

new schedules will have been developed.

Dated: October 18, 1983.

W. F. Willis,

General Manager.

[FR Doc. 83-28916 Filed 10-24-83; 8:45 am]

BILLING CODE 8120-01-M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. IP83-1; Notice 2]

BF Goodrich Co.; Grant of Petition for Determination of Inconsequential Noncompliance

This notice grants the petition by BF Goodrich Co. of Akron, Ohio, to be exempted from the notification and remedy requirements of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. 1381 *et seq.*) for a noncompliance with 49 CFR 571.109, *New Pneumatic Tires—Passenger Cars*. The basis of the petition was that the noncompliance is inconsequential as it relates to motor vehicle safety.

Notice of the petition was published on April 18, 1983, and an opportunity afforded for comment (48 FR 16567).

Paragraph S4.3(e) of Standard No. 109 requires that the sidewall of each passenger car tire be labeled with the actual number of plies in the sidewall and the actual number of plies in the tread area, if different. Goodrich has produced an unknown number of P205/70R14 Advantage tires branded "2 plies rayon" under the tread on the white sidewall side. The correct labeling "6 plies rayon" appears on the serial side sidewall.

Goodrich argued that the noncompliance was inconsequential because the failure to label properly has no impact upon safety, and the tires otherwise comply with standard No. 109. Branding is correct on one side of the tire, and the number of plies in the tread is described in point of purchase literature.

No comments were received on the petition.

NHTSA has decided to grant this petition. The error of indicating 2 plies beneath the tire tread area when the actual number is 6 in no way compromises the safety of the tire. The

additional plies have no effect upon the load carrying capacity or the endurance of a tire, being simply breaker strips and belts. The information at the point of sale correctly describes the tire composition. Rebranding the correct information on a sidewall after buffing off the incorrect information could possibly damage the bead area. This occurrence, of course, would have a deleterious effect upon safety.

Accordingly, BF Goodrich has met its burden of persuasion that the noncompliance herein described is inconsequential as it relates to motor vehicle safety, and its petition is herewith granted.

The engineer and attorney primarily responsible for this notice are Art Casanova and Taylor Vinson, respectively.

(Sec. 102, Pub. L. 93-492, 88 Stat. 1470 (15 U.S.C. 1417); delegations of authority at 49 CFR 1.50 and 49 CFR 501.8)

Issued on October 18, 1983.

Kennerly H. Digges,

Acting Associate Administrator for Rulemaking.

[FR Doc. 83-28996 Filed 10-24-83; 8:45 am]

BILLING CODE 4910-59-M

Sunshine Act Meetings

Federal Register

Vol. 48, No. 207

Tuesday, October 25, 1983

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

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1

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 11 a.m., Friday October 28, 1983.

PLACE: 2033 K Street NW., Washington, D.C., eighth floor conference room.

STATUS: Closed

MATTERS TO BE CONSIDERED:

Surveillance Briefing

CONTACT PERSON FOR MORE

INFORMATION: Jane Stuckey, 254-6314.

[S-1497-83- Filed 10-21-83; 3:30 pm]

BILLING CODE 6351-01-M

2

FEDERAL ENERGY REGULATORY COMMISSION

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: (To be published October 24, 1983.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 10 a.m., October 26, 1983.

CHANGE IN THE MEETING: The meeting will begin at 9:30 a.m.

[S-1498-83- Filed 10-21-83; 2:21 pm]

BILLING CODE 6717-02-M

3

FEDERAL HOME LOAN BANK BOARD

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: Vol. No. 48, Page No. none at this time. Date Published, none at this time.

PLACE: Board Room, Sixth floor, 1700 G Street, NW., Washington, D.C.

STATUS: Open meeting.

CONTACT PERSON FOR MORE

INFORMATION: Ms. Gravlee (202-377-6970).

CHANGES IN THE MEETING: The following item has been added to the open portion of the Bank Board scheduled Monday, October 24, 1983, at 10 a.m.:

Brokered Deposits

[No. 61, October 19, 1983]

[S-1497-83- Filed 10-20-83; 4:06 pm]

BILLING CODE 6720-01-M

4

NUCLEAR REGULATORY COMMISSION

DATE: Week of October 24, 1983.

PLACE: Commissioners' Conference Room, 1717 H Street NW., Washington, D.C.

STATUS: Open and closed.

MATTERS TO BE DISCUSSED:

Wednesday, October 26:

2:00 p.m.:

Diablo Canyon Motions by Intervenor for Formal Hearings (Closed—Exemption 10)

Thursday, October 27:

10:00 a.m.:

Progress Report on Safety Goal Evaluation Plan (Public Meeting)

3:30 p.m.:

Affirmation/Discussion and Vote (Public Meeting):

a. Amendments to 10 CFR 50 Related to Anticipated Transients Without Scram (ATWS) Events

b. Final Rulemaking Concerning Fitness for Duty for Personnel with Unescorted Access to Protected Areas

Friday, October 28:

10:00 a.m.:

Public Meeting on Diablo Canyon (Public Meeting)

2:00 p.m.:

Continuation of Public Meeting on Diablo Canyon (Public Meeting)

ADDITIONAL INFORMATION: On October 7 the Commission voted 5-0 to hold Discussion of Proposed Notice to Parties in TM1-1 Restart Proceeding, held that day.

AUTOMATIC TELEPHONE ANSWERING

SERVICE FOR SCHEDULE UPDATE: (202)

634-1498. Those planning to attend a meeting should verify the status on the day of the meeting.

CONTACT PERSON FOR MORE

INFORMATION: Walter Magee (202) 634-1410.

Walter Magee,

Office of the Secretary.

[S-1492-83 Filed 10-21-83; 9:07 am]

BILLING CODE 7590-01-M

5

FEDERAL RESERVE SYSTEM

TIME AND DATE: 10 a.m., Monday, October 31, 1983.

PLACE: 20th Street and Constitution Avenue NW., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE

INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board (202) 452-3204.

Dated: October 21, 1983.

James McAfee,

Associate Secretary of the Board.

[S-1498-83 Filed 10-21-83; 3:53 pm]

BILLING CODE 6210-01-M

6

NATIONAL SCIENCE BOARD

DATE AND TIME:

October 20, 1983 9:00 a.m. Open session;

October 21, 1983 8:30 a.m. Closed session;

October 21, 1983 9:00 a.m. Open session.

PLACE: National Science Foundation, Washington, D.C.

STATUS: Change to previously published announcement. The following additional item was added to the Friday, October 21 Closed Session Agenda.

D. Proposed Amendment to the NSF Act of 1950, as amended

All Board members present voted in favor of adding this item to the Closed Session Agenda. No earlier announcement of the change was possible.

CONTRACT PERSON FOR MORE

INFORMATION: Ms. Margaret L. Windus, Executive Officer (202) 357-9582.

[S-1495-83 Filed 10-21-83; 2:08 pm]

BILLING CODE 7555-01-M

7

NATIONAL TRANSPORTATION SAFETY BOARD

[NM-83-24]

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 48 FR 46469, October 12, 1983.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 9 a.m., Tuesday, October 18, 1983.

CHANGE IN MEETING: A majority of the Board determined by recorded vote that the business of the Board required revising the agenda of this meeting and that no earlier announcement was possible. The following item was added to the agenda:

1. *Recommendation* to the Federal Aviation Administration regarding crash/fire/rescue procedures.

CONTACT PERSON FOR MORE

INFORMATION: Sharon Flemming (202) 382-6525.

October 18, 1983.

[S-1495-83 Filed 10-21-83; 1:44 pm]

BILLING CODE 4910-58-M

8

NATIONAL TRANSPORTATION SAFETY BOARD

[NM-83-25]

TIME AND DATE: 9 a.m., Tuesday, November 1, 1983.

PLACE: NTSB Board Room, eighth floor, 800 Independence Avenue SW., Washington, D.C. 20594.

STATUS: The first two items will be open to the public; the remainder will be

closed under Exemption 10 of the Government in the Sunshine Act.

MATTERS TO BE CONSIDERED:

1. *Marine Accident Report:* Capsizing of the Charter Passenger Vessel *San Mateo*, Morro Bay, California, February 18, 1983.

2. *Marine Accident Report:* Sinking of the Charter Fishing Vessel *Joan La Rie III* off of Manasquan Inlet, New Jersey, October 24, 1982.

3. *Opinion and Order:* *Sotillie v. Administrator*, Dkt. 5-EAJA-5388; disposition of the Administrator's petition for reconsideration.

4. *Opinion and Order:* Petition of Phillips, Dkt. SM-2799; disposition of petitioner's appeal.

5. *Opinion and Order:* *Administrator v. Mannix*, Dkt. SE-5879; disposition of the Administrator's appeal.

CONTACT PERSON FOR MORE

INFORMATION: Sharon Flemming (202) 382-6525.

October 21, 1983.

[S-1495-83 Filed 10-21-83; 1:44 pm]

BILLING CODE 4910-58-M

Test Report

Tuesday
October 25, 1983

Part II

Environmental Protection Agency

Inorganic Chemicals Manufacturing Point
Source Category; Effluent Limitations
Guidelines, Pretreatment Standards, and
New Source Performance Standards;
Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 415

[WH-FRL-2438-7]

Inorganic Chemicals Manufacturing Point Source Category; Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes regulations to limit the discharge of pollutants into navigable waters and into publicly owned treatment works by existing and potential new sources that manufacture certain inorganic chemicals.

The Clean Water Act and a consent decree require EPA to issue this regulation.

The purpose of this proposal is to provide effluent limitations guidelines based on "best practicable technology," "best available technology," "best conventional technology," and to establish new source performance standards and pretreatment standards for existing and new sources. The Agency also proposes to amend currently effective regulations for two subcategories. After considering comments received in response to this proposal, EPA will promulgate a final rule.

DATE: Comments on this proposal must be submitted by December 27, 1983.

ADDRESSES: Send comments to: Dr. Thomas E. Fielding, Effluent Guidelines Division (WH-552) Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460, Attention: EGD Docket Clerk, Proposed Inorganic Chemicals Phase II Rules (WH-552).

The Record will be available for public review in EPA's Public Information Reference Unit, Room 2404 (Rear) (EPA Library), 401 M Street, SW., Washington, D.C. The EPA information regulation (40 CFR Part 2) Provides that a reasonable fee may be charged for copying.

Technical information may be obtained by writing to Dr. Thomas E. Fielding, Effluent Guidelines Division (WH-552), EPA, 401 M Street, SW., Washington, D.C. 20460, or through calling 202/382-7156. The economic analysis may be obtained from Ms. Debra Maness, Economic Analysis Staff (WH-586), at the above address or by calling (202) 382-5385.

FOR FURTHER INFORMATION CONTACT: Dr. Thomas E. Fielding (202/382-7156).

SUPPLEMENTARY INFORMATION:

Overview

The preamble summarizes the legal authority, background, technical and economic bases, and other aspects of the regulation. The abbreviations, acronyms, and other terms used in the preamble are defined in Appendix A.

The proposed rule is supported by EPA's technical conclusions detailed in the "Development Document for Proposed Effluent Limitations Guidelines and Standards for the Inorganic Chemicals Point Source Category (Phase II)", EPA 440/1-83-007-B, October, 1983. The Agency's economic conclusions are detailed in "Economic Impact Analysis of Proposed Effluent Limitations and Standards for the Inorganic Chemicals Industry, Phase II", EPA 440/2-83-009, October, 1983. Further supporting materials are contained in the record supporting this rulemaking.

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 - A. Abbreviations, Acronyms, and Other Terms Used in This Notice
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 - E. Exclusion of Subcategories from PSES

I. Legal Authority

This regulation is being proposed under the authority of Sections 301, 304, 306, 307, 308 and 501 of the Clean Water Act (the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1251 *et seq.*, as amended by the Clean Water Act of 1977, Pub. L. 95-217), also called the "Act," and as further amended. It is also being proposed in response to the Settlement Agreement in *Natural Resources Defense Council, Inc., v. Train*, 9 ERC 2120 (D.D.C. 1976), modified, 12 ERC 1833 (D.D.C. 1979), modified by Orders dated October 26, 1982 and August 2, 1983.

II. Scope of This Rulemaking

The inorganic chemicals manufacturing industry is included within the U.S. Department of Commerce, Bureau of the Census, Standard Industrial Classification (SIC) 281, Industrial Inorganic Chemicals. This proposed regulation applies to parts of Subgroups 2812, Alkalies and Chlorine; 2813, Industrial Gases; 2816, Inorganic Pigments; and 2819, Inorganic Chemicals, Not Elsewhere Classified.

The most important pollutants or pollutant parameters found in the wastewater of these subcategories are: (a) Toxic pollutants (antimony, chromium, nickel, lead, copper, cadmium, zinc, selenium, and arsenic); (b) conventional pollutants (TSS and pH); and (c) nonconventional pollutants (chlorine and cobalt). EPA's 1973 to 1976 round of rulemaking emphasized the achievement of best practicable technology currently available (BPT) by July 1, 1977. In general BPT represents the average of the best existing performances of well-known technologies for control of familiar (i.e., "classical") pollutants.

In contrast, this round of rulemaking aims for the achievement by July 1, 1984, of the best available technology economically achievable (BAT) that will result in reasonable further progress toward the national goal of eliminating

the discharge of all pollutants. At a minimum, BAT represents the best economically achievable performance in any industrial category or subcategory. Moreover, as a result of the Clean Water Act of 1977, the emphasis of EPA's program has shifted from "classical" pollutants to the control of a lengthy list of toxic substances.

EPA is proposing BPT, BCT, BAT, NSPS, and PSNS for the following six subcategories:

- Subpart BL (Cadmium Pigments and Salts)
- Subpart BM (Cobalt Salts)
- Subpart AJ (Copper Salts)
- Subpart AU (Nickel Salts)
- Subpart BN (Sodium Chlorate)
- Subpart BO (Zinc Chloride)

PSES are being proposed for the following five subcategories:

- Subpart BL (Cadmium Pigments and Salts)
- Subpart BM (Cobalt Salts)
- Subpart AJ (Copper Salts)
- Subpart AU (Nickel Salts)
- Subpart BO (Zinc Chloride)

Amendments are being proposed for Subpart P (Sodium Chloride), and Subpart T (Sodium Sulfite). For Subpart P (Sodium Chloride, solution brine-mining process), this proposal includes revocation of the existing BAT, and establishment of BCT limitations equal to the existing BPT. For Subpart T (Sodium Sulfite), this proposal would withdraw BAT, NSPS, and PSNS and establish a new BAT rule. It further proposes to establish a new BCT equal to BPT and a new NSPS and PSNS equal to the new BAT. No PSES are proposed for the single indirect discharger.

BAT regulations for the above industries, as well as the calcium chloride industry, were reconsidered as the result of a petition from the Salt Institute. No change is proposed for the calcium chloride industry. The technical rationale for these decisions can be found in Section VI, "Control Treatment Options and Technology Basis for Regulations."

The Agency is also proposing to amend the applicability of the promulgated chlor-alkali effluent limitations guidelines and standards to include the manufacture of calcium hypochlorite (bleaching powder).

III. Background

A. The Clean Water Act

The Federal Water Pollution Control Act Amendments of 1972 established a comprehensive program to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," Section 101(a). By July 1, 1977, existing industrial discharges were

required to achieve "effluent limitations requiring the application of the best practicable control technology currently available" ("BPT"). Section 301(b)(1)(A); and by July 1, 1983, these dischargers were required to achieve "effluent limitations requiring the application of the best available technology economically achievable . . . which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants" ("BAT"). Section 301(b)(2)(A). New industrial direct dischargers were required to comply with Section 306 new source performance standards ("NSPS"), based on best available demonstrated technology; and new and existing dischargers to publicly owned treatment works ("POTW") were subject to pretreatment standards under Sections 307 (b) and (c) of the Act. While the requirements for direct dischargers were to be incorporated into National Pollutant Discharge Elimination System (NPDES) permits issued under Section 402 of the Act, pretreatment standards were made enforceable directly against dischargers to POTW (indirect dischargers).

Although Section 402(a)(1) of the 1972 Act authorized the setting of requirements for direct dischargers on a case-by-case basis, Congress intended that, for the most part, control requirements would be based on regulations promulgated by the Administrator of EPA. Section 304(b) of the Act required the Administrator to promulgate regulations providing guidelines for effluent limitations setting forth the degree of effluent reduction attainable through the application of BPT and BAT. Moreover, Sections 304(c) and 306 of the Act required promulgation of regulations for NSPS, and Sections 304(f), 307(b), and 307(c) required promulgation of regulations for pretreatment standards. In addition to these regulations for designated industry categories, Section 307(a) of the Act required the Administrator to develop a list of toxic pollutants and promulgate effluent standards applicable to all dischargers of toxic pollutants. Finally, Section 501(a) of the Act authorized the Administrator to prescribe any additional regulations "necessary to carry out his functions" under the Act.

EPA was unable to promulgate many of these regulations by dates contained in the Act. In 1976, EPA was sued by several environmental groups, and in settlement of this lawsuit EPA and the plaintiffs executed a "Settlement Agreement" which was approved by the Court. This Agreement required EPA to develop a program and adhere to a schedule for promulgating BAT effluent

limitations guidelines, pretreatment standards, and NSPS for 65 "priority" pollutants and classes of pollutants for 21 major industries (see *Natural Resources Defense Council, Inc. v. Train*, 8 ERC 2120 (D.D.C. 1976), modified, 12 ERC 1833 (D.D.C. 1979)), modified by Orders dated October 26, 1982, and August 2, 1983.

On December 27, 1977, the President signed into law the Clean Water Act of 1977. Although this law makes several important changes in the federal water pollution control program, its most significant feature is its incorporation of several of the basic elements of the Settlement Agreement program for toxic pollution control. Sections 301(b)(2)(A) and 301(b)(2)(C) of the Act now require the achievement by July 1, 1984, of effluent limitations requiring application of BAT for "toxic" pollutants, including the 65 "priority" pollutants and classes of pollutants which Congress declared "toxic" under Section 307(a) of the Act. Likewise, EPA's programs for NSPS and pretreatment standards are now aimed principally at toxic pollutant controls. Moreover, to strengthen the toxics control program, Section 304(e) of the Act authorizes the Administrator to prescribe "best management practices" ("BMPs") to prevent the release of the toxic and hazardous pollutants from plant site runoff, spillage or leaks, sludge or waste disposal, and drainage from raw material storage associated with, or ancillary to, the manufacturing or treatment process.

BPT Effluent Limitations

The factors considered in defining best practicable control technology currently available (BPT) include the total cost of applying such technology in relation to the effluent reductions derived from such application, the age of equipment and facilities involved, the process employed, non-water quality environmental impacts (including energy requirements), and other factors the administrator considers appropriate (Section 304(b)(1)(B)). In general, the BPT technology level represents the average of the best existing performances of plants of various ages, sizes, processes, or other common characteristics. Where existing performance is uniformly inadequate, BPT may be transferred from a different subcategory or category. BPT focuses on end-of-pipe treatment rather than process changes or internal controls, except where such are common industry practice. The cost/benefit inquiry for BPT is a limited balancing, committed to EPA's discretion, which does not require the Agency to quantify benefits in

monetary terms. See, e.g., *American Iron and Steel Institute v. EPA*, 526 F.2d 1027 (3rd Cir. 1975). In balancing costs in relation to effluent reduction benefits, EPA considers the volume and nature of existing discharges, the volume and nature of discharges expected after application of BPT, the general environmental effects of the pollutants, and the cost and economic impacts of the required pollution control level. The Act does not require or permit consideration of water quality problems attributable to particular point sources or industries, or water quality improvements in particular water bodies. Therefore, EPA has not considered these factors. See *Weyerhaeuser v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978).

BAT Effluent Limitations

The factors considered in assessing best available technology economically achievable (BAT) include the age of equipment and facilities involved, the process employed, process changes, and non-water quality environmental impacts (including energy requirements), (Section 304(b)(2)(B)). At a minimum, the BAT technology level represents the best economically achievable performance of plants of various ages, sizes, processes, or other shared characteristics. As with BPT, uniformly inadequate performance may require transfer of BAT from a different subcategory or category. BAT may include process changes or internal controls, even when these technologies are not common industry practice. The statutory assessment of BAT "considers" costs, but does not require a balancing of costs against effluent reduction benefits (see *Weyerhaeuser v. Costle*, *supra*). In developing the BAT regulations, however, EPA has given substantial weight to the reasonableness of costs. The Agency has considered the volume and nature of discharges, the volume and nature of discharges expected after application of BAT, the general environmental effects of the pollutants, and the costs and economic impacts of the required pollution control levels. Despite this expanded consideration of costs, the primary determinant of BAT is effluent reduction capability. As a result of the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, the achievement of BAT has become the principal national means of controlling water pollution due to toxic pollutants. As noted above, the deadline for compliance with BAT limitations on toxic pollutants is July 1, 1984. For non-toxic, nonconventional pollutants, Sections 301(b)(2)(A) and (b)(2)(F) require achievement of BAT effluent

limitations within three years after their establishment or by July 1, 1984, whichever is later, but not later than July 1, 1987.

BCT Effluent Limitations

The 1977 Amendments added Section 301(b)(2)(E) to the Act establishing "best conventional pollutant control technology" (BCT) for discharge of conventional pollutants from existing industrial point sources. Conventional pollutants are those defined in Section 304(a)(4) (biological oxygen demanding pollutants (BOD5), total suspended solids (TSS), fecal coliform, and pH), and any additional pollutants defined by the Administrator as "conventional" (oil and grease, 44 FR 44501, July 30, 1979).

BCT is not an additional limitation but replaces BAT for the control of conventional pollutants. In addition to other factors specified in Section 304(b)(4)(B), the Act requires that BCT limitations be assessed in light of a two part "cost-reasonableness" test. *American Paper Institute v. EPA*, 660 F.2d 954 (4th Cir. 1981). The first test compares the cost for private industry to reduce its conventional pollutants with the costs to publicly-owned treatment works for similar levels of reduction in their discharge of these pollutants. The second test examines the cost-effectiveness of additional industrial treatment beyond BPT. EPA must find that limitations are "reasonable" under both tests before establishing them as BCT. In no case may BCT be less stringent than BPT.

EPA published its methodology for carrying out the BCT analysis on August 29, 1979 (44 FR 50732). In the case mentioned above, the Court of Appeals ordered EPA to correct data errors underlying EPA's calculation of the first test and to apply the second cost test. (EPA had argued that a second cost test was not required).

On October 29, 1982, EPA proposed a revised BCT methodology. On the basis of the proposed BCT methodology, EPA has determined that, in this proposed rulemaking, in two subcategories, BCT limitations should be based on BPT technology. If the proposed BCT methodology is changed significantly, the Agency will need to reconsider the BCT limitations for those two subcategories. In four other subcategories, no additional technologies were identified that would remove significant additional quantities of conventional pollutants. Accordingly, EPA is proposing that BCT equal BPT in those four subcategories.

NSPS

New Source Performance Standards (NSPS) are based on the best available demonstrated technology. New plants have the opportunity to install the best and most efficient production processes and wastewater treatment technologies, and, therefore, Congress directed EPA to consider the best demonstrated process changes, in-plant controls, and end-of-pipe treatment technologies to reduce pollution to the maximum extent feasible.

PSES

Pretreatment Standards for Existing Sources (PSES) are designed to prevent the discharge of pollutants that pass through, interfere with, or are otherwise incompatible with the operation of well-operated publicly owned treatment works (POTW) with secondary treatment installed. According to statute, PSES must be achieved no later than 3 years from promulgation. EPA has determined that the PSES proposed in this regulation can be met within 24 months of promulgation, and has proposed a compliance date accordingly.

The Act requires pretreatment for toxic pollutants that pass through the POTW in amounts that would violate direct discharger effluent limitations or interfere with the POTW's treatment process or chosen sludge disposal method. The legislative history of the 1977 Act indicates that pretreatment standards are to be technology-based, analogous to the best available technology for removal of toxic pollutants. EPA has generally determined that there is pass through of pollutants if the percent of pollutants removed by a well-operated POTW achieving secondary treatment is less than the percent removed by the BAT model treatment system. The general pretreatment regulations, which served as the framework for the categorical pretreatment regulations are found at 40 CFR Part 403. 43 FR 27736 (June 28, 1978); 46 FR 9462 (January 28, 1981).

PSNS

Like PSES, Pretreatment Standards for New Sources (PSNS) are to prevent the discharge of pollutants which pass through, interfere with, or are otherwise incompatible with the operation of the POTW. PSNS are to be issued at the same time as NSPS. New indirect dischargers, like new direct dischargers, have the opportunity to incorporate the best available demonstrated technologies. The Agency considers the same factors in promulgating PSES.

The propose of these proposed regulations is to provide effluent limitations guidelines for BPT, BAT and BCT, and to establish NSPS, PSES, and PSNS, under Sections 301, 304, 306, 307, and 501 of the Clean Water Act.

B. Prior EPA Regulations

EPA initially approached the regulation of the Inorganic Chemicals Manufacturing Point Source Category in two stages. The first stage covered 22 Major Inorganic Chemical Products, and the final regulations for these industrial subcategories were published on March 12, 1974. (39 FR 9612) The regulations included numerical BPT and BAT effluent limitations and standards of performance and pretreatment standards for new sources. Zero-discharge requirements specified for many of the subcategories were to become effective in 1977 or later. In the second stage, the Agency promulgated BPT-based effluent limitations for an additional group of 27 subcategories referred to as "Significant Inorganic Chemical Products." (40 FR 22402 (May 22, 1975)). Taken together, the two groups of regulations covered 49 inorganic chemical subcategories, many of which included more than one specific chemical product. Although some toxic pollutants were covered in cases where a direct relationship to the process was obvious (e.g., mercury and/or lead in the Chlor-Alkali Industry), the main thrust of the regulations was the control of the pollutant parameters which accounted, in terms of quantity, for most of the pollutant loading of navigable waters attributable to the manufacture of inorganic chemicals.

On March 10, 1976, the United States Court of Appeals for the Fourth Circuit in *E. I. duPont de Nemours & Co., V. Train*, 541 F.2d 1018 (4th Cir. 1976), set aside and remanded for reconsideration a number of general definitions and specific discharge regulations (generally requiring zero discharge of pollutants) promulgated in 1974. These regulations were all within 40 CFR Parts 401 and 415 and covered the chlor-alkali, hydrochloric acid, hydrofluoric acid, nitric acid, sodium carbonate, sodium dichromate, sodium metal, sodium silicate, sulfuric acid, and titanium dioxide subcategories.

Following the court remand, on November 23, 1976 (41 FR 51601), the Agency revoked the second set of published regulations for aluminum fluoride, chrome pigments, hydrogen cyanide, and sodium silicofluoride. The Agency's intent was to reconsider the specific effluent limitations established for these industries in the light of information made available on process

differences between plants and additional data on the actual concentrations and treatability of the regulated discharge constituents. The information was presented to the Agency in the form of various documents prepared by members of the industries concerned.

On July 20, 1977, the Agency promulgated interim final regulations establishing pretreatment standards for existing sources for nine of the 49 inorganic chemical subcategories (42 FR 37294).

At about the same time, a consent decree was issued as a result of a suit filed by four environmental groups (*Natural Resources Defense Council, Inc. v. Train, supra*). The consent decree identified 21 point source categories and required EPA to promulgate BAT effluent limitations guidelines, new source performance standards, and pretreatment standards for specified industrial categories identified by Standard Industrial Classification (SIC) code numbers. The major industries included in the Inorganic Chemicals Manufacturing Point Source Category are:

- SIC 2812—Alkalies and Chlorine.
- SIC 2813—Industrial Gases.
- SIC 2816—Inorganic Pigments.
- SIC 2819—Industrial Inorganic Chemicals, Not Elsewhere Classified.

Following the NRDC consent decree, the Agency divided its inorganic chemicals rulemaking effort into two phases.

Phase I covered 60 of 177 subcategories previously identified as belonging to the category. The Phase I regulations were promulgated June 29, 1982 (47 FR 28260).

C. Overview of the Industry

Phase II was to have covered the remaining 117 subcategories. However, after review of all of the inorganic products listed in SIC codes 2812, 2813, 2816, and 2819, seven more subcategories were identified, bringing the total number of subcategories examined in Phase II to 124. These additional subcategories were identified as a result of contacts with chemical producers, a literature search, site visits by EPA and contractor personnel, and telephone communications. Of the 124 subcategories, 104 were excluded from further study for one or more of the following reasons:

1. The chemical is no longer being produced;
2. Only one plant was known to be producing the chemical;
3. The amount and toxicity of the pollutants discharged did not justify national regulations.

4. No dischargers could be identified in the subcategory;

5. No toxic pollutants were found at significant treatable levels; or

6. The subcategory was already regulated by existing guidelines.

As discussed below, we propose to exclude these subcategories from national regulation under Paragraph 8 of the Settlement Agreement.

In addition, we propose to defer one subcategory for coverage under a more appropriate point source category, and to modify an existing regulation to include the product included under two other subcategories.

IV. Industry Subcategorization

The inorganic chemicals industry is very large and diversified and has been segmented into subcategories for the purpose of establishing effluent guidelines. In developing these regulations, the Agency has considered whether different effluent limitations and standards are appropriate for different segments of the inorganic chemicals industry. Factors taken into consideration for subcategorization include: Raw materials used, product produced, manufacturing process employed, geographical location, size and age of equipment and facility involved, nonwater-quality aspects of waste characteristics, water pollution control technology, treatment costs, energy requirements and solid waste disposal. EPA found that final product is the industry's most significant identifying factor, and developed 184 subcategories on this basis. Some subcategories required secondary subcategorization because of process differences for the same product. Other subcategories were consolidated because of similar production processes, pollutants, unit flows, and treatment processes. Section 4 of the Development Document describes the rationale for the subcategorizations in detail.

The Agency identified the following 17 chemical products in Phase II for which effluent limitations guidelines and standards are warranted:

1. Cadmium Pigments.
2. Cadmium Chloride.
3. Cadmium Nitrate.
4. Cadmium Sulfate.
5. Cobalt Chloride.
6. Cobalt Nitrate.
7. Cobalt Sulfate.
8. Copper Carbonate.
9. Copper Chloride.
10. Copper Iodide.
11. Copper Nitrate.
12. Nickel Carbonate.
13. Nickel Chloride.
14. Nickel Fluoborate.

15. Nickel Nitrate.
16. Sodium Chlorate.
17. Zinc Chloride.

Because the pollutants, pollutant concentrations, and applicable treatment technologies are the same for a number of the subcategories, the following consolidation of 17 subcategories into six subcategories is proposed:

1. Cadmium Compounds—Includes cadmium pigments, cadmium chloride, cadmium nitrate, and cadmium sulfate. There are 12 plants in the subcategory, of which six are direct dischargers, four are indirect dischargers and two have no discharge.

2. Cobalt Salts—Includes cobalt chloride, cobalt nitrate, and cobalt sulfate. There are ten plants in the subcategory, of which five are direct dischargers, three are indirect dischargers and two have no discharge.

3. Copper Salts—Includes copper carbonate, copper chloride, copper iodide, copper nitrate, and copper sulfate. This subcategory will replace the copper sulfate subcategory. There are 23 plants in the subcategory, of which six are direct dischargers, six are indirect dischargers and 11 have no discharge.

4. Nickel Salts—Includes nickel carbonate, nickel chloride, nickel fluoborate, nickel nitrate and nickel sulfate. This subcategory will replace the nickel sulfate subcategory. There are 19 plants in the subcategory, of which 8 are direct dischargers, 9 are indirect dischargers, and 2 have no discharge.

5. Sodium Chlorate. There are 13 plants in the subcategory of which nine are direct dischargers and four have no discharge.

6. Zinc Chloride. There are 7 plants in the subcategory, of which 5 are direct dischargers and 2 are indirect dischargers.

EPA proposes the replacement of two subcategories with new consolidated subcategories. Subpart AJ (Copper Sulfate) will be replaced by Subpart AJ (Copper Salts) which includes copper sulfate, copper chloride, copper iodide, copper nitrate, and copper carbonate. Subpart AU (Nickel Sulfate) will be replaced by Subpart AU (Nickel Salts), which includes nickel sulfate, nickel chloride, nickel nitrate, nickel fluoborate, and nickel carbonate.

This proposed subcategorization is for the following reasons:

a. Many facilities produce copper sulfate or nickel sulfate as well as other copper or nickel salts covered in these subparts. The wastewater streams are typically commingled and sent to a common wastewater treatment system.

b. The production processes for copper or nickel sulfate and the other copper or nickel salts covered in this subpart are very similar.

c. Wastewater flows and pollutant characteristics are very similar for copper or nickel sulfate and the other copper or nickel salts.

d. Wastewater treatment processes which have been determined to be effective in the copper or nickel sulfate industry are the same as for the other salts.

e. Levels of treatability are the same for copper or nickel sulfate and the other copper or nickel salts.

The exception to the above is the copper or nickel carbonate production industry. The Agency is proposing that copper carbonate be a separate segment within the Copper Salts subcategory and that nickel carbonate be a separate segment within the Nickel Salts Subcategory because the wastewater unit flows at copper carbonate and nickel carbonate facilities are substantially greater than at other copper or nickel salts facilities covered in these subparts. The proposed limitations for the copper salts and nickel salts subparts are based upon the same concentration limits as are currently in effect for the copper sulfate and nickel sulfate industries, respectively. Thus, there is no change for the copper sulfate and nickel sulfate industries. The copper carbonate and nickel carbonate industries have different mass limits due to different unit flows.

This regulation applies to the 46 existing plants in these subcategories. Many plants are multiproduct plants manufacturing several products in different subcategories. For multiproduct plants incurring costs, the Agency has estimated the total cost for the technology, and prorated the costs to each product based on the wastewater flow from each product in Phase II.

V. Methodology and Data Gathering Efforts

Initiating and undertaking a comprehensive study of the toxic pollutant problem in the Inorganic Chemicals Industry was preceded by an intensive evaluation by the Agency of the kinds of data and supporting information that should be assembled as a basis for the development of regulations. All major decisions on the identity of pollutants and the establishment of effluent limitations and standards of performance for each subcategory had to be supported by documented evidence collected from operating production facilities. Similarly, the necessary information on

production rates, processes, raw materials, water use, waste sources, and treatment technologies in practice had to be acquired with sufficient detail and breadth of coverage to permit an analysis of the engineering and economic variables that are characteristic of each subcategory. Toxic pollutant control regulations would be based on the application of best available technology economically achievable for treatment and reliable performance evaluations for the removal of specific waste substances.

A. Industry Data Base Development

Information from individual manufacturers and previous study documents were reviewed in detail, and an evaluation of possible subcategorization was performed. A review of the data base acquired for this group of chemical products indicated that there are 47 individual facilities in this group (many plants are multiple product plants). The Agency has data obtained during Phase I or II pursuant to Section 308 of the Act or engineering visit data on file for 44 of the 46 plants. In addition, EPA obtained data from State agencies, EPA regional offices, telephone contacts, and letter requests. During sampling, 13 plants were sampled (one plant was sampled twice). EPA conducted follow-up visits during October and November 1982 to 12 plants (three had been visited previously during the sampling program).

B. The Screening and Verification Sampling Program

The collection of detailed analytical data on conventional, nonconventional, and toxic pollutant concentrations in raw and treated process wastewater streams was completed in a comprehensive sampling program. In its 1977 legislation, Congress recognized that it was dealing with areas of scientific uncertainty when it declared the 65 "priority" pollutants and classes of pollutants "toxic" under Section 307(a) of the Act. Many of the "priority" pollutants were relatively unknown outside of the scientific community, and those engaged in wastewater sampling and control have had little experience in dealing with these pollutants. Additionally, these pollutants often appear (and have toxic effects) at concentrations that tax current analytical techniques. Even though Congress was aware of the state-of-the-art difficulties and expense of "toxics" control and detection, it directed EPA to act quickly and decisively to detect, measure and regulate these substances.

The sampling and analysis program for this rulemaking concentrated on the toxic pollutants designated in the Clean Water Act. However, conventional and nonconventional pollutants were also sampled and analyzed. Although it was expected that the toxic pollutants in inorganic chemicals manufacturing would be inorganic rather than organic, the wastes from this industry were sampled and analyzed for the presence of toxic organic pollutants. The Agency has not promulgated analytical methods for many of the organic toxic pollutants under section 304(h) of the Act, although a number of these methods have been proposed (44 FR 69464, December 3, 1979; 44 FR 75028, December 18, 1979). Additional information on the development of sampling and analysis methods for toxic organic pollutants is contained in the preamble to the proposed regulations for the Leather Tanning Point Source Category, 40 CFR Part 425, 44 FR 38749 dated July 2, 1979. Before proceeding to analyze inorganic chemicals wastes, EPA concluded that it had to isolate specific toxic pollutants for analysis. The list of 65 pollutants and classes of pollutants potentially includes thousands of specific pollutants; analyses for all of them would overwhelm private and government laboratory resources. In order to make the task more manageable, therefore, EPA selected 129 specific toxic pollutants for study in this rulemaking and other industry rulemakings. The criteria for choosing these pollutants included the frequency of their occurrence in water, their chemical stability and structure, the amount of the chemical produced, and the availability of chemical standards for measurement.

The primary objective of the field sampling program was to produce composite samples of wastewater from which to determine the concentrations of toxic pollutants. Sampling visits were made during three consecutive days of plant operation, with raw wastewater samples taken either before treatment or after minimal preliminary treatment. Treated effluent samples were taken following application of in-place treatment technologies. EPA also sampled intake water to determine the presence of toxic pollutants prior to contamination by inorganic chemicals processes.

Using the analytical techniques proposed on December 3, 1979, EPA looked for, but did not find, significant quantities of organic priority pollutants in the inorganic chemicals manufacturing wastewaters. The Phase I study showed that organic priority

pollutants would not be expected to be significant in the inorganic chemicals manufacturing industry. Therefore, the screening and verification sampling program was modified to reduce the frequency of organic sampling for Phase II.

Metals analysis was by AA spectrophotometry, except that the standard cold vapor method was used for mercury. This 304(h) method was somewhat changed in order to avoid excessive matrix interference that caused high limits of detection.

Analyses for cyanide and cyanide amenable to chlorination also used 304(h) methods.

Analysis for asbestos fibers used transmission electron microscopy with selected area defraction; results were reported as chrysotile fiber count.

Analyses for conventional pollutants (BOD₅, TSS, pH, and oil and grease) and nonconventional pollutants (total residual chlorine, iron, ammonia, fluoride, and COD) were performed by 304(h) methods. In all, 13 of the 47 plants were sampled during the sampling program.

C. Engineering

The Development Document describes the procedures and sources used in developing the industry production and wastewater generation characteristics that form the basis of the model plant concept. The sources of detailed process and waste treatment information are also presented, as well as evaluation of treatment technology currently applied in existing wastewater treatment systems and advanced technologies that may be recommended for BAT and NSPS applications. The document contains estimates of the treatability of selected toxic and nonconventional pollutants to be applied in the development of achievable performance characteristics for specific technologies. A discussion of the approach taken in the statistical analysis of long-term monitoring data is also included. The statistically derived parameters, including variability factors for the 24-hour maximum and maximum 30-day average limitations, are presented. The groundwork is presented for the estimation of pollutant removal performances for each subcategory. The candidate toxic pollutants to be controlled in each subcategory are identified on the basis of the screening and verification data, and the rationale for the application of advanced level technologies is presented.

D. Treatment System Cost Estimates

The Development Document presents

the general approach to cost estimating, discusses the assumptions made, and gives the detailed cost estimates for alternative levels of treatment and control. For each subcategory, the total estimated installed cost of typical treatment systems is developed on the basis of model plant design specifications. Estimated incremental costs are given for each of the advanced level treatment alternatives: Estimates of the sludge generated by wastewater treatment and the costs associated with its proper disposal in compliance with anticipated RCRA requirements are included. Where available, industry data on sludge volumes and characteristics were utilized. Disposal costs were estimated on the basis of disposal in an off-site hazardous material landfill except where data showed that the waste is not hazardous.

E. Treatability Study

Data were collected through a treatability study in Phase I to evaluate the achievable performance of various treatment and control alternatives and to provide empirical treatment system performance information applicable to selected inorganic chemical subcategories. The study, completed in July 1980, specifically concentrated on those subcategories in the Phase I Inorganic Chemicals Industry for which treatability data either did not exist or was deficient, and for which data were needed for purposes of comparison with proposed effluent limitations. Subcategories of Phase I for which treatability studies were conducted include:

- Nickel sulfate
- Hydrofluoric acid
- Copper sulfate
- Chlor-alkali (diaphragm cells)
- Titanium dioxide (chloride process)
- Chrome pigment
- Sodium dichromate
- Sodium bisulfite
- Sodium hydrosulfite

These treatability studies are relevant to Phase II because the chemical manufacturing processes are similar, similar wastewater treatment practices are employed, and similar wastewater streams have been encountered.

Where adequate data were unavailable for Phase II, treatability study results for similar wastewater streams from Phase I and data from other industries were considered in determination of achievable levels of performance.

VI. Control Treatment Options and Technology Basis for Proposed Regulations

A. Control Treatment Options

1. Available Control Treatment Options

It was found that most treatment requirements in this industry could be met by optimized design and operation of conventional technologies. For all subcategories except Sodium Chlorate, the treatment technology options considered were:

Option 1—Lime precipitation with clarification for heavy metals removal.

Option 2—Filtration of the clarified wastewater from Option 1 for further removal of metal hydroxide precipitates and other suspended solids.

The use of sulfide precipitation prior to filtration was considered as a polishing step for further toxic pollutant removals beyond those achieved by Option 2. However, it was rejected because:

a. The only available data demonstrating the performance of sulfide treatment are from chlor-alkali mercury cell plants.

b. The process wastewater at mercury cell plants is significantly different from the wastewaters from other inorganic chemicals plants.

c. Treatability studies conducted to determine the effectiveness of sulfide treatment when transferred to other industries did not show significant improvement in toxic metal removals over those achieved by Option 2 technology.

For the Sodium Chlorate subcategory, the following treatment options were considered:

Option 1—Hexavalent chromium reduction followed by lime precipitation and clarification for the removal of heavy metals. The chromium reduction technology will also reduce total residual chlorine.

Option 2—Granular media filtration of the clarified wastewater from Option 1 for improved removal of metal hydroxide precipitates and other suspended solids.

Hexavalent chromium reduction is needed only in the Sodium Chlorate subcategory because there is no hexavalent chromium in the wastewater from the other five subcategories.

In addition, for all subcategories flow reduction by maximum recycle was considered as a means of greatly reducing the volume of process wastewater. Zero discharge was also considered.

Zero discharge was rejected as a BAT option for the Sodium Chlorate

subcategory since it is not technically feasible. (See Section VI.B.5, *infra*).

In all other subcategories except zinc chloride, several plants have no discharge. However, at all of those plants, special circumstances enable the facility to achieve no discharge, such as use of very pure raw materials, production of only liquid products, location in arid regions of the country, or very low production volumes.

Accordingly, a zero discharge requirement for either existing or new sources is not technically feasible for most plants, and the Agency does not propose to establish a zero discharge requirement for those subcategories. (A more detailed discussion of how individual plants achieve zero discharge is contained in Sections 11 to 16 of the Development Document).

Flow reduction was considered as an option in all subcategories because it has proven to be an effective and inexpensive means to reduce toxic pollutant discharges in other categories. However, plants in the inorganic chemicals industry already have consistently low flows. Therefore, a treatment technology which includes flow reduction could not be identified. The direct discharge limitations will be mass-based limits (i.e., limits based on volume of production); those mass-based limits will also be available as alternative limitations for indirect dischargers.

2. Control Treatment Options Recommended

BPT

The BPT technology recommended is the technology currently installed by the majority of the direct dischargers in each subcategory, except for the Sodium Chlorate subcategory, where only one of nine direct dischargers has any treatment installed. Option 2, filtration of the clarified wastewater from Option 1, is the technology upon which the proposed BPT limitations are based for the following subcategories:

- Cadmium Pigments and Salts
- Cobalt Salts
- Copper Salts
- Nickel Salts

Option 1, lime precipitation with clarification, is the technology upon which the proposed BPT limitations are based for the following subcategory:

- Zinc Chloride

Option 1, hexavalent chromium and total residual chlorine reduction followed by lime precipitation and clarification, is the technology upon which the proposed BPT limitations are based for the following subcategory:

—Sodium Chlorate

The implementation of BPT would remove 26,400 pounds per year of toxic pollutants, including over 25,000 pounds per year of hexavalent chromium and 195 pounds per year of cadmium, at estimated investment costs of \$3.8 million and annualized costs of \$1.9 million. The Agency has concluded that these costs are justified by the pollution reduction benefits.

BAT

Option 2, filtration of the clarified wastewater from the Option 1 treatment is the technology upon which the proposed BAT limitations are based for all six subcategories. Option 2 is proposed for the following reason:

- All six subcategories are very similar to the Copper Sulfate, Nickel Sulfate, Chrome Pigments, and Chlor-Alkali (Diaphragm Cell) subcategories covered in Phase I; the wastewaters in Phase II contain the same toxic metal pollutants at the same concentrations as the Phase I subcategories.
- Option 2 was selected as the technology basis for BAT in those four Phase I subcategories.
- Most direct discharge plants in Phase II either have Option 2 (or equivalent) or no treatment.
- Filters remove significant additional amounts of toxic pollutants in this industry because, after lime precipitation and clarification, the bulk of the suspended solids are the precipitated toxic metal hydroxides.
- No additional technologies were identified that would remove significant additional amounts of toxic or non-conventional pollutants.

According to the statute, the compliance date for BAT limitations for non-conventional pollutants is not more than three years from promulgation and in no case later than July 1, 1987. This proposed regulation would limit the non-conventional pollutant cobalt in discharges from the Cobalt Salts subcategory and the non-conventional pollutants total residual chlorine in discharges from the Sodium Chlorate subcategory. The proposed BAT limitations on these nonconventional pollutants are identical to the proposed BPT limitations and thus would take effect at the same time as the BPT limitations. The time necessary to achieve compliance with the BPT limitations is to be determined by the permit writer on a case-by-case basis.

PSES

The proposed PSES limitations are based upon the proposed BAT treatment

technology, i.e., filtration of the clarified wastewater from the Option 1 treatment because BAT provides better removal of the regulated toxic pollutants than is achieved by a well-operated POTW with secondary treatment installed and thus these toxic pollutants would pass through a POTW in the absence of pretreatment.

EPA has generally determined that there is pass through of pollutants if the percent of pollutants removed by a well-operated POTW achieving secondary treatment is less than the percent removal by the BAT model treatment system. A study of 40 well-operated POTW's with biological treatment and meeting secondary treatment criteria showed that regulated metals are typically removed at rates varying from 20 to 70 percent. POTW's with only primary treatment have even lower rates of removal. In contrast, BAT level treatment by inorganic chemicals manufacturing industrial facilities can achieve removals of approximately 97 percent or more. Thus it is evident that metals from this industry do pass through POTW's. Many of the pollutants present in inorganic chemicals manufacturing wastes, at sufficiently high concentrations, can inhibit biodegradation in POTW operations. In addition, a high concentration of toxic pollutants in the sludge can limit POTW use of sludge management alternatives, including the beneficial use of sludges on agricultural lands. Please refer to section B below for the specific pollutants regulated in each subcategory.

According to the statute, PSES must be achieved no later than 3 years after promulgation. EPA has determined that the PSES established in this proposed regulation can be met within 24 months of promulgation, and has proposed a compliance date accordingly. The Agency is proposing PSES (and PSNS) limitations based on concentrations (mg/l) rather than mass-based limitations, because the flow in the industry is low and the Agency could not identify any flow reduction technology for this industry, and because it is easier for POTW's to monitor pretreatment compliance when the standards are based on concentrations of pollutants.

NSPS

The proposed NSPS limitations for all six subcategories are based upon the proposed BAT treatment technology, i.e., filtration of the clarified wastewater from the Option 1 treatment since no additional technology which removes significant quantities of additional pollutants is known to the

Administrator. The Agency does not propose to establish an NSPS of zero discharge because it is not technically feasible. (See Section VI.A.1. above).

PSNS

The proposed PSNS limitations for all six subcategories are based upon the proposed BAT treatment technology, i.e., filtration of the clarified wastewater from the Option 1 treatment for the reasons given under PSES and NSPS above. For the reasons discussed under PSES, EPA is proposing concentration based limitations for PSNS.

BCT

The proposed BCT limitations for all six subcategories are based upon the BPT treatment technologies and are applicable only to TSS and pH. For the sodium chlorate and zinc chloride subcategories, additional technology considered failed the proposed BCT cost test. For the other four subcategories, no additional technologies that would significantly reduce conventional pollutants are known to the Administrator.

B. Technology Basis for Proposed Regulations

The Agency is proposing limitations for the six subcategories detailed below. The Cadmium Pigments and Salts subcategory is subdivided into two segments: (1) Cadmium Pigments and (2) Cadmium Salts. The Copper Salts subcategory is divided into two segments: (1) Copper Sulfate, Copper Chloride, Copper Iodide, Copper Nitrate, and (2) Copper Carbonate. Likewise, the Nickel Salts subcategory is divided into two segments: (1) Nickel Sulfate, Nickel Chloride, Nickel Nitrate, Nickel Fluoborate, and (2) Nickel Carbonate.

1. Cadmium Pigments and Salts (Subpart BL)

There are 12 facilities producing cadmium compounds in this subcategory. Five facilities manufacture cadmium pigments; however, pigment production is always associated with production of a precursor cadmium salt. Cadmium salts are produced by dissolving cadmium or its oxide in acid and evaporating to dryness. Cadmium pigments are produced by reacting cadmium salts with sulfides or mixtures of sulfides and selenides. Due to the large differences in the volume of wastewater discharged, cadmium pigments and cadmium salts are treated separately in the proposed regulation.

(a) Cadmium Pigments

(i) Background. There are currently five plants in the United States

producing cadmium pigments, of which two are direct dischargers, two are indirect dischargers and one has no discharge. The cadmium pigments model plant has a unit flow of 92.4 m³/kkg. The major sources of wastewater are from washing, quenching, and rinsing the pigments.

The toxic pollutants found in significant amounts are cadmium, selenium, and zinc.

(ii) Proposed Limits. For BPT, the Agency is proposing limitations based upon Option 2 because one of the two direct dischargers in this segment of the subcategory already has this technology installed. BPT limitations for pH, TSS, cadmium, selenium, and zinc, are proposed based upon long-term plant data, screening and verification sampling data, as well as data collected during the Phase I study of the Inorganic Chemicals Industry.

Proposed BCT limitations for TSS are based on the proposed BPT technology and limitations because no technologies which would remove significant additional amounts of conventional pollutants are known to the Administrator.

For BAT, the Agency is proposing limitations based on BPT treatment technology for the reasons given in Section VI.A. above. Toxic pollutants limited by the proposed BAT regulation are cadmium, selenium, and zinc at the same concentration levels and loadings proposed for BPT.

The Agency is proposing NSPS, PSNS, and PSES limitations equal to BAT for the reasons given in Section VI.A. above. The pollutants limited include cadmium, selenium, zinc, pH, and TSS (the latter two are not regulated under PSES and PSNS).

(b) Cadmium Salts

(i) Background. There are currently seven plants in the United States producing cadmium salts not associated with cadmium pigments production. Four of these are direct dischargers, two are indirect dischargers, and one achieves zero discharge. The cadmium salts model plant has unit flow of 0.058 m³/kkg. Wastewater emanates from decanted, filtered, or purified reaction media, washdown of equipment and area, air-pollution control devices, and other indirect process sources.

As in the cadmium pigments segment, the toxic pollutants found in significant amounts in cadmium salts process wastewaters are cadmium, selenium, and zinc.

(ii) Proposed Limits. For BPT, the Agency is proposing limitations based upon Option 2 because three of the four

direct dischargers have installed this technology or its equivalent. BPT limitations for pH, TSS, cadmium, selenium, and zinc are proposed based upon long-term plant data, screening and verification sampling data, as well as data collected during the Phase I study of the Inorganic Chemicals Industry.

Proposed BCT limitations for TSS are based on the proposed BPT technology and limitations because no other technologies which would remove significant additional amounts of conventional pollutants are known to the Administrator.

For BAT, the Agency is proposing limitations based on BPT treatment technology for the reasons given in Section VI.A. above. Toxic pollutants limited by the proposed BAT regulation are cadmium, selenium, and zinc.

For NSPS, PSES, and PSNS, the Agency is proposing limitations equal to BAT for the reasons given in Section VI.A. above. The pollutants limited include cadmium, selenium, zinc, pH, and TSS (the latter two are not limited under PSES and PSNS).

2. Cobalt Salts (Subpart BM)

(i) Background. The cobalt salts considered in this subcategory are cobalt chloride, cobalt nitrate, and cobalt sulfate. There are ten facilities in the United States which manufacture cobalt salts. Cobalt salts are produced by reacting cobalt metal with either hydrochloric, sulfuric, or nitric acid.

Of the ten facilities producing cobalt salts in the United States, five are direct dischargers, three are indirect dischargers, and two achieve zero discharge. The cobalt salts model plant has a unit flow of 0.083 m³/kkg. Process wastewaters in this industry is generally the result of washdowns, cleanups, spills, and pump leaks. All direct process contact water is recycled back to the process. In general, air pollution control water is also recycled to the process. No screening and verification data are available for this subcategory because none of the plants contacted at the time available for sampling were producing cobalt salts. The Agency has assumed that the toxic pollutants (nickel and copper) found in the raw materials are the toxic pollutants most likely to be present at treatable levels in the wastewater. Since all cobalt salts producers also manufacture copper or nickel salts and combine the wastewaters for common treatment, limiting the toxic metals common to all three wastewaters simplifies the establishment of permit limits and monitoring requirements and reduces monitoring costs by minimizing the

number of pollutants to be monitored. In addition, the nonconventional pollutant, cobalt, is found in significant quantities.

(ii) Proposed Limits. For BPT, the Agency is setting limitations based upon Option 2 because four of the five direct dischargers in this subcategory have this technology or its equivalent installed. BPT limitations for pH, TSS, cobalt, and nickel are proposed based upon long-term plant data. The limitations on copper are based on data collected from the nickel sulfate subcategory. Most of the plants producing cobalt salts also produce nickel sulfate and other nickel salts and treat the wastewaters from all processes in the same treatment facility.

A BCT limitation for TSS is proposed based upon the BPT technology because no additional technology which would remove significant additional amounts of conventional pollutants is known to the Administrator.

For BAT, the Agency is proposing limitations based on treatment consisting of BPT technology for the reasons given in Section VI.A. above. Pollutants limited by the proposed BAT regulation are cobalt, copper, and nickel.

For NSPS, PSES, and PSNS, the Agency is proposing limitations equal to BAT for the reasons given in Section VI.A. above. The pollutants limited are cobalt, copper, nickel, pH and TSS (the latter two are not limited under PSES and PSNS). Since no untreated waste data are available, the Agency cannot accurately project removals for this subcategory.

3. Copper Salts (Subpart AJ)

The Agency is proposing the replacement of Subpart AJ, Copper Sulfate, with a new Subpart AJ, Copper Salts, which will include copper sulfate as well as copper chloride, copper iodide, copper nitrate, and copper carbonate. This proposed subcategorization is for the reasons given in Section IV above.

(a) Copper Sulfate, Copper Chloride, Copper Iodide, Copper Nitrate

(i) Background. Twenty-one facilities are known to produce copper salts exclusive of copper carbonate, which will be discussed separately.

The copper salts covered in this segment are produced by reacting a copper source (metal, oxide, or salt) with either sulfuric acid (copper sulfate), chlorine or hydrochloric acid (copper chloride), iodine or potassium iodide (copper iodide), or nitric acid (copper nitrate).

Of the 21 facilities identified as copper salts producers, 5 are direct dischargers, 5 are indirect dischargers, and 11 achieve zero discharge. The

copper salts model plant has a unit flow of 0.94 m³/kkg.

Process wastewater is generated primarily from indirect process contact and non-contact ancillary uses.

The toxic pollutants found in the wastewater include nickel, copper, and in some cases, selenium. Selenium was found in one copper sulfate plant wastewater after treatment but not in the raw waste. The existing limitations for selenium under the copper sulfate subcategory are to ensure that selenium is adequately controlled if added to the wastewater during treatment.

(ii) Proposed Limits. For BPT, the Agency is proposing limitations equal to the existing Copper Sulfate limitations, which are based upon Option 2 because all direct dischargers in this segment manufacture copper sulfate and have that technology or its equivalent installed. The pollutants limited are pH, TSS, copper, nickel and selenium. Since all direct dischargers already have the BPT technology, no costs are projected.

A BCT limitation for TSS is proposed based upon the BPT technology and TSS limitations because no additional technology which would remove significant additional amounts of conventional pollutants is known to the Administrator.

For BAT, the Agency is proposing limitations based on BPT technology for the reasons given in Section VI.A. above. Pollutants limited by the proposed BAT regulation are copper, nickel, and selenium.

For NSPS, PSES and PSNS the Agency is proposing limitations equal to BAT for the reasons given in Section VI.A. above. The pollutants limited are copper, nickel, selenium, pH and TSS (the latter two are not regulated under PSES and PSNS).

(b) Copper Carbonate

(i) Background. There are eight facilities in the United States which produce copper carbonate. Four of these also produce other copper salts. Copper carbonate is manufactured by reacting either copper sulfate or copper nitrate with sodium carbonate in water. The wash water is the major source of wastewater from the copper carbonate process.

Of the eight copper carbonate production facilities, four are direct dischargers, three are indirect dischargers, and one achieves zero discharge. The copper carbonate model plant has a unit flow of 58.1 m³/kkg.

The toxic pollutants found in the wastewater at copper carbonate facilities include copper and nickel.

(ii) Proposed Limits. For BPT, the Agency is setting limitations based upon Option 2, because three of the four direct dischargers have this treatment or its equivalent. BPT limitations for pH, TSS, copper, nickel and selenium are proposed based upon the same concentration levels proposed for the other copper salts, but using the higher unit flow of the copper carbonate model plant as the basis for the mass based limits proposed. Limitations for selenium are proposed for the same reasons described above for copper salts.

A BCT limitation for TSS is proposed for this industry which is based upon the BPT technology because no additional technology which would remove significant additional amounts of conventional pollutants is known to the Administrator.

For BAT, the Agency is proposing limitations based on BPT technology for the reasons given in Section VI.A. above. Pollutants limited by the proposed BAT regulation are copper, nickel, and selenium.

For NSPS, PSES and PSNS the Agency is proposing limitations equal to BAT for the reasons given in Section VI.A. above. The pollutants limited are copper, nickel, selenium, pH and TSS (the latter two are not regulated under PSES and PSNS).

4. Nickel Salts (Subpart AU)

The Agency is proposing the replacement of Subpart AU, Nickel Sulfate, with a new Subpart AU, Nickel Salts, which will include nickel sulfate as well as nickel chloride, nickel nitrate, nickel fluoborate, and nickel carbonate. This proposed subcategorization is for the reason given in Section IV. above.

(a) Nickel Sulfate, Nickel Chloride, Nickel Fluoborate, Nickel Nitrate

(i) Background. There are 19 plants in the United States producing nickel salts, exclusive of nickel carbonate, which will be discussed separately.

The nickel salts covered in this subdivision are produced by reacting a nickel source (metal, oxide, or salt) with either sulfuric acid (nickel sulfate), hydrochloric acid (nickel chloride), fluoboric acid (nickel fluoborate) or nitric acid (nickel nitrate).

Of the 19 facilities identified as nickel salts producers, 8 are direct dischargers, 9 are indirect dischargers, and 2 achieve zero discharge. The nickel salts model plant has a unit flow of 0.68 m³/kgg.

Process wastewater at the plants in this segment of the Nickel Salts subcategory is generated primarily from indirect process contact and non-contact ancillary uses.

The toxic pollutants found in the wastewater include nickel and copper.

(ii) Proposed Limits. For BPT, the Agency is setting limitations equal to existing Nickel Sulfate limitations which are based upon Option 2, because six of the eight direct dischargers have this technology or its equivalent installed. BPT limitations for pH, TSS, and nickel are proposed.

A BCT limitation for TSS is proposed for this industry which is based upon BPT technology because no additional technology which would remove significant additional amounts of conventional pollutants is known to the Administrator.

For BAT, the Agency is proposing limitations based on BPT technology for the reasons given in Section VI.A. above. However, the proposed BAT limitations are more stringent than the BPT limitations because a treatability study of the nickel sulfate wastewater treatment system shows that the system can achieve the more stringent limitations. The BAT limitations proposed are the same as the BAT limitations promulgated for the same as the BAT limitations promulgated for the nickel sulfate subcategory. Pollutants limited by the proposed BAT regulation are copper and nickel. Since the technology is the same as BPT technology, the Agency projects no additional costs to achieve these more stringent limitations.

For NSPS, PSES and PSNS, the Agency is proposing limitations equal to BAT for the reasons given in Section VI.A. above. The pollutants limited are copper, nickel, pH, and TSS (the latter two are not regulated under PSES and PSNS).

(b) Nickel Carbonate

(i) Background. There are seven facilities in the United States which produce nickel carbonate, as well as other nickel salts. Nickel carbonate is manufactured by reacting any one of several nickel salts with sodium carbonate in water. The wash water is the major source of wastewater from the nickel carbonate process.

Of the seven nickel carbonate production facilities, four are direct dischargers, and three are indirect dischargers. The nickel carbonate model plant has a unit flow of 120 m³/kgg.

The toxic pollutants found in the wastewater at nickel carbonate facilities include copper and nickel.

(ii) Proposed Limits. For BPT, the Agency is setting limitations based upon Option 2 because three of the four direct dischargers have this treatment or its equivalent. BPT limitations for pH, TSS, and nickel are proposed based upon the

same concentration levels proposed for the other nickel salts, but using the higher unit flow of the nickel carbonate model plant as the basis for the mass limits proposed.

A BCT limitation for TSS is proposed based upon the BPT technology because no additional technology that would remove significant additional amounts of conventional pollutants is known to the Administrator.

For BAT, the Agency is proposing limitations based on BPT technology for the reasons given in Section VI.A. above but using the more stringent concentration basis described previously for the nickel salts segment. Pollutants limited by the proposed BAT regulation are copper and nickel. Since the BAT technology is the same as the BPT technology, the Agency projects no additional costs to achieve the more stringent limitations.

For NSPS, PSES and PSNS the Agency is proposing limitations equal to BAT for the reasons given in Section VI.A. above. The pollutants limited are copper, nickel, pH and TSS (the latter two are not regulated under PSES and PSNS).

5. Sodium Chlorate (Subpart BN)

(i) Background. There are 13 facilities in the United States known to be producing sodium chlorate.

Sodium chlorate is produced by the electrolysis of sodium chloride brine in diaphragmless electrochemical cells. Sources of process wastewater are brine purification wastes, barometric condenser water, brine and caustic discharge from the air scrubbers, equipment leaks and spills, pump seal leaks, product filter backwash, and equipment washdown. Considerable amounts of process water are recycled in this industry.

Of the 13 facilities in the United States producing sodium chlorate, 9 are direct dischargers and 4 achieve zero discharge. There are no indirect dischargers in this subcategory. The sodium chlorate model plant has a unit flow of 2.7 m³/kgg.

The Agency has identified chromium and antimony as the only toxic pollutants to be regulated at sodium chlorate facilities. The non-conventional pollutant, total residual chlorine, has also been selected for regulation.

(ii) Proposed Limits. For BPT, the Agency is setting limitations based upon hexavalent chromium reduction, chlorine destruction, alkaline precipitation, and clarification. Of the nine direct dischargers in the industry, only one has this level of treatment installed. Two others discharge their

wastewater to wastewater treatment facilities at paper and pulp mills. The majority of direct dischargers currently provide less than the proposed BPT treatment of process wastewater. Proposed BPT limitations for pH, TSS, antimony, total chromium, and total residual chlorine are based upon long-term inorganic chemicals plant data and other industrial wastewater treatment system performance data. Data used were obtained during both the Phase I and Phase II studies of the Inorganic Chemicals Industry. The proposed limitations for antimony are based on literature data.

A BCT limitation for TSS is proposed based upon BPT technology, because the candidate BCT technology did not pass the proposed BCT cost test.

For BAT, the Agency is proposing limitations based on the addition of filtration following BPT treatment. The Agency considered zero discharge for BPT, but did not adopt it because it is not technically feasible for most plants. Pollutants limited by the proposed BAT regulation are antimony, total chromium and total residual chlorine. Total residual chlorine will not be significantly reduced by filtration. Therefore, the BAT limitation for chlorine is the same as the BPT limitation.

For NSPS and PSNS the Agency is proposing limitations equal to BAT for the reasons given in Section VI.A. above. The pollutants limited include total antimony, total chromium, total residual chlorine, pH and TSS (the latter three are not regulated under PSNS). Total residual chlorine is not regulated under PSNS because POTW influent is often chlorinated.

Since there are no existing indirect dischargers in this subcategory, the Agency is excluding this subcategory from categorical PSES under the provisions of paragraph 8(b) of the Settlement Agreement.

In developing the limitations for this subcategory, the Agency examined several plants that achieve zero discharge of pollutants. However, since the four plants achieve zero discharge through special circumstances (access to an economic source of purified salt, customer preference for solution grade product, and/or location in an arid region of the country), the zero discharge option is not technically feasible for the average plant.

6. Zinc Chloride (Subpart BO)

(i) Background. There are seven known producers of zinc chloride in the United States. Zinc chloride is produced by reacting zinc metal with hydrochloric acid. Various forms of zinc feed

materials are used from pure zinc metal to galvanizer skimmings. One plant uses a zinc containing wastewater from an organic chemical plant as the source of zinc.

Of the seven facilities which manufacture zinc chloride, five are direct dischargers and two are indirect dischargers. The zinc chloride model plant has a unit flow of 13.5m³/kkg. Process wastewater in the industry is generally condensate from evaporators used in the concentration process. In addition, barometric condenser cooling water, and small quantities of water from air scrubbers, equipment washdown, and pump seal leaks are discharged.

The toxic pollutants found in the wastewater include arsenic, lead, and zinc.

(ii) Proposed Limits. For BPT, the Agency is proposing limitations based upon Option 1 because all of the five direct dischargers have this technology installed. BPT limitations for pH, TSS, arsenic, lead, and zinc are proposed based upon long-term plant data and data pertaining to other industrial wastewater treatment system performance, collected during both the Phase I and Phase II studies of the Inorganic Chemicals Industry. Since all direct dischargers already have BPT technology, the Agency projects no cost to achieve the BPT effluent limitations.

A BCT limitation for TSS is proposed based upon the BPT technology since the candidate BCT technology did not pass the proposed BCT cost test.

For BAT, the Agency is proposing limitations based on Option 2, filtration of the effluent from the proposed BPT treatment system for the reasons given in Section VI.A. above. Two of the five dischargers have equivalent technology installed. Pollutants limited by the proposed BAT regulation are arsenic, lead, and zinc.

For NSPS, PSES, and PSNS the Agency is proposing limitations equal to BAT for the reasons given in Section VI.A. above. The pollutants limited are arsenic, lead, zinc, pH and TSS (the latter two are not limited under PSES and PSNS).

C. Proposed Revisions to BAT

1. Background

The effluent limitations guidelines and standards for the Sodium Chloride (Solution Brine-Mining Process), Calcium Chloride, and Sodium Sulfite (Soda Ash-Sulfur Dioxide Reaction Process) subcategories were promulgated on March 12, 1974 and are still in effect. These guidelines set numerical discharge limitations for BPT

and established limitations for BAT, NSPS and PSNS at no discharge of process wastewater pollutants. PSES were reserved for each subcategory. The technology used as a basis for the BAT limitations, NSPS and PSNS for the Sodium Chloride (Solution Brine-Mining Process) and Calcium Chloride subcategories was the use of surface (noncontact) condensers instead of barometric (contact) condensers. For the Sodium Sulfite subcategory, the technology basis was evaporation of the BPT treated wastewater.

On May 19, 1981, EPA received a petition from the Salt Institute requesting reconsideration of the currently effective BAT guideline for the Sodium Chloride (Solution Brine-Mining Process) subcategory, which requires no discharge of process wastewater pollutants. BPT for that subcategory allows a discharge. The Agency decided to include in this BAT review the Calcium Chloride and Sodium Sulfite subcategories, which also require no discharge for BAT but allow a discharge for BPT.

The Sodium Chloride (Solution Brine-Mining Process) subcategory includes 22 plants, none of which are indirect dischargers. The annual production was estimated at about 3,175,000 metric tons (3,500,000 short tons) per year in 1981. The estimated daily discharge is 1,454,000 m³/day (384 million gallons per day) of barometric condenser wastewater. The plants are located in inland rural areas where the annual precipitation is too high to permit solar evaporation of the water from the brine to be used to recover the sodium chloride product.

The Calcium Chloride subcategory includes seven plants, none of which discharge process wastewater. There are three Sodium Sulfite plants which utilize the soda ash-sulfur dioxide reaction process. The annual production capacity of sodium sulfite by this process is estimated to be approximately 69,840 metric tons (77,000 short tons) with an estimated total average daily discharge of 416.4 cubic meters (110,000 gpd). There are two direct dischargers and one indirect discharger. The discharge to POTW from that one plant averages 70 cubic meters per day (18,500 gpd); this stream is lightly contaminated washdown water only.

In our review, we have acquired information on all 32 plants in the three subcategories, including data on the discharge of toxic pollutants and the costs of the technology basis for the existing BAT. Based on this data, we are proposing changes to the regulation for

the Sodium Chloride (Solution Brine-Mining Process) and Sodium Sulfite subcategories.

2. Proposed Revisions

(a) Sodium Chloride

EPA proposes to revoke the existing BAT for the Sodium Chloride (Solution Brine-Mining Process) subcategory and replace it with a BCT equal to the currently effective BPT. The action would reduce projected industry costs for environmental control by over \$36.4 million in capital costs and over \$11.6 million in annual costs. The rationale for this proposed revision is summarized as follows: BAT is to control toxic and nonconventional pollutants, BCT to control conventional pollutants. There are no toxic pollutants discharged. No nonconventional pollutants are discharged, except for sodium chloride (table salt), which is discharged in concentrations equivalent to those normally found in high quality, fresh surface waters. Therefore, we do not believe that BAT regulations are justified. All technologies to control conventional pollutants more stringent than BPT failed the proposed BCT cost test. (If the proposed cost test is substantially revised, we will re-evaluate those more stringent technologies).

The technology basis for NSPS and PSNS is the use of noncontact condensers instead of contact condensers. New plants can design for noncontact condensers, which cost about as much as contact condensers. Therefore, there is no need to change the currently effective NSPS or PSNS.

(b) Calcium Chloride

We are not proposing to revise BAT for the Calcium Chloride subcategory because there are no existing direct dischargers in that subcategory, i.e., all plants have achieved no discharge of process wastewater pollutants.

(c) Sodium Sulfite

We propose to withdraw the current BAT, NSPS and PSNS for the Sodium Sulfite subcategory because the technology basis for those regulations, evaporation of the wastewater, is considerably more expensive than originally estimated, primarily due to the greatly increased cost of fuel.

In order for the two existing direct dischargers to comply with the current BAT, total capital investment would be \$1.8 million, with total annualized costs of \$2.9 million. An analysis of these compliance costs projects significant effects on the cost of production and on profitability with a minimum reduction of 15 percent in profitability. One plant

closure due to treatment costs is projected. Thus, these increased costs would result in a regulation that is not economically achievable for this subcategory.

The economic impact of the current NSPS was evaluated for a model plant producing sodium sulfite. The costs associated with wastewater treatment would result in an estimated 25 percent increase to the cost of production, which could represent a barrier to entry for this product. Thus, the current NSPS is not economically achievable.

The alternative of solar evaporation of the wastewater from an evaporation pond is not feasible for the two direct dischargers because the plants are located in areas of the country where precipitation exceeds evaporation.

In place of the current BAT, NSPS and PSNS, we propose new limitations based on the technology for BPT. Chromium, zinc and COD would be the controlled pollutants. Sodium sulfite production and wastewater characteristics are very similar to those for sodium bisulfite. The toxic pollutant limitations we propose for the Sodium Sulfite subcategory are based on those promulgated for the Sodium Bisulfite subcategory. Both direct dischargers also produce sodium bisulfite and combine the wastewaters for treatment; that treatment effectively controls COD and toxic metals. Data from both plants was used in developing the BAT limitations for the Sodium Bisulfite subcategory.

The proposed BAT limitations are economically achievable. The two existing direct dischargers are currently meeting these levels, and there would be no additional costs or impacts to those plants.

There is no existing PSES for this subcategory and it was included among the 23 subcategories for PSES consideration. Since there is only one plant, with a discharge of only 18,000 gallons per day, containing an estimated 19.3 kg/yr toxic pollutants, we propose to exclude the subcategory from further national PSES regulation development under Paragraph 8b of the Settlement Agreement.

VII. Pretreatment Standards for 23 Subcategories

A. General

EPA considered in the Phase II project PSES for 18 subcategories from Phase I for which no PSES have previously been developed and reviewed PSES for five subcategories for which PSES were promulgated in 1977. Those 23 subcategories were excluded from further national BAT regulation development under Paragraph 8 because

existing BPT or BAT guidelines for those 23 subcategories required no discharge of process wastewater pollutants. PSNS of zero discharge are in effect for 10 of those 23 subcategories including two of those with currently effective PSES.

We conducted a telephone survey of all plants in those 23 subcategories. For the 18 subcategories with no PSES, the purposes of this survey were to identify whether any discharging facilities existed, to identify how many indirect dischargers existed, and to determine which subcategories might require development of PSES or a more detailed examination and review. For the remaining five subcategories, the purposes of the survey were to determine how many indirect dischargers there were and whether existing pretreatment standards were adequate.

Some 310 of the 312 plants in 22 subcategories were contacted by phone and provided information. The two operations which could not be contacted are located in areas where there are no POTW's and the process utilized would not be expected to produce an effluent to be treated. For the Hydrogen subcategory (refinery byproduct), there are 137 plants listed in addition to those identified above. However, any dischargers to POTW's are controlled under existing PSES and PSNS for the Petroleum Refining Category (40 CFR 419).

B. Proposed Exclusions From PSES

After examining these 23 subcategories, EPA has decided to exclude them from further national PSES regulation, for the reasons set forth in Appendix E.

C. Proposed PSNS

Of the 23 subcategories under discussion, there is no currently effective PSNS for the following 12 subcategories:

Borax
Bromine
Calcium Hydroxide
Chromic Acid
Fluorine
Iodine
Potassium Chloride
Stannic Oxide
Zinc Sulfate
Ferric Chloride
Lead Monoxide
Sodium Fluoride

We are proposing a PSNS for each subcategory based on the currently effective BPT, which for each subcategory requires zero discharge of process wastewater pollutants. Since the existing plants are required to

achieve zero discharge of process wastewater pollutants and are in fact able to meet that requirement, there would be no barrier to entry for potential new plants that might discharge indirectly in the absence of PSNS.

There are also no New Source Performance Standards (NSPS) for these 12 subcategories. However, none are needed since, in the absence of NSPS, currently effective BPT effluent limitations of zero discharge of process wastewater pollutants would apply.

VII. Economic Considerations

A. Costs and Impacts

The economic impact assessment is presented in *Economic Impact Analysis of Proposed Effluent Standards and Limitations for the Inorganic Chemicals Industry, Phase II*, EPA 440/2-83-009. That document details the investment and annual compliance costs for the industry as a whole and for model plants in each subcategory covered by the proposed regulation. Compliance costs are based on engineering estimates of capital and operating requirements for the effluent control systems described earlier in this preamble. Cost estimates for hazardous waste disposal are also included. The report assesses the impact of effluent control costs in terms of production cost changes, plant closures, employment effects, and balance of trade effects. These impacts are discussed in the report for each regulatory option.

EPA has identified 46 facilities that manufacture the chemicals covered by this regulation; 19 of them will incur costs to comply with the proposed guideline. Total investment for existing dischargers (BAT and PSES combined) is estimated to be \$5.6 million, with annualized costs of \$2.7 million, including depreciation and interest. These costs are expressed in 1983 dollars and are based on the determination that plants will move from existing treatment to either BAT or PSES. No major economic impacts (e.g., plant closure or unemployment) are projected as a result of compliance costs for this regulation. Maximum price increases if all costs are passed on to consumers are small, ranging from 0.05 to 2.0 percent. Balance of trade effects are not significant. The Agency concludes that the proposed regulation is economically achievable.

In order to measure the potential economic impacts, EPA estimated compliance costs for 46 individual plants. The plant-specific analysis focuses on the increase to production costs, changes to profitability, and

changes to net present values. Plant closure determinations are based on a comparison of net present value of cash flow to salvage value.

Cost-Effectiveness Analysis. EPA has also conducted an analysis of the incremental removal cost per pound equivalent for each of the proposed technology-based options. Pound equivalents are calculated by multiplying the number of pounds of a pollutant by a weighting factor for that pollutant. The weighting factor is equal to the water quality criterion for a standard pollutant (copper) divided by the water quality criterion for the pollutant being evaluated. The use of pound equivalents gives relatively more weight to removal of the more toxic pollutants. Thus, for a given expenditure, the cost per pound equivalent would be lower when a highly toxic pollutant is removed than if a less toxic pollutant is removed. The results of this analysis are presented in "Cost-Effectiveness Analysis of Proposed Effluent Limitations and Standards for the Inorganic Chemicals Industry, Phase II"; this analysis is included in the record of this rulemaking. EPA invites comments on the methodology used in this analysis.

BPT. Of the 21 direct dischargers, 10 will incur costs to comply with BPT. The remaining facilities are achieving removal levels equivalent to or better than BPT. Investment costs for the 10 direct dischargers are estimated to be \$3.8 million, and total annualized costs are \$1.9 million, and total annualized costs are \$1.9 million. The major portion of these costs are attributed to Sodium Chlorate producers, where most facilities do not currently operate wastewater treatment systems. There are no plant closures or employment losses projected as a result of BPT costs. The price increases associated with these costs are approximately 2.0 percent for Sodium Chlorate and Nickel Carbonate and less than one percent for the other subcategories. These impacts are not significant.

BAT. For all subcategories except Sodium Chlorate and Zinc Chloride, BAT is the same as BPT. Since many of the existing direct dischargers are currently achieving BAT levels of removal, the incremental costs of BAT over BPT are primarily associated with seven Sodium Chlorate producers. For the 11 direct dischargers incurring costs to meet BAT, investment costs are \$4.4 million, and total annualized costs are \$2.2 million. No plant closures or employment losses are projected as a result of these costs. Price increases associated with these costs are small—less than one percent for most

subcategories. Thus the Agency believes that the proposed BAT effluent limitations are economically achievable.

PSES. There are ten indirect dischargers and eight will incur costs to comply with PSES. Total investment costs are \$1.2 million and total annualized costs are \$0.5 million. No plant closures or employment losses are projected as a result of these costs. The price increases associated with these costs are small—less than one percent for all subcategories. The Agency believes the proposed PSES are economically achievable.

NSPS and PSNS. An analysis of new source standards uses a model plant approach. The pollution control investment required to install a treatment technology is the same for new and existing producers in the industry. Therefore, new plants will not be operating at a cost disadvantage relative to current manufacturers. Regulations for new sources are not expected to discourage entry into the industry or result in any differential economic impacts to new plants.

B. Executive Order 12291

Executive Order 12291 requires EPA and other agencies to perform regulatory impact analyses of major regulations. Major rules impose an annual cost to the economy of \$100 million or more or meet other economic impact criteria. The proposed regulation for inorganic chemicals manufacturing phase II is not a major rule. The costs to be incurred by this industry will be significantly less than \$100 million. Therefore, formal regulatory impact analysis is not required. This proposed rulemaking satisfies the requirement of the Executive Order for a non-major rule. The Agency's regulatory strategy considered both the cost and the economic impacts of the proposed rulemaking.

C. Regulatory Flexibility Analysis

Pub. L. 96-354 requires EPA to prepare an Initial Regulatory Flexibility Analysis for proposed regulations that have a significant impact on a substantial number of small entities.

The analysis may be conducted in conjunction with or as part of other Agency analyses. A small business analysis for this industry is included in the economic impact analysis.

The primary variable used to define firm size is number of employees. According to the Small Business Administration's designation of small firm for the SIC groups covering these chemicals (1,000 employees or less),

small businesses comprise 38 percent (17 firms) of the plants in the analysis. The Agency invites comment on this size definition.

For the small firms, as defined above, investment costs for BAT and PSES are \$1.3 million, and total annualized costs are \$0.6 million. The economic impact analysis presents the effects associated with this proposed rule and with the other regulatory options the Agency considered. For this proposed rulemaking, there are no significant impacts on small firms; therefore, a formal Regulatory Flexibility analysis is not required.

D. SBA Loans

The agency is continuing to encourage small plants to use Small Business Administration (SBA) financing as needed for pollution control equipment. The three basic programs are: (1) The Guaranteed Pollution Control Bond Program, (2) the Section 503 Program, and (3) the Regular Guarantee Program. All the SBA loan programs are only open to businesses that have: (a) net assets less than \$6 million, and (b) an average annual after-tax income of less than \$2 million, and (c) fewer than 250 employees.

For further information and specifics on the Guaranteed Pollution Control Bond Program contact: U.S. Small Business Administration, Office of Pollution Control Financing, 4040 North Fairfax Drive, Rosslyn, Virginia 22203 (703) 235-2902.

The Section 503 Program, as amended in July 1980, allows long-term loans to small and medium sized businesses. These loans are made by SBA approved local development companies. These companies are authorized to issue Government-backed debentures that are brought by the Federal Financing Bank, an arm of the U.S. Treasury.

Through SBA's Regular Guarantee Program, loans are made available by commercial banks and are guaranteed by the SBA. This program has interest rates equivalent to market rates.

For additional information on the Regular Guarantee and Section 503 Program contact your district or local SBA Office. The coordinator at EPA headquarters is Ms. Frances Desselle who may be reached at (202) 382-5373.

IX. Non-Water-Quality Environmental Impacts

Eliminating or reducing one form of pollution may cause other environmental problems. Sections 304(b) and 306 of the Act require EPA to consider the non-water-quality environmental impacts (including energy requirements) of certain regulations. In

compliance with these provisions, the effects of this regulation on air pollution, solid waste generation, water scarcity and energy consumption were considered. This regulation was circulated to and reviewed by EPA personnel responsible for non-water-quality programs. Although it is difficult to balance pollution problems against each other and against energy use, EPA believes that this regulation will best serve often competing national goals.

The following non-water-quality environmental impacts (including energy requirements) are associated with the proposed regulation. The Administrator has determined that the impacts identified below are justified by the benefits associated with compliance with the limitations and standards.

A. Air Pollution

Imposition of BPT and BAT limitations and NSPS, PSES, and PSNS will not create any substantial air pollution problems.

B. Solid Waste

The largest amount of solid waste generated by facilities in complying with this regulation will be associated with BPT treatment. Very small amounts of additional solid wastes would be generated by facilities in complying with BAT, NSPS, PSES, and PSNS. It is estimated that less than 150 kilograms per day (330 pounds per day) of solid waste will be generated by the proposed BPT treatment, and less than 10 kilograms per day (22 pounds per day) of solid waste will be generated by the proposed BAT treatment.

If a waste is identified or listed as hazardous, it is subject to handling, transportation, treatment, storage, and disposal requirements under Section 3002-3005 of RCRA and EPA regulations promulgated under RCRA (see 40 CFR Parts 261-267).

Compliance with these requirements involves costs in addition to the costs for compliance with the effluent limitations established by this regulations. The specific standards necessary to estimate these costs have been established, and costs for compliance with RCRA-SS requirements are specifically considered in the economic impact analysis for this regulation.

C. Consumptive Water Loss

Treatment and control technologies that require extensive recycling and reuse of water may require cooling mechanisms. Evaporative cooling mechanisms can cause water loss and contribute to water scarcity problems—a primary concern in arid and semi-arid

regions. This regulation assumes some recycling, thus assuming some cooling mechanisms may be required which could create additional consumptive water loss. However, the quantity of water involved is not significant, and most of the industry is located in coastal areas or areas with sufficient water resources. Moreover, it was concluded that the pollutant reduction benefits of recycle technologies outweigh their impact on consumptive water loss.

D. Energy Requirements

The achievement of BPT effluent limitations and PSES is estimated to increase electrical energy consumption by approximately 3 million kilowatt-hours per year. Implementing BAT limitations will consume a negligible amount of additional electric power. Achievement of BPT and BAT effluent limitations will require a typical direct discharger to increase total energy consumption by less than 1 percent of the energy now consumed in production processes. The proposed BAT amendments for the Sodium Chloride (solution brine-mining process) and Sodium Sulfite subcategories would decrease energy use.

X. Pollutants and Subcategories Not Regulated

The Settlement Agreement contains provisions authorizing the exclusion from regulation, in certain circumstances, of toxic pollutants and industry categories and subcategories. These provisions have been rewritten in a Revised Settlement Agreement which was approved by the District Court for the District of Columbia on March 9, 1979, 12 ERC 1833.

A. Exclusion of Pollutants

Paragraph 8(a)(iii) of the Settlement Agreement authorizes the Administrator to exclude the following toxic pollutants from regulations: (a) Those not detectable by Section 304(h) analytical methods or other state-of-the-art methods; (b) those present in amounts too small to be effectively reduced by available technologies; (c) those present only in trace amounts and neither causing nor likely to cause toxic effects; (d) those detected in the effluent from only a small number of sources within a subcategory and uniquely related to those sources; and (e) those that will be effectively controlled by the technologies on which other effluent limitations and standards are based. The toxic pollutants excluded from regulation in all subcategories, under paragraph 8(a)(iii) of the Settlement

Agreement, are listed in Appendix B of this Notice.

The Agency proposes the exclusion of certain additional toxic pollutants from regulation in particular subcategories on the basis of a review of long-term industry data as well as treatability study data indicating that in the particular subcategories, the pollutants in question will be effectively controlled by the technologies upon which other effluent limitations and standards are based. These pollutants and the reasons for their exclusion are listed in Appendix C of this notice.

B. Exclusion of Subcategories

Paragraph 8(a)(i) of the Settlement Agreement authorizes the Administrator to exclude from regulation industry categories or subcategories for which equal or more stringent limitations are already provided by existing effluent limitations are standards. Also, paragraph 8(a)(iv) of the Settlement Agreement authorizes the exclusion of subcategories in which the amount and toxicity of each pollutant in the discharge does not justify developing national regulations.

Paragraph 8(b) of the Settlement Agreement authorizes the Administrator to exclude from pretreatment standards a subcategory if: (i) 95 percent or more of all point sources in the subcategory introduce into POTWs only pollutants which are susceptible to treatment by the POTW and which do not interfere with, do not pass through, or are not otherwise incompatible with such treatment works; or (ii) the toxicity and amount of the incompatible pollutants introduced by such point sources into POTWs is so insignificant that developing a pretreatment regulation is not justified. The subcategories excluded under paragraphs 8(a)(i), 8(a)(iv), and 8(b) of the Settlement Agreement are listed in Appendix D of this Notice.

In addition to the subcategories excluded under the Settlement Agreement, one subcategory is deferred for coverage under other guidelines and two subcategories will be included under an existing guideline by amending the applicability section of that guideline. These subcategories are listed in Appendix D.

XI. Best Management Practices

Section 304(e) of the Clean Water Act gives the Administrator authority to prescribe "best management practices" (BMPs).

Although EPA is not proposing them at this time, development of BMPs specific to the Inorganic Chemicals Industry is being considered. The

industry has numerous problem areas including leaks and spills, stormwater runoff, and groundwater infiltration from storage areas and onsite solid waste disposal. Most subcategories have problems in some or all of these areas. Sections 11-16 of the Development Document describe possible BMPs for each regulated subcategory. This information can guide the permitting agency in developing case-by-case BMPs for NPDES permits.

Future BMPs may require dikes, curbs, or other measures to contain leaks and spills, as well as the treatment of toxic pollutants in these wastewaters.

XII. Upset and Bypass Provisions

A recurring issue of concern has been whether industry guidelines should include provisions authorizing noncompliance with effluent limitations during periods of "upset" or "bypass." An upset, sometimes called an "excursion," is an unintentional noncompliance occurring for reasons beyond the reasonable control of the permittee. It has been argued that an upset provision in EPA's effluent limitations is necessary because such upsets will inevitably occur even with properly operated control equipment. Because technology-based limitations require only what technology can achieve, it is claimed that liability for such situations is improper. When confronted with this issue, courts have disagreed on whether an explicit upset or excursion exemption is necessary, or whether upset or excursion incidents may be handled through EPA's exercise of enforcement discretion. Compare *Marathon Oil Co. v. EPA*, 564 F. 2d 1253 (9th Cir. 1977) with *Weyerhaeuser Co. v. Costle*, 590 F. 2d 1011 (D.C. Cir. 1978) and *Corn Refiners Association, v. Costle*, No. 78-1069 (8th Cir., April 2, 1979). See also *American Petroleum Institute v. EPA*, 540 F. 2d 1023 (10th Cir. 1976); *CPC International, Inc. v. Train*, 540 F. 2d 1320 (8th Cir. 1976); *FMC Corp. v. Train*, 539 F. 2d 973 (4th Cir. 1976).

An upset is an unintentional episode during which effluent limits are exceeded; a bypass, however, is an act of intentional noncompliance during which waste treatment facilities are circumvented in emergency situations. In the past, bypass provisions have been included in NPDES permits.

EPA determined that both upset and bypass provisions should be included in NPDES permits and has promulgated permit regulations that include upset and bypass permit provisions (see 40 CFR 122.41). The upset provision establishes an upset as an affirmative defense to prosecution for violation of technology-based effluent limitations.

The bypass provision authorizes bypassing to prevent loss of life, personal injury, or severe property damage. Consequently, although permittees in the Inorganic Chemicals Industry will be entitled to upset and bypass provisions in NPDES permits, this proposed regulation does not address these issues.

XIII. Variances and Modifications

Upon the promulgation of this regulation, the effluent limitations for the appropriate subcategory must be applied in all Federal and State NPDES permits thereafter issued to direct dischargers in the Inorganic Chemicals Industry. In addition, on promulgation, the pretreatment limitations are directly applicable to any indirect dischargers.

For the BPT effluent limitations, the only exception to the binding limitations is EPA's "fundamentally different factors" variance. See *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977); *Weyerhaeuser Co. v. Costle*, *supra*. This variance recognizes factors concerning a particular discharger that are fundamentally different from the factors considered in this rulemaking. Although this variance clause was set forth in EPA's 1973-76 industry regulations, it is now included in the NPDES regulations and will not be included in the inorganic chemicals or other industry regulations (see the NPDES regulations at 40 CFR Part 125, Subpart D).

The proposed BAT limitations in this regulation are also subject to EPA's "fundamentally different factors" variance. In addition, BAT limitations for nonconventional pollutants are subject to modifications under Sections 301(c) and 301(g) of the Act. These statutory modifications do not apply to toxic or conventional pollutants. According to Section 301(j)(1)(B), applications for these modifications must be filed within 270 days after promulgation of final effluent limitation guidelines.

The economic modification section (301(c)) gives the Administrator authority to modify BAT requirements for nonconventional pollutants (Section 301(1) precludes the Administrator from modifying BAT requirements for any pollutants which are on the toxic pollutant list under Section 307(a)(1) of the Act) for dischargers who file a permit application after July 1, 1977, upon a showing that such modified requirements will: (1) represent the maximum use of technology within the economic capability of the owner or operator, and (2) result in reasonable further progress toward the elimination

of the discharge of pollutants. The environmental modification section (301 (g)) allows the Administrator, with the concurrence of the State, to modify BAT limitations for nonconventional pollutants from any point source upon a showing by the owner or operator of such point source satisfactory to the Administrator that:

(a) Such modified requirements will result at a minimum in compliance with BPT limitations or any more stringent limitations necessary to meet water quality standards;

(b) Such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(c) Such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities.

Section 301(j)(1)(B) of the Act requires that application for modifications under Section 301 (c) or (g) must be filed within 270 days after the promulgation of an applicable effluent guideline. Initial applications must be filed with the Regional Administrator and, in those States that participate in the NPDES program, a copy must be sent to the Director of the State program. Initial applications to comply with 301(j) must include the name of the permittee, the permit and outfall number, the applicable effluent guideline, and whether the permittee is applying for the 301(c) or 301(g) modification or both. Applicants interested in applying for both must do so in their initial application (for further details, see 43 FR 40859, September 13, 1978).

Pretreatment standards for existing sources are subject to the "fundamentally different factors" variance and credits for pollutants removed by POTW (see 40 CFR 403.7, 403.13).

Indirect dischargers subject to PSES and PSNS are eligible for credits for toxic pollutants removed by POTW. See 40 CFR 403.7 48 FR 9404 (January 28, 1981). New sources subject to NSPS are not eligible for any other statutory or

regulatory modifications. See *E.I. duPont de Nemours & Co. v. Train*, supra.

Indirect dischargers subject to PSES have, in the past, been eligible for the "fundamentally different factors" variance. See 40 CFR § 403.13. However, on September 20, 1983, the U.S. Court of Appeals for the Third Circuit held that "FDF variances for toxic pollutants are forbidden by the Act," and remanded § 403.13 to EPA. *NAMF v. EPA*, Nos. 79-2256 et al. (3d Circuit, September 20, 1983). EPA is considering the effect of that decision.

In a few cases, information which would affect these PSES may not be available to EPA or affected parties in the course of this rulemaking. As a result it may be appropriate to issue specific categorical standards for such facilities, treating them as a separate subcategory with more, or less, stringent standards as appropriate. This will only be done if a different standard is appropriate because of unique aspects of the factors listed in 304(b)(2)(B) of the Act: the age of equipment and facilities involved, the process employed, the engineering aspects of applying control techniques, nonwater quality environmental impacts (including energy requirements) or the cost of required effluent reductions (but not of ability to pay that cost).

After promulgation of this proposed rule, indirect dischargers and other affected parties may petition the Administrator to examine those factors and determine whether these PSES are properly applicable in specific cases or should be revised. Such petitions must contain specific and detailed support data, documentation, and evidence indicating why the relevant factors justify a more, or less, stringent standard, and must also indicate why those factors could not have been brought to the attention of the Agency in the course of this rulemaking. The Administrator will consider such rulemaking petitions and determine whether a rulemaking should be initiated.

Pretreatment standards for new sources are subject only to the credits provision in 40 CFR 403.7. NSPS are not subject to EPA's "fundamentally different factors" variance or any statutory or regulatory modifications (see *E.I. du Pont de Nemours and Co. v. Train*, supra).

XIV. Relationship to NPDES Permits

The BPT, BAT, and BCT limitations and NSPS in this regulation will be applied to individual inorganic chemicals manufacturers through NPDES permits issued by EPA or approved state agencies under Section

402 of the Act. As discussed in the preceding section of this preamble, these limitations must be applied in all Federal and State NPDES permits, except to the extent that variances and modifications are expressly authorized. Other aspects of the interaction between these limitations and NPDES permits are discussed below.

One issue that warrants consideration is the effect of this regulation on the powers of NPDES permit-issuing authorities. The promulgation of this regulation does not restrict the power of any permitting authority to act in any manner consistent with law or these or any other EPA regulations, guidelines, or policy. For example, even if this regulation does not control a particular pollutant, the permit issuer may still limit such pollutant on a case-by-case basis when limitations are necessary to carry out the purposes of the Act. In addition, to the extent that State water quality standards or other provisions of State or Federal law require limitation of pollutants not covered by this regulation (or require more stringent limitations on covered pollutants), such limitations must be applied by the permit-issuing authority.

A second topic that warrants discussion is the operation of EPA's NPDES enforcement program, many aspects of which were considered in developing this regulation. It is emphasized that although the Clean Water Act is a strict liability statute, the initiation of enforcement proceedings by EPA is discretionary. EPA has exercised and intends to exercise that discretion in a manner that recognizes and promotes good-faith compliance efforts.

XV. Availability of Technical Information

The basis for this regulation is detailed in four major documents. Analytical methods are discussed in Sampling and Analysis Procedures for Screening of Industrial Effluents for Priority Pollutants. EPA's technical conclusions are detailed in Development Document for Effluent Guidelines, New Source Performance Standards and Pretreatment Standards for the Inorganic Chemicals Manufacturing Point Source Category (Phase II) EPA 440/1-83-007-B. The Agency's economic analysis is presented in Economic Impact Analysis of Pollution Control Technologies for Segments of the Inorganic Chemicals Manufacturing Industry, EPA 440/2-83-009. A contractor's report on treatability studies is presented in Treatability Studies for the Inorganic Chemical Manufacturing Point Source Category

(EPA 440/1-80-103). The Development Document for Phase I, EPA 440/1-82-007, was also used extensively.

Technical information may be obtained by writing to Dr. Thomas E. Fielding, Effluent Guidelines Division (WH-552), EPA, 401 M Street, SW, Washington, D.C. 20460, or through calling 202/426-2582.

The Record will be available for public review in EPA's Public Information Reference Unit, Room 2004 (Rear) (EPA Library), 401 M Street, SW, Washington, D.C. The EPA information regulation (40 CFR Part 2) provides that a reasonable fee may be charged for copying.

XVI. Solicitation of Comments

EPA invites and encourages public participation in this rulemaking. The Agency asks that any deficiencies in the record of this proposal be specifically addressed and that suggested revisions or corrections be supported by data.

EPA is particularly interested in receiving comments and information of the following issues:

1. In the sodium chlorate subcategory, the unit flow does not include barometric condenser wastewater. The barometric condenser wastewater is considered process wastewater, and the proposed limitations would include pollutants discharged with the barometric condenser wastewater. The barometric condenser wastewater is high in volume but low in pollutant concentrations, and the Agency believes those plants where the barometric condenser wastewater is discharged separately from the rest of the process wastewater should have no difficulty in achieving the proposed limitations since treatment of the low volume concentrated wastewaters should be sufficient. However, the Agency has been unable to quantify the costs for separating the barometric condenser wastewater from the other process wastewater of plants that currently mix barometric condenser wastewater with other process wastewater. The Agency invites comment and cost data on this issue.

2. In developing the proposed limitations, the Agency has used the best available treatment system data from operating plants in the inorganic chemical industry. However, only limited treatment system performance data is available for control of selenium and antimony. The limitations proposed for selenium and antimony are based on screening and verification data and on literature data, respectively. The Agency requests that any data concerning the treatment and control of these pollutants at operating inorganic chemical plants

be provided for incorporation into the data base.

3. To determine the economic achievability of this regulation, the Agency has estimated the cost and economic effects of installing BPT, BAT, PSES, NSPS and PSNS. The details of the estimated costs and economic impacts are presented in Section X of the development document and in the economic impact analysis. Based on these analyses, the Agency makes plant closure and employment loss projections. The Agency invites comment on these analyses and projections. We particularly seek comments from small or less profitable plants. Commenters should focus on the effects of the regulation on plant closures, employment losses, production costs, the ability to finance non-environmental investments, product prices, profitability, international competitiveness, and the availability of less costly technology.

The regulation was submitted to the Office of Management and Budget for review as required by Executive Order 12291. This proposed rule does not contain any information collection requirements subject to OMB review under the Paperwork Reduction Act of 1980, 44 U.S.C. 35001 *et seq.*

Dated: September 30, 1983.

William D. Ruckelshaus,
Administrator.

List of Subjects in 40 CFR Part 415

Inorganic chemicals, Water pollution control, Waste treatment and disposal.

XVII. Appendixes

Appendix A—Abbreviations, Acronyms, and Other Terms Used in This Notice

Act—The Clean Water Act.

Agency—The U.S. Environmental Protection Agency.

BAT—The best available technology economically achievable under Section 304(b)(2)(B) of the Act.

BCT—The best conventional pollutant control technology, under Section 304(b)(4) of the Act.

BMPs—Best management practices under Section 304(e) of the Act.

BPT—The best practicable control technology currently available under Section 304(b)(1) of the Act.

Clean Water Act—The Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. 1251 *et seq.*), as amended by the Clean Water Act of 1977 (Pub. L. 95-217).

Direct Discharger—A facility which discharges or may discharge pollutants into waters of the United States.

Indirect Discharger—A facility which discharges or may discharge pollutants into a publicly owned treatment works.

NPDES Permit—A National Pollutant Discharge Elimination System permit issued under Section 402 of the Act.

NSPS—New source performance standards under Section 306 of the Act.

POTW—Publicly owned treatment works.

PSES—Pretreatment standards for existing sources of indirect discharges under Section 307(b) of the Act.

PSNS—Pretreatment standards for new sources of indirect discharges under Section 307 (b) and (c) of the Act.

RCRA—Resources Conservation and Recovery Act (Pub. L. 94-580) of 1976, Amendments to Solid Waste Disposal Act.

Appendix B—Toxic Pollutants Excluded in All Subcategories Under Paragraph 8(a)(iii).

Under Paragraphs 8(a)(iii) of the Settlement Agreement, EPA is excluding certain toxic pollutants from regulation in all subcategories, for one or all of the following reasons:

(a) The pollutant is not detectable in the effluent with the use of analytical methods approved pursuant to 304(h) of the Act or other state of the art methods.

(b) The pollutant is present only in trace amounts and is neither causing nor likely to cause toxic effects.

(c) The pollutant is present in amounts too small to be effectively reduced by technologies known to the Administrator.

(d) The pollutant will be effectively controlled by the technologies upon which are based other effluent limitations and guidelines, standards of performance, or pretreatment standards.

The reason(s) for each of the following exclusions is keyed to the above list.

Acenaphthene (a)
Acrolein (a)
Acrylonitrile (c)
Benzene (b)
Benzidine (a)
Carbon Tetrachloride (Tetrachloromethane) (b)
Chlorobenzene (c)
1,2,4-Trichlorobenzene (a)
Hexachlorobenzene (a)
1,2-Dichloroethane (c)
1,1,1-Trichloroethane (a)
Hexachloroethane (a)
1,1-Dichloroethane (d)
1,1,2-Trichloroethane (c)
1,1,2,2-Tetrachloroethane (a)
Chloroethane (c)
Bis (2-Chloroethyl) Ether (b)
2-Chloroethyl Vinyl Ether (Mixed) (a)
2-Chloronaphthalene (a)
2,4,6-Trichlorophenol (b)
Parachlorometa Cresol (a)

Chloroform (Trichloromethane) (d)
 2-Chlorophenol (c)
 1,2-Dichlorobenzene (a)
 1,3-Dichlorobenzene (a)
 1,4-Dichlorobenzene (c)
 3,3'-Dichlorobenzidine (a)
 1,1-Dichloroethylene (c)
 1,2-Trans-Dichloroethylene (c)
 2,4-Dichlorophenol (c)
 1,2-Dichloropropane (c)
 1,2-Dichloropropylene (a)
 (1,3-Dichloropropene)
 2,4-Dimethylphenol (a)
 2,4-Dinitrotoluene (a)
 2,6-Dinitrotoluene (a)
 1,2-Diphenylhydrazine (c)
 Ethylbenzene (a)
 Fluoranthene (c)
 4-Chlorophenyl Phenyl Ether (a)
 4-Bromophenyl Phenyl Ether (a)
 Bis(2-Chloroisopropyl) Ether (a)
 Bis(2-Chloroethoxy) Methane (a)
 Methylene Chloride (c, d)
 Methyl Chloride (Chloromethane) (b)
 Methyl Bromide (Bromomethane) (a)
 Bromoform (Tribromomethane) (c)
 Dichlorobromomethane (c)
 Chlorodibromomethane (c)
 Hexachlorobutadiene (a)
 Hexachlorocyclopentadiene (a)
 Isophorone (c)
 Naphthalene (a)
 Nitrobenzene (c)
 2-Nitrophenol (a)
 4-Nitrophenol (c)
 2,4-Dinitrophenol (c)
 4,6-Dinitro-O-Cresol (c)
 N-Nitrosodimethylamine (a)
 N-Nitrosodiphenylamine (c)
 N-Nitrosodi-N-Propylamine (a)
 Pentachlorophenol (c)
 Phenol (c)
 Bis(2-ethylhexyl) Phthalate (c)
 Butyl Benzyl Phthalate (c)
 Di-N-Butyl Phthalate (c)
 Di-N-Octyl Phthalate (c)
 Diethyl Phthalate (c)
 Dimethyl Phthalate (c)
 1,2-Benzanthracene (Benzo(A)Anthracene) (c)
 Benzo (A) Pyrene (3,4-Benzo-Pyrene) (a)
 3,4-Benzofluoranthene (Benzo (B) Fluoranthene) (a)
 11,12-Benzofluoranthene (Benzo (K) Fluoranthene) (a)
 Chrysene (C)
 Acenaphthylene (a)
 Anthracene (a)
 1,12-Benzoperylene (Benzo(GHI)-Perylene) (a)
 Fluorene (a)
 Phenanthrene (a)
 1,2,5,6-Dibenzanthracene (Dibenzo (A, H) Anthracene) (a)
 Ideno (1, 2, 3-CD) Pyrene (2, 3-O-Phenylene Pyrene) (a)
 Pyrene (a)
 Tetrachloroethylene (c)
 Toluene (c)
 Trichloroethylene (c)
 Vinyl Chloride (Chloroethylene) (c)
 Aldrin (c)
 Dieldrin (c)
 Chlordane (Technical Mixture and Metabolites) (c)
 4, 4'-DDT (c)
 4, 4'-DDE (P, P'-DDX) (c)
 4, 4'-DDD (P, P'-TDE) (c)

Alpha-Endosulfan (c)
 Beta-Endosulfan (c)
 Endosulfan Sulfate-(c)
 Endrin (c)
 Endrin Aldehyde (a)
 Heptachlor (c)
 Heptachlor Epoxide (c)
 (BHC-Hexachlorocyclohexane)
 Alpha-BHC (c)
 Beta-BHC (c)
 Gamma-BHC (c)
 Delta-BHC (a)
 PCB-1242 (Arochlor 1242) (a)
 PCB-1254 (Arochlor 1254) (a)
 PCB-1221 (Arochlor 1221) (a)
 PCB-1232 (Arochlor 1232) (a)
 PCB-1248 (Arochlor 1248) (a)
 PCB-1260 (Arochlor 1260) (a)
 PCB-1016 (Arochlor 1016) (a)
 Toxaphene (a)
 Asbestos (c)
 Beryllium (a)
 Cyanide (a)
 Mercury (a)
 Silver (c)
 Thallium (b)
 2,3,7,8-Tetrachlorodibenzo-P-Dioxin (TCDD) (a)

Appendix C—Toxic Pollutants Excluded in Particular Subcategories

Under Paragraph 8(a)(iii) of the Settlement Agreement, EPA is excluding certain toxic pollutants from regulation in particular subcategories, for one or all of the following reasons:

(a) The pollutant is not detectable in the effluent with the use of analytical methods approved pursuant to 304(h) of the Act or other state of the art methods.

(b) The pollutant is present only in trace amounts and is neither causing nor likely to cause toxic effects.

(c) The pollutant is present in amounts too small to be effectively reduced by technologies known to the Administrator.

(d) The pollutant will be effectively controlled by the technologies upon which are based other effluent limitations and guidelines, standards of performance, or pretreatment standards.

The reason(s) for each of the following exclusions is keyed to the above list.

Cadmium Pigments and Salts Subcategory (Subpart BL):

Antimony (a)
 Arsenic (a)
 Chromium (a)
 Copper (c)
 Lead (c)
 Nickel (c)

The toxic pollutants limited are cadmium, selenium, and zinc.

Cobalt Salts Subcategory (Subpart BM):

Antimony (a)
 Arsenic (a)
 Cadmium (a)
 Lead (c)

Selenium (a)
 Zinc (c)

The toxic pollutants limited are copper and nickel.

Copper Salts Subcategory (Subpart AJ):

Antimony (a)
 Arsenic (c)
 Cadmium (a)
 Chromium (a)
 Lead (a)
 Zinc (c)

The toxic pollutants limited are copper, nickel, and selenium.

Nickel Salts Subcategory (Subpart AU):

Antimony (a)
 Arsenic (a)
 Cadmium (c)
 Chromium (a)
 Lead (a)
 Selenium (a)
 Zinc (c)

The toxic pollutants limited are copper and nickel.

Sodium Chlorate Subcategory (Subpart BN):

Arsenic (c)
 Cadmium (a)
 Copper (c)
 Lead (c)
 Nickel (c)
 Selenium (a)
 Zinc (c)

1. The toxic pollutants limited are antimony and chromium.

Zinc Chloride Subcategory (Subpart BO):

Antimony (a)
 Cadmium (c)
 Chromium (c)
 Copper (c)
 Nickel (c)
 Selenium (c)

The toxic pollutants limited are arsenic, lead, and zinc.

Appendix D—Subcategories Excluded

The products in the subcategory are regulated by existing guidelines (8a(i)):

Chromium Oxide (Chrome Pigments)
 Whiting (Calcium Carbonate)
 Aluminum Oxide (Bauxite Refining Subcategory of Nonferrous Metals Manufacturing)
 Aluminum Hydroxide (Bauxite Refining Subcategory of Nonferrous Metals Manufacturing)
 Hydrogen Sulfide (Petroleum Refining)
 Sulfur (Petroleum Refining)

2. The subcategory is identified by a class name, and each commercial product included under the class name has been covered individually (8a(i) or 8a(iv)):

Sulfides and Sulfites*—Covered as the metal hydrosulfide or metal sulfite, i.e., sodium hydrosulfide (8a(iv)), barium sulfide (8a(iv)), sodium sulfite (8a(i)), zinc sulfide (8a(iv)).

Thiocyanates*—Covered as the metal thiocyanate, i.e., sodium thiocyanate (8a(iv)), potassium thiocyanate (8a(iv)).

Sulfocyanides*—Another name for thiocyanate.

Reagent Grade Chemicals*—A particular grade or quality of chemical. The term can apply to any chemical. The individual chemicals are each addressed separately (8a(i) and 8a(iv)).

3. The subcategory is deferred for coverage under another guideline:

Beryllium Oxide—Beryllium Manufacturing subcategory of Nonferrous Metals Manufacturing Phase II.

4. The subcategories will be included under existing guidelines by amending the applicability section of that guideline:

Calcium Hypochlorite—Will be included under the chlor-alkali subcategory of the Inorganic Chemicals (Phase I) guidelines.

Bleaching Powder—Another name for Calcium Hypochlorite.

5. The product is no longer produced in the United States (Paragraph 8a(iv)):

Lead Arsenate
Ultramarine Pigment
Borosilicate
Hydrophosphites
Luminous Compounds (Radium)
Oxidation Catalyst Porcelain
Potassium Hypochlorite
Radium Chloride
Radium Luminous Compounds

6. There are no discharges in the subcategory (Paragraph 8a(iv)):

Sodium Antimoniate
Lead Dioxide, Brown
Lead Dioxide, Red
Alums
Ammonium Alum
Ammonium Perchlorate
Cobalt 60 (Radioactive)
Heavy Water
Hydrated Aluminum Silicate
Inorganic Acids*
Manganese Dioxide
Peroxides*
Potash Alum
Potassium Aluminum Sulfate
Soda Alum
Potash Magnesia
Sodium Hydrosulfite
Isotopes, Radioactive
Sodium Silicofluoride

7. There are no toxic pollutants discharged at treatable levels from plants included in the subcategory (Paragraph 8a(iv) and 8b(ii)):

Industrial Gases*

Nitrous Oxide
Iron Oxide, Black
Iron Oxide, Magnetic
Iron Oxide, Yellow
Ochers
Siennas
Umbers
Ammonium Thiosulfate
Brine Chemicals
Chlorosulfonic Acid
Oleum
Potassium Bromide
Strontium Carbonate
Tin Compounds*
Silver Nitrate
Silica, Amorphous
Silica Gel

8. There is only one plant or only one discharger in the subcategory (Paragraph 8a(iv) and 8b(ii)):

Chromium Sulfate
Mercury Chloride
Mercury Oxide
Nickel Ammonium Sulfate
Potassium Cyanide
Sodium Cyanide
Zinc Sulfide
Iron Colors
Satin White Pigment
Ammonium Molybdate
Indium Chloride
Perchloric Acid
Potassium Chlorate
Potassium Nitrate
Potassium Sulfate
Sulfur Chloride

9. The discharges are too insignificant (based on very low production or very low flow) to justify developing a national regulation (8a(iv) and 8b(ii)):

Silver Bromide
Silver Carbonate
Silver Cyanide
Silver Iodide
Silver Oxide
White Lead Pigments
Barium Sulfate
Sodium Compounds*
Stannic and Stannous Chloride
Strontium Nitrate
Barytes Pigments
Aluminum Compounds*
Ammonium Compounds*
Barium Compounds*
Boron Compounds*
Calcium Compounds*
Cerium Salts
Sulfur Hexafluoride
Aluminum Chloride
Lead Silicate
Iodides*
Lithium Compounds
Magnesium Compounds*
Potassium Compounds
Rare Earth Metals Salts
Salts of Rare Earth Metals
Silver Chloride
Potassium Carbonate

The pollutant is a nuclear source material, nuclear by-product material, or special nuclear material, as these terms are defined at 10 CFR 20.3(a) (3), (15), and (16). All aspects of the production of the products, including wastewater discharges, are controlled by licenses issued by the Nuclear Regulatory Commission (NRC). The Supreme Court decided, in *Train v. Colorado PIRG*, 426 U.S. 1 (1976) that these materials, at least when regulated by the NRC, are not "pollutants" under the Clean Water Act.

Fissionable Material Production
Nuclear Cores, Inorganic
Nuclear Fuel Reactor Cores, Inorganic
Nuclear Fuel Scrap Reprocessing
Uranium Slug, Radioactive

Notes: (a) All subcategories marked with an asterisk (*) are identified by class names (i.e., Aluminum Compounds). All products included under that class name are either regulated separately, excluded separately, or were considered individually in this project and are recommended for exclusion at this time. We also considered addressing several products in one subcategory, but the individual products are too dissimilar in pollutant characteristics for that to be technically feasible.

(b) In many cases, a subcategory could have been listed above under different exclusion categories. For example, Nickel Ammonium Sulfate is produced in small quantities at only one plant, which has a direct discharge, through a BAT equivalent treatment system. Data from the plant shows that toxic metal pollutants in the treated effluent are below treatable levels.

Appendix E—Exclusion of Subcategories From PSES

1. The following subcategories are proposed for exclusion from further national PSES regulation development under Paragraph 8(b) of the Settlement Agreement because there are no existing indirect dischargers in the subcategory:

Borax
Bromine
Calcium Carbide
Calcium Chloride
Chromic Acid
Fluorine
Calcium Oxide
Potassium Chloride
Potassium Metal
Potassium Sulfate
Sodium Chloride
Stannic Oxide

2. The following subcategories are proposed for exclusion from further national PSES regulation development under Paragraph 8(b) of the Settlement Agreement because the discharge of toxic pollutants from all existing indirect dischargers in the subcategory is too

insignificant to justify developing a national regulation:

Iodine (discharge to POTW by the one existing indirect discharger is only 200 gallons per day (gpd)).

Calcium Hydroxide (discharge to POTW by the one existing indirect discharger is only 200 gpd).

Sodium Bicarbonate (data from the one existing indirect discharger shows that all toxic metal pollutants are below treatable levels).

Sodium Sulfite (the one existing indirect discharge introduces only 19.3 kg/yr of toxic metal pollutant into the POTW).

Zinc sulfate (the discharge to POTW by both existing indirect dischargers amounts to a total of 4200 gpd).

3. The currently existing PSES provides adequate control of toxic metal pollutants for the following five subcategories because the technologies necessary to control the toxic metal or non-conventional pollutants regulated by the PSES also controls all other toxic metal pollutants that may be in the wastewater.

Aluminum Sulfate
Ferric Chloride
Lead Monoxide
Potassium Dichromate
Sodium Fluoride

PART 415—INORGANIC CHEMICALS MANUFACTURING POINT SOURCE CATEGORY

EPA proposes to amend the Table of Contents to 40 CFR Part 415 as follows:

Subpart T—Sodium Sulfite Production Subcategory

- 415.207 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT).

Subpart AA—Borax Production Subcategory

- 415.273–415.275 [Reserved]
- 415.276 Pretreatment standards for new sources (PSNS).

Subpart AC—Bromine Production Subcategory

- 415.293–415.295 [Reserved]
- 415.296 Pretreatment standards for new sources (PSNS).

Subpart AE—Calcium Hydroxide Production Subcategory

- 415.313–415.315 [Reserved]

- 415.316 Pretreatment standards for new sources (PSNS).

Subpart AI—Chromic Acid Production Subcategory

- 415.353–415.355 [Reserved]
- 415.356 Pretreatment standards for new sources (PSNS).

Subpart AJ—Copper Salts Production Subcategory

- 415.360 Applicability; description of the copper salts production subcategory.
- 415.361 Specialized definitions.
- 415.362 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).
- 415.363 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).
- 415.364 Pretreatment standards for existing sources (PSES).
- 415.365 New source performance standards (NSPS).
- 415.366 Pretreatment standards for new sources (PSNS).
- 415.367 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT).

Subpart AL—Ferric Chloride Production Subcategory

- 415.385 [Reserved]
- 415.386 Pretreatment standards for new sources (PSNS).

Subpart AN—Fluorine Production Subcategory

- 415.403–415.405 [Reserved]
- 415.406 Pretreatment standards for new sources (PSNS).

Subpart AQ—Iodine Production Subcategory

- 415.433–415.435 [Reserved]
- 415.436 Pretreatment standards for new sources (PSNS).

Subpart AR—Lead Monoxide Production Subcategory

- 415.445 [Reserved]
- 415.446 Pretreatment standards for new sources (PSNS).

Subpart AU—Nickel Salts Production Subcategory

- 415.470 Applicability; description of the nickel salts production subcategory.
- 415.471 Specialized definitions.

- 415.472 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).
- 415.473 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).
- 415.474 Pretreatment standards for existing sources (PSES).
- 415.475 New source performance standards (NSPS) Specified in 415.672.
- 415.476 Pretreatment standards for new sources (PSNS).
- 415.477 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT).

Subpart AX—Potassium Chloride Production Subcategory

- 415.503–415.505 [Reserved]
- 415.506 Pretreatment standards for new sources (PSNS).

Subpart BC—Sodium Fluoride Production Subcategory

- 415.555 [Reserved]
- 415.556 Pretreatment standards for new sources (PSNS).

Subpart BH—Stannic Oxide Production Subcategory

- 415.603–415.605 [Reserved]
- 415.606 Pretreatment standards for new sources (PSNS).

Subpart BK—Zinc Sulfate Production Subcategory

- 415.633–415.635 [Reserved]
- 415.636 Pretreatment standards for new sources (PSNS).

Subpart BL—Cadmium Pigments and Salts Production subcategory

- 415.640 Applicability; description of the cadmium pigments and salts production subcategory.
- 415.641 Specialized definitions.
- 415.642 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).
- 415.643 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).
- 415.644 Pretreatment standards for existing sources (PSES).
- 415.645 New source performance standards (NSPS).
- 415.646 Pretreatment standards for new sources (PSNS).

415.647 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT).

Subpart BM—Cobalt Salts Production Subcategory

- 415.650 Applicability; description of the cobalt salts production subcategory.
- 415.651 Specialized definitions.
- 415.652 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).
- 415.653 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).
- 415.654 Pretreatment standards for existing sources (PSES).
- 415.655 New source performance standards (NSPS).
- 415.656 Pretreatment standards for new sources (PSNS).
- 415.657 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT).

Subpart BN—Sodium Chlorate Production Subcategory

- 415.660 Applicability; description of the sodium chlorate production subcategory.
- 415.661 Specialized definitions.
- 415.662 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).
- 415.663 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).
- 415.664 Pretreatment standards for existing sources (PSES). [Reserved]
- 415.665 New source performance standards (NSPS).
- 415.666 Pretreatment standards for new sources (PSNS).
- 415.667 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT).

Subpart BO—Chloride Production Subcategory

- 415.670 Applicability; description of the zinc chloride production subcategory.
- 415.671 Specialized definitions.
- 415.672 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).
- 415.673 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).
- 415.674 Pretreatment standards for existing sources (PSES).

- 415.675 New source performance standards (NSPS).
- 415.676 Pretreatment standards for new sources (PSNS).
- 415.677 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT).

Authority: Sec. 301.304 (b), (c), (e), and (g), 306 (b) and (c), 307 (b) and (c), and 501 of the Clean Water Act (the Federal Water Pollution Control Act Amendments of 1972, as amended by the Clean Water Act of 1977) (the "Act"); 33 U.S.C. 1311, 1314 (b), (c), (e), and (g), 1316 (b) and (c), 1317 (b) and (c), and 1361; 86 Stat. 816, Pub. L. 92-500; 91 Stat. 1567, Pub. L. 95-217.

EPA proposes to Amend 40 CFR Part 415 as follows:

Subpart F—Chlor-alkali Subcategory (Chlorine and Sodium or Potassium Hydroxide Production)

1. Section 415.60 is revised to read:

§ 415.60 Applicability; description of the chlorine and sodium or potassium hydroxide production subcategory.

The provisions of this subpart are applicable to discharges resulting from the production of chlorine and sodium or potassium hydroxide by the diaphragm cell process and by the mercury cell process. The provisions of this subpart are also applicable to discharges resulting from the production of calcium hypochlorite at chlor-alkali plants.

Subpart P—Sodium Chloride Production Subcategory

2. Sections 415.160, 415.16, 415.163 and 415.167 are revised to read:

§ 415.160 Applicability; description of the sodium chloride production subcategory.

The provisions of this subpart are applicable to discharges resulting from the production of sodium chloride by the solution brine-mining process and by the solar evaporation process.

§ 415.161 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations, and methods of analysis set forth in 40 CFR Part 401 shall apply to this subpart.

(b) The term "product" shall mean sodium chloride.

(c) The term "bitterns" shall mean the saturated brine solution remaining after precipitation of sodium chloride in the solar evaporation process.

* * *

§ 415.163 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of 403 and achieve the following pretreatment the best available technology economically achievable (BAT).

(b) [Reserved]

§ 415.167 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT).

(a) [Reserved]

(b) Except as provided in 40 CFR 125.30-32, any existing point source subject to this subpart and using the solution brine-mining process must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT): The limitations are the same for TSS and pH as specified in 415.162(b).

Subpart T—Sodium Sulfite Production Subcategory

3. Section 415.203 is revised, § 415.204 is reserved, § 415.206 is revised and § 415.207 is added to read:

§ 415.203 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).

Except as provided in 40 CFR 125.30-32, any existing point source subject to this subpart must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT):

SUBPART T—SODIUM SULFITE

Pollutant or pollutant property	BAT effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Kg/kg (or pounds per 1,000 lb) of product	
Chromium (T)	0.0020	0.00063
Zinc (T)	0.0051	0.0015
COD	3.4	1.7

§ 415.204 [Reserved]

§ 415.205 New source performance standards (NSPS).

Any new source subject to this subpart must achieve the following new source performance standards (NSPS):

SUBPART T—SODIUM SULFITE

Pollutant or pollutant property	NSPS effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Kg/kg (or pounds per 1,000 lb) of product	
TSS	0.032	0.016
Chromium (T)	0.0020	0.00063
Zinc (T)	0.0051	0.0015
COD	3.4	1.7
pH	(1)	(1)

(1) Within the range 6.0 to 9.0.

§ 415.206 Pretreatment standards for new sources (PSNS).

Except as provided in § 403.7, any new source subject to this subpart which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and achieve the following pretreatment standards for new sources (PSNS).

SUBPART T—SODIUM SULFITE

Pollutant or pollutant property	PSNS effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter (mg/l)	
Chromium (total)	1.3	0.42
Zinc (total)	3.4	1.2
COD	1260	630

In case when POTWs find it necessary to impose mass limitations, the following equivalent mass limitations are provided as an alternate: The limitations on chromium (total), zinc (total), and COD are the same as specified in § 415.205.

§ 415.207 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BAT).

Except as provided in 40 CFR 125.30–125.32 any existing point source subject to this subpart must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT):

The limitations for TSS and pH are the same as specified in § 415.202.

Subpart AA—Borax Production

4. Sections 415.273–415.276 are added

and reserved and § 415.276 is added to read:

§§ 415.273–415.275 [Reserved]

§ 415.276 Pretreatment standards for new sources (PSNS).

Except as provided in 40 CFR 403.7, any new source subject to this subpart which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and achieve the following pretreatment standards for new sources (PSNS): The limitations are the same as specified in § 415.272.

Subpart AC—Bromine Production Subcategory

5. Sections 415.293–415.295 are added and reserved and § 415.296 is added to read:

§§ 415.293–415.295 [Reserved]

§ 415.296 Pretreatment standards for new sources (PSNS).

Except as provided in 40 CFR 403.7, any new source subject to this subpart which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and achieve the following pretreatment standards for new sources (PSNS): The limitations are the same as specified in § 415.292.

Subpart AE—Calcium Hydroxide Production Subcategory

6. Sections 415.313–415.315 are added and reserved and § 415.316 is added to read:

§§ 415.313–415.315 [Reserved]

§ 415.316 Pretreatment standards for new sources (PSNS).

Except as provided in 40 CFR 403.7, any new source subject to this subpart which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and achieve the following pretreatment standards for new sources (PSNS): The limitations are the same as specified in § 415.312.

Subpart AI—Chromic Acid Production Subcategory

7. Sections 415.353–415.355 are added and reserved and § 415.356 is added to read:

§§ 415.353–415.355 [Reserved]

§ 415.356 Pretreatment standards for new sources (PSNS).

Except as provided in 40 CFR 403.7, any new source subject to this subpart

which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and achieve the following pretreatment standards for new sources (PSNS): The limitations are the same as specified in § 415.352.

Subpart AJ—Copper Salts Production Subcategory

8. Sections 415.360–415.367 are added to read:

§ 415.360 Applicability: description of the copper salts production subcategory.

The provisions of this subpart are applicable to discharges and to the introduction of pollutants into treatment works which are publicly owned resulting from the production of copper salts, including (a) copper sulfate, copper chloride, copper iodide, and copper nitrate, and (b) copper carbonate.

§ 415.361 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations, and methods of analysis set forth in Part 401 of this chapter shall apply to this subpart.

(b) The term "product" shall mean copper salts.

(c) The term "copper" shall mean the total copper present in the process wastewater stream exiting the wastewater treatment system.

(d) The term "selenium" shall mean the total selenium present in the process wastewater stream exiting the wastewater treatment system.

(e) The term "nickel" shall mean the total nickel present in the process wastewater stream exiting the wastewater treatment system.

§ 415.362 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).

(a) Except as provided in 40 CFR 125.30–125.32 any existing point source subject to this subpart and producing copper sulfate, copper chloride, copper iodide, or copper nitrate must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).

SUBPART AJ—COPPER SULFATE, COPPER CHLORIDE, COPPER IODIDE, COPPER NITRATE

Pollutant or pollutant property	BPT effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
Kg/kg (or pounds per 1,000 lb) of product		
TSS	0.069	0.023
Copper (T)	0.0030	0.0010
Nickel (T)	0.0060	0.0020
Selenium (T)	0.0015	0.00050
pH	(¹)	(¹)

¹ Within the range 6.0 to 9.0.

(b) Except as provided in 40 CFR 125.30–125.32 any existing point source subject to this subpart and producing copper carbonate must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT):

SUBPART AJ—COPPER CARBONATE

Pollutant or pollutant property	BPT effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
Kg/kg (or pounds per 1,000 lb) of product		
TSS	4.2	1.4
Copper (T)	0.19	0.064
Nickel (T)	0.37	0.12
Selenium (T)	0.093	0.031
pH	(¹)	(¹)

¹ Within the range 6.0 to 9.0.

§ 415.363 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).

(a) Except as provided in 40 CFR 125.30–125.32, any existing point source subject to this subpart and producing copper sulfate, copper chloride, copper iodide, or copper nitrate must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT): The limitations for copper (T), nickel (T), and selenium (T) are the same as specified in § 415.362(a).

(b) Except as provided in 40 CFR 125.30–125.32, any existing point source subject to this subpart and producing copper carbonate must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT): The limitations for copper (T), nickel (T) and

selenium (T) are the same as specified in 415.362(b).

§ 415.364 Pretreatment standards for existing sources (PSES).

(a) Except as provided in 40 CFR 403.7 and 403.13, any existing source subject to this subpart and producing copper sulfate, copper chloride, copper iodide, or copper nitrate which introduces pollutants into a publicly owned treatment works must comply with 40 CFR, CFR Part 403 and by [24 months after promulgation] achieve the following pretreatment standards for existing sources (PSES):

SUBPART AJ—COPPER SULFATE, COPPER CHLORIDE, COPPER IODIDE, COPPER NITRATE

Pollutant or pollutant property	PSES effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
Milligrams per liter (mg/l)		
Copper (T)	3.2	1.1
Nickel (T)	6.4	2.1
Selenium (T)	1.6	0.53

In cases where POTWs find it necessary to impose mass limitations, the following equivalent mass limitations are provided as an alternate: The limitations for copper (T), nickel (T), and selenium (T) are the same as specified in § 415.362(a).

(b) Except as provided in 40 CFR 403.7 and 403.13, any existing source subject to this subpart and producing copper carbonate which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and by [24 months after promulgation] achieve the following pretreatment standards for existing sources (PSES):

Subpart AJ—Copper Carbonate

SUBPART AJ—COPPER CARBONATE

Pollutant or pollutant property	PSES effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
Milligrams per liter (gm/l)		
Copper (T)	3.2	1.1
Nickel (T)	6.4	2.1
Selenium (T)	1.6	0.53

In case where POTWs find it necessary to impose mass limitations, the following equivalent mass limitations are provided as an alternate: The limitations for copper (T) nickel (T), and selenium (T) are the same as specified in § 415.362(b).

§ 415.365 New source performance standards (NSPS).

(a) Any new source subject to this subpart and producing copper sulfate, copper chloride, copper iodide, or copper nitrate must achieve the following new source performance standards (NSPS): The limitations for pH, TSS, copper (T), nickel (T), and selenium (T), are the same as specified in § 415.362(a).

(b) Any new source subject to this subpart and producing copper carbonate must achieve the following new source performance standards (NSPS): The limitations for pH, TSS, copper (T), nickel (T), and selenium (T) are the same as specified in § 415.362(b).

§ 415.366 Pretreatment standards for new sources (PSNS).

(a) Except as provided in § 403.7, any new source subject to this subpart and producing copper sulfate, copper chloride, copper iodide, or copper nitrate which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and achieve the following pretreatment standards for new sources (PSNS): The limitations for copper (T), nickel (T), and selenium (T) are the same as specified in § 415.364(a).

(b) Except as provided in § 403.7, any new source subject to this subpart and producing copper carbonate which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and achieve the following pretreatment standards for new sources (PSNS): The limitations for copper (T), nickel (T), and selenium (T) are the same as specified in 415.364(b).

§ 415.367 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT).

(a) Except as provided in 40 CFR 125.30–125.32 any existing point source subject to this subpart and producing copper sulfate, copper chloride, copper iodide, or copper nitrate must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT): The limitations are the same for TSS and pH as specified in § 415.362(a).

(b) Except as provided in 40 CFR 125.30–125.32 any existing point source subject to this subpart and producing copper carbonate must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best conventional pollutant

control technology (BCT): The limitations are the same for TSS and pH as specified in § 415.362(b).

Subpart AL—Ferric Chloride Production Subcategory

9. Section 415.385 is added reserved and § 415.386 is added to read:

§ 415.385 [Reserved]

§ 415.386 Pretreatment standards for new sources (PSNS).

Except as provided in 40 CFR 403.7, any new source subject to this subpart which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and achieve the following pretreatment standards for new sources (PSNS): The limitations are the same as specified in § 415.382.

Subpart AN—Fluorine Production Subcategory

10. Sections 415.403–415.405 are added and reserved and § 415.406 is added to read:

§§ 415.403–415.405 [Reserved]

§ 415.406 Pretreatment standards for new sources (PSNS).

Except as provided in 40 CFR 403.7, any new source subject to this subpart which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and achieve the following pretreatment standards for new sources (PSNS): The limitations are the same as specified in § 415.402.

Subpart AQ—Iodine Production Subcategory

11. Sections 415.433–415.435 are added and reserved and § 415.436 is added to read:

§§ 415.433–415.435 [Reserved]

§ 415.436 Pretreatment standards for new sources (PSNS).

Except as provided in 40 CFR 403.7, any new source subject to this subpart which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and achieve the following pretreatment standards for new sources (PSNS): The limitations are the same as specified in § 415.432.

Subpart AR—Lead Monoxide Production Subcategory

12. Section 415.445 is added and reserved and § 415.446 is added to read:

§ 415.445 [Reserved]

§ 415.446 Pretreatment standards for new sources (PSNS).

Except as provided in 40 CFR 403.7, any new source subject to this subpart which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and achieve the following pretreatment standards for new sources (PSNS): The limitations are the same as specified in § 415.442.

Subpart AU—Nickel Salts Production Subcategory

13. Sections 415.470–415.477 are added to read:

§ 415.470 Applicability; description of the nickel salts production subcategory.

The provisions of this subpart are applicable to discharges and to the introduction of pollutants into treatment works which are publicly owned resulting from the production of nickel salts, including (a) nickel sulfate, nickel chloride, nickel nitrate, and nickel fluoborate, and (b) nickel carbonate.

§ 415.471 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations, and methods of analysis set forth in Part 401 of this chapter shall apply to this subpart.

(b) The term "product" shall mean nickel salts.

(c) The term "nickel" shall mean the total nickel present in the process wastewater stream existing the wastewater treatment system.

(d) The term "copper" shall mean the total copper present in the process wastewater stream existing the wastewater treatment system.

§ 415.472 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).

(a) Except as provided in 40 CFR 125.30–125.32 any existing point source subject to this subpart and producing nickel sulfate, nickel chloride, nickel nitrate, or nickel fluoborate must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT):

SUBPART AU—NICKEL SULFATE, NICKEL CHLORIDE, NICKEL NITRATE, NICKEL FLUOBORATE

Pollutant or pollutant property	BPT effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Kg/kg (or pounds per 1,000 pounds) of product	
TSS	0.069	0.032
Nickel (T)	0.0096	0.0020
pH	(¹)	(¹)

¹ Within the range 6.0 to 9.0.

(b) Except as provided in 40 CFR 125.30–125.32 any existing point source subject to this subpart and producing nickel carbonate must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT):

SUBPART AU—NICKEL CARBONATE

Pollutant or pollutant property	BPT effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Kg/kg (or pounds per 1,000 pounds) of product	
TSS	17	5.6
Nickel (T)	1.1	0.35
pH	(¹)	(¹)

¹ Within the range 6.0 to 9.0.

§ 415.473 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).

(a) Except as provided in 40 CFR 125.30–125.32, any existing point source subject to this subpart and producing nickel sulfate, nickel chloride, nickel nitrate, or nickel fluoborate must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT):

SUBPART AU—NICKEL SULFATE, NICKEL CHLORIDE, NICKEL NITRATE, NICKEL FLUOBORATE

Pollutant or pollutant property	BAT effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Kg/kg (or pounds per 1,000 pounds) of product	
Copper (T)	0.00074	0.00024
Nickel (T)	0.00074	0.00024

(a) Except as provided in 40 CFR 125.30-125.32, any existing point source subject to this subpart and producing nickel carbonate must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT):

SUBPART AU—NICKEL CARBONATE

Pollutant or pollutant property	BAT effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
Kg/kg (or pounds per 1,000 pounds of product)		
Copper (T)	0.13	0.042
Nickel (T)	0.13	0.042

§ 415.474 Pretreatment standards for existing sources (PSES).

(a) Except as provided in 40 CFR 403.7 and 403.13, any existing source subject to this subpart and producing nickel sulfate, nickel chloride, nickel nitrate, or nickel fluoborate which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and by [24 months after promulgation] achieve the following pretreatment standards for existing sources (PSES):

SUBPART AU—NICKEL SULFATE, NICKEL CHLORIDE, NICKEL NITRATE, NICKEL FLUOBORATE

Pollutant or pollutant property	PSES effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
Milligrams per liter (mg/l)		
Copper (T)	1.1	0.36
Nickel (T)	1.1	0.36

In cases where POTWs find it necessary to impose mass limitations, the following equivalent mass limitations are provided as an alternate: The limitations for copper (T) and nickel (T) are the same as specified in § 415.473(a).

(b) Except as provided in 40 CFR 403.7 and 403.13, any existing source subject to this subpart and producing nickel carbonate which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and by [24 months after promulgation] achieve the following pretreatment standards for existing sources (PSES):

SUBPART AU—NICKEL CARBONATE

Pollutant or pollutant property	PSES effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
Milligrams per liter (mg/l)		
Copper (T)	1.1	0.36
Nickel (T)	1.1	0.36

In cases where POTWs find it necessary to impose mass limitations, the following equivalent mass limitations are provided as an alternate: The limitations for copper (T) and nickel (T) are the same as specified in § 415.473(b).

§ 415.475 New source performance standards (NSPS) specified in § 415.672.

(a) Any new source subject to this subpart and producing nickel sulfate, nickel chloride, nickel fluoborate or nickel nitrate must achieve the following new source performance standards (NSPS):

SUBPART AU—NICKEL SULFATE, NICKEL CHLORIDE, NICKEL NITRATE, NICKEL FLUOBORATE

Pollutant or pollutant property	PSES effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
kg/kg (or pounds per 1,000 pounds of product)		
TSS	0.096	0.032
Copper	0.00074	0.00024
Nickel	0.00074	0.00024
pH	(¹)	(¹)

¹ Within the range 6.0 to 9.0.

(b) Any new source subject to this subpart and producing nickel carbonate must achieve the following new source performance standards (NSPS):

SUBPART AU—NICKEL CARBONATE

Pollutant or pollutant property	NSPS effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
kg/kg (or pounds per 1,000 pounds of product)		
TSS	17	5.6
Copper	0.13	0.042
Nickel	0.13	0.042
pH	(¹)	(¹)

¹ Within the range 6.0 to 9.0.

§ 415.476 Pretreatment standards for new sources (PSNS).

(a) Except as provided in § 403.7, any new source subject to this subpart and producing nickel sulfate, nickel chloride, nickel fluoborate or nickel nitrate which

introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and achieve the following pretreatment standards for new sources (PSNS): The limitations for copper (T) and nickel (T) are the same as specified in § 415.474(a).

(b) Except as provided in § 403.7, any new source subject to this subpart and producing nickel carbonate which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and achieve the following pretreatment standards for new sources (PSNS): The limitations for copper (T) and nickel (T) are the same as specified in § 415.474(b).

§ 415.477 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT).

(a) Except as provided in 40 CFR 125.30-125.32 any existing point source subject to this subpart and producing nickel sulfate, nickel chloride, nickel fluoborate or nickel nitrate must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT): The limitations are the same for TSS and pH as specified in § 415.472(a).

(b) Except as provided in 40 CFR 125.30-125.32 any existing point source subject to this subpart and producing nickel carbonate must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT): The limitations are the same for TSS and pH as specified in § 415.472(b).

Subpart AX—Potassium Chloride Production Subcategory

14. Sections 415.503-415.505 are added and reserved and § 415.406 is added to read:

§§ 415.503-415.505 [Reserved]

§ 415.506 Pretreatment standards for new sources (PSNS).

Except as provided in 40 CFR 403.7, any new source subject to this subpart which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and achieve the following pretreatment standards for new sources (PSNS): The limitations are the same as specified in § 415.502.

Subpart BC—Sodium Fluoride Production Subcategory

15. Section 415.555 is added as reserved and § 415.556 is added to read:

§ 415.555 [Reserved]**§ 415.556 Pretreatment standards for new sources (PSNS).**

Except as provided in 40 CFR 403.7, any new source subject to this subpart which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and achieve the following pretreatment standards for new sources (PSNS): The limitations are the same as specified in § 415.552.

Subpart BH—Stannic Oxide Production Subcategory

16. Sections 415.603–415.605 are added and reserved and § 415.606 is added to read:

§ 415.603–415.605 [Reserved]**§ 415.606 Pretreatment standards for new sources (PSNS).**

Except as provided in 40 CFR 403.7, any new source subject to this subpart which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and achieve the following pretreatment standards for new sources (PSNS): The limitations are the same as specified in § 415.602.

Subpart BK—Zinc Sulfate Production Subcategory

17. Sections 415.633–415.635 are added and reserved and § 415.636 is added to read:

§ 415.633–415.635 [Reserved]**§ 415.636 Pretreatment standards for new sources (PSNS).**

Except as provided in 40 CFR 403.7, any new source subject to this subpart which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and achieve the following pretreatment standards for new sources (PSNS): The limitations are the same as specified in § 415.632.

Subpart BL—Cadmium Pigments and Salts Production Subcategory

18. Sections 415.640–415.647 are added to read:

§ 415.640 Applicability; description of the cadmium pigments and salts production subcategory.

The provisions of this subpart are applicable to discharges and to the

introduction of pollutants into treatment works which are publicly owned resulting from the production of cadmium pigments and salts including cadmium chloride, cadmium nitrate, and cadmium sulfate salts.

§ 415.641 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations, and methods of analysis set forth in Part 401 of this chapter shall apply to this subpart.

(b) The term "product" shall mean cadmium pigment or cadmium salt.

(c) The term "cadmium" shall mean the total cadmium present in the process wastewater stream exiting the wastewater treatment system.

(d) The term "selenium" shall mean the total selenium present in the process wastewater stream exiting the wastewater treatment system.

(e) The term "zinc" shall mean the total zinc present in the process wastewater stream exiting the wastewater treatment system.

§ 415.642 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).

(a) Except as provided in 40 CFR 125.30–125.32 any existing point source subject to this subpart and producing cadmium pigments must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).

SUBPART BL—CADMIUM PIGMENTS

Pollutant or pollutant property	BPT effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
Kg/kg (or pounds per 1,000 pounds) of product		
TSS	2.59	1.57
Cadmium (T)	0.043	0.014
Selenium (T)	0.11	0.037
Zinc (T)	0.011	0.0062
pH	(¹)	(¹)

¹ Within the range 6.0 to 9.0.

(b) Except as provided in 40 CFR 125.30–125.32 any existing point source subject to this subpart and producing cadmium salts must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT):

SUBPART BL—CADMIUM SALTS

Pollutant or pollutant property	BPT effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
Kg/kg (or pounds per 1,000 pounds) of product		
TSS	0.0016	0.001
Cadmium (T)	2.7×10^{-3} ^a	8.7×10^{-4}
Selenium (T)	7.0×10^{-4}	2.3×10^{-4}
Zinc (T)	7.0×10^{-4}	3.9×10^{-4}
pH	(¹)	(¹)

¹ Within the range 6.0 to 9.0.

§ 415.643 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).

(a) Except as provided in 40 CFR 125.30–125.32, any existing point source subject to this subpart and producing cadmium pigments must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT): The limitations for Cadmium (T), Selenium (T), and Zinc (T) are the same as specified in § 415.642(a).

(b) Except as provided in 40 CFR 125.30–125.32, any existing point source subject to this subpart and producing cadmium salts must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT): The limitations for cadmium (T), selenium (T), and zinc (T) are the same as specified in § 415.642(b).

§ 415.644 Pretreatment standards for existing sources (PSES).

(a) Except as provided in 40 CFR 403.7 and 403.13, any existing source subject to this subpart and producing cadmium pigments which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and by [24 months after promulgation] achieve the following pretreatment standards for existing sources (PSES):

SUBPART BL—CADMIUM PIGMENTS

Pollutant or pollutant property	PSES effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
Milligrams per liter (mg/l)		
Cadmium (T)	0.47	0.15
Selenium (T)	1.1	0.40
Zinc (T)	0.12	0.067

In cases where POTWs find it necessary to impose mass limitations, the following equivalent mass limitations are provided as an alternate: The limitations for Cadmium (T), Selenium (T), and Zinc (T) are the same as specified in § 415.642(a).

(b) Except as provided in 40 CFR 403.7 and 403.13, any existing source subject to this subpart and producing cadmium salts which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and by [24 months after promulgation] achieve the following pretreatment standards for existing sources (PSES):

SUBPART BL—CADMIUM SALTS

Pollutant or pollutant property	PSES effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
Milligrams per liter (mg/l)		
Cadmium (T)	0.47	0.15
Selenium (T)	1.1	0.40
Zinc (T)	0.12	0.067

In cases where POTWs find it necessary to impose mass limitations, the following equivalent mass limitations are provided as an alternate: The limitations for cadmium (T), selenium (T), and zinc (T) are the same as specified in § 415.642(b).

§ 415.645 New source performance standards (NSPS).

(a) Any new source subject to this subpart and producing cadmium pigments must achieve the following new source performance standards (NSPS): The limitations for pH, TSS, cadmium (T), selenium (T), and zinc (T), are the same as specified in § 415.642(a).

(b) Any new source subject to this subpart and producing cadmium salts must achieve the following new source performance standards (NSPS): The limitations for pH, TSS, cadmium (T), selenium (T), and zinc (T), are the same as specified in § 415.642(b).

§ 415.646 Pretreatment standards for new sources (PSNS).

(a) Except as provided in § 403.7, any new source subject to this subpart and producing cadmium pigments which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and achieve the following pretreatment standards for new sources (PSNS): The limitations for cadmium (T), selenium (T), and zinc (T), are the same as specified in § 415.644(a).

(b) Except as provided in § 403.7, any

new source subject to this subpart and producing cadmium salts which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and achieve the following pretreatment standards for new sources (PSNS): The limitations for cadmium (T), selenium (T), and zinc (T) are the same as specified in § 415.644(b).

§ 415.647 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT).

(a) Except as provided in 40 CFR 125.30–125.32 any existing point source subject to this subpart and producing cadmium pigments must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT): The limitations are the same for TSS and pH as specified in § 415.642(a).

(b) Except as provided in 40 CFR 125.30–125.32 any existing point source subject to this subpart and producing cadmium salts must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT): The limitations are the same for TSS and pH as specified in § 415.642(b).

Subpart BM—Cobalt Salts Production Subcategory

19. Sections 415.650–415.657 are added to read:

§ 415.650 Applicability; description of the cobalt salts production subcategory.

The provisions of this subpart are applicable to discharges and to the introduction of pollutants into treatment works which are publicly owned resulting from the production of cobalt salts.

§ 415.651 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations, and methods of analysis set forth in Part 401 of this chapter shall apply to this subpart.

(b) The term "product" shall mean cobalt salts.

(c) The term "cobalt" shall mean the total cobalt present in the process wastewater stream exiting the wastewater treatment system.

(d) The term "copper" shall mean the total copper present in the process

wastewater stream exiting the wastewater treatment system.

(e) The term "nickel" shall mean the total nickel present in the process wastewater stream exiting the wastewater treatment system.

§ 415.652 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).

Except as provided in 40 CFR 125.30–125.32 any existing point source subject to this subpart must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT):

SUBPART BM—COBALT SALTS

Pollutant or pollutant property	BPT effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
Kg/kg (or pounds per 1,000 pounds of product)		
TSS	0.0023	0.0014
Cobalt (T)	0.0003	0.00012
Copper (T)	2.7×10^{-4}	8.3×10^{-5}
Nickel (T)	2.7×10^{-4}	8.3×10^{-5}
pH	(¹)	(¹)

¹ Within the range 6.0 to 9.0.

§ 415.653 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).

Except as provided in 40 CFR 125.30–125.32 any existing point source subject to this subpart must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT): The limitations for cobalt (T), copper (T), and nickel (T), are the same as specified in § 415.652.

§ 415.654 Pretreatment standards for existing sources (PSES).

Except as provided in 40 CFR 403.7 and 403.13, any existing source subject to this subpart which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and by [24 months after promulgation] achieve the following pretreatment standards for existing sources (PSES):

SUBPART BM—COBALT SALTS

Pollutant or pollutant property	PSES effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
Milligrams per liter (mg/l)		
Cobalt (T)	3.6	1.4
Copper (T)	3.3	1.0
Nickel (T)	3.3	1.0

In cases where POTWs find it necessary to impose mass limitations, the following equivalent mass limitations are provided as an alternate. The limitations for cobalt (T), copper (T), and nickel (T), are the same as specified in § 415.652.

§ 415.655 New source performance standards (NSPS).

Any new source subject to this subpart must achieve the following new source performance standards (NSPS): The limitations for pH, TSS, cobalt (T), copper (T), and nickel (T) are the same as specified in § 415.652.

§ 415.656 Pretreatment standards for new sources (PSNS).

Except as provided in § 403.7, any new source subject to this subpart which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and achieve the following pretreatment standards for new sources (PSNS): The limitations for cobalt (T), copper (T), and nickel (T), are the same as specified in 415.654.

§ 415.657 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT).

Except as provided in 40 CFR 125.30–125.32 any existing point source subject to this subpart must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT): The limitations are the same for TSS and pH as specified in § 415.652.

Subpart BN—Sodium Chlorate Production Subcategory

20. Sections 415.660–415.667 are added to read:

§ 415.660 Applicability; description of the sodium chlorate production subcategory.

The provisions of this subpart are applicable to discharges and to the introduction of pollutants into treatment works which are publicly owned

resulting from the production of sodium chlorate.

§ 415.661 Specialized definitions.

For the purpose of this subpart:
(a) Except as provided below, the general definitions, abbreviations, and methods of analysis set forth in Part 401 to this chapter shall apply to this subpart.

(b) The term "product" shall mean sodium chlorate.

(c) The term "chromium" shall mean the total chromium present in the process wastewater stream exiting the wastewater treatment system.

(d) The term "chlorine" shall mean the total residual chlorine present in the process wastewater stream exiting the wastewater treatment system.

(e) The term "antimony" shall mean the total antimony present in the process wastewater stream exiting the wastewater treatment system.

§ 415.662 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).

Except as provided in 40 CFR 125.30–125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently achievable (BPT):

SUBPART BN—SODIUM CHLORATE

Pollutant or pollutant property	BPT effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
Kilograms per kilogram (or pounds per 1,000 pounds) of product		
TSS	0.116	0.0675
Antimony (T)	0.0086	0.0043
Chromium (T)	0.0027	0.0014
Chlorine (total residual)	0.0041	0.0024
pH	(¹)	(¹)

¹ Within the range 6.0 to 9.0.

415.663 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).

Except as provided in 40 CFR 125.30–125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT):

SUBPART BN—SODIUM CHLORATE

Pollutant or pollutant property	BPT effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
Kilograms per kilogram (or pounds per 1,000 pounds) of product		
Antimony (T)	0.0043	0.0022
Chromium (T)	0.0017	0.00086
Chlorine (total residual)	0.0041	0.0024

§ 415.664 Pretreatment standards for existing sources (PSES) (Reserved)

§ 415.665 New source performance standards (NSPS)

Any new source subject to this subpart must achieve the following new source performance standards (NSPS): The limitations for pH and TSS are the same as those specified in § 415.662. The limitation for Antimony (T), Chromium (T) and Total Residual Chlorine are the same as specified in § 415.663.

§ 415.666 Pretreatment standards are for sources (PSNS).

Except as provided in § 403.7, any new source subject to this subpart which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and achieve the following pretreatment standards for new sources (PSNS):

SUBPART BN—SODIUM CHLORATE

Pollutant or pollutant property	PSNS effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
Milligrams per liter (mg/l)		
Antimony (T)	1.6	0.8
Chromium (T)	0.64	0.32

In cases where POTWs find it necessary to impose mass limitations, the following equivalent mass limitations are provided as an alternate: The limitations for antimony (T) and chromium (T) are the same as specified in § 415.663.

§ 415.667 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT).

Except as provided in 40 CFR 125.30–125.32 any existing point source subject to this subpart must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best conventional pollutant

control technology (BCT): The limitations are the same for TSS and pH as specified in § 415.662.

Subpart BO—Zinc Chloride Production Subcategory

21. Sections 415.670–415.677 are added to read:

§ 415.670 Applicability; description of the zinc chloride production subcategory.

The provisions of this subpart are applicable to discharges and to the introduction of pollutants into treatment works which are publicly owned resulting from the production of zinc chloride.

§ 415.671 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations, and methods of analysis set forth in Part 401 of this chapter shall apply to this subpart.

(b) The term "product" shall mean zinc chloride.

(c) The term "arsenic" shall mean the total arsenic present in the process wastewater stream exiting the wastewater treatment system.

(d) The term "zinc" shall mean the total zinc present in the process wastewater stream exiting the wastewater treatment system.

(e) The term "lead" shall mean the total lead present in the process wastewater stream exiting the wastewater treatment system.

§ 415.672 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).

Except as provided in 40 CFR 125.30–125.32 any existing point source subject to this subpart must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).

SUBPART BO—ZINC CHLORIDE

Pollutant or pollutant property	BPT effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Kg/kg (or pounds per 1,000 pounds) of product	
TSS	0.58	0.34
Arsenic (T)	0.041	0.014
Zinc (T)	0.076	0.026
Lead (T)	0.024	0.0061
pH	(¹)	(¹)

¹ Within the range 6.0 to 9.0.

§ 415.673 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).

Except as provided in 40 CFR 125.30–125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT):

SUBPART BO—ZINC CHLORIDE

Pollutant or pollutant property	BAT effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Kg/kg (or pounds per 1,000 pounds) of product	
Arsenic (T)	0.041	0.014
Zinc (T)	0.018	0.0061
Lead (T)	0.0023	0.00060

§ 415.674 Pretreatment standards for existing sources (PSES).

Except as provided in 40 CFR 403.7 and 403.13, any existing source subject to this subpart which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and by [24 months after promulgation] achieve the following pretreatment standards for existing sources (PSES):

SUBPART BO—ZINC CHLORIDE

Pollutant or pollutant property	PSES effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter (mg/l)	
Arsenic (T)	3.0	1.1
Zinc (T)	1.3	0.45
Lead (T)	0.17	0.044

In cases where POTWs find it necessary to impose mass limitations, the following equivalent mass limitations are provided as an alternate: The limitations for arsenic (T), zinc (T), and lead (T) are the same as specified in § 415.673.

§ 415.675 New source performance standards (NSPS).

Any new source subject to this subpart must achieve the following new source performance standards (NSPS): The limitations for pH and TSS are the same as specified in § 415.672. The limitations for arsenic (T), zinc (T), and lead (T) are the same as specified in § 415.673.

§ 415.676 Pretreatment standards for new sources (PSNS).

Except as provided in § 403.7, any new source subject to this subpart which introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and achieve the pretreatment standards for new sources (PSNS): The limitations for arsenic (T), zinc (T), and lead (T) are the same as specified in § 415.674.

§ 415.677 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT).

Except as provided in 40 CFR 125.30–125.32 any existing point source subject to this subpart must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT): The limitations are the same for TSS and pH as specified in § 415.672.

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Registered Federal Reporter

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Part III

Federal Communications Commission

Multiple Ownership of AM, FM, and
Television Broadcast Stations; Proposed
Rule

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[Gen. Docket No. 83-1009; FCC 83-440]

Multiple Ownership of AM, FM and Television Broadcast Stations

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: Action taken herein adopts a Notice of Proposed Rule Making regarding the modification or elimination of that aspect of the FCC's rules commonly known as the "seven station" rule. The rule prohibits any party from being a stockholder, officer or director or otherwise holding any interest in more than seven stations in the same broadcast service. The dramatic changes in the communications marketplace during the three decades the rule has been in effect, as well as the increased programming diversity likely to result from its relaxation, form the basis for taking this action.

DATES: Comments must be received on or before December 19, 1983, and reply comments on or before January 18, 1984.

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

FOR FURTHER INFORMATION CONTACT: Steven A. Bookshester, Office of General Counsel (202) 254-6530.

List of Subjects in 47 CFR Part 73

Radio broadcast, Television.

Notice of Proposed Rule Making

In the matter of amendment of §§ 73.35, 73.240, and 73.636 of the Commission's rules relating to multiple ownership of AM, FM, and television broadcast stations (Gen. Docket No. 83-1009).

Adopted: September 22, 1983.

Released: October 20, 1983.

By the Commission: Commissioner Rivera dissenting and issuing a statement.

1. The Commission, acting on its own motion, here proposes to modify that aspect of its multiple ownership rules commonly known as the "seven station rule." The rule prohibits any party from being a stockholder, officer or director or otherwise holding any interest in more than seven stations in the same broadcast service.¹ The dramatic

¹ No more than five of the seven television stations may be VHF. The rule does not apply to noncommercial FM and television stations, but does limit noncommercial AM ownership. The full text of the rule as applied to each of the services is attached as Appendix "B".

changes in the communications marketplace during the three decades the rule has been in effect, as well as the increased programming diversity likely to result from its relaxation, suggest that this action is in order.

I. Background

A. Early Ownership Restrictions

2. Although multiple ownership of stations had been a feature of the broadcast industry since its earliest days, it was not until the late 1930's that the Commission began to focus its attention on this aspect of industry organization.² The Commission's considerations came at a time when there was a significant expansion of Federal governmental activity and a corresponding lack of belief in the efficacy of the competitive marketplace.³ An early target of Commission action was "duopoly," the term the Commission has applied to common ownership of more than one station in the same service in a particular community. In 1938, the Commission adopted a strong presumption against granting new licenses which would result in ownership duopolies.⁴ This new policy was based in part on the value the Commission stated was being placed on "diversification of service," a concept which became a cornerstone of Commission ownership restrictions.⁵

3. When the Commission adopted rules governing the new commercial FM service in June, 1940, as absolute duopoly prohibition was included. Additionally, for the first time the Commission established a limit on the

number of licenses which could be held under common control. The limit was six stations. The Commission subsequently stated that the purpose of the new rule was "[t]o obviate possible monopoly, and encourage local initiative."⁶ In 1940 the Commission also promulgated similar rules for television, which was still being treated as an experimental service, but set the maximum number of stations which could be owned at three.⁷ When rules authorizing television broadcasting as a regular commercial service were adopted in April, 1941, these restrictions were retained.⁸ In May 1944, the maximum number of television stations which could be controlled by one owner was increased to five in response to a National Broadcasting Co. ("NBC") petition.⁹

4. Two years later, the Commission established a *de facto* seven station limit for AM when it denied CBS' application to purchase an eighth such station, KQW in San Jose. The Commission asserted that concentration of control, "particularly in AM," was "not a factor of the absolute number of stations alone," but also depended on "the powers and frequencies of the stations." CBS already owned six 50,000-watt clear channel stations, as well as a 5,000-watt regional station.¹⁰ While the decision indicated that the Commission would in AM matters consider all the factors involved in a given case, it in fact set a numerical line by which future Commission actions were measured.

² The Communications Act of 1934 is largely derived from the Radio Act 1927. That statute was adopted in part due to the belief that Federal station licensing was necessary to prevent "monopolistic domination" in broadcasting. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940). The Commission has no authority to pass on antitrust violations as such. *United States v. Radio Corporation of America*, 358 U.S. 334, 343 (1959). It has, however, historically considered ownership concentration issues under the public interest standard. See *National Broadcasting Co., Inc., v. United States*, 319 U.S. 190, 222-224 (1943).

³ See, for example, B.A. Lee, *The New Deal Reconsidered*, VI the *Wilson Quarterly* 62, 65-67 (1982).

⁴ *Genesee Radio Corp.*, 5 F.C.C. 163 (1936).

⁵ For the history of the early days of broadcasting, see generally E. Barnouw, *A Tower in Babel* (1966), *The Golden Web* (1968). For historical information on the multiple ownership issue, see generally H. H. Howard, *Multiple Broadcast Ownership: Regulatory History*, 27 Fed. Comm. B.J. 1 (1974); L. A. Powe, Jr., *FCC Determinations on Networking Issues in Multiple Ownership Proceedings* (Network Inquiry Special Staff Preliminary Report on Projects for Additional Networks) (February, 1980); C. H. Sterling, *Television and Radio Broadcasting*, in B. M. Compaine, C. H. Sterling, T. Guback, and J. K. Noble, Jr., *Who Owns the Media?* 299-372 (2d ed. 1982) (hereinafter cited as "Who Owns").

⁶ Federal Communication Commission, *Sixth Annual Report* 68 (FY 1940) (1941). The FM "six station rule" placed a burden on the application to show that its proposed ownership of more than one station in that service "would foster competition . . . or provide a high frequency broadcasting service distinct and separate from existing service" and that such ownership would "not result in the concentration of control of high frequency broadcasting facilities in a manner inconsistent with the public interest, convenience and necessity." Ownership of six stations was stated to be merely the point at which the Commission would in any case consider that such a concentration of control existed. *Rules Governing High Frequency Broadcast Stations*, 5 FR 2382, 2384 (1940).

⁷ H. H. Howard, *supra* note 5, at 6.

⁸ *Broadcast Services Other Than Standard Broadcast*, 6 FR 2282, 2284-2285 (1941). The Commission stated that it adopted a three station television ceiling rather than six as in FM because "the more limited television channels make three such stations the limit for the main television band." Federal Communications Commission, *Seventh Annual Report* 34 (FY 1941) 1941.

⁹ *Rules Governing Broadcast Services Other Than Standard Broadcast*, 9 FR 5442 (1944). NBC did not get all that it had asked for, however, as it had requested that the figure be raised to seven. H. H. Howard, *supra* note 5, at 8.

¹⁰ *Sherwood B. Brunton*, 11 F.C.C. 407, 413 (1946).

5. The decision in the KQW case also reflected the ambivalence about network ownership of broadcast stations which has colored many subsequent Commission ownership deliberations. The *Report on Chain Broadcasting*, adopted in May, 1941 stated that if "the question were presented as an original matter at this time, the Commission might well reach the conclusion that the businesses of station operation and network operation should be entirely separated." However, given the existing ownership situation, the Commission determined that requiring divestiture was undesirable.¹¹ The Commission did include in its new "chain broadcasting regulations" provisions forbidding network ownership of more than one AM station in the same area as well as prohibitions on operation of more than one network by a single entity.¹² The Supreme Court affirmed the Commission's promulgation of the chain broadcasting rules early in 1943.¹³ As one commentator has observed, the Court's ruling came at "a time when there was a great urge to support the central government and the administrative process . . . a period in which it was unusual for the Supreme Court to conclude that an administrative law initiative was unauthorized, much less that the authorization was unconstitutional."¹⁴ Several months later, the Commission concluded a rule making proceeding begun in 1941 and adopted a duopoly rule applicable to all AM licensees.¹⁵

6. Thus, by the mid-1940's the Commission had established the broad outline of what were to be the basic elements of its ownership regulations for several decades. There were to be local and national ownership limitations—regional regulations would come later—with special attention sometimes given to the role of networks. The Commission had also established use of a pattern of analysis in which it generally merged its consideration of action necessary to prevent economic concentration, essentially an antitrust matter, with concerns regarding diversity of information sources, a First Amendment issue, and frequently utilized a relatively unsophisticated approach to these merged issues.

7. In 1947, Senator Wallace White, Chairman of the Committee on Interstate and Foreign Commerce, introduced legislation which would, *inter alia*, have barred the use of numerical national ownership ceilings, and substituted the limitation that no person could own or control stations "which in the aggregate provide a primary service . . . for more than 25 percentum of the population of the continental United States as determined in the last preceding decennial census."¹⁶

The Commission opposed enactment of Senator White's proposal, arguing in part that it was "undesirable to attempt to write a single standard on multiple ownership which should govern all classes of service." It pointed out that it had not adopted an AM rule, and described the FM and TV rules as "tentative" and "[a] nyone who comes in and shows good reasons for changing it, up or down, will be given consideration."¹⁷ The proposal was also opposed by representatives of the broadcast industry, who generally favored elimination of ownership limitations.

B. The "Seven Station" Rule Making

8. The White proposals were not reported out of committee. However, in August, 1948, the Commission initiated a proceeding which for the first time proposed formal restrictions on the number of AM stations under common

control.¹⁸ The number suggested for AM was seven, the KQW figure. No changes were proposed in the existing ceilings of six FM and five TV stations, but the Commission suggested allowing two minority noncontrolling interests as a substitute for one controlling station holding. Thus, an individual would have been permitted noncontrolling interests in up to 14 AM, 12 FM and 10 TV stations.¹⁹ The Notice contemplated an effective date of January 1, 1953, to allow for the "orderly disposition of interests" in conflict with the rule.

9. One month after the Commission initiated the "seven station" proceeding, it established a "freeze" on the processing of new or pending applications for television station construction permits. The action was taken to allow the Commission time to revise the Table of Television Assignments, which had been adopted at the close of World War II. In early 1952, the Commission assigned VHF channels and channels in the new UHF band to various communities, and ended the "freeze" effective July 1. Thus, when the Commission took action in the "seven station" proceeding in November, 1953, television was on the edge of enormous expansion but relatively few stations were as yet operational.²⁰ The Commission's *Order* adopted the limits of seven AM and five TV stations as proposed. The AM limit was kept at seven, the Commission said, so that the existing holdings of such stations would not be "unduly disrupted." The Commission found that a seven station limit was "consistent with the historical development of AM broadcasting and the tremendous expansion that has been achieved almost entirely within the framework of that limitation." The six station FM rule

¹¹ FCC Report on Chain Broadcasting 67 (1941).

¹² *Id.*, at 92. The result of these requirements was to force NBC to divest itself of one of its two radio networks (which subsequently became ABC) and four owned-and-operated stations. H. H. Howard, *supra* note 5, at 8.

¹³ *National Broadcasting Co. v. United States*, *supra* note 2.

¹⁴ M. E. Price, *Taming Red Lion: The First Amendment and Structural Approaches to Media Regulation*, 31 Fed. Comm. L. J. 215, 220 (1978). The Court's approval of the Commission's action in the "chain broadcasting" case was based in part on a posited "scarcity" of the broadcast spectrum. *National Broadcasting Co., Inc. v. United States*, *supra* note 2, at 1008, 1011. The continuing validity of the "scarcity" rationale for regulation is questionable. See Part II, *infra*. See, also, for example, *Loveland v. FCC*, 707 F.2d 1443, 1459-1459 (D.C. Cir. 1983); D. L. Bazelon, *The First Amendment and the "New Media"—New Directions in Regulating Telecommunications*, 31 Fed. Comm. L. J. 201, 207 (1978). For a critique of the Court's reasoning in the NBC case, see W. E. Lee, *Antitrust Enforcement, Freedom of the Press, and the "Open Market": The Supreme Court on the Structure and Conduct of Mass Media*, 32 Vand. L. Rev. 1249, 1315, 1322 (1979) (hereinafter "W. E. Lee, *Antitrust*").

¹⁵ *Order No. 84-A—Multiple Ownership of Standard Broadcast Stations*, 8 FR 16065 (1943). In April, 1944, the Commission required divestiture of existing stations if necessary to comply with the new duopoly rule. *Order No. 84-B—Multiple Ownership of Standard Broadcast Stations*, 9 FR 3300 (1944).

¹⁶ S. 1333, 80th Cong., 1st Sess. (1947).

¹⁷ *To Amend the Communications Act of 1934: Hearings Before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce on S. 1333, 62-63, 70, 80th Cong., 1st Sess. (1947)*. The Commission also stated that on the basis of the 1940 Census, one person could have stations serving the entire population of 20 of the 22 states west of the Mississippi under the 25 percent rule. Even in the more populous East, one individual "could own stations serving virtually all of New England and the Middle Atlantic States." It believed that such a provision was therefore "not conducive to the prevention of monopoly."

¹⁸ *Amendment of §§ 3.35, 3.240, and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 13 FR 5060 (1948).

¹⁹ Additionally, the language of the proposed rule eliminated the presumption against ownership of more than one station embodied in the existing FM and TV rules. In its stead the *Notice* proposed that in determining whether ownership of stations below the limit constituted a concentration of control, the Commission would on a case-by-case basis consider "such factors as the size, extent and location of areas served, the number of people served, classes of stations involved, and the extent of other competitive service to the areas in question."

²⁰ *Amendment of § 3.606 of the Commission's Rules and Regulations*, 41 F.C.C. 148 (1952); Federal Communications Commission, *19th Annual Report* 110-112 (FY 1953) (1954); *Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to the Multiple Ownership of AM, FM and Television Broadcasting Stations*, 18 F.C.C. 288 (1953). Comments had been due on September 27, 1948. Oral argument was held on January 17, 1949.

was stated to have been raised to AM's level of seven "because of their interrelationship and the present status of FM's growth."²¹ The TV limit was maintained at five because in the Commission's "judgment based on extensive experience with the problems of multiple ownership," it had "proven practicable and desirable."

10. In adopting the "seven station rule," the Commission acknowledged the arguments by some parties that the proposed rules were arbitrary because they did not take into account "class and size of stations, geographical locations, populations served, and similar factors." Because of these adverse comments, it had "considered alternatives to the outstanding proposal." However, it had determined as a result of a study of existing multiple ownership that "any proposal to limit multiple ownership on the basis of such factors as class of station or geographic location" was "either unsatisfactory or unworkable." A formula which would "reasonably limit ownership on such basis" would have required extensive divestiture by existing licensees. Any formula which allowed existing licensees to maintain their holdings would, the Commission commented, "substantially extend the present maximum limitation on station ownership—a result felt to be completely unwarranted in view of the important policy considerations involved."²² Any new formula which would resolve that problem by "grandfathering" existing interests was viewed as providing "unfair preferential treatment" to existing multiple owners. Thus, the Commission concluded that the numerical type of limitation it has proposed was "the only sound and workable" regulatory method "because of the history and present development of the broadcast industry."²³

²¹ The Commission noted that as of January, 1953, 538 of the 600 existing FM stations were owned by AM licensees "and for the most part, duplicate the AM programming."

²² Only two licensees, CBS and J. Elroy McCaw, appear to have held interests in excess of those permitted under the new rule. They were given three years to divest. H.H. Howard, *supra* note 5, at 15.

²³ The new rule did state, as had its predecessors, that in determining whether a concentration of control existed, the Commission would on a case-by-case basis consider such factors as "the size, extent and location of areas served, the number of people served, classes of stations involved [radio only], and the extent of other competitive services to the area in question." Ownership in excess of the station ceiling was only the case in which the Commission would "in any event" consider that a concentration of control existed. However, it appears that no acquisition within the numerical national limit had then been or was ever prevented because of concerns regarding national ownership concentration. L. A. Powe, Jr., *supra* note 5, at 49. The reference to "size . . . of areas served" and related factors was deleted from the rule without specific explanation in 1977, in the proceeding

11. The Commission said that it had historically acted to further "diversification" of broadcast ownership in order to "implement the Congressional policy against monopoly" seen as underlying adoption of the Communications Act and "in order to preserve competition." The "principle" of "diversification", it stated, required a limit on the number of stations "which may be licensed to any person or persons under common control." The Commission said that the vitality of the system of broadcasting depended on a group of diversified licensees "prepared and qualified to serve the varied and divergent needs of the public for radio service." Thus, the fundamental purpose of its new national ownership rules was "to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest."²⁴ The Commission decided that the Notice proposal to equate two minority non-controlling interests with one controlling interest would not be implemented. It stated that while the holder of a minority interest might have only slight influence on station operations, it also appeared that such an individual might exert considerable influence not directly correlated with the size of his holdings.²⁵

12. The Commission noted in the Report and Order that neither the prior nor the new rules differentiated between UHF and VHF television. It concluded that as it and others were then studying the status of UHF, it would defer action on pending petitions to increase or eliminate the ceiling on UHF ownership to "the over-all UHF study."

13. Less than a month later, on December 24, 1953, it adopted a Notice proposing an increase in the

adopting the present rule regarding regional ownership limits. The regional ownership rule was adopted in large part to eliminate case-by-case consideration of issues related to "regional concentration of control." *Amendment of §§ 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 83 F.C.C. 2d 824, 825-826, 830-831 (1977).

²⁴ *Amendment of §§ 73.35, 73.240 and 73.636 of the Rules and Regulations Relating to the Multiple Ownership of AM, FM and Television Broadcast Stations*, *supra* note 20, at 292-293.

²⁵ The Commission rejected arguments that its actions were really improper attempts to enforce the antitrust laws, a responsibility entrusted by Congress to the Justice Department, and the Federal Trade Commission. Rather, the Commission stated, its actions were designed to implement the Congressional policy against monopoly it saw as embodied in the Communications Act.

²⁶ The Commission stated that opposition to its proposal to consider the interests of non-shareholder officers and directors of licensees and applicants ignored the realities of business organization and control. It observed that "[i]n numerous business organizations the actual day to

permissible UHF ownership level."²⁷ Three petitions to permit additional UHF ownership had been filed: (a) An NBC proposal that there be no limit on the number of UHF stations owned; (b) a request by Allen B. DuMont Laboratories, Inc. ("DuMont") that the allowable maximum television ownership be increased to eight stations, of which no more than five could be VHF; and (c) an American Broadcasting Companies, Inc. ("ABC") proposal that the ceiling be raised to seven, with a five VHF maximum. The Commission stated that it believed initiation of the new rule making proceeding was appropriate "in order to encourage the rapid and effective development of the UHF band." It proposed action on the ABC "seven station" approach, finding this "best designed" to achieve the objective of UHF development "consistent with preventing an undue concentration of control of television facilities."

14. While the UHF proposal was under consideration, Senator Edwin Johnson of Colorado introduced a bill²⁸ which would have set a statutory ownership limit of five VHF stations, with two UHF's substitutable for one VHF (so that one might, for example, own four VHF and two UHF stations, up to a ten UHF maximum). Hearings were held on the Johnson bill in mid-1954, as part of a larger Senate review of the condition of UHF broadcasting.²⁹ The Commission opposed enactment of the bill. The Johnson proposal required a licensee that already had five VHF stations to dispose of one as a condition of obtaining two UHF's. The Commission did not believe those holding five VHF stations would sacrifice a VHF outlet for the sake of UHF ownership. It therefore saw the short-term impact of the

day control is in the hands of officers and directors who are not necessarily owners or stockholders." The Commission believed it was reasonable and necessary to "take cognizance of the interests of directors and officers of licensees and applicants in order to preserve competition and prevent monopoly in the broadcasting field." The Commission determined that in corporations with fifty voting shareholders or more, only the interests of shareholders who were officers or directors or held one percent or more of the outstanding voting stock need be considered under the rule. These "attribution" aspects of the "seven station rule" were subsequently modified on several occasions to give special treatment to the interests of various "passive" institutional investors. Further revisions to the "attribution" aspects of the multiple ownership rules are being considered in a separate Commission proceeding, *Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, 48 FR 10082 (March 10, 1983). They are not under review herein.

²⁷ *Amendment of § 73.636 of the Commission's Rules and Regulations Relating to Multiple Ownership of Television Broadcast Stations*, 18 FR 8904 (1953).

²⁸ S. 3095, 83d Cong., 2d Sess. (1954).

Johnson bill as "maintenance of the status quo with respect to ownership of television stations by the networks or the other major interests in the broadcasting field."³⁰

15. On September 17, 1954, no further action having been taken on the Johnson bill, a Report and Order was adopted in the UHF docket.³¹ The modification of the television rule to allow for ownership of seven stations, a maximum of five being VHF, was enacted as proposed.³² The Commission stated that this action was not a turning-away from its decision of a year earlier in the main "seven station" proceeding. However, it observed that a key factor in its decision was the belief that diversity should not always be its paramount consideration:

Clearly if the only relevant consideration were implementation of the policy of diversification, an absolute limitation of one broadcast station to any one person or persons under common control would best serve the public interest. But, of course, that is not the case. The multiple ownership of broadcast stations does play an important role in our nationwide broadcast system. The ownership of broadcast stations in major markets by the networks, for example, is an important element of network broadcasting. Our nation-wide system of broadcasting as we know it today requires that some multiple ownership of broadcast stations be permitted. We have always recognized these needs and have by rule permitted multiple ownership of broadcast stations in the light of such (other and competing) considerations. Here too it is our view that the greater good which will flow from the proposed rule offsets the disadvantage resulting from permitting individual licensees to own a larger number of stations.³³

³⁰ Status of UHF and Multiple Ownership of TV Stations: Hearings Before the Subcomm. on Communications of the Senate Comm. on Interstate and Foreign Commerce, 83d Cong., 2d Sess. (1954).

³¹ Additionally, the Commission questioned whether it would be in the public interest in any case for any person to have an interest in more than seven television stations, even if a substantial percentage were UHF.

³² Amendment of § 3.636 of the Commission's Rules and Regulations Relating to Multiple Ownership of Television Broadcast Stations, 43 F.C.C. 2797 (1954).

³³ The Commission concluded that this action would be of particular assistance to UHF development "in the larger prefreeze markets where high VHF-only saturation obtains." It believed that it was "in these markets particularly where the prestige, capital, and know-how of the networks and other multiple owners would be most effective in aiding UHF."

³⁴ *Id.*, at 2801-2802. Additionally, the Commission stated that the rule continued to provide that "a grant of even one additional station would not be made where it would result in a concentration of control of * * * broadcasting in a manner inconsistent with the public interest, convenience and necessity." The Commission rejected the proposal of Ozark Television Corporation, St. Louis, ("Ozark"), that it adopt a "five and two and one-half" rule. Under the Ozark proposal an individual

16. In dissenting from the decision, Commissioner Hennock objected in part to the fact that the rule established a uniform ceiling "for small and large stations alike without any reference to wide discrepancies in the size of areas covered or the population served. There is scant justification for giving equal treatment to seven widely scattered small stations and on the other hand to seven large powerful stations serving major markets in metropolitan centers like New York." Although Commissioner Doerfer concurred in the decision because the new rule provided greater flexibility than the previous version, he stated, "A number related to population, or areas, or capacity to program in the public interest is a more realistic guide or standard than a bare numerical evaluation. There is not much more than intuition as the basis for the present rule."³⁴

17. The Commission's authority to promulgate such rules was put to the judicial test as a result of an appeal of the initial five station television limit by Storer Broadcasting Company ("Storer"). On November 25, 1953, the day the five station rule was adopted, the Commission dismissed Storer's application for a construction permit for Channel 10 in Miami.³⁵ The station would have been Storer's sixth VHF outlet. Storer argued on appeal that the Communications Act provided it with the right to a "full hearing" on its application. It contended that the Commission could only resolve such questions as what constitutes "concentration of control" on a case-by-case basis. The Court of Appeals for the District of Columbia Circuit agreed.³⁶ However, the Supreme Court held that the hearing requirement did not prevent the Commission from exercising "the rule making authority necessary for the orderly conduct of its business."³⁷ The Court stated that it in fact read the Act and regulations as providing a "full hearing" for those applicants who had "set out adequate reasons why the rules should be waived or amended." However, the Court found that no hearing need be held unless the application set forth reasons, "sufficient if true," to justify a change or waiver of the rules.³⁸

could have minority interests in five UHF stations in addition to control of five stations as permitted under the existing rule.

³⁵ *Id.*, at 2803-2804.

³⁶ *Storer Broadcasting Company*, 18 F.C.C. 300 (1953).

³⁷ *Storer Broadcasting Company v. United States*, 220 F.2d 204 (D.C. Cir. 1955).

³⁸ *United States v. Storer Broadcasting Company*, 351 U.S. 192, 202-205 (1956).

³⁹ On remand, the Court of Appeals upheld the specific numerical limitation because no information was before the Court which

C. Action Since 1954

18. While the seven station numerical limitation has not changed since 1954, both the Commission and the Congress have from time to time given serious consideration to its modification. In these actions, Congress and the Commission generally have not focused on whether continuation of this type of regulation is appropriate, but have struggled with much the same issues raised in earlier deliberations. For example, in 1956 attention was drawn to legislation introduced by Senator John Bricker of Ohio³⁹ which would have adopted, for television only, a 25 percent population coverage limitation similar to that which Senator White proposed in 1947. The purpose of the Bricker bill was to encourage competition by facilitating the growth of independent stations. Bricker believed that substituting the 25 percent limit for the "sterile abstraction" of a seven station ceiling "entirely unrelated to factors of population and markets covered" would allow independents to obtain sufficient coverage to compete with the networks and perhaps become network operators themselves.⁴⁰

19. During late 1956 and early 1957, there was also internal Commission consideration of possible alternatives to the rule, including such options as population coverage limits and case-by-case reviews of concentration issues.⁴¹ However, no action was taken, and the October, 1957, release of a special Commission study of network broadcasting appears to have put an end to these deliberations.⁴² The study was conducted by a special staff under the direction of Dean Roscoe L. Barrow of the University of Cincinnati College of Law, and is thus commonly known as the "Barrow Report."

20. The fundamental focus of the Barrow Report was "the effect of the television network structure and network practices on the concentration of control in the industry and on the

outweighed the Commission's judgment that these limits were appropriate. *Storer Broadcasting Company v. United States*, 240 F.2d 55 (D.C. Cir. 1956).

³⁹ S. 3859, 84th Cong., 2d Sess. (1956). Virtually identical bills were introduced in the House as H.R. 10524, H.R. 10733 and H.R. 10756.

⁴⁰ Additionally, the 25 percent figure would not have required any divestiture, as NBC, the largest owner in coverage terms, reached only 23 percent of the population within its service areas. *The Network Monopoly: A Report for the Comm. on Interstate and Foreign Commerce* 22-25, 84th Cong., 2d Sess. (1956).

⁴¹ H. H. Howard, *supra* note 5, at 19-31.

⁴² The report was subsequently published by the House of Representatives as *Network Broadcasting: Report of the Committee on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. (1958).

opportunities for competition." However, the document also included a lengthy discussion of television multiple ownership as such, since its authors believed group ownership in television raised significant questions regarding competition.⁴³ As to modifying the numerical limit, the report concluded that if the Commission were to consider the matter *de novo*, a limit of one television station per licensee would best serve the public interest. However, it found that requiring the divestiture necessary to achieve this result would be inappropriate.

21. Considering other regulatory alternatives, the report argued that adopting a 25 percent population coverage ceiling would result in substantial increases in multiple ownership. A 10 percent population limit would as a general matter also allow a substantial increase, but would also have required divestiture by the three networks and at least one other multiple owner. Further, such a rule would have precluded any New York City licensee from owning a second station in any market of significant size.⁴⁴

22. The report thus proposed that over a period of time the Commission seek "a pattern of ownership which approaches one to a customer as closely as the circumstances permit." More immediately, it recommended that a sub-element of the seven station rule be a limitation of no more than three VHF licenses in the top 25 markets. Although the Commission held hearings on the Barrow Report from March through July, 1959, no affirmative action was taken regarding its recommendations.⁴⁵

23. In something of a reprise of Barrow's "top 25" proposals, the Commission again turned to consideration of numerical ownership limits in 1964, when its concerns regarding an apparent trend toward ownership concentration in major markets led to adoption of the "interim top 50 policy."⁴⁶ The policy required that applications to acquire a second VHF station in the top 50 markets be designated for hearing unless there was a "compelling affirmative showing." In 1965, the Commission proposed adoption of a rule prohibiting ownership of more than three television stations or

two VHF stations in the top 50 markets, and established a new "interim policy" under which applications in conflict with the proposed rule would be designated for hearing "absent a compelling affirmative showing to the contrary."⁴⁷ In 1968, the Commission declined to formulate a rule, but adopted a "top 50 policy" which required licensees seeking to acquire a fourth television station or a third VHF station in the top 50 markets to make a "compelling public interest showing" that the benefits of the transfer would overcome the transfer's presumed "detriment with respect to the policy of diversifying the sources of mass media communications to the public."⁴⁸ The Commission eliminated the policy in 1979, having found that the feared trend toward additional ownership concentration had not occurred.⁴⁹

24. The issue has recently received Congressional attention in the House Communications Subcommittee's 1978-79 attempts to comprehensively rewrite the Communications Act.⁵⁰ The 1978 rewrite bill proposed a limit of five radio and five television stations, with no more than three television stations in the top 50 markets. Divestiture of existing holdings would not have been required. The only proposed limitation in the 1979 version of the bill was a seven station ceiling for television. Active consideration of legislation on the matter ended when rewrite efforts were abandoned.⁵¹

⁴³ *Interim Policy Concerning Acquisition of Television Broadcast Stations*, 5 R.R. 2d 271, 272 (1965).

⁴⁴ *Multiple Ownership of TV Broadcast Stations*, 22 F.C.C. 2d 686 (1968).

⁴⁵ *Amendment of § 73.636(a) of the Commission's Rules (Multiple Ownership of Television Stations)*, 75 F.C.C. 2d 585 (1979), recon. denied, 82 F.C.C. 2d 329 (1980), *off'd sub nom. National Association for the Advancement of Colored People v. FCC*, 682 F. 2d 993 (D.C. Cir. 1982). During the years the policy was in effect, the Commission determined that a "compelling public interest showing" had been made in each of the 19 cases brought before it. Factors which were found to be "compelling" included financial revitalization and capital improvement of an ailing station, increase in diversity of media control in the local market, improved programming, buyer's "general lack of market dominance," absence of concentration of control by the acquiring entity, and improved service to minorities. *Tribune Publishing Co.*, 45 F.C.C. 2d 227, 229 (1974); L.A. Powe, Jr., *supra* note 5, at 85. The length and expansive nature of this list of itself raises serious question as to whether there was ever any need for the policy as such. For a more comprehensive analysis of the "top 50" proceedings and cases, see L.A. Powe, Jr., *supra* note 5, at 60-72, 87-95.

⁴⁶ H.R. 13015, 95th Cong., 2d Sess. (1978); H.R. 3333, 96th Cong., 1st Sess. (1979).

⁴⁷ However, diversity and ownership concentration have been an area of continuing Congressional study. See, for example, *Telecommunications in Transition: The Status of*

II. Changed Circumstances and Arbitrariness

25. It is clear from our examination of the record that there has always been substantial debate, within the Commission and elsewhere, regarding the use of the "seven station rule" and its numerical predecessors as limits on national ownership concentration. This debate, however, has only infrequently focused on the continued desirability, if any, such regulation. Further, it generally has not involved questioning of the joint regulatory treatment of economic concentration and diversity issues, nor has there been much consideration given to delineating the relevant markets involved. Thus, absent more sophisticated analysis, the operation of the rule has historically engendered concern in two ways: (a) It does not take into account the signal coverage of the individual station or the size of the population its programming reaches; and (b) it may serve both to enhance the power of the three major networks and to preclude the initiation of new over-the-air networks and programming. Even when considered from this more traditional perspective, the growth in on-air broadcast stations suggests that the Commission's national ownership regulations are ripe for change. Indeed, after a thorough review of the matter, the Commission's most recent "network study" concluded that the use of the rule is "arbitrary and capricious."⁵² When such factors as the recent development and growth of alternative program sources are given consideration, the importance of regulatory change in this area is even more apparent.

26. When the Supreme Court approved promulgation of the "seven station rule," it did so with the expectation that "if time and changing

Competition in the Telecommunications Industry. A Report by the Majority Staff of the Subcomm. on Telecommunications, Consumer Protection, and Finance 235-300, 97th Cong., 1st Sess. (Comm. Print 1981) (hereinafter "Telecommunications in Transition"); Print and Electronic Media: The Case for First Amendment Parity. National Telecommunications and Information Administration ("NTIA") Staff Report to the Chairman, Senate Committee on Commerce, Science, and Transportation 56-109, 98th Cong., 1st Sess. (Comm. Print 1983) (hereinafter "Print and Electronic Media").

⁵² *Network Inquiry Special Staff Final Report. New Television Networks: Entry, Jurisdiction, Ownership and Regulation (Vol. II)* 17, 361, 439 (1980) (hereinafter "New Television Networks"). Thus, even a commentator supportive of continued national television ownership regulation acknowledges that the present limit is "arbitrary," stating that "[t]here is no real basis for the number

⁴³ *Id.*, at 553-599.

⁴⁴ The report found similar problems with a "market rank" approach. Another alternative, that of considering ownership matters "case-by-case," would have required appropriate standards defining the "diversity of ownership" principle.

⁴⁵ H. H. Howard, *supra* note 5, at 37-38.

⁴⁶ *Hearings on Applications for Second VHF Stations*, 3 R.R. 2d 909 (1964).

circumstances reveal that the 'public interest' is not served by application of the Regulations," the Commission would consider whether the rule should be modified or held inapplicable.⁵³ At the time the rule was adopted, television and FM were still in their infancy, development of both services having been severely retarded by World War II restrictions on private use of construction and electronic materials.⁵⁴ the subsequent "freeze" on television applications processing, and 1945 decision by the Commission moving the FM service to a higher frequency band.⁵⁵ Thus, given the way in which the Commission had historically approached national ownership issues, it is not difficult to understand its concerns at that time regarding ownership concentration when one notes that early in 1953 there were only 96 fully licensed television stations, of which 30 were controlled by six group owners holding the then-maximum of five licenses each.⁵⁶

27. However, as Table 1 below shows, the number of on-air stations has increased dramatically since 1953:

TABLE 1.—BROADCAST STATIONS ON-AIR 1953 AND 1983¹

	1953	1983	Per- cent in- crease
TV	199	1,127	466
AM	2,458	4,720	92
FM	686	4,532	561
Total stations	3,343	10,379	210

¹ 1953 figures as of June 30. Source: Federal Communications Commission, 47th Annual Report 96-98 (FY 1981) (1982). 1983 figures as of June 30. Source: FCC Release 84-4, July 22, 1983. All figures include noncommercial stations. 1953 data includes on-air stations operating with construction permits, while 1983 data includes only licensed stations. For a depiction of the impact of this growth in selected radio markets, see the Notice of Inquiry and Proposed Rule Making in Deregulation of Radio, 73 F.C.C. 2d 457, 548 (1979).

28. We believe that the growth in the number of over-the-air stations since 1953 constitutes a fundamental change in the nature of the media marketplace that of itself calls for a reexamination of our approach to national ownership limitations. Such action is consistent with the Commission's view that its rules and policies should be drawn with an eye to the current market environment in which its licensees and applicants operate, "so as to facilitate maximum service to the listening and viewing public while minimizing the cost induced by regulation."⁵⁷ Further evidence of the need for this review is the enormous growth which has occurred in cable television and other nontraditional programming sources. Cable television has gone from an estimated 150 systems serving 30,000 subscribers in 1953 to approximately 5,000 systems with 29-32 million subscribers in mid-1983.⁵⁸ Thus, cable now passes about 60 percent of all television households, and 35-39 percent of television households now subscribe to cable service.⁵⁹ This is predicted to increase to the 46-50 percent range by 1985, and to as much as 60 percent by

1993.⁶⁰ Pay cable networking, which provides numerous new programming options through satellite distribution, now reaches more than half of all basic cable subscribers.⁶¹

29. Other alternatives to conventional over-the-air broadcasting include multipoint distribution service ("MDS"), a microwave delivery service, and subscription television ("STV") from over-the-air stations. At the close of 1982, there were 99 MDS systems, serving approximately 565,000 subscribers. This service can be expected to expand significantly as a result of recent Commission action reallocating certain spectrum for multichannel MDS service.⁶² Nineteen STV stations serve 985,560 subscribers. An estimated 100,000-150,000 subscribers received service from satellite master antenna television ("SMATV") services at the end of 1982. Industry sources expect the SMATV market to double from the 500,000 homes presently passed to one million homes by 1984.⁶³ Additional new service will be introduced as the Commission processes the more than 12,000 low power television station applications currently on file, and direct broadcast satellite ("DBS") service is expected to provide most Americans with additional viewing options in the near future.⁶⁴ Another option for consumers is offered

five or seven, and it makes little sense to equate a station in Butte with one in New York City." This commentator argues for "revision and rationalization" of the limitation. H. Geller, *FCC Media Ownership Rules: The Case for Regulation*, 32 J. of Comm. 148, 155 (Autumn 1982) (hereinafter "H. Geller, *FCC Media Ownership*").

⁵³ *United States v. Storer Broadcasting Co.*, supra note 37, at 205, citing *National Broadcasting Co. v. United States*, supra note 2, at 207, 225.

⁵⁴ Shortages were such that existing AM broadcasters were ordered to reduce power in order to conserve their equipment. Federal Communications Commission, *Ninth Annual Report* 46-47, 53-54 (FY 1943) (1944).

⁵⁵ This action rendered existing FM radios and transmitters obsolete, slowing the growth of FM for more than a decade. E. G. Krasnow and L. D. Longley, *Smothering FM with Commission Kindness*, in *The Politics of Broadcast Regulation* 107-117 (2d ed. 1978).

⁵⁶ *Doubleday Broadcasting Co., Inc., Amendment of §§ 73.35 and 73.240 of the Commission's Rules, Regarding Multiple Ownership 4* (Petition for Rule Making) (October 6, 1982), citing *Broadcasting*, March 30, 1953, at 27. The number of commercial FM stations was actually in decline, and most were being operated by AM owners as part of AM-FM combinations. Federal Communications Commission, *19th Annual Report*, supra note 20, at 102, 115. Of an estimated 110 million sets in use, including combination models, only 25 million received television and only 10 million received FM Broadcasts. *Id.*, at 113. Although the number of commercial AM stations was substantial, the national networks played a major role in the service through program distribution and through their ownership of a significant number of the Class I-A "clear channel" stations. See, for example, *FCC Report on Chain Broadcasting*, supra note 11, at 16, 23, 67. For a contemporaneous description of the clear channel service, see Federal Communications Commission, *Fourteenth Annual Report* 31 (FY 1946) (1946).

⁵⁷ *Amendment of Section 73.3587 of the Commission's Rules*, 47 FR 965 (1982). As the Court of Appeals for the District of Columbia Circuit has stated, "a regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." *City of Chicago v. FCC*, 458 F. 2d 731, 742 (D.C. Cir. 1971), cert. denied, 405 U.S. 1074 (1972), cited in *Home Box Office v. FCC*, 567 F. 2d 9, 36 (D.C. Cir. 1977) (per curiam), cert. denied, 435 U.S. 829 (1977). See also *FCC v. Pottsville Broadcasting Co.*, supra note 2, at 138; *Pinellas Broadcasting Co. v. FCC*, 230 F. 2d 204, 206 (D.C. Cir. 1956), cert. denied, 350 U.S. 1007 (1956).

⁵⁸ *Television Factbook No. 50* (Services Volume 1981), at 83-a; *Broadcasting/Cablecasting Yearbook* 1983 (1983), at D-3; *CableVision*, July 25, 1983, at 94; *Communications Daily*, June 20, 1983, at 10; *Multichannel News*, June 27, 1983, at 4.

⁵⁹ Arbitron puts July, 1983, penetration at 35 percent nationally. *Communications Daily*, August 3, 1983, at 4. See also, *CableVision*, supra note 58. A.C. Nielsen estimates July, 1983, penetration at 39.3 percent nationally. *Broadcasting*, September 5, 1983, at 90.

⁶⁰ Donaldson, Lufkin & Jenrette, *Industry Viewpoint: Cable '82*, (October, 1982), at 13, estimates 46 percent. *New York Times*, April 7, 1983, at D. 20, cites estimate of 50 percent by Robert H. Alter, *Cabletelevision Advertising Bureau*. Other estimates generally center in this range. *Multichannel News*, June 13, 1983, at 35, cites Paul Kagan projection of 60 percent by 1993.

⁶¹ *CableVision*, supra note 59.

⁶² Data on the number of MDS systems from Paul Kagan Associates, Inc., *The Pay TV Newsletter*, Census Issue (1983), at 2. Data as of December 31, 1982. Kagan reports that the operating MDS systems were marketing to areas comprised of almost 14 million dwelling units. As to multichannel MDS, see *Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 48 FR 33673 (July 26, 1983). By September 9, 1983, the filing deadline, an estimated 15,000 multichannel MDS applications had been submitted to the Commission.

⁶³ As to the number of STV stations and subscribers, see *Broadcasting*, September 5, 1983, at 36, citing Paul Kagan Associates data. Data on the number of SMATV subscribers from *The Pay TV Newsletter*, supra note 63, at 1, and Donaldson, Lufkin & Jenrette, supra note 61, at 61. As to estimate for 1984 SMATV expansion, see *Multichannel News*, May 23, 1983, at 21.

⁶⁴ *Direct Broadcast Satellites Services*, 90 F.C.C. 2d 676 (1982), recon. denied, FCC 83-241, released May 19, 1983; *Satellite Television Corporation*, 91 F.C.C. 2d 953 (1982); *CBS, Inc.*, 92 F.C.C. 2d 64 (1982). See, also, *GTE Satellite Corporation*, 90 F.C.C. 2d 1009 (1982), recon. denied, FCC 83-271 released June 23, 1983; *Broadcasting*, August 1, 1983, at 21.

by video cassettes and video discs. About 6.4 million home video cassette recorders ("VCRs") were in use throughout the country as of July, 1983, and VCR sales were booming at an annual rate of almost 5 million units a year. The video disc player is designed to be a relatively low cost video medium. Unlike the VCR, it is a playback-only device. In 1982, the first year of mass marketing, about 220,000 video disc players were sold in the United States.⁶⁵ Further, the Commission has recently acted to limit the protection from interference afforded Class I-A clear channel stations so as to increase spectrum availability for new AM radio service, and has taken action which increases the number of potential FM stations by more than 600. Similar action to increase the number of VHF stations is under consideration.⁶⁶

30. The increase in the number and stability of over-the-air stations over the past three decades, and the expected future increase in the number of such stations, combined with the existing development and projected growth of broadcast-like alternatives, suggest that the potential for such national ownership concentration as would tend to monopoly or threaten diversity is far less a matter of concern today than might have been the case in 1953 and earlier years, even if viewed from the same perspective.⁶⁷ Relaxation of the rule would, *inter alia*, allow us to mitigate the arbitrary nature of its impact and its negative effect on program development, and relieve a

⁶⁵ Electronic Industries Association, *Consumer Electronics Annual Review: 1983 Industry Facts and Figures* (1983), at 16, 18; TV Digest, August 15, 1983, at 10-12.

⁶⁶ *Clear Channel Broadcasting in the AM Broadcast Band*, 78 F.C.C. 2d 1345 (1980), *reconsidered*, 48 R.R. 2d 1077 (1980), *aff'd sub nom. Loyola University v. FCC*, 670 F. 2d 1222 (D.C. Cir. 1982); *Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments*, 53 R.R. 2d 1550 (1983); *Table of Television Channel Allotments*, 83 F.C.C. 2d 51 (1980). The multiplication in the number of AM and FM stations coupled with the recent reduction in protection offered clear channel stations has significantly reduced the once-dominant rural service role of the limited number of clear channel operators.

⁶⁷ As to cable television, we have recently held that "while the amount of concentration in the cable television industry is increasing it is still not a concentrated industry" and that "in general, there is no reason to suspect that any trend exists which is decreasing the vigor of competition between cable television operators in the franchising process or that the industry has reached or is likely to reach a point in the near future where concentration in it endangers the diversity of viewpoints received by the public." We therefore declined to adopt rules limiting multiple system ownership. *Amendment of Part 78, Subpart J of the Commission's Rules and Regulations Relative to Diversification of Control of Community Antenna Television Systems*, 52 R.R. 2d 277 (1982).

questionable regulatory restraint. Thus, even in the context of the traditional approach to national ownership matters, Commission action regarding our national ownership rules appears in order.

31. This is particularly the case in radio, where both the size of the audience reached and the number of

stations owned by groups are an extremely low percentage of the whole, and only three owners have the maximum number of 14 outlets.⁶⁸ Table 2 shows the status of commercial station group ownership in radio since the early days of the medium, for groups with three or more stations. The current audience of the top group owners is found in Table 3.⁶⁹

TABLE 2.—COMMERCIAL RADIO STATION GROUP OWNERSHIP 1929-1980¹

Year	Total number of AM's	Total number of FM's	Number of group owners	Number of group owned stations	Average number of stations owned/group	Percent of stations under group ownership
1929	600		12	20	1.7	3.3
1939	764		39	109	2.8	14.3
1951	2,295	558	63	253	4.0	8.9
1953	2,495	537	88	423	4.8	14.0
1970	4,304	2,145	250	1,432	5.7	22.2
1978	4,498	3,010	324	1,905	5.9	25.4
1980	4,572	3,267	360	2,124	5.9	27.1

¹ Source: M.O. Wirth, *The FCC's Multiple Ownership Rules and National Concentration in the Commercial Radio Industry*, (prepared for the National Association of Broadcasters) Table 1 (1981). Except for 1929 and 1939 data, only groups which owned three or more stations generally are included in the group ownership statistics, due to the limitations of available data. 1929 and 1939 figures should be viewed as approximations, due to limitations of source material.

TABLE 3¹.—TOP 20 COMMERCIAL RADIO STATION GROUP OWNERS AS RANKED BY TOTAL WEEKLY LISTENERS—1983

Rank	Ownership unit	Number of stations owned	Total weekly listeners
1.	CBS	14	14,757,200
2.	ABC	13	13,961,200
3.	Westinghouse	11	9,532,500
4.	NBC	9	9,298,400
5.	RKO	11	8,482,200
6.	Capital Cities	14	8,013,300
7.	Metromedia	13	7,772,200
8.	Bonneville	11	5,747,300
9.	Gannett	13	5,659,100
10.	Cox	12	4,837,100
11.	Infinity	9	4,440,500
12.	Douglas	8	4,329,100
13.	Greater Media	10	3,978,800
14.	Tribune Co.	5	3,954,500
15.	Taft	11	3,812,700
16.	Inner City	7	3,520,300
17.	Malrite	13	3,410,200
18.	Plough	12	3,252,200
19.	Viacom	9	3,138,900
20.	Blair	8	3,137,000
Total		213	

¹ Source: J. H. Duncan, Jr., *American Radio: Spring 1983* A-38, A-40 (1983). Based on Arbitron data. Data includes those individuals 12+ who listened to the station for five minutes or more during a given week. Data includes AM and FM stations. Source counts simulcast AM-FM stations as single stations, and includes only those groups with five or more stations showing up in market rating books (which does not substantially impact above list).

⁶⁸ On observer has remarked that the seven AM/ seven FM limit has become "difficult to defend in light of the 9,000 stations and increasing numbers," and that given this "radio of abundance," revision is appropriate and is "unlikely to do much harm to the diversification principle." H. Geller, *FCC Media Ownership*, *supra* note 52, at 155.

⁶⁹ Although it appears important in the context of this proceeding to describe the nature of group ownership of broadcast stations, the limits on the significance of this information should be noted. Concern with such data tends to overemphasize the impact of group ownership, to the detriment of the

32. In addition to the growth in the number of radio stations, in recent years significant expansion in the number and diversity of national and regional radio networks has broadened the availability of programming for local stations. The number of national networks has grown from the historic four—ABC, CBS, NBC and Mutual—to an estimated 19 at the close of 1981.⁷⁰ There are 98 regional networks which also meet diverse needs.⁷¹ However, no networks (or other sources) dominate radio station ownership or the supply of its audio content.⁷²

33. While group ownership plays a more significant role in television than radio, with 72 percent of all commercial

significance which should be placed on the number of competing stations/voices found in local markets. See J. D. Levy and P. O. Setzer, *Measurement of Concentration in Home Video Markets*, (FCC Office of Plans and Policy) (December 23, 1983), at 74. Based on the competitive nature of the radio marketplace, the Commission has eliminated most content-related radio regulation, an action recently affirmed in most respects by the Court of Appeals for the District of Columbia Circuit. *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983). See, also, *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981).

⁷⁰ National Association of Broadcasters Committee on Science and Technology, *New Technologies Affecting Radio and Television Broadcasting* 37 (1981). This development has apparently been facilitated by our 1977 elimination of the "chain broadcasting" prohibition on dual networking in radio discussed at paragraph 5, *supra*. It should be noted that stations can affiliate with more than one network.

⁷¹ *Broadcasting/Cablecasting Yearbook 1982* D-46-D-50 (1982).

⁷² *Telecommunications in Transition*, *supra* note 51, at 276, 278-279, 340-342.

television stations group-owned in 1982, there is substantial national ownership diversity. The 571 group-owned commercial television stations operating at the beginning of 1982 were controlled by 169 different entities. Table 4 depicts

the state of television group ownership from 1956 to 1982, while Table 5 shows the distribution of group owners by number of stations. Table 6 ranks the 20 largest groups by "net weekly circulation."

TABLE 4.—COMMERCIAL TELEVISION STATION GROUP OWNERSHIP 1956-82

	1956			1966			1972			1982		
	Group owned	Total stations	Percent of total	Group owned	Total stations	Percent of total	Group owned	Total stations	Percent of total	Group owned	Total stations	Percent of total
VHF	175	369	47	336	480	70	362	507	71	418	518	81
UHF	30	87	35	60	112	54	85	181	47	153	272	56
Total	205	456	45	396	592	67	447	688	65	571	790	72

¹ Source: P. W. Cherington, L. V. Hirsch, and R. Brandwein, *Television Station Ownership* 121 (1971); *Broadcasting Yearbook 1972* (1971); *Broadcasting/Cablecasting Yearbook 1982*, supra note 14; *Television Factbook*, Vols. 42, 50 and 51 (Stations Volumes 1972, 1981 and 1982). Totals found in Tables 4 through 7 and the associated text may vary due to the use of several sources and varying methodologies for data compilation. Such data tends to overemphasize the significance of the increase in group ownership, to the detriment of the attention which should be given to the increase in the total number of voices and the number of competing stations/voices found in local markets.

TABLE 5.—NUMBER OF COMMERCIAL TELEVISION STATION OWNERSHIP GROUPS 1972, 1982, AND 1983¹

Number of TV stations owned	1972 groups	1982 groups	1983 groups
2	64	62	62
3	34	44	46
4	20	28	29
5	20	15	13
6	5	12	15
7	1	8	9
Total group ownership	144	169	174

¹ Ownership defined as majority shareholder or by a principal of the group being president of the station licensee. Source: *Broadcasting Yearbook 1972*, supra note 14; *Broadcasting/Cablecasting Yearbook 1982*, supra note 14; *American Research Bureau, Inc., ARB 1972 Television Market Analysis* (1972); The Arbitron Company, *1981-1982 Television Markets and Rankings Guide* (1981); *Television Factbook*, Vols. 42, 50, and 51, supra note 14; H. H. Howard, *Group and Cross-Media Ownership of Television Stations in 1983*, at 6 (prepared for the National Association of Broadcasters) (1983), citing *Television Factbook*, Vol. 51, supra note 14, and other sources noted at 4.

TABLE 6.—TOP 20 COMMERCIAL TELEVISION STATION GROUP OWNERS AS RANKED BY NET WEEKLY CIRCULATION 1980, 1982, AND 1983¹

Group owner	Rank			Net weekly circulation (households)	Number of stations
	1980	1982	1983		
CBS	2	2	1	15,722,300	5
ABC	1	1	2	15,695,800	5
Metromedia	3	4	3	15,425,000	7
NBC	4	3	4	14,814,500	5
Tribune Co.	5	6	5	10,124,400	3
Westinghouse	7	7	6	8,889,000	6
RKO General	6	5	7	8,068,400	3
Storer	8	8	8	7,313,000	7
Field Communications	9	9	9	7,257,500	5
Gaylord	10	11	10	6,120,000	7
Cox	12	13	11	6,047,600	6
Capital Cities	11	10	12	5,973,900	6
Taft	13	12	13	5,947,800	7
Hearst	14	20	14	4,453,500	5
Scripps-Howard	15	14	15	4,249,900	6
Post-Newsweek	18	15	16	4,011,300	4
Times-Mirror	16	17	17	3,933,900	7
Gannett	17	18	18	3,902,000	7
Corinthian	19	19	19	3,756,500	6
Golden West	21	16	20	3,457,000	2

¹ Source: H. H. Howard, *Television Station Group Ownership and Cross-media Ownership—1982* 11 (prepared for the

TABLE 7.—LARGEST COMMERCIAL TELEVISION GROUP OWNERS BY NUMBER OF STATIONS—1983

Seven stations	Six stations
Bahakel	Capital Cities
Gannett	Corinthian
Gaylord	Cosmos
Metromedia	Cox
Park Broadcasting	Forward
Spanish International	Hariscope
Storer	Lee Enterprises
Taft	Liberty
Times-Mirror	Meredith
	Multimedia
	Scripps-Howard
	Standard Communications
	Trinity
	Westinghouse
	Wometco

National Association of Broadcasters) (1982). Data compiled from *Television Factbook No. 50*, supra note 14, and other sources, as cited at 3, 10. H. H. Howard, *Group and Cross-Media Ownership of Television Stations in 1983*, supra note 14, at 14-15. Although Howard indicates that data on the number of stations owned by each group is current as of January 1, 1983, the net weekly circulation statistics, which he compiled from *Television Factbook No. 51*, supra note 14, are based on 1981 Arbitron data. Similarly, the net weekly circulation rankings for 1982 and 1980 appear to have been drawn from earlier years' Arbitron data. Net weekly circulation indicates the estimated total number of different households reached at least once each week by a given station.

34. The estimated total number of television households in the United States at the beginning of 1983 was 83.3 million.⁷³ Based on the available circulation data, no group owner reached as much as 20 percent of these television households. Only four owners—CBS, ABC, Metromedia, and NBC—had stations with a net weekly circulation of more than 15 percent of all television households.⁷⁴ Two groups reached between 10 and 15 percent of television households, nine between 5 and 10 percent, 21 between 2.5 and 5 percent, and 43 between one and two and one-half percent. An additional 95 groups reached less than one percent. Seventy-two of these smaller groups had a net weekly circulation of fewer than 500,000 households, while 35 reached fewer than 250,000 households weekly.⁷⁵

35. Table 7⁷⁶ lists the owners of six and seven station television groups:

⁷³ H. H. Howard, *Group and Cross-Media Ownership of Television Stations in 1983*, supra note 14, at 7, citing A. C. Nielsen Co. data.

⁷⁴ However, the three networks actually reach more than 95 percent of all households through their affiliates and owned-and-operated ("O&O") stations. H. H. Howard, *Television Station Group Ownership*, supra note 14.

⁷⁵ H. H. Howard, *Group and Cross-Media Ownership of Television Stations in 1983*, supra note 14, at 7-8.

⁷⁶ *Id.*, at 13-22.

36. As Tables 6 and 7 indicate, those firms with the largest net weekly circulation are not necessarily those with the greatest number of stations. Only 11 of the top 20 owners in terms of net weekly circulation have six or seven stations. Park Broadcasting holds seven stations, but ranks 35th in net weekly circulation, with 2,065,600 households.⁷⁷ This is less than one-quarter the net weekly circulation of the three stations owned by fifth-ranked Tribune Co. Spanish International, controlling seven stations, ranks 83rd in net weekly circulation, with 752,600 households. This is less than eight percent of Tribune's three station net weekly circulation. The effect of population disparities can also be depicted by noting that one station in the New York City market can potentially reach more people than one station in each of the seven markets between 14 and 20.⁷⁸ To equal the potential reach of a New York City station, one would need to own one station in each of the bottom 86 markets. While an owner of stations in each of the top seven markets can reach 27.5 percent of the U.S. population, stations in each of the bottom seven markets collectively reach less than one-half of one percent of the population. This data makes clear the arbitrary nature of the "seven station" rule.

III. Discussion and Proposals

37. As we have earlier discussed, the Commission has not over the years been unaware of the inequities inherent in utilization of an absolute numerical limitation on national station ownership. It took note of these criticisms at the

⁷⁷ In mid-1977, Park Broadcasting became the first group owner to hold the permissible limit of seven stations in each service. *Who Owns*, supra note 5, citing Broadcasting, June 27, 1977, at 24.

⁷⁸ Arbitron ranks markets according to population. The New York market encompasses 8.33 percent of the nation's population. Market number 14 has 1.3 percent of the total population. Markets 14 through 20 hold 8.32 percent of the total population.

time the rule was adopted, conducted internal studies of the matter several years later, and studied the issue again when it considered the recommendations of the "Barrow Report".⁷⁹ Rather, it appears that the "seven station rule" was adopted and survived subsequent review because it seemed to the Commission to be the best option available at the time, given the nature of the Commission's analysis and policy objectives and the level of industry development. The growth in the broadcasting industry over the past three decades, as well as the development of other media program sources, suggest that a substantial revision of our national ownership rules is in order. In light of these changes the continued application of a regulation as arbitrary in nature as the "seven station" rule is increasingly suspect. The growth of the industry may have simply rendered the rule obsolete. Further support for the modification of the present restrictions comes from the possibility of programming expansion which may result. Our new analytic perspective on the issue also suggests that change may be appropriate.

38. One concern which has been generated by the inequities inherent in the rule's application is that in the course of furthering ownership diversity, the "seven station rule" may actually limit the "diversification of program and service viewpoints" that it was intended to advance. This is because the rule may in some instances preclude the possibility of realizing the benefits inherent in program production or acquisition for large audiences.⁸⁰ Ownership of a sufficient number of stations to generate a base for quality program production might well facilitate development of a new over-the-air television network in the future. It is likely in any case to lead to expanded production of programming, including non-entertainment programming, for national, regional, and group presentation to the viewing and listening publics. The access to a larger potential audience which a group owner enjoys reduces the level of difficulty involved in getting initial distribution of an unproven first-run show or series, cuts marketing expenses, and assists in generating revenues that could be used to finance even more attractive, higher quality programming. Cooperative production or distribution by larger groups is another possible vehicle by

which enhanced programming options can be provided.⁸¹

39. By maintaining regulations which tend to interfere with development of additional programming, the Commission may inadvertently be strengthening the significant role of the three major networks in national program distribution. The Commission has recognized the historic role of owned-and-operated stations in development of the network system.⁸² It appears somewhat anomalous to prevent potential competitors from realizing the similar advantages which might be obtained through establishment of larger groups, so long as diversity is not harmed. And, indeed, from the perspective of programming availability, diversity may in fact be enhanced by the growth of these groups. In this regard, we note that an integrated firm can realize efficiencies that are not obtainable when programmers merely contract with stations for distribution.^{83 84}

40. As we have observed at para. 11, *supra*, the stated purpose of the "seven station rule" is "to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue economic concentration

contrary to the public interest."⁸⁵ Diversification of ownership, then, has been viewed, as the vehicle by which to assure diversity in sources of information and foster economic competition. Of these objectives, the Commission has in its various ownership policies placed "principal reliance on ensuring diversity in sources of information because of the part such diversity serves in reaching First Amendment goals."⁸⁶ Even diversification must give way, however, if when all factors are considered, the "public interest harms outweigh the potential gains that would follow" if the diversification-maximizing action were taken. A key factor to be considered in this regard is whether the action maximizing diversification would hinder "the best practicable service to the American public."⁸⁷ Thus, proper review of national ownership policy involves separate consideration of the treatment of First Amendment and economic policy issues, as well as an examination and balancing of competing public interest concerns.

41. The element of the Commission's diversification policy regarding economic concentration derives from antitrust policy. The Commission has historically considered such matters under the public interest standard without regard to whether an actual antitrust violation is involved.⁸⁸ Antitrust law as such is, however, under the jurisdiction of the Department of

⁸¹ Although the prospect of a new fulltime over-the-air television network has brightened in recent years, the creation of such a network does not appear imminent. R.E. Park, *New Television Networks: An Update*, in *New Television Networks: Entry, Jurisdiction, Ownership and Regulation*, *supra* note 52, at 177-180. However, changes in the rules may facilitate the development of part-time "networks" such as "Operation Prime Time" and "Independent Network News." Both Metromedia and a consortium of group owners including Tribune Broadcasting, Taft Broadcasting, Gaylord Broadcasting and Chris Craft Industries are presently attempting to establish prime time movie "networks" of this sort. Broadcasting, May 16, 1983, at 83; Wall Street Journal, July 27, 1983, at 8. A sufficient economic base and substantial potential audience coverage appear to be key factors governing such endeavors. See, for example, Variety, March 18, 1983, at 43; L.A. Powe, Jr., *supra* note 5, at 89-92.

⁸² See paragraph 15, *supra*.

⁸³ See paragraph 38, *supra*. While diversification of ownership may further statutory and constitutional policies, under the public interest standard the Commission is delegated the authority to weigh competing policies, and it is not required that such diversification "be given controlling weight in all circumstances." *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 810 (1978). As to programming, see para. 58, *infra*.

⁸⁴ See also, for example, A. Parkman, *An Economic Analysis of the FCC's Multiple Ownership Rules*, 31 Admin. L. Rev. 205, 218-221 (1979); R.G. Noll, *Television and Competition*, in *Federal Trade Commission Bureau of Competition, Proceedings of the Symposium on Media Concentration* 243, 249-251 (Vol. 1, 1979); G.G. Trask, *The Palace of Humbug—A Study of FCC Policies Relating to Group Ownership of Television Stations*, 22 Fed. Comm. B.J. 185, 207-209 (1968).

⁸⁵ Amendment of §§ 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to the Multiple Ownership of AM, FM and Television Broadcast Stations, *supra* note 20, at 292-293.

⁸⁶ Amendment of § 73.636(a) of the Commission's Rules (Multiple Ownership of Television Stations), *supra* note 49, at 585-586. See, also, *Multiple Ownership*, 50 F.C.C. 2d 1046, 1079 (1975) (Second Report and Order in Docket 18110). "[T]he 'public interest' standard necessarily invites reference to First Amendment principles." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973), and, in particular, to the First Amendment goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. at 20. Cited in *FCC v. National Citizens Committee for Broadcasting*, *supra* note 89, at 795.

⁸⁷ *FCC v. National Citizens Committee for Broadcasting*, *supra* note 89, at 804-805.

⁸⁸ See, for example, *National Broadcasting Co. v. United States*, *supra* note 2, at 223; *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 33-34 (D.C. Cir. 1950). The Supreme Court has observed, in dictum, that in a given licensing case antitrust considerations might keep the public interest standard from being met, "as when the publisher of the sole newspaper in an area applies for a license which, if granted, would give him a monopoly of that area's major media of mass communications." *United States v. Radio Corporation of America*, *supra* note 2, at 351-352, cited in *FCC v. National Citizens Committee for Broadcasting*, *supra* note 89, at 790.

⁷⁹ See paras. 10, 19 and 21, *supra*.

⁸⁰ This was in fact the problem Senator Bricker was attempting to address through his 1956 proposal substituting a 25 percent population coverage limit for the seven station restriction on television ownership. See paragraph 18, *supra*.

Justice ("DOJ") and the Federal Trade Commission ("FTC") and involves significantly different considerations than might be at issue from a First Amendment standpoint. For example, in a situation involving advertiser-support media, the antitrust concern may in part be related to preserving competition in advertising, while the diversity issue involves the sources of information available to the consumer.⁸⁸ Accommodating the economic aspect of the Commission's diversity policy to actual marketplace conditions may require complex case-by-case analyses regarding the nature of the relevant market, which would significantly strain the Commission's resources and expertise. Further, such activity is duplicative of that regularly performed by DOJ and FTC, the expert agencies in this area. Thus, at least as to national ownership policy it may be appropriate to defer to DOJ and FTC on antitrust concerns. Such action could range from establishment of a formal liaison relationship on these matters, perhaps conditioning any action in proceedings involving antitrust issues to FTC or DOJ review, to a policy simply limiting the Commission's antitrust considerations in this area to those required by Section 313 of the Communications Act. We note that private parties threatened by antitrust violations may sue for injunctive relief under Section 16 of the Clayton Act, and those whose business or property is injured as a result of an antitrust violation may sue for treble damages under Section 4 of the Clayton Act. Court costs and attorney's fees are recoverable, as is simple interest on the amount of actual damages in Section 4 actions. Thus, those individuals and institutions most directly affected have a private right of action available.⁸⁹ We solicit comment on this proposal.⁹¹

⁸⁸ See, in a slightly different context, *Multiple Ownership*, supra note 92, at 1079. DOJ is responsible for enforcement of the Sherman Act, and shares responsibility with FTC for enforcement of the Clayton Act. Under the applicable case law, FTC can take action against practices which violate the Sherman Act under Section 5 of the Federal Trade Commission Act, for which it has sole enforcement authority. Von Kalinowski, *Antitrust Laws and Trade Regulation* (Desk Ed. 1982), at § 1.06.

⁸⁹ Von Kalinowski, *Antitrust Laws and Trade Regulation*, supra note 95. During the twelve months ended June 30, 1982, a total of 1,348 antitrust cases were filed in the U.S. district courts. This included 29 U.S. civil cases, 82 U.S. criminal cases, and 1,037 private actions. *Annual Report of the Director of the Administrative Office of the United States Courts* 1982 (1983), at 102-103.

⁹¹ In this regard, we specifically request comment as to whether anything more than the consideration of these issues in the rulemaking context may be required by the holdings in such cases as *Northern Natural Gas Co. v. Federal Power Commission*, 399 F.2d 953, 958-961 (D.C. Cir. 1968) and *United States*

42. As an alternative to this action, the Commission may choose to pursue development of a methodology to assess economic concentration in the market(s) found relevant to national broadcast ownership. The Commission has initiated a proceeding which, *inter alia*, seeks a method of assessing concentration that could facilitate uniform treatment of ownership issues in all FCC-regulated media services.⁹² This effort may result in development of an index, or indices, which would likely be utilized in general policy deliberations and which would be utilized, for regulatory purposes, in determining whether particular transaction(s) might lead to unacceptable levels of concentration. We hereby incorporate by reference herein the comments submitted in that proceeding, CT Docket No. 82-434, to the degree that they treat the concentration issue. Parties who have submitted comments on indexing in CT Docket No. 82-434 may wish to respond to this Notice with particular attention to concerns regarding national broadcast ownership.⁹³

43. Consideration of economic concentration requires defining both a product market and a geographic market. The basic test for inclusion within a product market is the interchangeability or substitutability of products from the viewpoint of potential buyers. A geographic market "usually is the area in which a firm sells in active and reasonably equal competition with other firms,"⁹⁴ and may be national, regional or local in character. In this regard, as to economic concentration the traditional Commission approach to national ownership requires that the relevant market be a national broadcast market for viewers and listeners (who are the products in an advertiser-supported system).

44. Accepting the conception of the national market, it appears that the market is relatively unconcentrated. One frequently-used measure of concentration is the Herfindahl-

v. FCC, 652 F.2d 72, 81-82 (D.C. Cir. 1980), viewed in the light of the Supreme Court's decision in *FCC v. WNCN Listeners Guild*, supra note 70. See, also, notes 2 and 94, supra.

⁹² Amendment of Part 76, Subpart J, § 76.501 of the Commission's Rules and Regulations Relative to Elimination of the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, 47 FR 39212 (September 7, 1982) (hereinafter "Amendment of Part 76").

⁹³ In taking this action, we in no way express any view as to the outcome of that proceeding.

⁹⁴ M. Botein, *Jurisdictional and Antitrust Considerations in the Regulation of the New Communications Technologies*, 25 N.Y.L.S.L. Rev. 863, 882 (1980) (hereinafter "Jurisdictional and Antitrust Considerations").

Hirschman Index ("HHI") presently utilized by the Justice Department,⁹⁵ while a related measure is the market share of the top firms in the defined market. Based on revenues, the Commission has calculated the market shares of the top three, six and 12 group owners of television and radio station, as well as the HHI:

TABLE 8¹

Group owners	Concentration of broadcast revenues (percent)	HHI
Television:		
Top 3.....	14.2	229
Top 6.....	23.0	
Top 12.....	34.9	
Radio:		
Top 3.....	6.6	77
Top 6.....	10.9	
Top 12.....	16.3	

¹ Financial data for each group owner was compiled using each station's 1980 Financial Form 324. Total revenues from *Television Broadcast Financial Data—1980*, August 10, 1981, and *1980 AM/FM Financial Data*, March 15, 1982, were used for indexing purposes. The three-firm concentration ratio was computed, rather than a four-firm ratio, due to certain concerns related to data confidentiality. Due to resource limitations, the exact revenue market share of every owner could not be computed. Shares were calculated, as indicated, for the top twelve group owners, and the share of the thirteenth owner in each service was identified. No owner would have a greater share. The potentially maximize the HHI, it was assumed that television station owners thirteen through fifty-one and radio station owners thirteen through one hundred thirty-nine each received the same share of total revenues. In both cases, this computation virtually exhausted the market share remaining after the top twelve owners' shares were calculated. This data was used to compute the HHI. Thus, the actual HHI in each case is somewhat less than the figure shown above. Net weekly circulation and "turns" (listeners) might also be utilized as the basis of this calculation. However, since net weekly circulation and turns reflect only limited viewer/listener attention to the station involved, one might choose instead to use audience share. One could, for example, use prime time audience share for television and drive time share for radio. The difficulty which inheres, of course, is that audience share is an extremely volatile measure. However, there are similar problems, albeit not as great, in the use of net weekly circulation, revenues, or any other standard subject to constant adjustment. Market share volatility highlights the importance of the potential competition in a market, and argues for the use of "reach" as the basis for an index. DOJ generally considers markets with an HHI of less than 1000 to be unconcentrated, and is unlikely to challenge mergers falling in that area. In markets with an HHI of between 1000 and 1800, mergers producing an increase in the HHI of less than 100 points are unlikely to be challenged. Markets with an HHI above 1800 are considered to be highly concentrated, and in those situations DOJ is likely to challenge mergers which increase the HHI by more than 50 points. U.S. Department of Justice Merger Guidelines, supra note 90, at 19-20. From this perspective, the traditional broadcast industry is extremely unconcentrated.

45. The low concentration ratios shown in Table 8 compare to such four-firm sales ratios as 90 in cereal breakfast foods, 85 in refrigerators and 47 in farm machinery and in motors. Nonetheless, the data in Table 8 may overestimate the degree of concentration due to the absence of other relevant media in the calculation. It may be, for example, that the relevant

⁹⁵ U.S. Department of Justice Merger Guidelines, issued June 14, 1982, at 17. See F.M. Scherer, *Industrial Market Structure and Economic Performance* 56-64 (2d ed. 1980), for a discussion of the Herfindahl index and other measures of concentration. See, also, K. Gordon, J.D. Levy, and R.S. Preece, *FCC Policy on Cable Ownership* (FCC Office of Plans and Policy Staff Report) (November, 1981), at 86-90.

video market is a national market for consumer-oriented video output, in which television stations, cable systems, MDS, STV, LPTV, SMATV and DBS all compete. This market may also include video cassettes and video discs. The market may be seen as one for electronic media output, and include radio. In some cases, the market may be conceptualized as a national market for information output, and include the print media and computer data base suppliers. Carried a step further, the market may be viewed as one for information/entertainment, and include movies, records and tapes, if not theater, live music and similar events.⁹⁶

46. As we have indicated, there is substantial debate as to the nature of the relevant market, focusing in significant part on the degree to which various products may correctly be considered substitutes available at competitive prices. Further, the Commission acknowledges that the market may be changing so quickly that any analysis will be valid only at a particular, and brief, point in time. Additionally, it has been suggested that such an analysis fails to take a sufficiently broad view of the nature of competitive markets relevant to antitrust considerations for it to be of

utility.⁹⁷ The Commission recognizes that given the complexity of the analytic task, it may well be that for the purpose of our specific consideration of the "seven station rule" it will be necessary to resolve this proceeding based on the limited question of whether the degree of competition in the television and/or radio industries is sufficient, and the potential anticompetitive impact sufficiently remote, to support elimination or modification of the rule.⁹⁸

47. We note, in this regard, that the staff of the Commission's Office of Plans and Policy ("OPP") takes a somewhat different approach to the nature of the market, arguing that the economic market, whether for viewers in an advertiser-supported system, or for distribution of programming by outlets in a subscriber-supported system, is essentially local in nature. OPP's analysis is that the concerns of participants in a given local market are the competition and diversity of voices in that market, and not the transactions and programming in which group owners in that market are involved in other locales. The OPP staff thus concludes that "[i]f every local market were sufficiently competitive, then no national or regional ownership rules would be necessary or desirable."⁹⁹ The OPP staff has, however, also estimated the concentration in an assumed national market, finding as a general matter, for example, that a national video market comprised of conventional broadcast television, cable, STV and MDS is, from a video distribution standpoint, "extraordinarily unconcentrated," with a four-firm concentration ratio of 8.7 percent and an HHI of 35.5.¹⁰⁰ Using net weekly circulation and basic subscribers as measures, OPP found that if affiliates are attributed to their networks, the four-firm concentration ratio is 61 percent and the HHI is 1112, within the range in which DOJ might scrutinize a

proposed merger.¹⁰¹ However, OPP made clear that it does not believe such attribution is appropriate.¹⁰²

48. A question which arises is the degree to which proper consideration of a national video output market requires that attention be given to the role of national program distributors, such as the three commercial networks and the cable networks and program syndicators, through their affiliated stations and systems. We solicit comment on the significance of these relationships, if any, to our review of the seven station rule. Another matter to be considered is the impact, if any, of relaxation of the seven station rule upon small businesses, and upon station ownership by minorities and women. It appears that such changes would facilitate the ability of new entrants to obtain funding from investors who desire equity interests in the stations (which are generally treated as though they were controlling interests under the rule). Additionally, modification of the rule would allow small business owners, including minorities and women, to put together larger groups which would be able to more easily produce desired special interest programming. It is difficult to ascertain the impact, if any, which such a freeing of the market might have on station prices, if, for example, larger existing multiple owners are more active in purchasing stations in certain market segments (for example, the "top twenty" or "top fifty"). While it appears that, when all factors are considered, the relaxation of the rule will prove beneficial to minorities, women, and small broadcasters, we request comment on this issue.

49. The Commission solicits comment on the issues raised above, and on such other and related matters as parties believe may be relevant to our consideration of the elimination or modification of the "seven station rule." We note that the perspective from which the Commission approaches this matter is our concern for the enhancement of consumer welfare in the public interest, and it is in that context that these issues should be addressed. In commenting on these issues, parties are requested to address not only the matter of market definitions, but also the measures of market share and concentration levels

⁹⁶ As to concentration ratios, see Scherer, *Industrial Market Structure and Economic Performance*, *Supra* note 99, at 62, citing 1972 U.S. Census data. In CT Docket No. 82-434, the use of net weekly circulation for free services and subscribers for pay services as measures of concentration, use of the HHI as a test of the level of concentration, and a possible downward adjustment of acceptable concentration to take viewpoint diversity concerns into account have been suggested. The House Telecommunications Subcommittee staff discusses a "video market" in which all video services potentially "compete as relatively substitutable options available to the consumer." However, the Subcommittee staff believes there is presently low cross-elasticity between submarkets, and that the "video market is as yet an emerging market." *Telecommunications in Transition*, *supra* note 51, at 273-274, 279-280, 360-361, 374-376. As to radio, the Subcommittee staff identifies an "audio market" comprised of radio programming, records and tapes. *Id.*, at 273. The Subcommittee staff notes that some observers suggest the market parameters include all mass media as components of a large information market. Professor Michael Botein of New York Law School argues that "[a]t the very least, the product market presumably would include all methods for delivering real-time video programming to a viewer." *Jurisdictional and Antitrust Considerations*, *supra* note 99, at 881. "Real-time" programming means "programs which are transmitted without any modification in the rate of data transfer," and might include broadcast television, cable, STV, MDS, DBS, SMATV, and low power. The FCC Office of Plans and Policy ("OPP") and Professor Botein suggest that it may be appropriate to distinguish between pay and advertiser-supported programming. *Id.*, at 881-882; *FCC Policy on Cable Ownership*, *supra* note 99, at 65-66. See also, the record in CT Docket No. 82-434, incorporated herein by reference.

⁹⁷ See, for example, DOJ Reply Comments in CT Docket No. 82-434, at 10-11. We draw no conclusions on DOJ's views at this time.

⁹⁸ A key concern, which parties are requested to address with particularity, is the utility of various measures of concentration as regulatory devices in the processing of the thousands of applications for construction of new stations, transfers and assignments presently disposed of each year in the broadcast services.

⁹⁹ J.D. Levy and F.O. Setzer, *Measurement of Concentration in Home Video Markets*, *supra* note 70, at 7-8. The Commission is inserting the OPP staff report in the record of this proceeding, and requests comment on the report insofar as it is relevant to consideration of the "seven station rule."

¹⁰⁰ *Id.*, at 80-89. The HHI initially computed (29.9) has been corrected. The market analysis is based on "household access units", a measure of availability of a video distribution system to a given household.

¹⁰¹ *Id.*, at 90-92. The HHI initially computed (1142) has been corrected.

¹⁰² OPP noted that a substantial proportion of affiliate programming is not network-provided, and affiliates may refuse to clear network programming if they desire. Additionally, affiliates are increasingly turning to programming from other sources. Finally, under Commission regulations, the licensee retains ultimate programming responsibility. *Id.*, at 75-76.

which may be relevant to our deliberations.

50. The Commission seeks comment on the appropriate use of such measures of market share as revenues, net weekly circulation, subscribers, ratings, and availability ("reach" or "homes passed"), and on the use of indices of concentration including but not limited to the HHI and the four-firm concentration ratio. We urge that these comments be targeted to the matter before us, the modification of the "seven station rule," as to both television and radio.

51. As we have noted at para. 40, *supra*, the Commission's principal concern in implementation of its policy of diversification of ownership has not been the enhancement of economic competition but, rather, the advancement of diversity in sources of information in order to further First Amendment values. Unfortunately, the difficulty of analyzing economic concentration fades in comparison to the problems involved in dealing with diversity of information. As the OPP cable study comments, the "antitrust laws are not meant to promote the exercise of First Amendment rights."¹⁰³ Thus, Dr. Benjamin M. Compaine of Harvard University's Program on Information Resources Policy has stated, "once we abandon the antitrust standard for concentration, there is no acceptable guideline for what constitutes too few voices."¹⁰⁴ Consequently, as Dr. Michael Wirth of Denver University remarks, "[t]he

selection of any numeric national ownership standard is necessarily arbitrary."¹⁰⁵

52. In examining this issue, it is important first to clarify the nature of the goal sought to be achieved. A major purpose of the First Amendment is the furthering of political discourse so that debate on public issues may be "uninhibited, robust, and wide-open."¹⁰⁶ National ownership rules, as the Commission has previously observed, cannot directly further the diversity of voices in a given community, because they do not govern such matters.¹⁰⁷ Thus, the leading concern of the Commission's national ownership rules has been with the furtherance of the First Amendment values in national political discourse,¹⁰⁸ and with the role of group owners as "gatekeepers" governing the flow of that discourse.¹⁰⁹

53. If the market is thus, for diversity purposes, that for national issue-oriented information output, it would appear to include, at the least, all sources of real-time programming, including radio, which provide such information, as well as daily newspapers covering national issues.¹¹⁰ In some circumstances, the 10,000 magazines published in this country

should also be included,¹¹¹ as should available information data base systems. It would appear that, when considering diversity of viewpoint, the appropriate concern is with information availability, not with market share.

54. There are, however, a number of alternative perspectives from which to approach this matter. As we have indicated in para. 52, consideration of the First Amendment values inherent in national political discourse carries a concern as to the number of "gatekeepers" involved. Thus, it may be appropriate to analyze the "gatekeeping" function of group owners in conventional broadcasting and other sources of real-time programming, as well as newspapers and magazines.¹¹² Considerations regarding the role of group owners as "gatekeepers" are complicated by the fact that while the owner can, in a sense, be seen as a "national" firm, the information with which we are concerned, even though it deals with national issues, is being delivered locally. Each station and newspaper, for example, has its own staff. Locally-originated newscasts and print stories deal with national issues, and local news editors have the authority to select and edit information being distributed by national sources. There is no reason to presume in every case that these local editors undertake such tasks in lockstep precision under the control of their group owners. In fact, a recent study by the Ethics Committee of the American Society of Newspaper Editors ("ASNE") indicates that group editors enjoy substantial editorial independence.¹¹³ Therefore, absent evidence to the contrary, it may well be that these outlets of national information should be seen as quasi-independent, if not truly independent, information sources. Comment on this approach is solicited. The Commission specifically requests comment as to any evidence that either local or national news which is locally originated by group-owned stations represents the group's monolithic viewpoint."

¹⁰³ FCC Policy on Cable Ownership, *supra* note 99, at 81. See also D. I. Baker, *Uses and Abuses of Antitrust Principles in Dealing with Media Concentration Questions*, in Federal Trade Commission Bureau of Competition, *Proceedings of the Symposium on Media Concentration*, *supra* note 90, at 649 [Vol. II].

¹⁰⁴ B. M. Compaine, *Conclusion: How Few Is Too Few?* in *Who Owns*, *supra* note 5, at 487. A number of the commenters in CT Docket No. 82-434 express similar views. For example, CBS, Inc. states, "Measurements which seek to go beyond economic factors and attempt to measure the appropriate degree of political or ideological concentration seem almost impossible to create." *Comments of CBS Inc.*, at 32. Time Inc. states that it "is not aware of any developed learning that explains how to utilize a measurement derived from an index intended to assess the market power of industrial organizations as a means of analyzing diversity." Time suggests that questions of diversity "have a complexity and inevitable subjectiveness not amenable to analysis by numerical means." *Comments of Time Inc.*, at 30. Baseman and Owen state that "[t]here is obviously no single desirable 'magic' number of independent editorial voices." K. C. Baseman and B. M. Owen, *A Framework For Economic Analysis of Electronic Media Concentration Issues*, prepared for submission by the National Cable Television Association in Docket No. 82-434, December, 1982, at 48. We draw no conclusions herein as to the action to be taken in CT Docket No. 82-434, citing these statements only to indicate some of the viewpoints held on this issue.

¹⁰⁵ *The FCC's Multiple Ownership Rules and National Concentration in the Commercial Radio Industry*, *supra* note 71, at 33. Diversity, the Court of Appeals for the D.C. Circuit has stated, is "an elusive concept entitling [the Commission] to rely on its own judgement." *National Association for the Advancement of Colored People v. FCC*, *supra* note 49, at 1001.

¹⁰⁶ *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). See, also, *National Association of Theatre Owners v. FCC*, 420 F.2d 194, 207 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970).

¹⁰⁷ Amendment of § 73.636(a) of the Commission's Rules (Multiple Ownership of Television Stations), *supra* note 49, 75 F.C.C. 2d at 591.

¹⁰⁸ *Id.*, at 593.

¹⁰⁹ J. D. Levy and F. O. Setzer, *Measurement of Concentration in Home Video Markets*, *supra* note 70, at 5-6. We observe that analyzing today's diversified group ownership in this manner takes us somewhat beyond the concerns of many of the authors of our communications laws, whose fears were that a few individuals or "a single selfish group" might place "American thought and American politics" at their mercy through monopoly control of broadcast facilities. See, for example, *Print and Electronic Media*, *supra* note 51, citing the remarks of Rep. Johnson of Texas, 67 Cong. Rec. 5557, 5558 (1926).

¹¹⁰ National television news programs are reported to have had a significant impact on afternoon newspapers in some markets. The various media are said to compete for the time the consumer has to receive the information he or she desires. That is, they are substitutes in the provision of such information. W. H. Read, *The First Amendment Meets The Second Revolution* (Harvard University Program on Information Resources Policy) (1981), at 10, citing *Note on the Newspaper Industry*, Case No. 4-376-082 (Harvard Graduate School of Business Administration) (1975). See, also, *Multiple Ownership*, *supra* note 92.

¹¹¹ J. D. Levy and F. O. Setzer, *Measurement of Concentration in Home Video Markets*, *supra* note 70, 93-94.

¹¹² In television and radio, the percentage of group-owned stations has remained relatively constant since the 1960's. During the same period, the total number of stations, the number of independent stations, and the number of group-owned stations have all increased. As the total number of stations increased, so has the dispersion in the sources of information available throughout the nation.

¹¹³ Ethics Committee of the American Society of Newspaper Editors, *News and Editorial Independence: A Survey of Group and Independent Editors* 12-25 (April, 1980).

55. A somewhat related approach to the issue is suggested by the OPP staff, which argues that the relevant context for diversity considerations is the local market, because "[t]he range of choices available to viewers depends on the number of outlets available at the local level." Multiple ownership of outlets in separate markets does not limit that range. The OPP staff observes that as the consumers of ideas must get information through local outlets, so the speakers (producers of ideas) must have those ideas delivered through local sources. Information on national issues must be distributed locally and therefore, OPP contends, "the national program delivery market is nothing more than a collection of local markets." Thus, OPP argues, as it does with regard to economic concentration, that if all local markets were competitive, there would be no need for national or regional ownership rules. "Only within the set of non-competitive local markets might non-local ownership rules be appropriate."¹¹⁴

56. The OPP staff states that there is no precise boundary between "competitive" and "noncompetitive" markets. It has, however, presented illustrative calculations showing the consequences of different assumptions regarding the number of independent voices within a local market that are needed for it to be defined as "competitive." Under this approach, national ownership regulations to limit multiple ownership in "noncompetitive" markets might be considered, but the OPP staff states that in doing so the Commission should take account of the costs such regulations impose in limiting combinations which increase efficiency. We request comment on the analysis by OPP.

57. The Commission notes that while the discussion of diversity of viewpoints has thus far focused on national political discourse, the Supreme Court has repeatedly held that entertainment is entitled to First Amendment protection.¹¹⁵ If entertainment is considered as part of the information as to which the Commission actively has diversity concerns, the market likely

should be viewed to include information transmission from video cassettes and discs, records and tapes, and, perhaps, movies, theater and related events. The Commission solicits comment on this point, with attention to the implications of *FCC v. WNCN Listeners Guild*¹¹⁶ in these considerations.

58. An issue which is fundamental to the Commission's consideration of diversity is the relationship between diversity of ownership and diversity of viewpoint; that is, "whether maximum dispersion of ownership of media outlets is necessary for the widest dissemination of information from diverse source."¹¹⁷ The First Amendment, as Alexander Meiklejohn has stated, "is not the guardian of unrelated talkativeness. It does not require that on every occasion, every citizen shall take part in public debate. Nor can it even give assurance that everyone shall have the opportunity to do so What is essential is not that everyone shall speak, but that everything worth saying shall be said."¹¹⁸ While all rules limiting ownership tend to increase the total number of owners, "such rules do not necessarily guarantee greater diversity of program content or advance the welfare of individual viewers * * *. Whether that occurs depends, *inter alia*, on the costs which the rules impose * * *."¹¹⁹ We have observed, at paras. 37-39, *supra*, that in the instant matter these costs may include a reduction in the diversity of programming which would otherwise be available due to the inability of station owners to benefit from the program production and distribution opportunities which the efficiencies of group ownership facilitate. As we have noted, a key factor which must be considered is whether the diversification-maximizing action would hinder "the best practicable service to the American public," or otherwise be outweighed by other public interest considerations. It is possible that if the Commission, modifies its rules to allow the potential efficiencies inherent in group ownership

to be realized, the resources devoted to program development will provide more original programming than is presently available. There may be greater diversity of views in the programming made available by strong group owners than in the repetitive fare which may otherwise be available.¹²⁰ Comment on this point is requested.

59. A final aspect of our consideration of diversity of information sources is examination of the role of the three major networks and other nationwide information delivery systems. Each of the networks, with its affiliates, can reach virtually all of the 83 million television households in the nation. Network programming remains a dominant factor in prime time viewing patterns. Allowing the networks to purchase additional stations might well increase the difficulty which other broadcast operators would have in assembling groups and informal "networks" large enough to foster new video programming. Our belief that such programming advances might flow from relaxation of the seven station standard is one of the motivating forces in our initiation of this proceeding. We therefore request comment as to whether an alternative regulatory scheme should apply to network acquisition of additional stations. The potential alternative limits include maintaining the present seven station ceiling and creating a new ceiling based on net weekly circulation or reach of owned stations.

60. In this regard, the Commission also solicits comment on the substitutes to network product distribution available in the information delivery market. We note, for example, that if our concern is national political discourse, the numerous radio networks would appear to be a delivery substitute. The national wire services serve broadcast outlets and print media around-the-clock. The national news services operated by such newspaper group owners as Gannett

¹¹⁴ J.D. Levy and F.O. Setzer, *Measurement of Concentration in Home Video Markets*, *supra* note 70, at 5-8.

¹¹⁵ See, for example, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-933 (1975); *Winters v. New York*, 333 U.S. 507, 510 (1948). "Literature and the arts must be protected by the First Amendment. They lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created." A. Meiklejohn, *The First Amendment Is An Absolute*, 1961 The Supreme Court Review 245, 256-257 (1961).

¹¹⁶ *Supra* note 70. As an additional related factor, we note that in a recent study more than one-third of all surveyed households owning video games reported a decline in television viewing since the games were purchased. Benton & Bowles, Inc., *The New TV Technologies: The View From The Viewer—II* (May, 1983), at 44. Given the apparent use of these games as a television entertainment substitute, it may be appropriate to include game cartridges in the relevant market.

¹¹⁷ *Amendment of Part 76, supra* note 96, at para. 24.

¹¹⁸ A. Meiklejohn, *Free Speech And Its Relation to Self-Government* 25 (1948).

¹¹⁹ *Amendment of Part 76, supra* note 96, at para. 24.

¹²⁰ See, for example, *Amendment of §§ 73.35 and 73.240 of the Commission's Rules Relating to Multiple Ownership of AM and FM Stations*, 51 R.R. 2d 449, 451-452 (1982), *aff'd*, *mem. National Association for the Advancement of Colored People v. FCC*, No. 82-1661 (D.C. Cir. March 31, 1983). See, generally, J.D. Levy and F.O. Setzer, *Measurement of Concentration in Home Video Markets*, *supra* note 70, at 19-32. Evidence from the newspaper business is that in majority of the cases, a new group owner increases the paper's spending for news coverage and equipment, and that in a significant proportion of the cases the amount and quality of coverage improves. Coverage of national politics increases in almost half the cases. Ethics Committee of the American Society of Newspaper Editors, *News and Editorial Independence: A Survey of Group and Independent Editors*, *supra* note 117A, at 17.

also contribute to the relevant market.¹²¹ Cable News Network ("CNN") and Satellite News Channel ("SNC") appear to compete directly with the networks. If the market for information is looked at more broadly, such video alternatives as C-Span and Cable Health Network may also be included, as might the information distributed by many of the approximately 170 national syndicate services.¹²² Expanding our consideration to encompass total programming diversity adds all nationally distributed entertainment programming, from whatever source, so long as such programming increases the voices available to the consumer. The Commission requests comment on the relationship between the "seven station rule" and the national information market, the appropriate parameters of that market to be considered, measures of market share and concentration, and such other and related factors as may be relevant to this proceeding.

61. It is the Commission's intent, at the conclusion of this proceeding, to reduce our national broadcast ownership restriction, the "seven station rule," to the maximum extent feasible consistent with the record developed herein. Thus, assuming the record indicates that the relevant markets are sufficiently competitive from the appropriate perspectives, the rule will be eliminated. It is clear, however, that a range of alternatives present themselves, including separate consideration of radio and television, separate treatment of network ownership, and adoption of the restrictions which the OPP staff analyzed regarding ownership across "noncompetitive markets."

62. As we have noted, the issue of "how much diversity of information is enough" is particularly difficult to resolve. Thus, it may be that as an interim step in its deregulatory efforts, the Commission would choose to significantly increase, rather than totally remove, the ceiling on the number of stations which can be owned by one entity.¹²³ In a paper on the topic of national ownership concentration in radio, prepared for the National Association of Broadcasters ("NAB"), Dr. Michael Wirth of Denver University examines seven policy alternatives: (1)

Keep the present rule; (2) modify the present standard to permit ownership of 14 radio stations without regard to type (AM or FM);¹²⁴ (3) modify the standard to allow one entity to own the same percentage of commercial stations nationally at present "as they were allowed to do in 1953," which would permit ownership of 36 radio stations regardless of type; (4) modify the standard to allow one entity to own the same percentage of commercial radio stations nationally as seven commercial television stations is of the total number of commercial television stations, which would permit ownership of 72 radio stations without regard to type; (5) eliminate all arbitrary standards, and consider each case separately to determine if that group's newest purchase is in the public interest; (6) use the Justice Department merger guidelines to determine when a station merger would not be in the public interest; and (7) limit national ownership via a population standard similar to that proposed by Senators White and Bricker.¹²⁵

63. Dr. Wirth's recommendation is that the Commission adopt policy alternative (3), permitting any entity to own 36 radio stations regardless of whether they are AM or FM. This would allow ownership of the same percentage of the total number of commercial radio stations as one was permitted to own when the "seven station rule" was adopted in 1953. Dr. Wirth concludes that permitting this amount of ownership "cannot possibly create unlawful concentration in the national media market," and "will maintain an efficient method for dealing with national media market concentration issues." However, he recommends that the Commission "not view this new standard as unwaivable," since "[f]ailure to ever waive what is admittedly an arbitrary standard is the ultimate in administrative inflexibility, particularly in a dynamic marketplace."¹²⁶

¹²¹ This approach has also been suggested by Doubleday Broadcasting Co., Inc., *supra* note 56, whose related *Petition for Rule Making* is hereby incorporated in this proceeding. In accordance with § 1.3 of the Commission's Rules, §§ 1.403 and 1.405 are hereby waived for this purpose.

¹²² M. O. Wirth, *The FCC's Multiple Ownership Rules and National Concentration in the Commercial Radio Industry*, *supra* note 71, at 31-32. Comparisons based on the number of commercial stations in 1981. A copy of the Wirth paper will be placed in the docket.

¹²³ *Id.*, at 33. As noncommercial stations are among the competing voices in the marketplace, the commercial/noncommercial distinction made by Wirth may be inappropriate. If that is the case, the permissible number of stations today would be 41 (based on 1983 data). We solicit comment on this alternative.

64. Dr. Wirth rejects alternatives (1) and (2) as unduly restrictive. Alternative (4), which would set a 72 station ceiling, "is rejected only because it would allow for such a large increase in national radio ownership without prior experience," but future consideration is recommended. Wirth rejects alternative (5)—case-by-case consideration, and (6)—antitrust-type review, because of the administrative inefficiencies and uncertainties at the Commission and in the industry which he concludes they entail. He discards alternative (7), the population percentage approach, due to the administrative difficulties which would be involved.¹²⁷ We solicit comment on the Wirth approach. While increasing the ownership limits to the level suggested by Wirth may alleviate the need to consider such matters directly, commenters are requested to discuss whether conditions should also be placed on such factors as the number of stations of any class which might be owned or the total population or geographic area served by one entity.

65. The proposals made by Dr. Wirth and by Doubleday are transferable to the situation in television. Given the progress made toward UHF comparability, the Commission could choose to act in a manner similar to that which Doubleday proposes and eliminate the UHF/VHF distinction in the "seven station rule" as an initial step in revising our rules. If we treat the expansion of on-air television stations in the same manner Dr. Wirth has suggested we handle radio, a single entity would be permitted to own 14 television stations of any class, based on the number of commercial stations broadcasting when the seven station television limit was established in 1954 compared to the number licensed in 1983. As to the 14 station limit, we request comment as to whether component restrictions on such factors as the population or geographic area served should also be adopted.¹²⁸

66. The Commission recognizes that there are inherent weaknesses in any regulatory approach based on numbers, population, or geographic area. It is our desire, should we determine to adopt such a standard, that we reduce insofar as possible the arbitrary nature of the measure in question. Parties are

¹²⁷ *Id.*, at 33-34.

¹²⁸ If the commercial/noncommercial distinction is eliminated and 1954 is the base year, the number of stations permitted would be 19. If 1953 is used as the base year (and noting that only five TVs were permitted at that time), the number of stations now permitted would be 21. This number would increase to 28 if noncommercial stations are included in the base. We solicit comment on these alternatives.

¹²¹ Many of the approximately 70 "news services, news picture companies and newsreel companies" identified in *The Working Press of the Nation* might also qualify. *The Working Press of the Nation, Newspaper Directory*, at Section 11 (1982).

¹²² *Id.*, at Section 12.

¹²³ Adoption of the alternative discussed by the OPP staff regarding treatment of "noncompetitive" markets is, as we have indicated, also one of the alternatives.

therefore encouraged to discuss in detail the steps they believe might be useful to the Commission in adopting as just and equitable a standard as is possible consistent with policy objectives and the requirements of the Communications Act and any relevant case law.

IV. Administrative Matters

67. Authority for this proposed rulemaking is contained in Section 1, 3, 4(i) and (j), 303, 313 and 403 of the Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules interested parties may file comments on or before December 19, 1983, and reply comments on or before January 18, 1984. All relevant and timely comments will be considered by the Commission before the final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

68. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation on the day of oral presentation. That written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above

must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's rules, 47 CFR 1.1231.

69. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis ("IRFA") of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix "A". Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this Notice, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 50 U.S.C. § 601 et seq.) (1981).

70. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original plus eleven copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, NW., Washington, D.C. 20554. For information on this proceeding, contact Steven A. Booksheter, Office of General Counsel, (202) 254-6530. Federal Communications Commission. William J. Tricarico, Secretary.

Appendix A

Initial Regulatory Flexibility Analysis

1. *Reason for Action.* The Commission believes that its rules and policies should be reviewed in the context of current social, technological and financial environments in which licensees and applicants operate, so that service to the public may be facilitated while the least regulatory cost is imposed. It is in this light that it is considering modification of the "seven station rule."

2. *The objectives.* The Commission proposes to modify the "seven station rule" in the light of changes in telecommunications, reducing regulation to the maximum extent feasible, and taking such action in a manner consistent with the objective of enhancing diversity in broadcasting. The Commission believes that such action may lead to additional production and distribution of broadcast programming, and may also facilitate the development of new over-the-air networks.

3. *Legal basis.* Action proposed herein is taken pursuant to Sections 1, 3, 4(i) and (j), 303, 313, and 403 of the Communications Act of 1934, as amended.

4. *Description, potential impact and number of small entities affected.* The proposals set forth herein would modify the seven station per service ownership limitation presently imposed on broadcast licensees. A substantial number of existing licensees and potential new entrants are small entities. The action would be expected to have an immediate impact upon only a limited number of entities, as few station owners presently are at or near to holding the maximum number of licenses in any service. Over a period of time, the number of such entities would be expected to expand. Relaxation of the rule may facilitate the ability of small businesses to obtain new investment capital from investors desiring equity participation in an enterprise (which is generally treated in the same manner as a controlling interest for purposes of the numerical limit), and may allow small entities to enter program production and related areas through realization of the efficiencies to be found in larger enterprises. The Commission cannot ascertain the impact, if any, which such a freeing of the market might have on station prices due to activity by larger existing enterprises purchasing stations in certain market segments. Other small entities which might be affected include station brokers, (approximately 50), those involved in the financing of broadcast stations (number unascertainable), and suppliers to broadcast stations (number unascertainable). Turnover of stations and new station start-ups may create new or additional business, or client changes, for those entities.

5. *Recording, record keeping and other compliance requirements.* The proposed change would reduce such requirements.

6. *Federal rules which overlap, duplicate or conflict with this rule.* None. Although antitrust enforcement

by the Federal Trade Commission and the Department of Justice is also concerned with precluding monopoly in telecommunications, the FCC does not enforce the antitrust laws. Rather, it presently takes such concerns into account in its regulation under the public interest standard.

7. Any significant alternatives minimizing impact on small entities and consistent with the stated objective. None.

Appendix B

The "Seven Station Rule"

(Sections 73.35(b)(1) [AM], 73.240(a)(2) [FM], and 73.636(a)(2) [TV] of the Commission's Rules)

"No license for an AM [FM] [television] broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other AM [FM] [television] broadcast station if the grant of such license would result in a concentration of control of AM [FM] [television] broadcasting in a manner inconsistent with the public interest, convenience, or necessity. The FCC however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers, or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven AM [FM] [television] broadcast stations, [no more than five of which may be in the VHF band] * * *

Dissenting Statement of Commissioner Henry M. Rivera

Re: Notice of Proposed Rulemaking
Amendment of the Multiple Ownership Rules.

I dissent to this reexamination of the "seven station rule."¹ The philosophy and objectives set forth in this Notice represent a reversal of the FCC's long-held approach to media ownership diversification that has profound implications.² That approach, which I

endorse, holds that the public interest lies in the widest possible dissemination of ideas from diverse and antagonistic sources, and that this public interest is best achieved by maximum diffusion of media ownership and control. As Judge Learned Hand so aptly put it: "The First Amendment presupposes that the right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."³ The majority now suggests that the public interest in diverse sources of opinion may be better achieved by a policy whose hallmark is the antithesis of maximum diffusion of ownership—media ownership conglomeration. I find no support for such a radical rethinking of the structural diversity policy; no urgent need to change these rules drastically; and no alternatives short of outright repeal sincerely considered in the Notice. Conversely, the prospective detriment to established diversification and minority ownership policies is patent. Therefore, I simply cannot support the issuance of this rulemaking notice.

Who can argue that the present rules are not arbitrary? Not I. Different seven station groups reach different percentages of the population depending on where the stations are located. This arbitrariness has been recognized since their promulgation. However, the lack of perfection in these rules is a price the FCC has long been willing to pay in exchange for the public benefits accruing from maximum diversification of ownership and viewpoint in broadcasting. That the rules have permitted uneven results does not diminish the fact that they have prevented concentration of the broadcast media in the hands of a few powerful companies.

The simple truth is that this rulemaking contemplates regulatory and philosophical changes far too sweeping, and with too much potential for harm, for me to support it in good conscience. And it embarks on this venture on its own motion rather than in response to any general public or industry claim that a change is needed. Indeed, the only concrete public benefit cited by the Notice in support of eliminating or liberalizing the seven station rule—the likelihood that additional networks and new program production will result—is unconvincing. According to the majority, the seven station rule may undermine

programming diversity by preventing group owners from reaching a percentage of the population comparable to that reached by the major networks through their owned stations. The limitation, it is argued, deters production of "quality" programming and the formation of additional full-time or part-time networks by curtailing the production and distribution efficiencies possible from such expanded group ownership.

There is no evidence that the rule has had this effect. As an initial matter, the number of households reached by some group owners through their broadcast stations has approached that of the network-owned stations for some time, thereby giving them a station ownership stake comparable to the networks. Until recently, however, those owners have not launched sizable programming ventures. If the majority's argument (that ownership penetration equivalent to that of the network-owned stations provides the economic base necessary for the creation of new networks) were valid, one would have expected these group owners to have launched sizable programming ventures some time ago. In fact, it is widely recognized that the most significant limitation on the creation of additional networks is the 1952 *Television Table of Allocations*, which limits the number of VHF television stations in most markets to less than four. The *Network Inquiry*, in examining regulatory alternatives that might lead to the formation of additional networks, identified spectrum allocations for DBS and MDS as promising routes and the Commission has implemented those recommendations. Now, with the advent of cost-effective satellite distribution technologies (and contrary to the majority's notion that the seven station rule inhibits group owners from producing programming) group owners are, in fact, beginning to launch nationwide programming ventures, in the terrestrial television service.⁴ Similar developments exist in radio, where numerous programming networks now exist. In sum, it is far from apparent that expanded group ownership of television stations is necessary to promote additional diversity of program sources or the development of new networks. Surely, a more persuasive case should have been made to support so radical a departure from the FCC's traditional approach to media diversity.

¹ See 47 CFR 73.35(b)(1) [AM], 73.240(a)(2) [FM], 73.636(a)(2) [TV].

² The Notice is confined to the seven station rule. However, various aspects of the discussion have implications for other ownership rules and policies as well. See, e.g., *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (setting maximum diffusion of mass media control as a licensing goal of primary significance); 47 CFR 73.35(b)(1) [AM]; 73.240(a)(2) [FM]; 73.636(a)(2) [TV] (regional concentration rules). See also *Broadcasting Magazine*, "Broadcasters urge FCC

regional concentration limits be lifted," (Sept. 26, 1983) p. 58.

³ *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd* 326 U.S. 1 (1945).

⁴ Furthermore, a host of cable programming networks have blossomed without substantial ownership or distribution outlets.

While expansive as to the program diversity benefits of increased combined ownership and the competitive advantages to existing group owners, the Notice shows little regard for the impact the proposed rule changes will have on ease of entry by newcomers to broadcasting—minorities and non-minorities alike—and upon the diversity that now exists in the industry. Prior congressional and FCC initiatives have strongly emphasized the importance of diversifying the pool of broadcast owners.⁵ Elimination or substantial relaxation of the seven station rule is likely to seriously impair entry and participation by all but very large media conglomerates, contrary to this well-founded policy. This is so because in the new, post-rule environment, these conglomerates will bid up the prices of stations in most markets significantly. So far up, in fact, that new entry by those with more limited resources will be all but impossible.⁶ The expanded presence of group owners will also make it more difficult for small broadcasters to compete.

This Adam Smith approach to broadcast regulation may be unobjectionable for industries not characterized by technical scarcity, and not affected with a nearly unique capacity to influence public opinion. However, rigid reliance on the free market philosophy is extremely hazardous in the sensitive domain of broadcast ownership and expression. The FCC's Advisory Committee on Alternative Financing for Minorities in Telecommunications appreciated these concerns when it concluded that "abrupt

removal [of the ownership rules] could result in greater market dominance by established entities, less diversity and fewer opportunities for new entrants into broadcast ownership, including minorities. The Commission cannot be blind to the restructuring consequences of deregulation."⁷ If not altogether blind to these consequences, this Notice, at the very least, is myopic.

Given that media diversification could be seriously undermined by substantial alteration of the existing seven station rule, any proposals for change should have been carefully considered, cautious, and justified by significant countervailing benefits to the public. However, such significant public benefits are not apparent from the new analytic approach to diversity and competition expounded by the majority. In addition, the Notice holds out little prospect for final action in this proceeding short of outright repeal of these rules.⁸ Although comment on alternatives to repeal is solicited in the Notice's concluding paragraphs, when these options are considered in light of the majority's "new analytic perspective," it is hard to credit them as truly possible outcomes in this proceeding.⁹

If any rationalization and revision were in order, it should have been accomplished in phases to provide experience about the public interest impact of changing the rules. One such approach would have been to reexamine

the aggregate ownership limits in radio, where a persuasive changed-circumstances argument can be made. In radio, the public has the benefit of well over 9,000 outlets. Only 27 percent of these stations are owned in groups of three or more. Thus, ownership in radio is diffused over a broad range of owners and a large number of outlets, and some modification of the present ownership limits is unlikely to undermine the diversification policy. In these circumstances, I could have supported an inquiry focussing solely on radio.

The case for changing the rule for television is much weaker, and the consequences of a policy misstep far more severe. Television is the dominant information and entertainment medium for most Americans. Therefore, any attempt to restructure ownership patterns in the medium should be executed with care. Television is not characterized by the abundance and ownership diversity that exists in radio. There are scarcely over 1000 outlets. Approximately 72 percent of the 790 commercial stations are held by group owners.¹⁰ The Notice indicates that by accepted measures of concentration, television is an unconcentrated industry. However, ownership patterns and economic measurement tools that may be perfectly appropriate for industries involving steel, breakfast cereal, or appliances should be regarded with caution in the sensitive field of information dissemination.¹¹ The concentration index approach explored in the Notice, if ultimately adopted, would allow for the placement of numerous television outlets under the editorial control of a limited number of entities. This prospect is fundamentally at odds with the First Amendment goals so long espoused by the Judiciary, Congress and this Commission.

Since only a handful of companies own the full complement of seven television stations, as a practical matter, postponing review of the television ownership ceiling would have caused

⁵ See, e.g., 47 U.S.C. 309(i)(3)(A) [mandating significant preferences to diversity mass media]; H. R. Rep. No. 97-785, 97th Cong., 2d Sess. 40-45 (1982) [recognizing "nexus between diversity of media ownership and diversity of program sources" and specifying that traditional diversification objectives be promoted in mass media lottery grants]; *Policy Statement of Minority Ownership of Broadcast Facilities*, 69 FCC 2d 1591 (1978); *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). See also *Associated Press v. United States*, 326 U.S. 1, 20 (1945) [First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . ."].

⁶ The Notice's suggestion that relaxation or elimination of the rule will prove beneficial to minority ownership strains credibility. Only a handful of existing minority broadcasters could be in a position to benefit from these proposed rule changes. And if the Commission were interested in facilitating investment in new minority enterprises, it need only have modified the ownership attribution rules to facilitate such investment, instead of opening the ownership rule floodgates altogether. See *Corporate Ownership and Reporting and Disclosure by Broadcast Licensees*, 48 FR 10082 (March 10, 1983). [Joint Concurring Statement of Commissioners Henry M. Rivera and Joseph R. Fogarty, at Note 11.]

⁷ *Final Report at 1-2 (Strategies to Advancing Minority Ownership in Telecommunications)* (1982).

⁸ As for promoting economic competition, the Notice proposes that the Commission defer to other agencies or develop various media concentration indices. Ultimately, the Notice questions the utility of such measures, observing that "it may well be necessary to resolve this proceeding based on the limited question of whether the degree of competition in television and radio is sufficient, and the potential anti-competitive impact sufficiently remote, to support elimination or modification of the rule." See para. 48. As for maximizing diversity of viewpoint, the majority regards the task of deciding how much diversity is enough as highly difficult, and accordingly encourages reevaluation of the philosophy that maximum ownership dispersion produces maximum dispersion of viewpoint. Such surgical parsing of the goals underlying the Commission's ownership rules is academically interesting, but does little to advance the analysis of whether and, if so, how to revise the rules. Of course, if elimination of the rules is the overriding objective, this technique may not be inappropriate.

⁹ An additional insight as to the likely outcome in this rulemaking is provided by the majority's explicit intent to reduce the rule "to the maximum extent feasible. . . ." See para. 61. The Notice's failure to consider the impact of the pending attribution rulemaking—which would elevate ownership benchmark to as much as 20 percent—upon the alternatives advanced further suggests that this proceeding may well be an exercise in predetermination. See generally *Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, 48 FR 10082 (March 10, 1983).

¹⁰ Television is undeniably facing increasing competition from cable, but the extent and continued growth of that competition is unclear. Furthermore, while other video services are beginning to emerge, they have yet to achieve any appreciable market share in the national video market. Therefore, fundamental alteration of the television ownership limits is premature.

¹¹ Judge Hand put it nicely when he said: "[I]f this were a case of the ordinary kind: the production of fungible goods, like steel, machinery, clothes or the like, it would be [a different matter]. . . . However, . . . [the press] serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible." *United States v. Associated Press*, supra, 52 F. Supp. at 372.

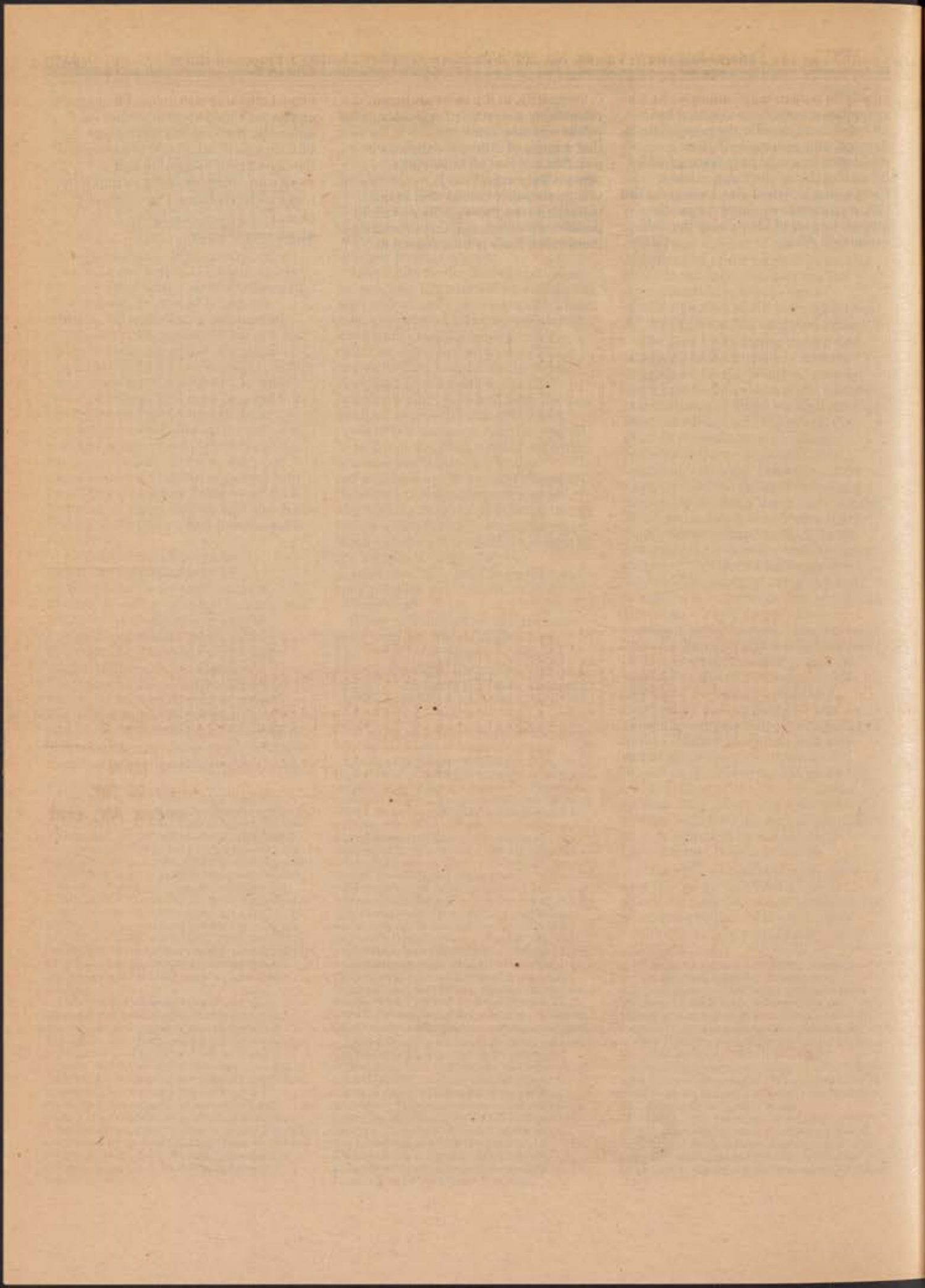
very little burden to the industry. At the same time, postponement would have afforded more time for the new media to develop, and perhaps with that development would have come greater diversification of the video market. Postponement would also have given the FCC a chance to evaluate the public interest impact of liberalizing the radio ownership rules.

Ordinarily, at the commencement of a rulemaking, dissatisfied segments of the public can take some comfort in the fact that a range of different outcomes is possible and that all viewpoints persuasively expressed in the comments will be seriously considered. In this instance, given the majority's explicit inclination toward major restructuring of these rules, there is little reason to

expect anything else unless the majority can be prevailed upon to temper its approach. Because this Notice sets the FCC on a path calculated to undermine the diversity of ownership and viewpoint in broadcasting so faithfully nurtured for decades, I must dissent.

[FR Doc. 83-25601 Filed 10-24-83; 8:45 am]

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Test Report Federal Register

Tuesday
October 25, 1983

Part IV

Environmental Protection Agency

Standards of Performance for New
Stationary Sources; Gas Analysis for
Carbon Dioxide, Oxygen, Excess Air, and
Dry Molecular Weight

**ENVIRONMENTAL PROTECTION
AGENCY****40 CFR Part 60****[AD-FRL 2410-6]****Standards of Performance for New
Stationary Sources; Gas Analysis for
Carbon Dioxide, Oxygen, Excess Air,
and Dry Molecular Weight****AGENCY:** Environmental Protection
Agency (EPA).**ACTION:** Final rule.

SUMMARY: Revisions to Method 3 were proposed on September 7, 1982 (47 FR 39204). This action promulgates the revisions to the method for tests of the emissions from the combustion of organic and fossil fuels using air for combustion and dilution. Such sources include fossil fuel-fired steam generators, industrial boilers, municipal incinerators, and internal combustion engines. The intended effect of these revisions is to provide a means for the tester to check and validate the measurement data on site. The quality control procedure is included as a recommendation, but not a requirement. In addition, some minor changes to F factor equations and tables in Method 19 are included.

EFFECTIVE DATE: October 25, 1983.

Under Section 307(b)(1) of the Clean Air Act, judicial review of these revisions to Method 3 is available *only* by the filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit within 60 days of today's publication of this rule. Under Section 307(b)(1) of the Clean Air Act, the requirements that are the subject of today's notice may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

ADDRESSES: *Summary of Comments and Responses.* The summary of comments and responses for the proposed revisions to Method 3 may be obtained from the U.S. EPA Library (MD-35), Research Triangle Park, North Carolina 27711, telephone number (919) 541-2777. Please refer to "Revisions to Method 3, Appendix A of 40 CFR Part 60—Summary of Comments and Responses, EPA-450/3-82-027." The document contains (1) a summary of the changes made to the Method 3 revisions since proposal and (2) a summary of all the public comments made on the proposed revisions and the Administrator's responses to the comments.

Docket. A docket, number A-82-05, containing information considered by EPA in the development of the revisions,

is available for public inspection between 8:00 a.m. and 4:00 p.m., Monday through Friday, at EPA's Central Docket Section (LE-131), West Tower Lobby, Gallery 1, 401 M Street SW., Washington, D.C. 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Roger T. Shigehara, Emissions Measurement Branch, Emission Standards and Engineering Division (MD-19), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone (919) 541-2237.

SUPPLEMENTARY INFORMATION:**Public Participation**

The revisions to Method 3 were proposed and published in the *Federal Register* on September 7, 1982 (47 FR 39204). Public comments were solicited at the time of proposal. To provide interested persons the opportunity for oral presentation of data, views, or arguments concerning the proposed revisions, a public hearing was scheduled for November 8, 1982. The hearing, however, was not held because no one requested to speak. The public comment period was from September 7, 1982, to November 8, 1982.

Seventeen comment letters concerning issues relative to the proposed revisions were received. The comments have been carefully considered; and, where determined to be appropriate by the Administrator, changes have been made in the proposed revisions.

**Significant Comments and Changes to
the Proposed Revisions to Method 3**

Comments on the proposed revisions to Method 3 were received from industry, State air pollution control agencies, trade associations, and testing consultants. A detailed discussion of these comments and responses can be found in the summary of comments and responses document referenced in the **ADDRESSES** section of this preamble. The summary of comments and responses serves as the basis for the revisions that were made between proposal and promulgation. The major comments and responses are summarized in this preamble. Most of the comment letters contained multiple comments.

Several commenters noted that the ± 5 percent criterion for acceptable F_o values was inconvenient for field application and that a table of acceptable ranges would be more appropriate.

A table of acceptable F_o value ranges has been included in the final version of the method. The values in the table are

representative of ranges experienced in field tests and are indicative of valid, accurate measurements.

There were several commenters who noted that mixed fuels are frequently encountered in the field, and no provisions were included in the proposal for calculating an appropriate F_o value for such mixtures.

The Agency agrees with this comment and included a procedure in the final version for determining a proper F_o value for mixed fuels. The calculation procedure includes a provision for high CO values if such occur.

A number of commenters stated that the proposed revisions would not improve the present quality assurance procedures. They felt the requirement of a test of the analyzer on air did not necessarily check the strength of the absorbing solutions. In addition, some commenters felt the F_o was not a valid indicator of Orsat accuracy.

The purpose of the analysis of an air sample is to check the equipment and the techniques to measure accurately a known concentration. The chemical strength of the absorbing solution is checked in another section of Method 3 (Section 4.2.5). Further, the Agency disagrees that the F_o calculation is not a good indicator of the accuracy of Orsat measurements. An F_o resulting from measurement data that does not agree with the fuel F_o indicates a real problem with the Orsat data and should be investigated. There are several issues that have led the Agency to reconsider the mandatory nature of the revisions. These issues are: (1) An accurate measure of O_2 content of an air sample does not assure that measurements in other ranges or of other components are accurate; (2) there are problems with sources determining a suitable F_o value for mixed fuels because the ratio of fuel combustion rates is not always easily or accurately determined; (3) suitable F_o values are not readily available for all fuels such as vegetable wastes or organic chemical wastes; (4) the F_o procedure would not apply to all tests with the Orsat, only to those on sources burning organic fuels; and (5) rejection of a test run or set of runs because of an errant F_o check is severe in many cases as the solution to many data inaccuracies can be found without retesting.

Review of these issues has led the Agency to revise the proposed required calculation and ambient air check to a recommended procedure in the final version. The F_o and the ambient air check are now recommended quality control procedures, the use of which is left to the discretion of the tester. The

Agency feels that inaccuracies in either the F_o check or the ambient air check are a good indication of problems in the equipment, technique, or calculation and should be investigated before accepting the results. The revisions include several areas or examples for investigation, as well as other considerations.

There were commenters who felt that the applicability of the procedures should be made more clear.

The Agency placed the F_o quality control check in Section 4 of the Method 3 which is applicable only to excess air corrections and emission rate calculation. There are industries for which the F_o calculation is not applicable, such as glass manufacturing, and are not included by Section 4. There are other types of sources for which the revisions are not applicable and are specifically mentioned in the revisions for clarification purposes. These include sources that remove CO_2 or O_2 through processes other than combustion, add O_2 and N_2 in proportions different from air, or add CO_2 , such as lime or cement kilns. A note is included in the revisions to the method that clarifies the applicability of the quality control procedures.

Some commenters noted that the proposed revisions could result in a great deal of extra time being spent in testing if the data failed to pass the F_o check. One commenter noted that retesting was sometimes unnecessary as equivalent alternatives were available.

The Agency feels that, if the quality control checks do not fall within the specified limits, there is an indication of some serious error in the sampling or analysis. In many cases, the problem can be solved without retesting (e.g., miscalculation, misreading) or by repeating only a small part of the test (e.g., the Orsat analysis). The Agency agrees that requiring a repeat of the entire emission test is severe in most instances and is promulgating optional quality control procedures in place of the proposed, required, quality assurance procedures. However, the revisions recommend that problems indicated by deviations from fuel F_o factors be investigated.

Docket

The docket is an organized and complete file of all the information considered by EPA in the development of this rulemaking. The docket is a dynamic file, since material is added throughout the rulemaking development. The docketing system is intended to allow members of the public and industries involved to identify readily and locate documents so that they can intelligently and effectively participate

in the rulemaking process. Along with the statement of basis and purpose of the proposed and promulgated method revisions and EPA responses to significant comments, the contents of the docket will serve as the record in case of judicial review [Section 307(d)(7)(A)].

Miscellaneous

This rulemaking does not impose any additional testing requirements of facilities affected by this rulemaking. Rather, this rulemaking revises existing test methods to which affected facilities are already subject. The revisions add quality control procedures designed to improve the quality of emission test data.

Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirement of a regulatory impact analysis. This regulation is not major because it will not have an annual effect of the economy of \$100 million or more; it will not result in a major increase in costs or prices; and there will be no significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that the attached rule will not have a significant economic impact on small entities because the revisions do not impose additional costs in tests.

This final rulemaking is issued under the authority of Sections 111, 14, and 301(a) of the Clean Air Act, as amended [42 U.S.C. 7411, 7414, and 7601(a)].

List of Subjects in 40 CFR Part 60

Air pollution control, Aluminum, Ammonium sulfate plants, Asphalt, Cement industry, Coal, Copper, Electric power plants, Glass and glass products, Grains, Intergovernmental relations, Iron, Lead, Metals, Metallic minerals, Motor vehicles, Nitric acid plants, Paper and paper products industry, Petroleum, Phosphate, Sewage disposal, Steel, Sulfuric acid plants, Waste treatment and disposal, Zinc, Tires, Incorporation by Reference Can surface coating, Sulfuric acid plants, Industrial organic chemicals; Organic solvent cleaners.

Dated: October 11, 1983.
William D. Ruckelshaus,
Administrator.

PART 60—[AMENDED]

Method 3 and Method 19 of Appendix A of 40 CFR Part 60 are amended as follows:

1. In Sections 4.1.5 and 4.2.7 of Method 3, by removing the phrase "Citation 5 in the Bibliography" and inserting in its place the words "Section 4.4."

2. By adding a new Section 4.4 to Method 3 as follows:

Method 3—Gas Analysis for Carbon Dioxide, Oxygen, Excess Air, and Dry Molecular Weight

4. Emission Rate Correction Factor on Excess Air Determination

4.4 Quality Control Procedures.

4.4.1 Data Validation When Both CO_2 and O_2 Are Measured. Although in most instances, only CO_2 or O_2 measurement is required, it is recommended that both CO_2 and O_2 be measured to provide a check on the quality of the data. The following quality control procedure is suggested.

Note—Since the method for validating the CO_2 and O_2 analyses is based on combustion of organic and fossil fuels and dilution of the gas stream with air, this method does not apply to sources that (1) remove CO_2 or O_2 through processes other than combustion, (2) add O_2 (e.g., oxygen enrichment) and N_2 in proportions different from that of air, (3) add CO_2 (e.g., cement or lime kilns), or (4) have no fuel factor, F_o , values obtainable (e.g., extremely variable waste mixtures). This method validates the measured proportions of CO_2 and O_2 for the fuel type, but the method does not detect sample dilution resulting from leaks during or after sample collection. The method is applicable for samples collected downstream of most lime or limestone flue-gas desulfurization units as the CO_2 added or removed from the gas stream is not significant in relation to the total CO_2 concentration. The CO_2 concentrations from other types of scrubbers using only water or basic slurry can be significantly affected and would render the F_o check minimally useful.

4.4.1.1 Calculate a fuel factor, F_o , using the following equation:

$$F_o = \frac{20.9 - \%O_2}{\%CO_2} \quad \text{Eq. 3-3}$$

Where:

$\%O_2$ = Percent O_2 by volume (dry basis).
 $\%CO_2$ = Percent CO_2 by volume (dry basis).
20.9 = Percent O_2 by volume in ambient air.

If CO is present in quantities measurable by this method, adjust the O_2 and CO_2 values before performing the calculation for F_o as follows:

$$\%CO_2(\text{adj}) = \%CO_2 + \%CO$$

$$\%O_2(\text{adj}) = \%O_2 - 0.5 \%CO$$

Where: $\%CO$ = Percent CO by volume (dry basis).

4.4.1.2 Compare the calculated F_o factor with the expected F_o values. The following table may be used in establishing acceptable ranges for the expected F_o if the fuel being

burned is known. When fuels are burned in combination, calculate the combined fuel F_d and F_e factors (as defined in Method 19) according to the procedure in Method 19 Section 5.2.3. Then calculate the F_o factor as follows:

$$F_o = \frac{0.209 F_d}{F_e} \quad \text{Eq. 3-4}$$

Fuel type	F_o range
Coal:	
Anthracite and lignite	1.016-1.130
Bituminous	1.083-1.230
Oil:	
Distillate	1.260-1.413
Residual	1.210-1.370
Gas:	
Natural	1.600-1.836
Propane	1.434-1.586
Butane	1.405-1.553
Wood	1.000-1.120
Wood bark	1.003-1.130

Calculated F_o values beyond the acceptable ranges shown in this table should be investigated before accepting the test results. For example, the strength of the solutions in the gas analyzer and the analyzing technique should be checked by sampling and analyzing a known concentration, such as air; the fuel factor should be reviewed and verified. An acceptability range of ± 12 percent is appropriate for the F_o factor of mixed fuels with variable fuel ratios. The level of the emission rate relative to the compliance level should be considered in determining if a retest is appropriate, i.e., if the measured emissions are much lower or much greater than the compliance limit, repetition of the

test would not significantly change the compliance status of the source and would be unnecessarily time-consuming and costly.

3. In Section 5.2.2 of Method 19, by revising the equations for fuel factors to read as follows:

5.2.2 Calculating an F Factor.

For SI units:

$$F_d = \frac{[227.0 (\%H) + 95.7 (\%C) + 35.4 (\%S) + 8.6 (\%N) - 28.5 (\%O)]}{10 * GCV}$$

$$F_w = \frac{[347.4 (\%H) + 95.7 (\%C) + 35.4 (\%S) + 8.6 (\%N) - 25.5 (\%O) + 13.0 (\%H_2O)]}{10 * GCV_w}$$

$$F_e = \frac{[20.0 (\%C)]}{10 * GCV}$$

For English units:

$$F_d = \frac{10 * [3.04 (\%H) + 1.53 (\%C) + 0.57 (\%S) + 0.14 (\%N) - 0.46 (\%O)]}{GCV}$$

4. In Table 19-1—*F Factors for Various Fuels* in Methods 19, by changing the F_e values for wood bark from 0.497×10^{-7} scm/J (1850 scf/10⁶ Btu) to 0.516×10^{-7} scm/J (1920 scf/10⁶ Btu).

[Sec. 111, 114, 301(a) of the Clean Air Act as amended (42 U.S.C. 7411, 7414, 7601(a))]

[FR Doc. 83-28452 Filed 10-24-83; 8:45 am]

BILLING CODE 6560-50-M

Register

Tuesday
October 25, 1983

Part V

Office of Personnel Management

Reduction in Force

**OFFICE OF PERSONNEL
MANAGEMENT****5 CFR Part 351****Reduction in Force**

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management is amending the reduction-in-force (RIF) regulations to give greater recognition to performance as a retention factor, strengthen the objectivity of the RIF process, and improve the efficiency of the system.

EFFECTIVE DATE: November 25, 1983.

FOR FURTHER INFORMATION CONTACT: Morton I. Horvitz (202) 632-6817.

SUPPLEMENTARY INFORMATION:

Background

OPM published an advance notice of proposed rulemaking in the *Federal Register* (47 FR 17528) on April 23, 1982, inviting all interested parties to make recommendations for changes in the RIF regulations. Based on information received, on March 30, 1983, OPM published proposed RIF regulations (48 FR 13388). After analyzing comments, OPM proposed new RIF regulations on July 14, 1983 (48 FR 32304). Comments on the latest proposal were received from 31 agencies, 9 labor organizations, 8 other organizations, and 47 individuals. These comments were carefully reviewed and major concerns expressed are reflected in the final regulations as discussed below. Certain technical issues raised are not addressed here but will be dealt with in the *Federal Personnel Manual*.

The RIF regulations are derived from provisions of the Veterans' Preference Act of 1944, as amended, and the Civil Service Reform Act (CSRA) of 1978. These provisions are codified in chapter 35 of title 5, United States Code, and require that retention in RIF be based on tenure, veterans preference, length of service, and performance. In addition, CSRA Merit Principle 6 states "Employees should be retained on the basis of the adequacy of their performance" (section 2301 of title 5, U.S.C.). Current regulations, however, give almost no recognition to the performance factor.

The need to emphasize performance and to reform other parts of the RIF system was indicated by agency experience with RIF as well as concerns expressed by members of Congress, employees, and other interested parties. In addition, the Merit Systems Protection Board's study on RIF actions

identified weaknesses in the system and made recommendations for change.

OPM's objectives in making changes were to: (1) Give more weight to performance in the RIF process; (2) minimize agency disruption; (3) limit negative effects on employees; and (4) preserve for veterans their preference in determining retention standing in accordance with law.

Discussion of Final Regulations

The major changes in the regulations are as follows.

1. *Credit for Performance* (§ 351.501 and § 351.504). To give more weight to performance, two options were proposed for comment. Under one, employees would be ranked by current tenure and veteran preference groupings, followed by performance categories (based on the median of the last three ratings) and then by seniority. Under the other proposal, employees would be ranked in current tenure, veteran preference, and seniority order but given greatly increased service credit for each of the last three ratings at fully successful and higher.

Most commenters favored the service credit alternative but some suggested reducing the amount of credit given for each performance level. An analysis of the effects of various suggested formulas showed that a modification of the proposal would assure equitable treatment of a fully successful employee with many years of service while improving the chances for retention of an outstanding employee with few years of service. Thus, the final regulations incorporate the service credit alternative but provide ten additional years of service for an outstanding rating, seven years for an exceeds fully successful rating, and five years for a fully successful rating. In addition, an employee with a current rating of unacceptable who has not received a final decision of demotion or separation would be ranked on a retention register along with other employees according to tenure, veteran preference, length of service, and additional service credit, as appropriate, for previous annual ratings. An employee with a final decision of demotion or separation would be released from a competitive level before other employees.

In response to suggestions, we clarified in § 351.504 the status of employees who lack three ratings and those who have been demoted due to unacceptable performance.

2. *Assignment Rights (Bump and Retreat)* (§ 351.701). To limit excessive disruption caused by bumping and retreating across the entire grade structure, two options were proposed.

Both would limit the bump to two grade intervals and retreat to one grade interval. The first option would also extend retreat rights for 30 percent disabled veterans to five grade intervals and would permit employee with unacceptable ratings to displace others with unacceptable ratings. The second option would limit bumping of professional employees to professional positions and clerical employees to clerical positions but would not permit an employee with an unacceptable rating to bump or retreat.

There was no pattern to indicate commenters favored one proposal over the other. Because many commenters opposed assignment rights for employees with unacceptable ratings, the second option has been adopted in its entirety but with the five grade interval retreat for disabled veterans, for whom OPM believes a special placement effort is justified.

Several commenters asked for clarification of assignment rights of employees who do not fall within "professional" or "clerical" groupings. The final regulation refers instead to "clerical" and "nonclerical" employees. Definitions and further guidance will be provided in the *Federal Personnel Manual*. Other commenters were concerned this provision would have an adverse effect on former clerical employees in upward mobility programs. Since the provision applies only to bumping, a nonclerical employee will not be prevented from retreating to a formerly-held clerical position.

Certain editorial changes were also made. Material from § 351.603 and § 351.703 in the current regulation has been rearranged under § 351.701 to pull together all requirements on assignment rights. Other sections have been renumbered. § 351.603 has been revised for clarification but reflects no policy change.

3. *Competitive Area* (§ 351.402). The proposal for a competitive area no smaller than a bureau or division was intended to provide more practical criteria for agencies to use in establishing minimum areas. Commenters frequently requested clarification of the term "bureau or division". The final regulation, therefore, defines the minimum as a bureau, major command, directorate or other equivalent major subdivision of an agency.

To insure objectivity, the proposed regulation provided that competitive areas be subject to OPM advance approval and be in effect at least 90 days prior to a RIF. Agencies felt this requirement would be costly and could

delay a RIF. To avoid these problems, the final regulation requires agencies to obtain OPM prior approval only for changes in competitive areas made less than 90 days before a RIF. However, agencies are required to make public, and available for OPM review, the competitive areas they would use in a RIF.

In keeping with these revisions in competitive areas and to limit unnecessary disruption, the final regulations do not contain current provisions allowing agency discretion to combine competitive areas for initial competition (§ 351.402(d)) and for displacement (§ 351.705(a)(1)).

4. Competitive Level (§ 351.403). Improvements were proposed to incorporate more specific job-related criteria for setting competitive levels. The proposal also required that levels be set at least 90 days prior to a RIF, with prior submission to OPM.

Agency comments reflected concern over possible delays in RIF due to the 90-day requirement. After weighing these concerns against the need to strengthen objectivity of the system, it was determined that no change would be made in the 90-day provision.

Comments also indicated a need to clarify the prior submission requirement. This clarification will be achieved by requiring agencies to certify to OPM that competitive levels are properly described and available for review at least 90 days prior to a RIF, and detailed guidance will be published in the Federal Personnel Manual.

5. Notice (§ 351.801). The proposed changes in § 351.801 and § 351.803 would set the minimum notice at 30 days and the maximum at 90 days, with a specific notice of ten days. Several commenters suggested a longer notice be permitted in special circumstances, such as the closing of a major facility, to allow for more effective outplacement programs. Final regulations permit this but only with OPM prior approval.

In addition, editorial changes were made in other sections of Subpart H. Notice to Employee, but the only substantive change is that noted above for the notice period.

6. Qualifications (§ 351.702). A revision was proposed to assure that employees are fully qualified to do the job into which they bump or retreat. The proposed standard would require a positive ability, based on overall background, including recency of experience, to perform the critical elements of a position upon assignment to it without any loss of productivity beyond that normally expected. Several commenters expressed concern that the recency requirement could be abused

and would be frequently challenged. It is OPM's intent that agencies apply this only to those job requirements where the agency can demonstrate recency of experience is necessary for successful performance on the job. Further guidance will be given in the Federal Personnel Manual.

Several commenters suggested the regulation should include reference to reasonable accommodation for handicapped employees when agencies determine qualifications for assignment. This has been done.

7. RIF Coverage (§ 351.201(a)). Under the proposed regulation, a downgrade due to job classification caused by erosion of duties would no longer be covered under RIF procedures. Several commenters suggested the regulation should show this as excluded from RIF coverage to distinguish it from downgrades due to reorganization or other planned management actions which continue to be covered by RIF procedures. This exclusion is added to § 351.202.

In addition, in § 351.201(a)(1) agency responsibility for identifying positions to be abolished is clarified. In response to suggestions, insufficient personnel ceiling is added to the circumstances in § 351.201(a)(2) which may trigger use of RIF procedures. This is consistent with other reasons for use of these procedures.

8. Appeals (§ 351.902). Under the current regulation, an employee affected by RIF because of demotion, separation, furlough for more than thirty days, or reassignment (where that reassignment requires displacement of another employee) may appeal to the Merit Systems Protection Board (MSPB). In the final regulation this reassignment is no longer an appealable action because it does not affect the grade, pay, or tenure of an employee and is no different than an administration reassignment which is never appealable to MSPB.

In addition, under current regulations, appellants who challenge RIF actions may appeal to MSPB and be granted a hearing. This is the case whether there are any material issues of fact involved, or whether any such material issues of fact require a hearing. As a result, the cost of RIF appeals has greatly increased without a concomitant increase in the protection afforded to appellants.

To encourage economy and efficiency of Government operations without in any way detracting from the legitimate rights of employees, the final regulation provides that unless MSPB determines there are material issues of fact in dispute, the review of agency actions will be confined to the written record.

Whether and to what extent a hearing should be held in a particular case is a matter for determination by the Board.

9. Retired Members of Uniformed Services. § 351.501(h) is redesignated (d) and amended to clarify conditions under which certain retired members of the uniformed services are considered preference eligibles for RIF purposes. The definition of "disabled veteran" is broadened as it applies to certain members who retired at the rank of major or above. This change is based on section 307 of the Civil Service Reform Act of 1978.

The entitlement to preference by reservists who at age 60 become eligible for retired pay under chapter 67 of title 10, U.S.C., is clarified in § 351.501(d)(5). This change is based on the Dual Compensation Act as modified by section 307 of the Civil Service Reform Act of 1978. Also, § 351.501(d)(2) as revised conforms to longstanding interpretation of the Dual Compensation Act that retired pay based on 20 years of active service, even when the actual service totals less than 20 years, disqualifies a retired member for retention preference. Both provisions were included in the March 30, 1983, proposed rulemaking but were inadvertently omitted from the July 14, 1983, proposal. We received numerous requests for clarification.

10. Other. Various other sections were amended to update or drop obsolete references. Minor changes were made for consistency and some sections reorganized for greater clarity. Subpart J, Reemployment Priority List, was not changed and is not reprinted here. A review of all placement programs is planned and changes to Subpart J will be proposed if necessary.

11. Effective Date. Agencies may delay implementation of these regulations if RIF plans are underway as of the date this regulation is issued and the RIF will take effect on or before January 16, 1984.

E.O. 12291, Federal Regulation

OPM has determined that this is not a major rule as defined under Section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation applies only to Federal agencies.

List of Subjects in 5 CFR Part 351

Government Employees.

U.S. Office of Personnel Management.
Donald J. Devine,
Director.

Accordingly, Subparts A through I of Part 351 of 5 CFR are revised to read as follows:

PART 351—REDUCTION IN FORCE

Subpart A—[Reserved]

Subpart B—General Provisions

- Sec.
351.201 Use of regulations.
351.202 Coverage.
351.203 Definitions.
351.204 Responsibility of agency.
351.205 Authority of OPM.

Subpart C—Transfer of Function

- 351.301 Applicability.
351.302 Transfer of employees.
351.303 Identification of positions with a transferring function.

Subpart D—Scope of Competition

- 351.401 Determining retention standing.
351.402 Competitive area.
351.403 Competitive level.
351.404 Retention register.
351.405 Employees demoted because of unacceptable performance.

Subpart E—Retention Standing

- 351.501 Order of retention—competitive service.
351.502 Order of retention—excepted service.
351.503 Length of service.
351.504 Credit for performance.
351.505 Records.
351.506 Effective date of retention standing.

Subpart F—Release From Competitive Level

- 351.601 Order of release from competitive level.
351.602 Prohibitions.
351.603 Actions subsequent to release from competitive level.
351.604 Use of furlough.
351.605 Liquidation provisions.
351.606 Mandatory exceptions.
351.607 Permissive continuing exceptions.
351.608 Permissive temporary exceptions.

Subpart G—Assignment Rights (Bump and Retreat)

- 351.701 Assignment involving displacement.
351.702 Qualifications for assignment.
351.703 Exception to qualifications.
351.704 Rights and prohibitions.
351.705 Administrative assignment.

Subpart H—Notice to Employee

- 351.801 Notice period.
351.802 General and specific notices.
351.803 Content of notice.
351.804 Notice concerning consideration for reemployment.
351.805 Expiration of notice.
351.806 New notice required.
351.807 Status during notice period.

Subpart I—Appeals and Corrective Action

- 351.901 Appeals.

Sec.
351.902 Correction by agency.

Authority: 5 U.S.C. 1302, 3502, unless otherwise noted.

Subpart A [Reserved]

Subpart B—General Provisions

§ 351.201 Use of regulations.

(a)(1) Each agency is responsible for determining the categories within which positions are required, where they are to be located, and when they are to be filled, abolished, or vacated. This includes determining when there is a surplus of employees at a particular location in a particular line of work.

(2) Each agency shall follow this part when it releases a competing employee from his or her competitive level by furlough for more than 30 days, separation, demotion, or reassignment requiring displacement, when the release is required because of lack of work, shortage of funds, insufficient personnel ceiling, reorganization, or the exercise of reemployment rights or restoration rights.

(b) This part does not require an agency to fill a vacant position. However, when an agency, at its discretion, chooses to fill a vacancy by an employee who has been reached for release from a competitive level for one of the reasons in paragraph (a)(2) of this section, this part shall be followed.

(c) Each agency is responsible for assuring that the provisions in this part are uniformly and consistently applied in any one reduction in force.

(d) An agency authorized to administer foreign national employee programs under section 408 of the Foreign Service Act of 1980 (22 U.S.C. 3968) may include special plans for reduction in force in its foreign national employee programs. In these plans an agency may give effect to the labor laws and practices of the locality of employment by supplementing the selection factors in Subparts D and E of this part to the extent consistent with the public interest. Subpart I of this part does not apply to actions taken under the special plans authorized by this paragraph.

§ 351.202 Coverage.

(a) *Employees covered.* Except as provided in paragraph (b) of this section, this part applies to each civilian employee in:

- (1) The executive branch of the Federal Government; and
- (2) Those parts of the Federal Government outside the executive branch which are subject by statute to competitive service requirements or are

determined by the appropriate legislative or judicial administrative body to be covered hereunder.

Coverage includes administrative law judges except as modified by Part 930 of this chapter.

(b) *Employees excluded.* This part does not apply to an employee:

- (1) In a position in the Senior Executive Service; or
- (2) Whose appointment is required by Congress to be confirmed by, or made with, the advice and consent of the United States Senate, except a postmaster.

(c) *Actions excluded.* This part does not apply to:

- (1) The termination of a temporary or term promotion or the return of an employee to the position held before the temporary or term promotion or to one of equivalent grade and pay.

(2) A change to lower grade based on the reclassification of an employee's position due to erosion of duties, the application of new classification standards, or the correction of a classification error.

(3) The change of an employee from regular to substitute in the same pay level in the U.S. Postal Service field service.

(4) The release from a competitive level of a National Guard technician under section 709 of title 32, United States Code.

§ 351.203 Definitions.

In this part:

"Competing employee" means an employee in tenure group I, II, or III.

"Days" means calendar days.

"Function" means all or a clearly identifiable segment of an agency's mission (including all integral parts of that mission), regardless of how it is performed.

"Local commuting area" means the geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and can reasonably be expected to travel back and forth daily to their usual employment.

"Performance rating" means an official performance rating under a performance appraisal system approved by OPM in accordance with 5 U.S.C., chapter 43; or for an agency not subject to chapter 43, an official performance rating as provided for in the agency's appraisal system.

"Reorganization" means the planned elimination, addition, or redistribution of functions or duties in an organization.

"Representative rate" means the fourth step of the grade for a position subject to the General Schedule, the prevailing rate for a position under a wage-board or similar wage-determining procedure, and for other positions, the rate designated by the agency as representative of the position. Employees covered by the Merit Pay System are General Schedule employees for purposes of determining representative rate.

"Transfer of function" means the transfer of the performance of a continuing function from one competitive area and its addition to one or more other competitive areas; or the movement of the competitive area in which the function is performed to another commuting area.

§ 351.204 Responsibility of agency.

Each agency covered by this part is responsible for following and applying the regulations in this part when the agency determines that a reduction in force is necessary.

§ 351.205 Authority of OPM.

The Office of Personnel Management may establish further guidance and instructions for the planning, preparation, conduct, and review of reductions in force through the Federal Personnel Manual system. OPM may examine an agency's preparations for reduction in force at any stage. When OPM finds that an agency's preparations are contrary to the express provisions or to the spirit and intent of these regulations or that they would result in violation of employee rights or equities, OPM may require appropriate corrective action.

Subpart C—Transfer of Function

§ 351.301 Applicability.

This subpart is applicable when the work of one or more employees is moved from one competitive area to another, regardless of whether or not the movement is made under authority of a statute, Executive order, reorganization plan, or other authority.

§ 351.302 Transfer of employees.

(a) Before a reduction in force is made in connection with the transfer of any or all of the functions of a competitive area to another continuing competitive area, each competing employee in a position identified with the transferring function or functions shall be transferred to the continuing competitive area without any change in the tenure of his or her employment.

(b) An employee whose position is transferred under this subpart solely for liquidation, and who is not identified

with an operating function specifically authorized at the time of transfer to continue in operation more than 60 days, is not a competing employee for other positions in the competitive area gaining the function.

(c) Regardless of an employee's personal preference, an employee has no right to transfer with his or her function, unless the alternative in the competitive area losing the function is separation or demotion.

§ 351.303 Identification of positions with a transferring function.

(a) The competitive area losing the function is responsible for identifying the positions of competing employees with the transferring function. Two methods are provided to identify employees with the transferring function:

- (1) Identification Method One; and
- (2) Identification Method Two.

(b) Identification Method One must be used to identify each position to which it is applicable. Identification Method Two is used only to identify positions to which Identification Method One is not applicable.

(c) Under Identification Method One a competing employee is identified with a transferring function if:

- (1) The employee performs the function during all or a major part of his or her work time; or
- (2) Regardless of the amount of time the employee performs the function during his or her working time, the function performed by the employee includes the duties controlling his or her grade or rate of pay.

(d) Under Identification Method Two, competing employees are identified with a transferring function in the inverse order of their retention standing.

(e)(1) The competitive area losing the function may permit other employees in the competitive area to volunteer for transfer with the function in place of employees identified under Identification Method One or Identification Method Two. However, the competitive area may permit these other employees to volunteer for transfer only if no competing employee who is identified for transfer under Identification Method One or Identification Method Two is separated or demoted solely because a volunteer transferred in place of him or her to the competitive area that is gaining the function.

(2) If the total number of employees who volunteer for transfer exceeds the total number of employees required to perform the function in the competitive area that is gaining the function, the losing competitive area should give

preference to the volunteers with the highest retention standing.

Subpart D—Scope of Competition

§ 351.401 Determining retention standing.

Each agency shall determine the retention standing of each competing employee on the basis of the factors in this subpart and in Subpart E of this part.

§ 351.402 Competitive area.

(a) Each agency shall establish competitive areas in which employees compete for retention under this part.

(b) A competitive area may consist of all or part of an agency. The minimum competitive area in the departmental service is a bureau, major command, directorate or other equivalent major subdivision of an agency within the local commuting area. In the field, the minimum competitive area is an activity under separate administration within the local commuting area. A competitive area must be defined solely in terms of an agency's organizational unit(s) and geographical location, and it must include all employees within the competitive area so defined.

(c) When a competitive area will be in effect less than 90 days prior to the effective date of a reduction in force, a description of the competitive area shall be submitted to the OPM for approval in advance of the reduction in force. Descriptions of all competitive areas must be made readily available for review.

§ 351.403 Competitive level.

(a) Each agency shall establish competitive levels consisting of all positions in a competitive area which are in the same grade (or occupational level) and classification series and which are similar enough in duties, qualification requirements, pay schedules, and working conditions so that the incumbent of one position could successfully perform the critical elements of any other position upon entry into it, without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee. Sex may not be the basis for assigning a position to a competitive level, except for a position which OPM has determined certification of eligibles by sex is justified.

(b) Each agency shall establish separate competitive levels according to the following categories:

(1) By service. Separate levels shall be established for positions in the competitive service and in the excepted service.

(2) By appointment authority. Separate levels shall be established for excepted service positions filled under different appointment authorities.

(3) By pay schedule. Separate levels shall be established for positions under different pay schedules.

(4) By work schedule. Separate levels shall be established for positions filled on a full-time, part-time, intermittent, seasonal, or on-call basis. No distinction may be made among employees in the competitive level on the basis of the number of hours or weeks scheduled to be worked.

(5) By supervisory or nonsupervisory status. Separate levels shall be established for positions filled by a supervisor or management official as defined in 5 U.S.C. 7103(a) (10) and (11), except that a probationary period required by Subpart I of Part 315 of this chapter for initial appointment to a supervisory or managerial position is not a basis for establishing a separate competitive level.

(6) By trainee status. Separate levels shall be established for positions filled by an employee in a formally designated trainee or developmental program having all the characteristics covered in § 351.702 (e)(1) through (e)(4) of this part.

(c) Competitive levels shall be submitted in advance to OPM and must be in effect at least 90 days prior to a reduction in force. Descriptions of competitive levels when established must be made readily available for review.

§ 351.404 Retention register.

(a) When a competing employee is to be released from a competitive level under this part, the agency shall establish a separate retention register for that competitive level. The retention register is prepared from the current retention records of employees. Except for an employee on military duty with a restoration right, the agency shall enter on the retention register, in the order of retention standing, the name of each competing employee who is:

- (1) In the competitive level.
- (2) Temporarily promoted from the competitive level by temporary or term promotion; or
- (3) Detailed from the competitive level under 5 U.S.C. 3341 or other appropriate authority.

(b)(1) The name of each employee serving under a time limited appointment or promotion to a position in a competitive level shall be entered on a list apart from the retention register for that competitive level, along with the expiration date of the action.

(2) The agency shall list, at the bottom of the list prepared under paragraph (b)(1) of this section, the name of each employee in the competitive level with a written decision under Part 432 of this chapter to remove him or her because of unacceptable performance.

§ 351.405 Employees demoted because of unacceptable performance.

An employee who has received a written decision under Part 432 of this chapter to demote him or her because of unacceptable performance competes under this part from the position to which he or she will be or has been demoted.

Subpart E—Retention Standing

§ 351.501 Order of retention—competitive service.

(a) Competing employees shall be classified on a retention register on the basis of their tenure of employment, veteran preference, length of service, and performance in descending order as follows:

(1) By tenure group I, group II, group III; and

(2) Within each group by veteran preference subgroup AD, subgroup A, subgroup B; and

(3) Within each subgroup by years of service as augmented by credit for performance under § 351.504, beginning with the earliest service data.

(b) Groups are defined as follows:

(1) Group I includes each career employee who is not serving a probationary period. (A supervisory or managerial employee serving a probationary period required by Subpart I of Part 315 of this title is in group I if the employee is otherwise eligible to be included in this group.)

(2) Group II includes each career-conditional employee and each employee serving a probationary period under Subpart H of Part 315 of this chapter. (A supervisory or managerial employee serving a probationary period required by Subpart I of Part 315 of this chapter is in group II if that employee has not completed a probationary period under Subpart H of Part 315 of this chapter.)

(3) Group III includes all employees serving under indefinite appointment, temporary appointment pending establishment of register, status quo appointment, and any other nonstatus nontemporary appointment.

(c) Subgroups are defined as follows:

(1) Subgroup AD includes each preference eligible employee who has a compensable service-connected disability of 30 percent or more.

(2) Subgroup A includes each preference eligible employee not included in subgroup AD.

(3) Subgroup B includes each nonpreference eligible employee.

(d) A retired member of a uniformed service is considered a preference eligible under this part only if the member meets at least one of the conditions of the following paragraphs (d) (1), (2), or (3) of this section, except as limited by paragraph (d)(4) or (d)(5):

(1) The employee's military retirement is based on disability that either:

(i) Resulted from injury or disease received in the line of duty as a direct result of armed conflict; or

(ii) Was caused by an instrumentality of war incurred in the line of duty during a period of war as defined by sections 101 and 301 of title 38, United States Code.

(2) The employee's retired pay from a uniformed service is not based upon 20 or more years of full-time active service, regardless of when performed but not including periods of active duty for training.

(3) The employee has been continuously employed in a position covered by this part since November 30, 1964, without a break in service of more than 30 days.

(4) An employee who retired at the rank of major or above (or equivalent) is considered a preference eligible under this part if such employee is a disabled veteran as defined in section 2108(2) of title 5, United States Code, and meets one of the conditions covered in paragraphs (d) (1), (2), or (3) of this section.

(5) An employee who is eligible for retired pay under chapter 67 of title 10, United States Code, and who retired at the rank of major or above (or equivalent) is considered a preference eligible under this part at age 60, only if such employee is a disabled veteran as defined in section 2108(2) of title 5, United States Code.

§ 351.502 Order of retention—excepted service.

Competing employees in the excepted service shall be classified on retention registers in a way that corresponds to that under § 351.501 for employees in the competitive service having similar tenure of employment, veteran preference and performance ratings except that an employee who completes 1 year of current continuous excepted service under a temporary appointment is in tenure group III.

§ 351.503 Length of service.

(a) Each agency shall establish a service date for each competing employee.

(b) An employee's service date is whichever of the following dates reflects the employee's creditable service:

(1) The date the employee entered on duty, when he or she has no previous creditable service;

(2) The date obtained by subtracting the employee's total creditable previous service from the date he or she last entered on duty; or

(3) The date obtained by subtracting from the date in paragraph (b)(1) or (b)(2) of this section, the service equivalent allowed for performance ratings under § 351.504.

(c) An employee who is a retired member of a uniformed service is entitled to credit under this part for:

(1) The length of time in active service in the armed forces during a war, or in a campaign or expedition for which a campaign badge has been authorized; or

(2) The total length of time in active service in the armed forces if the employee is considered a preference eligible under § 351.501(d) of this part.

(d) Each agency shall adjust the service date for each employee to withhold credit for noncreditable time.

§ 351.504 Credit for performance.

(a) Performance ratings of outstanding, exceeds fully successful, fully successful, minimally successful and unacceptable are those ratings established under Part 430 of this chapter.

(b) An employee's entitlement to additional service credit for performance under this subpart shall be based on the employee's last three annual performance ratings received during the 3-year period prior to the date of issuance of specific reduction-in-force notices.

(c) The current annual performance rating shall be the last annual rating except that:

(1) An employee who has received an improved rating following an opportunity to demonstrate acceptable performance as provided in Part 432 of this chapter shall have the improved rating considered as the current annual rating; and

(2) An employee's current annual rating shall be presumed to be fully successful when the employee had been demoted under Part 432 of this chapter because of unacceptable performance and as of the date of issuance of specific reduction-in-force notices has not received a rating for performance in the position to which demoted.

(d) Service credit for employees who do not have three previous annual ratings shall be determined as follows:

(1) An employee who has not received a rating shall receive credit for performance for three assumed ratings of fully successful or equivalent.

(2) An employee who has received at least one but fewer than three previous annual ratings shall receive credit for performance based on the actual rating(s) received and on one, or two, assumed rating(s) of fully successful or equivalent, whichever is needed to credit the employee with three ratings.

(e) In computing credit for performance an employee shall receive for each of the three previous annual performance ratings:

(1) Ten additional years of service for each performance rating of outstanding or equivalent;

(2) Seven additional years of service for each performance rating of exceeds fully successful or equivalent; or

(3) Five additional years of service for each performance rating of fully successful or equivalent.

(f) Each agency subject to Part 430 of this chapter is responsible for assuring that its application of these provisions is consistent with that part. Each agency not subject to Part 430 shall apply the provisions of its performance appraisal plan as appropriate.

§ 351.505 Records.

Each agency shall maintain the current correct records needed to determine the retention standing of its competing employees. The agency shall allow the inspection of its retention registers and related records by:

(a) A representative of OPM; and

(b) An employee of the agency to the extent that the registers and records have a bearing on a specific action taken, or to be taken, against the employee.

The agency shall preserve intact all registers and records relating to an employee for at least 1 year from the date the employee is issued a specific notice.

§ 351.506 Effective date of retention standing.

Except for applying the performance factor as provided in § 351.504:

(a) The retention standing of each employee released from a competitive level in the order prescribed in § 351.601 is determined as of the date the employee is so released.

(b) The retention standing of each employee temporarily retained in a competitive level under § 351.608 is determined as of the date the employee would have been released from the

competitive level had temporary retention action under § 351.608 not been taken. The retention standing of each employee so retained remains fixed until the completion of the reduction-in-force action which resulted in the temporary retention.

(c) When an agency discovers an error in the determination of an employee's retention standing, it shall correct the error and adjust any erroneous reduction-in-force action to accord with the employee's proper retention standing as of the effective date established by this section.

Subpart F—Release From Competitive Level**§ 351.601 Order of release from competitive level.**

(a) Each agency shall select competing employees for release from a competitive level under this part in the inverse order of retention standing, beginning with the employee with the lowest retention standing on the retention register. An agency may not release a competing employee from a competitive level while retaining in that level an employee with lower retention standing except:

(1) As required under § 351.606 when an employee is retained under a mandatory exception or under § 351.806 when an employee is entitled to a new written notice of reduction in force; or

(2) As permitted under § 351.607 when an employee is retained under a permissive continuing exception or under § 351.608 when an employee is retained under a permissive temporary exception.

(b) When employees in the same retention subgroup have identical service dates and are tied for release from a competitive level, the agency may select any tied employee for release.

§ 351.602 Prohibitions.

An agency may not release a competing employee from a competitive level while retaining in that level an employee with:

(a) A specifically limited temporary appointment;

(b) A specifically limited temporary or term promotion;

(c) A written decision under Part 432 of this chapter of removal or demotion from the competitive level because of unacceptable performance.

§ 351.603 Actions subsequent to release from competitive level.

An employee reached for release from a competitive level shall be offered assignment to another position in

accordance with Subpart G of this part. If the employee accepts, the employee shall be assigned to the position offered. If the employee has no assignment right or does not accept an offer under Subpart G, the employee shall be furloughed or separated.

§ 351.604 Use of furlough.

(a) An agency may furlough a competing employee only when it intends within 1 year to recall the employee to duty in the position from which furloughed.

(b) An agency may not separate a competing employee under this part while an employee with lower retention standing in the same competitive level is on furlough.

(c) An agency may not furlough a competing employee for more than 1 year.

(d) When an agency recalls employees to duty in the competitive level from which furloughed, it shall recall them in the order of their retention standing, beginning with the highest standing employee.

§ 351.605 Liquidation provisions.

When an agency will abolish all positions in a competitive area within 3 months, it shall release employees in subgroup order but may release them regardless of retention standing within a subgroup, except as provided in § 351.606. When an agency releases an employee under this section, the notice to the employee shall so state and also shall give the date the liquidation will be completed. An agency may apply § 351.607 and § 351.608 in liquidation.

§ 351.606 Mandatory exceptions.

(a) When an agency applies § 351.601 or § 351.605, it shall give the following special retention priorities:

(1) Each group I or II preference eligible employee entitled under section 9 of the Military Selective Service Act of 1967, as amended (50 U.S.C. App. 459), to retention for 1 year after restoration shall be retained over other employees in the same subgroup for the retention period; and

(2) Each group I or II nonpreference eligible employee entitled under section 9 of the Military Selective Service Act of 1967, as amended (50 U.S.C. App. 459), to retention for either 6 months or 1 year after restoration shall be retained over other employees in the same subgroup for the retention period.

(b) Each agency shall record on the retention register, for inspection by each employee, the reasons for any deviation from the order of release required by § 351.601 or § 351.605.

§ 351.607 Permissive continuing exceptions.

An agency may make exception to the order of release in § 351.601 and to the action provisions of § 351.603 when needed to retain an employee on duties that cannot be taken over within 90 days and without undue interruption to the activity by an employee with higher retention standing. The agency shall notify in writing each higher-standing employee reached for release from the same competitive level of the reasons for the exception.

§ 351.608 Permissive temporary exceptions.

(a) An agency may make exception for not more than 90 days to the order of release in § 351.601 and to the action provisions of § 351.603 when needed to retain an employee for 90 days or less after the effective date of release of a higher-standing employee from the same competitive level:

(1) To continue an activity without undue interruption; or

(2) To satisfy a Government obligation to the retained employee; or

(3) When the temporary retention of the lower-standing employee does not adversely affect the rights of any higher-standing employee who is released ahead of the lower-standing employee. The temporary retention of a lower-standing employee on sick leave as a permissive exception may exceed 90 days but may not exceed the date the employee's sick leave is exhausted.

(b) When the agency retains an employee for more than 30 days after the effective date of release of a higher-standing employee from the same competitive level, it shall notify in writing each higher-standing employee reached for release of the reasons for the exception and the date the lower-standing employee's retention will end. When the agency retains a lower-standing employee for 30 days or less, it shall list opposite the employee's name on the retention register the reasons for the exception and the date this employee's retention will end.

Subpart G—Assignment Rights (Bump and Retreat)

§ 351.701 Assignment involving displacement.

(a) *General.* When a group I or II competitive service employee with a performance rating of minimally successful or equivalent, or higher, is released from a competitive level, an agency shall offer assignment, rather than furlough or separate, in accordance with paragraphs (b), (c), and (d) of this section to another competitive service

position which requires no reduction or the least possible reduction in representative rate. The employee must be qualified for the offered position which shall be in the same competitive area and last at least three months.

(b) *Lower subgroup—bumping.* A released employee shall be assigned in accordance with paragraphs (a) and (d) of this section and bump to a position that:

(1) Is held by another employee in a lower subgroup within the same or a lower tenure group; and

(2) Is no more than two grades (or appropriate grade intervals or equivalent) below the position from which the employee was released.

(c) *Same subgroup—retreating.* A released employee shall be assigned in accordance with paragraphs (a) and (d) of this section and retreat to a position that:

(1) Is held by another employee with a lower retention standing in the same tenure group and subgroup;

(2) Is no more than one grade (or appropriate grade interval or equivalent) below the position from which the employee was released, except that for a preference eligible employee with a compensable service-connected disability of 30 percent or more the limit is five grades (or appropriate grade intervals or equivalent); and

(3) Is the same position, or an essentially identical one, previously held by the released employee in a Federal agency.

(d) *Limitations.* (1) An employee in a clerical position may be assigned only to a clerical position and an employee in a nonclerical position may be assigned only to a nonclerical position in an assignment made under paragraph (b) of this section.

(2) An employee with a current annual performance rating of minimally successful or equivalent may be assigned under paragraph (c) of this section only to a position held by another employee with a current annual performance rating no higher than minimally successful or equivalent.

(e) *Pay rates.* (1) The determination of equivalent grade intervals shall be based on a comparison of representative rates.

(2) Each employee's assignment rights shall be determined on the basis of the pay rates in effect on the date of issuance of specific reduction-in-force notices, except that when it is officially known on the date of issuance of notices that new pay rates have been approved and will become effective by the effective date of the reduction in force,

assignment rights shall be determined on the basis of the new pay rates.

§ 351.702 Qualifications for assignment.

(a) Except as provided in § 351.703, an employee is qualified for assignment under § 351.701 if the employee:

- (1) Meets the OPM standards and requirements for the position, including any minimum educational requirement;
- (2) Is physically qualified, with reasonable accommodation where appropriate, to perform the duties of the position;

(3) Meets any special qualifying condition which the OPM has approved for the position; and

(4) Clearly demonstrates on the basis of overall background, including recency of experience, a positive ability to successfully perform all critical elements of the specific position upon entry into it, without undue interruption to that activity and without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee.

(b) The sex of an employee may not be considered in determining whether an employee is qualified for a position, except for positions which OPM has determined certification of eligibles by sex is justified.

(c) An employee who is released from a competitive level during a leave of absence because of a compensable injury may not be denied an assignment right solely because the employee is not physically qualified for the duties of the position if the physical disqualification resulted from the compensable injury. Such an employee must be afforded appropriate assignment rights subject to recovery as provided by 5 U.S.C. 8151 and Part 353 of this chapter.

(d) If an agency determines, on the basis of evidence before it, that a preference eligible employee who has a compensable service-connected disability of 30 percent or more is not able to fulfill the physical requirements of a position to which the employee would otherwise have been assigned under this part, the agency must notify the OPM of this determination. At the same time, the agency must notify the employee of the reasons for the determination and of the right to respond, within 15 days of the notification, to the OPM which will require the agency to demonstrate that the notification was timely sent to the employee's last known address. The OPM shall make a final determination concerning the physical ability of the employee to perform the duties of the position. This determination must be made before the agency may select any other person for the position. When the

OPM has completed its review of the proposed disqualification on the basis of physical disability, it must send its finding to both the agency and the employee. The agency must comply with the findings of the OPM. The functions of the OPM under this paragraph may not be delegated to an agency.

(e) An agency may formally designate as a trainee or developmental position a position in a program with all of the following characteristics:

(1) The program must have been designed to meet the agency's needs and requirements for the development of skilled personnel;

(2) The program must have been formally designated, with its provisions made known to employees and supervisors;

(3) The program must be developmental by design, offering planned growth in duties and responsibilities, and providing advancement in recognized lines of career progression; and

(4) The program must be fully implemented, with the participants chosen through standard selection procedures. To be considered qualified for assignment under § 351.701 to a formally designated trainee or developmental position in a program having all of the characteristics covered in paragraphs (e) (1), (2), (3), and (4) of this section, an employee must meet all of the conditions required for selection and entry into the program.

§ 351.703 Exception to qualifications.

An agency may assign an employee under § 351.201(b) or § 351.701 without regard to OPM's standards and requirements for the position if:

(a) The employee meets any minimum education requirement for the position; and

(b) The agency determines that the employee has the capacity, adaptability, and special skills needed to satisfactorily perform the duties and responsibilities of the position.

§ 351.704 Rights and prohibitions.

(a)(1) An agency may satisfy an employee's right to assignment under § 351.701 by assignment under § 351.201(b) or § 351.705 to a position having a representative rate equal to that to which he or she would be entitled under § 351.701.

(2) An agency may, at its discretion, choose to offer a vacant other-than-full-time position to a full-time employee or to offer a vacant full-time position to an other-than-full-time employee in lieu of separation by reduction in force.

(b) Section § 351.701 does not:

(1) Require an agency to assign an employee to a position having a higher representative rate;

(2) Authorize or permit an agency to displace a full-time employee by an other-than-full-time employee, or to satisfy an other-than-full-time employee's right to assignment by assigning the employee to a vacant full-time position.

(3) Authorize or permit an agency to displace an other-than-full-time employee by a full-time employee, or to satisfy a full-time employee's right to assignment by assigning the employee to a vacant other-than-full-time position.

§ 351.705 Administrative assignment.

(a) An agency may, at its discretion, adopt provisions which:

(1) Permit a competing employee to displace an employee with lower retention standing in the same subgroup consistent with § 351.701 when the agency cannot make an equally reasonable assignment by displacing an employee in a lower subgroup;

(2) Permit an employee in subgroup III-AD to displace an employee in subgroup III-A or III-B, or permit an employee in subgroup III-A to displace an employee in subgroup III-B consistent with § 351.701; or

(3) Provide competing employees in the excepted service with assignment rights similar to those in § 351.701 and in paragraphs (a) (1) and (2) of this section.

(b) Provisions adopted by an agency under paragraph (a) of this section:

(1) Shall be consistent with this part;

(2) Shall be uniformly and consistently applied in any one reduction in force;

(3) May not provide for the assignment of an other-than-full-time employee to a full-time position;

(4) May not provide for the assignment of a full-time employee to an other-than-full-time position;

(5) May not provide for the assignment of an employee in a competitive service position to a position in the excepted service; and

(6) May not provide for the assignment of an employee in an excepted position to a position in the competitive service.

Subpart H—Notice to Employee

§ 351.801 Notice period.

(a) Each competing employee selected for release from a competitive level under this part is entitled to a written notice at least 30 full days before the effective date of release. When a general notice is supplemented by a specific notice, an agency may not release an employee from his or her

competitive level until at least 10 days after the employee's receipt of the specific notice.

(b) The notice shall not be issued more than 90 days before release except with the prior approval of OPM.

(c) The notice period begins the day after the employee receives the notice.

(d) When an agency retains an employee under § 351.806 or § 351.808, the notice to the employee shall cite the date on which the retention period ends as the effective date of the employee's release from the competitive level.

§ 351.802 General and specific notices.

When an agency cannot specifically determine all individual actions at the start of the notice period, it may issue general notices which shall later be supplemented by specific notices. The combined general and specific notice periods shall meet the requirements in § 351.801, and the combined contents of the general and specific notices shall meet the requirements in § 351.803.

§ 351.803 Content of notice.

(a) The notice shall state specifically the action to be taken and its effective date except as provided in paragraph (b) of this section; the employee's competitive area, competitive level, subgroup, service date, and annual performance ratings received during the last three years; the place where the employee may inspect the regulations and records pertinent to this case; the reasons for retaining a lower-standing employee in the same competitive level under § 351.607 or § 351.608; the information on reemployment rights except as permitted by § 351.804; and the employee's right, as applicable, to grieve under a negotiated grievance procedure or to appeal to the Merit Systems Protection Board under the provisions of the Board's regulations. The agency shall comply with the provisions of § 1201.21 of this title.

(b) A general notice shall inform the employee that action under this part may be necessary but a specific action has not yet been determined. The notice shall state that as soon as the agency determines what action, if any, will be taken under this part the employee will receive specific notice of the action to be taken. The general notice shall contain an expiration date. A general notice may also include other information specified in paragraph (a) of this section.

§ 351.804 Notice concerning consideration for reemployment.

An employee who receives a specific notice of separation under this part must also be given information concerning the right to reemployment consideration under the provisions of Subparts B and C of Part 330 of this chapter. This information should be included in or with the specific reduction-in-force notice; otherwise, a separate supplemental notice covering this information must be given to the employee.

§ 351.805 Expiration of notice.

(a) An agency may cancel an unexpired general notice, or may renew it for additional periods within the maximum notice period referred to in § 351.801. A general notice expires as stated therein unless, on or before the expiration date, the employee receives a renewal of the general notice or a specific notice.

(b) A specific notice expires except when followed by the action specified, or by action less severe than specified, in the notice or in an amendment made to the notice before the agency takes the action. An agency may not take action before the effective date in the specific notice. An action taken after the specified date in the specified notice shall not be ruled invalid for that reason except when it is challenged by a higher-standing employee in the

competitive level who is reached out of order for reduction in force as a result of the action or when it results in a notice period longer than the maximum allowed.

§ 351.806 New notice required.

An employee is entitled to a new written notice of at least 30 full days if the agency decides to take an action more severe than first specified.

§ 351.807 Status during notice period.

When possible, the agency shall retain the employee on active duty during the notice period. When in an emergency the agency lacks work or funds for all or part of the notice period, it may place the employee on annual leave with or without his or her consent, on leave without pay with his or her consent, or in a nonpay status without his or her consent.

Subpart I—Appeals and Corrective Action

§ 351.901 Appeals.

An employee who has been furloughed for more than 30 days, separated, or demoted by a reduction-in-force action may appeal to the Merit Systems Protection Board. Unless the presiding official determines that there are material issues of fact in dispute that would require a hearing for resolution, the review of an agency action shall be confined to the written record.

§ 351.902 Correction by agency.

When an agency decides that an action under this part was unjustified or unwarranted and restores an individual to the former grade or rate of pay held or to an intermediate grade or rate of pay, it shall make the restoration retroactively effective to the date of the improper action.

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Tuesday
October 25, 1983

Part VI

Office of Personnel Management

**Performance Management System; Final
Rule and Interim Rule With Request for
Comments**

**Personnel Records; Transfer of an
Official Personnel Folder to Another
Agency; Proposed Rule**

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 300, 335, 430, 431, 451,
531, 532, 540, and 771

Performance Management System

AGENCY: Office of Personnel
Management.

ACTION: Final rule and interim rule, and
request for comments.

SUMMARY: The Office of Personnel Management is issuing regulations to implement Performance Management including a Performance Based Incentive System for the General Schedule. The rules also require that agencies grant merit pay employees the equivalent of the General Schedule within-grade pay increase to provide equity between merit pay and General Schedule employees. These regulations reflect major comments on recent proposals to create a system designed to pay employees based on performance.

DATES: Effective November 25, 1983. Comment date: OPM invites comments on the interim rule portions of the document (§ 430.207(d), § 540.102, the definitions of "total performance pay" and "total performance pay pool", § 540.109, and § 540.110(a)(3)). To be considered, comments must be received by December 27, 1983.

ADDRESS: Send or deliver written comments (on the interim rules) to: John W. Fossum, Assistant Director for Performance Management, Workforce Effectiveness and Development, Office of Personnel Management, 1900 E Street, NW., Washington, D.C. 20415.

FOR FURTHER INFORMATION CONTACT: James Weddel, 202-632-7630.

SUPPLEMENTARY INFORMATION:

Background

On March 30 and July 14, 1983, OPM proposed revisions to 5 CFR Parts 300, 335, 430, 451, 531, 532 and 540, and a new part 431 that would require agencies to implement a Performance Management System (48 FR 13342 and 48 FR 32288). Sixty and 30-day comment periods were provided respectively, during which OPM requested comments and suggestions.

We have carefully reviewed and analyzed all comments received during the comment periods, adopted many suggestions, and made numerous modifications to the proposals.

Comments

Comments received on the earlier proposal (except for a number of comments on the Merit Pay System) are reflected in the Supplementary

Information section of the rules proposed on July 14. During the 30-day comment period on the July 14 proposal, OPM received comments from 40 Federal agencies, 10 professional organizations, 7 labor organizations, and 83 individuals, most of whom were Federal employees. Many of the comments contained specific constructive suggestions: OPM is adopting many of those suggestions in this document.

Overview of the Performance Management System

The new Performance Management System regulations will meet OPM's primary objectives and, we believe, will also meet agency needs and objectives. The regulations establish pay for performance systems for all employees and provide needed revisions to merit pay.

All General Schedule employees who earn at least a "Fully Successful" rating on all critical elements and a "Fully Successful" summary rating will be eligible to receive within-grade increases. The proposal that General Schedule employees in top pay steps of their grade be rated at least "Exceeds Fully Successful" in order to receive within-grade increases has been deleted.

All merit pay employees who earn a "Fully Successful" summary rating will receive pay increases equivalent to those received by General Schedule employees as well as the amount of any general pay increase.

A written recommendation for appropriate monetary, non-monetary, or honorary recognition must be prepared for all employees who earn an "Outstanding" summary rating. Agencies must establish a "Total Performance Pay Pool" to be distributed to merit pay employees as a combination of merit pay increases and performance-related cash awards. Each agency plan for administering the agency Merit Pay System must specify a funding level for merit pay performance awards to be specified by OPM within the context of agency past practices.

To emphasize the connection between performance and awards, Incentive Awards regulations have been divided into two parts: Performance Awards and Special Awards. Employees can earn a Performance Award for performance that "Exceeds Fully Successful" overall or on one or more critical elements of a job. To further strengthen the link between pay and performance in the minds of employees and their supervisors, performance awards and QSI's will be provided as soon as possible after annual performance ratings are approved.

The regulations meet agency and OPM concerns about the cost, paperwork, and time requirements of Performance Management. Agencies are not required to write performance standards at three element rating levels, although they are encouraged to do so. The minimum requirement is three element rating levels with written performance standards at the "Fully Successful" level. In addition, revised performance appraisal requirements will be implemented at the beginning of an agency's new appraisal cycle, avoiding a requirement for revision of individual Performance Plans in the middle of the current appraisal cycle.

Employees will be able to seek a reconsideration if they feel that performance ratings are unfair. Additional procedures for review of a performance rating, including a grievance procedure, can be established at the discretion of the agency head. Agencies will not be able to utilize preestablished rating distributions that interfere with appraisal of actual performance against standards. Agencies are required to provide for second level review of ratings in the interest of employee equity and ensuring that ratings are consistent with organizational accomplishments. Through that process, managers can change inaccurate appraisals. It is required that critical elements, non-critical elements, and performance standards be related to an employee's assigned work. Higher level approval of elements and standards is required.

The regulations require each agency to establish a Performance Management Plan for OPM approval. Agencies will be able to tie the establishment and revision of performance elements and standards to the beginning of management planning cycles so that employee performance expectations can clearly support achievement of organizational goals and objectives. Performance ratings and performance based personnel actions can now reflect each employee's contribution during the past year to achievements in support of the organization's purposes and mission.

The regulations standardize performance ratings among agencies by requiring five summary rating levels. Agencies may consider performance of non-critical elements in deriving summary ratings but more weight must be given to performance of critical elements. The regulations also standardize performance requirements for within-grade increases, performance awards, quality step increases, career ladder promotions, and merit pay. For the first time, regulations are being

established for SES performance appraisal. The SES regulations parallel appraisal requirements for other employees.

Key Issues in the Final Regulations

The following are the key issues raised in the proposed regulations, a general summary of comments which have been received in these areas, and an explanation of the final regulations.

1. Career Ladder Promotions and Time-In-Grade Restrictions

a. Sections 300.602, 335.104.
b. Half of the agencies who commented on these proposals noted they were very pleased that longer time-in-grade restrictions were eliminated from the proposals. Most commenters continued to support the requirement that an employee be rated "Fully Successful" overall to receive a career ladder promotion. A number of agencies, labor organizations, and individual commenters were concerned with the new requirement for priority consideration for career ladder promotions for employees with the highest summary ratings in situations when not all eligible employees could receive promotions. Several thought that the scope of coverage must be narrower than "all employees" and requested clarification.

c. The regulation retains the requirement for a "Fully Successful" summary rating in order to be eligible for a career ladder promotion and for ratings of "Fully Successful" or better on all critical elements that are critical to the position at the next higher grade level in the career ladder. The requirement that employees with the highest summary ratings be given first consideration in career ladder promotions is clarified to indicate that the employees concerned must be in the same career ladder.

d. These regulations retain the connection of performance to career ladder promotions by requiring agencies to carefully consider both summary ratings and pertinent critical element ratings in making such promotions and to promote employees with higher summary ratings when not all employees in the same career ladder can be promoted at the same time. The phrase "same career ladder" should be interpreted to mean positions in the same series and, at agency discretion, usually in the same organization.

2. Distinguishing Between the Terms "Appraisal" and "Performance Rating"

a. Sections 430.201(d); 430.203; 430.204(b); 431.201(d); 431.203; 431.204(b). (u).

b. Several commenters indicated that the terms "appraisal" and "rating" appeared to have the same meaning in the proposed regulations.

c. The final regulations distinguish between appraisal of performance during an appraisal period and a written performance rating provided to the employee.

d. This change permits agencies to determine whether a regulation is referring to the act or process of reviewing and evaluating performance (appraisal) or to written records of element or overall performance (ratings).

3. Definition of a Critical Element

a. Sections 430.203 and 431.203.

b. Regarding the definition of "critical element," a number of agencies recommended deleting, revising, or expanding the phrase "which contributes toward accomplishing organizational goals and objectives". Several agencies and a labor organization also pointed out that the phrase "in the position" is inconsistent with identifying critical elements for details to another position. Finally, agencies stated that the word "acceptable" was not defined.

c. The definition of a "critical element" has been revised by deleting the word "acceptable" which has several possible meanings and using the word "unacceptable", which is defined in law. Specifically, the July 14 proposal stated that a critical element "is of such importance that acceptable performance on the element is necessary for acceptable performance in the position" while the final regulation states that a critical element "is of such importance that unacceptable performance on the element would result in unacceptable performance of assigned work". It should also be noted that the revised definition refers to performance "of assigned work" instead of performance "in the position".

d. The phrase "which contributes toward accomplishing organizational goals and objectives" was not changed because it provides a minimum criterion for identification of critical elements. The goals and objectives referred to would be those for the unit where the employee works, not necessarily agency-wide objectives. Identified critical elements must be consistent with the planned work of the organizational unit. Use of the phrase "performance of assigned work" will enable agencies to consider performance in more than one position when deriving a summary rating, as long as an employee served in all positions considered for the agency's minimum

appraisal period and during the annual appraisal period.

4. References to Non-Critical Elements

a. Sections 430.203, 431.203, 430.204(b), 431.204(b).

b. A few commenters noted that reference should be made to appraisal of non-critical elements in the definitions of several terms.

c. The definitions of the following terms have been amended by adding references to non-critical elements: "Appraisal System," "Performance," "Performance Plan," "Rating," and "Performance Rating." In addition, regulations on the performance appraisal process provide that employees must be appraised and rated on any non-critical elements included in individual Performance Plans.

d. Although an agency is not required to establish or identify non-critical elements, the definitions indicate that when non-critical elements are included in individual Performance Plans, a written performance rating for the non-critical elements must be prepared.

5. Use of Non-Critical Elements

a. Sections 430.203, 430.204(d)(1), 431.203, 431.204(d)(1).

b. Fourteen agencies, two associations, one labor organization and six individuals stated that performance on non-critical elements should be considered in deriving a summary rating of performance. Commenters felt that employees should be held accountable for the whole job. Commenters also stated that appraisal of non-critical elements would be meaningless unless performance of non-critical elements had a bearing on an employee's summary rating.

c. The prohibitions on use of non-critical elements in deriving summary ratings have been deleted from non-SES and SES performance appraisal regulations.

d. Agencies will be required to include decision tables for deriving summary ratings in their Performance Management Plans. Agency procedures for deriving summary ratings may include consideration of ratings on non-critical elements but only if the procedures give more weight to performance of critical elements.

6. Revision of Rating Level Definitions

a. Sections 430.204(h); 431.204(h).

b. Several agencies and individuals commented that quantity and timeliness criteria may not be pertinent to all positions and that production of work ahead of schedule may not be desirable for some positions. Some agencies also

indicated that the definitions of "Minimally Successful" and "Unacceptable" performance were too much alike. One comment objected to the phrase "corrective action must be taken" in the definition of "Unacceptable" or "Unsatisfactory" performance. About one-fourth of agencies and a few individuals asked that the same names be used for both SES and non-SES rating levels.

c. The definitions of "Outstanding" and "Exceeds Fully Successful" have been changed by adding the phrase "as warranted" to indicate selective application of quantity, timeliness, and amount of supervision as factors differentiating levels of performance. Also, the definitions of "Minimally Successful" and "Minimally Satisfactory" have been revised to indicate that performance needs improvement, but is not "Unacceptable" or "Unsatisfactory". All references to remedial and corrective action have been deleted from the SES rating level definitions. The phrase "consistent with required procedures" has been added to the requirement for corrective action for the "Unacceptable" non-SES rating level.

d. These changes reflect the concept that quality of performance is a universally applicable factor in measuring performance, while other factors should be applied only if appropriate to the type and level of position involved. The revised definitions also create a greater distinction between "Minimally Successful" and "Unacceptable" performance, especially if it is understood that the performance standards mentioned in the definition of the "Unacceptable" ("Unsatisfactory") rating level are those which have been written at the "Minimally Successful" ("Minimally Satisfactory") or "Unacceptable" ("Unsatisfactory") level. The standards describe a threshold of performance, below which performance is "Unacceptable" or "Unsatisfactory".

Names of the two lowest rating levels have not been changed because of specific statutory references to "Unacceptable" performance of non-SES employees, "Satisfactory" performance as a requirement for Federal Wage System step increases and "Minimally Satisfactory" and "Unsatisfactory" summary rating levels for SES employees.

7. Performance Rating Procedures

a. Sections 430.203, 430.204(b), (c), (d), (e); 431.203, 431.204 (b), (c), (d), (e).

b. Almost one-third of agencies commenting, two labor organizations,

and an individual commenter indicated a desire to continue with existing procedures using fewer than five element rating levels. Just over one-third of agencies preferred not to write performance standards at three element rating levels, many of them stating that agencies should have the flexibility to set the number of written standards. Half of those objecting saw no benefit, stated that costs would be high, and thought there would be too much paperwork and burden on supervisors. Half felt there should only be one standard, written at the "Fully Successful" level, while a few others thought there should be two.

c. Agencies are now required to have a minimum of three rating levels for all critical elements, written performance standards at the "Fully Successful" level for all elements, and five summary rating levels. At any time during the appraisal cycle when performance has been determined to be below "Fully Successful" on one or more critical elements, agencies are required to provide a Performance Improvement Plan to an employee if performance standards had not previously been established at the "Unacceptable" ("Unsatisfactory") level or the rating level immediately above the "Unacceptable" ("Unsatisfactory") level. The Performance Improvement Plan must explain employee deficiencies, explain steps to be taken in an attempt to resolve the deficiencies, and include performance standards established at the "Minimally Successful" ("Minimally Satisfactory") level. The Performance Improvement Plan must be provided to the employee at the beginning of a new appraisal period. 5 CFR Part 432 provides for an opportunity period to improve "Unacceptable" performance which is in addition to the new appraisal period described above. The length of the new appraisal period will be determined by the agency, but cannot be shorter than the agency's minimum appraisal period.

As an editorial change, the non-SES definition of the term "rating" and the SES definition of the term "performance rating" have been changed by deleting the names of rating levels.

d. The proposed regulations specify minimum requirements. Agencies are required to write performance standards at the "Minimally Successful" ("Minimally Satisfactory") level only when demonstrated performance is below "Fully Successful" on one or more critical elements. The minimum rating requirements provide a sufficient basis for within-grade increase determinations. Although these requirements are a minimum, agencies

are encouraged to establish five element rating levels.

8. Performance ratings for Reduction-in-Force

a. Sections 430.204(k), (l)(m); 431.204(l), (m), (n).

b. Agencies have asked if the annual performance ratings to be used as a basis for Reduction-in-Force could include ratings given for appraisal periods of less than one year.

c. The regulations state that agencies must take into consideration all performance ratings given during the annual appraisal period when preparing an annual rating. The regulations also state that one exception to use of annual performance ratings as a basis for RIF is when a new employee does not have a performance rating of record, but has served for the agency's minimum appraisal period. Agencies are required to rate the performance of the newly hired employee and use the rating as a basis for the RIF action.

d. These revisions provide that annual ratings used as a basis for RIF actions are not interim ratings or unscheduled ratings provided upon reassignment of a supervisor or employee, completion of a detail, because of poor performance, or for some other reason. Instead, annual ratings are prescheduled ratings given once each year.

9. Grievance of a Performance Rating

a. Sections 430.204(p) and 771.206(c)(3).

b. Over half of the agencies disagreed with the July 14 proposal which stated that an "employee may not grieve or appeal a performance rating." About half of the agencies disagreeing were concerned with employees' perception of fairness and objectivity. About one-fourth were concerned with FLRA rulings and the scope of grievances. About one-fifth were concerned with potential disputes, and with employees seeking more expensive avenues of redress (such as EEO complaints), when they disagreed with their ratings. Two agencies noted that there might be inconsistent treatment of bargaining unit vs. non-bargaining unit members. Four of the 10 associations and all seven labor organizations disagreed with the proposal—as did one-fourth of the individual commenters, citing legal and FLRA issues as well as the employees' perception of fairness and objectivity in performance ratings.

c. The revised regulations require that an employee be provided an opportunity to request reconsideration of a performance rating by the supervisor or manager who approved the rating. Th

revised regulations also provide that an agency may, at the discretion of the agency head, establish a further review of a performance rating. The review procedure may be established under a negotiated agreement. However, SES performance evaluations are not covered by the Agency Grievance System procedures established under 5 CFR Part 771.

d. The revision will enable agencies to permit grievances of performance ratings, but agencies may determine that performance ratings will not be grievable.

10. Performance Ratings for Details

a. Sections 430.204(g), (r); 431.204(p), (q)

b. A number of agencies stated that elements and standards cannot always be provided at the beginning of a detail within an agency because not all details are anticipated in advance. A few agencies also requested clarification of the regulations on details to other organizations.

c. The regulations provide that agencies should provide elements and standards as soon as possible but no later than 30 days after the beginning of a detail or temporary promotion within the same agency. The regulations also provide more detailed instructions on performance ratings for non-SES employees detailed to another organization. Agencies are required to prepare performance ratings if the employee had served for the minimum appraisal period in the agency. Failing that, agencies are required to make a reasonable effort to obtain appraisal information from the other organization sufficient to prepare a performance rating. If no rating can be prepared, the agency can extend an employee's rating of record for no longer than one year.

d. Regulations on details of SES employees to other organizations have not been revised because of the specific legal requirement for annual ratings based on performance during an appraisal period.

11. Implementation

a. Sections 430.207, 430.301, 431.301.

b. Over half the agencies, three labor organizations, and one professional association stated that agencies need more time to implement the Performance Management System. One-fourth of the agencies also noted that performance appraisal changes would be more costly and burdensome if implemented during the middle of an appraisal period. It was noted that new appraisal requirements must be implemented before personnel decisions based on the new appraisal data can begin.

c. The regulations set staggered implementation dates for new performance appraisal requirements by grade level. The regulations also state that decisions based upon performance appraisals under an agency's Performance Management Plan must begin as soon as possible after performance appraisal provisions have been implemented.

d. A proposed requirement has been deleted which would have required agency reports of provisions of any negotiated agreement which conflict with Performance Management System regulations.

12. Documentation for SES Performance Appraisals

a. Section 431.204(o), (r).

b. In response to a few comments, the regulations have been revised to provide that SES employees must be provided a copy of a final performance rating. The regulations also provide that a senior executive's response to an initial rating must be provided to the official making the higher level review and to the Performance Review Board.

13. Use of SES Appraisals as a Basis for Personnel Actions

a. Section 431.204(u), (v).

b. Several commenters noted that performance appraisals would not have any impact on the base pay of SES employees.

c. The regulations provide that SES performance ratings may provide a basis for decisions to grant performance-related ES pay rate adjustments.

14. Performance Salary Ceiling for General Schedule Employees

a. Sections 531.404(a).

b. Half of the agencies, individuals, and associations commenting and six labor organizations asked that the performance salary ceiling proposal for General Schedule employees be deleted. The proposal would have required a summary rating of "Exceeds Fully Successful" for within-grade increases above step 7 of each grade. Commenters cited a GAO opinion, the prospect of rating "inflation", and inconsistency with lower performance requirements for promotions.

c. The performance salary ceiling previously proposed for General Schedule employee has been deleted.

15. Mandatory Quality Step Increases

a. Sections 430.204(f), (t); 431.204(f), (w); 531.504.

b. Seventeen agencies and two labor organizations objected to requiring quality step increases for "Outstanding"

employees in steps 1-3 of their grade. Reasons for objections included reduced management flexibility, a preference for granting cash awards, concern that the QSI would be meaningless if the employee was quickly promoted, preference for treating all "Outstanding" employees the same, and concern that QSI's might not be appropriate if disciplinary or budgetary problems existed.

c. The proposed requirement for mandatory QSI's for "Outstanding" employees in steps 1-3 of each grade has been deleted.

d. The regulations require that written recommendations for appropriate monetary, non-monetary, or honorary recognition be provided for all employees with "Outstanding" summary performance ratings.

16. Productivity Benefit Sharing Programs

a. Part 451, Subpart C (Reserved).

b. One agency asked whether it could continue developing and implementing specially designed Productivity Benefit Sharing Programs and like productivity programs.

c. The regulations now contain a "Reserved" Subpart for Productivity Benefit Sharing regulations, which OPM may publish in the future. In the meantime, nothing precludes agencies from continuing the development and implementation of Productivity Benefit Sharing Programs.

17. A Special Award may be granted alone or in addition to a Performance Award

a. Section 451.201(b) and 451.208(c).

b. Almost one-fourth of the agency comments made evident the need for further clarification.

c. New language clarifies that a Special Award may be granted alone or in addition to a Performance Award. Presidential awards shall be granted only under this subpart.

18. Definition of "Meritorious Action"

a. Section 451.203.

b. Almost one-fourth of the agencies expressed the need for clarification of the difference between Performance Awards under Part 531, Subpart F, and Meritorious Action Awards under Part 451.

c. New language clarifies the purpose and use of Meritorious Action Awards under Part 451. Meritorious actions rewarded must be outside or beyond job responsibilities and performance standards, and must be highly exceptional and unusually outstanding. Language proposed on July 14 which

stated that Special Awards "shall be in addition to a performance award" has been deleted to further clarify the distinction between awards for performance and Special Awards.

19. Awards for One-Time Special Acts or Services

- a. Sections 451.204 and 531.601(c).
- b. Several agencies indicated a need to clarify the circumstances under which awards for special acts or services may be given.
- c. One-time special acts or services within the scope of normal employee job responsibilities and performance standards shall be rewarded under the Performance Awards component of the Performance Management Plan; those outside the scope of job responsibilities and performance standards shall be rewarded under the Special Awards Program.

20. Coverage of Employees Under the Merit Pay System

- a. Sections 531.603(a) and 451.203(a).
- b. One agency and one individual comment reflected the need for further clarification.
- c. New language clarifies that employees in the Senior Executive Service are not eligible for performance awards under Part 531, Subpart F, but that employees covered under Merit Pay Systems established under Chapter 54 of title 5, United States Code, are eligible for performance awards. The revision also clarifies that all Merit Pay and Senior Executive Service employees are eligible for Special Awards, but only under the agency Performance Management Plan.

21. Definitions of Awards Terms

- a. Sections 531.604 and 451.204.
- a. A number of agencies commented on the need to add definitions of the terms "honorary award", "monetary award", "non-monetary award", "contribution", "meritorious action" and "special act or service", and to provide a more precise definition for the terms "tangible benefits" and "intangible benefits."
- c. New language provides definitions for each of these terms.

22. Policy on Performance Awards and Special Awards

- a. Sections 531.605(a) and 451.205(a).
- b. New language provides further clarification regarding OPM policy for the Performance Awards and Special Awards Programs.

23. Inclusion of any Within-Grade Increase and/or Quality Step Increase in the Limit of 15% of Employee Base Pay When Granting a Performance Award

- a. Section 531.605(b)(3).
- b. Several agencies and individuals and one professional association preferred that within-grade increases and OSI's not be included in the 15-percent-of-base-pay limitation on performance awards. These commenters felt the limits should be established by agencies, within OPM guidelines and agency budget limitations. Several agencies and individuals were also concerned about the possible conflict between the timing of a Performance Award and the timing of a Within-Grade Increase, which could occur several months later.
- c. The regulations provide that if the sum of a performance award recommended and any within-grade and/or quality step increase received by the employee during the previous twelve (12) months exceeds 20 percent, the award must be reduced to that maximum.
- d. This provision is consistent with a 20% limitation on performance awards for SES employees.

24. OPM Guidance to Agencies

- a. Sections 531.608(a) and 451.208(a).
- b. Earlier proposed regulations required that OPM provide guidance to agencies on honorary and non-monetary awards, including honorary Presidential awards.
- c. New language requires that OPM provide guidance to agencies on how the entire Performance Award component of the Performance Management Plan should be carried out.
- d. This further reinforces the statutory requirement (5 U.S.C. 4506) that OPM provide guidance on all aspects of the awards program.

25. Review and Approval of the Performance Award Component of the Agency Performance Management Plan

- a. Section 531.608(b).
- b. New language corrects an oversight in the earlier regulations.
- c. The regulation requires that OPM review and approve the agency Performance Award component of the Performance Management Plan, as required under Section 430.207.

26. Documentation of Performance Awards and Special Awards in Official Personnel Folders

- a. Sections 531.609(a)(1) and 451.209(a)(8).

b. This requirement has been moved to "Agency Responsibilities" for purposes of clarity.

27. Consideration of Performance Awards When Rating and Ranking an Employee for a Promotion

- a. Sections 531.609(a)(2) and 451.209(a)(9).
- b. Agencies called to our attention the need to maintain this requirement in the regulations in order to comply with a statutory requirement (5 U.S.C. 3362).
- c. This provision corrects an oversight. It requires that due weight be given to a Performance Award or a Special Award when rating and ranking an employee for a promotion.

28. Plan for Determining the Performance Award Fund

- a. Section 531.609(d)(6).
- b. This provision is required under Section 430.207 and should also appear in this Subpart.
- c. Section 430.207(a)(4) requires that the agency Performance Management Plan include plans for determining and distributing Within-Grade Increases, Quality Step Increases, and the agency performance award fund, including previous years' and projected expenditures.

29. Funds for Productivity Benefit Sharing Programs

- a. Section 531.609(d)(6).
- b. The regulation requires that funds for awards for Productivity Benefit Sharing Programs be separate from funds for Performance Awards.
- c. This provision was moved from Section 531.608(b) to Section 531.609(d)(6) for purposes of clarity.

30. Merit Pay Performance Appraisal Period

- a. Section 540.105(b).
- b. This section requires that agencies align their merit pay performance appraisal periods to end proximate to the time of the merit pay increase. The change allows OPM to adjust that time requirement.
- c. If it becomes necessary to award merit pay increases on a regular basis at a different time of the year, it would also be appropriate for agencies to adjust their performance appraisal year.

31. Consideration of Other Pay Increases Received

- a. Section 540.106(b).
- b. One-fourth of the agencies, an individual and one association commented on the requirement to consider other pay increases when determining the merit pay increase.

Most of the commenters said that such consideration should remain optional; one agency thought that the reason for any increase (or the lack of one) should also be considered; and one agency and an individual suggested that prior years' merit pay increases should not be considered.

c. The section has been changed to include consideration of the reasons for previous pay adjustments, and to add performance awards.

d. Earlier pay increases and awards and the reason that they were or were not granted must be considered if the merit pay process is to be properly managed.

32. New Appointments to Merit Pay Positions

a. Section 540.103(c).

b. This section refers to the agency head's authority to identify merit pay employees. The change excepts from merit pay fund calculations and merit pay adjustment eligibility those employees who had been appointed to the Federal service on the same date as the General Schedule increase.

c. Persons thus appointed will have their pay set at a rate in the pay range which has already been adjusted for the General Schedule increase. It would be inappropriate to allow the employee to receive the pay adjustment a second time through the merit pay process.

33. Date for Determining Merit Pay Funds Available

a. Section 540.104(b).

b. This section prescribes how agencies determine the amount of money which is available to be allocated as merit pay increases. The change makes it explicit that merit pay funding computations are to be based on agency merit pay populations as they exist on the effective date of the merit pay increases.

c. The merit pay fund is derived by accumulating contributions made in behalf of each employee who is to have his or her pay set in accordance with the System. The fund, therefore, needs to be computed on the population which exists at the time of the increases.

34. Merit Pay Performance Salary Ceiling

a. Section 540.110(d).

b. This proposal would have reserved rates of pay higher than the equivalent of step 7 to merit pay employees who are rated either "Exceed Fully Successful" or "Outstanding". One-fourth of agencies, one association, and one individual commenter opposed the restriction outright; several pointed out that it conflicted with the guarantee in

§ 540.110(c) of the full General Schedule increase equivalent for all employees rated "Fully Successful".

c. The performance salary ceiling previously proposed for merit pay employees has been deleted.

d. It would not be consistent or equitable to establish a performance salary ceiling for merit pay employees if no similar requirement is established for non-merit pay employees.

35. Parity for Merit Pay Employees

a. Section 540.110(c).

b. In this rulemaking, "parity" means the equivalent of the General Schedule within-grade increase as well as the comparability ("October") increase. During the two comment periods, a number of agency, Congressional and professional organizations' comments expressed that, while granting full comparability to merit pay employees would improve the Merit Pay System, a better solution would be to provide "parity". One professional association suggested eliminating the Merit Pay System, since managers rated "Fully Successful" or above can receive less pay under the System than if they had remained out of it. Another association noted that the current system "penalized many high performers by depriving them of the equivalent of a within-grade increase." The perception by many individual commenters of the Merit Pay System's "unfairness" may be attributed to the parity issue.

c. The final rules provide "parity" for merit pay employees.

d. After carefully considering the comments, OPM has made the change to provide equity between General Schedule and Merit Pay employees.

Interim Rule Changes

Interim rules are being added at this time so that agencies can begin implementation of their entire Performance Management System in a timely manner.

36. Definitions of "Total Performance Pay" and "Total Performance Pay Pool"

a. Sections 540.102, 540.106 (a) and (d), 540.108(b)(3), 540.110(a)(3), and 540.110(d).

b. New terms, "Total Performance Pay" and "Total Performance Pay Pool," are added to the "Definitions" section of Part 540.

c. Total performance pay will include the employee's merit pay increase and performance-related merit pay cash award. The Total Performance Pay Pool will include all funds identified by an agency for merit pay increases and performance awards for merit pay employees.

d. References to "Total Performance Pay" have been inserted in all appropriate sections of Part 540.

37. Required Distribution of Merit Pay Performance Awards

a. Section 540.110(a)(3).

b. OPM has determined that performance awards should be a mandatory part of the "total performance pay" for merit pay employees in order to maintain the pay-for-performance concept.

c. The interim rule provides that agencies must include in their Performance Management Plan the way in which performance award funds will be distributed and the amount to be funded by the agency for such purposes. OPM will specify the minimum funding level for merit pay performance awards.

d. With parity being granted to all merit pay employees, there will be only a relatively small amount left in the Merit Pay Fund for distribution based on performance. In order to maintain a meaningful pay-for-performance system, performance awards must be used on a regular basis to supplement increases to base pay as a reward for a high level of performance.

38. Labor-Management Demonstration Projects on Merit-Type Pay Systems

a. Section 430.207(d).

b. Before the white-collar workforce moves to a full merit-type pay system, the Office of Personnel Management (OPM) has determined that demonstration projects would first be necessary. It has determined that these would be most productive with labor organization involvement.

c. OPM has provided for up to the maximum eight demonstration projects now allowed under law, involving up to 5,000 employees each, under the demonstration projects authority of Section 4703 of 5 U.S.C. The Office of Personnel Management would directly or through agreement or contract with one or more agencies conduct and evaluate these demonstration projects under the criteria set in the statute. The scope of such demonstration projects would cover all aspects related to a merit-type pay system for white collar employees in the demonstration project agencies.

E.O. 12291 Federal Regulation

OPM has determined that this is not a major rule as defined under Section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a

substantial number of small entities because the regulation will only affect Government employees.

Waiver of Notice of Proposed Rulemaking

Pursuant to section 553(b)(3)(B) of title 5, United States Code, I find that good cause exists for waiving the general notice of proposed rulemaking for the interim rules contained in Parts 430 and 540. The notice is being waived because agencies must begin implementing these demonstration projects and Merit Pay System changes at the same time as they implement the other provisions of the Performance Management System, and because these changes, which will be beneficial to merit pay employees, should become effective as soon as possible.

List of Subjects

5 CFR Part 300

Government employees,
Administrative practice and procedure.

5 CFR Part 335

Government employees.

5 CFR Part 430

Government employees,
Administrative practice and procedure,
Reporting requirements.

5 CFR Part 431

Government employees,
Administrative practice and procedure,
Reporting requirements.

5 CFR Part 451

Decoration, medals, awards,
Government employees.

5 CFR Part 531

Government employees, Wages,
Administrative practice and procedure.

5 CFR Part 532

Administrative practice and
procedure, Government employees,
Wages.

5 CFR Part 540

Government employees, Wages.

5 CFR Part 771

Administrative practice and
procedure, Government employees.
U.S. Office of Personnel Management.
Donald J. Devine,
Director.

Accordingly, the Office of Personnel Management amends Title 5, Code of Federal Regulations, as follows:

PART 300—EMPLOYMENT (GENERAL)

1. § 300.602 is revised to read as follows:

* * * * *

Subpart F—Time-in Grade Restrictions

* * * * *

§ 300.602 Restrictions.

The time-in-grade restrictions in this subpart are subject to the eligibility requirements based on performance in § 335.104 of this chapter.

(a) *Advancement to positions at GS-12 and above.* An agency may advance an employee to a position at GS-12 or above only after he or she has served a minimum of 1 year in the next lower grade.

(b) *Advancement to positions at GS-6 through GS-11.* An agency may advance an employee to a position at GS-6 through GS-11 only after he or she has served a minimum of:

(1) One year in a position two grades lower, when the position to which he or she is advanced is in a line of work properly classified at two-grade intervals; or

(2) One year at the next lower grade when the position to which he or she is advanced is in a line of work properly classified at one-grade intervals.

(c) *Advancement to positions at GS-5 or below.* An agency may advance an employee to a position at GS-5 or below which is not more than two grades above the lowest grade he or she held within the preceding year under a nontemporary appointment.

PART 335—PROMOTION AND INTERNAL PLACEMENT

2. § 335.104 is added to Subpart A, to read as follows:

Subpart A—General Provisions

* * * * *

§ 335.104 Eligibility for career ladder promotion.

(a) No employee shall receive a career ladder promotion unless his or her most recent summary rating under Part 430 of this chapter is "Fully Successful" or higher. In addition, no employee may receive a career ladder promotion who has a rating below "Fully Successful" on a critical element that is also critical to performance at the next higher grade of the career ladder.

(b) Employees with the highest summary ratings must be given first consideration for career ladder promotions when it is not possible to promote all eligible employees in the same career ladder at the same time.

3. Part 430 is revised to read as follows:

(In § 430.207, paragraph (d) is an interim rule. OPM invites comments on this interim rule, for consideration in final rulemaking.)

PART 430—PERFORMANCE APPRAISAL

Subpart A—Statutory Authority

Sec.

430.101 Statutory authority.

Subpart B—Regulatory Requirements of the Office of Personnel Management

430.201 Purpose.

430.202 Coverage.

430.203 Definitions.

430.204 The performance appraisal process.

430.205 Training and evaluation.

430.206 OPM review of appraisal systems.

430.207 Performance Management Plans.

Subpart C—Implementation

430.301 Implementation of this part.

Authority: 5 U.S.C. 4305

Subpart A—Statutory Authority

§ 430.101 Statutory authority.

Chapter 43 of title 5, United States Code (5 U.S.C. 4301–4305) provides for the establishment of agency performance appraisal systems and for appraisal of employees. This part contains regulations which the Office of Personnel Management has prescribed for non-SES Performance Appraisal Systems and supplements the provisions of 5 U.S.C. 4301–4305.

Subpart B—Regulatory Requirements of the Office of Personnel Management

§ 430.201 Purpose.

It is the purpose of this subpart to ensure that performance appraisal systems are used as a tool for executing basic management and supervisory responsibilities by:

(a) Communicating and clarifying agency goals and objectives,

(b) Identifying individual accountability for the accomplishment of organizational goals and objectives,

(c) Evaluating and improving individual and organizational accomplishments, and

(d) Using performance ratings as a basis for rewarding employees and other personnel actions.

§ 430.202 Coverage.

(a) Employees and agencies covered by statute.

(1) 5 U.S.C. 4301(1) lists agencies covered by this part.

(2) 5 U.S.C. 4301(2) lists employees covered by statute by this part.

(b) *Statutory exclusions.* This subpart does not apply to agencies or employees excluded by 5 U.S.C. 4301 (1) and (2), the United States Postal Service and the Postal Rate Commission.

(c) *Administrative exclusions.* OPM may exclude any position or group of positions in the excepted service under the authority of 5 U.S.C. 4301(2)(G). The following are excluded:

(1) Positions in Schedule C as authorized by § 213.3301 of this chapter.

(2) Positions filled by Noncareer Executive Assignments under Part 305 of this chapter.

(3) Positions for which employment is not reasonably expected to exceed 120 calendar days in a consecutive 12-month period.

(d) *Agency requests for exclusions.* Heads of agencies or their designees may request the Director of the Office of Personnel Management to exclude positions in the excepted service. The request must be in writing, explaining why the exclusion would be in the interest of good administration.

§ 430.203 Definitions.

In this part, terms are defined as follows—

"Appraisal" means the act or process of reviewing and evaluating the performance of an employee against the described performance standard(s). This includes oral or written progress reviews.

"Appraisal period" means the period of time established by an appraisal system for which an employee's performance will be reviewed and for which a performance rating will be given.

"Appraisal system" means a performance appraisal system established by an agency or component of an agency under subchapter I of chapter 43 of title 5, U.S.C. and Subpart B of this part which provides for identification of critical and non-critical elements, establishment of performance standards, communication of elements and standards to employees, establishment of methods and procedures to appraise performance against established standards, and appropriate use of appraisal information in making personnel decisions.

"Critical element" means a component of a job consisting of one or more duties and responsibilities which contributes toward accomplishing organizational goals and objectives and which is of such importance that "Unacceptable" performance on the element would result in "Unacceptable" performance of assigned work.

"Non-critical element" means a component of an employee's job which

does not meet the definition of a critical element, but is of sufficient importance to warrant appraisal and the assignment of an element rating.

"Performance" means an employee's accomplishment of assigned duties and responsibilities as specified in the critical and non-critical elements of the employee's position.

"Performance Plan" means the aggregation of all of an employee's written critical and non-critical elements and performance standard(s).

"Performance standard" means a statement of the expectations or requirements established by management for a critical or non-critical element at a particular rating level. A performance standard may include, but is not limited to, factors such as quality, quantity, timeliness, and manner of performance.

"Rating" means the written record of the appraisal of each critical and non-critical element and overall performance.

§ 430.204 The performance appraisal process.

(a) As required by 5 U.S.C. 4302(a), each agency shall establish one or more appraisal systems for appraising the work performance of employees during an appraisal period.

(b) Critical elements must be included and non-critical elements may be included in individual Performance Plans. An employee must be appraised and rated on each critical and non-critical element in the employee's Performance Plan, unless the employee has had no opportunity to demonstrate performance on the element. An employee must also be given a summary rating. Agency appraisal systems may not provide for assignment of performance ratings to subelements.

(c) Agency appraisal systems shall provide for a minimum of three rating levels for each critical element. Performance standards must be written at the "Fully Successful" level for all critical and non-critical elements. The absence of a written standard at a given rating level shall not preclude the assignment of a rating at that level. Pass/fail elements are tasks, not true elements, and therefore cannot be used as elements in an appraisal.

(d) Agency appraisal systems shall provide for five summary rating levels. The required summary rating levels are "Outstanding", "Exceeds Fully Successful", "Fully Successful", "Minimally Successful", and "Unacceptable".

(1) Agency Performance Management Plans must include decision tables for deriving summary rating levels from

performance ratings on critical elements and, at agency discretion, ratings on non-critical elements. If ratings on non-critical elements are considered in deriving summary ratings, the decision tables must show that more weight will be given to critical elements than to non-critical elements in determining an employee's summary rating.

(2) If an employee is rated "Unacceptable" on one or more critical elements, an "Unacceptable" summary rating must be given.

(e) The requirements of this paragraph apply only if performance standards have not been established at the "Unacceptable" level or at the element level immediately above the "Unacceptable" level.

(1) If at any time an employee's performance is determined to be below "Fully Successful" on one or more critical elements, agencies must start a new appraisal period which is not an opportunity period under Part 432 of this chapter.

(2) At the beginning of a new appraisal period, agencies must provide a Performance Improvement Plan (PIP) to each employee who has been determined to be below "Fully Successful" on one or more critical elements. The PIP must:

(i) Explain the employee deficiencies;

(ii) Explain steps to be taken in an attempt to resolve the deficiencies; and

(iii) Communicate performance standards at the "Minimally Successful" or "Unacceptable" level for those critical elements where performance has been determined to be below "Fully Successful."

(f) If performance standards have not been prepared at the "Outstanding" level or at the element level immediately below the "Outstanding" level, a written justification must be prepared for an "Outstanding" summary rating.

(g) An appraisal system shall not permit any preestablished distributions of expected levels of performance (such as the requirement to rate on a bell curve) that interfere with appraisal of actual performance against standards. However, agencies must provide for higher level management of the performance appraisal process in the interest of employee equity and in order to reflect organizational performance.

(h) Definitions of the five required summary rating levels follow. Performance standards and agency procedures for deriving summary ratings must be consistent with these definitions.

(1) "Outstanding" means performance of rare, very high quality. As warranted, an Outstanding performer produces an

exceptional quantity of work significantly ahead of established schedules or deadlines and with very little supervision.

(2) "Exceeds Fully Successful" means performance of unusually good or excellent quality. As warranted, the employee produces a very high quantity of work ahead of established schedules or deadlines and with less than normal supervision.

(3) "Fully Successful" means performance which is of good quality. The employee produces the expected quantity of work and meets deadlines or schedules for completion of work.

(4) "Minimally Successful" means performance which is not "Unacceptable", but needs improvement to achieve the "Fully Successful" level. This may be evidenced by the need for close supervisory review, discussion, and correction of work products. When performance falls below "Fully Successful", it may be necessary to take remedial action.

(5) "Unacceptable" means performance which fails to meet established performance standards in one or more critical elements of the employee's position. When performance is "Unacceptable", corrective action must be taken consistent with required procedures.

(i) Each appraisal system shall provide for establishing performance standards based on requirements of employees' positions, providing written Performance Plans to employees at the beginning of each appraisal period, and appraising employees based on a comparison of performance with the standards established for the appraisal period. An agency shall encourage employee participation in establishing performance standards.

(j) Critical elements, non-critical elements, and performance standards must be related to the employee's assigned work.

(k) Employees shall generally be given performance ratings on an annual basis. Agencies may provide for longer appraisal periods when duties and responsibilities of a position or the tour of duty of a position so warrant. Agencies should take into consideration all performance ratings of assigned work given the employee throughout the appraisal period in arriving at the annual rating.

(l) Annual performance ratings shall be used as a basis for reduction-in-force actions, except that an employee without an annual performance rating of record shall be given a performance rating before a RIF if the employee has served for the minimum appraisal period.

(m) Agency appraisal systems shall establish a minimum appraisal period of not less than 90 calendar days. A performance rating of assigned work for the minimum appraisal period but less than one year shall constitute the annual rating only as required by paragraph (l) of this section or any other applicable provision of law or regulation. When a within-grade increase decision is not consistent with the employee's last performance rating, an additional and more current performance rating must be prepared.

(n) Critical elements, non-critical elements, and performance standards shall be in writing and shall be reviewed and approved by a supervisor or manager at a higher level than the appraising official.

(o) Periodic performance ratings and performance based personnel actions shall be reviewed and approved by a supervisor or manager at a higher level than the appraising official. Performance ratings shall be in writing and shall be provided to the employee. Performance ratings may not be communicated to employees prior to approval by a higher level reviewer.

(p) An employee must be given the right to ask for reconsideration of a performance rating by the supervisor or manager who approved the performance rating. This reconsideration will be in the interest of insuring fairness of an individual's rating. Additional procedures for review of a performance rating may be established at the discretion of the agency head.

(q) *Details within the same agency.* Agencies shall provide written critical elements and performance standards to employees as soon as possible but no later than 30 calendar days after the beginning of a detail or temporary promotion within the same agency when the detail or temporary promotion is expected to last 120 calendar days or longer. Performance ratings on critical elements must be prepared for these details and temporary promotions and must be considered in deriving an employee's next annual summary rating.

(r) *Details to another agency or organization.* When an employee is or has been detailed or temporarily assigned outside of the agency, an annual performance rating must be prepared if the employee has served for the minimum appraisal period inside the agency.

(1) If an employee has not served in the agency for the established minimum appraisal period, but has served for the minimum appraisal period in another organization, the agency must make a reasonable effort to obtain appraisal information from the other organization

sufficient to prepare an annual performance rating.

(2) When an annual performance rating cannot be prepared, the employee's performance rating of record may be extended for no longer than one year. (An extended performance rating shall not be used as a basis for within-grade increase or merit pay determinations which must be waived under § 531.409(d) or § 540.106(g) of this chapter.)

(3) During any period of time when an agency cannot prepare a new performance rating or extend a previous rating, the agency may assume that the employee's performance is "Fully Successful."

(s) Performance appraisals and ratings shall be used:

(1) To provide employees with information on their performance and how it may be improved.

(2) As a basis for decisions to grant awards; grant or withhold pay increases, i.e., within-grade increases, Federal Wage System step increases, and quality step increases; grant merit pay; reassign; promote; develop; retain in reduction in force; and reduce in grade or remove.

(t) If an employee is given an "Outstanding" summary performance rating, a written recommendation for appropriate monetary, non-monetary, or honorary recognition must be prepared.

(u) The performance rating of a disabled veteran may not be lowered because the veteran has been absent from work to seek medical treatment in accordance with Executive Order 5396.

§ 430.205 Training and evaluation.

To assure that the requirements of the law will be effectively implemented, agencies must provide appropriate training and information to supervisors and employees on the appraisal process, and must establish methods and procedures to evaluate periodically the effectiveness of their appraisal system(s) and to improve the system(s).

§ 430.206 OPM review of appraisal systems.

(a) The Office of Personnel Management will review performance appraisal systems to determine if they conform to requirements of law and OPM regulations. The Office of Personnel Management will also review appraisal systems with respect to their contribution to agency effectiveness and efficiency and appropriate use of performance information in personnel decisions.

(b) If the Office of Personnel Management Determines that an

appraisal system does not meet the requirements of Subchapter I of 5 U.S.C. 43 or of this part, it shall direct the agency to implement an appropriate system or to correct operations under the system. The agency shall take any action so required.

§ 430.207 Performance Management Plans.

(a) Agencies must submit proposed Performance Management Plans to the Office of Personnel Management for review and approval. Performance Management Plans shall include each of the following which is applicable to the agency and any additional information requested by OPM:

(1) Appraisal Systems required under 5 U.S.C. 4302 and 4312. Submissions may either be agency-wide appraisal systems or requirements which the systems of subordinate organizations must meet.

(2) Merit Pay System Plans required by Part 540 of this chapter.

(3) Performance Award Plans required by Part 531 of this chapter.

(4) Plans for determining and distributing Within-Grade Increases, Quality Step Increases and the agency performance award fund, including previous years' and projected expenditures.

(b) Proposed changes to approved Performance Management Plans which would have an impact on how an agency meets legal or regulatory requirements must be submitted to the Office of Personnel Management for review and approval.

(c) Each agency shall maintain records and submit reports required by OPM regarding the operation of an agency Performance Management Plan or any part of a plan.

(d) Up to eight (8) performance management plans may be submitted as demonstration projects under 5 U.S.C. 4703 which would allow for consultation or negotiation, as appropriate, by an agency and recognized labor organizations. Such plans will not be restricted by the provisions of this part but shall investigate and implement different types of merit pay plans. They may include proposals for waiting periods for within-grade increases, when within-grades shall be granted automatically or when granted earlier or later, career ladder promotions, grievance of ratings, gain sharing and other merit pay proposals. Any such plans shall meet all of the requirements of Section 4703.

Subpart C—Implementation

§ 430.301 Implementation of this part.

(a) Each agency covered by subparts A and B of this part or by 5 CFR Part 540 shall submit Performance Management Plans to the Office of Personnel Management for review by February 24, 1984.

(b) Agencies will be required to implement the performance appraisal provisions of an approved Performance Management Plan not later than October 1, 1984 for employees in the Senior Executive Service and for GS and CM employees in grades 11-18; not later than October 1, 1985 for GS employees in grades 6-10; and not later than October 1, 1986 for GS employees in grades 1-5 and for employees under prevailing rate pay systems.

(c) Decisions based on performance appraisals under the agency's Performance Management Plan must begin as soon as possible after the performance appraisal provisions have been implemented and in accordance with provisions of an agency's Performance Management Plan approved by OPM.

(d) Agencies shall implement their Performance Management Plans except where provisions of an existing negotiated agreement are in explicit conflict with these OPM regulations in which case the provisions of the negotiated agreement shall be in effect until its expiration. Agencies may request OPM approval of the following exceptions:

(1) For specific provisions of OPM regulations that are not in explicit conflict with existing provisions of a labor agreement but would cause significant inequities if implemented in combination with provisions of the labor agreement, or

(2) Where apparently conflicting provisions of negotiated agreements are consistent with the intent of OPM regulations (e.g., where an agreement calls for five rating levels with different names).

4. A new Part 431 is added, to read as follows:

PART 431—PERFORMANCE APPRAISAL IN THE SENIOR EXECUTIVE SERVICE

Subpart A—Statutory Authority

Sec.

431.101 General.

Subpart B—Regulatory Requirements of the Office of Personnel Management

431.201 Purpose.

431.202 Coverage.

431.203 Definitions.

431.204 The performance appraisal process

Sec.

431.205 Training and evaluation.

431.206 OPM review of SES appraisal systems.

431.207 Performance Management Plans.

Subpart C—Implementation

431.301 Implementation of this part.

Authority: 5 U.S.C. 43 Subchapter II.

Subpart A—Statutory Authority.

§ 431.101 General.

Chapter 43 of title 5, United States Code (5 U.S.C. 4311-4315) provides for the establishment of Senior Executive Service performance appraisal systems and appraisals of senior executives' (as defined in 5 U.S.C. 3132(a)) performance. This part contains the regulations which the Office of Personnel Management has prescribed for performance appraisal in the Senior Executive Service, and supplements the provisions of 5 U.S.C. 4311-4315.

Subpart B—Regulatory Requirements of the Office of Personnel Management

§ 431.201 Purpose.

It is the purpose of this subpart to ensure that performance appraisal systems are used as a tool for executing basic performance management responsibilities by:

(a) Communicating and clarifying organizational goals and objectives,

(b) Identifying individual accountability for the accomplishment of agency goals and objectives,

(c) Evaluating and improving individual and organizational accomplishments, and

(d) Using performance ratings as a basis for rewarding employees and other personnel actions.

§ 431.202 Coverage.

(a) All senior executives covered by subchapter II, of Chapter 31 of title 5, United States Code are covered by this part.

(b) 5 U.S.C. 3132(a)(1) identifies agencies covered by this part.

§ 431.203 Definitions.

In this part, terms are defined as follows—

"Appointing authority" means the agency or department head or his or her designee.

"Appraisal period" means the period of time established by an appraisal system for which the senior executive's performance will be reviewed and for which a performance rating will be given.

"Appraisal system" means a performance appraisal system established by an agency or component

of an agency under subchapter II of chapter 43 of title 5, U.S.C., and Subpart B of this part which provides for identification of critical and non-critical elements, establishment of performance standards, communication of elements and standards to senior executives, establishment of methods and procedures to appraise performance against established standards, and appropriate use of appraisal information in making personnel decisions.

"Critical element" means a component of a job consisting of one or more duties and responsibilities which contributes toward accomplishing organizational goals and objectives and which is of such importance that "Unsatisfactory" performance on the element would result in "Unsatisfactory" performance of assigned work.

"Final rating" means the rating assigned by an appointing authority after considering the recommendations of a Performance Review Board.

"Initial rating" means the rating by the senior executive's immediate supervisor, the rating official.

"Non-critical element" means a component of an employee's job which does not meet the definition of a critical element, but is of sufficient importance to warrant appraisal and the assignment of an element rating.

"Performance" means the senior executive's accomplishment of assigned duties and responsibilities as specified in the critical and non-critical elements of the executive's position.

"Performance appraisal" means the act or process of reviewing and evaluating the performance of an executive against the described performance standards. This includes oral or written progress reviews.

"Performance Plan" means the aggregation of the senior executive's written critical and non-critical elements and performance standards.

"Performance Rating" means the written record of the appraisal of each critical and non-critical element and overall performance.

"Performance requirement" means performance standard.

"Performance standard" means a statement of the expectations or requirements established by management for a critical or non-critical element at a particular rating level. A performance standard may include, but is not limited to, factors such as quality, quantity, cost efficiency, timeliness, and manner of performance.

§ 431.204 The performance appraisal process.

(a) As required by 5 U.S.C. 4312(a), each agency shall establish one or more appraisal systems for appraising the individual and organizational work performance of senior executives during an appraisal period.

(b) Critical elements must be included and non-critical elements may be included in individual Performance Plans. An executive must be appraised and rated on each critical and non-critical element in the executive's Performance Plan, unless the employee has had no opportunity to demonstrate performance on the element. An executive must also be given a summary rating. Agency appraisal systems may not provide for assignment of performance ratings to subelements.

(c) Agency appraisal systems shall provide for a minimum of three rating levels for each critical element. Performance standards must be written at the "Fully Successful" level for all critical and non-critical elements. The absence of a written standard at a given rating level shall not preclude the assignment of a rating at that level. Pass/fail elements are tasks, not true elements, and therefore cannot be used as elements in an appraisal.

(d) Agency appraisal systems shall provide for five summary rating levels. The required summary rating levels are "Outstanding," "Exceeds Fully Successful," "Fully Successful," "Minimally Satisfactory," and "Unsatisfactory."

(1) Agency Performance Management Plans must include decision tables for deriving summary rating levels from performance ratings on critical elements and, at agency discretion, ratings on non-critical elements. If ratings on non-critical elements are considered in deriving summary ratings, the decision tables must show that more weight will be given to critical elements than to non-critical elements in determining an employee's summary rating.

(2) If an employee is rated "Unsatisfactory" on one or more critical elements, an "Unsatisfactory" summary rating must be given.

(e) The requirements of this paragraph apply only if performance standards have not been established at the "Unsatisfactory" level or at the element level immediately above the "Unsatisfactory" level.

(1) At the beginning of a new appraisal period, agencies must provide a Performance Improvement Plan (PIP) to each employee who has been rated below "Fully Successful" on one or more critical elements.

(2) The PIP must:

(i) Explain the employee deficiencies,
(ii) Explain steps to be taken in an attempt to resolve the deficiencies, and
(iii) Communicate performance standards at the "Minimally Satisfactory" or "Unsatisfactory" level for those critical elements which were rated below "Fully Successful".

(f) If performance standards have not been prepared at the "Outstanding" level or at the element level immediately below the "Outstanding" level, a written justification must be prepared for an "Outstanding" summary rating.

(g) An appraisal system shall not permit any preestablished distributions of expected levels of performance (such as the requirement to rate on a bell curve) that interfere with appraisal of actual performance against standards. However, agencies must provide for higher level management of the performance appraisal process in the interest of employee equity and in order to reflect organizational performance.

(h) Definitions of five required summary rating levels follow. Performance standards and agency procedures for deriving summary ratings must be consistent with these definitions.

(1) "Outstanding" means performance of rare very high quality. As warranted, an Outstanding performer produces an exceptional quantity of work significantly ahead of established schedules or deadlines and with very little supervision.

(2) "Exceeds Fully Successful" means performance of unusually good or excellent quality. As warranted, the employee produces a very high quantity of work ahead of established schedules or deadlines and with less than normal supervision.

(3) "Fully Successful" means performance which is of good quality. The employee produces the expected quantity of work and meets deadlines or schedules for completion of work.

(4) "Minimally Satisfactory" means performance which is not "Unsatisfactory", but needs improvement to achieve the "Fully Successful" level. This may be evidenced by the need for close supervisory review, discussion and correction of work products.

(5) "Unsatisfactory" means performance which fails to meet established performance standards in one or more critical elements of the executive's position.

(i) Each appraisal system shall provide for establishing performance standards based on the requirements of senior executives' positions, providing written Performance Plans to senior

executives on or before the beginning of each appraisal period, and appraising senior executives based on a comparison of performance with the standards established for the appraisal period. An agency shall establish performance standards in consultation with the senior executive.

(j) Critical elements, non-critical elements, and performance standards must be related to the senior executive's assigned work and organizational performance requirements.

(k) Critical elements, non-critical elements, and performance standards shall be in writing and shall be reviewed and approved by an executive at a higher level than the appraising official or by a review committee. When elements and standards are written by the agency head, no further review is possible.

(l) Senior executives shall be given performance ratings on an annual basis. Agencies should take into consideration all performance ratings of assigned work given the employee throughout the appraisal period in arriving at the annual rating.

(m) Annual performance ratings shall be used as a basis for reduction-in-force actions, except that an employee without an annual performance rating of record shall be given a performance rating before a RIF if the employee has served for the minimum appraisal period.

(n) Agency appraisal systems shall establish a minimum appraisal period of not less than 90 calendar days. A performance rating of assigned work for the minimum appraisal period but less than one year shall constitute the annual rating only as required by paragraph (m) of this section or any other applicable provision of law or regulation.

(o) Agencies shall provide to each senior executive a copy of the following documents at the time they are prepared: The initial rating, along with notification of the right to respond in writing and to request a higher level review before the rating becomes final; any recommended changes by a higher level executive; and the final rating. Agencies must also provide a copy of critical elements, non-critical elements, and performance standards to each senior executive.

(p) *Details within the same agency.* Agencies shall provide written critical elements and performance standards to senior executives as soon as possible but no later than 30 calendar days after the beginning of a detail or temporary assignment within the same agency when the detail or temporary assignment is expected to last 120 calendar days or longer. Performance

ratings on critical elements must be prepared for these details and temporary assignments and must be considered in deriving a senior executive's next annual summary rating.

(q) When a senior executive is detailed or temporarily assigned outside the agency, the agency shall obtain relevant appraisal information from the agency or organization to which the executive is detailed or temporarily assigned.

(r) Agency performance appraisal systems must provide an opportunity for senior executives to respond in writing to an initial rating and have the rating reviewed by an employee in a higher executive level than the supervisor before review by the Performance Review Board (PRB). The senior executive's response shall be provided to both the official making the higher level review and to the PRB.

(1) Agency performance appraisal systems may provide for a mandatory second level review.

(2) A senior executive is entitled to only one higher level review unless the agency provides otherwise.

(3) Agencies shall provide copies of the reviewer's comments and recommendations to the senior executive, the supervisory official and the PRB.

(s) As required by 5 U.S.C. 4314(c), each agency is required to establish one or more PRB's to make recommendations to the appointing authority on the performance of senior executives in the agency.

(1) Each PRB in an agency shall have three or more members appointed by the head of the agency or by another official or group acting on behalf of the head of the agency.

(2) Notice of appointment to the PRB must be published in the *Federal Register*.

(3) The members of the PRB must be appointed in such a manner as to assure consistency, stability, and objectivity in performance appraisal.

(4) When appraising a career appointee, more than one-half of the membership of the PRB must be SES career appointees unless OPM determines that there exists an insufficient number of career appointees available to comply with the requirement.

(5) Each PRB will review and evaluate the initial rating, the senior executive's written response, if any, and the written comments, if any, on the initial rating by a higher level executive, and will conduct such further review as the PRB finds necessary.

(6) Individual PRB members must not take part in any PRB deliberations or appraisals involving themselves.

(7) The PRB must make a written recommendation concerning the senior executive's summary rating.

(t) Agencies are required to retain all documentation on performance appraisal decisions for no less than five years from the date of the appraisal.

(u) Final performance ratings shall provide a basis for decisions to remove senior executives from the SES.

(v) Final performance ratings may provide a basis for decisions to:

(1) Reassign or transfer senior executives within the SES;

(2) Grant performance awards to career senior executives; and

(3) Grant performance-related ES pay rate adjustments.

(w) If an employee is given an "Outstanding" summary performance rating, a written recommendation for appropriate monetary, non-monetary, or honorary recognition must be prepared.

§ 431.205 Training and evaluation.

To assure that the requirements of the law will be effectively implemented, agencies must provide appropriate training and information to supervisors and senior executives on the appraisal process, and must establish methods and procedures to evaluate periodically the effectiveness of their appraisal system(s) and to improve the system(s).

§ 431.206 OPM review of SES appraisal systems.

(a) SES performance appraisal systems must conform to requirements of law and OPM regulations. The Office of Personnel Management will review appraisal systems for conformance with these regulations as well as with respect to their contribution to agency effectiveness and efficiency and appropriate use of performance information in personnel decisions.

(b) If the Office of Personnel Management determines that an appraisal system does not meet the requirements of Subchapter II of Chapter 43 of title 5, United States Code or of this part, it shall direct the agency to implement an appropriate system or to correct operations under the system. The agency shall take any action so required.

§ 431.207 Performance Management Plans.

(a) Agencies must submit proposed Performance Management Plans to the Office of Personnel Management for review and approval as required by § 430.207 of this chapter.

(b) Proposed changes to approved Performance Management Plans which have an impact on how an agency meets legal or regulatory requirements must be submitted to the Office of Personnel Management for review and approval.

Subpart C—Implementation

§ 431.301 Implementation of this part.

(a) Each agency covered by this part shall submit Performance Management Plans to the Office of Personnel Management for review by February 24, 1984.

(b) Agencies will be required to implement the performance appraisal provisions of an approved Performance Management Plan not later than October 1, 1984 for employees in the Senior Executive Service.

(c) Decisions based on performance appraisals under the agency's Performance Management Plan must begin as soon as possible after the performance appraisal provisions have been implemented and in accordance with provisions of an agency's Performance Management Plan approved by OPM.

5. In Part 451, the heading is revised. Subpart A is removed and reserved, a new Subpart C is added and reserved, and Subpart B is revised. As revised, Part 451 reads as follows:

PART 451—SPECIAL AWARDS

Subpart A—[Reserved]

Subpart B—Regulatory Requirements of the Office of Personnel Management for Special Awards.

Sec.

- 451.201 Applicability.
- 451.202 Purpose.
- 451.203 Coverage.
- 451.204 Definitions.
- 451.205 Policy.
- 451.206 Eligibility.
- 451.207 Payment.
- 451.208 Responsibilities of the Office of Personnel Management.
- 451.209 Agency responsibilities.

Subpart C—Regulatory Requirements of the Office of Personnel Management for Productivity Benefit Sharing Programs [Reserved]

Authority: 5 U.S.C. 4506 and 5405.

Subpart A—[Reserved]

Subpart B—Regulatory Requirements of the Office of Personnel Management for Special Awards

§ 451.201 Applicability.

(a) This subpart contains the regulatory requirements of the Office of Personnel Management for the establishment and conduct of the

Special Awards Program for employee suggestions, inventions, and meritorious actions.

(b) An award under this subpart may be granted alone or in addition to a performance award granted under Part 531, Subpart F, of this chapter.

(c) Refer to Part 531, Subpart F, of this chapter for the regulatory requirements on Performance Awards based on accomplishments and contributions within the scope of the employee's job responsibilities and performance standards.

§ 451.202 Purpose.

(a) The Federal Government employees' Special Awards Program is designed to improve Government operations and services. Its purpose is to motivate employees to increase productivity and creativity by rewarding those whose accomplishments and adopted ideas benefit the Federal Government.

(b) The Office of Personnel Management encourages agencies to make maximum use of their authorities under Chapters 45 and 54 of title 5, United States Code, to establish and administer special awards for suggestions, inventions, and meritorious actions that best support and enhance agency and national goals, and meet employee recognition needs.

§ 451.203 Coverage.

(a) This subpart applies to employees as defined by Section 2105 of title 5, United States Code, including those covered by the Merit Pay System, established under Chapter 54 of title 5, United States Code.

(b) This subpart applies to agencies as defined in Section 4501 of title 5, United States Code.

§ 451.204 Definitions.

In this subpart, terms are defined as follows:

"*Contribution*" means a suggestion, an invention, a meritorious action or other personal or group effort that contributes to the efficiency, the economy, or other improvement of Government operations; or a special act or service in the public interest in connection with or related to official employment (5 U.S.C. 4503).

"*Honorary award*" means a medal, certificate, plaque, citation, badge, or other similar item that has an award or honor connotation.

"*Intangible benefits*" means benefits to the Federal Government that are very exceptional and cannot be measured or are difficult to measure in terms of dollars saved.

"*Meritorious action*" means any employee or group contribution which is

highly exceptional and unusually outstanding and which is beyond or outside job responsibilities and performance standards.

"*Non-monetary award*" means an award tailored to meet special conditions and needs of an employee and/or organization. It usually has a monetary connotation for the agency but not for the employee.

"*Presidential award*" means an award granted by the President under Section 4504 of title 5, United States Code.

"*Special act or service*" under this part means a non-recurring contribution which is beyond or outside normal job responsibilities and performance standards; a single scientific achievement; or an act of heroism.

"*Special award*" or "*award*" means a monetary, an honorary, or a non-monetary award based on the tangible savings and/or intangible benefits to the Federal Government.

"*Tangible savings*" means savings to the Federal Government that can be measured in terms of dollars saved.

§ 451.205 Policy.

(a) The policy of the Special Awards Program shall be to:

(1) Grant recognition in keeping with the value of the contribution to the Federal Government;

(2) Consider employee contributions for application throughout the Federal Government; and

(3) Assure that awards are not used as a substitute for other personnel actions, or as a substitute for pay.

(b) A special award under this subpart shall be:

(1) Monetary, honorary, or non-monetary;

(2) Based on employee accomplishments and contributions that are clearly beyond or outside assigned job responsibilities and performance standards.

(c) Monetary awards based on tangible savings shall not exceed amounts indicated by the following scales:

(1) Awards of up to \$10,000, based on tangible savings:

Tangible savings	Award
Up to \$20,000	5% of savings
\$20,001 to \$100,000	\$1,000 plus 1.5% of savings over \$20,000
Over \$100,000	\$2,200 plus .25% of savings over \$100,000 up to maximum award of \$10,000

(2) Awards over \$10,000 based on tangible savings:

Savings (in millions)		Award
Savings will continue for 5 years or more. First year savings will be—	Savings that occur on a one-time basis will be—	
\$5 to 7.4	\$15	\$15,000
\$7.5 to 9.9	\$20	\$20,000
\$10	\$25	\$25,000

(3) Presidential Awards based on tangible savings:

Savings (in millions)		Award
Savings will continue for 5 years or more. First year savings will be—	Savings that occur on a one-time basis will be—	
\$20 or more	\$75	\$10,000 in addition to a \$25,000 award, for a total of \$35,000.

(d) In addition to special awards based on tangible savings under paragraphs (c) (1), (2) and (3) of this section, special awards may be granted for contributions having exceptional intangible benefits to the Government. OPM shall provide guidance to agencies regarding how to limit the use of monetary awards based on intangible benefits, and how they should be computed.

(e) OPM shall provide guidance to agencies regarding criteria for granting all honorary and non-monetary awards based on tangible savings and/or intangible benefits to Federal Government.

§ 451.206 Eligibility.

(a) A special award may be granted when the suggestion, invention, meritorious action or other personal or group effort:

- (1) Meets the requirements under § 451.205 of this subpart;
- (2) Benefits the Government as described in 5 U.S.C. 4503 and 4504;
- (3) Was made while the contributor was a Government employee;
- (4) Has been described in writing; and
- (5) Has been approved by the benefiting organization at a management level higher than the individual who:

(i) Recommended use of the suggestion, invention, or meritorious action; or

(ii) Recommend the award.

(b) Special awards shall not be mandatory.

§ 451.207 Payment.

(a) Awards paid under this subpart do not increase the rate of basic pay.

(b) When a special award is approved for an employee of another agency, arrangements shall be made to transfer

funds to the employing agency. If the administrative costs of transferring funds would exceed the amount of the award, the employing agency shall absorb the award costs.

§ 451.208 Responsibilities of the Office of Personnel Management.

(a) OPM shall provide guidance to agencies on how the Special Awards Program should be carried out (5 U.S.C. 4506).

(b) OPM shall review, and following verification of savings or benefits and relationship of contributions to job requirements, approve or disapprove recommendations for all awards in excess of \$10,000 on a case-by-case basis. OPM shall limit approval of all awards to denominations of \$15,000, \$20,000 and \$25,000.

(c) The Director, OPM, shall advise the President on monetary and honorary Presidential awards for Government employees which shall only be granted under this subpart. A monetary Presidential award granted in addition to a \$25,000 award made under 5 U.S.C. 4503 shall be for \$10,000.

§ 451.209 Agency responsibilities.

(a) The head of each agency shall establish an agency Special Awards Program that seeks to gain maximum benefits for the Government through improved employee motivation and productivity by providing for:

(1) The greatest motivational impact by allocating an adequate budget, staffing, and support services to assure prompt action on special award recommendations, and effective promotion and publicity activities;

(2) Delegation of authority and responsibility for approval of special awards to the appropriate management level;

(3) Special award recommendations involving the minimum amount of paperwork and processing which show that criteria are met and expenditure of appropriated funds for the award is justified;

(4) Central administration and review of the agency-wide program, including systematic evaluation, planning, and feedback reports to management officials and employees;

(5) The granting of special awards as soon as possible after an assessment of the contribution indicates that an award should be granted;

(6) Time limits for processing special award recommendations and granting of special awards;

(7) The integrity of the program by reviewing agency program results to assure that special awards are granted equitably, on the basis of the tangible

savings and/or intangible benefits to the Government; that action is taken to grant special awards in a timely manner; and that information is made available concerning persons who have received special awards and the reason(s) why each award is granted;

(8) Documentation in the Official Personnel Folder to reflect the nature of a special award, including the amount of a monetary award;

(9) Due weight to a special award when rating and ranking an employee for a promotion, as provided in 5 U.S.C. 3362; and

(10) Consideration of accomplishments and adopted ideas for wider application both within the agency and Governmentwide, and prompt referral when appropriate.

(b) Each agency head may delegate the responsibilities in § 451.209(a) of this subpart as deemed appropriate for his or her organization.

(c) The head of each agency shall transmit to OPM:

(1) Award recommendations over \$10,000;

(2) All recommendations for Presidential awards; and

(3) An annual report on program activities for the past fiscal year.

Subpart C—Regulatory Requirements of the Office of Personnel Management for Productivity Sharing Programs [Reserved]

PART 531—PERFORMANCE BASED INCENTIVE SYSTEM FOR THE GENERAL SCHEDULE

6. The heading for Part 531 is revised as set forth above and the authority citation for Part 531, Subpart D, are revised to read as follows:

Subpart D—Within Grade Increases

Authority: 5 U.S.C. 5301, 5335, and 5338 and E.O. 11721 as amended, 402, unless otherwise noted.

7. § 531.401 is revised to read as follows:

§ 531.401 Principal authorities.

The following are the principal authorities for the regulations in this subpart:

(a) 5 U.S.C. 2301(b)(3) provides in part that " * * * appropriate incentives and recognition should be provided for excellence in performance."

(b) 5 U.S.C. 5301(a)(2) provides that "pay distinctions be maintained in keeping with work and performance distinctions."

(c) Section 402 of E.O. 11721, as amended, provides that "The Civil Service Commission [Office of Personnel Management] shall issue such regulations and standards as may be necessary to ensure that only those employees whose work is of an acceptable level of competence receive periodic step-increases under the provisions of section 5335 of title 5, United States Code."

8. § 531.403 is amended by revising the terms "acceptable level of competence" and "critical element", to read as follows:

§ 531.403 Definitions.

In this subpart:

"Acceptable level of competence" means fully successful performance by an employee of the duties and responsibilities of his or her assigned position which warrants advancement of the employee's rate of basic pay to the next higher step of the grade of his or her position, subject to the requirements of § 531.404 of this subpart.

"Critical Element" has the meaning given that term in 430.203 of this chapter.

9. § 531.404 is revised to read as follows:

§ 531.404 Earning within-grade increase.

An employee paid at less than step 10 of the grade of his or her position shall only earn advancement in pay to the next higher step of that grade upon meeting the three requirements established by law:

(a) To earn a within-grade increase, the employee's performance of assigned work must be at an acceptable level of competence, as defined in this subpart by authority of Section 402 of E.O. 11721, as amended. Acceptable level of competence means a level of performance of assigned work of at least "Fully Successful", as defined in Part 430 of this chapter, for each critical element. In addition, the employee's most recent summary performance rating, as defined in the agency Performance Management Plan, must be at least "Fully Successful".

(b) The employee must have completed the required waiting period for advancement to the next higher step of the grade of his or her position; and

(c) The employee must not have received an equivalent increase during the waiting period.

10. § 531.408 (b) and (c) are revised to read as follows:

§ 531.408 Communication of Performance Requirements.

(b) Employees covered by an appraisal system established under § 430.204 of this chapter shall be informed of the specific performance requirements that constitute an acceptable level of competence within the time frame and by the means of communication of performance standards established under § 430.204 of this chapter.

(c) Employees not covered by an appraisal system established under § 430.204 of this chapter shall be informed, under procedures established by the head of the agency, of the specific requirements for performance at an acceptable level of competence within a reasonable time after initial appointment or permanent change in position.

11. In § 531.409, paragraphs (b), (c) and (d), are revised to read as follows:

§ 531.409 Acceptable level of competence determinations.

(b) *Basis for determination.* When applicable, an acceptable level of competence determination shall be based on a current performance rating made under Part 430 of this chapter. For those agencies not covered by 5 U.S.C. 43 and for employees in positions excluded from subchapter I of 5 U.S.C. 43, an acceptable level of competence determination shall be based on minimal performance appraisal requirements issued by OPM. If an employee has been reduced in grade due to "Unacceptable" performance and has served in one position at the lower grade for at least the minimum appraisal period established by the agency, a performance rating at the lower grade shall be used as the basis for an acceptable level of competence determination.

(c) *Delay in determination.* An acceptable level of competence determination must be delayed when both of the following apply:

(1) An employee has not had the minimum period of time established by the agency to demonstrate acceptable performance because he or she has not been informed of the specific requirements for performance at an acceptable level of competence in his or her current position; and

(2) The employee has not been given a performance rating in any position within 90 days before the end of the waiting period. When an acceptable level of competence determination has been delayed under this subpart, the employee shall be informed that his or

her determination is postponed and of the specific requirements for performance at an acceptable level of competence. The determination shall be based on a performance rating completed at the end of the minimum appraisal period established by the agency performance appraisal plan.

(d) *Waiver of requirement for determination.* An acceptable level of competence determination shall be waived and a within-grade increase granted when an employee has not served in any position for the minimum appraisal period under an applicable agency performance appraisal system during the final 52 calendar weeks of the waiting period for one or more of the following reasons:

(1) Absences that are creditable service in the computation of a waiting period or periods under § 531.406 of this subpart;

(2) Because of paid leave;

(3) Because the employee received service credit under the back pay provisions of subpart H of Part 550 of this chapter;

(4) Because of details to another agency or employer; or

(5) Because of long term training.

In such a situation, there shall be a presumption that the employee would have performed at an acceptable level of competence had the employee performed the duties of his or her position of record for the minimum appraisal period under the applicable agency performance appraisal system.

12. § 531.409(e)(2)(i) is revised to read as follows:

§ 531.409 [Amended]

(e) Notice of determination.

(2) * * *

(i) Set forth the reasons for the negative determination and the respects in which the employee must improve his or her performance in order to be granted a within-grade increase under § 531.411 of this subpart.

13. § 531.411 is revised to read as follows:

§ 531.411 Continuing evaluation after withholding a within-grade increase.

When a within-grade increase has been withheld, an agency may, at any time thereafter, rate the employee and grant the within-grade increase when it determines that he or she has demonstrated sustained performance at an acceptable level of competence. However, the agency shall determine whether the employee's performance is

at an acceptable level of competence after no more than 52 calendar weeks following the original eligibility date for the within-grade increase and, for as long as the within-grade increase continues to be denied, determinations will be made after no longer than each 52 calendar weeks.

14. In Subpart E, §§ 531.503 and 531.504 are revised to read as follows:

Subpart E—Quality Step Increases

§ 531.503 Purpose of quality step increases.

The purpose of quality step increases is to recognize outstanding performance by granting faster than normal step increases.

§ 531.504 Level of performance required for quality step increase.

A quality step increase shall not be required but may be granted only to an employee who receives a summary performance rating of "Outstanding", as defined in Part 430 of this chapter.

15. § 531.505 is removed. §§ 531.506 through 531.508 are redesignated as §§ 531.505 through 531.507, and revised to read as follows:

§ 531.505 Restrictions on granting quality step increases.

As provided by 5 U.S.C. 5336, a quality step increase may not be granted to an employee who has received a quality step increase within the preceding 52 consecutive calendar weeks.

§ 531.506 Effective date of quality step increase.

Quality step increases shall be effective as soon as possible after annual performance appraisals are approved.

§ 531.507 Agency plans for granting quality step increases.

Each agency shall include a plan for granting quality step increases, as required by § 430.207(a)(4) of this chapter, in the agency's Performance Management Plan. The plan shall:

- Be as simple as practicable;
- Provide for delegation of authority to grant quality step increases to the lowest practicable level of management;
- Be reviewed and approved in accordance with § 430.207 of this chapter; and
- Provide for informing employees, at least annually, of the number of quality step increases granted in the agency by grade level.

§ 531.509 [Redesignated as § 531.508]

16. § 531.509 is redesignated § 531.508.
17. In Part 531, a new Subpart F is added to read as follows:

Subpart F—Performance Awards

Sec.

- 531.601 Applicability.
- 531.602 Purpose of performance awards.
- 531.603 Coverage.
- 531.604 Definitions.
- 531.605 Policy.
- 531.606 Eligibility.
- 531.607 Payment.
- 531.608 Responsibilities of the Office of Personnel Management.
- 531.609 Agency responsibilities.

Authority: 5 U.S.C. 4302(a)(3), 4506, and 5405.

Subpart F—Performance Awards

§ 531.601 Applicability.

(a) This subpart contains the Office of Personnel Management's regulatory requirements for establishment and conduct of the performance awards component of the Performance Management System, under the authority of title 5, United States Code, Chapters 43, 45, and 54.

(b) An award under this subpart shall be supported by the employee's performance rating and based on accomplishments and contributions which are within the scope of the employee's assigned job responsibilities and performance standards.

(c) One-time special acts or services rewarded under this subpart shall be within the scope of job responsibilities and performance standards.

(d) Refer to Part 451 of this chapter for the regulatory requirements for granting awards to employees for suggestions, inventions, and meritorious actions.

§ 531.602 Purpose of performance awards.

(a) The purpose of performance awards is to motivate employees, and recognize and reward those who attain high levels of performance.

(b) The Office of Personnel Management encourages agencies to make maximum use of their authorities under Chapters 43, 45, and 54 of title 5, United States Code, to establish and administer performance awards that best support and enhance agency and national goals and meet employee recognition needs.

§ 531.603 Coverage.

(a) This subpart applies to employees as defined by Section 2105, title 5, United States Code, including those covered by the Merit Pay System established under Chapter 54 of title 5,

United States Code, but does not include employees in the Senior Executive Service.

(b) This subpart applies to agencies as defined in section 4501 of title 5, United States Code.

§ 531.604 Definitions.

In this subpart, terms are defined as follows:

"*Honorary award*" means a medal, certificate, plaque, citation, badge, or other similar item that has an award or honor connotation.

"*Monetary award*" means a cash award which is not part of an employee's basic rate of pay.

"*No-monetary award*" means an award tailored to meet special conditions and needs of an employee and/or an organization. It usually has a monetary connotation for the agency but not for the employee.

"*Performance award*" or "*award*" means a monetary, honorary, or non-monetary award.

"*Plan*" means a written statement submitted by the head of the agency and approved by OPM, implementing law and regulation for performance awards with specific attention to the monetary component of the overall Performance Management Plan as described in § 430.207 of this chapter.

§ 531.605 Policy.

(a) The policy of the Performance Awards Program shall be to:

(1) Grant recognition in keeping with the value of the contribution to the Federal Government;

(2) Consider employee contributions for application throughout the Federal Government; and

(3) Assure that awards are not used as a substitute for other personnel actions, or as a substitute for pay.

(b) A performance award under this subpart shall be:

(1) Monetary, honorary, or non-monetary;

(2) Based on employee accomplishments and contributions which are within the scope of an employee's assigned job responsibilities and performance standards; and

(3) Based on a percentage of the employee's base pay, up to a maximum of 20 percent. However, if the sum of the performance award recommended and any within-grade and/or quality step increase received by the employee during the previous 12 months exceeds 20 percent, the award shall be reduced to that maximum.

§ 531.606 Eligibility.

(a) A performance award may be granted to an employee when performance accomplishments or other contributions:

- (1) Are within the scope of his or her assigned job responsibilities and performance standards;
- (2) Benefit the Government as described in 5 U.S.C. 4503 and 4504;
- (3) Were made while the contributor was a Government employee;
- (4) Have been supported by a performance rating of at least "Exceeds Fully Successful" on one or more elements of a job or a summary performance rating of at least "Exceeds Fully Successful"; and
- (5) Have been approved at a management level higher than the official who recommended the performance award.

(b) Performance awards shall not be mandatory except as required by §§ 430.204(t), 431.204(w) and 540.110(a)(3) of this chapter.

§ 531.607 Payment.

Awards paid under this subpart do not increase the rate of basic pay and are subject to the withholding of income taxes.

§ 531.608 Responsibilities of the Office of Personnel Management.

(a) OPM shall provide guidance to agencies on how the performance awards component of the Performance Management System should be carried out.

(b) OPM shall review and approve the agency performance award component of the Performance Management Plan, and any proposed plan revisions which have an impact on how an agency meets statutory and regulatory requirements.

§ 531.609 Agency responsibilities.

(a) The head of each agency shall establish all performance awards as a component of the Performance Management Plan. The plan must provide for:

- (1) Documentation in the employee's Official Personnel Folder to reflect the nature of a performance award, including the amount of a monetary award; and
- (2) Due weight to a performance award when rating and ranking an employee for a promotion, as provided in 5 U.S.C. 3362.

(b) The head of each agency shall transmit to OPM:

- (1) All award recommendations over \$10,000;
- (2) A Performance Management Plan which includes a performance awards

component, and proposed plan revisions for review and approval, as required by § 430.207(a) of this chapter; and

(3) An annual report on performance awards activities for the past fiscal year.

(c) The performance awards component of the Performance Management Plan to be submitted to OPM shall include the following provisions:

(1) Use of the agency's performance rating under Part 430 of this chapter as the basis for granting monetary, honorary, and non-monetary performance awards;

(2) Delegation of authority and responsibility for approval of monetary, honorary and non-monetary performance awards to the appropriate management level;

(3) Performance award recommendations to involve the minimum amount of paperwork and processing which show that criteria are met and that expenditure of appropriated funds for the award is justified;

(4) Granting of performance awards as soon as possible after performance ratings are approved, or as soon as possible after an assessment of performance indicates that an award should be granted;

(5) A plan for incorporating performance awards into the merit pay determination process, as required by § 540.110(a)(3) of this chapter; and

(6) A plan for determining the performance award fund, including previous years' and projected expenditures, as required by § 430.207(a)(4) of this chapter. Funds for any agency Productivity Benefit Sharing Program shall not be included in the performance award fund, inasmuch as these are separate from performance awards.

PART 532—PREVAILING RATE SYSTEMS

18. In Part 532, a new Subpart H is added, to read as follows:

Subpart H.—Performance and Special Awards

Sec.

532.801 General.

Authority: 5 U.S.C. 5343, 5346.

Subpart H.—Performance and Special Awards**§ 532.801 General.**

(a) Performance awards for prevailing rate employees are covered under the provisions of Subpart F of Part 531 of this chapter.

(b) Awards for employee accomplishments beyond normal job responsibilities and performance standards are covered under Part 451 of this chapter.

19. Part 540 is revised to read as follows:

In § 540.102, the definitions of "total performance pay" and "total performance pay pool" are interim rules. References to those terms, found in §§ 540.106(a) and (d), 540.108(b)(3), and 540.110(c) and (d) are interim rules, also.

§§ 540.109 and 540.110(a)(3), pertaining to merit pay cash awards, are interim rules.

OPM invites comments on these interim rules, for consideration in final rulemaking.

PART 540—MERIT PAY SYSTEM

Sec.

540.101 General.

540.102 Definitions.

540.103 Ranges of basic pay and employee coverage.

540.104 Determination and allocation of merit pay funds.

540.105 Merit pay performance appraisals.

540.106 Merit pay determinations.

540.107 Merit pay increases and salary levels.

540.108 Special provisions for merit pay increases.

540.109 Cash awards.

540.110 Agency plans for Merit Pay System.

540.111 Reports.

Authority: 5 U.S.C. Chapters 43 and 54.

§ 540.101 General.

Chapter 54 of title 5, United States Code (5 U.S.C. 5401-5405), provides for a Merit Pay System to recognize and reward quality performance by supervisors and management officials (as defined in 5 U.S.C. 7103(a)(10)-(a)(11)) in positions classified in GS-13, 14, or 15. This part contains the regulations which the Office of Personnel Management has prescribed for the Merit Pay System, and supplements the provisions of 5 U.S.C. 4302, 4304, and 5401-5405.

§ 540.102 Definitions.

In this part:

"Agency" has the meaning given it in 5 U.S.C. 5102.

"Employee" means a supervisor or management official to whom chapter 54 of title 5 U.S.C. applies.

"Management official" has the meaning given that term in 5 U.S.C. 7103(a)(11); i.e., * * * an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency.

"Merit pay determination" is the decision as to the amount of the merit pay increase (including a zero amount) and total performance pay.

"Merit pay fund" means the amount of agency money to be allocated to merit pay increases, as determined through application of appropriate Merit Pay Fund Computation Tables.

"Merit pay increase" means the increase in basic pay for a merit pay employee in excess of that granted automatically under 5 U.S.C. 5402(c)(1) or (c)(3).

"Merit pay pool" means that portion of an agency identified by agency management as having an optimum number of merit pay positions to facilitate internal management of its merit pay plan and to which funds are allocated for distribution as merit increases to covered employees.

"Supervisor" has the meaning given that term in 5 U.S.C. 7103(a)(10); i.e., * * * an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority.

"Total performance pay" means the sum of the merit pay increase received by an employee and the amount of money received by the employee as a performance-related cash award under 5 U.S.C. 5403.

"Total performance pay pool" means the amount of money identified by an agency to be distributed to merit pay employees as merit pay increases and performance-related cash awards.

§ 540.103 Ranges of basic pay and employee coverage.

(a) Under 5 U.S.C. 5402(a), the Office of Personnel Management is required to establish a Merit Pay System which provides a range of basic pay for each grade of the Merit Pay System. The Merit Pay System shall consist of three grades, as follows:

(1) GM-13, which shall consist of supervisors and management officials who are in positions classified in Grade GS-13;

(2) GM-14, which shall consist of supervisors and management officials

who are in positions classified in grade GS-14; and

(3) GM-15, which shall consist of supervisors and management officials who are in positions classified in grade GS-15.

(b) The range of annual rates of basic pay for each grade of the Merit Pay System shall be the same as the range of annual rates of basic pay for the corresponding grade of the General Schedule. Higher ranges of rates of basic pay authorized under 5 U.S.C. 5303 shall be applicable under this part to any position covered by such authorization.

(c) In accordance with the definitions in 5 U.S.C. 7103 (a)(10) and (a)(11), the head of each agency shall identify employees who are supervisors or management officials for purposes of coverage under the Merit Pay System. Employees who were appointed on the effective date of a pay adjustment under 5 U.S.C. 5305 and whose pay was set in accordance with the newly adjusted pay range for their grade are not to be considered covered by the Merit Pay System on that day for the purposes of calculating merit pay funds and dispensing increases under 5 U.S.C. 5402 (b)(1), (c)(1), and (c)(3).

§ 540.104 Determination and allocation of merit pay funds.

(a) Under 5 U.S.C. 5402(b)(4), the Office of Personnel Management must determine the funds available for merit pay purposes. Each agency covered by the Merit Pay System shall submit such information as OPM may require for this purpose.

(b) The Office of Personnel Management shall issue annual Merit Pay Fund Computation Tables consistent with the annual increase made to the General Schedule at these grade levels and shall provide instructions for their use. Each agency covered by the Merit Pay System shall apply the appropriate table to the agency merit pay population, as of the effective date for merit pay increases, to determine the size of the merit pay fund available to the agency.

(c) Each agency covered by the Merit Pay System shall have one or more merit pay pools. If there is more than one pool, agencies may determine the funds available to each pool by the same method that is used to compute the merit pay fund, or they may make adjustments to that method to recognize organizational accomplishment or unusual distribution of performance within a pool, or to satisfy the requirements of paragraph (d)(2) of this section. If other than the computation table amount is to be allocated, the method must assure the equitable

distribution of funds, be approved by OPM for inclusion in the agency's Merit Pay Plan, and must be fully documented.

(d) Each agency covered by the Merit Pay System is required to establish procedures to ensure that—

(1) The sum of merit pay increases awarded each year under § 540.107 of this part to Merit Pay System employees in the agency is no less than 95 percent and no more than 105 percent of the agency's merit pay fund (unless the Office of Personnel Management has granted prior approval for a lesser or greater obligation); and

(2) No portion of the contribution to the merit pay fund made for employees to whom no immediate merit pay increase may be paid, because of the statutory pay ceiling imposed by 5 U.S.C. 5308 or by appropriations limitations on pay, is used to pay such increases for employees not subject to the statutory pay ceilings or limitations.

§ 540.105 Merit pay performance appraisals.

(a) Except as provided in paragraph (c) of this section, each merit pay determination shall be based on a current appraisal of performance which is to be made under a performance appraisal system that has been approved by the Office of Personnel Management under 5 U.S.C. 4304(b)(1).

(b) The performance appraisal period on which the merit pay determination is based should be as close to the merit pay determination as the agency deems practicable, but will not end earlier than June 30 nor later than November 30 of the same year (or such other dates prescribed by OPM).

(c) Agencies and employees subject to the Merit Pay System but not covered by Chapter 43 of title 5, U.S.C., shall meet minimal performance appraisal requirements issued by the Office of Personnel Management.

§ 540.106 Merit pay determinations.

(a) Each agency shall establish a procedure for determining in a fair and objective manner the amount of merit pay increase and total performance pay that shall be granted each Merit Pay System employee. The determination is to be made for each employee covered by the System on the closest date to the effective date for merit pay increases that is determined by the agency to be administratively feasible and is to be based on a current performance rating. This does not preclude agencies from granting performance awards at any time during the appraisal period as provided in Part 430 of this chapter.

(b) Each merit pay determination shall take into consideration, in addition to the employee's performance, the reason for, amount of, and period of time since any increases in rate of basic pay and performance awards received by the employee in the current performance year.

(c) If the agency determines it is appropriate to do so, a merit pay determination may also take into consideration the accomplishments of the employee's organization.

(d) Each agency shall establish procedures to manage the performance appraisal process and merit pay determinations for employees covered by the Merit Pay System so as to obtain equitable and appropriately sized merit pay increases and total performance pay.

(e) agency procedures for making merit pay determinations must include a requirement for an approval of each merit pay determination by an official of the agency who is at a higher level than the official who made the merit pay determination (unless there is no official at a higher level in the agency), and also by the official with responsibility for managing the merit pay pool, if different.

(f) The reasons for each merit pay determination are to be documented and shall be made available to the affected employee at his or her request.

(g) The requirement that the merit pay determination be based on performance shall be waived when an employee's performance cannot be appraised for the minimum appraisal period established by the agency. When the merit pay determination is waived, pay is to be set in accordance with § 540.108 of this part.

§ 540.107 Merit pay increases and salary levels.

(a) Merit pay increases under 5 U.S.C. 5402(b)(1) are to be made effective on the same day as the automatic pay adjustments under 5 U.S.C. 5402 (c)(1) and (c)(3), except as otherwise prescribed by OPM. In the event that the amount of the merit increases cannot be determined in a timely manner, the increases shall be made retroactive to the effective date of the pay adjustments. The retroactive payment shall not be made later than December 31 of the calendar year during which such pay adjustment takes effect, except as prescribed by OPM.

(b) In accordance with the requirements of 5 U.S.C. 5402(a)—

(1) Each Merit Pay System employee's rate of basic pay must be increased, effective on the same day a pay adjustment under 5 U.S.C. 5402(c)(1) becomes effective, by an amount necessary to raise the employee's rate of

basic pay to the new minimum rate for the employee's grade; and

(2) No Merit Pay System employee's rate of basic pay may be increased by an amount that would cause that rate of basic pay to exceed the maximum rate for the employee's grade, except as provided in 5 U.S.C. 5334(b) and 5363 in connection with retained pay.

(c) Merit pay increases must be reduced by the amount of any increase required under 5 U.S.C. 5402(c)(3) to raise an employee's pay to a new range minimum amount, up to and including the full amount of the merit increase granted under 5 U.S.C. 5402(b)(1).

(d) Agencies must establish procedures to prevent employees in the same merit pay pool and grade level with identical performance ratings from experiencing a reversal in their relative rates of basic pay due solely to the construction of the merit pay allocation model.

§ 540.108 Special provisions for merit pay increases.

(a) An employee for whom the requirement for a performance-based merit pay determination is waived under § 540.106(g) of this part shall be paid the sum of—

(1) The employee's rate of basic pay immediately before the merit pay increase; and

(2) The automatic adjustments required by 5 U.S.C. 5402 (c)(1) and (c)(3) at the time of the merit pay increase; and, except as provided in paragraph (c) of this section,

(3)(i) The average increase received, or, if necessary, a constructed average increase which would have been received under 5 U.S.C. 5402(b)(1) by comparably situated employees; or

(ii) An increase identified with a predetermined performance level designator for comparably situated employees; or

(iii) The amount provided by the appropriate factor of the Merit Pay Fund Computation Table (to include the Quality Step Increase equivalent or not, as determined by the agency).

(b) When an employee returns to a pay status after an approved absence which encompassed the time of one or more pay adjustments provided under 5 U.S.C. 5402, the employee's rate of basic pay shall be set at the sum of—

(1) The employee's rate of basic pay immediately before the interruption of his or her employment with the agency; and

(2) The automatic adjustments that would have been required by 5 U.S.C. 5402 (c)(1) and (c)(3) if the employee's service had not been interrupted; and,

except as provided in paragraph (c) of this section:

(3)(i) The average increases received, or, if necessary, constructed average increases which would have been received under 5 U.S.C. 5402(b)(1) by comparably situated employees; or

(ii) Increases identified with a predetermined performance level designator for comparably situated employees; or

(iii) The amounts provided by the appropriate factor of the Merit Pay Fund Computation Table to include the Quality Step Increase equivalent or not, as determined by the agency; or

(iv) The contributions to the merit pay fund in behalf of the employee which were authorized under 5 U.S.C. 5402(b)(4)(B) representing the portion of the annual GS pay increase which the employee was not granted automatically.

(c)(1) When the requirement for a performance-based merit pay determination is waived or when the employee's pay is being set because of—

(i) Service in the armed forces or non-Government service referenced in 5 U.S.C. 5402(d), or

(ii) Other service for which an employee's advancement through the pay range is preserved by statute, or

(iii) One or more merit pay increases that occurred during a period for which the employee has received credit under the back pay provisions of 5 U.S.C. 5596 and Subpart H of Part 550 of this chapter,

the employee's pay shall be set at the sum of—

(2)(i) The employee's rate of basic pay immediately before the merit pay increases or before interruption of his or her duty status, as appropriate; and

(ii) The automatic adjustments that are required or that would have been required by 5 U.S.C. 5402 (c)(1) and (c)(3) if the employee's duty status had not been interrupted; and

(iii) The amounts provided by the appropriate factors of the Merit Pay Fund Computation Tables for the employee for each pertinent year.

(d) Increases granted under paragraphs (a)(3), (b)(3), and (c)(2)(iii) of this section are to be reduced as described in § 540.107(c) of this part.

§ 540.109 Cash awards.

5 U.S.C. 5403 authorizes the payment of cash awards as part of the Merit Pay System. There are two categories of cash awards:

(1) Performance awards, which are to be administered in accordance with the provisions of Subpart F of Part 531 of this chapter, and instructions issued by

the Office of Personnel Management; and

(2) Cash awards, that are not related to the Merit Pay System employee's performance in his or her position, to be administered in accordance with the provisions of Part 451 of this chapter and the agency's Special Awards Program established under Part 451.

§ 540.110 Agency plans for Merit Pay System.

(a) Each agency with employees who are subject to the Merit Pay System shall establish a plan for administering the Merit Pay System within that agency. Each agency's plan shall be consistent with the provisions of 5 U.S.C. 5401-5403 and this part, and shall include, in addition to provisions to carry out requirements of this part, provisions for—

(1) Communication to the agency's Merit Pay System employees of the purpose of the Merit Pay System and how it works;

(2) Training in the operation of the Merit Pay System for employees who are subject to that System and for employees who are responsible for its operations; and

(3) Distribution of the funds contained in the agency's Total Performance Pay Pool. The plan must describe the manner in which the funds will be distributed, and must specify a funding level for merit pay performance awards as described in Part 531, Subpart F, the minimum funding level to be specified by OPM.

(b) When determining the size of merit pay increases to be granted, agencies must use a matrix (either percentage or points) that provides an inverse

relationship between amount of increase and position in the pay range.

(c) No employee who is rated "Fully Successful" or higher on each critical element and on the employee's summary rating shall receive a total increase to base pay under 5 U.S.C. 5402 (b)(1), (c)(1), and (c)(3) which is less than the sum of the percentage increase authorized under 5 U.S.C. 5305 for General Schedule pay system employees and the average annualized equivalent of a within-grade increase.

(d) Employees who are rated "Outstanding" will receive a minimum differential in the total performance pay under this part above the total performance pay for employees rated "Fully Successful," as approved by OPM in the agency Merit Pay Plan.

(e)(1) Each agency covered by Subparts A and B of Part 430 or by Part 540 of this chapter shall submit Performance Management Plans, including a Merit Pay System Plan, to the Office of Personnel Management for review by February 24, 1984.

(2) Agencies will be required to implement the provisions of an approved Performance Management Plan pertaining to its merit pay employees no later than October 1, 1984.

(3) an agency may utilize Performance Appraisal Systems for merit pay employees and Merit Pay Systems which have been approved by the Office of Personnel Management until October 1, 1984.

(4) Changes to already approved merit pay plans, except as provided in paragraph (g) of this section, must be submitted to OPM at least 60 days

before they are scheduled to be effective.

(f) Changes to agency merit pay plans prompted by unanticipated Government-wide merit pay funding levels or other emergency events shall be submitted to the Office of Personnel Management for approval in accordance with special instructions issued by OPM at that time.

§ 540.111 Reports.

So that the Office of Personnel Management can provide the Congress and others with information regarding the operation of the Merit Pay System including cash awards, each agency shall maintain such records and submit to OPM such reports as OPM may require.

PART 771—AGENCY ADMINISTRATIVE GRIEVANCE SYSTEM

20. A new § 771.206(c)(3) is added to read as follows:

* * *

Subpart B—General

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§ 771.206 Exclusions.

* * *

(c) Matters excluded.

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(3) An agency may, in its discretion, exclude performance appraisals and/or ratings (under subchapter I of chapter 43 of title 5 United States Code, or Part 430 of this chapter) from coverage under this part.

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