U.S. DEPARTMENT OF AGRICULTURE

Federal Grain Inspection Service Official Agency Geographic Area; Request for Comments on Applicants for Designation in a Portion of a Four County Area of Northwestern Iowa

AGENCY: Federal Grain Inspection Service.

ACTION: Notice.

SUMMARY: This notice requests comments from interested parties' on the applicants for designation as an official agency in a portion of a four, county area of Northwestern Iowa.

DATE: Comments to be postmarked on or before October 6, 1980.

ADDRESS: Comments should be submitted to USDA, FGIS, Issuance and Coordination Staff, Room 1127, Auditor's Building, 1400 Independence Ave., SW, Washington, D.C. 20250.

FOR FURTHER INFORMATION CONTACT: J. T. Abshier, Director, Compliance Division, Federal Grain Inspection Service, (202) 447-8262.

SUPPLEMENTARY INFORMATION: The May 16, 1980, issue of the **Federal Register** contained a notice from the Federal Grain Inspection Service requesting applications for designation to provide official services under the United States Grain Standards Act, as amended (7 U.S.C. 71 *et seq.*) (the "Act"), for the portion of the four county area previously serviced by A. V. Tischer and Son, Inc. Applications were to be postmarked by July 15, 1980. A total of three applications were received.

The names of the applicants for designation are as follows: Fremont Grain Inspection Department, 603 East Dodge Street, Fremont, Nebraska 68025; Joe P. Jaimes, 9445 Connell Drive, Overland Park, Kansas 66212; and Sioux City Inspection & Weighing Agency, Inc., 310 South Floyd Boulevard, Room 302, Sioux City, Iowa 51101.

In accordance with section 800.206(b)(2) of the regulations under the Act, this notice provides interested persons the opportunity to present their views and comments concerning the applicants. All comments must be submitted to the Issuance and Coordination Staff, specified in the address section of this notice and be postmarked not later than October 6, 1980.

A comment period of 30 days is deemed adequate because such a period of time would expedite the designation of an official agency to service the portion of the four county area in Northwestern Iowa. Such a comment period does not impose any undue obligations or requirements on others, and under the circumstances, provides a sufficient period of time for comments.

Consideration will be given to all comments filed and to all other information available to the Administrator of the Federal Grain Inspection Service before a final decision is made with respect to this matter. Notice of the final decision will be published in the **Federal Register** and the applicants will be informed of the decision in writing.

(Sec. 8, Pub. L. 94-582, 90 Stat. 2870 (7 U.S.C. 79))

Done in Washington, D.C. on August 28, 1980.

Neil E. Porter,

Acting Director, Compliance Division.

[FR Doc. 80-26992 Filed 9-3-80; 8:45 am]

BILLING CODE 3410-02-M

federal register

Thursday
September 4, 1980

Part V

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

Civil Penalties

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 722, 723, 843 and 845

Civil Penalties, Final Rulemaking

AGENCY: Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior.

ACTION: Final rulemaking.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement adopts final rules, pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA), which would (1) modify the amount of penalties assessed in cases of nonabatement of violations, (2) mandate a review of a permittee's history of violations to determine whether a pattern of violations exists in such nonabatement cases, (3) provide for appropriate enforcement action in such nonabatement cases, and (4) make minor wording changes in Part 723 of the interim regulations so that Part 723 is the same as Part 845 of the permanent regulations.

EFFECTIVE DATE: October 6, 1980.

FOR FURTHER INFORMATION CONTACT: Richard Robinson, Enforcement Specialist, Office of Surface Mining, Department of the Interior, Washington, D.C. 20240, (202) 343-8061.

SUPPLEMENTARY INFORMATION: In this document the Office adopts final rules to modify the amounts of penalties assessed in cases of nonabatement of violations, mandate a review of a permittee's history of violations to determine whether a pattern of violations exists in such nonabatement cases, provide for appropriate enforcement action in such nonabatement cases, and make minor wording changes in Part 723 of the interim regulations so that Part 723 is exactly the same as Part 845 of the permanent regulations. The Department has determined that these final rules are not significant rules and do not require the preparation of a regulatory analysis. An environmental assessment of these regulations has been prepared, and has been made a part of the administrative record for these rules.

Introduction to Final Rules

Conforming Interim to Permanent Regulations

30 CFR 723.2–723.18 are changed to be exactly the same as (except as indicated in this document) the corresponding permanent regulations (30 CFR 845.2–845.20). The basis and purpose of these permanent regulations are explained in the preamble to Part 845 of the proposed permanent regulations, 43 FR 41796–41797 (September 18, 1978), and of the final permanent regulations, 44 FR 15305–15309 (March 13, 1979).

These changes, are for the most part, merely ones of phraseology. The Office responded only to those comments on portions of these regulations which involved substantive changes. Since the procedural areas are not the subject of this rulemaking, the Office believes it is unnecessary to respond to these comments. For instance, a number of commenters suggested changes to the methods by which civil penalty points are assessed in the interim and permanent programs. In this area, there is no difference between the two programs. Such commenters, thus, went beyond the phraseology changes and commented on the substance of the rule which was not revised. The entire rule was reprinted in the text of this rulemaking only for the convenience of the reader, and not for the purpose of inviting public comment.

Penalties for Failure To Abate

The Office has been confronted with a problem in the assessment and the collection of civil penalties under SMCRA. Under section 723.14(a) of the interim regulations as previously written, in cases where a cessation order was issued for failure to abate, the Office was required to assess a daily penalty equal to the amount assessed for the violation or $750, whichever was greater. section 845.15(b) of the permanent regulations and section 518(h) of SMCRA provide that in such cases the Office must assess a daily penalty of not less than $750.

Under the prior interim regulations, if an operator failed to abate a violation for 30 days and if that violation was assessed at $2,000 (the average penalty per violation), the penalty for nonabatement would have been $60,000. If the operator failed to abate two such violations, the total penalty was $120,000. On certain occasions, computation of failure-to-abate penalties under this scheme resulted in clearly excessive amounts considering the nature and effects of the underlying violations of SMCRA.

The rule modification will reduce the potential for assessment of excessive penalties under the interim regulations by reducing the daily penalty to $750, the statutory minimum, except in those cases where the Director determines that a larger amount is appropriate. Nevertheless, even with this modification, the penalty in a failure-to-abate case could quickly become excessive where there is no limitation upon the number of days for which the penalty may be assessed. Furthermore, failure-to-abate penalties computed over a lengthy time period might drive many operators out of business. Many operators have been operating in States where enforcement efforts have historically been weak and penalties low. Without some limitation on the period during which failure-to-abate penalties run, a small-to-medium sized operator might be put out of business with his first such penalty. Since this would not give such an operator a second chance, the Office believes such action would be unduly harsh. While Congress intended that, in certain instances, recalcitrant operators who persist in defying SMCRA not be allowed to continue in business, the Office believes that, in most cases, the appropriate method of effectuating that intent is through an action to suspend or revoke the operator's permit under section 521(a)(4) of SMCRA or other enforcement action under the Act, rather than through the more cumbersome and indirect method of imposing unrealistically large civil penalty assessments.

The Office has adopted certain management measures to reduce the number of cases of nonabatement, such as: using interim steps for abatement where appropriate; attempting to inspect for compliance as close as possible to the final abatement date; increasing efforts to inform operators of the penalties and sanctions for nonabatement; expediting paperwork in nonabatement cases so that the operator receives notice of the penalty accrual as soon as possible; and seeking injunctive, and criminal relief, initiating procedures under section 518(f) of the Act, and using permit suspension and revocation powers more frequently. However, even with better management and with the modification discussed above, but without limitation on the penalty period, cases of nonabatement over lengthy periods would still occur with the consequent potential for excessive penalties.

At the inception of the interim program, the Office had no occasion to anticipate the potential for exorbitant failure-to-abate penalties generated by applying the $750 daily penalty over months, years, or an indeterminate, lengthier period of time. The Office believed that desire to avoid increasing penalties, together with the other sanctions mentioned above, would universally motivate operators to abate violations of SMCRA. Experience under SMCRA has borne out the Office's beliefs in the vast majority of cases, and the failure-to-abate penalty has proven to be an effective enforcement tool. In some cases, however, the $750 daily penalty has led to alarmingly high totals. Ironically, such high penalties may actually deter effective enforcement by forcing operators out of business and to ultimately abandon unreclaimed sites.

Subsection (h) of section 518 of SMCRA, which provides for the assessment of the $750-per-day penalty for failure-to-abate violations, contains no language limiting the length of time over which the assessment is to be made. Read outside the context of the remainder of section 518, the subsection would seem to require unlimited assessment. However, subsection (c) of section 518 provides as follows:

(c) Upon the issuance of a notice or order charging that a violation of the Act has occurred, The Secretary shall inform the operator *within thirty days* of the proposed amount of said penalty (emphasis added).

The Office is of the opinion that the language quoted above indicates Congress' intention to terminate at thirty days the time over which failure-to-abate penalties may be assessed.

These penalties are assessed in addition to the penalty under Section 518(a) of SMCRA for the violation itself, which penalty may be as much as $5,000. Thus, guided by SMCRA, the Office now intends to avoid uncertainty and confusion by the changes to the interim and permanent regulations to clearly state that failure-to-abate penalties are subject to a thirty-day maximum assessment period. (See 30 CFR 723.15(b)(2), 845.15(b)(2).)

The Office intends to modify any existing assessments in these failure-to-abate cases in accordance with the changes in these regulations, when they become effective, and will so notify affected operators. The Office intends to grant hearing and conference requests as though such recomputations were new assessments. Also, existing cases may be settled for the amounts that would be proper under these final rules.

In addition, as discussed above, the interim civil penalty regulations have been modified to be exactly the same as the corresponding permanent regulations. This includes changing the requirement that the daily penalty for failure-to-abate run from the date of non-abatement, not the date on which the reinspection occurred and the cessation order for failure to abate was issued. The Office recognizes that unless reinspections are carried out on the date set for abatement, an operator who believes he has abated, but who in fact has not, may be assessed unfairly. For instance, if the inspector inspects 20 days later and finds that the operator still has not completely abated, even though he thought he had, the operator would face an additional $15,000 fine, part of which could have been avoided had the inspector inspected on the abatement date.

Accordingly, these final rules provide that the Office will not assess the daily penalty for failure-to-abate during the period from the abatement date set in the notice of violation or cessation order to the date of the OSM reinspection (30 CFR 723.15(b)). Thus, penalties will begin to accumulate on the date that the Office actually reinspects the minesite and determines that the violation cited in the notice of violation or cessation order has not been abated. Such reinspections will normally occur on the date set for abatement unless something unexpected occurs such as an equipment failure, inclement weather, etc.

The Office recognizes that there is a potential for abuse of this modification, and that if the reinspection does not occur on the abatement date, it may be a *de facto* extension of time to abate. However, the Office is coupling this modification with a policy that the Office reinspect on the date set for abatement or within 3 days thereafter.

Lastly, the Office believes that stronger enforcement action must be taken in most cases against those persons who fail to abate their violations within the periods set for such abatement. As part of its scheme to deal with such persons, described at Comment 6 below, the regulations require the Office to take appropriate action pursuant to sections 518(e), 518(f), 521(c), or 521(a)(4) of SMCRA in all cases where a person has failed to abate a violation within 60 days from the date the failure-to-abate cessation order is issued. This requirement is imposed under new subsections 30 CFR 723.15(b)(2) and 845.15(b)(2).

Background

Proposed modifications to 30 CFR Parts 722, 723, 843 an 845 were published in the **Federal Register** on January 23, 1980 (45 FR 5540). A public hearing was held on February 13, 1980, in Washington, D.C. At the close of the comment period on February 11, 1980, nine commenters had submitted written comments. The transcript of the public hearing and all written comments pertaining to substantive changes in the regulations have been fully and completely considered in the development of these final regulations. Comments pertaining to each section of the regulations have been summarized below to assist the public in understanding the response to each comment and the bases and purposes of the final regulations.

Sections 722.16 and 843.13

1. One commenter suggested that the review for a pattern of violations provided in 30 CFR 722.16(e) and 843.13(f) be limited to violations which are willful or involve an unwarranted failure to comply. The Office rejects this recommendation as unnecessary. The results of such review will be based only on such violations because a permit may be revoked or suspended only if the Director determines that a pattern of violations exists, and that the violations were willfully caused by the permittee or through its unwarranted failure to comply (See 30 CFR 722.16(a) and 843.13(a)).

2. Another commenter suggested that the Office either delete 30 CFR 722.16(e) and 843.13(f), or make its review for a pattern of violations discretionary. Because the rule states that an order to show cause may be issued as appropriate, the Office does not feel that it is necessary to make such review discretionary. Additionally, as mentioned above, the Office believes that such review is especially appropriate in cases of nonabatement of violations. This is true because the failure of operators to correct cited violations in a timely fashion demonstrates an intent to flout the Act. It also creates a gross abuse of the environmental standards of the Act and must be treated accordingly.

The Office believes that if a notice of violation is uncorrected and ripens into a failure-to-abate cessation order, and that such order is in turn uncorrected for at least one month, a serious question arises regarding the permittee's intent to comply with the Act, and it is incumbent upon the Office to examine the permittee's history of violations to determine if a pattern of unwarranted or willful violations exists. While the Office will attempt to review all operations with an eye to enforcement of 521(a)(4) of the Act, it is especially necessary to make such reviews in these cases of chronic non-abatement of violations.

Parts 723 and 845

1. Two commenters recommended that the Office change 30 CFR 723.13(b)(3)(iii), which requires that acts of all persons working on the site be attributed to the person issued the notice or order, unless such acts are those of deliberate sabotage. The commenters suggested that acts of persons not working for the operator

and acts which are unauthorized or beyond the scope of employment, also not be attributed to the person to whom the notice or order was issued. The Office rejects this comment because it is the responsibility of the permittee to control the site and access thereto, and to prevent such violations from occurring on his/her property.

2. Two commenters objected to the Office's statement in the preamble of these proposed rules that failure-to-abate penalties may force operators into bankruptcy because such penalties are not dischargeable in bankruptcy. The Office agrees with the commenters that such penalties are not dischargeable in bankruptcy. However, such penalties may be a cause of operators going out of business. This clarification has been made in the preamble of these final rules.

3. One commenter recommended that the amount of the failure-to-abate penalty bear a direct correlation to the operator's economic position. The Office rejects this comment because the daily penalty is set at a minimum of $750 per day under section 518(h) of the Act. Congress did not differentiate between operators on the basis of an operator's economic position. Even in the case of penalties other than for failure-to-abate situations, the criteria set by Congress in section 518(a) of the Act do not include an operator's ability to pay.

4. One commenter objected to the Office's policy of beginning to accumulate the failure-to-abate penalty on the date that the Office actually reinspects the minesite and determines that the cited violation has not been abated. The Office rejects this comment because it does not feel it is fair to penalize operators for the failure of the Office, in certain instances, to reinspect for compliance with the notice or order on the date set for abatement.

5. One commenter asked for the right to comment on any agency documents describing the management measures adopted by the Office to reduce the number of cases of non-abatement. This comment is rejected. These documents are internal management procedures and the rules are in no way based upon the information contained in these documents. Any person may, of course, request copies of these documents under the Freedom of Information Act. The Office, however, expresses no opinion as to whether these documents are available to the public under that law.

6. One commenter suggested that the Office agree, in nonabatement cases, to take whatever enforcement action or actions are most likely to abate a violation in the most expeditious manner possible and to deter future violations. The commenter recommended that the Office take such action within 45 days from the date the failure-to-abate cessation order is issued.

The Office accepts this suggestion, except that the regulation provides the Office with 60 days from the date the failure-to-abate cessation order is issued to take such action. 30 CFR 723.15(b)(2) and 845.15(b)(2) are amended accordingly. Specifically the amended regulations require the Office to take appropriate action under sections 518(e), 518(f), 521(a)(4) or 521(c) of SMCRA. The Office will also develop an administrative system to insure that appropriate action is taken within the 30-day period after the maximum penalty has been assessed, and that alternative enforcement action will be pursued at least until such time as the violation has been abated except in cases where no enforcement purpose would be served.

The Office considers this suggestion to be appropriate because of the likelihood that one who refuses to comply with a cessation order for more than 30 days is usually flouting the Act and that other effective enforcement or legal action is required. Operators who fail to cease operations and to correct violations when ordered to do so must be subjected as quickly as possible to other enforcement actions. Longstanding violations often cause serious environmental hazards on minesites and must be dealt with in some effective manner. The Office is doing no more than utilizing other enforcement tools already available in the Act to accomplish this end.

7. Two comments were received regarding the Director's discretion to waive the formula in determining a civil penalty under 30 CFR 723.16. One suggestion was that such waiver be used only to lower the amount of a penalty. The Office rejects this comment because it needs the flexibility for cases where waiver of the formula is appropriate, and where the facts as established at the time of the proposed assessment turn out to be different and less favorable to the permittee.

Another commenter suggested adding, "and such exceptional factors as he may deem appropriate," to the criteria to be considered by the Director in determining the amount of the penalty, and the term "detailed" to describe the written explanation of the basis for the assessment in 30 CFR 723.16(b). The Office rejects these recommendations as unnecessary. The Director is already required under 30 CFR 723.16(a) to take exceptional factors into account in determining whether to waive the formula. The Director is also prohibited from using any factors in determining the amount of the penalty other than the four contained in section 518(a) of SMCRA. Finally, the Office feels that the Director's written explanation of the basis for the assessment will be sufficient without the addition of the term "detailed."

8. One commenter requested that the Office serve copies of all records on which an assessment is based, including the inspector's notes, statements and inspection reports, and the worksheet showing the computation of the proposed assessment on the person to whom the notice or order was issued. While these documents are not now served on the person to whom the notice or order was issued, all are available upon request from the Assessment Office and the Regional Office except for the inspector's notes which are merely preparatory to the inspector's statement and the inspection report. The Office finds that it would be administratively cumbersome to routinely include these extra documents in the already large package presently being sent to violators and, therefore, rejects this comment.

9. One commenter suggested that the Office modify 30 CFR 723.18(d)(1) to allow the person assessed a penalty to contest the fact of the violation and not the amount of the penalty even though such person has entered into a settlement agreement. The Office rejects this comment because its adoption would undermine the purpose of settlements. If such person wishes to contest the fact of a violation, he may do so in the hearing provided for in Section 525 of SMCRA if no settlement has been entered into.

10. One commenter recommended changing the last sentence of 30 CFR 723.19(a) to allow a person charged with a violation to contest the fact of the violation irrespective of whether it has been decided in a review proceeding commenced under section 525 of SMCRA and 43 CFR Part 4. The Office rejects this comment because it believes that one hearing on the fact of the violation is sufficient, and any further hearings would unduly burden the administrative system. If a decision was rendered previously on the identical violation which is the subject of a civil penalty review action the earlier ruling would be *res judicata* on the fact of the violation.

Regulation Drafters

These rules have been drafted principally by Harriet B. Marple, Chief, Division of Enforcement; Richard Robinson, Enforcement Specialist, Office of Surface Mining, Reclamation and Enforcement; John Williams, Staff Attorney; and Marc McGraw, Assistant Solicitor for Enforcement.

Dated: August 25, 1980.

Joan M. Davenport,

Assistant Secretary, Energy and Minerals.

PART 722—ENFORCEMENT PROCEDURES

1. Section 722.16 is revised by adding paragraph (e) as follows:

§ 722.16 Pattern of violations.

* * * * *

(e) Whenever a permittee fails to abate a violation contained in a notice of violation or cessation order within the abatement period set in the notice or order or as subsequently extended, the Director shall review the permittee's history of violations to determine whether a pattern of violations exists pursuant to this section, and shall issue an order to show cause as appropriate pursuant to 30 CFR 723.15(b)(2).

1a. The table of contents for Part 723 is amended by revising the headings for §§ 723.2 and 723.11–723.19, a new § 723.20 is added.

PART 723—CIVIL PENALTIES

Sec.

* * * * *

Authority: Surface Mining Control and Reclamation Act of 1977, secs. 201, 501, 518 (30 U.S.C. 1211, 1251, 1268).

2. Part 723 is amended by revising each section, including the headings (all but § 723.1) and by adding § 723.2 to read as follows:

§ 723.2 Objective.

Civil penalties are assessed under section 518 of the Act and this Part to deter violations and to ensure maximum compliance with the terms and purpose of the Act on the part of the coal mining industry.

§ 723.11 How assessments are made.

The Office shall review each notice of violation and cessation order in accordance with the assessment procedures described in 30 CFR 723.12, 723.13, 723.14, 723.15, and 723.16 to determine whether a civil penalty will be assessed, the amount of the penalty, and whether each day of a continuing violation will be deemed a separate violation for purposes of the total penalty assessed.

§ 723.12 When penalty will be assessed.

(a) The Office shall assess a penalty for each cessation order.

(b) The Office shall assess a penalty for each notice of violation, if the violation is assigned 31 points or more under the point system described in 30 CFR 723.13.

(c) The Office may assess a penalty for each notice of violation assigned 30 points or less under the point system described in 30 CFR 723.13. In determining whether to assess a penalty, the Office shall consider the factors listed in 30 CFR 723.13(b).

§ 723.13 Point system for penalties.

(a) The Office shall use the point system described in this section to determine the amount of the penalty and, in the case of notices of violation, whether a mandatory penalty should be assessed as provided in 30 CFR 723.12(b).

(b) Points shall be assigned as follows:

(1) *History of previous violations.* The Office shall assign up to 30 points based on the history of previous violations. One point shall be assigned for each past violation contained in a notice of violations. Five points shall be assigned for each violation (but not a condition or practice) contained in a cessation order. The history of previous violations for the purpose of assigning points, shall be determined and the points assigned with respect to a particular surface coal mining operation. Points shall be assigned as follows:

(i) A violation shall not be counted if the notice or order is the subject of pending administrative or judicial review or if the time to request such review or to appeal any administrative or judicial decision has not expired, and thereafter it shall be counted for only one year.

(ii) No violation for which the notice or order has been vacated shall be counted; and

(iii) Each violation shall be counted without regard to whether it led to a civil penalty assessment.

(2) *Seriousness.* The Office shall assign up to 30 points based on the seriousness of the violation, as follows:

(i) *Probability of Occurrence.* The Office shall assign up to 15 points based on the probability of the occurrence of the event which a violated standard is designed to prevent. Points shall be assessed according to the following schedule:

Probability of Occurrence

	Points
None	0
Insignificant	1–4
Unlikely	5–9
Likely	10–14
Occurred	15

(ii) *Extent of potential or actual damage.* The Office shall assign up to 15 points, based on the extent of the potential or actual damage, in terms of area and impact on the public or environment, as follows:

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

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

(iii) *Alternative.* In the case of a violation of an administrative requirement, such as a requirement to keep records, the Office shall, in lieu of Paragraphs (i) and (ii), assign up to 15 points for seriousness, based upon the extent to which enforcement is obstructed by the violation.

(3) *Negligence.* (i) The Office shall assign up to 25 points based on the degree of fault of the person to whom the notice or order was issued in causing or failing to correct the violation, condition, or practice which led to the notice or order, either through act or omission. Points shall be assessed as follows:

(A) A violation which occurs through no negligence shall be assigned no penalty points for negligence;

(B) A violation which is caused by negligence shall be assigned 12 points or less, depending on the degree of negligence;

(C) A violation which occurs through a greater degree of fault than negligence shall be assigned 13 to 25 points, depending on the degree of fault.

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

(A) "No negligence" means an inadvertent violation which was unavoidable by the exercise of reasonable care.

(B) "Negligence" means the failure of a permittee to prevent the occurrence of any violation of his or her permit or any requirement of the Act or this Chapter due to indifference, lack of diligence, or lack of reasonable care, or the failure to abate any violation of such permit or the Act due to indifference, lack of diligence, or lack of reasonable care.

(C) "A greater degree of fault than negligence" means reckless, knowing, or intentional conduct.

(iii) In calculating points to be assigned for negligence, the acts of all persons working on the surface coal mining and reclamation site shall be attributed to the person to whom the notice or order was issued, unless than person establishes that they were acts of deliberate sabotage.

(4) *Good faith in attemping to achieve compliance.* (i) The Office shall add points based on the degree of good faith of the person to whom the notice or order was issued in attempting to achieve rapid compliance after notification of the violation. Points shall be assigned as follows:

Degree of Good Faith

	Points
Rapid compliance	−1 to −10
Normal compliance	0

(ii) The following definitions shall apply under Paragraph (b)(4)(i) of this Section:

(A) "Rapid compliance" means that the person to whom the notice or order was issued took extraordinary measures to abate the violation in the shortest possible time and that abatement was achieved before the time set for abatement.

(B) "Normal compliance" means the person to whom the notice or order was issued abated the violation within the time given for abatement.

(iii) If the consideration of this criterion is impractical because of the length of the abatement period, the assessment may be made without considering this criterion and may be reassessed after the violation has been abated.

§ 723.14 Determination of amount of penalty.

The Office shall determine the amount of any civil penalty by converting the total number of points assigned under 30 CFR 723.13 to a dollar amount, according to the following schedule:

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

§ 723.15 Assessment of separate violations for each day.

(a) The Office may assess separately a civil penalty for each day from the date of issuance of the notice of violation or cessation order to the date set for abatement of the violation. In determining whether to make such an assessment, the Office shall consider the factors listed in 30 CFR 723.13 and may consider the extent to which the person to whom the notice or order was issued gained any economic benefit as a result of a failure to comply. For any violation which continues for two or more days and which is assigned more than 70 points under 30 CFR 723.13(b), the Office shall assess a civil penalty for a minimum of two separate days.

(b) In addition to the civil penalty provided for in paragraph (a), whenever a violation contained in a notice of violation or cessation order has not been abated within the abatement period set in the notice or order or as subsequently extended pursuant to section 521(a) of the Act, a civil penalty of not less than $750 shall be assessed for each day during which such failure to abate continues, except that:

(1)(i) If suspension of the abatement requirements of the notice or order is ordered in a temporary relief proceeding under section 525(c) of the Act, after a determination that the person to whom the notice or order was issued will suffer irreparable loss or damage from the application of the requirements, the period permitted for abatement shall not end until the date on which the Office of Hearing and Appeals issues a final order with respect to the violation in question; and

(ii) If the person to whom the notice or order was issued initiates review proceedings under section 526 of the Act with respect to the violation, in which the obligations to abate are suspended by the court pursuant to section 526(c) of the Act, the daily assessment of a penalty shall not be made for any period before entry of a final order by the court.

(2) Such penalty for the failure to abate a violation shall not be assessed for more than 30 days for such violation. If the permittee has not abated the violation within the 30-day period, the Office shall take appropriate action pursuant to sections 518(e), 518(f), 521(a)(4) or 521(c) of the Act within 30 days to ensure that abatement occurs or to ensure that there will not be a reoccurrence of the failure to abate.

§ 723.16 Waiver of use of formula to determine civil penalty.

(a) The Director, upon his own initiative or upon written request received within 15 days of issuance of a notice of violation or a cessation order, may waive the use of formula contained in 30 CFR 723.13 to set the civil penalty, if he or she determines that, taking into account exceptional factors present in the particular case, the penalty is demonstrably unjust. However, the Director shall not waive the use of the formula or reduce the proposed assessment on the basis of an argument that a reduction in the proposed penalty could be used to abate violations of the Act, this Chapter, any applicable program, or any condition of any permit or exploration approval. The basis for every waiver shall be fully explained and documented in the records of the case.

(b) If the Director waives the use of the formula, he or she shall use the criteria set forth in 30 CFR 723.13(b) to determine the appropriate penalty. When the Director has elected to waive the use of the formula, he or she shall give a written explanation of the basis for the assessment made to the person to whom the notice or order was issued.

§ 723.17 Procedures for assessment of civil penalties.

(a) Within 15 days of service of a notice or order, the person to whom it was issued may submit written information about the violation to the Office and to the inspector who issued the notice of violation or cessation order. The Office shall consider any information so submitted in determining the facts surrounding the violation and the amount of the penalty.

(b) The Office shall serve a copy of the proposed assessment and of the worksheet showing the computation of the proposed assessment on the person to whom the notice or order was issued, by certified mail, within 30 days of the issuance of the notice or order. If the mail is tendered at the address of that person set forth in the sign required under 30 CFR 715.12(b) or at any address at which that person is in fact located, and he or she refuses to accept delivery of or to collect such mail, the requirements of this paragraph shall be deemed to have been complied with upon such tender.

(c) Unless a conference has been requested, the Office shall review and reassess any penalty if necessary to consider facts which were not reasonably available on the date of issuance of the proposed assessment because of the length of the abatement period. The Office shall serve a copy of any such reassessment and of the worksheet showing the computation of the reassessment in the manner provided in paragraph (b) of this section, within 30 days after the date the violation is abated.

§ 723.18 Procedures for assessment conference.

(a) The Office shall arrange for a conference to review the proposed assessment or reassessment, upon written request of the person to whom the notice or order was issued, if the request is received within 15 days from the date the proposed assessment or reassessment is mailed.

(b)(1) The Office shall assign a conference officer to hold the assessment conference. The assessment conference shall not be governed by section 554 of Title 5 of the United States Code, regarding requirements for formal adjudicatory hearings. The assessment conference shall be held within 60 days from the date of issuance of the proposed assessment or the end of the abatement period, whichever is later.

(2) The Office shall post notice of the time and place of the conference at the regional, district or field office closest to the mine at least 5 days before the conference. Any person shall have a right to attend and participate in the conference.

(3) The conference officer shall consider all relevant information on the violation. Within 30 days after the conference is held, the conference officer shall either:

(i) Settle the issues, in which case a settlement agreement shall be prepared and signed by the conference officer on behalf of the Office and by the person assessed; or

(ii) Affirm, raise, lower, or vacate the penalty.

(4) An increase or reduction of a proposed civil penalty assessment of more than 25 percent and more than $500 shall not be final and binding on the Secretary, until approved by the Director or his designee.

(c) The conference officer shall promptly serve the person assessed with a notice of his or her action in the manner provided in 30 CFR 723.17(b) and shall include a worksheet if the penalty has been raised or lowered. The reasons for the conference officer's action shall be fully documented in the file.

(d)(1) If a settlement agreement is entered into, the person assessed will be deemed to have waived all rights to further review of the violation or penalty in question, except as otherwise expressly provided for in the settlement agreement. The settlement agreement shall contain a clause to this effect.

(2) If full payment of the amount specified in the settlement agreement is not received by the Office within 30 days after the date of signing, the Office may enforce the agreement or rescind it and proceed according to paragraph (b)(3)(ii) of this section within 30 days from the date of the rescission.

(e) The conference officer may terminate the conference when he determines that the issues cannot be resolved or that the person assessed is not diligently working toward resolution of the issues.

§ 723.19 Request for hearing.

(a) The person charged with the violation may contest the proposed penalty or the fact of the violation by submitting a petition and an amount equal to the proposed penalty or, if a conference has been held, the reassessed or affirmed penalty to the Office of Hearings and Appeals to be held in escrow as provided in paragraph (b) of this section within 30 days from receipt of the proposed assessment or reassessment or 15 days from the date of service of the conference officer's action, whichever is later. The fact of the violation may not be contested, if it has been decided in a review proceeding commenced under section 525 of the Act and 43 CFR Part 4.

(b) The Office of Hearings and Appeals shall transfer all funds submitted under paragraph (a) of this section to the Office, which shall hold them in escrow pending completion of the administrative and judicial review process, at which time it shall disburse them as provided in 30 CFR 723.20.

§ 723.20 Final assessment and payment of penalty.

(a) If the person to whom a notice of violation or cessation order is issued fails to request a hearing as provided in 30 CFR 723.19, the proposed assessment shall become a final order of the Secretary and the penalty assessed shall become due and payable upon expiration of the time allowed to request a hearing.

(b) If any party requests judicial review of a final order of the Secretary, the proposed penalty shall continue to be held in escrow until completion of the review. Otherwise, subject to Paragraph (c) of this Section, the escrowed funds shall be transferred to the Office in payment of the penalty, and the escrow shall end.

(c) If the final decision in the administrative and judicial review results in an order or eliminating the proposed penalty assessed under this part, the Office shall within 30 days of receipt of the order refund to the person assessed all or part of the escrowed account, with interest from the date of payment into escrow to the date of the refund at the rate of 6 percent or at the prevailing Department of the Treasury rate, whichever is greater.

(d) If the review results in an order increasing the penalty, the person to whom the notice or order was issued shall pay the difference to the Office within 15 days after the order is mailed to such person.

PART 843—FEDERAL ENFORCEMENT

3. Section 843.13 is revised by adding paragraph (f) as follows:

§843.13 Suspension or revocation of permits.

* * * * *

(f) Whenever a permittee fails to abate a violation contained in a notice of violation or a cessation order within the abatement period set in the notice or order or as subsequently extended, the Director shall review the permittee's history of violations to determine whether a pattern of violations exists pursuant to this section, and shall issue an order to show cause as appropriate pursuant to 30 CFR 845.15(b)(2).

PART 845—CIVIL PENALTIES

4. Section 845.15(b) is revised to read as follows:

§845.15 Assessment of separate violations for each day.

* * * * *

(b) In addition to the civil penalty provided for in Paragraph (a), whenever a violation contained in a notice of violation or cessation order has not been abated within the abatement period set in the notice or order or as subsequently extended pursuant to section 521(a) of the Act, a civil penalty of not less than $750 shall be assessed for each day during which such failure to abate continues, except that:

(1)(i) If suspension of the abatement requirements of the notice or order is ordered in a temporary relief proceeding under section 525(c) of the Act, after a determination that the person to whom the notice or order was issued will suffer irreparable loss or damage from the application of the requirements, the period permitted for abatement shall not end until the date on which the Office of Hearings and Appeals issues a final order with respect to the violation in question; and

(ii) If the person to whom the notice or order was issued initiates review proceedings under section 526 of the Act with respect to the violation, in which the obligations to abate are suspended by the court pursuant to section 526(c) of the Act, the daily assesment of a penalty shall not be made for any period before entry of a final order by the court;

(2) Such penalty for the failure to abate a violation shall not be assessed for more than 30 days for each such violation. If the permittee has not abated the violation within the 30-day period, the Office shall take appropriate action pursuant to sections 518(e), 518(f), 521(a)(4), or 521(c) of the Act within 30 days to ensure that abatement occurs or to ensure that there will not be a reoccurrence of the failure to abate.

(Surface Mining Control and Reclamation Act of 1977 (the "Act"), Sections 201, 501, 518, (30 U.S.C. 1211, 1251, 1268)

[FR Doc. 80-27918 Filed 9-3-80; 8:45 am]
BILLING CODE 4310-05-M

federal register

Thursday
September 4, 1980

Part VI

Department of Energy

Economic Regulatory Administration

Motor Gasoline Allocation; Adjustments and Downward Certification; Availability of Draft Regulatory Analyses

DEPARTMENT OF ENERGY

Economic Regulatory Administration

10 CFR Part 211

[Docket No. ERA-R-79-23C]

Motor Gasoline Allocation; Adjustments and Downward Certification

AGENCY: Economic Regulatory Administration, Department of Energy.

ACTION: Notice of availability of draft regulatory analysis.

SUMMARY: The Economic Regulatory Administration (ERA) of the Department of Energy has prepared for public comment a draft regulatory analysis of the proposals pending under the motor gasoline allocation program which would establish a downward certification procedure for jobbers and other wholesale purchaser-resellers. The draft analysis is set forth in the Appendix to this notice. Written comments are solicited on all aspects of the draft analysis.

DATE: Written comments by October 31, 1980.

ADDRESS: All written comments to: Economic Regulatory Administration, Office of Public Hearing Management, Docket No. ERA-R-79-23C, Room B-210, 2000 M Street, N.W., Washington, D.C. 20461.

FOR FURTHER INFORMATION CONTACT:

Cynthia Ford (Comment Procedures), Economic Regulatory Administration, Room B-210, 2000 M Street, N.W., Washington, D.C. 20461. (202) 653-3971.

William Webb (Office of Public Information), Economic Regulatory Administration, Room B-110, 2000 M Street, N.W., Washington, D.C. 20461. (202) 653-4055.

C. Eric Hager (Office of Regulatory Policy), Economic Regulatory Administration, Room 7202 2000 M Street, N.W., Washington, D.C. 20461. (202) 653-3974.

SUPPLEMENTARY INFORMATION: On November 30, 1979, ERA proposed for public comment alternative regulatory changes to establish a downward certification and adjustment procedure for wholesale purchaser-resellers of motor gasoline (44 FR 69962, December 5, 1979). Under the allocation program, a wholesale purchaser-reseller's entitlements are determined with reference to the firm's base period supply obligations. When a reseller's base period allocation obligations are increased by an ERA assignment or adjustment, the firm may adjust upward its allocation entitlements by certifying to its suppliers the corresponding increase in accordance with 10 CFR 211.13(C). However, when a reseller's obligations decrease because a relationship with a base period purchaser is terminated, there is no equivalent mandatory procedure to certify to its suppliers the corresponding decrease except where previous upward adjustments have been granted to the firm.

The downward certification proposals were designed to assure that a reseller's entitlements from suppliers match more closely the firm's actual obligations to purchasers. The changes proposed were intended to restore this balance and to resolve the distortions the absence of a downward adjustment is having on the program's effectiveness as a measure of actual supply conditions.

The November 30 notice of proposed rulemaking set forth several alternative methods of achieving this result, and a substantial number of written comments and extensive public testimony have been received. In general, jobbers and their representatives opposed adoption of any rule that would adjust downward reseller allocation entitlements to reflect reduced supply obligations.

After careful review of the issues raised in the comments, ERA decided not to adopt the principal proposal on the grounds that it might operate to divert supply from markets that have experienced no net reduction in demand (45 FR 28148, April 28, 1980). In order to provide opportunity for a more complete exploration of this and other issues, we stated our intent to prepare a regulatory analysis of the alternative proposals.

This is to give notice that a draft regulatory analysis has been prepared and is set forth in the Appendix to this notice.

In general, the findings of the draft analysis are consistent with the ERA's initial conclusion that the allocation program would operate more effectively if some form of downward certification requirement were adopted. The draft analysis assesses the costs and benefits of the alternative provisions and indicates our tentative conclusions on the merit of each. The analysis has also taken into account related aspects of the pending proposals to revise the motor gasoline allocation program set forth in a notice of proposed rulemaking issued on June 6, 1980 (45 FR 40078, June 12, 1980). In this respect, the interaction of each set of proposals is complex, and comment is invited on all aspects of their operation.

Written comments should be submitted by October 31, 1980, to the address indicated in the "Addresses" section of this notice. Comments should be identified on the outside envelope and on the document with the docket number and the designation: "Downward Certification Regulatory Analysis". Ten copies should be submitted.

Any information or data submitted which you consider to be confidential must be so identified and submitted in writing, one copy only. We reserve the right to determine the confidential status of such information or data and to treat it according to our determination.

No further action will be taken in this proceeding until the comments on the draft regulatory analysis have been received and evaluated.

Issued in Washington, D.C., August 26, 1980.

Hazel R. Rollins,

Administrator, Economic Regulatory Administration.

Appendix—Draft Regulatory Analysis Notice of Proposed Rulemaking Motor Gasoline Downward Certification

I. Introduction

a. *Purpose of Analysis.* The economic Regulatory Administration (ERA) of the Department of Energy (DOE) prepares regulatory analyses of proposed regulations which may either have a major impact on the general economy, individual industries, or geographic regions and levels of government, or may be significant in that they substantially affect public policy.[1] An analysis should present a review of the issues prompting the regulatory proposals and an evaluation of alternative regulatory and non-regulatory solutions.

In the Notice of Proposed Rulemaking issued November 30, 1979 entitled "Motor Gasoline Allocation; Adjustments and Downward Certification", it was determined that adoption of a certification procedure to supplement the existing provisions applicable to gasoline marketers does not require preparation of a regulatory analysis (44 FR 69962, December 5, 1979).

Upon review of the extensive public comment received and its further consideration, the ERA stated that would nonetheless prepare for public review an analysis of the pending alternative proposals (45 FR 28148, April 28, 1980). The analysis will examine the basis for and probable effects of the

[1] Executive Order 12044, "Improving Government Regulations" (43 F.R. 12661, March 23, 1978) and the Department of Energy's Implementing DOE Order 2030.1, "Procedures for the Development and Analysis of Regulations, Standards and Guidelines" (44 F.R. 1032, January 3, 1979).

alternative proposals with particular reference to their applicability to gasoline marketers.

b. *Scope of Analysis.* The gasoline allocation program is designed to alleviate the adverse effects of a supply shortfall at the wholesale level and indirectly thereby upon consumers. During those periods when a supplier has insufficient product to meet its purchasers' base period entitlements, the program recognizes certain priority activities and applies the necessary supply reductions equitably among a supplier's remaining customers. When supply is adequate, purchasers may obtain product from any supplier who has it to sell without risk of losing future allocation entitlements, provided this base period is not changed in the future.

Because the program governs all supplier purchaser relationships at the wholesale level, its operation depends upon firms determining among themselves the applicability of its provisions. As a matter of course, individual relationships may be reviewed by the ERA to consider requests for adjustments and assignments, to resolve disputes among firms, and to determine compliance with its provisions. In most respects, however, the program is self-operating.

The category of marketers to which the pending proposals and this analysis are most directly related include "jobbers" and other firms that fall within the regulatory term "wholesale purchaser-reseller". This term is defined in § 211.51 of the regulations to mean

> any firm which purchases, receives through transfer, or otherwise obtains (as by consignment) an allocated product and resells or otherwise transfers it to other purchasers without substantially changing its form.

The definition is intended to include marketers that purchase and resell or transfer product to their own retail facilities, the facilities of independent dealers, or commercial accounts.

While the DOE collects and has available significant data with respect to many features of the allocation program, little information is routinely collected specifically on the activities of wholesale purchaser-resellers. This analysis relies to a large extent on the limited program data available, the information and views provided in rulemaking and other proceedings, and generally available publications. The analysis is not based upon a specific data collection activity. However, the foregoing provide a reasonably reliable basis upon which indicators of probable qualitative effects can be identified.

II. Background

a. *Legislative Objectives.* The statutory authority for the motor gasoline allocation program is the Emergency Petroleum Allocation Act of 1973 (Pub. L. 93–159) as amended, which provides that the program to the maximum extent practicable shall provide for a number of broad objectives in § 4(b)(1) thereof, including

> preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;
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> * * * * *
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> equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;
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> * * * * *
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> economic efficiency; and
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> minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

The statute, which is scheduled to expire on September 30, 1981 directs that the program be designed and implemented in a manner that (i) meets the nation's priority needs, (ii) distributes remaining supplies equitably and (iii) does so in a manner that preserves the competitive viability of the independent sectors of the industry. The pending downward certification proposals are evaluated in light of these primary objectives.

b. *Current Regulatory Program*—1. *Supplier Purchaser Relationships.* In general, the regulatory program allocates product to historic purchasers with reference to purchases made during the base period year, November 1977 through October 1978. In a calendar month when supplies are adequate, a purchaser is entitled to receive from its historic suppliers the same volumes that it received during the corresponding month of the base period. Certain bulk purchaser customers engaged in specified priority uses are always entitled to receive their full base period volumes. Remaining purchasers' entitlements are subject to *pro rata* reductions during months for which supply is inadequate to meet all base period obligations. These reductions are made by application of an "allocation fraction."

Allocation entitlements of wholesale purchaser-resellers are determined with reference to each firm's obligations to its base period customers. When a reseller's base period allocation obligations are increased by an ERA assignment or adjustment, a reseller may adjust upward its allocation entitlements by certifying to its suppliers to corresponding increases in accordance with procedures set forth in the regulations. However, when a reseller's obligations decrease because a relationship with a base period purchaser is terminated, there is no equivalent mandatory procedure to certify to its suppliers the corresponding decrease except where previous upward adjustments have been granted to the firm.

2. *Surplus Product Rule.* In cases where supply for a month is in excess of a supplier's monthly allocation obligations, the supplier is deemed to have "surplus product" which certain large or "prime" suppliers are required to report to ERA. In such cases, the ERA can direct the supplier to distribute the product to specific purchasers, to retain the surplus in inventory, or to take other appropriate action. Firms not qualifying as "prime suppliers" need not report the volumes but are required to distribute them in accordance with the surplus product rules.

Unless otherwise directed by ERA, suppliers are required to offer surplus product to their classes of branded and non-branded independent marketer customers in the same proportion that the base period volumes of those classes bear to the base period volumes of all their purchasers. Having done this, a supplier may then distribute the product at its discretion. Suppliers with an allocation fraction of less than or equal to 1.0 may also have "underlifted" product which is that which remains when a base period purchaser fails to take its full allocation for a month. Underlifted product in such circumstances qualifies as surplus and must also be distributed in accordance with the surplus product rules.

3. *Closed Retail Outlets.* Under the current provisions, the product a marketer would have been required to allocate to a retail outlet that closed is required to be offered to its remaining customers either by increasing its allocation fraction if it is less than 1.0, or by distributing the volumes as surplus product.

With regard to closed retail outlets, § 211.106(d)(2) of the regulations provides

> Whenever an operator of a retail sales outlet goes out of business * * * the supplier of

that outlet shall, in calculating its allocation fraction, remove the amount of the allocation entitlement of that retail sales outlet from its supply obligation, unless the right to such allocation has transferred to a successor * * *

Thus, when a retail sales outlet is closed, the supplier must increase the volume made available to its remaining base period coustomers or distribute the product as surplus.

If a closed outlet had been operated by the reseller, it may request that ERA adjust upward the allocations to its remaining retail outlets. A supplier which operates two or more retail outlet's may also reassign up to 30 percent of the allocation entitlement of one retail outlet it operates to another which it operates without further notification to the ERA (§ 211.106(b)(3)(ii)).

4. *Existing Downward Certification Provision.* The only current provision that requires a firm to certify to its supplier a downward adjustment to correspond to reduced supply obligations is set forth in § 211.13(f). This section relates to provisions permitting a wholesale purchaser-reseller to certify to its supplier increased supply obligations as a result of ERA assignments and adjustments made pursuant to § 211.13(c). To obtain upward adjustments to reflect ERA assignments, § 211.13(f) requires the applicant to state that the additional volumes

shall be used only for the purpose stated in the application, shall not be diverted for other uses; and that if its needs decline, the purchaser shall file an amended application for a downward adjustment to its base period use.

In an interpretation of this provision, the DOE stated that the downward certification requirement applies only to the specific volumes for which a previous adjustment has been made and not to the overall supply obligations of the applicant or to categories of uses. *Nelson Oil Co.,* Interpretation 1978-24. Under this provision, the decreased supply obligations attributable to a closed station must be certified as a downward adjustment by a wholesale purchaser-reseller only if the volumes allocated to the closed outlet had previously been the subject of an upward adjustment.[2]

c. *Problems Under the Current Rules.* Since the inception of the allocation program in 1974, mid-level marketer expansion has been occurring at an apparent rate that may have been exaggerated by effects of the allocation regulations. During the period 1974 to 1978, the 28 largest refiners reported a decrease in the gasoline allocation shares of directly supplied retail outlets and reported significant increases for the jobber/chain retailer class of trade.[3] This trend was especially evident for the top eight refiners. In general, refiners have greatly increased the amount of product distributed through jobbers for supply to independent outlets and large consumers. Throughout 1979 and 1980, approximately 49 percent of all refiners' total supplies to independents were delivered through jobbers, up from 36 percent in 1972.[4] While a combination of influences may produce this phenomenon, dramatic shifts in market position during periods when many suppliers have been applying allocation fractions suggest that incentives created by the regulations may be contributing to this growth.

In this respect, ERA continued to receive anecdotal information that some marketers were engaged in manipulation of the adjustment provisions solely in an effort to expand market share. In one case, a refiner reported that a medium sized jobber with an allocation of approximately 600,000 gallons on January 1, 1975, was able by use of upward adjustment procedures to increase its allocation entitlement to more than 10 million gallons by July 31, 1979. The expansion of the jobber's allocation entitlement over the objection of the supplying refiner eventually resulted in reducing the amount supplied to the refiner's remaining base period purchasers to three percent of the volume supplied by the refiner at the point of delivery.

In general, all indicators available to DOE suggest that the market share of non-refiner wholesale purchaser-resellers has increased substantially during the existence of the allocation program. The ERA has not collected reliable data on the extent to which new assignments and upward adjustments are made to resellers. However, the means to receive increases on a relatively liberal basis are available to this class of firms, significant incentives exist to take advantage of these provisions, and extensive anecdotal accounts all point to a probable correlation between use of the upward adjustment provisions and the increases in market share evident for this group.

In addition, there have been indications that relatively large volumes of gasoline flowed out of the regulated distribution system during the gasoline shortfall that occurred in 1979. Since little reliable data on spot market transactions are available to DOE, conclusions on the extent of spot market activity and particularly the types of firms involved in such activity cannot be determined definitively. During this period, there were indications that large volumes of domestic gasoline were being sold in these unallocated markets. On the basis of this and other information, the ERA initiated a number of special investigations into possible violations of the regulations. In general, these investigative efforts have confirmed that abuses were occurring. In one case, a large marketer of gasoline closed more than 200 retail gasoline outlets, yet continued to receive in excess of 12 million gallons a month for which it effectively had no allocation obligation. In the course of this investigation, it was determined that most of this product was diverted to the spot market and possibly lost to the marketing area to which it had been originally allocated.

The current rules dictate specifically the manner in which product freed from lost business is to be allocated. Section 211.106(d)(2) requires suppliers in such cases to increase the allocable supply to remaining customers or to distribute the remaining product as surplus. Diverting such product to the spot market or otherwise disposing of it is a clear violation of the regulations.

In general, however, opportunities for identifying these violations do not arise on a consistent basis. A supplier's remaining customers usually cannot know whether other supplied outlets have been closed, whether the supplier has accounted for the volumes in calculating an allocation fraction or whether the supplier has complied with the surplus product rules. Furthermore, ERA cannot review each supplier purchaser relationship on a case by case basis to determine whether violations of this sort have occurred. A premise of the downward certification proposals is that with the aid of a mandatory notification requirement, a marketer's supplier is in a better position to monitor closely compliance with these procedures. A supplier, particularly during a shortage, will want to be sure that its reseller customers' allocation entitlements match closely their actual obligations. A supplier would be especially alert to a marketer's taking unusual advantage of

[2] In a recent court decision, *Shell Oil Co.* v. *Nelson Oil Co., Inc.,* No. 9-47 (TECA July 21, 1980), the Temporary Emergency Court of Appeals determined that circumstances other than station closings can also trigger the § 211.13(f) downward certification requirement.

[3] DOE, Office of Competition, *The State of Competition in Gasoline Marketing,* Part I, May 1980, p. 102.

[4] DOE, EIA *Petroleum Market Shares* "Report on Sales of Refined Petroleum Products."

provisions enabling it to increase its own entitlements by declaring itself a "willing supplier" for new business. A reluctant supplier would scrutinize carefully the upward adjustment request and have an incentive to insist that a downward certification be made where appropriate. In this respect, a downward certification procedure could provide refiners and other suppliers with a more effective means of assuring that a marketer's supply entitlements reflect actual supply obligations. However, whether such a notification procedure could be enforced in each and every situation remains to be seen.

The absence of a downward certification procedure can also contribute to distortions in the allocation fraction as a measure of actual supply conditions. Each month a supplier is required to offer to its historic purchasers a volume of gasoline equal to the volume purchased during the same month of the base period. When a supplier's total available supply is less than its total obligations, the firm must reduce on a *pro rata* basis the amount supplied to its non-priority purchaseers by the application of an allocation fraction. The numerator of the allocation fraction represents a supplier's allocable supply less obligations to priority use customers and state set-aside volumes. The denominator represents the supplier's base period obligations. If the allocation fraction is less than 1.0, all purchasers whose allocation level is subject to the fraction are offered only that portion of their base period volumes.

A low allocation fraction can reflect either a decrease in supply or an increase in obligations or both. The allocation program cannot increase the amount of product available to a refiner but does operate actively to effect increases and decreases in obligations. This can occur either as a result of the upward adjustment provisions available to firms through new station and interim assignment procedures or the limited downward certification procedure under § 211.13(f). Continuing increases in obligations from a relatively fixed level of allocable supply results in downward pressure on suppliers' allocation fractions. When decreased supply obligations through station closings or other shifts are not accounted for, the accuracy of the allocation fraction as a measure of actual supply conditions is distorted. This could be resulting in lower refiner allocation fractions and less product being available to independent retail dealers that are supplied directly by refiners.

III. Proposed Amendments

a. *Rulemaking History*. On July 15, 1979, ERA adopted, effective September 1, 1979, amendments to the allocation regulations which included a downward adjustment provision for wholesale purchaser-resellers whose supply obligations to retail sales outlets decreased (44 FR 42529, July 19, 1979).[5]

On August 22, 1979, the effective date of the downward certification procedure was deferred until October 1, 1979, and on September 11, 1979, the effective date was deferred again to the date of completion of the pending rulemaking proceedings (44 FR 54041, September 18, 1979). On November 30, 1979, a notice of proposed rulemaking was issued presenting several alternative downward certification proposals and soliciting further public comment (44 FR 69961, December 5, 1979).

Many refiners and others responding to the downward certification proposals contended that the allocation program was being distorted significantly because of the growing imbalance occurring between mid-level marketers' allocation entitlements and their actual supply obligations. Marketers opposed adoption of a downward certification requirement on the grounds that it would severely restrict their ability to respond to demand shifts occurring within their markets and would tend to move product away from the market area they serve. The mechanism under consideration for correction of this effect would have provided that a wholesale purchaser-reseller must adjust downward its base period use by the amount its supply obligations decrease when a retail sales outlet that it supplies goes out of business or otherwise reduces its allocation obligation. On April 21, 1980, ERA announced that it would not adopt the principal downward certification proposal and that the rulemaking proceeding would be continued pending preparation of this regulatory analysis (45 FR 28148, April 28, 1980).

b. *Alternatives Under Consideration*. The alternatives to the principal downward certification proposal described in the December 5, 1979 notice of proposed rulemaking were presented as follows:

The first would require downward adjustments only as a condition precedent to receiving an upward adjustment. Under this alternative, wholesale purchaser-resellers would not be required to adjust downward their base period uses when their supply obligations decrease except to the extent that they wish to certify upward adjustments to their suppliers.

The second would require downward adjustments when retail outlets close but would not require downward adjustments when a reseller is relieved of its obligation to supply wholesale purchaser-consumers or bulk purchaser customers.

The third would require certification of downward adjustments only when a supplier's base period obligations are assumed by another supplier in accordance with the regulations. To a varying extent, ERA requires applicants to account for the reduced obligation when its Regional Offices approve applications for such reassignments.

The fourth would require downward adjustments only for decreased obligations due to station closings that occurred subsequent to the end of the current base period.

The fifth would apply prospectively only from the date of the adoption of a final rule. Under this alternative, marketers would be required to certify to their suppliers downward adjustments for lost business occurring only in the future.

In connection with these alternatives, ERA stated that none are mutually exclusive, and that features from more than one alternative could be included in a final rule.

c. *Effective Date of Alternatives*. The pending proposals present for consideration several proposed effective dates. The principal proposal would have required resellers to certify downward adjustments for amounts that its supply obligations have decreased since the corresponding base period month of the period November 1977 through October 1978. This provision would have required wholesale purchaser-resellers to certify to their suppliers downward adjustments to correspond to all decreased obligations back to October 1978.

One alternative would apply to decreased obligations from station closings occurring prospectively only from the date of adoption of a final rule, thus requiring downward certification for decreased obligations occurring only in the future.

A significant portion of the comments received argued strongly against adoption of any of the alternative proposals on a retroactive basis. Many of the firms commenting opposed a retroactive application on the grounds that severe disruptions within many

[5] On July 19, 1979, a corrective amendment was adopted to include wholesale purchaser-consumers and bulk purchasers as categories of customers for which downward adjustments would be applicable and to clarify that the provision would have applied for decreased supply obligations occurring since the corresponding base period month (44 FR 43458, July 25, 1979).

markets would result, and that the additional administrative burdens imposed on many small firms would outweigh any advantages achieved. In addition, several opposed as inherently unfair, administrative action of any type adopted on a retroactive basis. Because, there is no doubt that a retroactive provision could affect a very large number of base period relationships, the administrative disruptions associated therewith would tend to be out of proportion to possible benefits. On this basis, a potential downward certification procedure is under consideration with respect to prospective application only.

IV Analysis of Alternatives

a. *Downward and Upward Certification Combined.* This alternative would require a marketer to certify to its supplier a downward adjustment only as a condition precedent to receiving an upward adjustment to meet increased supply obligations. This proposed alternative would effectively require a marketer to net out upward and downward adjustments to its allocation obligations. In a case where a marketer is relieved of a base period obligation because an outlet closes, no downward certification would be required except when the firm seeks an increase in its allocation entitlements to supply new business. Under this alternative an upward adjustment would be authorized only for volumes in excess of those no longer obligated to closed stations.

If a firm applied for an ERA assignment for a marketer to supply a new retail outlet at a level of 100,000 gallons per month, and the marketer had experienced a decrease in its supply obligation for a closed outlet of 75,000 gallons, upon receipt of the obligation to supply the new outlet with 100,000 gallons, the marketer would be permitted to certify an upward adjustment of only up to 25,000 gallons per month. If the marketer's lost business equaled 100,000 gallons per month, the new assignment would be made, but no upward adjustment would be granted.

For firms whose upward certification volumes were less than the volumes attributable to decreased supply obligations, no upward adjustment of allocation entitlements would be granted. In this latter example, however, the firm would not be required to certify to its supplier the incremental decrease in obligations to reflect the lost business. The available volumes would only be required to be offered to the firm's other base period purchasers in accordance with existing procedures.

This alternative differs somewhat from the currently effective downward certification provision in § 211.13(f) which requires a reduction in allocation entitlements that had been previously awarded with respect to a specific base period purchaser. The new proposed alternative would require a comparison of firm-wide increases and decreases in obligations without reference to specific purchaser.

1. *Effect on Marketers.* The proposed alternative would not impose upon marketers any affirmative requirement to report to suppliers decreased obligations excxept to the extent upward adjustments for new business are sought. Adoption of this alternative would tend to restrict the present ability of some resellers to increase market share by a combined pattern of applying for upward adjustments and distributing volumes freed from lost business to other purchasers. The alternative would serve to halt this practice with respect to future station closings and would effectively preserve resellers' base period allocation volumes as of the date of its adoption. Reductions in allocation entitlements would be effected only for the purpose of offsetting equivalent upward adjustments sought by a firm. This rule would tend to decrease the ability of jobbers to expand market share solely by manipulation of the allocation regulations.

2. *Effect on Supply.* The alternative would tend to reduce jobbers flexibility to shift volumes within markets and to divert product unlawfully to spot markets. During periods of ample gasoline availability, however, the impact of this provision on supply patterns would tend to be minimal.

Adoption of this proposed procedure would probably result in fewer new station applications because an applicant would be required to account for volumes attributable to closed stations or other lost business. By minimizing the incentive to apply for new station assignments, the rule would tend to reduce the erosion of existing station allocations from which new stations are often supplied and would tend to reduce administrative burdens generally.

If adopted, however, the alternative could also operate as a disincentive to convert outmoded outlets to more efficient operations in those instances where total lost business exceeded new station needs. For example, a firm may be reluctant to consolidate inefficient or unprofitable stations for fear of having to account for volumes it has redistributed from previously closed outlets. This could inhibit improvements in marketing patterns and tend to reduce a marketer's flexibility to respond to actual demand shifts.

The generalized effect the alternative may have upon product movement within markets is difficult to predict. On the one hand, unaccounted for volumes freed prior to the provision's effective date would continue to be effectively available for redustribution across markets. On the other, requiring downward certification when a firm attempts to expand its allocation base would tend to contain product within the firm's current distribution system. In cases where a marketer operates in more than one marketing region, the offering of freed product to all of the firm's base period purchasers could tend to shift some product among markets. However, this is the case presently, and this possible effect would represent no change.

Opponents of a downward certification requirement contend that jobbers would lose flexibility in closing stations for fear of reduced entitlements and that this could encourage maintenance of inefficient stations and lead to higher prices. It could also limit a marketer's ability to direct product to areas experiencing stronger demand, especially during a shortage. On this basis, it has been argued that an active spot market during a shortage is the "grease" that lubricates the allocation mechanism, by directing supply toward areas of most acute demand.

Adoption of a downward certification rule would increase administrative costs to marketers, suppliers, and the ERA. Further, it is argued, the imposition of the increased regulatory burdens in order to curb spot market activity would also contribute to inefficiency, since the level of spot market sales is small as a percentage of national sales. Additional administrative problems could arise under this rule where a firm applies for an upward adjustment and simultaneously certifies its downward adjustments. In such a case, there could be an incentive for a reluctant supplier to effect the downward adjustment immediately and stall the upward adjustment pending administrative approval by ERA. However, the proposed rule would not permit a supplier to act independently to adjust downward a purchaser's entitlements. A downward adjustment would be effected only as a limit on an authorized upward adjustment. In general effect, however, the alternative would to a large extent discourage apparent abuses without disrupting reseller positions within markets.

b. *Downward Certification for Closed Retail Outlets Only.* This alternative would require a firm to certify to its supplier downward adjustments of allocation entitlements to reflect volumes attributable to closed retail outlets, but not for decreased obligations to wholesale purchaser-consumers or bulk purchasers.

Adoption of this alternative proposal would require a downward certification procedure with respect to the major portion of the volumes governed by the allocation program's supplier purchaser provisions. The volumes supplied to wholesale purchaser-consumers and bulk purchasers tend to be a small percentage of most marketers' sales and would have the advantage of reducing administrative burdens for affected firms. Further, several comments were received to the effect that many bulk purchasers and end-user accounts, such as construction site operators or other short term purchsers, can and do change often, and administrative flexibility is desirable to accommodate these activities.

c. *Downward Adjustment for Supply Assumptions Only.* This alternative would require a firm to certify to its supplier a decrease in its supply obligation attributable to supplier substitution agreements approved by ERA under § 211.25 of the regulations. For example, if Jobber A enters into an agreement to assume Jobber B's base period obligation to supply retailer C, the proposal would require Jobber B to certify to its supplier a reduction in its allocation entitlements to reflect the reduced supply obligation to retailer C. This alternative would operate to assure that supply entitlements properly reflect supply obligations and would achieve the objective of reducing the amount of allocated product available to a firm having no corresponding supply obligation. This is currently a condition imposed by many ERA Regional Offices in approving these agreements and, to this extent, would have little new impact. If adopted in conjunction with the first alternative, the provision would assure that the affected volumes are properly accounted for under the program. Minimal impact on supply patterns would be anticipated under this alternative.

d. *Downward Certification and Pending Proposals to Increase Supplier Flexibility.* Under the current allocation regulations, a wholesale purchaser-reseller's actual supply obligations are reduced when one of its base period purchasers goes out of business. For such firms that wish to redistribute to their remaining customers the gasoline no longer supplied to closed outlets, the regulations permit applicants to petition ERA pursuant to § 211.106(c)(2)(i) for an appropriate adjustment. The principal downward certification provision would have modified the effect of this section by requiring that when a supplier reduced its supply obligation, its allocation entitlement would be decreased by an equivalent amount. Thus, unless the firm petitioned the ERA (which it could only do for its directly operated outlets), the wholesale purchaser-reseller would no longer have been able to keep the product within its distribution system for supply to its remaining customers.

The principal proposal no longer under consideration would have required a certification upon the closing of a retail sales outlet or other lost account. The volumes attributable to the lost business would be certified as reductions up the supply chain to the ultimate supplying refiner. The volumes so certified would then be included as an increase to the refiner's allocable supply for a month and effectively distributed on a *pro rata* basis to all the refiner's base period customers. The principal proposal, would have operated to spread the lost volumes attributable to a closed station across the marketing area of the supplying refiner. This is the effect currently in cases where a refiner operated outlet is closed.

This scheme was based upon an assumption that a closed service station is a good measure of decreased demand within a market. On the basis of the many public comments received, and further consideration, it appears that this assumption in many cases is unwarranted. For example, it has been suggested that many factors can contribute to station closings including changing economics of the outlet operator or owner of the real property upon which it is situated, and changes in demand patterns, demographics, competition, and marketing strategies of outlet operators and suppliers. More importantly, it has been pointed out that station closings often result from a firm's effort to consolidate its retail operations to promote increased marketing efficiencies and to enhance the profitability of its units. Employment of this strategy does not necessarily indicate reduced demand and may be appropriate as often in growth environments as not.

In light of the extensive comment received to this effect, ERA included within its general proposed revisions to the gasoline allocation program proposals that would grant suppliers more flexibility to shift volumes from lost accounts to remaining outlets (45 FR 20078, June 12, 1980).

Under the proposal, suppliers, including refiners, would be permitted to distribute the base period volumes of closed outlets among remaining outlets in any way they choose, provided they do not jeopardize the relative volumes allocable to their independently operated outlets. They would not be permitted to increase the total base period uses of company operated outlets, and such shifts could not be certified as increases in supply obligations.

As stated in the preamble to the June 12 gasoline allocation proposals, the supplier flexibility provisions appear to conflict with objectives of the pending downward certification proposals. In some respects, this may be true. To the extent that retail outlet closings were proposed as a measurement of decreased demand within a market, the two proposals conflict. To the extent that the objective of a downward certification procedure is to assure that a reseller's entitlements match as closely as possible the resellers' actual obligations, the two proposals do not conflict. If volumes are transferred from a closed outlet to a remaining outlet supplied by a firm under the proposed supplier flexibility provisions, the volumes would be included in the base period supply entitlements of the remaining outlets. No downward certification procedure would be necessary, because the supply entitlements of the wholesale purchaser-reseller would still be equivalent to its base period supply obligations. If volumes freed from closed accounts were not included in remaining outlets' base period volumes, they would be certified to suppliers as a downward adjustment to base period entitlements. This operation of the two sets of proposed provisions would be consistent and would tend to assure the accuracy of the allocation fraction as a measure of actual supply.

e. *No Action.* In its preparation of regulatory analyses, the ERA normally considers the costs and benefits of the always available alternative of taking no action. In light of the many implications involved in adopting some form of downward certification procedure, this alternative deserves full consideration. Jobbers and their representatives argued strenuously in favor of this course.

1. *Effect on Marketers.* Since its inception in 1974, the regulatory provisions have operated without any generally applicable requirement to provide for mandatory reductions in base period allocation entitlements to reflect lost business. The apparent effect of the absence of such a requirement in conjunction with the relatively

accessible means such firms have to increase allocations may have contributed to the growth of jobbers as a class. This result is consistent with the program's objective to preserve the independent marketing sector of the industry. An expanding independent marketing segment can operate to assure that competition achieves its goal of improving distribution of supplies and restraining price. This improving position of independent marketers can in part be traced to relatively favorable treatment of this group under the regulations.

However, the objective of the program to minimize interference with market mechanisms may be frustrated by the provisions that contribute to marketer growth beyond that which would be permitted by a free market. The present ability of a jobber to increase the supply it is allocated over the objection of the refiner producing the product would not be available without a regulatory program. In the context of a generally fixed amount of available supply, these increases are often made at the expense of existing retail outlets that have no comparable means of obtaining allocation increases. No action in this proceeding would continue the favorable treatment jobbers receive in this regard, and this could, over the long term, contribute to economic inefficiency. The adverse impacts on the independent retail segment of the market would also continue. By favoring one segment of the independent sector, the viability of another could be jeopardized.

2. *Effect on Supply.* Without a downward certification requirement it can be anticipated that jobbers and other marketers will continue to take advantage of the present liberal upward adjustment procedures to the detriment of competing firms. Failure to adopt a downward certification requirement could result in some illegal spot market activity during times when competing firms have insufficient product to supply base period customers. Further, the disadvantages associated with a distorted allocation fraction would also continue.

The separately proposed revisions to the allocation program could, if adopted, reduce the need for a downward certification procedure. First, the proposed restrictions on new station assignments should result in fewer volumes being diverted to jobbers in this manner. The proposed requirement that all suppliers be "willing" could reduce significantly jobbers' ability to receive increased allocations solely because of the regulations. In addition, the proposed modification that would enable existing retail outlets to obtain increases would encourage more efficient conversions and reduce new station applications, and thereby the increased allocations available to jobbers as a class.

No action taken with respect to a downward certification requirement would serve chiefly to provide a favorable environment for continued jobber expansion at the expense of the retail dealer and continue distortion of the allocation fraction. If the pending proposals (i) to place existing and new stations on the same basis for increases, (ii) to require that all suppliers be "willing" to authorize new assignments and adjustments, and (iii) to increase supplier flexibility are adopted the need for a downward certification provision would appear to be reduced.

V. Conclusion

The unintended regulatory effects that the alternative downward certification proposals are intended to resolve are real and continue today. The regulations have permitted jobbers to draw product away from competing segments of the marketing industry. Further, the continuing distortion of the allocation fraction should be corrected.

While it appears that there is a definite benefit to granting marketers some degree of flexibility to move product within their distribution systems, experience has shown that some abuses can and have occurred during periods of shortfall in gasoline supply. Adoption of a downward certification provision on a prospective basis as a condition to receiving an upward adjustment appears to be the most satisfactory alternative. It could resolve identified problems without the disruptive effects of a retroactive provision.

The downward certification proposal should be considered together with the pending proposed allocation revisions. The adoption of more restrictive standards for new station assignments, the proposed "willing" supplier provisions, and the increased supplier flexibility provisions could diminish the need for a downward certification rule.

[FR Doc. 80-27109 Filed 9-3-80; 8:45 am]
BILLING CODE 6450-01-M