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Presidential Documents

Title 3—

The President

Proclamation 4827 of March 20, 1981

Pan American Day and Pan American Week, 1981

By the President of the United States of America

A Proclamation

Since its first observance fifty years ago, Pan American Day has served as an annual reminder of the common ideals of the nations of this hemisphere, further strengthening our peoples' bonds.

Commitment to such common goals among nations is an example for the world. Such cooperation has as its first priority the resolution of differences through peaceful conciliation and arbitration. The Organization of American States has provided a valuable framework for such progress to be made.

Through increased awareness and mutual cooperation, the Pan American nations strive to promote peace and stability in the region, as well as economic, social and cultural development. Pan American Day commemorates the voluntary cooperation of our countries in achieving solidarity of purpose while maintaining individuality of culture and tradition.

On this Pan American Day of 1981, the people of the United States extend warm greetings to their neighbors in the Americas, and reaffirm their commitment to the spirit of solidarity, the ideals and purposes of the Inter-American system, and their active support of the Organization of American States.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim Tuesday, April 14, 1981, as Pan American Day, and the week beginning on April 12, 1981, as Pan American Week; and I urge the Governors of the fifty States, and the Governor of the Commonwealth of Puerto Rico, and officials of the other areas under the flag of the United States of America to honor these observances with appropriate activities and ceremonies.

IN WITNESS WHEREOF, I have hereunto set my hand this 20th day of March in the year of our Lord nineteen hundred eighty-one, and of the Independence of the United States of America the two hundred fifth.

Ronald Reagan

[FR Doc. 81-9252
Filed 3-24-81; 11:05 am]
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Presidential Documents

Proclamation 4828 of March 20, 1981

Cancer Control Month

By the President of the United States of America

A Proclamation

This year an estimated 805,000 Americans will be diagnosed as having cancer. About 134,000 cancer patients will die who might have been saved by earlier diagnosis and prompt treatment.

While cancer is often called the disease Americans fear most, it is also now one of the most manageable chronic diseases in our country. We are approaching the day when, through surgery, chemotherapy and radiotherapy, half of the most serious forms of cancer can be cured.

Although we still face an enormous struggle in treating this disease, we must reaffirm today our ultimate goal—the cure of all those struck by this dread disease.

In addition to improving treatment for cancer patients, we must also reduce the incidence of this disease. In view of increasing evidence that a majority of cancers are related to environment and life-style, the major effort of Federal research today is in these areas.

Vigorous cancer research, directed to both treatment and prevention, must continue. All of us look to the day when this disease has been eradicated as a major threat to American lives.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim the month of April 1981 as Cancer Control Month, and I invite the Governors of the States and the Commonwealth of Puerto Rico, and the appropriate officials of all other areas under the United States flag to issue similar proclamations.

To give emphasis to this serious problem and to encourage the determination of the American people to meet it, I also ask the medical and health professions, the communications industries, and all other interested persons and groups to unite during this appointed time in public reaffirmation of our Nation's abiding commitment to control cancer.

IN WITNESS WHEREOF, I have hereunto set my hand this 20th day of March in the year of our Lord nineteen hundred and eighty-one, and of the Independence of the United States of America the two hundred and fifth.

Ronald Reagan

Rules and Regulations

Federal Register
Vol. 46, No. 57
Wednesday, March 25, 1981

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.
The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each month.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 20

Environmental Radiation Protection Standards for Nuclear Power Operations

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission is amending its regulations to incorporate the existing Environmental Protection Agency requirement for certain uranium fuel cycle licensees to comply with the EPA's "Environmental Radiation Protection Standards for Nuclear Power Operations". These standards require certain uranium fuel cycle facilities to be operated such that releases of radioactive materials and resulting radiation doses to the public are below specified limits. The amendments also require licensees to submit reports to NRC when those standards have been or may be exceeded.

EFFECTIVE DATES: The effective dates for the existing requirement to comply with EPA's 40 CFR Part 190 are already specified in 40 CFR 190.12: December 1, 1979 for most operations; December 1, 1980 for uranium mills; and January 1, 1983 for discharges of krypton-85 and iodine-129. The effective date for these amendments to 10 CFR Part 20 is June 23, 1981.

FOR FURTHER INFORMATION CONTACT: Mr. John W. N. Hickey, Office of Standards Development, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555 (phone: (301) 443-5966).

SUPPLEMENTARY INFORMATION: The Nuclear Regulatory Commission (NRC) is amending its regulations in 10 CFR Part 20, "Standards for Protection Against Radiation," to incorporate the existing Environmental Protection Agency (EPA) requirement for compliance with 40 CFR Part 190, "Environmental Radiation Protection Standards for Nuclear Power Operations." The EPA published 40 CFR Part 190 on January 13, 1977 (42 FR 2858). In accordance with a Memorandum of Understanding between EPA and the former Atomic Energy Commission (38 FR 24936, September 11, 1973), NRC is responsible for enforcing the provisions of 40 CFR Part 190 for NRC licensees.

Title 40 CFR Part 190 requires certain uranium fuel cycle facilities to be operated so that releases of radioactive material and resulting radiation doses to the public are below specified limits. The effective dates for compliance are December 1, 1979 for most operations; December 1, 1980 for uranium mills; and January 1, 1983 for discharges of krypton-85 and iodine-129. The regulation provides that under certain circumstances variances may be granted by the regulatory agency responsible for enforcing 40 CFR Part 190.

The amendments to NRC regulations state that NRC licensees must comply with 40 CFR Part 190, and require licensees to submit reports to NRC when 40 CFR Part 190 limits have been or may be violated.

The NRC has submitted these amendments to the Comptroller General for such review as may be appropriate under the Federal Reports Act, as amended, 44 U.S.C. 3512. The date on which the reporting requirement of this rule becomes effective reflects inclusion of the 45-day period which that statute allows for such review (44 U.S.C. 3513(c)(2)).

As discussed in the notice of proposed rulemaking, the Commission has concluded that an environmental impact statement for the amendments is not required, because they will not significantly affect the quality of the human environment.

The amendments were published for public comment on April 17, 1980 (45 FR 26072), with comments requested by June 16, 1980. Timely comments were received from Northeast Utilities, Duke Power Company, Consumers Power Company, and the County of San Diego. The public comments are available for free inspection or copying for a fee at the NRC Public Document Room, 1717 H Street, Washington, D.C. 20555. No significant adverse comments or questions were received on the proposed amendments during the public comment period.[1] Therefore, they are being published in final form with only one minor change. Following is a discussion of the issues raised by the public comments.

1. One comment stated that the amendments were unnecessary because licensees are already required to comply with 40 CFR Part 190. The purpose of the amendments is to incorporate the existing 40 CFR Part 190 requirements into NRC regulations to make it more clear that compliance with 40 CFR Part 190 is required.

2. One comment stated that the requirements of 40 CFR Part 190 and 10 CFR Part 50 Appendix I should be combined, because both regulations relate to radioactive releases from nuclear power reactors. This is not practical because 40 CFR Part 190 also applies to fuel cycle facilities other than power reactors, and because the two regulations are not identical. However, whenever possible, the NRC staff is avoiding unnecessary duplicative requirements for reactors by combining release limits and reporting requirements for 40 CFR Part 190 with existing Appendix I requirements in individual licensees' technical specifications.

3. One comment expressed concern that 40 CFR Part 190 applied to combined radiation doses from all fuel

[1] In October, 1980 approximately four months after the comment period closed, several operators of uranium mills jointly filed later comments on this proposed rule. They basically requested the Commission to defer implementation of the NRC program to enforce Part 190 at uranium mills. Recognizing that their comments were late, these operators requested in the alternative that their filing be treated as a petition to rescind any NRC regulations imposing Part 190 requirements on uranium mills. In a separate action, the American Mining Congress also moved the Commission in October, 1980 to stay implementation and enforcement of Part 190 at NRC licensed uranium mills. The Commission is currently considering these filings. However, the issuance of these amendments as a final rule needs not be delayed. For the most part, these amendments simply incorporate into 10 CFR Part 20 the NRC's already existing responsibility to enforce 40 CFR Part 190 at fuel cycle facilities including uranium mills. Issuance of these amendments as a final rule does not modify that responsibility. Thus, because these amendments do not change the status quo regarding the Commission's authority, they can be issued before the Commission reaches a decision on pending requests to delay enforcement of Part 190.

cycle facilities, making it difficult to determine compliance. EPA addressed this issue when 40 CFR Part 190 was published. EPA stated: "* * * in the vast majority of situations, the sum of all reasonably postulable contributions from sources other than the immediate site will be small compared to these standards and should be ignored in assessing compliance" (42 FR 2858, January 13, 1977).

4. One comment pointed out that 40 CFR Part 190 allows for licensees to obtain variances to exceed 40 CFR Part 190 limits under temporary and unusual conditions, and requested NRC to specify procedures for obtaining such variances. Because variances will be considered only in unusual cases, it is preferable to treat each case on an individual basis. This is consistent with existing NRC regulations, which do not specify procedures for obtaining variances to exceed regulatory limits. Rather, 10 CFR § 20.501 states, "The Commission may, upon application by any licensee or upon its own initiative, grant such exemptions from the requirements of the regulations in this part as it determines are authorized by law and will not result in undue hazard to life or property."

One minor clarifying change related to variances was made to the proposed rule. When a licensee submits to NRC a report of excessive radioactive releases, the description of corrective steps taken or planned shall include the schedule for achieving conformance with 40 CFR Part 190 and associated license conditions. This is consistent with 40 CFR 190.11, which requires that a regulatory agency granting a variance should make public the schedule for achieving conformance with 40 CFR Part 190.

5. One comment stated that licensees should have 60 days to report violations of 40 CFR Part 190 to NRC, rather than the 30 days specified in the proposed rule. The reason given was that licensees need more time to perform calculations associated with assessing compliance. The NRC staff has concluded that the 30-day requirement is reasonable. Specific license conditions which implement this requirement for individual facilities will allow reasonable time to gather data and perform dose calculations as appropriate.

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and section 553 of title 5 of the United States Code, the following amendments are published as a document subject to codification.

PART 20—STANDARDS FOR PROTECTION AGAINST RADIATION

1. A new paragraph (c) is added to § 20.105 to read as follows:

§ 20.105 Permissible levels of radiation in unrestricted areas.

* * * * *

(c) In addition to other requirements of this part, licensees engaged in uranium fuel cycle operations subject to the provisions of 40 CFR Part 190, "Environmental Radiation Protection Standards for Nuclear Power Operations," shall comply with that part.

2. Paragraph (f) of § 20.106 is revised, and a new paragraph (g) is added, to read as follows:

§ 20.106 Radioactivity in effluents to unrestricted areas.

* * * * *

(f) The provisions of paragraphs (a) through (e) of this section do not apply to disposal of radioactive material into sanitary sewerage systems, which is governed by § 20.303.

(g) In addition to other requirements of this part, licensees engaged in uranium fuel cycle operations subject to the provisions of 40 CFR Part 190, "Environmental Radiation Protection Standard for Nuclear Power Operations," shall comply with that part.

3. Paragraph (b) of § 20.405 is revised, and a new paragraph (c) is added, to read as follows:

§ 20.405 Reports of overexposures and excessive levels and concentrations.

* * * * *

(b) Any report filed with the Commission pursuant to paragraph (a) of this section shall include for each individual exposed the name, social security number, and date of birth, and an estimate of the individual's exposure. The report shall be prepared so that this information is stated in a separate part of the report.

(c) In addition to any notification required by § 20.403, each licensee shall make a report in writing within 30 days to the appropriate NRC Regional Office listed in Appendix D, with a copy to the Director of Inspection and Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, of levels of radiation or releases of radioactive material in excess of limits specified by 40 CFR Part 190, "Environmental Radiation Protection Standards for Nuclear Power Operations," or in excess of license conditions related to compliance with 40 CFR Part 190. Each report required under this paragraph shall describe the extent of exposure of individuals to radiation or to radioactive material; levels of radiation and concentrations of radioactive material involved; the cause of the exposure, levels or concentrations; and corrective steps taken or planned to assure against a recurrence, including the schedule for achieving conformance with 40 CFR Part 190 and associated license conditions.

* * * * *

(Section 161b., 161o., Pub. L. 83-703, 68 Stat. 948, 950 (42 U.S.C. 2201); Sec. 201, as amended, Pub. L. 93-438, 88 Stat. 1243, Pub. L. 94-79, 89 Stat. 413, (42 U.S.C. 5841); Memorandum of Understanding between the Environmental Protection Agency and the Atomic Energy Commission, August 1973, 38 FR 24936, September 11, 1973)

Dated at Washington, D.C., this 17th day of March, 1981.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission

[FR Doc. 81-8640 Filed 3-24-81; 8:45 am]

BILLING CODE 7590-01-M

SMALL BUSINESS ADMINISTRATION

13 CFR Part 123

[Rev. 9, Amt. 17]

Disaster Loans; Changes in Eligibility

AGENCY: Small Business Administration.

ACTION: Final rule.

SUMMARY: In recognition of severe funding limitations in the face of unprecedented demand for drought disaster assistance, changes in eligibility are necessary to assure the continuing availability of recovery assistance to all disaster victims. Due to the emergency nature of these changes, they will become effective March 19, 1981, for disaster loans approved on or after that date. The changes affect the rules for disaster declarations and will reduce the amounts of physical disaster loans (other than home loans) to not more than 60% of verified loss. Economic injury loans will not exceed $100,000. Business disaster loans will be made only to concerns unable to obtain the financial assistance from their own or their principals' resources or credit.

EFFECTIVE DATE: March 19, 1981.

FOR FURTHER INFORMATION CONTACT: Questions may be addressed to: Charles R. Hertzberg, Acting Director, Disaster Operations, Small Business Administration, 1441 L Street, N.W., Washington, D.C. 20416, [202] 653-6574.

SUPPLEMENTARY INFORMATION: The drought catastrophes of the past summer have placed a severe strain on funds available for disaster assistance. In

addition, the critical national economic and fiscal circumstances preclude supplemental appropriations. The President has therefore directed that SBA adopt policies, forthwith, intended to ensure that SBA's Disaster Loan Fund operate within its total budgetary resources of $2.379 billion for the entire 1981 fiscal year. For these reasons, SBA avails itself of its authority pursuant to § 123.0(a) of its Disaster Loan regulation, 12 CFR 123.0(a), to change without advance notice certain regulations affecting disaster business loans. The Acting Administrator has determined that the need to resume Disaster Loan Assistance immediately to eligible persons in a rational and equitable way within the Small Business Administration's limited resources presents a circumstance contemplated by 13 CFR 101.9 and 123.0(a), thus rendering impracticable and contrary to the public interest any delay in the effectuation of these amendments. The rules for disaster home loans remain unchanged.

The amended regulations provide that disaster declarations will be made by SBA if at least 25 homes and/or businesses have suffered uninsured losses of at least 40% of their estimated fair replacement value, or at least 3 businesses have been damaged to the same extent and at least a quarter of the workforce in the community would be unemployed for at least 90 days as a result of such damage. The provision for a disaster declaration, based on 200 victims who have suffered any damage, is repealed.

No loan will be approved where SBA determines that the requested assistance is available to the damaged business either through the resources or the personal credit of the applicant concern or through its principals, as provided in 13 CFR 120.2(a)(2).

Physical disaster loan amounts will not exceed 60% of the verified loss suffered by a business concern. (It may be necessary, to insure repayment ability, that the remaining 40% will be required from other sources.) Economic injury disaster loans [Sec. 7(b)(2) of the Small Business Act, as amended (15 USC § 636)] will not be subject to the 60% limit but may not exceed $100,000.

The emergency nature of the circumstances surrounding the promulgation of these amendments makes public participation in this rulemaking procedure impractical and contrary to the public interest. SBA is publishing the rule as a final rule at this time, and is not providing an opportunity for public comment, in reliance on section 553(a)(2) of the Administrative Procedure Act ("APA"), 5 U.S.C. 553(a)(2) which provides that matters relating to loans, contracts and benefits are exempted from the public participation provisions of the Act. See also § 101.9 of SBA regulations, 13 CFR 101.9. In view of the APA exemption, no regulatory flexibility analysis is required by Pub. L. 96–354, 5 U.S.C. 603 and 604.

Finally, in accordance with section 8(a)(1) of Executive Order 12291, we are presently preparing and will transmit to the Director of the Office of Management and Budget as soon as practicable, a Regulatory Impact Analysis for these amendments.

Accordingly, and pursuant to the authority of section 5(b)(6) of the Small Business Act, as amended, 15 U.S.C. 634(b)(5), Part 123, Chapter I of Title 13 of the Code of Federal Regulations is amended as follows:

1. Section 123.1(a)(2) is revised to read as follows:

§ 123.1 General.

(a) *Disaster loan authority.* * * *

(2) Minimum damage requirements generally required for a declaration. A physical disaster declaration by the Administrator of SBA is based solely on physical property damage to items such as buildings, machinery, equipment, inventory, homes and the like of such an extent as to warrant such a declaration. The Administrator of SBA has no legal authority to make any physical disaster declaration based solely on the fact that economic injury has been incurred. The minimum amount of damage that SBA usually requires before making a physical disaster declaration is (i) At least 25 homes or 25 businesses, or a combination of at least 25 homes and businesses, in any county or other political subdivision that have sustained uninsured losses of at least forty (40) percent or more of their estimated fair replacement value. (Note: a business activity being conducted over several contiguous parcels of property, such as all growing crops in contiguous fields, is considered a single operation) or (ii) At least three businesses have sustained uninsured losses of at least forty (40) percent or more of their estimated fair replacement value and, as a result, 25 percent of the work force in the community would be unemployed for at least 90 days as a direct result of the physical damage.

* * * * *

§ 123.3 [Amended]

2. Section 123.3(a)(1) is revised to read as follows:

(a) *Physical-loss disaster assistance.* (1) The purpose of these loans is to restore a victim's home or homes (including a mobile home used as a residence of the applicant) or business property as nearly as possible to predisaster condition. Such business loans shall be made to the extent that the required financial assistance is not otherwise available from private sources, see § 120.2(a)(2) of this Chapter. A loan to an individual may be used to repair or replace damaged or lost furniture and other household belongings or personal effects, except for irreplaceable or extraordinarily expensive items. Funds may be used to repair or replace destroyed or damaged inventory, machinery, or equipment. If the disaster victim elects to construct a new home or new business facilities on a different site, the loan may be used for such purpose. However, any such loan shall not exceed the estimated cost of restoring or replacing the damaged or destroyed property. SBA's lien position shall be at least as strong as it would have been if the victim had restored in the original location; and loans to relocate a 1 to 4 family residential structure will be subject to the Real Estate Settlement Procedures Act of 1974.

3. Section 123.3(a)(2)(i) is revised to read:

(a) *Physical—less disaster assistance.* * * *

(2) *Refinancing.* * * *

(i) the property suffered uninsured damage of 30 percent or more of the market value at the time of the disaster, and * * *.

4. Section 123.3(b) is revised to read as follows:

* * * * *

(b) *Substantial economic injury assistance.* The purpose of these loans is solely to provide relief to small business concerns for substantial economic injury sustained as a result of a major or natural disaster declared by the President or Secretary of Agriculture, or SBA declared physical disaster. Personal and/or business resources must be used by the applicant to the greatest extent feasible to alleviate the injury incurred, see § 120.2(a)(2) of this Chapter. Loans may be used for working capital and to pay financial obligations which the borrower would have been able to pay had it not been for the loss of revenue resulting from the disaster. Unrealized net profits or a drop in sales not disaster-related may not be considered in arriving at the amount of injury incurred. No funds may be authorized which would provide for the payment of any dividends, distributions, bonuses, or for disbursements to owners, partners, officers, or stockholders not directly related to the performance of services.

5. Section 123.3(m)(2) is revised to read as follows:

* * * * *

(m) *Economic dislocation loan assistance.* * * *

(2) Refinancing of existing debt is permissible if such refinancing does not reduce the exposure of any other lender. Thus, refinancing is limited to debts owed to commercial lenders as defined in § 123.1(c)(2) who will participate with SBA in a guaranteed or immediate participation loan at least retaining their prior exposure, but in no event less than 10 percent.

§ 123.5 [Amended]

6. Section 123.5(a) is revised to read as follows:

(a) Physical disaster loans to businesses shall not exceed sixty (60) percent of the actual physical loss resulting from the disaster [except as permitted by §§ 123.3(a)(2) and 123.3(h)] and shall not [except for those described in § 123.3(h)] exceed $500,000 for SBA's share in the aggregate for any one disaster. Economic injury disaster loans [described in § 123.3(b)] shall not exceed the amount of economic injury and are subject to a maximum of $100,000. Economic injury loans under § 123.3 (c) through (l) are not subject to the $100,000 maximum.

* * * * *

7. Section 123.5(a)(1) is removed.

8. Section 123.5(a) (2) through (5) are hereby renumbered § 123.5(a) (1) through (4).

(Catalog of Federal Domestic Assistance Programs Nos. 59.002 (Economic Injury Disaster Loans) and 59.008 (Physical Disaster Loans))

Dated: March 19, 1981.

Roger H. Jones,

Acting Administrator.

[FR Doc. 81-9000 Filed 3-24-81; 8:45 am]

BILLING CODE 8025-01-M

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 15, 16, 17, 18 and 21

Reporting Open Positions, Deliveries and Exchanges of Futures for Physicals

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission ("Commission") is amending Parts 15–18 and 21 of its regulations pertaining to reporting requirements for contract markets, futures commission merchants (FCMs), foreign brokers and large traders. The amendments to Part 17 will require FCMs and foreign brokers to report the number of exchanges of futures for physicals (EFPs) and delivery notices issued or stopped against open futures positions in accounts which are being reported to the Commission. These amendments will allow the Commission to obtain more complete and timely surveillance information concerning EFPs and deliveries.

The Commission is also effecting amendments to its reporting and publication requirements which will enable the Commission to obtain open interest data from all contract markets and futures position data from all FCMs, foreign brokers and large traders which are determined exclusive of delivery notices issued or received. This action should simplify both bookkeeping procedures for FCMs and clearing members and those procedures which the Commission utilizes in its market surveillance program.

EFFECTIVE DATE: May 15, 1981.

FOR FURTHER INFORMATION CONTACT: Lamont L. Reese, Division of Economics and Education, Commodity Futures Trading Commission, 2033 K Street, N.W., Washington, D.C. 20581, Telephone (202) 254–3310.

SUPPLEMENTARY INFORMATION: On August 27, 1980, the Commission published for public comment[1] the following proposed amendments to its reporting requirements:

1. Amendments to Part 17 of the Commission's regulations to require FCMs and foreign brokers to report the number of EFPs and the number of delivery notices issued and stopped for individual accounts which are reported to the Commission; and

2. Amendments to Parts 15–18 and 21 of the Commission's regulations which would require contract markets, large traders, FCMs and foreign brokers to report open interest and open positions exclusive of futures contracts against which delivery notices have been issued or stopped.

In addition to these specific proposals, the Commission also sought public comment on issues concerning the practice of allowing traders to hold contracts representing long and short positions in the same future of the same commodity, whether such positions should be included in published open figures and the extent to which such practices have caused problems.[2]

[1] 45 FR 57141.

[2] In the August 27, 1980, **Federal Register** release, the Commission also published a proposal which would have required exchanges to collect and process large trader information similar to that which the Commission obtains from FCMs and foreign brokers. The Commission is continuing its consideration of that part of its proposal.

FCM and Foreign Broker Reporting of EFP and Delivery Information

The Commission routinely obtains EFP and delivery information from individual traders on the series '03 report. However, as the Commission previously noted, the information concerning deliveries reported by traders who are not located in a city in which the Commission maintains an office, is generally not received in sufficient time to permit the Commission to adjust its surveillance to a fluid and fast changing market situation.[3] In addition, under Commission Rule 18.07,[4] traders located outside of the United States are not required to routinely file series '03 reports for any commodity regulated under the Act but not specifically set forth in Section 2(a) of the Commodity Exchange Act prior to the enactment of the Commodity Futures Trading Commission Act of 1974.

Thus, because '03 reports are neither timely nor complete, it has been necessary for Commission staff to contact FCMs on a routine basis in order to determine whether certain accounts have issued or stopped delivery notices or exchanged futures for physicals. Since it is at best difficult and time consuming to attempt to gain an accurate picture of the liquidation of a maturing future in this manner, the Commission proposed to make the filing of EFP and delivery information a routine requirement for FCMs and foreign brokers. In addition, the Commission noted that this requirement would be necessary if in the future it determined to eliminate the routine filing of series '03 reports by large traders.[5]

No FCMs commented on this proposed rule. Other commentators stated that they perceived no advantage to the adoption of such a requirement, since the Commission currently receives daily information on EFPs and deliveries by clearing member FCMs from each contract market. These commentators suggested that the Commission obtain

[3] Under Rule 18.03, 17 CFR § 18.03 (1980), if a reporting trader is located in a city in which the Commission maintains an office, reports must be filed with such office on the business day following the day covered by the report. If the reporting trader is located elsewhere, reports are transmitted by mail, postmarked not later than midnight of the day covered by the report. Depending upon the speed of the postal service, this information is received by the Commission from a substantial number of traders three or four days after the trading day for which the report is filed. See 45 FR 57143 (August 27, 1980).

[4] 17 CFR § 18.07 (1980).

[5] See 45 FR 57143–44 (August 27, 1980).

information as necessary on individual traders by directly contacting FCMs.

The Commission disagrees with these comments. Those methods recommended by commentators for obtaining EFP and delivery information correspond generally to the manner in which the Commission presently obtains information. As noted above, this method is lacking in several respects. Moreover, since adoption of this rule amendment may in the future allow the Commission to reduce the reporting burden on the trading public by eliminating the routine filing of series '03 reports, the Commission has determined to adopt its amendments as proposed.

Positions Against Which Delivery Notices Have Been Issued or Stopped

Practices of contract markets, FCMs and traders in determining open interest vary according to whether a position against which delivery notices which have been issued by the clearing organization of a contract market or stopped by traders are open or closed for reporting purposes. Varying practices in this regard are due to the fact that contract markets, FCMs and foreign brokers which were regulated by the Commission's predecessor agency, the Commodity Exchange Authority (CEA), prior to the enactment of the Commodity Futures Trading Act of 1974[6] were instructed to consider futures positions open until delivery occurred. Contract markets which came under regulation after enactment of the Commodity Futures Trading Commission Act of 1974, however, generally report and publish open interest figures net of delivery notices issued. Several exchanges had requested that the Commission reconsider CEA's views on this issue.

The Commission has carefully considered this matter and determined that the present disparity in reporting practices has resulted in unwarranted costs for FCMs. For example, several FCMs have commented that the existing reporting requirements have forced them to keep two sets of books—one for clearing organization procedures, another for Commission reporting purposes. Lack of consistency among clearing organizations has further complicated the task of bookkeeping for those FCMs which are members of different exchanges. Further, certain reporting traders who commented expressed the view that it was burdensome to report positions against which delivery notices have been issued or stopped, particularly since, in certain commodities, as many as 75 days may transpire between the time a notice is issued and delivery occurs.[7]

The Commission has determined it desirable that open interest and open position information be determined in the same manner. This approach would eliminate the Commission's current practice of manually adjusting data before it is published or used for market surveillance purposes. Further, the Commission has noted its need for timely data.[8] In this respect, if persons who are required to report do not reduce positions until delivery day, the reporting of important surveillance information is delayed.

In order to ameliorate the above problems, the Commission proposed amendments to its reporting requirements which would standardize the manner in which open interest and open positions are determined with respect to delivery notices issued and stopped. In particular it proposed that for reporting purposes, open interest and open positions be reduced when a delivery notice is issued by the clearinghouse of a contract market or stopped by a trader.[9]

Although no commentators opposed the proposals to standardize the manner in which open interest and open positions are determined, several commentators noted that standardizafion should not be an end in itself. One commentator suggested that requirements and circumstances peculiar to various markets may dictate the adoption of divergent procedures. Other commentators, however, noted the benefits of such standardized procedures with respect to the bookkeeping procedures for FCMs and clearing members. The Commission has determined that considerable benefits may accrue from standardization of the manner in which open interest is determined not only by end users of the data, such as the Commission, but also by those who initially provide the data to the exchanges, namely their members. Accordingly, the Commission is adopting its amendments to the reporting requirements as proposed.

Traders Long and Short the Same Future of a Commodity

The Commission has also requested comment on the practice of traders holding long and short open futures positions in the same future of a commodity. The Commission noted that this practice has resulted in overstatements of published open interest figures and questioned whether this practice served any purpose. The Commission requested comment concerning any problems which may have resulted from this practice.[10]

No comments were received that would indicate problems were posed by current practices in this area. In addition, commentators offered several examples of potential benefits which could result from this practice. Accordingly, the Commission has determined it will take no further action concerning this question until such time as problems are identified that would warrant reconsideration of the issue.

The Commission has determined that the provisions of the Regulatory Flexibility Act, Pub. L. 96-354, 94 Stat. 1164 *et seq.*, do not apply to this rulemaking proceeding. See Section 4 of the Regulatory Flexibility Act, 94 Stat. 1170.

In consideration of the foregoing and pursuant to its authority under Section 4g, 4i, 5(d), and 8a(5) of the Commodity Exchange Act, 7 U.S.C., §§ 6g, 6i, 7(d) and 12a(5) (1976), the Commission hereby amends Parts 15, 16, 17, 18 and 21, of Chapter I of Title 17 of the Code of Federal Regulations as follows:

PART 15—REPORTS—GENERAL PROVISIONS

1. Section 15.00 is amended by revising paragraph (b) as follows:

§ 15.00 Definition of terms used in Parts 15 to 21 of this chapter.

* * * * *

(b) "Reportable position" means:

(1) Any open contract position in any one future of any commodity on any one contract market, excluding positions against which notices of delivery have been stopped by a trader or issued by the clearing organization of a contract market, which at the close of the market on any business day, equals or exceeds the quantity specified below for reporting purposes for the particular commodity:

(i) For the purposes of reports required by Part 17 and § 18.04, the quantity specified in § 15.03(a).

(ii) For the purposes of reports required by § 18.00, the quantities specified in § 15.03(c).

(2) For the purposes of reports required by Part 19 any open contract position in any one future or all futures combined, either gross long or gross short, of any commodity on any one contract market, excluding positions against which notices of delivery have been stopped by a trader or issued by the clearing organization of a contract

[6] 88 Stat. 1839, *et. seq.*

[7] 45 FR 57141, 57145.

[8] *Ibid.*, at 57143.

[9] *Ibid.*, at 57147.

[10] *Ibid.* at 57146.

market which, at the close of the market on the last business day of the week, equals or exceeds the quantity fixed in § 15.03(b) for reporting purposes for the particular commodity.

* * * * *

PART 16—REPORTS BY CONTRACT MARKETS

2. Section 16.00 is amended by revising paragraphs (a) and (e) as follows:

§ 16.00 Information to be furnished by contract markets.

* * * * *

(a) The total of all long open contracts and the total of all short open contracts carried at the end of the day covered by the report, excluding the number of contracts against which delivery notices have been stopped or against which delivery notices have been issued by the clearing organization of the contract market.

* * * * *

(e) The quantity of the commodity for which delivery notices have been issued by the clearing organization of the contract market and the quantity for which notices have been stopped during the day covered by the report.

3. Section 16.02 is amended by revising paragraphs (c) and (d) as follows:

§ 16.02 Publication of volume of trading and open contracts.

* * * * *

(c) The total gross open contracts excluding contracts against which delivery notices have been stopped.

(d) Open contracts against which delivery notices have been stopped on the day for which publication is made.

* * * * *

PART 17—REPORTS BY FUTURES COMMISSION MERCHANTS AND FOREIGN BROKERS

4. Section 17.00 is amended by revising paragraph (a) in its entirety as follows:

§ 17.00 Information to be furnished by futures commission merchants and foreign brokers.

(a) Special Accounts—Reportable Positions and Delivery Notices. (1) Each futures commission merchant and each foreign broker, except a foreign broker who carries all accounts on a fully disclosed basis with a registered futures commission merchant, shall submit a report to the Commission for each business day with respect to all Special Accounts, including house accounts, carried by futures commission merchant or foreign broker. Such report shall be made on the appropriate series '01 form and shall show each reportable position, separately for each contract market and for each future, in such account as of the close of the market on the day covered by the report. In addition, for each Special Account, for the day covered by the report, a futures commission merchant or foreign broker shall show, separately for each contract market and for each future in the commodity for which a report is filed, the quantity of exchanges of futures for physicals and the number of delivery notices issued for the account by the clearing organization of a contract market and the number stopped by the account.

(2) A report covering the first day upon which a Special Account shows a reportable position in a particular future shall also show for the preceding business day:

(i) The position in such future account;

(ii) Exchanges of futures for physicals for the account;

(iii) Delivery notices for such future issued for the account by the clearing organization of the contract market on which delivery will occur; and

(iv) Delivery notices for such future stopped by the account.

(3) A report showing the information specified in paragraphs (a)(2)(i)–(iv) of this section shall also be filed covering the first day when any account theretofore in Special Account status is no longer in such status.

* * * * *

PART 18—REPORTS BY TRADERS

5. Section 18.00 is amended by revising the introductory text, and paragraphs (a) and (c) as follows:

§ 18.00 Information to be furnished by traders.

Every trader who holds or controls a reportable position shall submit reports to the Commission. A report shall be filed for the first day on which such trader acquires a reportable position, for each day thereafter on which he has transactions in any future of each commodity on any contract market and for the first day on which he no longer holds or controls a reportable position. In addition, a report shall be filed for the day on which delivery notices are issued by the clearing organization of a contract market against short futures positions of the trader in the commodity in which the trader is reportable and for the day on which the trader stops delivery notices against long futures positions in such commodity. Each such report shall be prepared on the appropriate series '03 form, on a separate sheet for each commodity, and shall show for the day covered by the report the following information, separately for each future and for each contract market:

(a) *Open contracts.* The quantity of all open contracts, regardless of size (except those contracts against which delivery notices have been stopped or against which delivery notices have been issued by the clearing organization of the contract market upon which delivery will occur), in each future of such commodity on all contract markets, broken down to show the quantity classified as hedging (as defined in § 1.3(z)) and the quantity classified as speculative (including spreading or straddling.

* * * * *

(c) Delivery notices issued and stopped. The quantity of the commodity against which notices of delivery have been issued by the clearing organization of the contract market on which delivery will occur and the quantity against which notices have been stopped by the trader.

* * * * *

6. Section 18.00 is further amended by removing paragraph)h)(2)(v), and by redesignating paragraph (h)(2)(vi) and paragraph (h)(2)(vii) as paragraphs (h)(2)(v) and (h)(2)(vi) respectively.

* * * * *

PART 21—SPECIAL CALLS FOR INFORMATION FROM FUTURES COMMISSION MERCHANTS, FOREIGN BROKERS AND MEMBERS OF CONTRACT MARKETS

7. Section 21.02 is amended by revising paragraph (b) as follows:

§ 21.02 Special calls for information on open contracts in accounts carried by futures commission merchants, members of contract markets and foreign brokers.

* * * * *

(b) The open contracts held or controlled by such traders in each future excluding contracts against which delivery notices have been stopped or against which delivery notices have been issued by the clearing organization of the contract market upon which delivery will occur.

* * * * *

Issued by the Commission on March 19, 1981.

Jane K. Stuckey,

Secretary of the Commission.

[FR Doc. 81-9006 Filed 3-24-81; 8:45 am]

BILLING CODE 6351-01-M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230 and 239

[Release No. 33-6301]

Adoption of Notice-of-Sales Forms for Transactions Pursuant to Section 4(6) and Rule 242

AGENCY: Securities and Exchange Commission.

ACTION: Adoption of amendments to notice-of-sales forms.

SUMMARY: The Commission is adopting in final form a notice-of-sales form to be used by issuers that sell their securities in reliance upon new Section 4(6) of the Securities Act of 1933. Section 4(6) provides an exemption from registration under the Securities Act of 1933 for offers and sales of securities by any issuer solely to one or more "accredited investors" if the aggregate offering price does not exceed the amount allowed under Section 3(b) of that Act. The exemption requires the issuer to file a notice of such sales with the Commission on such forms as the Commission shall prescribe. This form is adopted today in response to the legislative amendments included in the Small Business Investment Incentive Act of 1980. The Commission, in addition, is adopting technical conforming amendments to Form 242 to reflect similar amendments to Form 4(6), and a technical conforming amendment to the instructions in Rule 242 regarding the use of Form 242.

EFFECTIVE DATE: April 24, 1981.

ADDRESS: Copies of revised Form 4(6) and Form 242 will be available from each of the Commission's Regional Offices and the headquarters office, 500 North Capitol Street, Washington, D.C. 20549.

FOR FURTHER INFORMATION CONTACT: Suzanne Brannan, (202) 272-2644, Office of Small Business Policy, Division of Corporation Finance, Securities and Exchange Commission, 500 North Capitol Street, Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission today announced that it is adopting in final form Form 4(6) [17 CFR 239.246], a notice-of-sales form to be used by issuers that sell their securities in reliance upon Section 4(6)[1] of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. 77a et seq.]. Section 4(6) was included in the Securities Act pursuant to the recently enacted Small Business Investment Incentive Act of 1980 (the "1980 Act") [Pub. L. No. 96-477 (October 21, 1980)]. It provides an exemption from the registration provisions of the Securities Act for transactions involving offers and sales of securities by an issuer solely to one or more "accredited investors"[2] if the aggregate price does not exceed the amount allowed under Section 3(b) of the Securities Act.[3] No advertising or public solicitation is permitted in connection with such transactions, and the issuer is required to file a notice of such sales with the Commission on such forms as the Commission shall prescribe.

In order to permit issuers immediately to utilize Section 4(6), the Commission adopted Form 4(6), effective November 14, 1980, on an interim basis, and sought public comment with respect to the form and content of a final notice.[4]

Discussion

The primary purpose of the Form 4(6) notice requirement is to elicit information which the Commission expects will be necessary in addressing the effectiveness of the exemption as a capital-raising device for small business in a manner that is consistent with the public interest and the protection of investors.[5] Form 4(6) is designed to enable an issuer to respond to most questions by simply checking boxes or by filling in blanks. In response to its request for comment on interim Form 4(6) the Commission received one comment letter. Based partly on this commentary and primarily on its further review of Form 4(6), the Commission has determined to make the following technical amendments to the Form which are designed to result in a simpler, more understandable form for the user: (1) former Part C, Brief Narrative Information About the Issuer, has been combined with Part A, Basic Identification of Issuer; (2) the ranges provided for answering statistical information about the issuer in Part B have been revised; (3) former item B.6. regarding the number of shares held by non-affiliated shareholders has been deleted and a new item calling for the percentage of shares outstanding held by non-affiliated persons and an instruction defining "non-affiliated person" included; (4) former item B.9. regarding part-time employees has been deleted, and item B.8 has been revised to call for the number of full-time equivalent employees, and a definition of the term "full-time equivalent employees" has been included; and (5) item C.4. in Form 4(6), and item C.5. in Form 242, will contain spaces to subtract expenses in connection with the issuance from the aggregate offering price to arrive at the figure for adjusted gross proceeds.

Amendments to Form 242

Rule 242 [17 CFR 230.242] promulgated under Section 3(b) of the Securities Act, provides an exemption from registration for sales of securities by domestic or Canadian corporate issuers to an unlimited number of accredited persons as defined in the rule, and to 35 non-accredited persons. Form 4(6) is substantially similar to Form 242, the notice-of-sales form required by issuers for securities issued pursuant to Rule 242, except certain information that would be inapplicable to Section 4(6) offering has been deleted. In view of the substantial similarity in purpose and content of Form 4(6) and 242, the Commission has determined that

[1] Section 4 of the Securities Act of 1933 ("Securities Act") provides, in pertinent part, that the provisions of Section 5 shall not apply to:

(6) transactions involving offers or sales by an issuer solely to one or more accredited investors, if the aggregate offering price of an issue of securities offered in reliance on this paragraph does not exceed the amount allowed under Section 3(b) of this title, if there is no advertising or public solicitation in connection with the transaction by the issuer or anyone acting on the issuer's behalf, and if the issuer files such notice with the Commission as the Commission shall prescribe.

[2] New Section 2(15) of the Securities Act provides:

(15) the term "accredited investor" shall mean—

(i) a bank as defined in section 3(a)(21) of the Act whether acting in its individual or fiduciary capacity; an insurance company as defined in section 2(13) of the Act; an investment company registered under the Investment Company Act of 1980 or a business development company as defined in section 2(a)(48) of that Act; a Small Business Investment Company licensed by the Small Business Administration; or an employee benefit plan, including an individual retirement account which is subject to the provisions of the Employee Retirement Income Securities Act of 1974, if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such Act, which is either a bank, insurance company, or registered investment adviser; or

(ii) any person who, on the basis of such factors as financial sophistication, net worth, knowledge, and experience in financial matters, or amount of assets under management qualifies as an accredited investor under rules and regulations which the Commission shall prescribe.

[3] As amended by Section 301 of the 1980 Act, the ceiling amount of Section 3(b) is $5,000,000.

[4] *See* Securities Act Release No. 6256 (November 7, 1980) [45 FR 75182] ("Interim Form Release").

[5] In its report on S. 2990, which proposed Section 4(6) as finally adopted by the House, the Senate Committee on Banking, Housing and Urban Affairs stated that it "anticipates that the Commission will monitor the effectiveness of the exemption to evaluate whether it is consistent with the underlying objectives of the federal securities laws to protect the integrity of the securities markets and fosters investor confidence in the capital formation process." S. Rep. No. 958, 96th Cong., 2d Sess., at 45 (1980).

technical amendments similar to those being made to Form 4(6) should be made in Form 242.

Amendment to Rule 242

Paragraph (h) of Rule 242 provides instructions regarding the filing and updating of Form 242. In view of the reformatting of certain items in Form 242 as described above, the Commission is adopting a technical amendment to Rule 242(h)(3) to reflect the appropriate items of Form 242 as revised.

Procedural Matters

In view of the substantial similarity in purpose and content of Forms 242 and 4(6), and in view of the technical and clarifying nature of the amendments, the Commission believes it is appropriate to adopt Form 4(6) in final form and the amendments to Form 242 and Rule 242. Accordingly, the Commission pursuant to Section 553(b) of the Administrative Procedure Act [5 U.S.C. 553(b)] for good cause finds that prior notice and comment is impracticable, unnecessary, and contrary to the public interest.

Regulatory Flexibility Act Considerations

The Commission believes that the requirement for a regulatory flexibility analysis pursuant to the Regulatory Flexibility Act [5 U.S.C. 604(b)] is inapplicable because Form 4(6) was adopted prior to the effective date of that act, and because the amendments to Form 4(6), Form 242, and Rule 242 are considered technical and are not being published for notice and comment pursuant to the Administrative Procedure Act.

Text of Amendments

Part 239 of Chapter II of Title 17 of the Code of Federal Regulations is amended as follows:

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

1. By adding § 239.246, to read as follows:

§ 239.246 Form 4(6), notice-of-sales of securities pursuant to section 4(6) of the Securities Act of 1933.

(a) Five copies of a notice on this form shall be filed with the Commission:

(1) No later than 10 days after the first sale of securities in any issue is made in reliance on section 4(6) of the Securities Act of 1933.

(2) No later than 10 days after the completion date of the offering of such issue: *Provided, however,* that only one notice need be filed if the offering of the issue is completed within the 10-day period described in paragraph (a)(1) of this section and this form is filed not later than at the conclusion of that period but subsequent to the completion of the offering of the issue; and

(3) Every six months after the first sale of securities in the issue made in reliance on section 4(6) unless the final notice required by paragraph (a)(2) of this section has been filed.

(b) If more than one notice is required to be filed as to any issue of securities offered in reliance on section 4(6), notices other than the original notice need only report the issuer's name and the information in response to Part C and any material changes in Parts A and B from the facts previously reported.

(c) A notice on this form shall be deemed to be filed with the Commission:

(1) As of the date on which it is received at the Commission's principal office in Washington, D.C., or

(2) If the notice is delivered to the Commission after the date on which it is required to be filed, as of the date on which the notice is mailed by means of United States registered or certified mail to the Commission's Office of Small Business Policy, Division of Corporation Finance, at the Commission's principal office in Washington, D.C.

2. By revising § 239.242(b) as follows:

§ 239.242 Form 242, notice of sales of securities pursuant to § 230.242 of this chapter.

* * * * *

(b) If more than one notice is required to be filed pursuant to paragraph (h)(1) of the rule as to any issue of securities offered in reliance thereon, notices other than the original notice need only report the information in response to Part C and any material changes in Part A and B from the facts previously reported.

* * * * *

Part 230 of Chapter II of Title 17 of the Code of Federal Regulations is amended as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

3. By revising paragraph (h)(3) of § 230.242 to read as follows:

§ 230.242 Exemption of limited offers and sales by qualified issuers.

* * * * *

(h) * * *

(3) If more than one notice is required to be filed pursuant to paragraph (h)(1) of this rule as to any issue of securities offered in reliance thereon, notices other than the original notice need only report the information required by Part C and any material change in the facts from those set forth in Parts A and B of the original notice.

* * * * *

Effective Date

Adopted Form 4(6) and amended Form 242 are effective April 24, 1981.

Authority

The Commission hereby adopts Form 4(6) pursuant to Sections 4(6) and 19(a) of the Securities Act of 1933 [Sec. 19(a), 48 Stat. 85; Sec. 209, 48 Stat. 908; Sec. 308(a), (2), 90 Stat. 57; 15 U.S.C. 77s(a)] and amends Form 242 pursuant to Sections 3(b) and 19(a) of the Securities Act of 1933. [Secs. 3(b), 19(a), 48 Stat. 75, 85; Sec. 209, 48 Stat. 908; 59 Stat. 167; 84 Stat. 1480; Sec. 308(a) (1), (2), (3), 90 Stat. 56, 57; Sec. 18, 92 Stat. 275; sec. 2, 92 Stat. 962; 15 U.S.C. 77c(b), 77s(a)]

By the Commission.

George A. Fitzsimmons,

Secretary.

March 19, 1981.

[FR Doc. 81-9107 Filed 3-24-81; 8:45 am]

BILLING CODE 8010-01-M

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17 CFR Part 250

[Release No. 35-21968; File No. S7-862]

Allocation of Consolidated Income Tax Liability by Registered Holding Companies and Their Subsidiaries

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Commission is adopting an amendment to Rule 45 under the Public Utility Holding Company Act of 1935 ("Act") pertaining to the methods by which registered holding companies and their subsidiaries may allocate consolidated income taxes. The amendment replaces subsection (b)(6) of Rule 45 adopted in 1955 with subsection (c), dealing with the same subject. Both are exceptions from the requirements of Rule 45(a). The amendment recognizes intervening changes in tax laws which have tended to restrict the use of the subsection (b)(6).

EFFECTIVE DATE: March 25, 1981. The amendment applies to all tax returns due after September 30, 1981, and all tax years ending on or after that date. It may be applied to the tax return for the preceding tax year, if such return has not been filed before its adoption.

FOR FURTHER INFORMATION CONTACT: Grant G. Guthrie, Associate Director (202) 523-5156, or James E. Lurie, Special Counsel (202) 523-5683, Division of Corporate Regulation, Securities and

Exchange Commission, 500 North Capitol Street, Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: The proposed amendment to Rule 45 was published for comment by release dated October 29, 1980 (HCAR No. 21767) (45 FR 73509, November 5, 1980). The history of Rule 45(b)(6) and its predecessors was sufficiently described therein. Changes in the kind and significance of available tax benefits and in methods of allocation recognized under the tax laws have made the 1955 rule inadequate. The registered systems have found it necessary to rely increasingly on a case-by-case series of applications for relief by order under Rule 45(a). Rule 45(c) reenacts the Commission's original purpose of regulating this whole subject by a general rule.

Comments on the proposed rule were received from seven registered holding company systems, two major accounting firms and one large nonutility system. All urged adoption of the rule. Several comments offered suggestions for clarification of the text, which are reflected in the final rule. None of the changes have substantive significance.

Rule 45(c) does not specify kinds of tax benefits. These change as tax laws and regulations are revised. An important function of the tax agreement, required by the rule, is to identify currently the material elements of allocation in terms of the applicable tax law. The rule specifies the amount to be allocated, that is, the difference between the consolidated return and separate return results, and establishes the principle of allocating to the individual members of the group the material effects of any particular features of the tax law applicable to them. The rule extends to all aspects of allocating consolidated return benefits. The Commission agrees with those comments which stressed the need for broad and comprehensive application.

The introductory paragraph of the rule has been revised to clarify two ambiguities. It was drawn, like its predecessor, with the Federal Internal Revenue Code in mind. Parts of some systems are also eligible to file consolidated returns under comparable state laws. The rule explicitly includes such returns also. If there are special needs with respect to state returns, suggestions for dealing with them by interpretation will be considered.

The requirement that tax agreements cover full tax years was not intended to exclude associate companies added or disposed of during a year. The text has been recast to eliminate any contrary implications and a sentence has been added to the definition of corporate taxable income to specify the treatment of partial years.

The definition of "consolidated tax" has been clarified. If the consolidated tax is negative, it would represent a refund. The "adjustments thereto thereafter determined" are adjustments to the tax shown on the return, i.e., the liability to the taxing authority. Such liability changes only by a revision of the tax, whether by an amendment of the return, a settlement or a final decision in any litigation. The procedure for dealing with such changes, and particularly with negotiated adjustments which may not involve an item-by-item modification of the return, is one of the subjects for which the tax agreement should provide.

The definition of "corporate taxable income" has been revised to make it unequivocal that the items eliminated in consolidation refer to the consolidation in the tax return under tax standards rather than to possibly inconsistent generally accepted accounting principles. The provisions for adjustment for other year carryover rights have been transferred from the definition of separate return tax to the definition of corporate taxable income, from which the separate return tax is calculated. This assures that these adjustments will be reflected in either allocation method.

The definitions of "separate return tax" and "corporate tax credit" have been rewritten to eliminate the terms "hypothetical" and "inconsistent" which might be misunderstood. The rule states the hypothesis of nonconsolidation to which these terms referred.

The first sentence of subsection (3) has been amended to correct an unintended omission by adding "(2)(ii)." The elimination of intercompany transactions would affect the allocation under the (2)(ii) method in essentially the same way as it affects a (2)(i) method allocation. In the first sentence of subsection (4), "subsidiary companies" has been changed to "associate companies." As stated in the release on the proposed rule, the holding company will not normally have a positive corporate taxable income, since intercompany dividends, its principal resource, are excluded.

Several comments also noted a failure to deal with the possibility that the tax saving in a year, including consolidated carrybacks, might not exhaust the deductions accrued in that year, so that only a partial cash reimbursement could be made. Subsection (5) has been enlarged to deal with that contingency. For reasons already stated, the rule does not prescribe the priorities to be accorded to various kinds of benefits. Such specifics depend on the tax laws then effective and should be dealt with in the tax agreement.

The final sentence of draft subparagraph (5), dealing with accounting for corporate tax credits, has been deleted.[1] The purpose of the deleted sentence was to identify the applicable principles, a purpose more appropriate for comment than in the text of the rule.

No provision was made in the proposal for amending the tax agreement. This was not an oversight. The proposal stressed the necessity of a current, reasonable and unequivocal annual determination of each member company's tax. The filing of a return on an agreed basis commits each of the associate companies to the procedures adopted, and their planning and reporting during the tax year may be affected by the terms of the agreement.

Unexpected events, including changes in the tax laws, may require modification of the agreement during its operation, as may some kinds of adjustments by the taxing authority after the return is filed. But amendments with retroactive effect cannot be treated as routine filings.[2] The effect of the rule, as proposed, would have been to require a declaration under Rule 45(a) for amendments. The adopted rule permits amendment, subject to Commission approval if the Commission directs within 60 days of the filing that the amendment be deemed a declaration under Rule 45(a). It thus eliminates formal procedures under Rule 23 if the amendment is of a character which does not need further examination.

All of the registered systems use a calendar year, except for one which uses a fiscal year ending September 30. Tax returns are filed the following year. The rule does not change the principles of present regulation. It will be effective for all tax years, including the current year, ending after its adoption. Registered systems may elect to apply it to returns for 1980, filed after its adoption, or to rely on Rule 45(b)(6) and applicable orders.

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[1] The deleted sentence read: "Such payments for tax benefits contributed to the consolidated return shall be accounted for in the same manner as tax refunds, provided that any such payment received by a subsidiary company which is not a public utility company shall be applied to reduce the costs incurred by such company for purposes of determining the costs of goods or services supplied by such company to associate companies under section 13(b) of the Act in the manner prescribed by the Commission by rule or order under that section."

[2] *Standard Gas & Electric Company*, 37 SEC 532, 542–550 (1957).

None of the outstanding orders under Rule 45(a) on this subject are inconsistent with Rule 45(c). To the extent they are more detailed, they incorporate matter which will be dealt with by the tax agreement under the new rule. The initial tax agreement will recognize carryover and other rights, if any, which have accrued under past regulation. If an amendment of existing orders is considered necessary for the orderly implementation of Rule 45(c), it should be applied for. The rule will not affect any prior or future orders under section 13 of the Act, relating to the accounting for tax benefits of service companies.

Statutory Basis and Text of the Rules

The Securities and Exchange Commission hereby amends Title 17, Chapter II of the Code of Federal Regulations, pursuant to its authority under the Public Utility Holding Company Act of 1935 [15 U.S.C. 79(a) *et seq.* and particularly sections 12(b), 12(f) and 20(a) thereof [15 U.S.C. § 79/(b), 79/(f) and 79t(a)]] by removing paragraph (b)(6) of § 250.45 and adding a new paragraph (c) thereto to read as set forth below. This action is effective immediately pursuant to the Administrative Procedure Act [5 U.S.C. § 553(d)(1)].

PART 250—GENERAL RULES AND REGULATIONS, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

§ 250.45 Loans, extensions of credit, donations and capital contributions to associate companies.

* * * * *

(b) * * *

(6) [Removed]

(c) A declaration under paragraph (a) of this section shall not be required for the filing of a consolidated tax return by the eligible associate companies in a registered holding company system, or the execution or performance of the agreement referred to herein, if such consolidated tax return is filed pursuant to a tax agreement, in writing, relating to either federal or state taxes, for a term of one or more tax years among the associate companies included in the consolidated return, and the agreement provides for allocation among such associate companies of the liabilities and benefits arising from such consolidated tax return for each tax year in a manner not inconsistent with the following conditions:

(1) Definitions:

"Consolidated tax" is the aggregate tax liability for a tax year, being the tax shown on the consolidated return and any adjustments thereto thereafter determined. The consolidated tax will be the refund if the consolidated return shows a negative tax.

"Corporate tax credit" is a negative separate return tax of an associate company for a tax year, equal to the amount by which the consolidated tax is reduced by including a net corporate taxable loss or other net tax benefit of such associate company in the consolidated tax return.

"Corporate taxable income" is the income or loss of an associate company for a tax year, computed as though such company had filed a separate return on the same basis as used in the consolidated return, except that dividend income from associate companies shall be disregarded, and other intercompany transactions eliminated in the consolidated return shall be given appropriate effect. It shall be further adjusted to allow for applicable rights accrued to the associate company under paragraphs (c)(4) and (5) of this section or under prior rules or orders, on the basis of other tax years, but carryovers or carrybacks shall not be taken into account if the associate company has been paid a corporate tax credit therefor. If an associate company is a member of the registered system's consolidated tax group for only part of a tax year, that period will be deemed to be its tax year for all purposes under paragraph (c) of this section.

"Separate return tax" is the tax on the corporate taxable income of an associate company computed as though such company were not a member of a consolidated group.

(2) The consolidated tax shall be apportioned among the several members of the group in proportion to (i) the corporate taxable income of each such member, or (ii) the separate return tax of each such member, but the tax apportioned to any subsidiary shall not exceed the separate return tax of such subsidiary.

(3) The tax agreement shall provide for appropriate and equitable adjustment of the allocation specified under paragraph (c)(2)(i) or (2)(ii) of this section if the sum of the corporate taxable incomes or separate return taxes of all members of the group in any taxable year differs from the consolidated taxable income or tax because of intercompany transactions excluded from the consolidated return. It shall provide for appropriate and equitable adjustment of the allocation specified under paragraph (c)(2)(ii) to the extent that the consolidated tax and separate return tax for any year include material items taxed at different rates or involving other special benefits or limitations. Such adjustments will be directed to allocating to the individual members of the group the material effects of any particular features of the tax law applicable to them.

(4) The tax agreement may exclude from the allocation under paragraph (c)(2)(i) of this section associate companies not having a positive corporate taxable income for the year being allocated, or under paragraph (c)(2)(ii) of this section associate companies not having a positive separate return tax for the year being allocated. An agreement under this paragraph shall make appropriate and equitable provision for preserving to each subsidiary company so excluded the equivalent of any rights which such company would have had, under the applicable tax law, had it filed a separate return, to use in other years any loss or credit availed of by the group through the consolidated return. With respect to carryover rights, such provisions will normally consist of recognition of the carryover in future allocations by reducing the consolidated tax allocation in the subsequent year of the subsidiary company entitled to the benefit, and by charging the excess to the companies which had benefited by the prior deduction or credit. In the case of a carryback, the excluded subsidiary company should normally be paid the amount of refund to which it would have been entitled had it filed a separate return.

(5) The agreement may, instead of excluding members as provided in paragraph (c)(4), include all members of the group in the tax allocation, recognizing negative corporate taxable income or a negative corporate tax, according to the allocation method chosen. An agreement under this paragraph shall provide that those associate companies with a positive allocation will pay the amount allocated and those subsidiary companies with a negative allocation will receive current payment of their corporate tax credits. The agreement shall provide a method for apportioning such payments, and for carrying over uncompensated benefits, if the consolidated loss is too large to be used in full. Such method may assign priorities to specified kinds of benefits.

(6) The tax agreement for each taxable year shall be filed as an exhibit to the system's annual report on Form U5S (§ 259.5s of this chapter) for the previous taxable year. The initial filing after the effective date of this amendment shall be made as an amendment to the last Form U5S filed. If an existing tax agreement is merely renewed or amended, prior filings may

be incorporated by reference. Amendments to a tax agreement shall be filed as an amendment to the Form U5S. Any amendment which would alter the allocation to any associate company for any period preceding its adoption shall be conditioned on approval by the Commission if the Commission directs, within 60 days after its filing, that it be deemed to be a declaration under Rule 45(a).

By the Commission.

George A. Fitzsimmons,

Secretary.

March 18, 1981.

[FR Doc. 81-9003 Filed 3-24-81; 8:45 am]

BILLING CODE 8010-01-M

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17 CFR Part 251

[Release No. 35-21967]

Interpretative Release Concerning Investment Bankers and Banks in Rule 70 Under the Public Utility Holding Company Act of 1935

AGENCY: Securities and Exchange Commission.

ACTION: Interpretation of rule.

SUMMARY: The Securities and Exchange Commission ("Commission") today issued this interpretative release concerning Rule 70 under the Public Utility Holding Company Act of 1935 ("Act"). Rule 70 implements the Commission's authority to define, by rule, exemptions under Section 17(c) of the Act, which, without the exemptions, prohibits officers and directors of banks, investment bankers and trust companies from serving as officers or directors of a registered holding company or its subsidiaries. A recent decision by the Federal Reserve Board permitting commercial banks to underwrite commercial paper and recent legislation which has expanded the kinds of services financial institutions may provide have raised questions about the definitions of an "investment banker" and a "bank" and the related exemptions under Rule 70. The release states that directors and officers may proceed on the basis that the exemptions previously available under Rule 70 continue in effect, pending review of the rule in light of intervening changes in the banking laws or in their interpretation.

DATE: March 18, 1981.

FOR FURTHER INFORMATION CONTACT: Aaron Levy, Director, Division of Corporate Regulation, (202) 523-5691, Grant G. Guthrie, Associate Director, (202) 523-5156, or James E. Lurie, Special Counsel, (202) 523-5683, Securities and Exchange Commission, 500 North Capitol Street, Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: Section 17(c) of the Act does not define the words "investment banker" or "bank." The first is defined in Rule 70(c)(4) and the second is defined negatively in Rule 70(c)(3).

There are virtually no exemptions for interlocking affiliations of directors and officers with respect to an investment banker. These affiliations are prohibited by section 17(c), and the two limited exemptions in Rule 70 are not significant today. There are several exemptions in Rule 70 for directors and officers in the case of banks (Rules 70(a)(3) and 70(a)(4)).

The critical distinction between an "investment banker" and a "bank" is provided in Rule 70(c)(4), which states, in relevant part:

> "Investment banker" means a person engaged in business as an underwriter or a dealer [as these terms are defined in the Investment Company Act of 1940] but does not include: (i) a bank, trust company, banking association, or banking firm which is prohibited by statute or by rule or regulation thereunder from underwriting or participating in the marketing of securities of a public utility or holding company * * *.

An investment banker is broadly defined as a person "engaged in business as an underwriter or dealer," as these terms are defined in the Investment Company Act of 1940, with respect to any security of any issuer. A limited exception from this definition is provided for a bank. A bank is not an investment banker if by law it is prohibited "from underwriting or participating in the marketing" of any securities of a public utility [1] or a holding company.[2]

On September 26, 1980, the Board of Governors of the Federal Reserve System ("Board") issued a ruling denying petitions to prohibit Bankers Trust Company from selling commercial paper of corporate issuers. It concluded that commercial paper was not a security under the Glass-Steagall Act,[3] the statute with respect to issuing, underwriting, selling and dealing in securities did not apply to commercial paper.[4] An industry association and a commercial paper dealer have challenged the Board's decision in both appellate and district courts.[5] The industry association has also brought a private action against Bankers Trust Company to enjoin the latter's commercial paper activities.[6]

If as a result of the Board's ruling a bank were to lose its special exception of exclusion in Rule 70(c)(4), it would not necessarily be an investment banker. In that event the bank would be an "investment banker," as defined in Rule 70(c)(4), only if it was actually engaged in the sale of any securities as underwriter or dealer, and commercial paper is a security under section 2(a)(16) of the Act.[7] If a bank were engaged, as underwriter or dealer, in selling or marketing of any security, including commercial paper, of a public utility company or a holding company, it would be an investment banker and the special exception for a bank would not apply to it. The immediate question is what is the status of a bank that, although permitted by law so to engage, in fact does not.

No definitive answer is required at this time. The Commission here announces that, pending disposition of the appeals from the Board's ruling and until such time as the Commission amends the rule, if any amendment should be necessary, a bank shall not be considered an investment banker, as provided in Rule 70(c)(4), if in fact the bank does not engage in the sale or marketing of securities of a public utility company or a holding company. This application of the rule is consistent with the intent and effect of the exclusion for banks that Rule 70(c)(4) provides and as such is appropriate for the limited and temporary purpose it is meant to serve. A bank director or officer, who serves or proposes to serve a registered holding

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[1] Section 2(a)(5) of the Act defines a public-utility company as an electric utility company or a gas utility company. Section 2(a)(3) of the Act defines an electric utility company as one "which owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale * * *." Section 2(a)(4) of the Act defines a gas utility company as one "which owns or operates facilities used for the distribution at retail * * * of natural of manufactured gas for heat, light or power."

[2] Section 2(a)(7)(A) of the Act defines a holding company as one "which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public-utility company * * *."

[3] 48 Stat. 162 (1933) [codified in scattered sections of 12 U.S.C.].

[4] Section 16 and section 21 of the Glass-Steagall Act, 12 U.S.C. § 24, seventh power, and § 378(a)(1), contain the prohibitions on such activities by national banks and state member banks of the Federal Reserve System, respectively.

[5] *Securities Industry Ass'n* v. *Board of Governors of the Federal Reserve System, et al.*, Civ. No. 80-2314 (D.C. Cir., filed Oct. 24, 1980); *A.G. Becker, Inc.* v. *Board of Governors of the Federal Reserve System, et al.*, Civ. No. 80-2258 (D.C. Cir., filed Oct. 14, 1980); *Securities Industry Ass'n* v. *Board of Governors of the Federal Reserve System, et al.*, Civ. No. 80-2730 (D.D.C., filed Oct. 24, 1980); *A.G. Becker, Inc.* v. *Board of Governors of the Federal Reserve System, et al.*, Civ. No. 80-2614 (D.C.C., filed Oct. 14, 1980).

[6] *Securities Industry Ass'n* v. *Bankers Trust Co.*, Civ. No. 80-6133 (S.D.N.Y., filed Oct. 27, 1980).

[7] It is also a security under section 2(1) of the Securities Act of 1933.

company or its subsidiaries in such positions pursuant to exemptions provide by Rule 70, may rely upon the exemption in Rule 70(c)(4) in light of today's announcement.

The prohibition of section 17(c) extents to a director, officer or other representative of any "bank, trust company, * * * banking association or firm * * *" except in cases the Commission exempts by rule. Rule 70(c)(3) states that these terms do not include a bank or a trust company—

(i) which does not accept deposits, or if accepting deposits, not less than 85 percent of whose total deposits at the end of the preceding calendar year consisted of time and savings deposits as defined by 12 CFR Part 329, or (ii) not more than 10 percent of whose total loans and discounts at the end of the preceding calendar year consisted of commercial loans and discounts.

The definition in Rule 70(c)(3) excludes primarily savings banks, savings and loan associations and trust companies not engaged in the general banking business. As first adopted and as later amended,[8] this definition reflected then existing laws which made sharp distinctions between commercial banks and other financial institutions regarding time and demand deposits and types of loans. These distinctions are not altogether as clear today, as a result of the Depository Institutions Deregulation and Monetary Control Act of 1980.[9] That statute, among other things, authorizes (1) banks, savings banks, mutual savings banks, savings and loan associations and credit unions to pay interest on demand deposits, or the equivalent thereto, (2) savings and loan associations to invest up to 20% of their capital in commercial paper and other corporate debt securities, and (3) mutual savings banks to invest up to 5% of their capital in corporate and business loans.

These legislative and possibly other changes may require restatement or perhaps modification of Rule 70(c)(3). Until that is done, the status of financial institutions under Rule 70(c)(3) will continue in effect, if in terms of time and savings deposits and commercial loans and discounts these institutions were qualified for the exclusion from section 17(c) pursuant to Rule 70(c)(3) as of January 1, 1979.

Accordingly, 17 CFR Part 251 is amended by adding this release thereto.

By the Commission.

George A. Fitzsimmons,

Secretary.

March 18, 1981.

[FR Doc. 81-9002 Filed 3-24-81; 8:45 am]

BILLING CODE 8010-01-M

[8] HCAR No. 271 (July 2, 1936) and HCAR No. 1478 (March 22, 1939).

[9] Pub. L. No. 96-221 (March 31, 1980).

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

27 CFR Part 72

[T.D. ATF-8]

Increase of Appraiser's Fees

AGENCY: Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury.

ACTION: Final rule (Treasury decision).

SUMMARY: This final rule increases the rate of compensation that is paid to appraisers of property seized as subject to forfeiture. This regulation affects appraisers of such property. This change will help ATF to obtain qualified appraisers of property seized as subject to forfeiture.

EFFECTIVE DATES: March 25, 1981.

FOR FURTHER INFORMATION CONTACT: E. J. Ference, Research and Regulations Branch, Bureau of Alcohol, Tobacco and Firearms, 1200 Pennsylvania Avenue, NW, Washington, DC 20226 (202-566-7626).

SUPPLEMENTARY INFORMATION:

Background

Section 72.51 of 27 CFR currently sets the rate of compensation that is paid to an appraiser of property seized as subject to forfeiture under Title 26 U.S.C. at $3.00 per hour or a portion thereof. Because this rate is inadequate, this regulation changes the rate of compensation that is paid from $3.00 per hour to "a reasonable fee not to exceed $15.00 per hour or a portion thereof."

Drafting Information

The principal author of this document is E. J. Ference, Research and Regulations Branch, Bureau of Alcohol Tobacco and Firearms. However, other personnel of the Bureau and of the Treasury Department have participated in the preparation of this document, both in matters of substance and style.

Authority and Issuance

Immediate action is needed to alleviate the undue burden on ATF of finding qualified appraisers willing to accept the present rate of compensation now authorized by regulations.

Because this regulation is nonsubstantive, liberalizing and essentially procedural, it is found unnecessary to issue it with notice and public procedure under subsection (b) of section 553 ot Title 5 of the United States Code or subject to the effective date limitation of subsection (d) of that section.

This regulation is issued under the authority contained in 26 U.S.C. 7805 (68A Stat. 917, as amended).

PART 72—DISPOSITION OF SEIZED PERSONAL PROPERTY

Accordingly, Title 27 Code of Federal Regulations is amended by revising § 72.51 to read as follows:

§ 72.51 Rate of compensation.

Each appraiser selected under § 72.22(a)(2) shall receive compensation at a reasonable fee not to exceed $15.00 per hour or a portion thereof for the performance of his or her duties in appraising property seized as subject to forfeiture under Title 26 U.S.C.

(Act of August 16, 1954, ch. 736, 68A Stat. 870, as amended (26 U.S.C. 7325))

Signed: February 24, 1981.

G. R. Dickerson,

Director.

Approved: March 12, 1981.

John P. Simpson,

Acting Assistant Secretary (Enforcement and Operations).

[FR Doc. 81-8828 Filed 3-24-81; 8:45 am]

BILLING CODE 4810-31-M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 936

Comments Submitted on Oklahoma's Permanent Surface Mining Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Discussion of comments.

SUMMARY: This notice summarizes significant issues raised in comments submitted to OSM and the Secretary of the Interior on Oklahoma's permanent program submission and explains the Secretary's resolution of those issues. These comments were considered by the Secretary in his decision to approve conditionally the Oklahoma program submission. That decision was

published January 19, 1981, at 46 FR 4902–4911.

FOR FURTHER INFORMATION CONTACT: Carl C. Close, Assistant Director, State and Federal Programs, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, South Building, 1951 Constitution Avenue, NW., Washington, D.C. 20240, Telephone (202) 343–4225.

SUPPLEMENTARY INFORMATION: On January 19, 1981, the Secretary of the Interior published his decision to approve conditionally the Oklahoma permanent regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). An explanation of that decision is found in the **Federal Register** at 46 FR 4902–4911 (the decision notice). That notice contains information necessary for a full understanding of this notice. A draft copy of the decision notice was released to officials of Oklahoma and to the public on January 14, 1981, as soon as it was completed and shortly before it was delivered to the Office of the Federal Register for publication.

As explained in it, the Secretary considered all comments submitted in making a determination on Oklahoma's program. However, when the notice was released January 14, 1981, the resolution of the issues in the comments was in the final stages of proof-reading, typing, and minor editorial revision, and the Secretary was unable to include it in the notice.

As he did with the decision announcement notice, the Secretary has also sent this notice as soon as it was completed to officials of the Oklahoma Department of Mines.

Accordingly, a summary of significant issues raised by comments received by the Secretary and a discussion of the Secretary's resolution of those issues follows. Some of the discussions refer to findings in the January 19, 1981, notice.

Disposition of Comments

1. At the public hearing on December 23, 1980, comments (written and oral) were made on the propriety of numerous OSM regulations that Oklahoma has chosen to adopt without substantive modification. Whatever their merits, these comments are not directed to the issue now before the Secretary. The issue is whether the resubmitted Oklahoma program is consistent with the requirements of SMCRA and with 30 CFR Chapter VII as modified by various court decisions. The commenters could have directed their suggestions to the Secretary during the comment period when the permanent program rules were being promulgated. Now that the OSM rules are final, it is not appropriate to question them in the context of determining whether Oklahoma's rules are consistent with OSM rules. Similarly, the commenters could have directed their suggestions to the Oklahoma DOM during its rulemaking comment periods to urge DOM to propose to the Secretary alternatives to OSM's regulations. Regardless of whether DOM received such comments, it chose to promulgate those rules identical to the OSM rules. Therefore, it is not appropriate for the Secretary to find fault with the questioned DOM rules in the context of the decision now before him.

This is not to say that those who questioned DOM rules that are equivalent to OSM rules are without redress if their comments have merit. Under 30 CFR 700.12 and the Federal Administrative Procedures Act (5 U.S.C. 553(e)), any person can petition the Secretary to change his regulations. Pursuant to the Oklahoma Administrative Procedures Act (75 O.S. 1979 Supp. Section 305), the DOM has promulgated regulation Section 700.12 to allow a similar petition process. A permanent regulatory program, once approved by the Secretary, is not unchangeable. It can be amended in response to changes in the Secretary's regulations initiated by petitioners under 30 CFR 700.12, or if the State proposes alternatives to OSM's rules that are in accordance with SMCRA and consistent with 30 CFR Chapter VII, but necessary because of local requirements or local agricultural or environmental conditions. See 30 CFR 731.13. Other circumstances allowing or requiring program modifications and the procedures for amendments are detailed at 30 CFR 732.17.

2. Several of the comments received at the December 23, 1980, hearing reveal misconceptions about the permanent regulatory program, the Oklahoma program, or particular regulations. Although the Secretary has no obligation to respond to comments on matters not germane to whether the Oklahoma program is consistent with Federal law, he believes that the misconceptions should be clarified.

(a) One commenter stated his assumption that the Oklahoma program included a precise duplicate of all of OSM's regulations because the DOM had no choice but to copy them. Although it is true that Oklahoma must have laws and regulations consistent with the Federal law, OSM encouraged states to propose alternatives appropriate for local conditions that were consistent with SMCRA (*see* 30 CFR 731.13) and helped states identify areas of regulation that are inapplicable. By letter dated May 15, 1980 (Admin. Record No. OK–78), OSM informed Oklahoma that major sections of its proposed regulations were not necessary because they duplicated Federal law not applicable in Oklahoma. In the initial decision of October 10, 1980, the Secretary found that other major provisions were not necessary in Oklahoma law because they were not relevant to the coal industry in Oklahoma (*see* 45 FR 67365).

The resubmitted Oklahoma program regulations do closely follow the OSM regulations that are applicable to Oklahoma, but duplication is not required. Other state programs have varied widely from OSM regulations or provisions of SMCRA and numerous "state window" proposals have been approved under 30 CFR 731.13 where supported by appropriate data and reasoning. Oklahoma elected to submit but one "state window" proposal under 30 CFR 731.13, which had to be disapproved as explained at 45 FR 67365 (Oct. 10, 1980).

(b) Several commenters misunderstood the permit application requirements of 30 CFR 779.13, requiring hydrology data. One misconception is that applicants must wait for the Oklahoma DOM to provide data for operators to use to show whether the planned operation will cause damage to the hydrologic balance outside the proposed permit area. Under Section 507(b)(11) of SMCRA and 30 CFR 779.13, the applicant must acquire data sufficient to make a determination of the probable hydrologic impact of his operation and sufficient for the state to determine the probable cumulative impact of all anticipated mining in the area. Although the data must reflect "seasonal flow conditions" (Section 507(b)(11) SMCRA and "seasonal variations in water quantity and quality" (30 CFR 779.16), this information can be obtained from a variety of sources, ranging from field studies by the applicant to published data. The state is required to provide to the applicant whatever useful data it has, as are Federal agencies (30 CFR 779.13(b)), but there is no requirement for operators to forego preparation of permit applications until the Oklahoma DOM acquires a data bank or modeling system of its own. It is necessary that the DOM have sufficient data from the applicant and that it make a determination consistent with 30 CFR 786.19(c) before a permit can be issued. The Oklahoma regulation reflects these

requirements in §§ 779.13–779.16 and 786.19(c).

(c) A similar misconception is that the Federal regulations impose on Oklahoma the obligation to require permit applicants to do (1) a detailed archaeological study or historical survey of the proposed permit area and (2) a detailed fish and wildlife resources study. It is true that 30 CFR 779.20 did require the fish and wildlife study, but that regulation was enjoined by the U.S. District Court for the District of Columbia (*In Re: Permanent Surface Mining Litigation*, ——F. Supp. ——, Feb. 26, 1980) and is not in effect. The Secretary's regulations have never required an archaeological or cultural study, but do require, at 30 CFR 779.12(b), that cultural, historical, or archaeological resources known from existing sources of data to be located on the proposed permit area, be identified in the application.

(d) One operator misconstrued the requirement that land be returned to its approximate original contour (Section 515(b)(3) of SMCRA) to mean that the precise pre-mining contour and drainage patterns must be restored even though the swell factor for broken overburden may make this impossible. The Secretary has defined "approximate original contour" at 30 CFR 701.5 to make clear that the term means what it implies—approximate, not exact, original contours. As required by SMRCA, specific exceptions may be granted for permanent impoundments, mountaintop removal and certain steep slope operations, and excess spoil may be disposed in designed fills (30 CFR 816.71–816.74).

(e) One commenter indicated that OSM, through the Oklahoma program, is presently requiring particular design criteria for sediment ponds. Several suggestions were made as to appropriate design criteria. It was also suggested that because EPA is considering revisions of the effluent limitations under the Clean Water Act, OSM should not require Oklahoma to enforce existing OSM effluent limitations. The Secretary, however, is not requiring the states to enforce the design criteria for sediment ponds prescribed by 30 CFR 816.46 (b), (c), and (d), concerning storage volume, detention time and dewatering because these rules were suspended on December 31, 1979 (*see* 44 FR 77452). The sediment removal rule, 30 CFR 816.46(h) is also suspended (44 FR 77453). The regulations of 30 CFR 816.46 that are not suspended continue to apply to state programs.

Similarly, 30 CFR 816.42(a), concerning effluent limitations, is no longer applicable to the reclamation phase of an operation because of its remand by the U.S. District Court for the District of Columbia on May 16, 1980 (*In Re: Permanent Surface Mining Regulation Litigation*, ——F. Supp. —— (D.D.C., 1980)), and the Secretary has suspended 30 CFR 816.42(b), concerning discharge exceptions, for the parameter of total suspended solids (*see* 44 FR 77452, December 31, 1979). The remainder of 30 CFR 816.42, including the effluent limitations of 30 CFR 816.42(a), remains applicable to land disturbed by mining until initiation of the revegetation phase.

It should be noted that EPA and OSM are considering rulemaking that might result in changes to the effluent limitations, pond design criteria, or both. EPA has published proposed rule changes on January 13, 1981, 46 FR 3136–3159. At this time, however, OSM effluent limitations, which are identical to the EPA limitations for coal mine point sources (40 CFR Part 434) are in effect and are reflected in the Oklahoma program regulations, Sections 816.42 and 817.42. The Secretary cannot suspend enforcement of the EPA–OSM effluent limitations on the premise that future rulemaking might result in some modification of the limitations.

Under the conditionally approved Oklahoma program, operators must construct sediment ponds for areas disturbed by active mining, but are free to design the ponds as they think necessary to meet the effluent limitations of Section 816.42 or 817.42. Because the ponds are point sources, operators must also obtain an NPDES permit from EPA or the State agency, if any, to which EPA has delegated its authority under the Clean Water Act. Operators are entitled to all the exemptions allowed by EPA under 40 CFR Part 434, as amended January 12, 1979 (44 FR 2586–2592).

(f) An operator asserted that the Oklahoma industry will be regulated under conflicting OSM and State standards regarding water quality criteria. The operator felt that "the OSM standards and criteria dictate that the effluent shall meet at (sic) a flow regime dictated by the 7-day, 2-year low flow conditions" is incorrect. The DOM has adopted effluent limitations based on OSM's effluent limitations in 30 CFR 816.42, which are identical to the effluent limits EPA has prescribed for coal mine point sources at 40 CFR Part 434. These effluent limitations are independent of the Oklahoma Water Resources Board's (WRB) ambient stream quality requirements (see *Oklahoma's Water Quality Standards, 1979 (Standards)* included in the resubmitted Oklahoma program.) Section 7 of the *Standards* states that the various numerical water quality standards expressed in the rules apply to perennial streams only when the flow "equals or exceeds the 7-day, 2-year low flow value" and to intermittent streams only when the flow "is at or above 1.0 cfs." The WRB standards are measurements of instream quality that a discharger cannot cause to be violated. The DOM standards are effluent quality limitations that apply to only four parameters: suspended solids, manganese, iron, and pH. Of these, WRB standards exist only for pH and suspended solids. The DOM/OSM standard for the pH of effluent waters is 6.0–9.0, which is less stringent than the WRB instream standard of 6.5–8.5 (Section 7.13). It is highly improbable that a discharge of water between pH 6.0–6.5 or 8.5–9.0 would cause the instream standard to be violated. The Secretary believes that there is no conflict between the DOM and WRB pH regulations, but to the extent there may be, the WRB regulation is more stringent and therefore not inconsistent with Section 505(b) of SMCRA.

(g) An operator stated that mulching should not be required on all regraded areas and that the phrase, "all regraded and top-soiled areas," in DOM regulation 816.114 is ambiguous and confusing. 44 FR 15235, Item 6, explains the intent of 30 CFR 816.114, from which the DOM rule was taken. The Secretary does not expect the DOM to require mulching of regrading spoil areas prior to topsoil replacement except where it will serve a useful purpose in erosion prevention.

(h) One operator asserted that DOM and OSM were advising farmers that they do not own their land for five years after a mine is reclaimed and that farmers must stay off the land. That is not necessarily the case. Surface owners have full rights to comment on proposed reclamation plans and on what the postmining land use will be (*see* DOM Regulations Parts 770–788). It is true that SMCRA Section 515(b)(20) requires operators to be responsible for the success of approved revegetation plans for a minimum of five years and Section 510(d) requires complete restoration of prime farmland soils. The obligations on operators require that they seek cooperation from surface owners so that landowners' activities will not interfere with the reclamation process. If a reclamation plan accommodates the wishes of the landowner to the extent allowed by law and the operator carries out the plan, the mutual interests of the

landowner and the operator will abet successful completion of the responsibility period. However, if the landowner interferes with the operator's reclamation obligations, the operator will have to take appropriate action to protect his ability to fulfill his reclamation responsibilities.

3. A third kind of comment received at the December 23, 1980, hearing requested the Secretary to interpret or clarify his own regulations where Oklahoma has adopted an OSM regulation without modification. This rulemaking is not the appropriate forum for interpretation of existing regulations. The commenters are directed to the preamble of the Secretary's permanent regulatory program regulations of March 13, 1979 (44 FR 14902, *et. seq.*, (book 2 of 3)), and to the preamble to the proposed permanent regulatory program of September 18, 1978 (43 FR 41662 *et seq.* (book 2 of 2)), for the Secretary's explanation of the rules and responses to comments received during the rulemaking process.

4. One commenter disagreed with the definition of "intermittent stream" in the Oklahoma regulations, alleging it is inconsistent with that used by the (U.S. Army) Corps of Engineers (COE) and the Oklahoma Water Resources Board (WRB). No evidence of inconsistency was presented, nor evidence that the differences, if any, cause the Oklahoma program to be unenforceable. The Secretary has examined the WRB regulations that were included in the Oklahoma program resubmission and finds no inconsistency with the DOM definition of "intermittent stream." In the course of the permanent program rulemaking, the Secretary solicited comments from the Corps of Engineers and the public on the definition of "intermittent stream." No fault was found with the definition on the basis of any conflict with Corps regulations (*see* 44 FR 14932, March 13, 1979). The Secretary finds that the DOM definition is consistent with the OSM definition and is not a deficiency in the Oklahoma program.

5. The same commenter suggested that "The biological criteria for stream classification purposes should be dropped." The Secretary assumes that this comment refers to Sections 816.57 and 817.57 of the DOM rules which are taken verbatim from 30 CFR 816.57 and 817.57, respectively, as these are the only rules that fit the comment. The commenter asserted that a determination of a biological community is time consuming, expensive and unnecessary, but he presented no evidence in support of these assertions and suggested no alternatives. Because the DOM rule is consistent with the OSM rules, no change is required. *See* 44 FR 15176, March 13, 1979, for a discussion of 30 CFR 816.57.

6. One commenter asserted that Section 816.65(f)(2) of the Oklahoma regulations, which prohibits blasting within 500 feet of an oil or gas line, is overly restrictive. 30 CFR 816.65(f) was remanded by the U.S. District Court for the District of Columbia (*In re: Permanent Surface Mining Regulation Litigation,* Civil Action 79–1144, Mem. Opinion, May 16, 1980, p. 26) because of an earlier decision by the Circuit Court for the District of Columbia (*In re: Surface Mining Regulation Litigation,* No. 78–2190, May 2, 1980, p. 21–23) and is not a part of the approved Oklahoma program. Section 522(e)(5) of SMCRA, however, prohibits surface mining operations within three hundred feet of dwellings and other structures. Because Section 522(e)(5) of SMCRA includes no provision prohibiting blasting near oil and has pipelines, there is no Federal provision applicable to those structures in effect.

7. One commenter maintained that the permit review timeframe and procedures in the Oklahoma program were insufficient for "extensive environmental studies" and that the discretion reserved to the DOM was a potential source of discrimination against smaller operations. No specific timeframe, procedures or instances of illegal discrimination were criticized. The Secretary has reviewed the Oklahoma program procedures for review of permit applications and finds that they are consistent with the procedures of SMCRA and the Secretary's regulations. It should be noted that an applicant's obligation to supply information to the regulatory authority under SMCRA envisions collection and analysis of the data prior to submitting an application. For those operators planning to continue an existing operation more than eight months after the Oklahoma permanent program is approved, a permanent program permit application is required two months from the program approval date by Section 502(d) of SMCRA and Section 4(B) of OCRA. These operators should have been collecting information for their first permanent program permit application during 1980 so that a complete application could be filed within two months of program approval. The two-month requirement, however, does not preclude amendments to an application timely filed.

8. One commenter questioned the Oklahoma program procedure for making a "negative determination" on prime farmlands, suggesting that the landowner and other "knowledgeable people" should be made a "party." The Secretary notes that DOM regulation 779.27(b)–(d) is identical to 30 CFR 779.27(b)–(d), the "negative determination" rule. There is nothing in the DOM rule or OSM's rule prohibiting the use of information from landowners, past or present. The burden is on the applicant, however, to demonstrate the existence of one of the factors of Section 779.27(b) when the soil appears from the investigation required by Section 779.27(a) to be prime farmland. Although SMCRA or 30 CFR Chapter VII do not require that a landowner or any other person be made a "party" to a proceeding for a permit application, there is opportunity for participation in the application process.

9. One commenter recommended that the moist bulk density criteria be dropped for monitoring soil compaction when prime farmland is mined. As a result of litigation, *In Re: Permanent Surface Mining Regulation Litigation* (Civil Action No. 79–1144), OSM suspended the moist bulk density criteria (*see* 44 FR 77455, December 31, 1979). Pursuant to Oklahoma's request, the Secretary affirmatively disapproved Section 785.17(b)(3) and 823.14(c) of Oklahoma's regulations concerning excessive soil compaction. Therefore, the rule to which the commenter referred is not a part of the Oklahoma program.

10. A commenter asked that OSM not approve the Oklahoma program requirement of certification of sediment ponds by professional engineers. The request cannot be honored because Section 515(b)(10)(B)(ii) of SMCRA requires "siltation structures" to be "certified by a qualified registered engineer to be constructed as designed and as approved in the reclamation plan." The Oklahoma program meets this requirement (*see* 45 O.S. 1979 Supp. Section 751).

11. One comenter asserted that the Oklahoma program permitting requirements exceeded the requirements of SMCRA in some unspecified way and suggested that the permitting requirements of the initial regulatory program were all that should be required. First, the initial regulatory program contains no Federal requirements for permit application contents nor the procedure for review of applications. Congress has, however, specified minimum requirements for permit systems under permanent regulatory programs in SMCRA, Sections 506–514. Those requirements

have been implemented through the Secretary's regulations at 30 CFR Chapter VII, Subchapter G. The Secretary has found that the Oklahoma program provisions are consistent with the Federal permitting requirements with the exception of the small operators assistance provisions of Section 507(c) of SMCRA and 30 CFR Part 795 (*see* Finding 4(n)).

12. One commenter suggested that the Oklahoma program should not be approved until a Memorandum of Understanding (MOU) between OSM and the U.S. Environmental Protection Agency is proposed for public comments. The Secretary lacks authority to delay approval of the Oklahoma program for the reasons suggested by the commenter.

13. One commenter suggested delaying approval of the Oklahoma program because the U.S. Environmental Protection Agency's New Source Performance Standards (NSPS) require an environmental assessment for mines that produce certain quantities of coal in order to obtain an NPDES permit. The Secretary lacks authority to delay approval for such a reason and the Administrator of EPA has concurred in his conditional approval. At the same time, EPA's requirement would remain in effect regardless of the Secretary's decision on the Oklahoma program.

14. One commenter questioned the appropriateness of requiring field trials before Oklahoma can approve the use of introduced species of grasses such as bermuda and fescue on reclaimed areas, as required by Section 816.112 and 817.112 of Oklahoma's regulations. In the preamble to the permanent federal regulations (44 FR 15233, March 13, 1979), OSM said, "* * * the requirement of appropriate field trials should be interpreted broadly to include successful experience with species in the mined area or a similar area * * *." Therefore, the Secretary believes that the regulations would allow the Oklahoma DOM to approve the use of bermuda or fescue without a site-specific field trial for the proposed permit area provided that the operator and the State are mindful of the geographic adaptation of each species and the use of the species is "desirable and necessary to achieve the approved postmining land use plan" as required by Section 515(b)(19) of SMCRA.

15. One commenter agreed with the concerns about the Oklahoma program expressed by the Secretary in the initial decision of October 10, 1980, and agreed that they must be resolved before the State may assume primary jurisdiction under Pub. L. 95-87. Fifteen items or areas of concern were listed, but no specific allegations or suggestions were made. As detailed in the Findings, the Secretary has found that the Oklahoma program is consistent with SMCRA and 30 CFR Chapter VII with the minor exceptions noted.

16. An operator indicated that the DOM definition of "aquifer" in Section 701.5 is inconsistent with the definition of that term by the Oklahoma Water Resources Board (WRB) and urged that its use imposes application of permit data requirements to operators that are inappropriate to the eastern Oklahoma coal field. The Secretary has examined the "Rules, Regulations and Modes of Procedure," 1979 revision, and Oklahoma's "Water Quality Standards, 1979," both published by the WRB, and finds no definition of "aquifer." The Secretary also finds no inconsistency between those rules, those of the DOM and 30 CFR Chapter VII.

17. One commenter suggested that instead of providing hydrologic information to small operators through the small operators assistance program for the determination of probable hydrologic consequences required in a permit by Section 780.12(c) and Section 784.14(c) of Oklahoma's regulations, that those requirements should be waived for those operators producing under 100,000 tons of coal per year. Section 507(b)(11) of SMCRA requires that the permit application contain a statement of the probable hydrologic consequences of the proposed mining operation, and Section 507(b)(15) of SMCRA requires a statement of the results of test borings or core samples from all applicants. The Secretary has no authority to waive the requirements.

18. Two operators objected to approval of the Oklahoma program because the Small Operator Assistance Program (SOAP) has been declared in violation of the Oklahoma Constitution by the Oklahoma Attorney General and because it discriminated against small operators. They further suggested that a state program that fails to include a SOAP as required by Section 507(c) of SMCRA must ultimately be disapproved. They are correct. The Oklahoma legislature enacted Section 19 of OCRA (45 O.S. 1979 Supp. Section 745.16) to authorize DOM to comply with Section 507(c), but the Oklahoma Attorney General ruled, in Opinion No. 79-213A (May 27, 1980) (affirmed September 2 and October 31, 1980) that enforcement of the legislature's scheme violates Article X, Section 15 of the Oklahoma Constitution. Bound by the Attorney General's opinion, the DOM withdrew proposed regulations that would have been consistent with 30 CFR part 795. However, the DOM believes that the legislature may be able to amend OCRA in a way that would eliminate the problem or that the Oklahoma Supreme Court might disagree with the Attorney General's opinions, and has committed itself to seeking renewed authority to run a SOAP. Meanwhile, DOM has entered into a cooperative agreement with OSM to administer a SOAP under special arrangements not involving expenditure of State funds (Admin. Record OK-281). The Secretary has accepted this arrangement on a temporary basis only, making it a condition of the approval of the program that DOM obtain authority to implement a SOAP on its own by November 1, 1981. In the interim, the agreement between OSM and DOM will guarantee that small operators in Oklahoma receive the assistance to which they are entitled under Section 507(c) of SMCRA.

19. Pursuant to Section 7 of the Endangered Species Act, the U.S. Fish and Wildlife Service issued a biological opinion that the approval of the Oklahoma program is not likely to jeopardize the continued existence of threatened and endangered species or adversely modify their critical habitat.

20. The U.S. Environmental Protection Agency (EPA) recommended that Oklahoma be required to amend Sections 816.89 and 817.89 of the State regulations, dealing with the disposal of non-coal wastes, to include a reference to the Resource Conservation and Recovery Act (RCRA). Subsection (b) of these sections of Oklahoma's regulations, like the Federal regulations at 30 CFR 816.89(b) and 817.89(b), requires the operation at the disposal site to be conducted "in accordance with all local, state, and federal requirements," which would include the requirements of RCRA.

21. The EPA commented that Section 776.17 of Oklahoma's regulations relating to the public availability of information required to obtain approval for coal exploration contained acceptable confidentiality provisions as long as emissions data are not classified as confidential. Emissions data are not required in an application for approval of exploration and the Secretary has found the State regulations to be consistent with 30 CFR 776.17.

22. The EPA recommended that Oklahoma be required to amend Section 780.15(b)(3) of the State regulations dealing with an air pollution control plan by requiring the applicant to submit a copy of all necessary Federal, State, and local air quality permits. The State rule requires the applicant to submit a

copy of "an air quality permit." The Secretary agrees that there is some ambiguity in this State provision. However, the Federal rule at 30 CFR 780.15(b), dealing with air pollution control plan requirements, does not require an applicant to submit a copy of any air quality permit, so the Secretary lacks the authority to require the recommended change.

23. The EPA recommended that Oklahoma be required to add two control measures to the air resources protection provisions of Section 816.95 of the State regulations. The Federal rules dealing with air quality control (30 CFR 816.95 and 817.95) were remanded by the U.S. District Court for the District of Columbia (*In Re: Permanent Surface Mining Regulations Litigation*, Civil Action No. 79–1144, Mem. Opinion, May 16, 1980, p. 26). Pursuant to the court's order to affirmatively disapprove remanded regulations, and at the State's request, the Secretary affirmatively disapproved Section 816.95 of Oklahoma's regulations. The Secretary cannot require the recommended change.

24. One commenter urged OSM to review the State program bonding requirements because he understood that the level of bonding in Oklahoma would be increased from $1,500 per acre to $3,000 per acre or greater when the permanent program goes into effect. The Oklahoma program does not contain any specific level of bonding per acre. However, Oklahoma is bound by the requirement of Section 509(a) of SMCRA that "the amount of bond shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture and in no case shall the bond for the entire area under one permit be less than $10,000." The level of bonding required will be set on a site-specific basis.

Dated: February 11, 1981.

Andrew V. Bailey,

Acting Director.

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30 CFR Part 944

Comments Submitted on Utah's Permanent Surface Mining Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Discussion of comments.

SUMMARY: This notice summarizes significant issues raised in comments submitted to OSM and the Secretary of the Interior on Utah's permanent program resubmission and explains the Secretary's resolution of those issues. These comments were all considered by the Secretary in his decision conditionally to approve the Utah program submission. That decision was published January 21, 1981 at 46 FR 5899–5915.

FOR FURTHER INFORMATION CONTACT: Mr. Carl C. Close, Assistant Director, State and Federal Programs, Office of Surface Mining, 1951 Constitution Avenue NW., Washington, D.C. 20240, (202) 343–4225.

SUPPLEMENTARY INFORMATION: On January 21, 1981, the Secretary of the Interior published his decision to approve conditionally the Utah State permanent regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). That decision is found in 46 FR 5899–5915 and contains information necessary for a full understanding of this notice. A draft copy of it was released to State officials and to the public on January 15, 1981.

As explained in the notice, the Secretary considered all comments submitted to him in making his decision on Utah's program; however, when the manuscript was released on January 15, 1981, that section for the resolution of issues raised in the comments was in the final stages of proofreading, typing, and minor editorial revision. The Secretary, consequently, was unable to include it in the decision announcement notice.

Accordingly, a summary of significant issues raised by commenters on the revised submission is published herewith. Their comments were either delivered to the Secretary and OSM or made at the public hearing or in public meetings. The discussions below often refers to the January 21, 1981, notice which should be read with this one for full understanding of the decision.

Disposition of Public and Federal Agency Comments

Comments have been accepted and considered on Utah's initial program submission of March 3, 1980 (Administrative Record No. UT–1), and the State's revised submission of December 23, 1980 (Administrative Record No. UT–174). The Secretary's resolution of comments received on the initial submission is found in the initial decision notice published October 24, 1980, 45 FR 70481–70510. The Secretary's responses to the comments on the revised submission follow immediately after the summary of each issue raised by a commenter.

1. The Environmental Policy Institute (EPI) stated that although Utah amended UMC 761.11(b) to require that the restriction on areas where mining is prohibited apply to "underground mining operations," the State's definition does not include the "surface effects of underground mining." It was suggested that either the definition of underground mining be amended to include "surface effects," or that "surface effects" language be added to UMC 761.11(b).

The Secretary disagrees with the commenter. Utah amended UMC 761.11(b) to prohibit, in the circumstances set forth in that section, "underground coal mining activities," not "underground mining operations," as suggested by EPI (see Administrative Record No. UT–174, Coal Mining and Reclamation Regulations, Proposed Amendments for Adoption on December 18, 1980).

The State's definition of "underground coal mining activities" in UMC 700.5 means a combination of "surface operations" and "underground operations" incident to an underground coal mine. "Surface operations" is defined by the State as "with respect to underground coal mining activities, the activities conducted on the surface of the earth incident to an underground coal mine * * *." "Underground operations" means those operations conducted below the surface of the earth in connection with an underground coal mine. Thus, if the conditions, which are the same in the Federal rule as in Utah's rule, are met, underground mining is prohibited in Utah as broadly as under the Federal rule. The conditions specified in 30 CFR 761.11(b)(1) which prescribe that there are no significant recreational, timber, economic or other values which may be incompatible with the surface operations and impacts incident to an underground coal mine are identical to those of UMC 761.11(b)(1).

Accordingly, the Secretary finds that Utah's provision provides the protection of the surface from the effects of underground coal mining consistent with that of 30 CFR Chapter VII.

2. Three commenters expressed concern that Utah did not address the Secretary's initial finding 4(d)(iv) that the alluvial valley floor (AVF) waiver language of UMC/SMC 785.19(c)(3) provides less protection of AVF's than that provided by the Federal regulation. They further contended that in Utah's July 24, 1980, resubmission there was no indication whether the proposed new language was adopted or was even a formal part of the resubmission. They stated that the proposed language still provides the Division discretion to

waive the AVF requirements of 785.19(d) and (e).

The Secretary disagrees. Utah's response to the Secretary's initial disapproval of UMC/SMC 785.19(c)(3) is found in the State's December 23, 1980, resubmission, "Coal Mining and Reclamation Regulations—Proposed Amendments for Adoption on December 18, 1980." These amendments were adopted by the State on December 18, 1980. In that action, Utah deleted UMC/SMC 785.19(c)(3) and amended UMC/SMC 785.19(d)(1). The Secretary finds that Utah's amendment clarifies the permit application contents required by that section and as such is consistent with and as stringent as the 30 CFR 785.19(d)(1) (see Finding 4(d)(iv)).

Several other commenters expressed concern that the revised text of UMC/SMC 785.19(c), which limited the Division's discretion to waive AVF requirements, only refers to "underground operations." Since the text has been adopted for both UMC 785.19 and SMC 785.19, it would be appropriate for only UMC.

The Secretary agrees with the commenters. The omission of reference to "surface operations" was a typographical error.

The State of Utah has agreed to insert "or surface operations" after "underground operations." (See Administrative Record No. UT–189).

3. EPI stated that Utah omitted in UMC/SMC 786.19(h) the requirement that a permit applicant submit proof that all applicable reclamation fees required under the AML program be paid prior to obtaining a permit.

The Secretary notes that on December 18, 1980, Utah adopted an amendment to UMC/SMC 786.19(h) to require that all reclamation fees required by Subchapter R of CFR Chapter VII be paid before a permit is issued (see Finding 4(d)(v), 46 FR 5906, January 21, 1981). He therefore finds that the adoption of this change makes Utah's provisions consistent with the provisions of 30 CFR 786.19(h).

4. EPI expressed the concern that Utah restricts initiating rulemaking to an "interested person" as opposed to the "any person" criterion of 30 CFR 700.12(a). The former term, according to EPI, sets a more restrictive standard for public participation than does the Federal provision. The Secretary requested in Finding 4(1)(v) of 45 FR 70495, October 24, 1980, that either the State present information which demonstrates that standing under the State provision is as broad as that under the Federal provision or make an appropriate rule change.

In Utah's December 23, 1980, resubmission, Rule B–1 of the Board's Rules of Practice and Procedure (amended on August 20, 1980) defines "interested person" as *"any* person with an interest which is or may be adversely affected to bring an action before the Board (emphasis added)." A review of Utah's State laws shows that under UCA 40–6–3.3 "any person or the attorney general on behalf of the state may apply for a hearing before the Board," and UCA 63–46–8 further provides that "an interested person may petition an agency requesting the promulgation, amendment or repeal of a rule." It follows that if any person may petition the Board for a hearing (UCA 40–6–3.3), any person may petition at that hearing for a rule change. In a telephone conversation between representatives of OSM and the Utah Attorney General, the State confirmed that this interpretation is correct (Administrative Record No. UT–183). The Secretary finds UMC/SMC 700.12 consistent with the intent of 30 CFR 700.12 to provide for public participation in rulemaking under the State program, based upon the representation that any person may petition the Division of Oil, Gas, and Mining for a rule change.

5. EPI noted that while Utah has submitted a staffing and budget proposal for its AML program, it has not addressed in its December 23, 1980, resubmission, staffing for inspection, enforcement and permitting.

The Secretary notes that on December 15, 1980, the State in a discussion with OSM (Administrative Record No. UT–187) indicated that it has requested funding from its legislature for three full-time equivalents (FTE's) for inspection and enforcement and one FTE for permit review and administration (see also the December 23, 1980, resubmission budget request Form 300). The State fully expects to have this additional staff within six months of the Secretary's final decision, which falls within the initial eight month permit review requirement mandated by Section 506 of SMCRA (see Finding 4(t), 46 FR 5910, January 21, 1981). Therefore, the Secretary believes that Utah will have adequate staffing properly to carry out inspection and enforcement activities and permitting functions as required by the Act on non-Federal and non-Indian lands.

6. Three commenters expressed concern that Utah's resubmission for SMC 816.46(o) and UMC 817.46(o) does not satisfy the deficiency noted by the Secretary in his decision of October 24, 1980 (45 FR 70487). Specifically, the commenters pointed out that the State offers an exception to the requirement of 30 CFR 816/817.46(o) that prohibits the use of coal processing waste in the construction of sedimentation ponds. The Utah regulations do allow the use of non-acid and non-toxic coal processing waste when certain measures prescribed by the regulations are taken by the operator. The commenters further contended that while the State's provision might be approved as a "state window," Utah has not proposed the alternative with the required documentation prescribed by 30 CFR 731.13. The commenters noted that the State rule lacks criteria for determining when coal processing waste would be suitable. Finally, the commenters stated that the last provision of UMC 817.46(o) and SMC 816.46(o) does not "make sense" as it is constructed because the State refers to "waste" being "designed and constructed" and not "dams and embankments" as set forth in the referenced regulations, UMC 817.91–93 and SMC 816.91–93. The commenters argued that these deficiencies make the rule unapprovable by the Secretary.

As discussed in Finding 4(c)(xii), 46 FR 5903, the Secretary believes that Utah's modification of the provisions in 30 CFR 816/817.46(o) are consistent with and as stringent as the standards of the Federal rule and provide the environmental protection mandated by Section 515(b)(22)(c) of SMCRA. Further, the Secretary finds that Utah's stated need to be able to use coal processing waste in the construction of sediment pond dams and embankments in the steep narrow canyons, characteristic of Utah's mining terrain, satisfies the requirement for approval of the alternative pursuant to 30 CFR 731.13. (See Utah State Program amended text and classifications—Rules and Regulations (Adopted Amendments) pp. 33–34, and Utah State Program—State Window Submission, December 23, 1980, Utah Program Resubmission).

The Secretary finds that Utah's incorporation of 30 CFR 816/817.91–93 for the use of coal processing waste in dams and embankments makes the Utah provision consistent with and as stringent as the standards of the Federal rules for determining the suitability of such waste for such use. Under the Federal rules, waste may not be used in dams constructed according to sediment pond embankment design criteria, but may be used in embankments which meet the criteria for waste dams, even if the purpose of the impoundment behind the dam is for sediment control.

Finally, while the Secretary agrees with the commenters that the construction of the last sentence in SMC 816.46(o) and UMC 817.46(o) may be awkward, the intent and practical

application of the provision to require that sedimentation pond dams and embankments that are constructed with non-acid and non-toxic forming coal processing waste meet the standards prescribed in UMC 817.91–93 and SMC 816.91–93 are met. Accordingly, the Secretary disagrees with the commenters' request that the resubmitted rule be disapproved (see Finding 4(c)(xii), 46 FR 5903, January 21, 1981).

7. Three commenters stated that Utah's resubmission response to the deficiency identified by the Secretary in UMC 817.52(a)(1) and SMC 816.52(a)(1) regarding requirements for conducting surface and groundwater monitoring is unacceptable. The commenters pointed out that Utah did not make any changes in its December 23, 1980, resubmission, but, rather, suspended those rules pursuant to the court order in *In Re: Permanent Surface Mining Regulation Litigation* (Civil Action No. 79–1144, Slip op. pp. 16–17). The commenters noted that the court's order addressed 30 CFR 817.52(a)(1), but not 30 CFR 816.52(a)(1). The commenters also contended that Utah's rules remain deficient as noted in the Secretary's decision on October 24, 1980 (45 FR 70487), and must be disapproved.

Utah submitted to OSM on July 24, 1980, as part of its proposed program submission, proposed regulatory amendments for SMC 816.52(a)(1) and UMC 817.52(a)(1). Those amendments were subsequently adopted on August 20, 1980. With those changes, SMC 816.52(a)(1) is identical to 30 CFR 816.52(a)(1) and UMC 817.52(a)(1) reflects 30 CFR 817.52(a)(1) with the suspended provision deleted. The amended provisions were not considered in the Secretary's initial decision partially approving/partially disapproving the Utah program (45 FR 47481–74510, October 24, 1980) because the adoption of the amendments did not occur before June 16, 1980 (See "General Background on State Program Approval Process," 45 FR 70482). In order to maintain consistency with the district court order in *In Re: Permanent Surface Mining Regulation Litigation* (Civil Action No. 79–1144), Utah on November 19, 1980, "suspended pursuant to Judge Flannery's order" all regulatory provisions which it had enacted since August 15, 1980. Utah noted this in its December 23, 1980, resubmission, but inadvertently failed to resubmit the revised regulatory language described above. The Secretary believes this deletion to be inadvertent and feels that SMC 816.52(a)(1) as in effect is consistent with the Federal rule because the authorization to suspend rules based on Judge Flannery's ruling does not authorize any suspension in 816.52(a)(1), which Judge Flannery did not remand. Accordingly, the Secretary finds that the deficiencies have been corrected and therefore approves UMC 817.52(a)(1) and SMC 816.52(a)(1) (see Finding 4(c)(xiv)).

8. Three commenters argued that Utah's amendment to SMC 816.57(a) and UMC 817.57(a) contained in its December 23, 1980, resubmission is deficient in that it does not address the deficiency noted by the Secretary in his October 24, 1980, decision (see Finding 4(c)(xvi), 45 FR 70488) and introduces a new deficiency. Specifically the commenters contended that the State limits the application of the buffer zone prescribed by 30 CFR 816/817.57(a) and fails to apply the buffer zone to streams which are neither perennial nor intermittent, but where a biological community is determined to exist.

The Secretary disagrees with the commenters. As discussed in Finding 4(c)(xvi), 45 FR 5903, January 21, 1981, Utah adopted verbatim the requirement of 30 CFR 816/817.57(c) in UMC 817.57(c) and SMC 816.57(c). These provisions prescribe that a biological community in a stream be determined by the existence in the stream at any time of an assemblage of two or more species of arthropods or mulluscan animals which meet certain criteria (30 CFR 816.57 and 817.57). Utah sets forth in SCM 816.57(a) and UMC 817.57(a) that "no land within 100 feet of a perennial or an intermittent stream and which contains a biological community * * * [may] be disturbed by surface (underground) coal mining activities." As explained in Finding 4(c)(xvi), the Secretary understands that a biological community could be found in both perennial and intermittent streams. This finding is consistent with the Federal preamble's discussion of the need for buffer zones (44 FR 15177, March 13, 1979). The regulation, by use of the term "biological community," seeks to protect biologically significant streams from direct disturbance except in accordance with Section 816.44. The more constant intermittent streams will usually have a biological community, but as streams become increasingly intermittent due to their climatic, geologic and geographic location, the less likely it will be that they have a biotic community that fits within the definition in 30 CFR 816/817.57(c). Further, perennial streams will almost always have a significant biota unless it has been eliminated by pollution. The Secretary knows of no perennial stream in Utah which does not have significant biota. Finally, while ephemeral streams may be significant sources of water and sediment to larger streams, the Act contemplates mining and associated activities to disturb directly minor stream channels when it allows for sedimentation ponds which have to be built in some sort of water drainage channel. Surface mining is impossible without destruction of a number of ephemeral streams, as defined in 30 CFR 701.5. The Secretary believes that in Utah's regulations all streams, perennial, intermittent, and ephemeral are afforded protection equal to that required by the Federal regulations based upon hydrologic considerations, regardless of the existence or nonexistence of a biological community.

Specifically, the provisions of SMC 816.43 and .44 are consistent with 30 CFR 816/817.43 and .44 in insuring the preservation of perennial, intermittent and ephemeral streams. All perennial streams and all intermittent streams with significant biota will be protected by the 100 foot buffer zone. Further, in Utah, ephemeral streams characteristic of the areas in which underground mining takes place do not contain biological communities which are important to fish because they derive from the direct result of snowfall which varies from year to year. Accordingly, the Secretary finds that Utah's provision provides the same level of protection as the Federal regulation.

9. Three commenters stated that Utah's response to the Secretary's finding that subsection (1) of 30 CFR 817.65 did not appear in the State rule, UMC 817.65, does not remedy the deficiency and as such may not be approved.

In its December 23, 1980, resubmission, Utah presented as adopted regulations, UMC 817.65 (i), (j) and (j)(1). These provisions are identical to 30 CFR 817.65 (i), (j) and (j)(1).

In further reviewing the Utah regulations, the Secretary has determined that UMC 817.65(l)(1) is included in the program resubmission (See Administrative Record No. UT–1). Therefore, the Secretary is approving UMC 817.65.

10. Three commenters contended that because Utah did not submit its provisions in UMC 817.72(b) and SMC 816.72(b), which differ from the requirements of 30 CFR 817/816.72(b), as a state window, they cannot be approved. 30 CFR 816/817.72(b) require that a subdrainage system always be constructed for valley fills. UMC 817.72(b) and SMC 816.72(b) allow an exemption when the operator satisfies certain conditions prescribed in the

regulation. The commenters also pointed out that Utah has not amended UMC 817.72(c) and SMC 816.72(c) to be consistent with 30 CFR 817/816.72(c). The Federal regulation only allows the regulatory authority the discretion to require the construction of lifts in valley fills less than four feet while the State allows lifts greater than four feet. The commenters argued that because the State did not file a state window to support its provision, the State rule must be disapproved as being inconsistent with and less stringent than the Federal rule.

The Secretary agrees with the commenters that Utah must revise UMC 817.72 (b) and (c) and SMC 816.72 (b) and (c) so that its regulations for insuring stability in valley fills are consistent with the standards prescribed by 30 CFR 816/817.72(c).

The Secretary has conditioned his approval of the Utah program on the revision of this section (see Findings 4(c)(xx)(5), 46 FR 5905).

11. Three commenters stated that Utah has not cured the deficiency in SMC 816.103 and UMC 817.103 identified by the Secretary in his decision on October 24, 1980 (45 FR 70488). In the decision, the Secretary pointed out that the State's regulations did not specify a minimum burial depth of four feet, if not treated, for prescribed materials and as such was inconsistent with 30 CFR 816/817.103(a)(1). The Secretary also noted that the Federal provision has been remanded by the court to allow treatment of such materials in *In Re: Permanent Surface Mining Regulation Litigation* (Civil Action No. 79–114).

Utah submitted to OSM on July 24, 1980, as part of its proposed program submission, proposed regulatory amendments for SMC 816.103(a)(1) and UMC 817.103(a)(1) which incorporated the Federal requirement that certain materials be "* * * covered with a minimum of four feet of the best non-toxic and non-combustible material * * *." The Board adopted this amendment on August 20, 1980. The amended provision was not considered in the Secretary's initial decision on October 24, 1980 (45 FR 70481–70510), partially approving and partially disapproving the Utah program because the adoption did not occur before June 16, 1980 (see "General Background on State Program Approval Process," 45 FR 70482).

In that decision the Secretary also set forth standards for applying the court order referenced above (45 FR 70482). Under those standards, the Secretary need not affirmatively disapprove state provisions similar to those Federal provisions suspended or remanded by the district court where the state had adoted such provisions in rulemaking which occurred after the date of the Round II District Court decision.

Although Utah did adopt modifications to UMC 817.103(a)(1) and SMC 816.103(a)(1) after the August 15, 1980, decision, the State did not want the Secretary to consider as part of its program any provisions which the court had indicated the Secretary could not require of a State. Accordingly, it "suspended pursuant to Judge Flannery's order" the provisions relating to cover and treatment of toxic materials on November 19, 1980. The latter action is identified in the State's resubmission on December 23, 1980. Utah elected to take this action in order to remain in accord with the court order and the revision and repromulgation of those provisions by OSM.

Based on these facts, the Secretary finds that SMC 816.103(a)(1) and UMC 817.103(a)(1), as promugated, are consistent with the requirement of 30 CFR 817/816.103(a)(1) for requiring a minimum burial depth, if not treated, and the provisions are in accord with the remanded order of the court. This finding is based on the Secretary's understanding that Utah's "suspension pursuant to Judge Flannery's order," only suspends or remands those provisions insofar as mandated by the court and as such does not affect the requirement to comply with those standards of the provision not addressed by the court. The court remanded the Federal rule because it did not include the alternative of treatment. In the case of this rule, the Utah "suspension" does not affect the applicability of the rule adopted August 20, 1980.

12. Three commenters argued that Utah's use of the phrase "to the extent technologically and economically feasible" in UMC 817.124(a) as a modifier to the requirement of the permittee to comply with the subsidence control plan approved pursuant to UMC 784.20, makes the Utah provision inconsistent with and less stringent than the 30 CFR 817.124(a).

The Secretary does not consider the phrase "to the extent technologically and economically feasible" to condition an operator's obligation to comply with the subsidence control plan. Rather, the Secretary agrees with the explanation of the use of the phrase submitted as part of the State's December 23, 1980, resubmission (Utah State Program Amended Text and Clarifications—Rules and Regulations (Adopted Amendments) page 55). In that discussion, Utah states that an operator must adopt the most technologically and economically feasible measures to control subsidence as mandated by Sections 102, 501(b) and 516(b)(1) of SMCRA. Further, the Secretary does not believe that an operator could argue legal non-compliance with an approved subsidence control plan on the basis that it was not feasible. Compliance with the plan is a standing condition of the permit. Arguments of "infeasibility" have no merit or standing. Accordingly, the Secretary finds UMC 817.124(a) consistent with and as stringent as 30 CFR 817.124(a).

13. It was noted by three commenters that while Utah added the word "noncancellable" to describe the type of prepaid insurance policy required in the protection of surface owners from the potential adverse effects of subsidence, the State did not delete the word "renewable." The commenters argued that under a "renewable" policy, the guaranteed coverage would necessarily expire at the end of the renewal term, thereby creating a situation where the coverage might expire as a result of nonpayment, notwithstanding that the policy is "noncancellable" during the term of the policy.

The Secretary agrees with the commenters that UMC 817.124(b) is inconsistent with and less stringent than 30 CFR 817.124(b) and has conditioned his approval of the Utah program on Utah's amending its provision to be consistent with the Federal regulation (see Finding (4)(c)(xxix), 46 FR 5905–5906).

14. It was pointed out by three commenters that while Utah has adopted in UMC 817.126(a) the buffer zone requirement of 30 CFR 817.126(a), the State also modified the determination the Division must make in order to waive the buffer zone. The commenters argued that by using the phrase "material damage which would result in the environmental degradation or safety hazards to streams, water bodies and associated structures" Utah has limited the use of a buffer zone. The commenters stated that the Federal rule requires the Division to determine that mining will not cause any "material damage" to listed surface structures. Further, the commenters argued, reductions in stream flow would not be considered a "material damage" under the Utah provision, when in fact loss of water owned by third persons would constitute "material damage" under the Federal rule. The commenters felt the Utah rule must be disapproved.

The Secretary believes that Utah's provision does not limit or restrict the determination of adverse effects due to material damage from subsidence. Utah

adopted, in UMC/SMC 700.5, a definition for "materially damage the quantity or quality of water" which is identical to that prescribed in 30 CFR 701.5. In that this definition recognizes changes in the quantity and quality of water supply as a material damage and there is no evidence to support that such changes would not result in "environmental degradation," the Secretary feels that UMC 817.126(a) is consistent with and as stringent as 30 CFR 817.126(a).

15. Three commenters stated that Utah did not respond to the Secretary's findings on October 24, 1980 (45 FR 70487), that the Utah definition of aquifer in UMC/SMC 700.5 was inconsistent with the definition of aquifer in 30 CFR 701.5.

The Secretary disagrees with the commenters. Utah adopted an amendment to its definition of aquifer on December 18, 1980, making the Utah definition identical to the Federal definition (See Administration Record No. UT–174) The amendment is contained in Utah's December 23, 1980, resubmission (Permanent Program Submission Under the Surface Mining Control and Reclamation Act of 1977—Proposed Amendments for Adoption).

16. Three commenters expressed concern with the provision of UMC/SMC 788.12(a)(1) which requires a permit revision if there is an increase in the size of the surface or subsurface area disturbed in an amount of 5% or greater than the originally approved area. Specifically, the commenters felt that this provision could allow a taking of property without due process of law. Further, they argued that Utah's rule is inconsistent with Section 511(a)(3) of SMCRA which requires that a revision of the permit boundary be treated as a permit revision. The commenters also contended that Utah's deletion of UMC/SMC 788.12(a)(1)(iv) only tends to limit those changes which are to be considered "significant departures" and as such require a permit revision.

A "disturbed area" is defined by UMC/SMC 700.5 and 30 CFR 701.5 to mean an area where vegetation, top soil or over burden is removed or upon which top soil, spoil, coal processing waste, underground development waste or noncoal waste is placed by surface coal mining operations. "Disturbed area" is contained within a "permit area," which is defined as the area of land and water within the boundaries of the permit approved by the regulatory authority. A permit area includes at a minimum all areas which are or will be affected by the surface coal mining and reclamation operations during the term of the permit. As all mines in Utah currently permitted are underground mines, the disturbed areas are not large in acreage. Hence an increase of less than 5% will not constitute a major change in the operations. Further, Utah adopted in UMC/SMC 788.12(d) a provision identical to 30 CFR 788.12(d). This section prescribes that "any extensions to the area covered by the permit, except for incidental boundary revisions, shall be made by an application for a new permit and shall not be approved under * * *" 788.12. The Secretary feels that Utah, by adopting the provision, has clearly given notice to the public as to the changes that will be considered significant.

The Secretary understands Utah's provision to address only "disturbed areas" and not "permitted areas." Accordingly, the Secretary does not find that significant changes will be obtained under the Utah provision. While the operator can change by up to 5% the disturbed area within the permit area, any change in the permit area is subject to approval by the regulatory authority, and any extensions other than incidental ones require a new permit. The Secretary considers Utah's provision to be consistent with the intent of 30 CFR 788.12(a)(1) to allow the regulatory authority discretion in providing parameters to determine what changes will constitute significant departures as used in the program.

The Secretary further finds that Utah's provision UMC/SMC 788.12(a)(1) defines what changes in the method of conducting operations, i.e., from room and pillar mining to longwall mining, would be considered a significant change from the approved permit and as such would require a permit revision. The Secretary finds Utah's deletion of UMC/SMC 788.12(d) consistent with the requirement of 30 CFR Chapter VII to limit variance from the Federal regulations to those cases where a standard has been established and the decisions are not made on a site-by-site basis.

17. Three commenters disagreed with the Secretary's preliminary analysis of the Utah State Window for Steep Slope Mining (see 45 FR 47485). The commenters argue that the Secretary must require the elimination of highwalls in all cases. The commenters contended that while Section 515(c) of SMCRA allows an exemption to the approximate original contour requirement of Section 515(b)(3) of SMCRA for mountain top removal operations and Section 515(b)(3) provides for an exemption for their overburden, no other exemptions are allowed by SMCRA. Further, the commenters stressed that Congress did not intend for general variances or exemptions from the performance standards in SMCRA. Finally, the commenters stated that Utah has presented no justification "for not implementing 30 CFR 826.12 in addition to subsection (b)." The commenters feel that "the remaining requirements of the section should apply to whatever backfilling is performed on the site."

The Secretary disagrees with the commenters. As he explained in detail in his initial decision on the October 24, 1980 (45 FR 70485–6), the requirement of Section 515(b)(3) to return an area to its natural approximate original contour is the determining provision of the Section and the elimination of highwalls is a means of accomplishing that mandate. Further, the Secretary believes that his approval of Utah's proposed state window implements Section 101(f) of SMCRA and 30 CFR 731.13 which mandate that consideration be given to environmental or agricultural conditions or local requirements unique to a particular state. At the same time, the Secretary has conditioned his approval of the Utah program on the State's revision of its program to include requirements consistent with and as stringent as those of 30 CFR 826.12 for the prevention of dumping certain materials on the downslope of steep slope areas (see Finding 4(c)(xxxi), 46 FR 5906).

20. Three commenters stated that Utah must revise Section 40–10–18 UCA of the Utah SCMRA before its program can be approved by the Secretary. The commenters contended that Utah's proviso in the section, "standard methods of mining," cannot be construed to be equivalent to the proviso of Section 516(b)(i) of "standard methods of room and pillar mining." Further, the commenters felt that an Attorney General's opinion is not sufficient for the Secretary to base his decision of equivalency.

The Secretary disagrees with the commenters. As discussed in Finding 1(a)(v) (46 FR 5900), the Secretary considers Utah's clarification that "standard methods of mining" applies to

"room and pillar" or "long wall" mining or a combination of those methods meets the requirements of consistency and stringency set forth by the Federal program. Section 516(b)(1) of SMCRA makes it clear that the subsidence controls in the Federal Act are not to prohibit room and pillar mining or longwall mining which is a technology which requires planned subsidence in a predictable and controlled manner. Further, the Secretary believes this interpretation to be fully consistent with legislative history of SMCRA (See H.R. Rep No. 218, 95th Congress, 1st Session 126 (1977); 1977 U.S. Code, Congressional and Administrative News 658). The Secretary considers the Attorney General's opinion part of the State program. As such, any failure by the State to abide by the opinion would be considered a violation of the program, just as a violation of its statute or regulations would be. Accordingly, the Secretary finds that Utah's statutory provision provides protection of the environment and the public equal to that guaranteed by SMCRA.

Dated: February 10, 1981.

Andrew V. Bailey,

Acting Director.

[FR Doc. 81-9030 Filed 3-24-81; 8:45 am]

BILLING CODE 4310-05-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 65

[Docket No. FEMA-6016]

Communities With Minimal Flood Hazard Areas for the National Flood Insurance Program

AGENCY: Federal Insurance Administration, FEMA.

ACTION: Final rule.

SUMMARY: The Federal Insurance Administrator, after consultation with local officials of the communities listed below, has determined, based upon analysis of existing conditions in the communities, that these communities' Special Flood Hazard Areas are small in size, with minimal flooding problems. Because existing conditions indicate that the area is unlikely to be developed in the foreseeable future, there is no immediate need to use the existing detailed study methodology to determine the base flood elevations for the Special Flood Hazard Areas.

Therefore, the Administrator is converting the communities listed below to the Regular Program of the National Flood Insurance Program (NFIP) without determining base flood elevations.

EFFECTIVE DATE: Date listed in fourth column of List of Communities with Minimal Flood Hazard Areas.

FOR FURTHER INFORMATION CONTACT: Mr. Robert G. Chappell, National Flood Insurance Program, (202) 755-5585, Federal Emergency Management Agency, Washington, D.C. 20472.

SUPPLEMENTARY INFORMATION: In these communities, the full limits of flood insurance coverage are available at actuarial, non-subsidized rates. The rates will vary according to the zone designation of the particular area of the community.

Flood insurance for contents, as well as structures, is available. The maximum coverage available under the Regular Program is significantly greater than that available under the Emergency Program.

Flood insurance coverage for property located in the communities listed can be purchased from any licensed property insurance agent or broker serving the eligible community, or from the National Flood Insurance Program. The effective date of conversion to the Regular Program will not appear in the Code of Federal Regulations except for the page number of this entry in the **Federal Register.**

The entry reads as follows:

§65.7 List of Communities with Minimal Flood Hazard Areas.

State	County	Community name	Date of conversion to regular program
Ohio	Stark	Village of East Sparta	May 1, 1981.
North Dakota	Burke	City of Portal	May 26, 1981.
Washington	Whitman	Town of St. John	May 26, 1981.

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended; 42 U.S.C 4001-4128; Executive Order 12127, 44 FR 19367; and delegation of authority to the Federal Insurance Administrator)

Issued: March 13, 1981.

Richard W. Krimm,

Acting Administrator, Federal Insurance Administration.

[FR Doc. 81-8982 Filed 3-24-81; 8:45 am]

BILLING CODE 6718-03-M

44 CFR Part 67

National Flood Insurance Program; Final Flood Elevation Determinations

AGENCY: Federal Insurance Administration, FEMA.

ACTION: Final rule.

SUMMARY: Final base (100-year) flood elevations are listed below for selected locations in the nation.

These base (100-year) flood elevations are the basis for the flood plain management measures that the community is required either to adopt or show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

EFFECTIVE DATE: The date of issuance of the Flood Insurance Rate Map (FIRM), showing base (100-year) flood elevations, for the community.

ADDRESSES: See table below.

FOR FURTHER INFORMATION CONTACT: Mr. R. Gregg Chappell, National Flood Insurance Program, (202) 755-5585 or

Toll Free Line (800) 424–8872 (In Alaska and Hawaii Call Toll Free (800) 424–9080), Room 5150, 451 Seventh Street, S.W., Washington, D.C. 20410.

SUPPLEMENTARY INFORMATION: The Federal Insurance Administrator gives notice of the final determination of flood elevations for each community listed.

This final rule is issued in accordance with Section 110 of the Flood Disaster Protection Act of 1973 (Pub. L. 93–234), 87 Stat. 980, which added Section 1363 to the National Flood Insurance Act of 1968 (Title XIII of the Housing and Urban Development Act of 1968 (Pub. L. 90–448), 42 U.S.C. 4001–4128, and 44 CFR Part 60.4(a)). An opportunity for the community or individuals to appeal this determination to or through the community for a period of ninety (90) days has been provided, and the Administrator has resolved the appeals presented by the community.

The Administrator has developed criteria for flood plain management in flood-prone areas in accordance with 44 CFR Part 60.

The final base (100-year) flood elevations for selected locations are:

Final Base (100-Year) Flood Elevations

State	City/town/county	Source of flooding	Location	#Depth in feet above ground. *Elevation in feet (NGVD)
California	Santa Rosa (City), Sonoma County (FI-5501)	Spring Creek	Doyle Park Drive (50 feet upstream from centerline)	*175
			Franquette Avenue (200 feet upstream from centerline).	*201
			Mayette Avenue (80 feet upstream from centerline)	*214
	Maps available for inspection at City Hall, Santa Rosa, California.			
Georgia	Waycross (City), Ware County (FI-5383)	Waycross Drainage Canal	3rd Corporate Limits at centerline	*88
			Morningside Drive—100 feet upstream of centerline	*90
			City Boulevard—20 feet upstream of centerline	*94
			Plant Avenue—30 feet upstream of centerline	*96
			Ricardo Street—60 feet upstream of centerline	*99
			Darling Avenue—20 feet upstream of centerline	*104
			Screven Avenue—20 feet upstream of centerline	*113
			Knight Avenue—80 feet upstream of centerline	*118
			Williams Street—20 feet upstream of centerline	*121
			Reynolds Street—20 feet upstream of centerline	*125
			Marion Street—20 feet upstream of centerline	*126
			Lee Street—20 feet upstream of centerline	*128
			Seaboard Coastline Railroad:	
			20 feet downstream of centerline	*129
			20 feet upstream of centerline	*134
		Tributary A	Morningside Drive:	
			80 feet downstream of centerline	*88
			60 feet upstream of centerline	*93
			Seminole Trail—20 feet upstream of centerline	*96
			City Boulevard:	
			85 feet downstream of centerline	*96
			100 feet upstream of centerline	*102
			Central Avenue:	
			40 feet downstream of centerline	*112
			50 feet upstream of centerline	*117
			Corporate Limits at centerline	*118
		Tributary B	Alice Street—40 feet upstream of centerline	*103
			Tebeau Street—40 feet upstream of centerline	*105
			Darling Avenue—20 feet upstream of centerline	*119
			Riverside Avenue—70 feet upstream of centerline	*124
		Tributary C	Alice—20 feet upstream of centedine	*110
			Tebeau Street at centerline	*111
		Tributary D	Knight Avenue—20 feet upstream of centerline	*115
			Carswell Avenue—20 feet upstream of centerline	*117
			Pendleton Street—40 feet upstream of centerline	*123
			McDonald Street—20 feet upstream of centerline	*127
			Jane Street—20 feet upstream of centerline	*131
			Ethel Street—30 feet upstream of centerline	*132
		Tributary F	Ball Street Extension at centerline	*134
		Tributary G	Lewis Avenue—20 feet upstream of centerline	*134
			Knight Avenue—125 feet downstream of centerline	*120
			Knight Avenue—125 feet upstream of centerline	*130
			Reynolds Street—25 feet upstream of centerline	*134
			Mosley Street—25 feet upstream of centerline	*137
		County Creek B	Seminole Trail—25 feet upstream of centerline	*96
	Maps available for inspection at City Hall, Waycross, Georgia.			
Kansas	(C) Kansas City, Wyandotte County (Docket No. FI-5266)	Missouri River	At eastern corporate limit	*751
			Approximately 0.5 mile downstream of Fairfax Bridge	*757
			Just upstream of Interstate 635	*759
			At northern corporate limit	*765
		Kansas River	At confluence with Missouri River	*751
			1,000 feet upstream of 7th Street	*752
			Just downstream of Kansas Avenue	*757
			At confluence of Brenner Heights Creek	*760
			At confluence of Mill Creek	*764
			At western corporate boundary	*767
		Turkey Creek	Just upstream of tunnel entrance	*763
			Just upstream of Interstate 35 Ramp	*768
			Approximately 350 feet upstream of Mission Road	*787
			Upstream of Interstate 35 (approximately 350 feet upstream of Southwest Boulevard).	*790
			Upstream of Mill Street	*799
			Just downstream of the St. Louis and San Francisco Railway.	*802

Final Base (100-Year) Flood Elevations—Continued

State	City/town/county	Source of flooding	Location	#Depth in feet above ground. *Elevation in feet (NGVD)
			Approximately 700 feet downstream of Roe Lane	*808
			400 feet upstream of 18th Street Expressway	*835
			Approximately 150 feet upstream of the upstream Interstate 35 crossing	*838
			Approximately 400 feet upstream of Lamar Avenue	*846
		Brenner Heights Creek	At confluence with Kansas River	*760
			Approximately 20 feet upstream of 57th Street	*765
			Approximately 200 feet downstream of State Avenue	*786
			Approximately 130 feet upstream of State Avenue	*790
			Just upstream of Everett Avenue	*816
			Approximately 800 feet downstream of Parallel Avenue	*842
			Approximately 250 feet upstream of Parallel Avenue	*849
			Just downstream of 59th Street	*849
			Just upstream of 59th Street	*862
			Approximately 2,750 feet upstream of 59th Street	*876
		Brenner Heights Creek Tributary	At confluence with Brenner Heights Creek	*763
			Approximately 150 feet downstream of State Avenue	*784
			Just upstream of 55th Street	*799
			Approximately 650 feet upstream of 55th Street	*800
			Approximately 2,850 feet upstream of 55th Street	*821
		Muncie Creek	At confluence with Brenner Heights Creek	*760
			Just upstream of 61st Street	*763
			Just upstream of Riverview Avenue	*775
			Just downstream of the Kansas Turnpike	*779
			Approximately 400 feet upstream of Kansas Turnpike	*788
			Approximately 2,800 feet upstream of Kansas Turnpike.	*788
			Just downstream of State Avenue	*811
			Approximately 100 feet upstream of State Avenue	*819
			Approximately 7,100 feet upstream of State Avenue	*861
		Mill Creek	At confluence with Kansas River	*764
			Just downstream of Union Pacific Railroad	*764
			Approximately 1,000 feet upstream of State Highway 32.	*775
			Just upstream of Kansas Avenue	*783
			Just downstream of 72nd Street	*792
			Just upstream of 72nd Street	*798
			Just downstream of Riverview Avenue	*810
			Just upstream of Riverview Avenue	*820
			Approximately 1,550 feet upstream of Interstate 70	*822
			Just downstream of State Avenue	*864
			Just upstream of State Avenue	*874
			Approximately 2,700 feet upstream of State Avenue	*881
		Little Turkey Creek	At confluence with Kansas River	*765
			Just upstream of Swartz Avenue	*777
			Just upstream of 85th Terrace	*789
			Just upstream of Kansas Avenue	*793
			At western corporate boundary	*843
		Little Turkey Creek Tributary	At confluence with Little Turkey Creek	*789
			Just upstream of Kansas Avenue	*791
			Just downstream of 86th Street	*791
			Just upstream of 86th Street	*797
			Approximately 5,700 feet upstream of 86th Street	*823
			Approximately 7,300 feet upstream of 86th Street	*840
		Connor Creek	At confluence with Missouri River	*765
			Approximately 200 feet upstream of 97th Street	*766
			Approximately 300 feet upstream of Hollingsworth Drive.	*778
			Just upstream of Donahoo Road	*819
			Approximately 150 feet upstream of 107th Street	*840
			Approximately 2 miles upstream 107th Street	*900
	Maps available for inspection at City Hall, Physical Planning Department, Kansas City, Kansas.			
Louisiana	Abbeville (City), Vermilion Parish (FEMA-5817)	Vermilion River	100 feet upstream from intersection of Vermilion River and center of Southern Pacific Railroad.	*10
		Valcourt Coulee	Intersection of Valcourt Coulee and center of South Hollingsworth Drive.	*11
			Intersection of Valcourt Coulee and center of West Summers Drive.	*13
		Dick Hunter Coulee	Intersection of Dick Hunter Coulee and the center of Memorial Drive.	*10
		Hog Coulee	Intersection of Hog Coulee and center of Port Street	*10
		Youngs South Coulee	Intersection of Youngs South Coulee and center of Eaton Drive.	*12
		Youngs North Coulee	Intersection of Youngs North Coulee and center of Hospital Road.	*7
			Intersection of Youngs North Coulee and center of Leonard Avenue.	*12
	Maps available for inspection at City Hall, 3040 Charity Street, Abbeville, Louisiana.			
Michigan	(C) Sterling Heights, Macomb County (Docket No. FEMA-5825).	Clinton River	Just upstream of Hayes Road	*602
			About 200 feet upstream of Kleino Road	*606
			About 250 feet upstream of Earl Memorial Highway	*614
			Just downstream of Van Dyke Road	*624
		Red Run Drain	Just downstream of Utica Road	*602
			Just upstream of 16 Mile Road	*605

Final Base (100-Year) Flood Elevations—Continued

State	City/town/county	Source of flooding	Location	#Depth in feet above ground. *Elevation in feet (NGVD)
			Just downstream of 14 Mile Road	*610
		Plum Brook	Just upstream of Schoenherr Road	*603
			Just upstream of Van Dyke Road	*615
			About 700 feet upstream of Mound Road	*624
			Just downstream of Golf Course Weir	*632
			Just upstream of 19 Mile Road	*643
			Just downstream of Hall Road	*677
		Gibson Drain	Mouth at Plum Brook	*632
			Just downstream of Dequindre Road	*642
		Chrissman Drain	Just downstream of culvert	*622
			Just upstream of culvert	*623
			Just upstream of Mound Road	*633
			Just downstream of State Highway 59	*648
		Chrissman Drain (Old Channel)	Mouth at Plum Brook	*621
			At divergence from Chrissman Drain	*623
		Chrissman Drain (Overland Flow at 19 Mile Road)	At confluence with Chrissman Drain	*635
			Just upstream of 19 Mile Road	*636
		Big Beaver Creek	Just upstream of Conrail	*611
			Just downstream of Dequindre Road	*630
		Sterling Relief Drain	Mouth at Red Run Drain	*606
			About 3,600 feet upstream of Dodge Park Road	*606
		Shanahan Drain	Mouth at Big Beaver Creek	*626
			About 1,200 feet upstream of 16 Mile Road	*632
		Phiel Drain	Mouth at Clinton River	*607
			Just downstream of Dodge Park Road	*607

Maps available for inspection at City Engineer's Office, 40555 Utica Road, Sterling Heights, Michigan.

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended (42 U.S.C. 4001–4128); Executive Order 12127, 44 FR 19367; and delegation of authority to Federal Insurance Administrator)

Issued: March 13, 1981.

Richard W. Krimm,

Acting Administrator, Federal Insurance Administration.

[FR Doc. 81-8893 Filed 3-24-81; 8:45 am]

BILLING CODE 6718-03-M

FEDERAL MARITIME COMMISSION

46 CFR Part 536

[General Order 13, Revised, Amendment No. 8]

Publishing and Filing Tariffs by Common Carriers in the Foreign Commerce of the United States

AGENCY: Federal Maritime Commission.

ACTION: Interim rule.

SUMMARY: Foreign commerce rail/water tariffs must continue to publish a single factor through rate, but need not continue to break out the division, rate or charge for the port-to-port portion of a through service required by § 536.8(b). This action temporarily waives an existing regulatory requirement and is taken to accommodate ICC tariff filing exemptions for TOFC/COFC traffic and to reduce the tariff filing burdens of ocean carriers.

EFFECTIVE DATE: March 25, 1981.

FOR FURTHER INFORMATION CONTACT: Joseph C. Polking, Acting Secretary, Federal Maritime Commission, 1100 L Street, NW., Washington, D.C. 20573 (202) 523–5725.

SUPPLEMENTARY INFORMATION: The Interstate Commerce Commission's recent decision in *Ex Parte 230 (Sub-No. 5)*, 46 FR 14348 (1981), has prompted the Federal Maritime Commission to temporarily waive a portion of its tariff regulations governing through rail/ocean transportation in foreign commerce. This interim action has been taken without prior notice and comment due to the fact that the ICC's decision was not released until February 19, 1981 with an effective date of March 23, 1981. The shortness of the time period involved makes it impractical to publish a final rule before the new ICC regulations take effect. Moreover, the public interest clearly requires that the Commission take prompt action to assuage the uncertainty *Ex Parte 230* has created in the multi-million dollar ocean transportation industry. The procedure to be implemented will insure that meaningful public tariffs continue to be on file and that ocean carriers adhere to the through rates published in those tariffs.

Effective March 23, 1981, transportation provided by railroads under trailer on flatcar (TOFC), container on flatcar (COFC), and certain other services connected with through intermodal traffic services will be exempt from ICC tariff filing requirements. This exemption apparently applies to all ex-ocean traffic in which United States railroads participate.

Since 1972, intermodal rail/ocean rates and routes have been accepted by the Commission and the ICC only in the form of a concurrently filed joint through tariff. This form was carefully devised to meet the requirements of both regulatory agencies and contained provisions describing the inland and ocean transportation, particularly the portion or division of the through rate received by each participating carrier, and is set forth in section 536.8(b) of the Commission's Rules (46 CFR 536.8(b)).

The ICC's amendments to 49 CFR Part 1300 will preclude a calculation of a through intermodal rate by combining its component land and ocean divisions. Because knowledge of the *through rate* is essential to the proper performance of the Commission's anti-rebating and anti-discrimination responsibilities under the Shipping Act, 1916 (46 U.S.C. 801, *et seq.*), it is necessary that ocean carriers *alone* be required to publish this through rate in their intermodal tariffs. Although the Commission does not regulate all

aspects of the through intermodal transportation being performed, the authority conferred by section 18(b) of the Shipping Act (46 U.S.C. 817(b)) fully supports the continued filing of the through rate collected from the shipper for such services. This arrangement does not subject land transportation itself to Shipping Act regulation, and as long as no jurisidiction is exercised over inland carriers, there is no legal or other obstacle to the Commission's continuation of its policy of requiring publication and adherence to through intermodal rates. *See United States v. Federal Maritime Commission (Gulf-U.K. Agreement)*, 636 F. 2d 792 (D.C. Cir. 1980), vacated pending rehearing.

The *Ex Parte 230* decision primarily affects compliance with the section 536.8 requirement that FMC intermodal tariffs include the ocean carrier's port-to-port division as well as a through rate. Heretofore, ocean carriers have met this requirement by stating the through rate on a weight or measure basis for each commodity carried in the through service, and also stating the rail division on a per container basis. The ocean portion of the through rate can only be calculated with reference to the *rail division* and then only with certain additional information, *e.g.*, the quantity of cargo moving in the container in question.

The Commission has been advised by several ocean carriers that the forthcoming ICC exemption of ex-ocean TOFC/COFC traffic is causing railroads to cancel existing concurrences with FMC regulated ocean carriers. If present ICC TOFC/COFC tariffs are cancelled, then present FMC intermodal tariffs will also have to be cancelled unless they are amended to provide significantly greater (and frequently changing) details concerning the ocean carriers' divisions or the Commission permits amendments which delete the ocean division altogether.

The former option is not a viable alternative at this time, both because railroads may not permit their TOFC/COFC charges to be published in FMC tariffs once this information is exempt from ICC requirements and because ocean carriers have claimed that an exact statement of the ocean division is impossible for all practical purposes given railroad ratemaking practices.[1]

Even if exact ocean divisions could be published in conjunction with the through rate, it would indirectly reveal the deregulated TOFC/COFC charges, thereby countermanding *Ex Parte 230* to a significant extent. Under these circumstances, the Commission believes it is neither appropriate nor feasible to continue requiring the publication of the ocean carrier's port-to-port division as provided by § 536.8(b).

Knowledge of the ocean carriers' division is of little practical use to the Commission, intermodal shippers or other interested parties.[2] Conduct actionable under the Shipping Act is triggered by the economic effects of the through rate, not the port-to-port division alone. Focusing solely upon the through rate will permit the Commission to lessen regulatory burdens on intermodal traffic by eliminating the present requirement for separately breaking out the ocean carrier's port-to-port division. Unless a through rate approach is taken, the revisions to 46 CFR Part 1300 will force the Commission to significantly increase the amount of detail with which the port-to-port rates and practices are described in intermodal tariffs—a requirement ocean carriers may be unable to meet. Other solutions to this problem may exist, but at this time the Commission believes the approach most consistent with both agencies' concern for stimulating transportation efficiencies is to rely solely upon the through rates for tariff filing purposes. The Commission has never interpreted Shipping Act section 18(b)(1) as mandating the ritualistic recitation of an exactly stated "port-to-port rate" in addition to the through rate in all instances of through transportation.[3] Rather, the plain purpose and language of the statute are adequately accommodated by the type and quantity of tariff matter which will provide meaningful information regarding the *ocean transportation* "between the United States * * * and a foreign country" subject to FMC jurisdiction under section 1 of the Shipping Act, 1916 (46 U.S.C. 801). The through route alone should meet this need in the case of rail/ocean intermodal transportation.

Temporary waiver of § 536.8's port-to-port division requirement will not impede the Commission's enforcement responsibilities nor alter formal complaint procedures in any way. Its purpose is simply to ensure there is no disruption of foreign commerce while the Commission attempts to develop final rules which will assure effective Shipping Act enforcement without placing undue regulatory burdens on intermodal cargoes.

Accordingly, that portion of section 536.8 which requires the publication of the ocean carrier's port-to-port divisions *for through rail ocean transportation only* will be waived until further notice. All other aspects of section 536.8 remain in effect. This waiver affects both existing tariffs and tariffs to implement new rail/ocean services and will remain in effect pending completion of a forthcoming Commission rulemaking proposal to permanently revise its tariff regulations governing through intermodal transportation.

This amendment to § 536.8 will take effect March 25, 1981. However, the rule has been written to apply only to transportation actually affected by the implementation of the ICC's new regulations.[4] Short notice publication is justified under 5 U.S.C. 553(d) because the interim rule will relax present tariff filing obligations and alleviate the regulatory and commercial conflicts which could arise in the absence of a clear indication of what tariff matter will continue to be accepted for filing at the FMC—and thereby become *prima facie* lawful—once the TOFC/COFC deregulation scheduled for March 23, 1981 takes effect.

The Commission certifies that this interim rule will not, if promulgated and adopted, have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act, Pub. L. 96-354, 94 Stat. 1164, September 19, 1980 (5 U.S.C. 601 *et seq.)*.

Therefore, it is ordered, That, pursuant to section 553 of the Administrative Procedure Act (5 U.S.C. 553(d)) and sections 18(b) and 43 of the Shipping Act, 1916 (46 U.S.C. 817(b) and 841a), Part 536 of 46 CFR of the Commission's Rules is temporarily amended by the addition of a new paragraph (c) to § 536.8 which reads as follows:

§ 536.8 Tariffs containing through rates and through routes.

* * * * *

[1] *See e.g., Report and Order in Docket No. 72-19*, 42 FR 59265 (1977). The ICC's *Ex Parte 230* decision is intended to encourage even greater flexibility and variation in railroad pricing.

[2] Indeed, the principal reason for the port-to-port breakout approach reflected in section 536.8 has been to avoid jurisdictional conflicts with the ICC prohibited under section 33 of the Shipping Act, 1916 (46 U.S.C. 832). The ICC's exemption of TOFC/COFC traffic now appears to have eliminated this problem.

[3] For example, the Commission has not required any breakout of the port-to-port division in an intermodal service where the inland transportation takes place in a foreign country.

[4] Petitions to review *Ex Parte 230 Sub-No. 5* are pending before the United States Court of Appeals for the Fifth Circuit and will be considered on an expedited basis. *American Trucking Associations, Inc., et al. v. Interstate Commerce Commission and United States of America* (Docket Nos. 81-4046 and 81-4080).

(c) Commencing upon publication of this rule in the **Federal Register** and until further notice of the Commission, tariffs containing rates for through rail/ocean transportation involving railroad movements within the United States must continue to be filed in full compliance with this section, except that such tariffs may omit the division, rate, or charge to be collected by the water carrier subject to the Act for the port-to-port portion of the through service, and existing tariffs may be amended to delete this information; *Provided, however,* that the port-to-port portion may be deleted only if the railroad transportation involved in the through route has actually been exempted from tariff filing responsibilities under the Interstate Commerce Act.

By the Commission March 23, 1981.*

Joseph C. Polking,

Acting Secretary.

Dissenting Opinion

Acting Chairman Kanuk, dissenting in part. While I agree with the majority that the Commission should address the impact of the Interstate Commerce Commission's (ICC's) final rule in Ex Parte No. 230 (Sub. No. 6), *Improvement of TOFC/COFC Regulation,* on ocean carriers' tariff filing requirements, I cannot agree that the Interim Rule should be implemented without providing for public notice and comment.

The Administrative Procedure Act (APA), 5 U.S.C. 553 (b) and (c), requires notice and an opportunity for comment on rules of a substantive nature. The Interim Rule is of a substantive nature. Provision is made for exceptions to this general rule when the agency finds that providing for notice and comment is "* * * impractical, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B). The majority relies on the ICC's date of March 23, 1981, for putting its rule into effect, as the basis for concluding that notice and comment would be impractical. In addition, the majority states that the public interest requires prompt action by the Commission, in order to address the uncertainty created by the ICC's rule.

There are several problems with this approach. In the first place, the exceptions to the APA's notice and comment requirement have been narrowly construed by the courts, and it has been found that the "* * * mere existence of deadlines for agency action, whether set by statute or court order, does not in itself constitute good cause for a § 553(b)(B) exception." *U.S. Steel Corp.* v. *U.S. Environmental Protection,* 595 F. 2d 207, 213 (5th Cir. 1979); *State of N.J.* v. *U.S. Environmental Protection,* 626 F. 2d 1038, 1045 (D.C. Cir. 1980).

In this case, the Commission is faced with neither a statutory nor a court deadline. What it is faced with is the fact that the ICC's rule exempting rail TOFC/COFC movements from ICC regulation will become effective March 23, 1981. This fact, standing alone, certainly does not create a basis for implementation of the Interim Rule, particularly since the effect of the ICC's rule on intermodal movements is not clearly foreseeable. The Commission goes on to state that it has been advised by several ocean carriers that the forthcoming ICC exemption of ex-ocean TOFC/COFC traffic is causing railroads to cancel existing concurrences with FMC regulated ocean carriers. This general statement is the sole factual basis given by the majority for implementing the Interim Rule. The majority provides no details as to which ocean carriers, which rail carriers, or precisely what action the rail carriers might take. This last factor is particularly important. If, for example, the rail carriers intend to cancel their participation with ocean carriers in joint through intermodal tariffs based on a fear of antitrust exposure, the Interim Rule will not prevent this occurrence. If, on the other hand, rail carriers will, as a result of the ICC's final rule, simply request that their division be deleted from the involved intermodal tariffs, the proposal in the Interim Rule could constitute a means of dealing with the situation. By not supplying more factual information, the Commission fails to provide an adequate basis for implementing the Rule. I find this deficiency particularly disturbing, since the Rule makes a substantive change in the Commission's tariff filing rules, and reverses the position previously adhered to by the Commission that "* * * the separate statement of the charge applicable to the port-to-port transportation is necessary to comply with the mandate of section 18(b) [of the Shipping Act, 1916]." Filing of Tariffs By Common Carriers By Water In The Foreign Commerce of the United States and By Conferences of Such Carriers; Filing of Through Rates and Through Routes, Final Rule, 35 FR 6394, 6396 (April 21, 1970).

I would like to point out that I am as concerned as the majority is that intermodal rail/ocean TOFC/COFC movements continue without interruption. However, the Commission has no sound basis upon which it can conclude that, absent the Interim Rule, these movements will be interrupted. Therefore, I believe that the Commission is acting precipitously in implementing the Interim Rule. The better course of action, in my opinion, would have been for the Commission to have issued a circular letter reminding ocean carriers of their tariff filing obligations under the Commission's rules, and at the same time, to have issued a Notice of Proposed Rulemaking to be conducted on an expedited basis. This course would have permitted the Commission to formulate an appropriate response to the ICC's rule, based on comments from all parties involved.

[FR Doc. 81-9156 Filed 3-24-81; 8:45 am]

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*Acting Chairman Leslie L. Kanuk submitted a separate dissenting opinion which follows. Commissioner Peter N. Teige did not participate.

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[Gen. Docket No. 80-488; FCC 81-68]

Amendment of the Aforementioned Part of the Commission's Rules

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This Report and Order amends the Commission's rules as follows: 1) the effective date of any full Commission action shall be the date of public notice of such action, unless the Commission affirmatively designates a different effective date; 2) all Commission actions become final, for purposes of seeking agency reconsideration or judical review, on the date of public notice of such actions; 3) the date of public notice shall commence at 3 p.m. Eastern Time on a given day. The purposes of these rule amendments, taken in the same order as the amendments outlined above, are as follows: 1) to clear up confusion as to when a full Commission action becomes effective, 2) to clear up confusion as to when any Commission action becomes final, and 3) to pinpoint the time of day when Commission decisions become final in order to make courthouse races a fair competition for all parties.

EFFECTIVE DATE: April 27, 1981.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Terence Mahony, Office of General Counsel, (202) 254-6530.

SUPPLEMENTARY INFORMATION:

Memorandum Opinion and Order

Adopted: February 25, 1981.

Released: March 10, 1981.

In the Matter of Addition of new Section 1.103 to the Commission's Rules of Practice and Procedures; Amendments to Section 1.4(b) of those Rules, [General Docket No. 80-488].

1. The primary purpose of this Order is to add new Section 1.103 to the Commission's rules. Subsection (a) of this rule will generally provide that, unless otherwise specified by law, Commission rules, or Commission discretionary action, the effective date of any Commission action will be the date of public notice as defined in Section 1.4(b) of our rules, 47 CFR § 1.4(b). Subsection (b) of the new rule will establish a standard of finality, namely, that Commission actions shall be final, for purposes of seeking

reconsideration of judicial review, on the date of public notice of such actions. The other purpose of this Order is to amend Section 1.4(b) and specify the precise starting time for the date of public notice.

2. At a public meeting dated September 10, 1980, the Commission deferred final adoption of this Order until the public was given an opportunity to comment on the proposed rules. Since these rules relate solely to practice and procedure, it should be noted that the Commission was not required to give prior notice and the opportunity for comment. See Section 553(b) of the Administrative Procedure Act, 5 U.S.C. § 553(b). Nonetheless, the Commission decided that the potential impact of these proposals on longstanding Commission practices warranted prior public comment. By separate order released September 15, 1980, the Commission specified a period of 30 days during which the public was invited to file comments.

3. During this period, the Commission received four sets of written comments. These comments were filed by Dow, Lohnes, and Albertson (DLA), Baraff, Koerner, and Olender (BKO), American Telephone and Telegraph Company (AT&T), and RCA Global Communications, Inc. (RCAG). The comments of DLA and BKO were directed mainly toward our statement that the proposed rule (establishing a relationship between the effective date and date of public notice for Commission actions) would adopt an approach which is substantially the same as the scheme already in effect for staff actions. DLA and BKO both noted that there are often long intervening delays between the time the staff adopts an action and the time that action becomes effective. Both commented that such delays could force interested parties to postpone execution of their private agreements, resulting in possible detriment. Apart from this matter, BKO also noted that copies of Public Notices are not always available on their release date from the Office of Public Affairs.

4. The comments of AT&T and RCAG focused on our proposal to establish the date of public notice as the standard of finality for Commission decisions. AT&T stated that adoption of this rule might deprive interested parties of their statutory right to seek immediate judicial review of an effective Commission decision. The comments of RCAG shared this view. RCAG also recommended that the "race to the courthouse" should begin when the full text of a decision is released by the Commission and not when that decision is later published in the **Federal Register** (when such publication is required). RCAG also believes that a Commission decision becomes final, for purposes of seeking judicial review, when that decision is adopted at a public meeting, provided that all parties are immediately bound by the decision.

5. The Federal Communications Bar Association (FCBA) also submitted comments in which it urged the Commission not to adopt the proposed rules. FCBA contends that, consistent with fundamental principles of due process, an action of the Commission should be final and reviewable when that action becomes effective for purposes of reliance or obligations.

Discussion: Effective Dates of Commission Decisions

6. The effective date of any Commission action may be defined as that date on which parties may begin to exercise private rights created by such action or, alternatively, the date on which parties must begin to comply with obligations imposed by such action. The date of public notice of any Commission action, which is further discussed *infra*, is that date from which any specified period for filing pleadings or other documents begins to run. Clearly these two dates have separate significance.

7. As stated above, Section 1.4(b) of the Commission's rules defines the date of public notice for different kinds of Commission actions. In general, our rules do not clearly identify the effective dates for these different kinds of actions.[1] Despite the absence of specific guidance in the rules, a practice has developed by which parties often act in reliance upon a final action by the Commission after its adoption but prior to the date of public notice. In such proceedings, the Commission has affirmatively designated an earlier effective date or the parties have reasonably assumed its existence. In other proceedings, the Commission has imposed obligations on parties which have taken effect on the date of adoption of such action, even though the date of public notice might not occur until later. Notwithstanding these informal practices, the absence of specific guidance in the rules has sometimes created uncertainty as to when a Commission action becomes effective.

8. The Commission has broad discretion to designate the effective dates of its actions. *See generally* 47 U.S.C. 154 (i) and (j). In order to remove any uncertainty, we will add § 1.103(a) to our rules. Subsection (a) will first establish that the effective date of any Commission action shall be the date of public notice of such action, unless the Commission affirmatively designates a different effective date. Thus, unlike the current practice, no party hereafter will be allowed to act in reliance upon a Commission action prior to the date of public notice, unless the Commission designates otherwise. Subsection (a) will further provide that the Commission, on its own motion or on motion by any party, may designate an effective date for its actions that is either earlier or later than the date of public notice.[2] Any party preferring to have an immediate effective date is urged to file a timely motion so that the Commission may consider that motion along with the other substantive matters in the same proceeding. Finally, subsection (a) will provide that the designation of a different effective date will have no bearing on specified periods during which pleadings and other documents must be filed for the purpose of seeking further agency or judicial action. Those periods will commence on the date of public notice, as defined in amended § 1.4(b) of the rules.

9. Because new § 1.103(a) creates a relationship between the effective date and the public notice date of Commission actions, we wish to restate the meaning and importance of a public notice. Public notice means legal notice, namely, the notice to the public that is required by the Administrative Procedure Act. The primary purpose of public notice is to formally advise all interested parties and the public of the fact that the Commission or the staff has taken action with respect to some matter. The date on which a public notice is issued has legal importance, since specified periods for filing pleadings and other documents begin to run from this date. As provided for in our amendments to Section 1.4(b), the date of public notice shall commence at 3 P.M. Eastern Time on the day after any of the following dates:

[1] There are Commission rules that provide effective date guidance for certain kinds of actions. Section 1.102 of the rules, 47 CFR 1.102, sets forth effective date guidance for staff actions taken pursuant to delegated authority. See also, § 1.427, 47 CFR 1.427, for guidance regarding the effective date for Commission rules.

[2] When an earlier effective date is designated, the Commission will ordinarily issue an order notifying the parties and the public of its action. However, the timing of the release of this order will not affect the designated effective date. In other words, if the Commission delays in issuing its order designating an earlier effective date, such delay will not cause the effective date to be changed.

(1) For documents in notice and comment rule-making proceedings, the date of publication in the **Federal Register.**

(2) For other documents released by the Commission (whether or not published in the **Federal Register**), the release date. A document is "released" by making the full text available to the press and the public in the Commission's Information Office. The release date appears on the face of the document. [Note omitted.]

(3) If the full text of an action document is not to be released by the Commission but a descriptive document entitled "Public Notice" is released, the date on which the descriptive "Public Notice" is released. [Note omitted.]

(4) If a document is neither published in the **Federal Register** nor released, and if a descriptive document entitled "Public Notice" is not released, the date on which the document is sent (*i.e.*, mailed, telegraphed, etc.) to persons affected by the action.

As explained below, we are specifying a particular time for the commencement of public notice in order to make any "race to the courthouse" a fair competition for all parties.

10. It must be emphasized that a Commission news release will never constitute legal public notice of any Commission action. Some confusion may persist because a news release is often referred to informally as a "Public Notice." In fact, the two items are distinctly different. A descriptive document entitled "Public Notice" constitutes legal public notice of certain Commission actions as provided for in Section 1.4(b) (3) and (4) of the rules. On the other hand, a news release is an unofficial description of certain Commission actions or other activities. A news release and its release date have no legal significance whatsoever. *See, e.g., Microwave Communications Inc.* v. *FCC*, 515 F.2d 385, 391–392 (D.C. Cir. 1974). Furthermore, when "Public Notice" is the method used to give legal public notice of a Commission action, the Commission ordinarily will not issue a news release to describe that same action.

11. New Section 1.103(a) will not disturb the current practice for actions taken by the staff pursuant to delegated authority. Under existing Section 1.102(b)(1) of our rules, 47 C.F.R. § 1.102(b)(1), staff actions "shall, unless otherwise ordered by the designated authority, be effective upon release of the document containing the full text of such action, or in the event such a document is not released, upon release of a public notice announcing the action in question." Read literally, Section 1.102(b)(1) would appear to set forth the same scheme for staff actions that we are adopting for full Commission action—namely—that the effective date of any action is the date of public notice, unless otherwise specified. The comments of DLA and BKO, summarized above, in effect stated that such a reading of Section 1.102(b)(1) could produce long and harmful delays between the adoption of an action by the staff and the effective date of the action. In response to these concerns, we recognize that, under current practice, the staff generally takes the posture that its actions become effective immediately. Although the staff may not always explicitly state that its action is effective immediately, the clear import of its actions is to allow parties to act without awaiting delivery of a written decision. For example, the staff frequently advises interested parties by telephone that final action has been taken so that those parties can act immediately. Nothing in this order is intended to or should change the way in which the staff operates. The staff will have the same discretion it has exercised in the past to make its actions effective immediately. For the sake of clarification, however, a "Public Notice" and any other document reflecting staff action will in the future indicate whether the action was made effective immediately. Apart from effective dates for staff actions, we also wish to make clear that the "3 P.M." rule adopted in this proceeding will apply to staff actions. Thus, the date of public notice for staff actions will begin at 3 P.M. Eastern Time on the day following the release of either the full text of the action or a descriptive "Public Notice" announcing the action. *See* Section 1.4(b) as amended.

Discussion: Finality of Commission Decisions

12. Uncertainty also persists as to when a Commission decision becomes final for purposes of seeking agency reconsideration or judicial review. The occurrence of that date of finality is significant because pleadings and other documents filed prior to that date could be dismissed as being premature. Similarly, pleadings filed after the expiration of a specified period commencing from that date could be dismissed as not being timely-filed. Finally, that date can be significant in proceedings where interested parties race to file their appeals with different appellate courts.

13. Section 402(c) of the Communications Act, 47 U.S.C. 402(c), generally provides that a "notice of appeal" to the court shall be filed "within thirty days from the date upon which public notice is given of the decision or order complained of." This provision applies to Commission actions enumerated in Section 402(b) of the Act. For parties seeking agency reconsideration, Section 405 of the Communications Act, 47 U.S.C. 405, provides that "a petition for rehearing must be filed within thirty days from the date upon which public notice is given" of the Commission action. Section 1.4(b) of the Commission's rules, as amended and discussed *supra*, provides guidance for determining the date of public notice for each kind of Commission action. Thus, with respect to relief sought under Sections 402(c) or 405 of the Act, an interested party need only consult Section 1.4(b) to determine when a Commission action becomes final for purposes of seeking further relief.

14. However, with regard to seeking judicial review for Commission actions other than those enumerated in Section 402(b), and in accordance with Section 402(a) of the Act, federal law elsewhere provides that "any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order * * *" 28 U.S.C. 2344. Since Section 2344 refers to the "entry" of a final order rather than "the date upon which public notice is given", confusion has persisted over whether § 1.4(b) of the rules should be applicable to the question of finality here.

15. For example, the United States Court of Appeals for the Second Circuit decided a case which involved the issue of when "entry" of a final order of the Commission occurred. *ITT World Communications, Inc.* v. *FCC*, 621 F.2d 1201 (2d Cir. 1980). That issue arose out of a Commission decision adopted at a public meeting on December 12, 1979. On that same day, an interested party filed a petition for review with the Second Circuit. Then on January 3, 1980, the Commission released a full text of its decision. On that same day, two other interested parties filed petitions for review within minutes of each other, one with the Second Circuit and the other with the United States Court of Appeals for the District of Columbia Circuit. All three petitions were filed pursuant to 28 U.S.C. 2344. Before the court could decide which party had won the race to the courthouse, it first had to decide when the race began, that is, when "entry" of the final order took place. The court concluded that the Commission's decision became final for purposes of seeking judicial review on December 12th, the date of the public meeting. Apparently, the court gave little or no weight to Section 1.4(b) of the Commission's rules. More importantly,

the court majority stated that the Commission has the authority to adopt clearcut rules for determining the finality of its decisions. As the court stated:

> If federal administrative agencies would promulgate straightforward regulations explaining how and when their reviewable orders are to issue, protracted procedural disputes born of the desire to win the race to the courthouse would largely be consigned to an early grave. *ITT World Communications, Inc.* v. *FCC, supra,* 621 F.2d at 1210, quoting *International Union of Electrical, Radio and Machine Workers* v. *NLRB,* 610 F.2d 956, 964 (D.C. Cir. 1979).

16. We are responding to this judicial invitation by adopting subsection (b) to new Section 1.103. The primary purpose of this new rule is to make clear that the statutory terms "entry" of a final order and "the date upon which public notice is given" have the same meaning and, therefore, that newly-amended § 1.4(b) of our rules will determine that date of finality. In particular, § 1.103(b) provides that *any* Commission action becomes final, for purposes of seeking agency reconsideration or judicial review, on the date of public notice as defined in § 1.4(b) of our rules.

17. As explained above, the amended § 1.4(b) specifies that public notice officially begins at 3 P.M. on a particular day. We have adopted this amendment in part to help avoid some of the problems encountered in *ITT World Communications, Inc.* v. *FCC supra.* In that case, there was considerable confusion as to when documents became officially available and when parties could file papers seeking relief from the courts. Notice of these facts can be especially important since different parties sometimes seek review of the same Commission action in different courts. By specifying a particular time as the beginning of public notice, we hope to make those races to the courthouse fair for all parties.[3] In sum, combining the amendments to § 1.4(b) with new § 1.103(b), it should be clear that, with respect to any Commission action, the date of finality shall be the date of public notice, the date of public notice shall begin at 3 P.M. Eastern Time, and pleadings and other documents seeking further relief may normally be filed commencing from 3 P.M. on that date.[4]

18. We have given careful consideration to the position of AT&T and RCAG that adoption of this rule of finality would foreclose a statutory right to seek immediate judicial review. As discussed above, Section 402(c) of the Communications Act and Section 2344 of Title 28, U.S. Code, contain such key words as "the date upon which public notice is given" and "entry" of a final order as guidance to determine the finality of a Commission decision. As the courts have stated, the Commission has the authority to interpret this language and specify the date of finality for its decisions. Moreover, we find nothing in the language of these sections, either express or implied, which suggests that a statutory objective would be violated or a statutory right foreclosed by a standard of finality such as the one we are adopting in this proceeding. If a decision adopted at a public meeting is made effective immediately, an aggrieved party always has the alternative of seeking immediate judicial relief in the form of a stay (or, if a party prefers, a stay from the Commission). *See* 28 U.S.C. 1651; 47 CFR 1.106(n). Finally, we wish to comment on RCAG's recommendation that, for certain decisions, the "race to the courthouse" should begin when the full text of the decision is released by the Commission and not when that decision is later published in the **Federal Register** (when such publication is presumably required). We note that under § 1.4(b) of our rules, as amended in this proceeding, **Federal Register** publication governs the date of public notice only with regard to documents in notice and comment rulemaking proceedings. Since an interested party generally cannot seek judicial review of a notice of proposed rulemaking, we assume that RCAG is directing its recommendation primarily toward those orders which adopt, delete, or amend a Commission rule. We do not wish to change § 1.4(b)(1) of our rules, especially since the Administrative Procedure Act requires **Federal Register** publication of "substantive rules of general applicability" and "each amendment, revision, or repeal" of such rules. See 5 U.S.C. 552(a)(1) (D) and (E).[5] Apart from this statutory requirement, we see no reason why interested parties cannot await formal publication before seeking judicial review. Again, if a party feels that delay will result in harm, that party can petition for an immediate stay from a court or the Commission.

19. In its comments, FCBA argues that a) no important public interest goal will be served by making parties wait for release of the Commission's decision before seeking judicial review, b) creating a distinction between "effectiveness" and "reviewability" will disserve the due process rights of parties, c) the proposal to designate earlier effective dates will lead to additional pleadings, probable delay, and bifurcated review, d) the proposal to fix the date of public notice on the day following the occurrence of certain events will cause confusion and delay, and may conflict with certain other rules, and e) the use of the terms "Public Notice" and "date of public notice", which have different meanings, will cause confusion. In the alternative, FCBA proposes that any "race to the courthouse" rules adopted herein exclude Section 402(b) actions, that the finality of Section 402(a) actions be determined on a case-by-case basis, and that newly-adopted rules be deemed final upon their release and not upon publication in the **Federal Register.**

20. We have carefully considered the arguments of the FCBA. Contrary to FCBA's view, we believe important interests will be served by making parties await the release of the Commission's decision before seeking judicial relief. Oftentimes, an Order adopted at a Commission meeting becomes subject to editorial changes after its adoption but prior to its release. In extreme cases, the Commission might adopt an Order at a meeting, send back the Order to the staff for editorial changes prior to release, only to have the Order so substantially changed that Commission consideration becomes necessary again. In one actual case, the Commission adopted an Order (in December, 1978) concluding that the language in a particular tariff was so ambiguous that the tariff could be given no effect. When the text of that Order was returned to the staff for editorial

[3] When the Commission designates an earlier effective date, parties may begin to act in reliance upon a Commission decision from that earlier effective date. However, the period for seeking agency reconsideration or judicial review will not commence until the subsequent date of public notice.

[4] The first sentence of § 1.4(b) generally provides that, for any action taken by the full Commission or its staff, the first day to be counted for computing pleading periods "is the day after the day on which public notice of that action is given." Since our new rules provide that the date of public notice begins at 3 P.M. Eastern Time on a given day, the first day to be counted for any pleading period shall be the next calendar day after that date of public notice. For example, assume that, on Monday, the Commission releases copies of a recently adopted memorandum opinion and order in accordance with § 1.4(b)(2). The date of public notice for that action will begin on Tuesday at 3 P.M. Eastern Time. The first day to be counted for any pleading period will be Wednesday.

[5] Although **Federal Register** publication is the controlling date for documents in notice and comment rulemaking proceedings, the Commission will try to release copies of these documents to the public on the same day that **Federal Register** publication occurs. However, in the event that copies are not made available on that same day, it is emphasized that the **Federal Register** publication date still controls for purposes of determining the date of public notice.

changes prior to release, it soon became apparent that the matter was wrongly decided. The Order was never released. Instead, the staff redrafted the Order, recommended a different conclusion, and returned it to the Commission for fresh consideration. The Commission adopted the new conclusion (July, 1979) and the Order was released soon thereafter. *See The Associated Press*, 72 FCC2d 760 (1979). Were we to adopt the FCBA proposal, the parties in that case could have filed their appeals after adoption of the first Order, only to discover later that the final Order ultimately released contained a different result than the one originally reached. Such a possibility would not serve the interests of the courts, the Commission, or the affected parties. Rather we believe our finality date rules are consistent with the realities of Commission decisionmaking, may encourage the parties to acquaint themselves with the Commission's written decisions before filing appeals, and may reduce the strain on judicial resources. We also fail to perceive how the due process rights of parties will be harmed in any way by postponing the right to appeal until the date of finality. As we have stated, any aggrieved party may seek a stay from the Commission or the courts after the adoption of a decision but before its full release. And further, if an appeal on the merits is filed and the court reverses the Commission's decision, any private actions taken by any parties pursuant to an effective date designation would have to be undone.

21. The FCBA also contends that our rule permitting designation of earlier effective dates will lead to more pleadings, probable delay, and bifurcated review. First, FCBA's prediction of more pleadings is greatly exaggerated. We believe that the insertion of one or two additional sentences (requesting a special effective date) in the primary pleadings will be sufficient. Such a request would not warrant a separate pleading. Nor do we believe that this rule will cause undue delay in our processes. Normally, determination of an order's effective date should not involve complex issues that would consume much time. We also do not foresee how our proposed rule here could lead to bifurcated judicial review since these new rules make clear that our decisions do not become final until the occurrence of certain events. See § 1.4(b) and new § 1.103(b). Thus, since the courts have recognized an agency's discretion to specify its own finality dates, an appeal (other than a petition for injunctive relief) filed prior to the finality date would be dismissed.

22. We also disagree with FCBA's contention that our proposal to fix the date of public notice on the day following the occurrence of certain events will produce confusion. On the contrary, we expect that the rules, once understood, will eliminate the current problems caused by the uneven release of Commission documents. However, we agree with FCBA that adoption of our proposed rules will require conforming amendments to other rules.[6] We have also tried to eliminate in this Order any confusion arising from the similar terms "Public Notice", which is a document, and "date of public notice", which is a day of the week.

23. Finally, FCBA urges the Commission to determine the finality of Section 402(a) actions on a case-by-case basis, rather than via the 3. P.M. rule, and further urges that, if this rule is adopted, it should exclude Section 402(b) actions since all such actions are appealable to only one court. As discussed above, we reject the case-by-case approach in favor of clearcut rules of finality because we believe this is the best way to eliminate disputes and also promote fair courthouse races. Although we recognize that courthouse races will not arise under Section 402(b) actions, we would rather, for the sake of clear uniformity, apply the finality rule to all appealable actions and we do not believe that parties to a Section 402(b) action will be inconvenienced or harmed in any way by complying with this rule.

Application of these Rules to Hypothetical Situations

24. The following hypothetical situations are presented to assist in understanding the meaning and impact of new § 1.103 and amended § 1.4(b):

Example 1: At a public meeting, the Commission considers an application to transfer control of a broadcast license. The Commission grants the transfer application, but directs the staff to make editorial changes in the draft Memorandum Opinion and Order. None of the parties to the proceeding moves the Commission to designate a special effective date, and the Commission takes no such action on its own. On the day following the public meeting, a news release announcing the Commission's action is issued. Two weeks later, an Order containing the full text of the Commission's decision is released to the public. As provided for in amended Section 1.4(B)(2) of the rules, the date of public notice shall commence at 3 P.M. Eastern Time on the day following the release date. Furthermore, as provided for in new Section 1.103(a), the public notice date of this action is also its effective date, since the Commission did not affirmatively designate a different effective date. Finally, the news release issued the day after the Commission's public meeting has no bearing on the determination of either the effective date or the date of public notice.

Example 2: At a public meeting, the Commission considers an application to transfer control of a broadcast license. The Commission grants the transfer application, but directs the staff to make editorial changes in the draft Memorandum Opinion and Order. Meanwhile, the transferee has already asked the Commission to designate an immediate effective date (if the Commission approves the transfer) on the ground that its private contract with the transferor might expire before the Order is released. At that meeting, the Commission designates an immediate effective date in accordance with new Section 1.103(a) and issues a separate order containing notice of this action. Thus, the parties are free to execute their private contract immediately. However, pursuant to Section 1.4(b)(2), the date of public notice will not begin until 3 P.M. Eastern Time on the day after the Order containing the full text of the Commission's decision is released.

Example 3: At a public meeting, the Commission considers an application to transfer control of a broadcast license. Even though no petitions to deny or other objections were filed, the application is presented for full Commission consideration because the proposed transaction raises important public interest questions. After resolving these questions in favor of the applicants, the Commission orders a grant of the application. Since the application is uncontested, the Commission does not plan to issue a Memorandum Opinion and Order or any other full text of its decision. Neither the parties to the application nor the Commission move for designation of a special effective date. Five days after the public meeting, a descriptive "Public Notice" announcing the action is released to the public. The date of public notice begins at 3 P.M. Eastern Time on the day after the release date, in accordance with Section 1.4(b) (3). Furthermore, pursuant to new Section 1.103(a), the public notice date of this action is also its effective date, since the Commission did not affirmatively specify a different effective date.

Example 4: At a public meeting, the Commission adopt a decision concluding that certain services offered by a common carrier do not violate the Communications Act. The Commission also grants a motion to designate an immediate effective date and issues a separate order containing notice of this action. Another party who had filed an opposition pleading intends to appeal the Commission's decision. The Memorandum Opinion and Order containing the full text of the Commission's decision is released two weeks after the public meeting. As provided for in Section 1.4(b)(2), the date of public notice begins on the day after that release date. This Commission decision is appealable under Section 402(a) of the Communications Act, and therefore carries the potential for a courthouse race. That race to seek judicial review in different courts may begin at 3 P.M. Eastern Time on the date of public notice, in

[6] We will make conforming changes to the following rules: § 1.104 (b) and (d); § 1.106(f); § 1.108; § 1.115(d); § 1.429(d).

accordance with new Section 1.103(b) and amended Section 1.4(b) of the rules. The first day to be counted in computing the 60-day filing period (see 28 U.S.C. § 2344) would be the day after the date of public notice. *See* Note 4, *supra*.

Conclusion

25. Authority for adoption of the rule amendments contained herein is set forth in Section 4 (i) and (j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154 (i) and (j) and 303(r).

Accordingly, it is ordered that, effective April 27, 1981, § 1.103 of the Commission's rules, 47 CFR 1.103, is added, § 1.4(b), 47 CFR 1.4(b), is amended, and the rules listed in Note 6 of this Order are amended, as set forth in the attached Appendices.

(Secs. 4, 303, 307, 48 Stat., as amended, 1966, 1082, 1083; 47 U.S.C. 154, 303, 307)

Federal Communications Commission.

William J. Tricarico,

Secretary.

PART 1—PRACTICE AND PROCEDURE

Appendix I

1. In § 1.4, the last sentence of paragraph (b) is revised, the notes following paragraphs (b)(2) and (b)(3) are removed, and paragraphs (b)(1), (b)(2), (b)(3) and (b)(4) are revised to read as follows.

§ 1.4 Computation of time

* * * * *

(b) * * *

The date of public notice commences at 3 P.M. Eastern Time on the day after any of the following dates:

(1) For documents in notice and comment rule-making proceedings, the date of publication in the **Federal Register.**

(2) For other documents released by the Commission (whether or not published in the **Federal Register**), the release date. A document is "released" by making the full text available to the press and the public in the Commission's Information Office. The release date appears on the face of the document.

(3) If the full text of an action document is not to be released by the Commission but a descriptive document entitled "Public Notice" describing the action is released, the date on which the descriptive "Public Notice" is released.

(4) If a document is neither published in the **Federal Register** nor released and if a descriptive document entitled "Public Notice" is not released, the date on which the document is sent (*i.e.*, mailed, telegraphed, etc.) to persons affected by the action.

* * * * *

2. A new § 1.103 is added to read as follows:

§ 1.103 Effective dates of Commission actions; finality of Commission actions.

(a) Unless otherwise specified by law or Commission rule (e.g. Sections 1.102 and 1.427), the effective date of any Commission action shall be the date of public notice of such action as that latter date is defined in § 1.4(b) of these rules: *Provided*, That the Commission may, on its own motion or on motion by any party, designate an effective date that is either earlier or later in time than the date of public notice of such action. The designation of an earlier or later effective date shall have no effect on any pleading periods.

(b) Notwithstanding any determinations made under subsection (a) of this section, Commission action shall be deemed final, for purposes of seeking reconsideration at the Commission or judicial review, on the date of public notice as defined in § 1.4(b) of these rules.

Appendix II

Remove headnote which appears immediately above § 1.101 of the Commission's rules and add the following:

Reconsideration and Review of Actions taken by the Commission and Pursuant to Delegated Authority; Effective Dates and Finality Dates of Actions.

Appendix III

Conforming Amendments

§ 1.104 [Amended]

1. In the first sentence of § 1.104(b), remove the words: "the date of release of the document containing the full text of such action, or in case such document is not released, after release of a public notice announcing the action in question."

Add the following: "the date of public notice of such action, as that date is defined in § 1.4(b) of these rules."

2. In the first sentence of § 1.104(d), remove the words: "the date of release of the document containing the full text of the final action on his petition, or in case the document is not released, after release of a public notice announcing the final action on his petition."

Add the following: "the date of public notice of such action, as that date is defined in § 1.4(b) of these rules."

§ 1.106 [Amended]

3. In the first sentence of § 1.106(f), remove the words: "the date of release of the document containing the full text of the action taken or, in case such document is not released, after release of a public notice announcing the action in question."

Add the following: "the date of public notice of the final Commission action, as that date is defined in § 1.4(b) of these rules."

§ 1.108 [Amended]

4. In § 1.108, remove all after the words: "within 30 days."

Add the following: "from the date of public notice of such action, as that date is defined in § 1.4(b) of these rules".

§ 1.115 [Amended]

5. In the first sentence of § 1.115(d), remove the words: "the date of release of the document containing the full text of such action, or in case such a document is not released, after release of a public notice announcing the action in question".

Add the following: "the date of public notice of such action, as that date is defined in § 1.4(b) of these rules."

§ 1.429 [Amended]

6. In the first sentence of § 1.429(d), remove the words: "after publication in the **Federal Register** of the document containing a full text of the action taken or, if the document is not published, within 30 days after the full text of the document is released."

Add the following: "from the date of public notice of such action, as that date is defined in 1.4(b) of these rules."

[FR Doc. 81-9035 Filed 3-24-81; 8:45 am]

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47 CFR Part 73

[BC Docket No. 79-219; RM-3099, RM-3273]

Radio Broadcast Services; Deregulation of Radio; Correction

AGENCY: Federal Communications Commission.

ACTION: Final rule; correction.

SUMMARY: Action taken herein corrects several minor errors contained in the Commission's Report and Order in the matter of deregulation of radio, published in 46 FR 13888, February 24, 1981.

DATE: March 17, 1981.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Roger D. Holberg, Broadcast Bureau, (202) 632-7792.

SUPPLEMENTARY INFORMATION:

Released: March 17, 1981.

By the Commission:

1. On February 24, 1981 (46 FR 13888), the Commission released a *Report and Order* in the above-captioned proceeding. A few errors contained in

that *Report and Order* have come to light which warrant correction.[1]

2. Paragraph 111 of the body of the *Report and Order* should be corrected as follows:

111. The policies enunciated herein, along with the relevant rule changes set forth in Appendix A, will become effective [April 3, 1981], unless a stay of the effectiveness is requested and granted. After the effective date of these policies, applications for new stations, as well as applications for the assignment, transfer, renewal and/or modification of existing stations, will be modified as set forth in Appendix J, and all such applicants will be required to file only the information requested therein.

3. Additionally, a portion of paragraph 11 of Appendix A of the *Report and Order* is incorrect. In that paragraph, the part referring to § 73.3526(a) of the Commission's Rules should be corrected as follows:

(a) *Records to be maintained.* Every applicant for a construction permit for a new station in the commercial broadcast services shall maintain for public inspection a file containing the material described in (1) of this paragraph. [Every permittee or licensee of an AM, FM or TV station in the commercial broadcast services shall maintain for public inspection a file containing the material described in (1), (2), (3), (4), (5), (6), and (7) of this paragraph. In addition, every permittee or licensee of a TV station shall maintain for public inspection a file containing the material described in (8), (9), (11), (12), and (13) of this paragraph;] every permittee or licensee of an AM or FM station shall maintain for public inspection a file containing material described in (14) of this paragraph. The material to be contained in the file is as follows:

* * * * *

3. Footnote 93 of the body of the document should be corrected to read:

[93] This will also apply to the [buyer's] portion of assignment and transfer applications.

4. Finally, in paragraph 9 of Appendix A, the notation "(a)" should be added at the very beginning of the portion of the text of § 73.1840, *Retention of Logs*, set forth therein and five asterisks (*) should be added at the end of that portion to indicate that no changes to § 73.1840(b) of the Commission's Rules are being made.

Federal Communications Commission.

William J. Tricarico,

Secretary.

[FR Doc. 81-9019 Filed 3-24-81; 8:45 am]

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[1] For clarity, entire paragraphs, as corrected, will be set out in this *Errata*. However, the portions of the paragraphs which reflect a correction are enclosed in brackets.

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47 CFR Part 73

[BC Docket No. 80-204; RM-3421]

Radio Broadcast Services; FM Broadcast Station in Auburn, Maine; Correction

AGENCY: Federal Communications Commission.

ACTION: Final rule; correction.

SUMMARY: The Report and Order in this proceeding inadvertently made reference to the assignment of FM Channel 260 to Auburn, Maine as a Class C channel. The Erratum serves to correct the designation of the assignment as Class B.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Mark N. Lipp, Broadcast Bureau, (202) 632-7792.

SUPPLEMENTARY INFORMATION:

Released: March 17, 1981.

By the Chief, Policy and Rules Division:

The *Report and Order* in this proceeding, released February 25, 1981, (46 FR 15149) assigned Channel 260 in place of Channel 261A at Auburn, Maine. Inadvertently reference was made to the channel as a Class C assignment. The community of Auburn is located in the zone designated as Class B and petitioner had requested a Class B channel. Thus, the assignment of Channel 260 at Auburn should have been designated as a Class B channel. The ordering clause amending the FM Table of Assignments, paragraph 8, however, was listed correctly.

Federal Communications Commission.

Henry L. Baumann,

Chief, Policy and Rules Division, Broadcast Bureau.

[FR Doc. 81-9018 Filed 3-24-81; 8:45 am]

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