protests.
2547.5 Disposal considerations.
2547.6 Lands not subject to disposal under this subpart.

Authority: Sec. 211 and 310 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1721 and 1740).

Subpart 2547—Omitted Lands—General

§ 2547.1 Qualifications of applicants.

(a) Any person authorized to hold title to land in the State may make application under section 211 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1721). For regulations on conveyances of omitted lands and unsurveyed islands to State and local governments see subpart 2342 of this title.

(b) The applicant shall be a citizen of the United States, or in the case of corporation, shall be organized under the laws of the United States or any State thereof.

(c) The applicant shall have occupied and developed the lands for a 5-year period prior to January 1, 1975.

§ 2547.2 Procedures; applications.

(a) The description of the omitted lands applied for shall be sufficiently complete to identify the location, boundary, and area of the land, including, if possible, the legal description of the land by section or fractional section, township, range, meridian and State.

(b) Each application shall be accompanied by a filing fee of $50 that is nonreturnable. The application shall be filed in accordance with the provisions of § 1821.2 of this title.

(c) No special form of application is required. The application shall be typewritten or in legible handwriting and shall contain the following information:

(1) The full name and legal mailing address of the applicant.

(2) The description and acreage of the public lands claimed.

(3) A statement showing that the applicant is qualified or authorized to hold title to land in the State, is a citizen of the United States, and in the case of a corporation, is organized under the laws of the United States or any State thereof.

(4) A statement describing how the applicant has satisfied the requirements of the statute.

(5) A statement describing the nature and extent of any developments made to the lands applied for and describing the period and type of any occupancy of the land.

(6) The names and legal mailing addresses of any known adverse claimants or occupants of the applied for lands.

(7) A citation of the Act under which the application is being made.

§ 2547.3 Price of land; payment.

(a) The land applied for shall be appraised for fair market value at the time of appraisal. However, in determination of the price payable by the applicant, value resulting from development and occupation by the applicant or his predecessors in interest shall be deducted from the appraised price.

(b) The applicant shall also be required to pay administrative costs, including:

(1) the cost of making the survey,

(2) the cost of appraisal, and

(3) the cost of making the conveyance.

(c) The applicant shall be required to make payment of the sale price and administrative costs within the time stated in the requests for payment or any extensions granted thereto by the authorized officer.

§ 2547.4 Publication and protests.

(a) The applicant shall be required to publish a notice of the application once a week for five consecutive weeks in accordance with § 1824.3 of this title, in a designated newspaper and in a designated form. All persons claiming the land adversely may file with the State Office of the Bureau of Land Management in which the lands are located, their objections to issuance of patent under the application. A protestant shall serve on the applicant a copy of the objections and furnish evidence of such service.

(b) The applicant shall file at the appropriate BLM office a statement of the publisher, accompanied by a copy of the notice published, showing that the publication has been made for the required time.

§ 2547.5 Disposal considerations.

(a) Disposal under this provision shall not be made until:

(1) It has been determined by the authorized officer that such conveyance is in the public interest and will serve objectives which outweigh all public objectives and values which would be served by retaining such lands in Federal ownership.

(2) The relevant State government, local government, and areawide planning agency designated under section 204 of the Demonstration Cities and Metropolitan Act of 1966 (80 Stat. 1255, 1262), and/or title IV of the Intergovernmental Cooperation Act of 1968 (82 Stat. 1098, 1103–4) have notified the authorized officer as to the consistency of such conveyance with applicable State and local government land use plans and programs.

(3) The plat of survey has been officially filed.

§ 2547.6 Lands not subject to disposal under this subpart.

This subpart shall not apply to any lands within the National Forest System, defined in the Act of August 17, 1974 (16 U.S.C. 1601), the National Park System, the National Wildlife Refuge System, and the National Wild and Scenic Rivers System.

§ 2547.7 Coordination with State and local governments.

At least 60 days prior to offering land for sale, the authorized officer shall notify the Governor of the State within which the lands are located and the head of the governing body of any political subdivision of the State having zoning or other land use regulatory jurisdiction in the geographical area within which the lands are located that the lands are being offered for sale. The authorized officer shall also promptly notify such public officials of the issuance of the patent for such lands.

PART 2740—RECREATION AND PUBLIC PURPOSES ACT

5. Part 2740 is amended by adding a new paragraph (c) to § 2740.0–8 to read as follows:

§ 2740.0–8 Lands subject to disposition.

* * * * *

(c) Omitted lands and unsurveyed islands may be conveyed to States or their political subdivisions under the provisions of law added by section 211 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1721).

6. Part 2740 is amended by adding Subpart 2742 to read as follows:

Subpart 2742—Recreation and Public Purposes Act—Omitted Lands and Unsurveyed Islands

Sec.

2742.1 Qualifications of applicants.
2742.2 Survey requirement.
2742.3 Conveyance limitations.
2742.4 Consistency with other laws.

Authority: Sec. 211 and 310, Federal Land Policy and Management Act of 1976 (43 U.S.C. 1721 and 1740).

Subpart 2742—Recreation and Public Purposes Act—Omitted Lands and Unsurveyed Islands

§ 2742.1 Qualifications of applicants.

States and their political subdivisions are qualified applicants.

§ 2742.2 Survey requirement.

(a) Islands.

(1) Survey is not necessary. However, unsurveyed islands shall be determined by the Secretary to be public lands of the United States.

(2) Islands shall be surveyed at the request of the applicant, as provided in Part 9185 of this chapter.

(b) Determination as to whether lands, other than islands, are public lands of the United States erroneously or fraudulently omitted from the original surveys shall be by survey. Surveys shall be in accordance with the requirements of Part 9185 of this Title.

§ 2742.3 Conveyance limitations.

(a) No conveyances shall be made under this section until the relevant State government, local government, and areawide planning agency have notified the Secretary as to the consistency of such conveyance with applicable State and local government land use plans and programs.

(b) At least 60 days prior to offering for sale or otherwise conveying public lands under this section, the Secretary shall notify the Governor of the State within which such lands are located and the head of the governing body of any political subdivision of the State having zoning or other land-use regulatory jurisdiction in the geographical area within which such lands are located in order to afford the appropriate body the opportunity to zone or otherwise regulate change or amend existing zoning or other regulations concerning the use of such lands prior to such conveyance.

(c) Conveyances under this section may be made without regard to acreage limitations contained in the Recreation and Public Purposes Act.

§ 2742.4 Consistency with other laws.

The provision of the Recreation and Public Purposes Act prohibiting disposal for any use authorized under any other law does not apply to conveyances under this subpart.

PART 9180—CADASTRAL SURVEY

7. Part 9180, section 9185.1–1 is amended by revising paragraph (b) to read as follows:

§ 9185.1–1 Surveys.

(a) * * *

(b) *Lands omitted from original survey.* Application for the survey of an unsurveyed island or other land omitted from the orginal survey shall be made on Form 9600–2, or its equivalent, and filed in duplicate with the State director for the State in which lands are situated.

8. Section 9185.2–2(a) is revised to read as follows:

§ 9185.2–2 Lands omitted from original survey.

(a) *Notice of intended application.* Notice of intention to apply for survey of an island or other land omitted from the original survey shall be served on the adjacent land owners, and the Attorney General and the Secretary of State for the State in which the land is situated, at least 30 days prior to the date of application for survey. Service may be had by return receipt mail or in person, evidence of which may consist of the return receipt or signed acknowledgment of service. A copy of each notice, with proof of service thereof, shall be filed with the application. Failure to obtain evidence of service may be explained.

9. Subpart 9185 is further amended by adding § 9185.2–3 to read as follows:

§ 9185.2–3 Unsurveyed islands and omitted lands.

(a) Section 211(a) of the Federal Land Policy and Management Act of 1976 (90 Stat. 2758), provides for the conveyance under the Recreation and Public Purposes Act of unsurveyed islands determined by the Secretary to be public lands of the United States. The conveyance of any such island may be made without survey; however, such island shall be surveyed at the request of the qualified applicant. If the applicant requests that a survey be executed, the applicant shall be required to:

(1) Furnish a written statement identifying his choice of donation of money, services, or both for the survey.

(2) If the applicant elects to donate money, such donation shall equal the Bureau of Land Management's estimated cost of survey. The donated money shall be credited and expended in accordance with section 307(c) of the Act. A written estimate of such costs shall be furnished to the applicant by the Bureau.

(3) If the applicant elects to donate services, such services shall be conducted and performed pursuant to the criteria established by the Director of the Bureau of Land Management.

(b) Section 211(b) of the Act, provides for conveyance, under the Recreation and Public Purposes Act (43 U.S.C. 869), of lands other than islands determined by the Secretary by survey to be public lands of the United States erroneously or fraudulently omitted from the original surveys. An applicant may be required to donate money, services, or a combination thereof for such survey. The procedures contained in § 9185.2–3(a) of this title shall be followed.

[FR Doc. 79–22171 Filed 7–17–79; 8:45 am]

BILLING CODE 4310–81–M

43 CFR Public Land Order 5669

Alaska; Partial Revocation of Public Land Order No. 5150, as Amended and Classification and Withdrawal of Lands for Conveyance to Cook Inlet Region, Inc.

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land order.

SUMMARY: This Public Land Order partially revokes PLO 5150, as amended, and classifies and withdraws certain lands for conveyance to Cook Inlet Region, Inc., under the Alaska Native Claims Settlement Act.

EFFECTIVE DATE: July 13, 1979.

FOR FURTHER INFORMATION CONTACT: Beau McClure—202–343–6511 or Bob Arnold, Bureau of Land Management, 701 C Street, Box 13, Anchorage, Alaska 99513.

By virtue of the authority vested in the Secretary of the Interior, by Section 17(d)(1) of the Alaska Native Claims Settlement Act, 85 Stat. 688, 708, and pursuant to Section 204 of the Act of October 21, 1976, 90 Stat. 2751, (43 U.S.C. 1714), it is ordered as follows:

1. Public Land Order No. 5150 of December 28, 1971, as amended, which withdrew lands for a utility corridor in Alaska is hereby revoked so far as it affects the following lands:

Fairbanks Meridian

T. 1S., R. 2E.,
Secs,. 14 and 15, all;
Sec. 21, S½;
Sec. 23, all;
Secs. 26 and 27, all.

The area described aggregates approximately 3,520 acres.

2. The segregative effect of the proposed withdrawal and reservation of lands for a Bureau of Land Management administrative and communications site, as published in the **Federal Register** (36 FR 7978) on April 28, 1971, is hereby terminated.

3. Subject to valid existing rights, the lands described below are hereby classified as suitable for conveyance to Cook Inlet Region, Inc. in accordance with paragraph I.C.(2) of the "Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area", as clarified August 31, 1976, and Sec. 12(b)(6) of the Act of January 2, 1976, 89 Stat. 1151:

Fairbanks Meridian

T. 1S., R. 2E.,
Secs. 21 E½NE¼SW¼, NW¼NE¼SW¼, N½SW¼NE¼SW¼, SW¼SW¼NE¼SW¼, W½SW¼, SE¼SW¼, SE¼;
Sec. 26, all;
Sec. 27, all.

Aggregating approximately 1,597.50 acres.

4. The lands described in paragraph 3 are hereby withdrawn from all forms of settlement, sale, location, or entry under the operation of the public land laws including the mining laws (30 U.S.C. Chap. 2) and State selection under Section 6 of the Alaska Statehood Act (72 Stat. 339), but not from selection by Cook Inlet Region, Inc., in accordance with paragraph I.C.(2)(e) of the "Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area", as clarified August 31, 1976, and Section 12(b)(6) of the Act of January 2, 1976, 89 Stat. 1151.

5. The lands described in paragraph 1 of this order which are not classified for conveyance to Cook Inlet Region, Inc., shall continue to remain withdrawn by Public Land Order 5180 of March 9, 1972, as amended.

6. Prior to any conveyance of the lands described in paragraph 3, the lands shall be subject to administration by the Secretary of the Interior under applicable laws and regulations, and his authority to make contracts and to grant leases, permits, rights-of-way, or easements shall not be impaired by this order. Applications for leases under the Mineral Leasing Act, as amended (30 U.S.C. 181–287 (1970)), will be rejected until this order is modified or the lands are appropriately classified to permit mineral leasing.

Guy R. Martin,

Assistant Secretary of the Interior.

July 13, 1979.

[FR Doc. 79–22151 Filed 7–17–79; 8:45 am]

BILLING CODE 4310–84–M